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Negligence, the Standard of Care of Infants in Civil Cases

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STUDENT NOTES

NEGLIGENCE, THE STANDARD OF CARE OF INFANTS IN CIVIL CASES

Children of tender years do not have the mental capacity, the power to discriminate, or the appreciation of peril which adults possess.[1] They must be expected to act upon childish instincts and impulses.[2] It is the purpose of this note to discuss the effect this immaturity has upon the standard of care to which infants are held. Due to the scarcity of negligence cases in which infants are made defendants the problem is better approached by a study of cases in which the contributory negligence of an infant is involved.

It is usually held in cases where contributory negligence is made a defense that the plaintiff infant must have exercised that degree of care ordinarily exercised by children of his age, intelligence and experience under the same or similar circumstances.[3] Whether the child has acted as a reasonably prudent child of his class under the circumstances is a question of fact for the jury except in those cases where the court rules as a matter of law that the infant was or was not negligent.

Various courts have named such qualities as age, experience, capacity, understanding, maturity, intelligence, discretion and combinations of these as important elements in determining the standard of care to which infants are to be held.[4]

None of these factors are, however, all-inclusive or the sole test by which the standard is determined. Age is the one quality

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[1] Restatement, Torts (1934) Sec. 283. See Allen v. Bland, 168 S. W. 35, 39 (Texas, 1914), in which case the defendant's son, age eleven, drove a car into the plaintiff's wife. In discussing the boy's ability to handle the car the court says: "Thoughtlessness of youth is proverbial and the reckless, careless disposition of the average boy has always been a matter of common knowledge."

[2] See Powers v. Harlow, 53 Mich. 515, 19 N. W. 257, 260 (1884).

[3] Felton v. Aubrey, 74 Fed. 350 (C. C. A. 6th, 1896); Grenell v. Mich. C. Ry., 124 Mich. 141, 82 N. W. 843 (1900); Quinn v. Ross Motor Car Co., 157 Wisc. 543, 147 N. W. 1000 (1914). Restatement, Torts (1934) Sec. 283, comment *e*, and Sec. 464, subsection 2.

[4] Abbott v. Alabama Power Co., 214 Ala. 281, 107 So. 811 (1926) (age and intelligence); Hartnett v. Boston Store Chicago, 265 Ill. 331, 106 N. E. 837, L. R. A. 1915 C, 460 (1914) (age capacity, discretion and experience); Ginford v. Johnson, 83 Ind. 426 (1882) (maturity and capacity); McEldon v. Drew, 138 Iowa 390, 116 N. W. 147 (1908) (age, experience, capacity, and understanding); Rufino Verga v. W. M. Evans, 128 Ohio St. 535, 191 N. E. 757 (1934) (age, experience); Briese v. Maechtle, 146 Wisc. 89, 130 N. W. 893, Ann. Cas. 1912 C, 176 (1911) (age, taking into account experience, capacity and understanding).

considered in nearly every case and in some cases is mentioned as the only thing to be considered.[5] It has long been considered one of the most important tests but it is by no means the sale determining element.[6]

In a Georgia case the court reversed a verdict for the plaintiff, age four and one-half years, for error in instructing the jury that the plaintiff might recover if he had exercised the care of an average child of his age and development. The court said:

> "Due care in a child of tender years is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation under investigation. The average child of its own age is not the standard by which to measure its legal diligence with exactness. 'Such care as the capacity of the particular child enables it to use naturally and reasonably, is what the law requires.' "[7]

The Massachusetts court held an infant of less than fourteen to the exercise of that degree of care which was a natural incident to his youth, inexperience and immature stage of mental development.[8] The period at which a child is capable of realizing danger varies with different children. Except in cases where the court rules as a matter of law that the infant is incapable of negligence, it is a question of fact for the jury whether, in consideration of the plaintiff's age, experience, intelligence, judgment, and alertness, he was capable of understanding the nature and extent of the peril.

In view of modern psychological tests and the great store of information concerning the mental and physical development of children and their relation to one another it would seem sound that the mental or psychological age instead of the chronological age should be considered in determining the degree of care which infants are capable of exercising. Due to widely differing conditions of physical make-up, intellectual capacity, training, education, experience, health, sex and general adjustment to environment, children of the same chronological age are by no means equal in ability to cope with any given situation. Carefully constructed tests are available by which a child's characteristics may be determined and evaluated. These tests would seem to be a suitable basis for determining the degree of care which children in certain groups are capable of exercising.

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[5] City of Owensboro v. York's Admr., 117 Ky. 294, 25 Ky. Law Rep. 1397, 77 S. W. 1130 (1904); Ranurez v. City of Cheyene, 34 Wyo. 67, 241 Pac. 710, 42 A. L. R. 245 (1925); Shearman & Redfield, Negligence, (5th ed., 1898) sec. 73 and 73a.

[6] Western and Atl. Ry. v. Young, 81 Ga. 397, 7 S. E. 912 (1888) ("age is of no significance, except as a mark or sign of capacity . . . Due care on the part of this boy might . . . exceed that of average boys of his own age." Berdos v. Tremont and Suffolk Mills, 209 Mass. 489, 95 N. E. 876 (1911).

[7] Herrington v. Mayor of Macon, 25 Ga. 58, 54 S. E. 71, 72 (1906).

[8] Herdos v. Tremont and Suffolk Mills, 209 Mass. 489, 95 N. E. 876 (1911).

These mental tests[9] would be applicable and practical in those instances in which the child might be brought into court or in instances where records of such tests are available to indicate the mental age of the child charged. Individual tests might be administered by a trained psychologist and the results introduced into evidence to show the class into which the child should be placed. It would then be the task of the jury to determine whether the child had acted as a reasonably prudent child of his class. However, such tests cannot be resorted to in those cases where the contributory negligence of the infant is to be shown and the infant is dead, unless records of such tests can be procured.

If age is not to be the conclusive test or the controlling element in determining the degree of care which a child must exercise there would seem to be little logic in the course some courts have taken in adopting the analogy of the criminal law. These courts hold that a child under seven years of age is deemed incapable of exercising any care for his own safety and hence is incapable of negligence as a matter of law. The question of such child's contributory negligence is not to be submitted to the jury.[10] From ages seven to fourteen there is a presumption that the child is incapable of negligence but this presumption is rebuttable and it is a question of fact for the jury whether the child was contributorily negligent.[11] These limits seem to make the question of the child's ability to exercise care rest entirely upon age. Most courts have broken away from these limitations, however, and allow the jury to determine, in the light of the child's age, experience and intelligence, whether he was contributorily negligent. The rule applied after the child reaches fourteen is the same in those courts which adopt the criminal analogy as in those which do not. The presumption of incapacity is removed at fourteen,[12] but the infant is not required to exercise the prudence of an adult, only the care proportionate to his age, experience and intelligence.[13]

[9] Bronner, August F., *A Manual of Individual Mental Tests* (1927); Dearborn, Walter F., *Intelligence Tests* (1928).

[10] Chicago City Ry. v. Tuohy, 196 Ill. 410, 63 N. E. 997 (1902); Palermo v. Orleans Ice Mfg. Co., 130 La. 833, 58 So. 589, 40 L. R. A. (N. S.) 671 (1912); Schneider v. Winkler, 74 N. J. L. 71, 70 Atl. 731 (1906); M. K. and T. Ry. v. Nesbit, 43 Tex. Civ. App. 630, 97 S. W. 827 (1906); Note (1921) 28 W. Va. L. Q. 303.

[11] Birmingham Ry. v. Landrum, 153 Ala. 192, 45 So. 198 (1907); McEldon v. Drew, 138 Iowa 390, 116 N. W. 147 (1908); United States Natural Gas Co. v. Hicks, 134 Ky. 12, 119 S. W. 166, 23 L. R. A. (N. S.) 249 (1909).

[12] Louisville and N. Ry. v. Hutton, 220 Ky. 277, 295 S. W. 175 (1927); Kehler v. Schwenk, 144 Pa. St. 348, 22 Atl. 910, 13 A. L. R. 374 (1891); Accord: Crouch v. Noland, 238 Ky. 575, 38 S. W. (2d) 471 (1931).

[13] United Ry. and Electric Co. v. Carneal, 110 Md. 211, 72 Atl. 771 (1909); Milbury v. Turner Center System, 274 Mass. 358, 174 N. E. 471, 73 A. L. R. 1970 (1931); Schmidt v. Riess, 186 Wisc. 587, 203 N. W. 362 (1925) (plaintiff was six years, nine and a half months old).

Adults are held to that degree of care which a reasonably prudent man would have exercised under like circumstances;[14] an *objective* test. Infants, however, cannot be held to the standard man test, for their normal condition is one of incapacity.[15] It has been said that in determining the standard for infants a *subjective* test is used,[16] but this is not entirely true. The degree of care is not determined entirely from the ability the particular infant possessed. From the known and determinable characteristics of the infant his capacity is judged and he is put into a class with other infants having the same or equivalent characteristics and capabilities. In determining the class into which the particular infant must be put, his own individual characteristics must be considered; to that extent he is dealt with subjectively. Once the class in which the infant belongs has been determined, however, the subjective treatment ceases, and the infant is judged from what the average infant of his class might fairly and reasonably be expected to do. Consequently the standard is largely objective.

It would seem that no higher degree of care would be required of an infant in cases where he is the defendant than in cases where he is the plaintiff and is charged with contributory negligence.[17] *In Charbonneau* v. *MacRury*,[18] the defendant, a minor of seventeen, negligently drove into and killed the plaintiff's son. The court said that reasonable care is required of minors as well as adults and no different measure is to be applied to their primary than to their contributory fault. In affirming judgment for the defendant the court approved the instruction that "his conduct should be judged according to the average conduct of persons of his age and experience."[19]

An infant cannot be expected to do that of which he is incapable and it is obviously true that an infant does not posses the faculties of an adult. To hold an infant to the exercise of the same degree of care to which an adult is held would be harsh and unjust. The position of the courts in holding an infant to that degree of care which his age, experience, intelligence, and general capacity fit him to exercise seems reasonable and fair. This note is in conformity with the majority rule, but in the matter of age suggests that more emphasis be placed upon the mental than upon the chronological age.

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[14] Restatement, Torts (1934) sec. 283.
[15] 20 R. C. L. sec. 105.
[16] Note (1925) 74 Pa. L. Rev. 79.
[17] Restatement, Torts (Tent. Draft No. 4, 1929) sec. 29-30.
[18] 84N. H. 501, 153 Atl. 457, 73 A. L. R. 1266 (1931). See also Briese v. Maechtle, 146 Wisc. 89, 130 N. W. 893, 35 L. R. A. (N. S.) 574 (1911) (Defendant, age ten years, was held to the standard of care of which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child.
[19] Charbonneau v. MacRury, 84 N. H. 501, 153 Atl. 457, 464, 73 A. L. R. 1266, 1276 (1931).