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PRESUMPTIONS EXISTING IN FAVOR OF THE INFANT IN RE: THE QUESTION OF AN INFANT'S ABILITY TO BE GUILTY OF CONTRIBUTORY NEGLIGENCE

LOUIS H. WILDERMAN*

There is a recognized principle in the field of tort law that the degree of care required of an infant is not the same as that required of an adult under the same circumstances. In the case of an adult there is an established standard by which to measure a requisite degree of care¹; but in the case of a child, the courts have not considered it feasible to establish one set standard. The differentiation between adults and infants in regard to the standards to which they are held is not peculiar to tort law, but exists in many other fields of the law, e. g. contracts and crimes. The social urge to protect children is the driving force that has resulted in the erection of safeguards for infants as regards their ability to be contributorily negligent.

Admitting that a different standard of care exists in regard to infants, two problems arise. 1. What standard of care shall be adopted? 2. How shall that adopted standard be applied?

What is the standard of care required of an infant? When faced with this situation the courts adopt either one of two standards.² Some courts apply the objective standard of care and hold that a child must exercise only such care and discretion as is reasonably to be expected of one of like age, judgment and experience. The other group of courts apply the subjective standard of care and hold that the particular child must exercise only such care as this child's capacity, both mental and physical, fits it to exercise in the actual circumstances on the occasion and situation under investigation. Since it makes no consequential difference, in this paper, which standard of care is adopted in view of the fact that we deal primarily with those safeguards accorded to the infant in the form of presumptions, it is sufficient for our purposes merely to state that these two views do exist. It is evident that no matter which standard of care is adopted, the problem of determining what presumptions do exist and what force they have cannot be affected. Whether the application of the presumption to an objective standard produces results different from those reached in connection with the subjective standards is a problem entirely distinct from the one to be herein discussed.

So far, we have found that there is a different standard of care to be applied to infants, and that this standard may be objective or subjective. The next logical step would be to apply the adopted standard to the facts before the court. The process is not as simple as it may appear. The application of

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¹ (1921) Col. L. Rev. 697; (1927) 5 Texas L. Rev. 447; (1922) 28 W. Va. L. Quarterly 303; (1920) Johnson v. Rutland Adm. 93 Vt. 132.

² (1927) 2 Wash. L. Rev. 204; (1920) 29 Yale L. J. 684.

the standard is complicated by the existence of numerous safeguards in the form of presumptions which have been created for the protection of the infant.

What are these presumptions? For clarity in the discussion, concerning an infant's contributory negligence, we will divide the infant group into three categories, to-wit: 1. Those below the age of seven. 2. Those infants between seven and fourteen years of age. 3. Those above fourteen.

I

The courts in treating of infants below the age of seven are split into two groups. The majority of the courts have set an arbitrary age limit below which no child can be held guilty of contributory negligence. The age limit which is set varies in the different states which accept the majority view. The minority does not set any arbitrary age, but the court leaves each case to the jury to be decided upon all the facts. Such courts treat age as merely one of the many factors to be considered.

The Majority View

The age below which a child cannot be held guilty of contributory negligence is purely arbitrary. All states adopting this view are in accord with the theory which underlies the setting of an arbitrary age limit. The courts agree that an infant may be of such tender years as to be incapable of appreciating the risk involved.³ There is no uniformity as to the age actually set or as to the factors to be considered in determining whether *any* child below a certain age is able to appreciate the risks involved. The fact that these states do not attempt to set up rules for determining the arbitrary age limit which is to rule accounts for the variance in age limits in the different states. There are several states which draw an analogy to crimes to aid them in setting an arbitrary age limit.⁴ These states which draw this analogy do so for purposes of expediency and their accord, in so far as they set seven years as the arbitrary age limit, is due to this administrative expediency rather than to any difference in theory from that of the other states adopting the majority view. The fact that Pennsylvania sets seven years as its arbitrary age limit does not differentiate it from state X, which sets four years as its arbitrary age limit, for it is submitted that the age limit actually set by any state in the majority group is incidental and that it is the theory and procedure underlying the practice of setting an arbitrary age limit which is the important consideration.

Those states in which the courts draw an analogy to crimes in setting their arbitrary age limit present no difficulty insofar as its arbitrary character is concerned. The age of seven is conclusive and arbitrary in these jurisdic-

³ Johnson Adm. v. Rutland (supra Note 1): "A more satisfactory doctrine—is that a child may be of such tender years that he should be conclusively presumed incapable of judgment and discretion;" Elwood Electric Street Railway Co. v. Ross, 26 Ind. App. 258: "* * * Contributory negligence cannot be imputed through a child of such tender years that it is, by legal presumption, incapable of judgment and discretion;" Magee v. Wabash Railroad Co., 214 Mo. 530: "Children may be as a matter of law, non sui juris at certain tender years and with certain infantile judgments."

⁴ (1914) Casper v. Geck, 185 Ill. App. 155; (1925) Maskalainas v. C. & W. I. R. R. Co., 318 Ill. 142; (1923) Tupman's Adm. v. Schmidt, 200 Ky. 85; (1913) Dodd v. Spartanburg Ry. Gas & Electric Co., 78 S. E.; (1921) King v. Holliday, 116 S. C. 463; Dumas v. Eminger (1927) 81 Mont. 79; (1931) Johnson v. Herring, 89 Mont. 420; Pisitz Dry Goods Co. v. Cusimano (1921) 206 Ala. 689; (1879) Nagle v. R. R., 88 Pa. 35; (1922) Horen v. Davis, Director General, 274 Pa. 244; (1908) McEldon v. Drew, 138 Iowa 390 at 395; (1907) Doggett v. C. B. & Q. R. R. Co., 134 Iowa 690 at 694; Baker v. Seaboard Air Lines Railway Co. (1909) 150 N. Car. 562.

tions. The difficulty arises when we deal with states in which the courts merely say "It is of course well established that a child three and one-half years of age cannot be made chargeable with contributory negligence,"⁵ or, "Practically no cases are found which hold that a child under six years of age can be guilty of contributory negligence."⁶ Are we justified in saying that the courts in the two instances quoted are setting an arbitrary age limit which is not based upon a consideration of any other fact other than the fact of age, or is the court merely saying that this child of three and one-half, or this child of six was not contributorily negligent in view of all the facts before the court concerning this particular case?

The difficulty in attempting to draw an indisputable conclusion from the opinion of these courts is readily apparent. Certainly there is nothing in the excerpts from the opinions quoted above that point conclusively either one way or the other. It is hard to determine, from the bare statements made, what was in the court's mind when it considered the question of the infant plaintiff's contributory negligence. Who can tell whether the court has arbitrarily set an age limit below which no infant could be contributorily negligent or whether it is merely stating a conclusion reached after a consideration of all the facts in that particular case?

The logical way to treat this problem is to consider several cases in the same state involving children approximately the same age and to note whether or not each separate case is influenced by a prior case which involved an infant of approximately the same age. If it is, and if the facts in the two cases are not so similar as to permit a belief that the court in the subsequent case has cited the previous case for its factual similarity, does this not point to the existence of an arbitrary age limit?

ARIZONA

(1) *De Amado v. Friedman*, 69 Pac. 588 (1907).

Child: 4 years and 4 months old.

Injured when wall caved in.

Charge to Jury: "The negligence of the decedent if he were negligent cannot be considered by you in this case as the decedent was of such tender age that the law would not impute negligence to him."

(2) *Southwest Cotton Co. v. Clements*, 215 Pac. 156 (1923).

Child: 12 years old.

Injured playing with dynamite.

"This court has held that negligence cannot be imputed to a child 4 years and 4 months old, but this arbitrary rule cannot be extended to a child 12 years old."

MICHIGAN

(1) *Johnson v. City of Bay City*, 164 Mich. 251 (1910).

Child: 5 years and 4 months old.

Injured when she came in contact with end of broken electric wire of defendant company.

Court: "The first assignment of error argued by the defendant's counsel is that the court erred in charging the jury that the plaintiff could not be

⁵ See (1927) *Morris v. Peyton*, 139 S. E. 500; (1912) *Ruehl v. Lidgerwood Rural Telephone Co.*, 23 N. D. 6.

⁶ (1912) *Palermo v. Orleans Ice Mfg. Co.*, 130 La. 833.

guilty of contributory negligence as a matter of law and was not a trespasser. At the time of injury, the plaintiff was 5 years and 4 months old. We are of the opinion that an infant of this extremely tender age cannot be charged with contributory negligence * * *. We believe, however, that all reasonable minds would agree that an infant but a little more than 5 years of age could not have sufficient intelligence to be charged with negligence, either as a matter of fact. It may be difficult, perhaps, impossible, to point out the exact age at which the question becomes one for the jury, but it is, we think, clear that it has not arrived at 5 years and 4 months."

(2) *Love v. Detroit Jackson & Chicago R. R. Co.*, 170 Mich. 1 (1912).

Child: 5 years and 5 months.

Injured while riding on a tricycle in attempting to cross tracks of trolley company.

Court: "A child of the tender years of plaintiff's intestate cannot be charged with contributory negligence." (Cites *Johnson v. City of Bay City*, 164 Mich. 251.)

(3) *Beno v. Kloka*, 211 Mich. 116 (1920).

Child: 5 years and 11 months old.

Injury: Run over by auto.

The lower court submitted the question of contributory negligence to the jury. The upper court reversed. "We are of the opinion that it was reversible error for the trial court to submit to the jury in any way the question of contributory negligence of the plaintiff. He was 5 years and 11 months of age. We think the instant case is governed by the rule stated by this court in *Johnson v. City of Bay City*, 164 Mich. 251 and in *Love v. R. R.* 170 Mich. 1."

(4) *Micks v. Morton*, 256 Mich. 308 (1931).

Child: 5 years and 11 months.

Injured by automobile.

Court: "Plaintiff's intestate was 5 years and 11 months old at the time of the injury. A child of his age cannot be guilty of contributory negligence." (Cites *Johnson v. City of Bay City*, 164 Mich. 251; *Love v. R. R.*, 170 Mich. 1 (1912).)

TENNESSEE

(1) *Wise v. Morgan*, 101 Tenn. 273 (1898), 17 Pickle 273.

Child: About 3 years old.

Injury: Child climbed up on a chair and took a bottle of eye medicine from the mantelpiece and drank same.

Court: "The child was an irresponsible agent. It has not yet reached the years of discretion and negligence was not imputable to it."

(2) *Atkin v. Shenker*, 4 Tenn. Court of Civ. App. 298 (1913).

Child: A little under 3 years old.

Injury: She stepped over the curbing and went upon the street to get a walnut. Run over by a team.

Court: "If we treat this request as asking the court to instruct the jury that the child could be guilty of negligence, we unhesitatingly hold it unsound.

A child of 3 years of age or less cannot be charged with contributory negligence. This is an old and universal rule. See our own case of *Wise v. Morgan*, 17 Pickle 273.

LOUISIANA

(1) *Barnes v. Shreveport City R. R. Co.*, 47 La. Ann. 1218 (1895).

Child: 3 years old.

Injury: Run over by trolley car.

Court: "In *Primis* we may dispose of the defendant's charge of contributory negligence in respect to the child, by observing that it was only three years old and incapable, *per se*, of contributory negligence fault."

(2) *Rice v. Crescent City R. R. Co.*, 51 La. Ann. Rep. 108.

Child: 3½ years old.

Injury: Run over by trolley car.

Court: "A child of 3½ years of age is of itself incapable of contributory negligence. 47 La. Ann. 1218" (*Barnes Case*).

(3) *Palmero v. Orleans Ice Mfg. Co.*, 130 La. 833 (1912).

Child: 4 years old.

Injury: Fell into an open gutter on Hospital Street which at the time contained hot water which had flowed from the plant of the ice company.

Court: "Practically no cases are found which hold that a child under 6 years of age can be charged with negligence."

It would seem to follow from an examination of these cases that the courts of the separate states have set an arbitrary age limit below which no child can be held guilty of contributory negligence.

In all of these cases age is the only factor which is considered. The courts in effect say "X being 4 years of age is too young to be contributorily negligent and no other fact need be considered."

The contention that the courts are merely deciding the case before them is unsound. The general nature of the words used;⁷ the absence of any consideration of any of the facts of the case other than the fact of age; the citing of previous cases involving children of approximately of the same age by subsequent cases which do not have similar facts, justify the conclusion reached.

The interesting question arises, "If the court of state Y has arbitrarily decided in the case of A v. B that A, who was three years old, was too young to be guilty of contributory negligence, must this court in a subsequent case involving the contributory negligence of infant C (3 years old) decide the question exactly as it did in the case of A v. B?" Logically, it should follow that since age is the only fact to be considered, and since there is no distinction between A and C as viewed from the standpoint of age alone, the result must be the same if the court wishes to be consistent. Therefore, the arbitrary age limit should be conclusive as well as arbitrary. It is to be noted that it is possible for state Y in a subsequent case to hold that a child of six years of age was incapable of being contributorily negligent. The court, however, should not in a subsequent case lower its arbitrary age limit

⁷ (1912) *Palermo v. Orleans Ice Mfg. Co.*, 130 La. 833; (1902) *Eskildsen v. City of Seattle*, 29 Wash. 583: "And it is universally held that a child under 5 cannot be guilty of contributory negligence in any event."

having once established it at a certain point if it seeks to remain logically consistent.

In conclusion may it be impressed that the principle underlying the creation of an arbitrary age (i. e., that there is an age below which an infant is too young to be contributorily negligent since due to its tender years it lacks the requisite judgment and discretion), is the important consideration. The majority of the courts are in accord with this principle. There is a variance in the ages actually set in the different states,⁸ but this is a variance which results from the application of the principle and not a variance in the principle itself. Finally, a state which decides in one case that a child of four is incapable of contributory negligence should so decide in all subsequent cases involving children of approximately the same age, because age is the only fact considered and to say that one child of four is any different from another child of four as considered from the fact of age alone, is absurd.

Before proceeding with the discussion of the minority view, the writer emphasizes the fact that there is no sharp, defined or marked division between the so-called majority and minority views. Those states which adopt the crime analogy in holding as a matter of law that infants under the age of 7 cannot be guilty of contributory negligence offer no difficulty. The same applies to those states which are to be enumerated under the minority view in which the courts hold that the contributory negligence of infants is a matter solely for the jury to decide.

The most difficult problem centers upon an analysis of the position of those jurisdictions in which the courts do not take a definite position in so many words. Under the majority view, the writer has considered those jurisdictions which, although not adopting the crime analogy, have consistently and in clear language treated the question of contributory negligence of infants as a matter of law. Even in these jurisdictions, the question is open to dispute. However, the Courts have consistently maintained one position which the writer has concluded to be more in accord with the majority than the minority view, and the comparison of several cases in the same jurisdiction involving children of approximately the same age, under different factual circumstances, forms the basis of this conclusion. The issue becomes more acute and frankly conjectural in analyzing the position of those jurisdictions whose Courts in different opinions and, in many instances, in the same opinion, attempt to unite both views in an effort to achieve an evident conscionable result. To illustrate:

INDIANA:

Elwood Electric Street Railway Co. v. Ross, 26 Ind. App. 258, 58 N. E. 533.

An infant 4 years, 9 months and 21 days old was run over and killed by a trolley car while the infant was crossing the street.

The Court: "* * * the discussion of this question involves the consideration of whether or not the infant was sui juris or non sui juris. The complaint is unquestionably bad for its failure to allege that the accident occurred without the fault or negligence of the child, unless we can say from the whole complaint that it was of such tender years that it cannot be chargeable with

⁸ (1896) St. Louis I. M. & S. Ry. Co. v. Denty, 63 Ark. 177 (4 years); (1899) Crawford v. Southern Ry. 106 Ga. 870 (4½ years); (1925) Terre Haute Traction Co. v. McDermott, 82 Ind. App. 614 (6 years); (1912) Reuhl v. Lidgerwood Tel. Co., 23 N. D. 6 (3½ years); (1906) Shellabarger v. Fisher, 143 Fed. 937 (5½ years); (1902) Eskildsen v. City of Seattle, 29 Wash. 583 (4 years 3 months).

discretion and care. The rule respecting contributory negligence presupposes sufficient intelligence to know the existence of danger * * *. The law does not fix or designate any certain age at which children are of sufficient intelligence to have imposed upon them the full degree of care incumbent upon persons of mature age * * *. It is an ancient rule, sustained by the great weight of authority that contributory negligence cannot be imputed to a child when of such tender years that it is, by legal presumption, incapable of judgment or discretion * * *.

"Up to a certain age, the precise limit of which cannot be well defined, a child is incapable of contributory negligence, and the court may so declare as a matter of law and children ranging in age from 18 months to 6 years and even under 7, have been declared, as a matter of law, to be incapable of such negligence * * *.

"In the case of the *Citizens Street Railway Co. v. Stoddard*, 10 Ind. Appeals 278, this Court held that a child 5 years of age is non sui juris and incapable of contributory negligence. From the averments of the complaint, as to the age of the child, and the authorities we have cited, we are lead to conclude that it was non sui juris and hence it was not necessary to aver that it was without fault or negligence."

Citizens Street Railway Co. v. Stoddard, 10 Ind. App. 278, 37 N. E. 723.

"As to the degree of care required of children, they must be charged according to their age and capacity. It may well be doubted whether the decisions referred to shall be constructed as holding that all children 7 years of age are, under the circumstances, non sui juris. Ordinarily, the question is one of capacity and usually, it should be referred to the jury to determine the measure of care required of the particular child under the circumstances of the case."

Indianapolis P. & C. Railroad Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310.

Arthur Pitzer, 7 years and two months of age, without paying for a ticket, boarded one of the defendant's trains. At a station on the route, he was ejected by the defendant's employee and no care was taken to see that he was safely conducted to a point of safety. The boy wandered around on the tracks and was run over and killed by a freight train.

The Court: "The child's age and helplessness, may, however, excuse where one of maturer age would be adjudged in fault and may, also, often make an act negligent as to him that would not be so as to one of riper years."

Indianapolis Street Railroad Co. v. Schamberg (1905), 164 Ind. 111, 72 N. E. 1041.

A child of three was run over and injured by a trolley car.

The Court: "The child by reason of its tender age was, in the eye of the law, non sui juris and was incapable of being guilty of contributory negligence. It would be required to exercise only such care and discretion as could reasonably be expected of a child of this age and intelligence. *Elwood St. Railway Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535."

J. F. Darmody Co. v. Reed, 111 N. E. 317.

"The allegations of the complaint show * * * that on March 20, 1913, the appellee was non sui juris and is now an infant about six years old and brings this action by his next friend, James F. Calvin. The injury occurred while the appellee was crossing the driveway leading into a grocery store,

which was part of the sidewalk. The auto truck ran into the driveway and struck the appellee.

The Court: "Under the circumstances of this case, we need not consider the question as to whether the appellee was guilty of negligence, which contributed to his injury. He was an infant less than 6 years of age and the jury, but its verdict, finds that he had not reached the age of accountability; in the eyes of the law he was non sui juris.

"The degree of accountability is covered by the Court's Instruction 5. In the Court's Instruction 6, the jury is told that if the plaintiff knew and apprehended the danger of being run over and that he was also guilty of negligence, which led to his injury, he could not recover even though the defendant was guilty of negligence so that the essential elements of the defendant's Instruction 4 were given and no error was committed in refusing it."

Terre Haute, etc. Traction Co. v. McDermont, 82 Ind. App. 134, 144 N. E. 61.

The infant, six years old, was injured by a trolley car while he was in the act of crossing the street. There was a demurrer to the complaint. The demurrer was overruled. An appeal was taken and judgment was affirmed for the plaintiff.

The Court: "In passing upon the sufficiency of the complaint, it is important that we keep in mind the averments that the appellee, at the time he received the injury complained of, was a small boy, but six years of age and that 'There were other small boys of about the same age of the plaintiff in said street and crossing said street at the same time.' Although the law does not fix the age at which children are of sufficient intelligence to have imposed upon them the degree of care incumbent upon persons of mature age, it is well settled that 'contributory negligence cannot be imputed to a child when of such tender years that he is, by legal presumption, incapable of judgment or discretion,' and many courts have held that children under the years of 7 are incapable of contributory negligence. *Elwood St. Ry. Co. v. Ross* (1900), 26 Ind. Appeals 258, 58 N. E. 535 * * *. In any event, as held by Judge Elliott of the Supreme Court of this state, 'The age of a child is an important element to be considered in determining whether the person who injured him was negligent as well as in determining whether the child himself was guilty of contributory negligence.' *Indianapolis, etc. R. R. Co. v. Pitzer* (1886), 109 Ind. 179, 186, 6 N. E. 310 * * *."

The writer finds it difficult in view of the language of the Courts to definitely ascribe the position of the Courts of the state of Indiana to either the majority or minority view. The Courts recognize the necessity of protecting the interests of the infant and the general nature of the language in some of the decisions would point toward the view of treating contributory negligence of infants as a matter of law. On the other hand, some of the cases speak of the question as being one for the determination of the jury. It would not be erroneous to conclude that the courts of Indiana attempt to join both the so-called majority and minority views in an effort to achieve a beneficial result. Such a practice creates confusion and leaves the law in a state of doubt. If the purpose and the desire of the courts are to protect the infant, the question of his contributory negligence should be a matter of law for the determination of the court and not for the jury. The case of *Terre Haute, etc. Traction Co. v. McDermott*, 82 Ind. App. 134, 144 N. E. 61, points towards this position.

Minority View

As to contributory negligence on the part of the child injured no definite rule of law can be laid down which should interfere with the jury judging each case on its own merits and by its particular circumstances. If the child from its age and experience is found to have capacity and discretion to observe and avoid danger, it should be held responsible for the exercise of such measure of capacity and discretion as it possesses. "No rule of law fixes an arbitrary age at which a particular degree of care may be expected, or furnishes a true presumption which takes the place of evidence that a child is not chargeable with contributory negligence."¹⁰ Only where the circumstances admit of but one inference may the court decide as a matter of law what inference should be drawn. Age is merely one of the facts of the case and is not to be considered exclusive of all the other facts.

Summary

The majority of the states set an arbitrary age limit below which no infant can be held guilty of contributory negligence. The minority sends every case to the jury except where the facts are undisputed and can result in but one conclusion. Age is the only fact considered by the majority. The minority treat age as just one of the many facts to be considered by the jury in settling that particular case before the court.

Which view is preferable? Under which view is the infant accorded the greater amount of protection?

The writer accepts the majority view for the following reasons: The majority view is administratively expedient. The possible danger of a shifting standard is avoided. The confusion and inconsistency which oftentimes mark jury decisions is eliminated. The law is crystallized and defined. The application of the majority view is simple.¹¹

The majority view in setting an arbitrary age attaches full significance to the fact that infants as a class lack that judgment and discretion which comes with age and experience. While the infant may have knowledge of the possibility of injury when he runs in front of a moving trolley, the writer contends that he fails to consider the full consequences, the immediacy of the danger and the severity of the consequences. The infant acts on impulse. Seldom, if ever, does the infant stop to consider the full consequences of any act. The possibility that he may be crippled for life or even killed is not appreciated. All that concerns the infant is his present desire. Deliberation and a sensible choice of alternatives in the light of future consequences are not the attributes of one of tender years.

The minority view fails to give adequate protection against this youthful deficiency in judgment and discretion. The tendency of the jury in considering the case before it is to attach importance to the fact whether or not the infant had knowledge of the possibility of present danger. The juror is impressed with the immediate facts and the infant's conduct in relation thereto and may not, unless clearly instructed by the court, go beyond those facts which are brought to his attention. The juror fails to consider whether

⁹ (1916) *Meserve v. Libby*, 115 Maine 282 (but note 115 Maine 171); (1909) *United Rwy. Co. v. Carneal*, 110 Md. 211; (1904) *MacDonald v. O'Reilly*, 78 Pac. 753; (1928) *Carmardo v. New York State Rwy.*, 247 N. Y. 111; (1889) *Stone v. Dry Dock, etc.*, R. R. Co., 115 N. Y. 104; (1911) *Dowd v. Tighe*, 209 Mass. 464; (1913) *Kyle v. Boston Elev. Rwy. Co.*, 215 Mass. 260; (1932) *Defuria v. Mooney*, 182 N. E. 828; (1921) *Rappa v. Conn. Co.*, 96 Conn. 285; (1920) *Ledderer Adm. v. The Conn. Co.*, 95 Conn. 520; (1922) *Rinaldi v. Levgar Structural Co.*, 92 N. J. L. 162.

¹⁰ (1928) *Carmoda v. N. Y. State Rwy.*, 247 N. Y. 111.

¹¹ (*Johnson Adm. v. Rutland* (1923) 93 Vt. 132.

or not the infant plaintiff would have done what he did in this case had he the ability to temper his impulsive action with the judgment and discretion which comes with age and experience.¹² The public charge of tomorrow demands present protection.

The negligent defendant placed the injurious force in operation. The infant was injured as a result of the defendant's acts. The courts are cognizant of the fact that the infant is not fully able to take care of himself and as a result has set a different standard of care for the infant than it has for the adult. If we agree that infants as a class are to be treated with leniency, why should we strive to relieve a negligent defendant whose only claim to be absolved from liability is based on the alleged fault of that group whom we seek to protect? This argument is practically sound. The complications of modern civilization with its crowding traffic and premium on speed has lessened the odds in favor of safety for infants. Why decrease these odds any further by favoring that negligent adult who initiated the injurious force with knowledge of its capacity to do harm?

II

As a general rule, above the age of seven, each case is submitted to the jury to be tried on its merits.¹² The jury applies either the objective or subjective standard of care in deciding the case before it. The conclusive presumption of inability on the part of the infant to be contributorily negligent below the set age limit does not exist in this age group of seven to fourteen. The presumptions that exist in this group are those presumptions which affect either the "risk of persuasion" or the "burden of going forward with the evidence."

In dealing with infants between seven and fourteen years of age the writer will confine himself to those jurisdictions which used the analogy to crime in setting their arbitrary age limit of seven. How far do the courts carry the analogy beyond the age of seven? If these courts do recognize the existence of a prima facie presumption to the effect that an infant between seven and fourteen cannot be guilty of contributory negligence, are there any factual situations which are sufficient of themselves to rebut this prima facie presumption?

Before proceeding to give a final and definite answer to the above questions, it would be advisable to select several representative states from among those that employ the crime analogy, and to note how each state treats the questions raised.

Virginia.—"As between seven and fourteen years of age the presumption is that they (infants) are incapable of exercising care and prudence¹³—and in an action by such an infant the burden is upon the defendant to overcome this presumption by proof of intelligence and capacity."¹⁴

The defendant has the "risk of persuasion" and not merely the duty of "going forward with the evidence." The plaintiff need not allege or prove due care. No cases have been found in which the court refused the request of the infant plaintiff to charge the jury that such a prima facie presumption did exist. However, the writer is of the opinion that if such a request was made and refused, the upper court would consider this sufficient grounds for reversal, if an appeal were taken.

¹² See L. R. A. 1917 F, for cases in which the court has ruled as a matter of law that children above the age of seven (eight, etc.) could not be guilty of contributory negligence, but this is the exception rather than the general case.

¹³ (1927) *Morris v. Peyton*, 148 Va. 812, 139 S. E. 500.

¹⁴ (1904) *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590.

It is impossible to say with any certainty that there are any recognized factual situations which are sufficient of themselves to rebut the prima facie presumption of inability on the part of the infant to be contributorily negligent. Any attempt to classify factual situations in their relation to the prima facie presumption would be misleading. The defendant has the task of rebutting the presumption and the facts are significant in determining whether or not he has succeeded in doing so. The factual situation is not considered separately and distinctly from the capacity and intelligence of the infant plaintiff.¹⁵

South Carolina.—"Under 14 years of age and down to seven, while there is a presumption of incapacity, yet it is not an irrebuttable presumption and when all the facts and circumstances of any given case have been once offered in evidence before the jury, it becomes a question of fact and the burden is upon him who asserts the capacity of an infant to understand and appreciate obvious dangers, to prove that to the satisfaction of the jury, from the greater weight of the evidence in the case."¹⁶

"Contributory negligence is an affirmative defense and the defendant must show that the plaintiff failed to show the care due under the circumstances."¹⁷

The burden of proof which rests upon the defendant is the "risk of persuasion" and not merely "the burden of going forward with the evidence." The defendant must rebut this prima facie presumption by the greater weight of the evidence.¹⁸

The courts fail to consider factual situations separately from the capacity and intelligence of the infant plaintiff. Any attempt to evaluate factual situations as regards their sufficiency in rebutting the prima facie presumption of incapacity is erroneous.¹⁹

Pennsylvania.—The courts recognize the existence of a prima facie presumption of the inability of the part of the infant to be guilty of contributory negligence.²⁰ There are several cases which fail to mention this prima facie

¹⁵ (1927) *Morris v. Peton* (supra note 13): Child of 13 was given a lift on the running board of defendant's truck. He fell off when the car hit a bump; (1904) *Lynchburg Cotton Mills v. Stanley* (supra note 14): Child of 12 was injured in a factory while handling a loose belt; (1899) *Roanoke v. Shull*, 97 Va. 419: Child between 11 and 12 was injured when he fell into a defectively covered hole in the pavement; (1905) *Virginia Iron, Coal & Coke Co. v. Tomlinson*, 104 Va. 249: Child of 11 injured while working around a dangerous machine in the factory; (1898) *Washington & C. R. Co. v. Quayle*, 95 Va. 740: Child of 13 jumped off a moving trolley car when ordered to leave by the motorman.

¹⁶ (1907) *Goodwin v. Columbia Mills Co.*, 80 S. C. 349.

¹⁷ (1907) *Tucker v. Buffalo Mills Co.*, 76 S. C. 539.

¹⁸ (1923) *Crawford v. Isle Charleston of Palms Traction Co.*, 126 S. C. 449.

¹⁹ (1907) *Tucker v. Buffalo Mills Co.* (supra note 17): Child of 8 employed in mill, hurt while tampering with machinery; (1907) *Goodwin v. Columbia Mills Co.* (supra note 16): Child between 13 and 14 years of age hurt when hand was caught in machinery. It will be noted that the child was employed in the factory for four years preceding the date of the accident and still the case was sent to the jury; (1915) *Newson v. F. W. Poe Mfg. Co.*, 102 S. C. 77: Child between 13 and 14 worked in a mill—injured by machinery; (1923) *Crawford v. Isle Charleston of Palms Traction Co.* (supra note 18): Child of 13 run over by trolley car.

²⁰ (1916) *Gerg v. Penna. Railroad Co.*, 254 Pa. 316: "But with a child of 11 years there is a presumption that he is not capable of seeing or appreciating danger. But this presumption is not irrebuttable, but the burden of rebutting it lies with the defendant." (1906) *Byron v. The Central Railroad*, 215 Pa. 82: "The boy being under 14 years of age, the presumption of incapacity to appreciate the danger arose and was not so conclusively overcome by the testimony offered at the trial . . .;" (1879) *Nagel v. Allegheny Railroad*, 88 Pa. 35.

presumption in so many words.²¹ This omission is not purposely made but is due to the fact that the court recognized the presumption as so well known that it considered it unnecessary to mention it. It should be noted that these cases do not disclaim the existence of the presumption and also that all of these cases agree that the question of contributory negligence should be left to the jury to be decided as a question of fact and not left to the court to be decided as a matter of law, where the infant is between 7 and 14 years of age.

The case of *Gress v. Phila. & Reading R. R. Co.*²² advances the interesting point, namely, that the strength of this prima facie presumption of incapacity tends to grow weaker as the infant advances from 7 years of age toward 14 years of age. The court in this case decided as a matter of law that the infant plaintiff, who was 10 days less than 14 years of age, was guilty of contributory negligence. Too much significance should not be attached to this statement in the *Gress* case. The opinion of the court was undoubtedly influenced by the fact that the child was so close to 14 years of age. The court felt that since there was no presumption of incapacity beyond the age of 14, it would be manifestly unfair in this case to give weight to the presumption of incapacity in view of proximity of the infant plaintiff to 14. It is to be doubted if this same court would have advanced this proposition had the infant plaintiff been 10 or 11 years of age. The more accurate statement would be that the presumption of incapacity does not weaken as the child advances from 7 to 14 years of age, although the task of the defendant, which is to rebut by sufficient evidence the presumption of inability, may become simplified as the child grows older. There is a distinction between the existence and strength of the presumption on one hand and the task of rebutting that presumption by sufficient proof on the other hand.

The infant plaintiff does not have to allege due care. The defendant has the "risk of persuasion."²³

The cases failed to show any agreement by the courts that certain factual situations will be sufficient of themselves to rebut the prima facie presumption of incapacity. Any attempt to classify factual situations is futile.²⁴

Iowa.—"Children between 7 and 14 are presumed incapable of contributory negligence, although the contrary may be shown. This presumption is sufficient until overcome by the defendant."²⁵

The question of contributory negligence of an infant between 7 and 14 years of age is one for the jury. "It must be a strong case to justify a court in holding, as a matter of law that a child of 12 years of age is guilty of contributory negligence."²⁶

²¹ (1890) *McMullen v. Penna. Railroad*, 132 Pa. 107; (1903) *Kelly v. Traction Co.*, 204 Pa. 623: "Being under the age of 14 years, the general rule is that his contributory negligence is a matter to be passed on by the jury;" (1885) *West Phila. Passenger Rwy. Co. v. Gallagher*, 108 Pa. 524; (1893) *Tagg v. McGeorge*, 155 Pa. 368; (1893) *Ash v. Verlender Bros.*, 154 Pa. 246; (1917) *Edelman v. Connell*, 257 Pa. 317; (1925) *Cinocchi v. Pittsburgh & Lake Erie R. R. Co.*, 283 Pa. 378.

²² (1910) *Gress v. Phila. & Reading R. R. Co.*, 228 Pa. 482.

²³ (1916) *Gerg v. Penna. R. R.* (supra note 20).

²⁴ (1917) *Edelman v. Connell* (supra note 21): Child of 11 coasted on a bobsled down a hill and collided with the defendant's auto; (1893) *Ash v. Verlender Bros.* (supra note 21): Child under 13 injured while working on a machine in the defendant's factory; (1903) *Kelly v. Traction Co.* (supra note 21): Child under 13 run over by trolley car; (1916) *Gerg v. Penna. R. R.* (supra note 20): Child of 11 killed by a train while walking across railroad tracks; (1916) *Di Meglio v. Phila. & Reading Rwy. Co.*, 252 Pa. 391: Child of 10 was injured when a shifting engine collided with a boxcar on which the child was playing.

²⁵ (1908) *McEldon v. Drew*, 138 Iowa 390; (1907) *Deggett v. Chicago, B. & Q. R. R. Co.*, 134 Iowa 690 at 695.

²⁶ (1908) *McEldon v. Drew* (supra note 25).

Illinois.—The courts fail to mention the existence of a prima facie presumption but definitely say that between the ages of 7 and 14 the question of contributory negligence is one for the jury.²⁷ The infant plaintiff has the duty of alleging due care²⁸ and it would appear from this that no presumption exists. But, if we consider that the legal weight of presumptions varies in the different jurisdictions, it could reasonably be argued that the presumption does exist, and has the force in this State of shifting the "burden of going forward with the evidence" to the defendant, rather than placing upon him the "risk of persuasion."²⁹

The courts do not classify either consciously or unconsciously factual situations as regards their sufficiency or insufficiency in rebutting the presumption of incapacity. The cases go to the jury and the jury considers the facts along with the capacity, intelligence and experience of the particular infant plaintiff before it.³⁰

Inasmuch as the states here given in detail are representative of the general view, it can safely be concluded that:

(1) The courts which draw an analogy to crimes in setting the arbitrary age limit at 7 years adhere to the analogy in dealing with infants between 7 and 14 years of age. These courts recognize the existence of a prima facie presumption of inability on the part of the infant to be guilty of contributory negligence, between 7 and 14 years of age.

(2) The presumption, except in Illinois, places the "risk of persuasion" on the defendant.

(3) The question of contributory negligence in this age group is a question for the jury and the court cannot decide it as a matter of law.

(4) The courts do not differentiate between factual situations or evaluate them as regards their sufficiency or insufficiency to rebut the presumption. The factual situation is considered together with the capacity, intelligence and experience of the child and not separate therefrom.

Do those courts which draw an analogy to crimes to aid them in setting their arbitrary age limit at 7 years carry the analogy when the child is over 14 years of age?

The standard of care by which an infant above the age of 14 is to be judged may be either that standard of care by which an adult is judged³¹ or that degree of care exercised by other infants of like age, capacity and experience.³² It will once again be noted that no matter which standard of care is adopted the question of what presumptions, if any, do exist when we treat with children above the age of 14 will be unaffected. It is the purpose

²⁷ (1931) *Herzon v. Schmitz*, 262 Ill. App. 337: "That between the ages of 7 and 14 the question of culpability of the child is an open question of fact and must be left to the jury; (1930) *Vial v. Graham*, 259 Ill. App. 172; (1926) *Deming v. City of Chicago*, 321 Ill. 341: "The law is clearly established by great weight of authority that the culpability of a child between the ages of 7 and 14 is an open question of fact and must be left to the jury;" (1907) *Lake Erie & Western R. R. v. Klinkrath*, 227 Ill. 439.

²⁸ (1931) *Hurzon v. Schmitz* (supra note 27); (1930) *Vail v. Graham* (supra note 27).

²⁹ See "The Effect of Rebuttable Presumptions of Law upon the Burden of Proof," by Prof. Francis H. Bohlen (1920) 68 U. of Pa. L. Rev. 307).

³⁰ (1930) *Vail v. Graham* (supra note 27): A child of 9 was killed by an auto; (1907) *Lake Erie & Western R. R. v. Klinkrath* (supra note 27): Child of 13 was injured while playing near turn-table; (1926) *Deming v. City of Chicago* (supra note 27): Child injured when he came in contact with an electric wire which passed through one of the branches of a tree, climbed tree to get a kite.

³¹ (1921) *Austin v. Public Service Co.*, 229 Ill. 112; (1920) *Waldren Express Co. v. Krug*, 229 Ill. 472; (1907) *Doggett v. Chicago, B. & O. R. R. Co.* (supra note 25).

³² (1891) *Kehler v. Schwenk*, 144 Pa. 348; (1864) *Oakway Rwy. Co. v. Fielding*, 48 Pa. 320. See L. R. A. 1917 F, at Page 72.

of this paper to consider solely the question of presumptions and it will suffice merely to set forth the two standards of care that exist and can be applied.

"After 14 the universal rule is that the presumption of incapacity ceases."³³ The cases examined point to the existence of a presumption of capacity in the infant above the age of 14.³⁴ This presumption shifts to the infant the task of showing that he did not have the capacity of others of like age, intelligence, and experience (if this be the standard of conduct adopted by the court), or that he did not have the capacity to exercise as much care as an adult would exercise under the circumstances (if this be the standard of conduct adopted by the court). The case proceeds like any case of contributory negligence in which an adult is the party charged with contributory negligence. No safeguards in the form of presumptions are accorded to the infant above 14 years of age.

III

The policy of protecting the infant against his lack of judgment and discretion should be carried as far as is reasonably possible. The writer favors the setting of an arbitrary age limit of 7 years below which it should be conclusively held that no infant could be guilty of contributory negligence. The existence of a prima facie presumption of inability where the infant is between 7 and 14 years of age is sound. The presumption of capacity above the age of 14 should be removed and the case should be allowed to proceed without placing this extra burden upon the infant. It is contended that there are occasions where a child of 14 or 15 is as helpless as a child of 7 and to leave this child of 14 or 15 unprotected is unjust.

The defendant is negligent. Why allow him to escape liability on the grounds that an infant, who is not *fully* aware of the consequences of any act, was also negligent? This is a weak compromise. If we must compromise, let us in all fairness, exclude the infant, who may have knowledge of the possibility of injury but who, because of his lack of judgment and discretion, fails to realize the immediacy of the danger or the severity of its consequences.

The Courts unanimously are of the opinion that the measure of care required of an infant is different than that required of an adult. Further, the decisions evidence a sincere desire to afford protection to the infant due to his tender years and lack of comprehension of both the immediacy of the danger and full effects of his conduct. To achieve this desire to protect the infant, it is necessary to establish a definite rule of law whereby the consideration of the question of an infant's guilt of contributory negligence should be determined by the Court, guided by certain and definite presumptions. The problem should not be left to the jury.

This is a social problem as well as a legal problem. The apparent inequity to the defendant, which would result from an arbitrary treatment of this question, is disposed of when it is considered that the question of contributory negligence of the infant can only come into consideration after having determined that the defendant himself was negligent. If there is no negligence on the part of the defendant, there can be no recovery on the part of even an innocent infant.

It is admitted that the analogy to crimes which is employed by many jurisdictions in dealing with this question does not answer fully the problems

³³ (1922) 28 W. Va. L. Quarterly 303.

³⁴ (1891) *Kehler v. Schwenk* (supra note 32); (1879) *Nagle v. Allegheny Rd.* (supra note 29). These cases may be found fully collected in *Thompson Negligence* (2nd Edition), Sections 307-318.

involved in treating with the tort question of contributory negligence. However, as pointed out, this analogy is used for administrative purposes in an effort to achieve the desired result of protection. This protection is likewise accorded the infant in the field of contract law. The writer can see no reason to differentiate between the protection offered to the infant in the field of tort law and that protection afforded in the fields of contract and criminal law.

It would be a progressive step to accord to the infant the protection of certain presumptions in regards to his ability to be contributorily negligent. If the law arbitrarily protects an infant from the consequences of a contract which can produce, in main, but financial damage, then, certainly, it should protect the infant from the consequences of the torts of a negligent defendant, which torts result in physical injury and in some cases, even in death.

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