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Torts--Contributory Negligence--Effect of the Violation of Statute by an Eight-Year-Old Child

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the property and looked to the bond for the assessed value of the automobile at the time it was seized.[18] In either case the defendant or his bondsman would be responsible for the loss in value due to the damage, and since defendant evidently is insolvent, the bondsman would be responsible. If defendant is insolvent and if the mechanic does not have an effective lien because of the priority of plaintiff's claim, the bondsman has been unjustly enriched at the expense of the mechanic. Thus it seems there were adequate grounds for an action in quasi-contract[19] or in equity.[20]

Both the intervening mechanic and the court[21] appear to have misunderstood the law of this case. The mechanic misconstrued his remedy and attempted to enforce a lien, instead of relying on quasi-contract or his equitable remedy. The court used the wrong basis for its decision that the plaintiff's interest was superior to the mechanic's lien. If a similar case were to arise in the future, a mechanic should not be hampered by this decision, for as long as he does not misconstrue his remedy and attempt to rely upon his lien, the question of priority of claims will not arise, and the present case will be irrelevant. However, if the question of priority should arise again, the court should acknowledge the mistake made in this case and place the decision on a sound basis of law.

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TORTS—CONTRIBUTORY NEGLIGENCE—EFFECT OF THE VIOLATION OF A STATUTE BY AN EIGHT-YEAR-OLD CHILD.— Plaintiff brought suit to recover damages for injuries sustained by his eight-year-old and five-year-old sons who were struck by defendant's automobile as they were crossing a street where there was no crosswalk. The eight-year-

[18] KRS § 426.300 (1959).

[19] Since "the law implies a promise where the party ought to promise," the bondsman might be liable on an implied contract. See Goodall v. Warden's Adm'r, 280 Ky. 632, 133 S.W.2d 944 (1939); see also, Fayette Tob. Whse. Co. v. Lexington Tob. Bd. of Trade, 299 S.W.2d 640 (Ky. 1957); Kellum v. Browning's Adm'r, 231 Ky. 308, 21 S.W.2d 459 (1929).

[20] One theory would be equitable subrogation. Since the bondsman would have been liable to the plaintiff for the damages to the automobile, the mechanic has in effect "paid" the debt of the bondsman. Since he was not a volunteer, the mechanic, to prevent unjust enrichment, should be subrogated to the plaintiff's rights against the bondsman. See Chapman v. Blackburn, 295 Ky. 606, 175 S.W.2d 26 (1943); McCracken County v. Lakeview Country Club, 254 Ky. 515, 70 S.W.2d 938 (1934).

[21] The plaintiff also failed, for the court pointed out in the opinion that the briefs only argued the question of whether the plaintiff was required to record its mortgage in Kentucky in order to preserve its interest against third parties.

old child was in the third grade at school, and there was no evidence introduced to indicate his capacity for being contributorily negligent. His act of crossing the street without yielding the right of way to defendant's vehicle was a statutory violation.[1] An instruction was given on contributory negligence to the effect that it was the eight-year-old child's duty at the time and place of the accident to exercise ordinary care for his own safety. This instruction did not refer to the younger boy. Also, an instruction was presented which provided that it was the statutory duty of the eight-year-old child to yield the right of way to defendant's car if the jury believed that defendant's approaching vehicle at that time constituted an immediate hazard to the child's safety if he continued across the street. The trial court entered judgment on a verdict for the defendant. *Held*: Reversed. In the absence of evidence indicating the eight-year-old child's capacity for being contributorily negligent, it is error to give an instruction on contributory negligence, and it is error to give an instruction relating to his statutory duty. *Baldwin v. Hosley*, 328 S.W.2d 426 (Ky. 1959).

The result in this case affirms the previous Kentucky decisions on the capacity of infants to be contributorily negligent and places this jurisdiction in a new position concerning the effect of a violation of a safety statute by an eight-year-old child. These two propositions will be discussed in order.

Kentucky has divided the period of infancy into these distinct categories in considering the capacity of infants to be contributorily negligent. Children under seven years of age are irrebuttably presumed to have no capacity for contributory negligence.[2] Between the ages of seven and fourteen, a rebuttable presumption exists that they have no capacity for contributory negligence[3] If the child is in this latter age group, sufficient evidence must be presented to overcome the presumption before the question of contributory negligence can either be submitted to the jury[4] or decided as a matter of law.[5] The jury or court must then determine whether there has been compliance with the standard of care with which the child is charged. This standard is usually that conduct to be expected[6] of a child

[1] Ky. Rev. Stat. § 189.570(4)(a) (1959).

[2] See, for example, Lever Bros. Co. v. Stapleton, 313 Ky. 837, 233 S.W.2d 1002 (1950); Lehman v. Patterson, 298 Ky. 360, 182 S.W.2d 897 (1944).

[3] See, for example, the consolidated cases of Carr v. Ky. Util. Co. and Sturgill's Adm'x v. Ky. Util. Co., 301 S.W.2d 894 (Ky. 1957); United Fuel Gas Co. v. Friend's Adm'x, 270 S.W.2d 946 (Ky. 1954); Ward v. Music, 257 S.W.2d 516 (Ky. 1953); Dixon v. Stringer, 277 Ky. 347, 126 S.W.2d 448 (1939).

[4] Ward v. Music, *supra* note 3.

[5] Dixon v. Stringer, *supra* note 3.

[6] In the principal case, it is stated that the care the youth must use is that "ordinarily exercised" under the circumstances. This standard is criticized in the

of like age, intelligence and experience[7] although the exact words do vary.[8] If the child is fourteen or older, there is a presumption that he has capacity for contributory negligence, and the burden is on the youth to show want of capacity or understanding.[9]

Apparently, Kentucky's rule is analogous to the rule applied in determining the criminal responsibility of an infant.[10] By the English common law, a child under seven years of age is conclusively presumed to be incapable of committing a crime, and a rebuttable presumption of incapacity is raised in favor of an infant between the ages of seven and fourteen.[11] This analogy is certainly of dubious validity because the definite age limits are used in criminal law to establish the age at which children are capable of a criminal intent; here neither crime nor intent is in question.[12] "While the . . . [analogy] has the merit of simplicity, it is purely arbitrary, and lacks the sanction of reason and experience."[13] Actually if there is any parallel which can be drawn to criminal responsibility, it seems that it would be in the field of intentional torts rather than in contributory negligence. Yet, contrary to any rule that a presumption exists in favor of the child in this field, it is said by way of dictum that "the law of this state . . . is that an infant is civilly liable for his torts. . . ."[14]

The great majority of courts have rejected this analogy to criminal law,[15] although they do hold that very young infants may be con-

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case of Neas v. Bohlen, 174 Md. 696, 199 Atl. 852 (1938). The court there held that the more accurate test was that the care the youth must use is that "reasonably to be expected" under the circumstances. It seems that the latter view is better because the jurors may not know the care "ordinarily exercised" but they can form an estimate of the care that might "reasonably be expected."

[7] Restatement, Torts § 464(2) (1934).

[8] See Shulman, "The Standard of Care Required of Children," 37 Yale L.J. 618, 620-21 (1928). It is said in this article that although the words vary, the combination usually consists of three qualities. The most frequent one is age intelligence and experience. The Kentucky court is inconsistent in the qualities it uses. See, for example, Richie v. Chears, 288 S.W.2d 660 (Ky. 1956) (age and capacity to appreciate the danger); United Fuel Gas Co. v. Friend's Adm'x, 270 S.W.2d 946 (Ky. 1954) (immaturity and want of understanding); Ward v. Music, 257 S.W.2d 516 (Ky. 1953) (age, experience and mental capacity); Ballback's Adm'r v. Boland-Maloney Lumber Co., 306 Ky. 647, 208 S.W.2d 940 (1948) (age, capacity and experience; capacity led as descriptive as intelligence).

[9] Louisville & N. R.R. v. Hutton, 220 Ky. 277, 295 S.W. 175 (1927).

[10] Prosser, Torts § 31, at 128 (2d ed. 1955).

[11] Rex v. Owen, 4 Car. & P. 236, 172 Eng. Rep. 685 (C.P. 1830). Kentucky adheres to this doctrine in the field of criminal law. See Heilman v. Commonwealth, 84 Ky. 457, 1 S.W. 731 (1886).

[12] Prosser, *op. cit. supra* note 10, at 128.

[13] Johnson's Adm'r v. Rutland R.R., 93 Vt. 132, 140, 106 Atl. 682, 685 (1919).

[14] Stephens v. Stephens, 172 Ky. 780, 784-85, 189 S.W. 1143, 1145 (1916). For cases that hold similarly, see Ellis v. D'Angelo, 253 P. 2d 675 (1953) (four-year-old child was held liable for violently pushing a baby-sitter); Seaburg v. Williams, 16 Ill. App. 2d 295, 148 N.E.2d 49 (1958) (six-year-old child might be held liable for an intentional tort, such as setting a fire).

[15] Prosser, *op. cit.* supra note 10, at 128.

clusively deemed to lack the capacity for contributory negligence.[16] The maximum age at which the child is conclusively presumed to lack this capacity varies with the jurisdiction. Some of these courts hold that if the child is younger than three this presumption is applicable.[17] Louisiana holds that a seven-year-old child is not capable, from a legal standpoint, of being charged with contributory negligence.[18] The other courts fall somewhere between these two views.[19] The effect of this is that all of these jurisdictions rejecting the analogy to criminal law are in accord that a child under three years old is irrebuttably presumed to lack this capacity.

It is impossible to establish a definite age at which children are able to cope with the dangers and risks inherent in any given situation. In one situation a child may have sufficient capacity to appreciate the risk involved in his conduct and realize its unreasonable character, but in another the same child may lack the necessary intelligence and experience to do so. The mere fact that there is such a wide variety of judicial opinion on the subject is proof that no definite age can be accurately established. A solution to this problem is to use the conclusive presumption of incapacity only when the child is so young that he *manifestly* does not possess those qualities necessary to perceive a risk in any situation and realize its unreasonable character. All of the courts already recognize that below the age of three a child is conclusively deemed to lack this capacity. Above this age, however, there *should* be no presumption, rebuttable or irrebuttable, in favor of the child. The determination of whether he had the capacity to exercise care for his safety under the circumstances should purely be a question of fact to be submitted to the jury. The question would be: In this particular situation, did the infant conform to the standard of conduct that is to be expected from a child of like age, intelligence and experience?

Apparently, the present goal of the Kentucky court is to measure children by a standard of conduct that makes "no sudden leap at any particular age."[20] This cannot be attained by using the court's current rule which arbitrarily divides the period of infancy into three categories and has a presumption against the child if he is over a certain age and one in his favor if he is below this age. If the solution suggested above were followed, the court's goal would be achieved. If the child were three years old or above, his conduct

[16] See Annot., 174 A.L.R. 1080, 1104-10 (1948).
[17] *Id.* at 1116.
[18] Bodin v. Texas Co., 186 So. 390 (La. App. 1939); Borman v. LaFargue, 183 So. 548 (La. App. 1938).
[19] See Annot. 174 A.L.R. 1080, 1117-28 (1948).
[20] Baldwin v. Hosley, 328 S.W.2d 426, 430 (Ky. 1959).

would be measured by the conduct of a child of like age, intelligence and experience. There would be no presumption either in his favor or against him. The standard of conduct for children would smoothly increase as the child grew older, developed his intelligence and gained new experiences. The conduct required of him would definitely make "no sudden leap at any particular age."

The other reason for reversal exists because the Kentucky Court of Appeals faced squarely the problem of what happens when the "statute and infant meet."[21] Kentucky Revised Statutes section 189.570(4)(a), provides:

> Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

In essence, the instruction relating to the eight-year-old child's statutory duty provided that he had a duty to comply with this statute and gave no consideration to his infancy. This instruction would have been sustained prior to this decision. It is correct in form where the injured person is an adult.[22] In the case of *Thomas v. Dahl*,[23] the rule applicable to the contributory negligence per se of an adult who violates a statute was applied, without question, to a twelve-year-old bicyclist who had violated a right-of-way statute. As a result of the principal case, that aspect of the *Dahl* case is overruled, and it is now held that the infancy of a violator who is seven years old or above must be considered in determining his statutory duty. This was already the established rule for children under seven years of age.[24]

There are opposing views on the issue of whether infancy should be considered at all in determining the child's right to recover when he has violated a statute. Some courts do not consider the infancy of the violator and take the view that the violation of the statute is contributory negligence per se, barring recovery.[25] The majority of the courts, however, support the view that his infancy should be given consideration in determining whether a child who has violated a statute is contributorily negligent,[26] and Kentucky now follows this view. It seems that the majority view is better. If it is found that a child of the same age, intelligence and experience ordinarily would

[21] This problem was aptly given this title by Prof. J. Douglas Mertz in "The Infant and Negligence Per Se in Pennsylvania," 51 Dick. L. Rev. 79 (1946).
[22] Louisville Taxicab & Transfer Co. v. Byrnes, 296 Ky. 560, 178 S.W.2d 4 (1944).
[23] 293 Ky. 808, 170 S.W.2d 337 (1943).
[24] Lehman v. Patterson, 298 Ky. 360, 182 S.W.2d 897 (1944).
[25] See Annot., 174 A.L.R. 1170, 1190 (1948).
[26] *Id.* at 1174.

have the capacity to understand and follow the pattern of conduct required by the statute, his violation thereof could be deemed contributory negligence, barring his recovery. On the other hand, if the minority rule is followed, the special standard of care for children is necessarily abrogated and their violation of the statute will be characterized by the court as contributory negligence per se. The courts generally recognize that a special standard of conduct applies to children because they realize that an infant does not have the capacity to perceive the inherent risks and dangers in certain situations.[27] There is no reason to obliterate this standard merely because a statute has been violated. If the child does not have the capacity to understand and follow the pattern of conduct required by the statute, he should not be judged by it.[28]

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TORTS—JOINT TORTFEASORS—APPORTIONMENT OF DAMAGES BY DEGREES OF NEGLIGENCE.— Plaintiff, after stopping his automobile, was struck from the rear by a taxicab. A third car in the line of traffic stopped short of impact, but was subsequently struck from the rear causing it to collide with the taxicab, which was then forced into the plaintiff's car a second time. In an action against the owners and drivers of the three cars, the trial court granted summary judgment on the ground that plaintiff received two separate injuries and failed to sustain his burden of proof as to which injury resulted from each impact. *Held*: Reversed. No evidence was presented to sustain a finding that planitiff incurred more than a single injury and where the concurrent or successive negligent acts or omissions of two or more persons combine to cause a single injury to another,[1] such persons

[27] See, for example, Charbonneau v. MacRury, 84 N.H. 501, 153 Atl. 457 (1931); see also, Prosser, *op. cit. supra* note 10, at 128; Restatement, *op. cit. supra* note 7, § 283 comment *e*.

[28] It appears that the court, in this portion of the decision, complied with the general desire of the legislature. Ky. Rev. Stat. § 189.570(4)(d) (1959) further provides:

> Notwithstanding the provisions of this subsection every operator of a vehicle . . . shall exercise proper precaution upon observing a child . . . upon a roadway.

Thus, the legislature, realizing that children may lack the capacity to appreciate the risk involved in running across a street at a place other than a crosswalk, preferred to give protection to the infant violator.

[1] The difficulty posed by the cause-in-fact issue is overcome by holding that only one tort occurred, and only the fact that each defendant's negligence was involved need be shown. An analogy is drawn from the cases where death results from the independent successive negligence acts of two persons; the death is presumed to have occurred subsequent to the second act of negligence. *E.g.*, Micelli v. Hirsch, 52 Ohio L. abs. 426, 83 N.E.2d 240 (1948). See also 4 Restatement, Torts § 879 (1938), as qualified by § 881.