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Torts--Infants Contributory Negligence

William S. Jett Jr.
University of Kentucky

TORTS—INFANTS CONTRIBUTORY NEGLIGENCE.

In the field of tort liability of infants, the courts recognize three views as to the possibility of an infant being guilty of contributory negligence. The first, that an infant cannot be contributorily negligent. *Lynch* v. *Nurdin*, 1 Q. B. 29 (1841); *Harold and another* v. *Watney*, 2 Q. B. 340 (1898). This view is practically obsolete and is generally no longer followed, except in part, by those states which hold that an infant below a certain age, generally six, cannot be guilty of contributory negligence as a matter of law; however, after an infant passes such age the presumption of non-liability is rebuttable.

The second view is that an infant may be guilty of contributory negligence the same as an adult. *Neal* v. *Gillett*, 23 Conn. 437 (1850); *Burke* v. *Broadway, Etc., Ry. Co.*, 49 Barb. (N. Y.) 529 (1867). A few early decisions laid down this rigid rule. The rule, however, as can be readily seen, is inherently bad, and the above courts no longer follow it. *Boland* v. *Conn. Co.*, 83 Conn. 456, 76 Atl. 1005 (1910); *Hine* v. *A. D. Co.*, 250 N. Y. 75 (1931).

The third view is that an infant may or may not be guilty of contributory negligence, depending upon the age, capacity, discretion, knowledge and experience of the particular infant who has been charged by the defendant as being contributorily negligent. This last view is followed in a large number of the states. *Birmingham, Etc., Ry. Co.* v. *Mattison*, 166 Ala. 602, 52 So. 49 (1909); *Richardson* v. *El Paso Consol. Gold Mining Co.*, 51 Col. 440, 118 Pac. 982 (1911); *Boland* v. *Conn. Co.*, 83 Conn. 456, 76 Atl. 1005 (1910); *Barstow* v. *Capital Traction Co.*, 29 App. (D. C.) 362 (1907); *Central, Etc., Co.* v. *Rylee*, 87 Ga. 49, 13 S. E. 584 (1891); *McEldon* v. *Drew*, 138 Iowa 390, 128 Am. St. Rep. 203 (1908); *Seifert* v. *Schaible*, 81 Kan. 323, 105 Pac. 529 (1909); *Berdos* v. *Tremont and Suffolk Mills*, 209 Mass. 489, 95 N. E. 876 (1911); *United R. and Elec. Co.* v. *Carneal*, 110 Md. 211, 72 Atl. 771 (1909); *Meserve* v. *Libby*, 115 Me. 282, 98 Atl. 754 (1916); *Roberts* v. *Ring*, 173 N. W. 437, (Minn. 1919); *Stanley* v. *C. M. and St. Ry. Co.*, 112 Mo. App. 601, 87 S. W. 112 (1905); *Ritscher* v. *O. and P. V. R.*, 79 N. J. L. 462, 75 Atl. 209 (1910); *Karpeles* v. *Heine*, 227 N. Y. 74, 124 N. E. 101 (1919); *Chi. Rock Is. and Pac. Ry. Co.* v. *Wright*, 161 Pac. 1070 (Okla., 1916); *Edwards* v. *Chi., Etc., Ry. Co.*, 21 S. D. 504, 110 N. W. 832 (1907); *Thomas* v. *Oregon Short Line Ry. Co.*, 47 Utah 394, 154 Pac. 777 (1916); *Prunty* v. *Tyler Traction Co.*, 110 S. E. 570 (W. Va., 1922). [For comments on above cases see 22 Mich. Law Rev. 160; 32 H. L. R. 434; 29 Yale Law Journal 684; 8 Minn. Law Rev. 73, and in the Federal courts, *Leach* v. *St. Louis and San Francisco Ry. Co.*, 48 Fed. (2d) 722 (1931).]

The age at which an infant is responsible under the criminal law is fairly well settled. Below the age of seven he is incapable of forming a criminal intent. Between the ages of seven and fourteen there is a rebuttable presumption of incapacity. Clark and Marshall, Sec. 72. The reasons for these rigid rules of the criminal law are to a large extent historical and have their origin in the reaction from the ex-

treme severity of the criminal law of the times. The liability of infants for torts is not analogous to the liability of infants for crimes. The courts make no attempt arbitrarily to set an age limit with respect to an infant's liability for torts except that some states deny liability for contributory negligence of very young children. This distinction between the civil and criminal law, viz., the one setting an age limit while the other does not, is sound, because, although in the field of criminal law there may be exceptional children yet it is the good policy of the state to discountenance the prosecution of children, and to attempt to check their criminal propensities in other ways. However, no such consideration operates in a purely private tort between two individuals where the equities of the parties are to be adjusted, and here exceptional children should be considered.

With respect to infants a number of the courts hold as a matter of law, that very young children are incapable of contributory negligence. *Parra* v. *Cleaver* (Cal. App.) 294 Pac. 6 (1930); *Ryan* v. *Louisana Ry. Co.*, 83 So. 371 (1919). Some authorities hold that this rule applies to all children under seven years of age, *Chicago City Ry. Co.* v. *Twoy*, 196 Ill. 410, 63 N. E. 997 (1902); *Ill. Cent. Ry. Co.* v. *Hernigan*, 198 Ill. 297, 65 N. E. 88 (1902), and that children between the ages of seven and fourteen are presumably incapable of contributory negligence, but that the contrary may be shown. *Mayor, Etc., of Vicksburg* v. *McLain*, 67 Miss. 4, 6 So. 774 (1889); *Lynchburg Cotton Mills* v. *Stanley*, 102 Va. 590, 46 S. E. 909 (1904); Cooley on Torts (3 ed.) 1470. A great number of states on the other hand hold that infants may be guilty of contributory negligence, and whether they are guilty or not depends upon age, experience, ability, and degree of development. It was held in North Carolina that a child should not be chargeable with the same degree of care as an experienced adult. *Tart* v. *So. Ry. Co.*, 202 N. C. 52, 161 S. E. 720 (1932). This is a question for the jury in determining whether the infant was guilty of contributory negligence, assuming that an infant may be guilty of contributory negligence in that particular jurisdiction. It was so held in a recent case involving a three and one-half year old child. *Hine* v. *A. D. Co.*, 250 N. Y. 75, 232 App. Div. 359 (1931).

In a late North Carolina case the complaint alleged that the plaintiff's intestate, a boy of twelve years, was struck and killed by the defendant's freight train, while walking along a well defined path which path crossed defendant's railroad track. It was further alleged that the train was being negligently operated by defendant's employee at the time. The defense was contributory negligence. The court said that the method for determining whether a child is contributorily negligent, consists in discovering whether it acted as a child of its age, capacity, discretion, knowledge and experience would have acted under similar circumstances. *Candle* v. *Seaboard Air Line Ry. Co.*, 202 N. C. 404, 163 S. E. 122 (1932). This method is applied in a great number of states and is perhaps as near a logical test as any in dealing with this problem. Although we must admit that chil-

dren generally have not enough intelligence and discretion to warrant holding them for their actions, yet a particular infant in any one situation may have sufficient mental capacity, and it should always be open to the defendant to prove this regardless of the plaintiff's age. Not to afford him such a defense would work an injustice. The defendant needs but prove that the infant was cognizant of the immediate consequences of his act, and that the consequences are ordinarily sufficient to deter a person of his age and mental development from doing the act. If the infant does such act as makes him capable of contributory negligence, then he should be held accountable.

A recent case states the rule, that an infant is guilty of contributory negligence if an ordinarily prudent child of the same capacity, age, experience, and ability would have known and appreciated the danger and risk under similar circumstances. *Turner* v. *City of Moberly*, 26 S. W. (2d) 997 (Mo., 1930). This test is in harmony with the accepted principles of the law of negligence, and requires every child to exercise the degree of care which he is capable of using. It is a psychological rather than a chronological test, and is subjective. At common law proof of contributory negligence of an adult plaintiff was an absolute bar to any action for negligence he might bring against his wrongdoer. There is apparently no sound reason why the same test should not apply in the case of an infant after the defendant has shown that the infant was contributorily negligent.

The general rule is that the burden of proof, in setting up the contributory negligence of the plaintiff, is on the defendant when the plaintiff is an adult. This is true in a great number of the state jurisdictions, Cooley on Torts (3rd ed.) 1340, and in the Federal courts, *Leach* v. *St. Louis and San Francisco Ry. Co.*, 48 Fed. (2d) 722 (1931).

Kentucky is in accord with those jurisdictions which hold that an infant under the age of seven cannot be guilty of contributory negligence as a matter of law. Kentucky also holds that one between the ages of seven and fourteen may or may not be guilty of it, depending on his mental development and other circumstances. *Tupman's Admr.* v. *Schmidt*, 200 Ky. 88, 254 S. W. 199 (1923). It has further been decreed that an infant five years of age cannot be guilty of contributory negligence by falling in a hole in the sidewalk, even if negligence on the part of the infant be shown. *City of Newport* v. *Lewis*, 155 Ky. 832, 160 S. W. 507 (1913).

Although under the Kentucky view there is a presumption that an infant between the ages of seven and fourteen cannot be guilty of contributory negligence, still this presumption is rebuttable, and for the purpose of rebutting it, the Kentucky courts apparently apply the same test in the case of infants over seven years of age as is applied by a great number of the courts to all infants under a subjective test of their mental development. The Kentucky test applied to infants over seven years of age is as follows: Infants over seven years of age are required to use only that degree of care which persons of like age, capacity and experience might be reasonably expected naturally and ordinarily to use under like circumstances. *Macon* v. *M. and P. R. Co.*,

110 Ky. 680, 62 S. W. 496 (1901); *Owensboro* v. *York*, 117 Ky. 294, 77 S. W. 1130 (1904); *Davis, Admr.* v. *Ohio Valley Banking Co.*, 127 Ky. 800, 106 S. W. 843 (1908); *Collett's Guardian* v. *Standard Oil Co.*, 186 Ky. 142, 216 S. W. 356 (1919); *Ham* v. *Hoard*, 189 Ky. 317, 224 S. W. 868 (1920).

It is to be appreciated that a jury must indeed find itself in a predicament in applying the subjective test in order to reach a decision after having heard all the evidence. The reason is obvious. Under the foregoing test as it is stated an infant is required to use only that degree of care which would ordinarily be used by a child of its age, capacity and experience under similar circumstances. This indefinite test places the burden on the jury to determine whether it acted as such. Query, assuming the facts of the case to be clear, how is a jury with nothing definite on which to work (unless one would say that the psychological aspect of an infant toward a certain set of facts is definite) to go about determining whether or not a particular infant acted as an ordinary child of its age, capacity and experience would have acted under similar circumstances?

WILLIAM S. JETT, JR.

CRIMES—THE RIGHT OF AN OFFICER TO ARREST WITHOUT A WARRANT.

In a recent Texas case the court held that an arrest by an officer without a warrant was illegal where the evidence did not show that the defendant was about to escape or would escape if time were taken to secure a warrant, even though the officer had reasonable grounds to believe the defendant was guilty of the felony committed.[1] A brief statement of the facts will show that the arrest would have been legal had not the Texas statute, which governed this case, included the clause, "it must appear that the accused was about to escape." The deceased was found dead at his filling station about six o'clock A. M. with a shotgun wound in his body. The defendant had been seen at the filling station carrying a shotgun late that same afternoon. Fresh tracks in the snow led from the filling station to the defendant's home where he was arrested less than an hour after the killing. According to the arresting officer's testimony, he told the defendant that he was making an investigation and thought that he (the defendant) might be able to give him some information. When asked if he had heard any shots the defendant answered in the negative and, after hesitating a moment, said, "That old man was a kind old man; I was down there at two o'clock but haven't been back since." The defendant apparently made these statements without being advised of the killing. The officer immediately arrested the defendant without a warrant as he was then seven miles from the county seat, the only place where he could have secured a warrant.

[1] *Rippy* v. *State* (Texas), 53 S. W. (2nd) 619 (1931).