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Volume 20 | Issue 1

Article

1971

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Recommended Citation

James B. Wilkens, *Contributory Negligence of Very Young Children*, 20 Clev. St. L. Rev. 65 (1971)
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Contributory Negligence of Very Young Children

James B. Wilkens*

IF IN BACKING YOUR CAR out of a driveway you look to only one side as you approach the sidewalk, and strike and injure a pedestrian approaching from the other side, who had been so engrossed in conversation with a companion as not to have cast even a glance up the driveway, your liability for his injuries might well depend upon his age. The standard of care required (in most circumstances) of normal adults (and corporations) for the protection of themselves and of others is that they take such care as ordinary prudent persons would take in the circumstances. Little, if any, allowance is made for the deviations of their actual capabilities or experience from those envisioned for the ordinary prudent person.¹ But for children it has long been otherwise.²

In general, where negligence of a child is at issue, the standard of care to which his behavior is compared is that of an ordinary child of the same age, intelligence, training, experience, and capacity.³ We do not discuss, here, the recent tendency to require of children the standard of care of adults when children are engaged in adult-type activities, such as driving a car. Thus in our opening scenario, if the injured pedestrian had been an adult, his recovery from the driver might well have been completely defeated by a finding of contributory negligence, or reduced in proportion to his comparative negligence. If the pedestrian had been a five year old boy, it might equally well have been found that ordinary five year olds don't look for cars in driveways, that this particular five year old had no special training or experience which differentiated him from the ordinary five year old (or alternatively that five is too young to be chargeable with negligence as a matter of law), and hence that he was not negligent and could recover from the negligent driver.

The Standard of Care for Very Young Children

While it might be thought somewhat unfair for liability to depend upon the individual characteristics of one of the parties in some cases, but not in others, this argument loses much of its force in the face of the fact that the vast majority of attempts to fasten negligence on children involve contributory negligence⁴ and only have a practical effect if the other party's negligence is established. Note also that the

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¹ Prosser, *Law of Torts* 153ff (3rd ed., West 1964).

² *Tyler v. Weed*, 285 Mich. 460, 280 N.W. 827, 831 (1938).

³ Prosser, *op. cit. supra* n. 1, at 157ff.

⁴ Prosser, *op. cit. supra* n. 1, at 159.

liability of a defendant arising out of the same course of conduct on his part can depend upon the characteristics of the plaintiff other than through the negating mechanism of contributory negligence. Where circumstances reasonably call for greater or different precautions than are demanded for the protection of adults to reduce the prospect of injury to children, the behavior of defendant which violates his duty of care to a child may not violate his duty to an adult so that a case of negligence can be made out against him by the child, but not by the adult.⁵

Unless one takes the radical view that the application of the doctrine of contributory negligence, which receives little sympathy in either court decisions or in legal literature,⁶ should be made as unreasonable as possible in order to enhance the prospect of eliminating it altogether, it seems desirable to have its application to children, at least in broad sweep, be in accord with the clear result of human experience that children only gradually develop an understanding of the world in which they live, an ability effectively to respond to and act upon that world, and an appreciation of the prospective results of their acts or failures to act in various circumstances.⁷ In most jurisdictions the basic rule as to negligence, and more particularly contributory negligence, of children is as indicated above, *i.e.* they are held to a standard of care for the protection of themselves or others based on the behavior in like circumstances of children of similar age, intelligence, training, experience and capability.⁸ Thus from requiring of a baby essentially no care in any circumstances, responsibility for his own behavior is gradually increased as the child matures (with some attempt to recognize differences in the development of different children in different environments) until as majority is approached the full responsibility of an adult is assumed,⁹ no longer mitigated after majority by personal characteristics unless these consist of significant, identifiable handicaps.¹⁰

Presumptions Based Solely on Age

The expression in statute and case law of the mechanism by which this transition from irresponsibility to full accountability occurs varies from one jurisdiction to another. In particular there is diversity as to

⁵ *Audette v. Lindahl*, 231 Minn. 239, 42 N.W. 2d 717 (1950); *McDermott v. Severe*, 202 U.S. 600, 26 S. Ct. 709, 50 L. Ed. 1162 (1905).

⁶ *Gregory*, *Vicarious Responsibility and Contributory Negligence*, 41 *Yale L. J.* 831 (1932).

⁷ *Supra* n. 2, at 831.

⁸ *Restatement of the Law 2nd, Torts* § 283A, p. 14 (Am. Law Inst., 1965); *Jennings v. Eble*, 147 N.E. 2d 139 (Ohio C. Pl. 1956), *aff'd* 105 Ohio App. 51, 143 N.E. 2d 744 (1917).

⁹ *Supra* n. 2.

¹⁰ *Prosser, op. cit. supra* n. 1, at 154ff.

whether there is some age below which a child is held incapable of (contributory) negligence as a matter of law on the basis of age alone¹¹ or whether each case is to be decided on its own evidence as to the capacity of the child.¹² For a one year old it would rarely, if ever, make any difference which rule applied, but some states hold absolutely that a child is incapable of contributory negligence below the age of seven.¹³ Others have allowed findings of contributory negligence to bar recoveries by children less than seven in a wide range of circumstances.¹⁴ The view is expressed by Judge Rodman, dissenting in *Walston v. Greene*,¹⁵ that since the state commonly deems children of six sufficiently capable of traveling in the vicinity of their homes as to require their attendance at school, it is reasonable to expect from them some degree of care for their own and others' safety in circumstances within their admittedly somewhat limited range of experience, is representative of a widely held and reasonable position.¹⁶ The alternative positions are sometimes referred to as the "Massachusetts rule" (no age of incapacity based on age alone) and the "Illinois rule" (no capacity for contributory negligence as a matter of law below some age, usually seven).¹⁷ The possibility that a difference of one day in age can produce a quantum difference in the outcome under either a conclusive or rebuttable presumption rule has not escaped comment.^{17a}

An intermediate position is taken in many jurisdictions. Below some age a presumption of incapacity for negligence is recognized, but evidence may be presented to show that in the particular case the child's intelligence, training, and experience were such as to make reasonable the imposition on him of responsibility for anticipating the consequences of his behavior in the circumstances and of responding in such a fashion as would have avoided or reduced the damages actually incurred.¹⁸ In jurisdictions where freedom from contributory negligence must be asserted by the plaintiff, the existence of such a presumption ordinarily operates to satisfy the requirement upon mere pleading and proof of plaintiff's age.¹⁹ It is usually held that the question covered by such a

¹¹ *Chicago City Ry. Co. v. Tuohy*, 196 Ill. 410, 63 N.E. 2d 997, 58 L.R.A. 270 (1902); *Walston v. Greene*, 247 N.C. 693, 102 S.E. 2d 124 (1958).

¹² *Dennehy v. Jordan Marsh Co.*, 321 Mass. 78, 71 N.E. 2d 758 (1947); *De Groot v. Van Akkeren*, 225 Wis. 105, 273 N.W. 725 (1937).

¹³ *Supra* n. 11.

¹⁴ *Idzi v. Hobbs*, 176 S. 2d 606 (Fla. App. 1965).

¹⁵ *Supra* n. 11.

¹⁶ *Minsk v. Pitaro*, 284 Mass. 109, 113, 187 N.E. 224, 225 (1933).

¹⁷ *Eckhardt v. Hanson*, 196 Minn. 270, 264 N.W. 776, 107 A.L.R. 1 (1936); *Bush v. N.J.&N.Y. Transit Co.*, 30 N.J. 345, 153 A. 2d 28, 77 A.L.R. 2d 908 (1959).

^{17a} *Eckhardt v. Hanson*, *supra* n. 17; Annot., 77 A.L.R. 2d 917, 925 (1961).

¹⁸ *Patterson v. Cushman*, 394 P. 2d 657, 6 A.L.R. 3d 421 (Alaska, 1964); *Bush v. N.J.&N.Y. Transit Co.*, *supra* n. 17.

¹⁹ *Lake Erie & W.R. Co. v. Mackey*, 530 Ohio St. 370, 41 N.E. 980 (1895).

rebuttable presumption cannot be submitted to the jury unless sufficient evidence as to the maturity of the plaintiff child has been presented to render consideration of the question by the jury reasonable.²⁰ Thus in a recent Minnesota case it was held that the issue of contributory negligence of a four year old child could not be submitted to the jury in the face of a presumption of incapacity without some evidence having been presented as to the intelligence, training, and experience of the particular child where the jury's information was limited to observation of the child during the trial.²¹ But in a subsequent case, this holding was refined to permit a contributory negligence instruction with respect to a five year old child where only meager evidence as to his capabilities had been presented. Here an instruction was required that he was presumed to have been using reasonable care for his own safety unless the jury found the weight of the evidence to show the contrary, on the ground that to require the jury to consider the evidence bearing on the presumption of due care by the child without an instruction as to the standard of care demanded would be to elevate a rebuttable presumption into an absolute one.²²

The frequency with which the appellate opinions reflect evidence out of the mouth of the child's parent to the effect that the child was brighter and more responsible than average and had been repeatedly admonished by the parent to guard against the peril which produced his injury is rather surprising.²³ Whether it is the result of especially effective examination by defense counsel in this type of case or of the triumph of pride and fear of disapprobation over pecuniary interest I do not venture to speculate, but it appears to be a phenomenon meriting considerable attention in preparing for trial.

Where the so-called Illinois rule applies, the maximum age of irresponsibility has frequently been set at seven,²⁴ apparently by analogy to the common law age of irresponsibility under criminal law.²⁵ The validity of this analogy has been much criticized by judges and others supporting more flexible rules, usually with emphasis on the absence of a requirement of evil intent in establishing negligence, let alone contributory negligence.²⁶ But it is not entirely clear that the common law rule in criminal cases was not historically based as much on the notion that young children tend not to anticipate the physical results of their actions nor to appreciate the possible consequential hardships stemming

²⁰ *Bush v. N.J.&N.Y. Transit Co.*, *supra* n. 17.

²¹ *Watts v. Erickson*, 244 Minn. 264, 69 N.W. 2d 626 (1955).

²² *Rosvold v. Johnson*, 169 N.W. 2d 598 (Minn. 1969).

²³ *Bush v. N.J.&N.Y. Transit Co.*, *supra* n. 17.

²⁴ *Annot.*, 174 A.L.R. 1080, 1103 (1948).

²⁵ *Walston v. Greene*, *supra* n. 11.

²⁶ *Chicago City Ry. Co. v. Tuohy*, *supra* n. 11.

from these physical results as on the notion that young children are incapable of, or at least not to be held criminally liable for, *mens rea*. History aside, the more flexible rules seem more consonant with the tenor of civil actions, where the emphasis is on the adjudication of controversies between parties of equal standing. Perhaps the chief disadvantage of a rule that children of some very tender age are incapable by law of contributory negligence is that such a rule will invite constant attempts to advance the age for possible imposition of responsibility into a more controversial range, whereas a rule requiring or permitting determination of capacity for negligence in each case as it arises entails little prospect of producing findings of such capacity in babies.

Actual Knowledge

Where the evidence shows that the young plaintiff not only understood the nature of the hazard which produced his injury, but also appreciated that he was himself exposed to risk of such injury, he can be found contributorily negligent even if he could not be charged with responsibility for such understanding of the situation by virtue of his immaturity.²⁷ Thus actual knowledge of the fact that the instrumentality of his injury was capable of inflicting the harm actually suffered, when coupled with a sensibility of the likelihood of himself falling its victim, is held to remove the requirement that a child's conduct be tested against the conduct of children of similar age and experience in order to establish contributory negligence on his part. But without more this does not truly resolve the issue of contributory negligence, for the question arises of how great a risk of harm the child was justified in taking in the pursuit of his activities. There have been no decisions spelling out the proper considerations from which an answer to that question is to be framed by the jury in cases where actual knowledge of the risk is said to eliminate the necessity of weighing the maturity of the child. It would clearly be unfair to require an adult standard of judgment as to the importance of the child's activities to be employed in such cases if the same standard were not also employed in cases where the jury is considering the maturity of the child relative to his perception of the risk, and there would seem to be little question but that in the latter situation juries would implicitly use a standard gauged to the maturity of the child in judging the value of his enterprise as well as in assessing his responsibility for appreciating the risk. But to omit instruction on this point, as seems to be the practice, is to gloss over the very essence of negligence and simultaneously to expose the child to the risk not just of having his pursuits evaluated

²⁷ *Alvarado v. Anderson*, 175 Cal. App. 2d 166, 346 P. 2d 73 (1959).

by an adult standard only because he happened to be unusually knowledgeable about one of the dangers which presented itself, but, even worse, of not having the value of his activities balanced at all against the risk perceived.

Assumption of Risk

The problem discussed above is to be distinguished from the doctrine of assumption of risk, which also applies to children.²⁸ Thus where the injured child has "full knowledge of an open and visible condition, appreciates the dangers incident thereto and voluntarily acts with reference thereto, he assumes the risk of the attendant dangers."²⁹ Unlike contributory negligence, assumption of risk is everywhere an active defense which must be asserted by the defendant. It will, if proved, defeat recovery in an action based upon strict liability or upon wilful, wanton or reckless conduct on the part of defendant and it frankly disavows any pretense of taking into consideration the importance of plaintiff's activities.³⁰

Violation of Statute

A young child's violation of a statute intended to regulate the situation which produced injury is in most states held not to constitute negligence *per se*³¹ or even, in many of those which recognize a conclusive presumption of incapacity for negligence in very young children, admissible evidence of negligence.³² Where a violation is permitted to be considered as part of the evidence bearing on the question of contributory negligence, the child's duty to obey the statute is frequently held not to be absolute, but only to constitute such compliance as would ordinarily be expected of children of the same age, intelligence and experience in the same circumstances.³³

Taking a completely different approach, some states recognize no mitigation at all based on immaturity of the effect of violation of general statutes upon the question of contributory negligence, holding usually that some such words as "No person . . ." or "Any person . . ." in the statute gives them no scope for formulating mitigating rules.³⁵ But this somewhat misguided judicial restraint appears to completely miss

²⁸ *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 90 N.E. 2d 859 (1950).

²⁹ *Id.*

³⁰ *Prosser, op. cit. supra* n. 1, at 450ff.

³¹ *Fightmaster v. Mode*, 31 Ohio App. 273, 167 N.E. 407 (1928).

³² *Van Saxe v. Barnett*, 125 Wash. 639, 217 P. 62 (1923).

³³ *Cummings v. Los Angeles County*, 14 Cal. Rptr. 668, 363 P. 2d 900 (Cal. 1961).

³⁵ *Barney v. Hannibal & St. J.R. Co.*, 126 Mo. 372, 28 S.W. 1069, 26 L.R.A. 847 (1894); *Barcolini v. Atlantic City & Shore R. Co.*, 82 N.J.L. 107, 81 A. 494 (1911).

the point that the issue here is not whether there has been a violation of the statute, but rather what is to be the effect of such a violation in a civil action. Note also that such reasoning seems to ignore the usual freedom of youthful offenders from the criminal sanctions of the same statutes, because of a presumed lack of criminal intent in the very young or otherwise, and hence leads to adverse civil consequences to the child from violations of statute for which he is not subject to any criminal penalty.³⁶

Imputation of Child's Negligence to Parent

In an action based upon injury to a child, but brought by his parent, guardian, or kinfolk in their own name for such damages to them as medical expenses or loss of companionship, services or support, contributory negligence of the child will bar recovery.³⁷ In most states a wrongful death action is subject to defeat by contributory negligence of the deceased child.³⁸ This is usually required by the statute creating the cause of action, which typically provides that the beneficiary can only recover if liability could have been found in favor of the deceased party if he were still alive.³⁹ The basis for the imputation of the child's contributory negligence to the parent so as to prevent the parent from recovering this class of damages from a negligent third party, where not covered by statute, is usually stated to be that the cause of action is derivative⁴⁰ or sometimes that it arises by assignment or partial assignment of a cause of action of the child, subject by virtue of the assignment to all the legal defects of the child's position.⁴¹

The result has been subjected to devastating critical attack over a long period of time,⁴² without any apparent effect on the course of actual decisions.⁴³ The thrust of the criticism, which includes within its purview derogation of the imputation of contributory negligence from one spouse to the other in similar actions, has centered on the fact that recovery for other types of damages, such as injury to his property, is not barred by his child's (or spouse's) contributory negli-

³⁶ Merz, *The Infant and Negligence Per Se in Pennsylvania*, 51 Dickinson L.R. 79 (1946).

³⁷ *Fekete v. Schipler*, 80 N.J. Super. 538, 194 A. 2d 361 (1963); *Schaffner v. Smith*, 158 Col. 387, 407 P. 2d 23 (1965); *Bonvillian v. Dauphin*, 166 S. 2d 40 (La. App. 1964), *review denied* 246 La. 859, 167 S. 2d 674 (1964).

³⁸ *Dulansky v. Iowa-Illinois Gas & Elec. Co.*, 10 F.R.D. 566 (D.C. Iowa).

³⁹ Prosser, *op. cit. supra* n. 1, at 932.

⁴⁰ *Dudley v. Phillips*, 218 Tenn. 648, 405 S.W. 2d 468, 21 A.L.R. 3d 462 (1966).

⁴¹ *Callies v. Reliance Laundry Co.*, 188 Wis. 376, 206 N.W. 198 (1925).

⁴² Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, Etc.*, 2 U. Chi. L.R. 173 (1935).

⁴³ *Supra* n. 40; Annot., 21 A.L.R. 3d 469, 475 (1968).

gence.⁴⁴ Treatment of the cause of action as resulting from assignment has also been faulted for logically implying that the cause would have first existed in the name of the child (or spouse), or in other words that for there to be an assignee there must logically have been an assignor, and this is usually not true, for the child will never have had a cause of action for medical expenses borne by the parent or for loss of services to the parent.⁴⁵

Imputation of Parent's Negligence to Child

In some states it was formerly the rule that for infants so young that close, continuous parental supervision of their activities was reasonably necessary for their safety, recovery for injuries suffered as a result of the negligence of a third party would be defeated by negligence of the child's parent or guardian or of a person to whom its care had been entrusted, despite the fact that negligence by another unrelated party contributing to its injury would not have had the same effect.⁴⁶ In almost all such jurisdictions this rule has been reversed by judicial decision⁴⁷ or, more commonly, by statute.⁴⁸ The rule never had any logical foundation and was widely condemned on the quite plausible ground that the child's recovery from a third party who had been negligent toward him should not be barred by additional negligence toward him, even if that additional negligence stemmed from the person responsible for his supervision and safety.⁴⁹ No doubt the motive for the rule was to prevent the proceeds from accruing to the benefit of the also negligent parent or guardian.⁵⁰ There can be little question that some benefit to parent or guardian, usually flows from a recovery by very young children. But to give the prevention of collateral advantage to those not free from fault precedence over providing recovery for the benefit of the innocent damaged party was surely a perversion of justice of which we are well rid. The modern trend toward permitting tort suits between members of the same family would make such a rule even more anomalous in present day context than it was when in sway.

Some remote vestiges of this rule remain in some jurisdictions, whereby a wrongful death action brought by the administrator of the

⁴⁴ Gregory, *op. cit. supra* n. 42.

⁴⁵ Gregory, *op. cit. supra* n. 42, at 188.

⁴⁶ Fitzgerald v. St. Paul, Mpls. & Manitoba Ry. Co., 29 Minn. 336, 13 N.W. 168 (1882); Hartfield v. Roper, 21 Wend. 613, 34 Am. Dec. 273 (N.Y. 1839).

⁴⁷ Mattson v. Minn. N.W. R. Co., 95 Minn. 477, 104 N.W. 443 (1905).

⁴⁸ Rubin v. Olympic Resort, Inc., 24 N.Y. Misc. 2d 131, 198 N.Y.S. 2d 408 (1960); Zaccari v. U.S., 144 F. Supp. 860 (D.C. Md. 1956).

⁴⁹ Bellefontaine and Indiana R.R. Co. v. Snyder, 18 Ohio St. 399, 98 Am. Dec. 175 (1868).

⁵⁰ Wymore v. Mahaska Cnty., 78 Iowa 396, 43 N.W. 264 (1889).

deceased child's estate is subject to defeat by a showing of negligence on the part of parent or guardian if he is a beneficiary of the estate.⁵¹ In some states recovery by the administrator is prevented only where the negligent parent is the sole beneficiary,⁵² while in others the judgment is reduced in proportion to the beneficial interest of those chargeable with negligence.⁵³ Some of the cases in jurisdictions permitting an administrator to recover for the wrongful death of a child in the face of a beneficiary parent's negligence appear to distinguish between "active" negligence by the parent or his agent at the scene of the injury, but for which the injury would have been avoided despite the defendant's negligence (in which case recovery by the administrator is barred) and "remote" negligence consisting of prior acts or failures to act in supervision of the child. But where the parent is unaware of the actual peril overtaking the child and not in a position to prevent it anyhow (in which case recovery by the administrator for the ultimate benefit of the parent is permitted).⁵⁵ This distinction is not merely the last clear chance doctrine in disguise, for it is not said to depend upon the knowledge of defendant that the parent (or the child) was no longer in a position to avoid the injury.⁵⁶ All of these situations represent in form, if not in ultimate effect, the imputation of the parent's negligence to the child as contributory negligence.

Conclusion

In this large body of law one can discover such pathologically unreasonable examples as the ruling in an old California case that it was, as a matter of law, not contributory negligence in a six year old boy run over by a train to have lain down on the tracks,⁵⁷ or Judge Cooley's argument that permitting imputation of the parent's negligence to the child was desirable to prevent deliberate exposure of children to risk by their parents in hopes of collecting large judgments for their children.⁵⁸ But on the whole, the law seems to judge young children with compassion and understanding, and in many cases with more than a little charity, in determining their responsibility for their own behavior in situations where a question of contributory negligence is presented.

⁵¹ *Hondl v. Chicago Great Western Ry. Co.*, 249 Minn. 306, 82 N.W. 2d 245 (1957).

⁵² *Peoples v. Seamon*, 249 Ala. 284, 31 S. 2d 88 (1947).

⁵³ *Humphreys v. Ash*, 90 N.H. 223, 6 A. 2d 436 (1939).

⁵⁵ *Cloyes v. Delaware Twp.*, 23 N.J. 324, 129 A. 2d 1 (1957).

⁵⁶ *Prosser, op. cit. supra* n. 1, at 441.

⁵⁷ *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602 (1878).

⁵⁸ *Cooley, A Treatise on the Law of Torts* 682, quoted in *Tyler v. Weed, supra* n. 2, at 836.

Nonetheless, the arguments in favor of requiring, or at least permitting, the jury to determine capacity for contributory negligence in young children seem convincing and, one hopes, will ultimately lead to reversal of the conclusive presumptions of incapacity based on age alone. The problem of balancing the value of the child's pursuit against the apparent risk in cases where he is shown to have actual knowledge of that risk should be squarely faced and resolved. The situation with respect to the imputation of contributory negligence to bar "derivative" suits for expenses and loss of services must probably by now be regarded as beyond hope of frank and rational resolution, the status quo surviving merely because it survives.