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Comparison of the Civil and Criminal Liability of Infants

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STUDENT NOTES

COMPARISON OF THE CIVIL AND CRIMINAL LIABILITY OF INFANTS

In dealing with infants the law sets up different standards and imposes different measures of liability in negligent tort and criminal cases. It is the purpose of this note to discuss this difference between the tort and the criminal liabilities of infants.

In civil negligence cases there are no arbitrary age limits at which an infant is conclusively presumed to be incapable of being negligent or a limit under majority at which the presumption of incapacity is removed, but, rather, the infant is held to that standard of care which a reasonable child of his age, experience and intelligence would exercise under similar circumstances. Age here is not the controlling element but it is to be considered by the jury along with the general characteristics of the infant in determining the class into which the infant should be placed. After the infant's class has been determined in the light of his general characteristics, the jury decides whether the defendant infant has exercised that degree of care that might fairly and reasonably be expected of an infant in his class under similar circumstances.[1]

The criminal law, however, presumes capacity or incapacity to commit a crime according to set age limits. Under the age of seven years an infant may not be convicted of a criminal offense.[2] He is conclusively presumed to be incapable of entertaining a criminal intent or having capacity to commit a crime, and no evidence of actual intent may be shown. It is stated in *State* v. *Aaron*:[3]

> "It is perfectly settled that an infant within the age of seven years cannot be punished for any capital offense, whatever circumstances of mischievous intention may be proved against him for by the presumption of the law he cannot have discretion to discern between good and evil and against this presumption no averment can be admitted."

The age limit has been set by statute in many states and varies in some from the common law age of seven.[4]

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[1] Note (1941) 29 Ky. L. J. 334.

[2] 1 Wharton, Criminal Law (12th ed. 1932) 126; 1 Hale, P. C. 27, an infant under 7 was pardoned after being indicted for homicide; Clark & Marshall, Criminal Law, (3rd ed. 1927) 114.

[3] 1 Russell, Crimes (7th ed. 1853) 2; State v. Aaron, 4 N. J. L. 263, 271, 7 Am. Dec. 592, 596 (1818).

[4] Dove v. State, 37 Ark. 261 (1881) (age 12); Ford v. State, 100 Ga. 63, 25 S. E. 845 (1896) (age 10); Angelo v. People, 96 Ill. 209 (1880) (age 10).

Between the ages of seven and fourteen years an infant is prima facie deemed to be incapable of committing a crime.[6] This presumption diminishes as the infant nears fourteen as there is a vast difference between a child a day over seven and one a day under fourteen.[6] To convict an infant between these two ages the evidence of malice or the capacity to discern between good and evil which supplies age ought to be strong and clear beyond all doubt of contradiction.[7] If actual malice is proved, or it is proved that the infant can discern between good and evil, his lack of age will not save him.[8] It has been held that a sense of moral guilt in the absence of a knowledge of the legal responsibility of his wrongful act will not authorize conviction.[9]

In *McCormack* v. *State*,[10] the court says:

> "The inquiry is, not whether the accused is of the average capacity of infants of his years, or above or below it. That he is the one or the other is doubtless a fact which the jury ought to consider in determining whether he had the knowledge and discretion requisite to legal accountability. It is the strength of the understanding and judgment of the delinquent which is in issue, and which the jury are to consider. The presumption of immunity proceeds, we suppose, on the theory that the infant is of the average capacity of one of his years; and the inquiry for the jury is whether it is clearly shown that in the particular transaction, intelligently, he intended the doing of a wrongful act. If this be clearly shown the presumption is repelled, and legal accountability attaches."

After fourteen the presumption of incapacity is removed, and an infant between the ages of fourteen and twenty-one has no immunity because of his age but is equally subject to punishment as an adult.[11]

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[6] Russell, *op. cit. supra* n. 3; Clark & Marshall (3rd ed. 1927) 114.

[6] McCormack v. State, 102 Ala. 156, 15 So. 438 (1894); Law v. Commonwealth, 75 Va. 885 (1881) (dictum).

[7] Archbold's Criminal Pleading (13th ed. 1938) 12; Reg. v. Vamplew, 3 F & F 521, 176 Eng. Rep. 234 (1862); Angelo v. People, 96 Ill. 209 (1880); Law v. Commonwealth, 75 Va. 885 (1881).

[8] 1 Hale, P. C. 27 (an infant of 8 was found guilty of murder and hanged); 1 Hale, P. C. 25 (an infant of between 8 and 9 was found guilty of having burned a barn with malice and cunning and was hanged); 1 Hale, P. C. 26 (a boy of 10 killed his companion and hid himself. He was hanged upon the ground that by his hiding he showed he could discern good from evil); Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494 (1858); Broadnax v. State, 100 Ga. 62, 25 S. E. 844 (1896); State v. Goin, 9 Humph. 175 (Tenn. 1848).

[9] Willet v. Commonwealth, 13 Bush 230 (Ky. 1877) (dictum); State v. Yeargan 117 N. C. 706, 23 S. E. 153 (1895).

[10] McCormack v. State, 102 Ala. 156, 15 So. 438 (1894).

[11] 1 Wharton, Criminal Law (10th ed. 1896) 85; 1 Hale, P. C. 25; Berry v. State, 209 Ala. 120, 95 So. 453 (1923); McCutcheon v. State, 199 Ind. 245, 155 N. E. 544 (1927); People v. Teller, 1 Sheel Cr. 231 (N. Y. 1823).

It is immaterial whether the infant over fourteen years of age actually had knowledge of the wrongfulness of the act or was able to discern good from evil, as far as the presumption of the law goes.[12]

There are very few criminal cases where an infant is charged with criminal negligence. Perhaps this is due to a hesitancy to prosecute or a reluctance of juries to convict infants for crimes involving negligence; and also a failure of these cases to reach appellate tribunals. There are a few cases where an infant has been charged with a crime in which a high degree of negligence takes the place of malice. The rule as to negligent crimes is essentially the same as the rule for crimes involving intent, i.e. under the age of seven there is no liability; between the ages of seven and fourteen there is a presumption of incapacity which may be removed by affirmative proof that the defendant has capacity or knowledge and understanding of the act and its wrongfulness; and after fourteen the presumption of incapacity is removed.

In *Watson et al. v. Commonwealth,*[13] the defendants, ages thirteen and eleven, were swimming with the decreased when they pushed him into deep water, knowing that he could not swim. The deceased drowned and the defendants were tried and convicted of manslaughter. This conviction was reversed. The court said that: "To seize one, whom you know to be unable to swim and against his will intentionally to pull or push him into water known to be of such depth he will have to swim or drown, and he is drowned thereby, or in reckless disregard of human life intentionally and recklessly to pull or push one into water of such depth he will have to swim or drown, and he is drowned thereby, is homicidal." But in view of the defendants ages as between seven and fourteen, and with the presumption in their favor that they were innocent of evil intent, the court should have instructed that unless the jury believed beyond a reasonable doubt that when the defendants did the act they had a guilty knowledge that they were doing wrong they should be acquitted.[14]

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[12] McCutcheon v. State, 199 Ind. 247, 155 N. E. 544 (1927), (defendant, age sixteen, was tubercular, mentally weak and deficient, morally delinquent, and a moron who was emotionally unstable; but he was condemned to die for murder). Angelo v. People, 96 Ill. 209 (1880) (dictum).

[13] 247 Ky. 336, 57 S. W. (2d) 39, (1933).

[14] In People v. Squazza, 81 N. Y. S. 254 (1903), an infant of eleven threw a brick from the roof of a building, striking and killing a child below. The defendant was indicted for first degree manslaughter and convicted. The conviction was reversed because the presumption of incapacity due to the defendant's age was not removed by proof that he had capacity to understand the act which he had done. State v. Milholland, 89 Iowa 5, 56 N. W. 403 (1893) (defendant, age thirteen, was convicted of manslaughter for having thrown a companion into deep water where he drowned. There was no evidence that the defendant acted through anger or ill will but the conviction was affirmed. The court held that an instruction to the jury that they were to consider the defendant's age and all the circum-

The criminal law, unlike the civil law, places strong emphasis upon age. Age limits are set under which an infant may not be held criminally liable, between which the presumption of incapacity is rebuttable, and a final limit under majority at which all presumption of incapacity is removed and the infant is placed in the same position as an adult.

It is submitted that this difference in the criminal and civil rules results in a greater liability under the age of seven in civil cases than in criminal cases. There is about the same liability in crimes or in tort between the ages of seven and fourteen. And after the age of fourteen there is a greater liability in criminal cases than in civil ones.

For example: X, an extremely intelligent boy of six and one-half years of age, has been taught something of the use of firearms. He handles a loaded gun in such a negligent manner that it is discharged and kills Y, the husband of Z. Z sues X for the wrongful death of her husband through X's negligence. A jury finds that X has not exercised the degree of care that might reasonably and fairly be expected of a child of X's age, intelligence, and experience under the circumstances and renders a verdict against X for his tort. But X cannot be held criminally because he is under the age of seven and conclusively presumed to be incapable of committing a crime. Nor may X's superior capacity be shown in the evidence to overcome the presumption of incapacity.[15]

Between the ages of seven and fourteen the criminal and civil rules are substantially the same as to capacity. An infant's liability would depend upon whether he had acted with that degree of care which might reasonably be expected of a child of his age, experience, and intelligence. He would be presumed to be incapable of committing a crime but the presumption is rebuttable and if his actual capacity were shown he might be held liable.

After the infant reaches the age of fourteen all presumption of incapacity is removed and he is criminally responsible in the same manner as an adult. However, civily he is not held to the standard of care of an adult but it is left to the jury to determine his responsibility by what might fairly be expected of an infant possessing the equivalent of the defendant's age, intelligence, and experience.

The harsher criminal rule after the age of fourteen, in effect, holds the infant to adult responsibility, in that the infant is presumed to be as fully capable of distinguishing right from wrong as an adult.

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stances, sufficiently presented the question of the defendant's capacity). State v. Peterson, 153 Minn. 310, 190 N. W. 345 (1922) (defendant, sixteen, killed a man while driving an automobile in a culpably negligent manner. In affirming his conviction of second degree manslaughter, the court said the offense rested upon a statute but at the same time said there was no lack of knowledge or understanding in the defendant and that he was mature for his age. It held that the trial court was correct in refusing an instruction that the jury should consider the defendant's age).

[15] See n. 2 *supra*.

The civil rule, however, results in the presumption that the infant is not capable of exercising the same discretion as an adult or acting as a reasonably prudent man until he reaches majority.

It is the opinion of the writer that the criminal rule is too harsh in applying an adult standard after the infant reaches the age of fourteen. The infant may be able to distinguish good from evil at an earlier age than he is able to distinguish the wise from the unwise, but, it remains, an infant of fourteen is immature as to knowledge of legal right and wrong as well as to discretion. Especially in crimes involving negligence, this rule works a hardship upon the infant for in these instances he has no intention of accomplishing the wrongful act but does so by his failure to exercise the proper discretion.

Not all infants of the same age are capable of exercising the same degree of care or able to distinguish right from wrong in an equal degree. Arbitrary age limits are artificial and do not serve the purpose of justice. In civil cases it is recognized that chronological age is a poor standard in determining an infant's capacity to be negligent and that it is far more just to consider the infant's general characteristics, only one of which is age. If age limits are not conclusive in determining an infant's capacity to be negligent in cases where only his tort liability is involved, *a fortiori* they should not be used in criminal cases where their use results in the unjust protection of the intelligent infant under seven years of age and the unjust punishment of the dull infant over fourteen. It would be better to leave the question of the infant's accountability to the jury to decide in the light of what might fairly and reasonably be expected of an infant of the defendant's age, intelligence, experience, and general capacity. This would make the tort and the criminal rule the same.

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NEGLIGENCE: THE STANDARD OF CARE REQUIRED OF PHYSICIANS AND SURGEONS

Not infrequently in the study of law, one finds situations in the field of negligence in which a different standard of care is employed to determine liability in civil and in criminal cases. It is the purpose of this note to compare the standards of care required of physicians and surgeons in the two fields. Do the courts, in the prosecution of a physician or surgeon or one assuming to act as such, judge the prisoner by the same objective standard that is used to determine his civil liability, or is a different standard used?

Tort liability of a physician is measured by the following standard: A physician or surgeon is required to exercise the degree of care ordinarily exercised by average members of the profession