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NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EFFECT OF VIOLATION OF STATUTE BY MINOR PLAINTIFF—Plaintiff's decedent, a thirteen year old boy, was killed in a collision between his bicycle and defendant's automobile. Both vehicles were travelling in the same direction on a public highway when, according to the defendant's testimony, the boy suddenly made a left turn in front of the automobile and was struck. The defendant asserted that the child failed to give any signal indicating a turn and therefore violated the Utah statute prescribing rules of the road.[1] Defendant moved for a directed verdict on the issue of contributory negligence charging that the conduct of the decedent was negligence per se. The trial court denied this motion. On appeal, *held*, affirmed. The generally accepted rule that consideration must be given to the age, intelligence and experience of an infant in determining the issue of his contributory negligence prevails over the rule that a statutory violation constitutes negligence as a matter of law. *Morby v. Rogers*, (Utah 1953) 252 P. (2d) 231.

The principal case raises the difficult problem of a conflict between two widely accepted rules in the law of negligence.[2] It is generally recognized that an infant is held to a lesser degree of care for his own personal safety than that which is required of adults. Thus it is said that in determining the question of the

[1] Utah Code Ann. (1953) tit. 41-1-1 et seq.

[2] Other cases dealing with this question are collected in 174 A.L.R. 1170 (1948).

contributory negligence of a minor plaintiff the standard of care to be applied is that of the ordinarily prudent child of the same age, intelligence, and experience under the same or similar circumstances.[3] A number of courts also hold that statutes prescribing traffic rules with penal sanctions have the effect of defining the standard of care to be exercised by persons using the highway and that the violation of such enactments constitutes negligence as a matter of law.[4] Under this view the jury need only determine whether the statute was in fact violated and whether such violation was a contributing cause of the injury. Various reasons have been advanced in support of this position.[5] Although some courts have said that there is an implied legislative intent to impose civil liability,[6] the more common justification is that the reasonably prudent man acts in accord with the rules of the criminal law and therefore the violation of such a penal statute is a failure to meet the requirements of the universally recognized common law standard.[7] The Utah court decided that the application of the negligence per se doctrine to an infant would result in the abrogation of the rule that the individual capacities of the child must be considered.[8] It would in effect predicate a finding of contributory negligence on the breach of an absolute legislative standard rather than a standard of conduct created by the jury with regard to the particular circumstances of the case.[9] Other decisions have reached a similar conclusion.[10]

However, a number of courts have held that the per se rule must be applied irrespective of the fact that an infant plaintiff is involved, provided the statute purports to cover all persons.[11] States following this view take the position that

[3] PROSSER, TORTS 229 (1941). Where very young children are involved there is a conclusive presumption that they are incapable of any negligence. See generally, Shulman, "The Standard of Care Required of Children," 37 YALE L.J. 618 (1928); extensive annotation in 107 A.L.R. 4 (1937).

[4] PROSSER, TORTS 264 (1941). There are other views as to the effect of a statutory violation. For a survey of the various state positions see 38 AM. JUR., Negligence §158 (1941).

[5] See generally, Morris, "The Relation of Criminal Statutes to Tort Liability," 46 HARV. L. REV. 453 (1932); Lowndes, "Civil Liability Created by Criminal Legislation," 16 MINN. L. REV. 361 (1932).

[6] Johnson v. Boston & Maine Railroad, 83 N.H. 350, 143 A. 516 (1928).

[7] Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920); Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317 (1914).

[8] Principal case at 234.

[9] See general discussion in Mertz, "The Infant and Negligence Per Se in Pennsylvania," 51 DICK. L. REV. 79 (1946).

[10] Fightmaster v. Mode, 310 Ohio App. 273, 167 N.E. 407 (1928), involving a thirteen year old plaintiff entering a street at a point other than the intersection; Locklin v. Fisher, 264 App. Div. 452, 36 N.Y.S. (2d) 162 (1942), involving a twelve year old plaintiff riding a bicycle into the street from a private driveway. The court said at 165: "We think it was a question of fact for the jury and not a question of law for the court to say whether or not plaintiff, having in mind his age, intelligence and experience had sufficient mental and physical capacity to be able to comply with the statute."

[11] Patrician v. Garvey, 287 Mass. 62, 190 N.E. 9 (1934), where a twelve year old plaintiff riding a bicycle made an improper left turn; D'Ambrosio v. Philadelphia, 354 Pa. 403, 47 A. (2d) 256 (1946), commented upon in Mertz, "The Infant and Negligence Per Se in Pennsylvania," 51 DICK. L. REV. 79 (1946).

these laws are designed to regulate the conduct of all users of the public highways for the purpose of promoting the public welfare by reducing the number of traffic accidents. Therefore, if children are permitted to operate vehicles on the road, they must be held to these minimum safety requirements in the same manner as other travelers. To find exceptions based on the judgment of the individual user of the highway would subvert the purposes of such legislation and increase the hazards of travel.[12] This position undoubtedly has merit where suit is brought against an infant for an injury inflicted upon an innocent plaintiff as a result of the child's conduct in violation of the statute. However, it is less persuasive where the minor is seeking recovery from an admittedly negligent defendant. The policy of protecting children from losses resulting from their immaturity receives added emphasis where the tortious conduct of the defendant is a contributing factor. Thus a distinction may be drawn between the question of primary liability and the question of contributory negligence.[13] In determining where the loss should fall in the situation presented by the principal case it seems more equitable to adopt the view of the Utah court and send the question to the jury.[14] Under such a ruling the statutory violation is not conclusive but is some evidence to be considered in determining whether or not the child was in the exercise of the care generally required of one of his age, intelligence and experience. Phrasing this result in the language of the common justification for the per se doctrine, it may be said that a reasonably prudent child may not necessarily follow the prescriptions of the criminal statutes regulating traffic.[15] It has also been suggested that to apply the statutory violation rule to children would give the statute a greater effect in civil litigation than it has in a penal proceeding, for ordinarily the criminal law takes recognition of the varying capacities of infants.[16]

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[12] Sagor v. Joseph Burnett Co., 122 Conn. 447, 190 A. 258 (1937), presents this argument. It is also stressed by Rugg, J., in Patrician v. Garvey, note 11 supra.

[13] Such a distinction is suggested by Shulman, "The Standard of Care Required of Children," 37 YALE L.J. 618 (1928). See also Karr v. McNeil, (Ohio App. 1952) 110 N.E. (2d) 714, where the court applied the per se rule to a nineteen year old driver, holding her liable for primary negligence and discussing this distinction.

[14] It must be recognized, of course, that the infant plaintiff's conduct may be such as to constitute contributory negligence as a matter of law irrespective of the application of the per se rule. The question is not always one for the jury. Thus see Geiger v. Garrett, 270 Pa. 192, 113 A. 195 (1921), affirming a directed verdict for defendant because of the contributory negligence of a fourteen year old plaintiff under circumstances similar to the principal case.

[15] In this connection it is interesting to note that a similar statement may be made regarding certain exceptions to the application of the statutory violation rule to adults. The rule is held not to apply where it would result in the imposition of liability without fault. In Burlie v. Stephens, 113 Wash. 182, 193 P. 684 (1920), the court held that it was not negligence for a motorist to swerve over to the wrong side of the road to avoid striking a child even though such conduct was in violation of a statute. See also Taber v. Smith, (Tex. Civ. App. 1930) 26 S.W. (2d) 722; Morris, "The Relation of Criminal Statutes to Tort Liability," cited in note 5 supra.

[16] Mertz, "The Infant and Negligence Per Se in Pennsylvania," 51 DICK. L. REV. 79 (1946).