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Negligence - Breach of Duty - Standard of Care Required of Infant Defendants

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NEGLIGENCE—BREACH OF DUTY—STANDARD OF CARE REQUIRED OF INFANT DEFENDANTS—One of the defendants, a child four years and eight months of age, while playing with infant plaintiff, threw a stone which struck a bottle near where plaintiff was standing. A chip of glass flew from the bottle into the eye of plaintiff, resulting in injury. The action was brought by infant plaintiff's father individually and as guardian ad litem against infant defendant's father individually and as guardian ad litem. The trial court denied infant defendant's motion for summary judgment. On appeal, *held*, reversed and remanded with directions to dismiss the complaint as to infant defendant. The authorities do not generally distinguish between primary and contributory negligence of infants; a child under five and one-half years of age is generally considered incapable of negligence. *Shaske v. Hron*, 266 Wis. 384, 63 N.W. (2d) 706 (1954).

There is not complete unanimity as to whether the liability of infants should be measured by a standard of care different from that required of adults in negligence cases.¹ It is generally agreed, however, that to be free from *contributory* negligence a child need use only that measure of care which children of his age, intelligence and experience ordinarily exercise under similar circumstances.² The question arises as to whether a different measure of care should be required when the *primary* negligence of an infant is at issue. Most writers in the field recognize the application of the same rule to both classes of cases,³ and the *Restatement of Torts* is in accord with this view.⁴ Among the few cases involving the issue of primary negligence of an infant there is considerable conflict. In addition to the instant case, five cases may be cited which involve the primary negligence of an infant and which apply the standard used in cases of contributory negligence.⁵ Some of these apply the contributory negligence standard

¹ CLARK AND MARSHALL, *LAW OF CRIMES*, 5th ed., 125 (1952); Bohlen, "Liability in Torts of Infants and Insane Persons," 23 MICH. L. REV. 9 (1924).

² Shulman, "The Standard of Care Required of Children," 37 YALE L.J. 618 (1928).

³ BURDICK, *LAW OF TORTS*, 4th ed., 158 (1926); 1 COOLEY, *TORTS*, 4th ed., 194 (1932); PROSSER, *TORTS* 1086 (1941); SALMOND, *TORTS*, 11th ed., 70 (1953). *Contra*: 1 SHEARMAN AND REDFIELD, *NEGLIGENCE*, rev. ed., 341 (1941); Terry, "Negligence," 29 HARV. L. REV. 40 (1915).

⁴ 2 TORTS RESTATEMENT §283, comment *e* (1934).

⁵ *Ellis v. D'Angelo*, 116 Cal. App. (2d) 310 at 315, 253 P. (2d) 675 (1953); *Hoyt v. Rosenberg*, 80 Cal. App. (2d) 500, 182 P. (2d) 234 (1947); *Harvey v. Cole*, 159 Kan. 239, 153 P. (2d) 916 (1944); *Charbonneau v. MacRury*, 84 N.H. 501, 153 A. 457 (1931); *Briese v. Maechtle*, 146 Wis. 89, 130 N.W. 893 (1911).

after thoughtful consideration of what the proper measure of care should be,⁶ whereas one applies it with no reference to any possible differentiation.⁷ On the other hand, three cases may be cited which apply the adult standard to determine the liability of an infant alleged to be primarily negligent,⁸ but none of these gives careful consideration to the question of whether a lesser standard is appropriate. The more recent cases favor the application of the same standard as that generally used for contributory negligence.⁹ One situation involving special factors merits additional analysis.¹⁰ This is the case in which the infant defendant is a licensed driver and is accused of primary negligence in the operation of a motor vehicle. It may be argued that by obtaining a license to operate a vehicle, the infant defendant has assumed adult responsibilities, and for this reason should be deprived of the shield of infancy.¹¹ On the other hand, it has been suggested that if the infant is required to meet adult standards he is being punished for not conforming to a standard which he may be incapable of meeting.¹² Finally, considerations of a child's natural development might militate against imposing upon him adult responsibilities. These considerations might well be of sufficient weight to rebut the opposing proposition that the injured party should be compensated where one of two innocent parties must suffer. It would be understandable, however, were a court to be more lenient toward the child whose injuries result partly from the negligence of another than toward the child whose act is the sole cause of injury to another.¹³ If infants who are alleged to be primarily negligent are to be judged by a standard different from that applied in contributory negligence cases, but less than that required of adults, what should that standard be? No answer has yet been offered, and none seems likely.

Dale Van Winkle

⁶ See *Ellis v. D'Angelo and Charbonneau v. MacRury*, note 5 *supra*.

⁷ *Hoyt v. Rosenberg*, note 5 *supra*.

⁸ *Hird v. Milne*, [1930] 3 D.L.R. 513; *House v. Fry*, 30 Cal. App. 157, 157 P. 500 (1916); *Stringer v. Frost*, 116 Ind. 477, 19 N.E. 331 (1889). Several older cases invoked the rule that there was liability for any injury except those arising from "unavoidable accidents." See *Conway v. Reed*, 66 Mo. 346 (1877); *Morgan v. Cox*, 22 Mo. 373 (1856); *Bullock v. Babcock*, 3 Wend. (N.Y.) 391 (1829). *Neal v. Gillett*, 23 Conn. 436 (1855), has been cited for the proposition that infant defendants should be held to the same measure of care required of adults. It is submitted that the court in substance ruled only that age should not be taken into account where the intelligence and experience of the infant enable him to exercise mature judgment. This is in reality the application of the standard usually used in the contributory negligence cases.

⁹ See notes 5 and 8 *supra*. Dicta supporting the application of the contributory negligence standard may be found in a number of cases. See, e.g., *Reid v. City Coach Co.*, 215 N.C. 469, 2 S.E. (2d) 578 (1939); *Siedlik v. Schneider*, 122 Neb. 763, 241 N.W. 535 (1932). Contrary dicta may be found in *Roberts v. Ring*, 143 Minn. 151, 173 N.W. 437 (1919).

¹⁰ *Charbonneau v. MacRury*, note 5 *supra*; *Harvey v. Cole*, note 5 *supra*.

¹¹ 79 UNIV. PA. L. REV. 1153 (1931).

¹² 25 TEMPLE L.Q. 478 (1952); 15 MINN. L. REV. 834 (1931).

¹³ *Shulman*, "The Standard of Care Required of Children," 37 YALE L.J. 618 (1928).