Michigan Law Review

Volume 37 | Issue 6

1939

NEGLIGENCE - CONTRIBUTORY NEGLIGENCE OF CHILDREN

Russel T. Walker
University of Michigan Law School

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE OF CHILDREN — In an action for damages for injuries sustained by a boy six years and seven months of age through the alleged negligence of defendant, *held*, the court would not rule as a matter of law that a child of this age could not be contributorily negligent; it would leave the question of plaintiff's contributory negligence to the jury with instructions that a child can only be held to that degree of care which could reasonably be expected from a child of his own age, ability, and understanding under like circumstances. A vigorous dissent upheld the common-law rule that, as a matter of law, a child under seven is conclusively presumed to be incapable of contributory negligence. *Tyler v. Weed*, 285 Mich. 460, 280 N. W. 827 (1938).

The principal case follows the rule which has always been the law in

Michigan,[1] in spite of several dicta supporting the minority view.[2] However, in keeping with the common view it is held, in cases where the question arises, that there is an age at which a child cannot be charged with contributory negligence.[3] The reason for such a rule is that in their tender years children are completely incapable, because of their lack of judgment, intelligence, and discretion, of exercising care.[4] There is, however, great diversity of opinion as to the specific age at which capacity attaches.[5] The Michigan courts have never attempted to set up the specific age at which discretion is acquired, but they have decided in the particular case whether or not the child has attained that age.[6] With the

[1] Hargreaves v. Deacon, 25 Mich. 1 (1872); Swoboda v. Ward, 40 Mich. 420 (1879); Hine v. Bay Cities Consolidated Ry., 115 Mich. 204, 73 N. W. 116 (1897); 4 MICH. ST. B. J. 84 (1925).

[2] Mollica v. Michigan Central Ry., 170 Mich. 96, 135 N. W. 927 (1912); Thornton v. Ionia Free Fair Assn., 229 Mich. 1, 200 N. W. 958 (1924).

[3] Elwood Electric Street Ry. v. Ross, 26 Ind. App. 258, 8 N. E. 535 (1900); Johnson v. Bay City, 164 Mich. 251, 129 N. W. 29 (1910); 107 A. L. R. 71 (1937).

[4] Hine v. Bay Cities Consolidated Ry., 115 Mich. 204, 73 N. W. 116 (1897); Government Street Ry. v. Hanlon, 53 Ala. 70 (1875); Berry v. St. Louis M. & S. E. Ry., 214 Mo. 593, 114 S. W. 27 (1908).

[5] Dowd v. Tighe, 209 Mass. 464, 95 N. E. 853 (1911), child of three capable of contributory negligence; Brown v. Wade, (La. App. 1933) 145 So. 790, three-year old cannot be contributorily negligent; St. Paul v. Kuby, 8 Minn. 154, Gil. 125 (1863), conclusive presumption applied to children younger than 4½ years; Devine v. Chicago Ry., 189 Ill. App. 435 (1914), child under seven incapable of contributory negligence; Eckhardt v. Hanson, 196 Minn. 270, 264 N. W. 776 (1936), question of capacity of child past six for the jury.

[6] Cases holding no capacity involved children ranging from 25 months to six years of age: East Saginaw City Ry. v. Bohn, 27 Mich. 503 (1873) (4 years); Keyser v. Chicago & Grand Trunk Ry., 56 Mich. 559, 23 N. W. 311 (1885) (2½ years); Shippy v. Village of Au Sable, 85 Mich. 280, 48 N. W. 584 (1891) (3 years); Schindler v. Milwaukee L. S. & W. Ry., 87 Mich. 400, 49 N. W. 670 (1891) (5½ years); Battishill v. Humphreys, 64 Mich. 494, 31 N. W. 894 (1887) (3 years); Johnson v. Bay City, 164 Mich. 251, 129 N. W. 29 (1910) (5⅓ years); Love v. D. J. & C. R. R., 170 Mich. 1, 135 N. W. 963 (1912) (6 years); Huggett v. Erb, 182 Mich. 524, 148 N. W. 805 (1914) (2 years, 8 months); Hoover v. D. G. H. & M. R. R., 188 Mich. 313, 154 N. W. 94 (1915) (25 months); Czarniski v. Security Storage & Transfer Co., 204 Mich. 276, 170 N. W. 52 (1918) (5 years); Beno v. Kloka, 211 Mich. 116, 178 N. W. 646 (1920) (5 years, 11 months); Door v. Valley Lumber Co., 254 Mich. 694, 236 N. W. 910 (1931) (4¼ years); Edgerton v. Lynch, 255 Mich. 456, 238 N. W. 322 (1931) (3½ years); Micks v. Norton, 256 Mich. 308, 239 N. W. 512 (1931) (5½); Guscinski v. Kenzie, 282 Mich. 204, 275 N. W. 820 (1937) (5 years); Zylstra v. Graham, 244 Mich. 319, 221 N. W. 318 (1928), implied that a child 6 years, 3 days of age had no capacity for contributory negligence.

Cases holding there was capacity involved children ranging from 8 years old to 6 years, 10 months: Powers v. Harlow, 53 Mich. 507, 19 N. W. 257 (1884) (8 years); Baker v. F. & P. M. Ry., 68 Mich. 90, 35 N. W. 836 (1888) (7¼ years); O'Leary v. Michigan State Tel. Co., 146 Mich. 243, 109 N. W. 434 (1906) (7 years); Barger v. Bissell, 188 Mich. 366, 154 N. W. 107 (1915) (6 years, 10 months).

addition of new decisions the uncertain boundary, between the age of capacity and the age of lack of capacity, is gradually being narrowed, so that the ultimate result will be a specific arbitrary age on one side of which a child will be capable of contributory negligence and on the other side of which he will be incapable. The principal case extends the age of discretion from six years, ten months,[7] to six years, eight months. The decision establishing the present upper limit of lack of ability to be contributorily negligent placed it at six years,[8] but in a subsequent case [9] the court was equally divided as to whether a child five years and eleven months of age should have the benefit of the conclusive presumption, the result being that the lower court's decision, giving him this presumption, stands. Some courts have carried the rule of the principal case a great deal further,[10] but even these courts have not applied it in cases of extreme youth.[11] It is submitted that, even though it is generally recognized that there is an age at which a child is not capable of contributory negligence, substantial justice can be given to all parties by application of the subjective rule of the principal case without establishing an arbitrary division between discretion and lack of discretion. If, as has been said, intelligence is the controlling factor [12] in the result, no such increase in intelligence can be found in a day's difference in age as to justify such a startling change in liability.[13] The final result of the Michigan decisions will be to establish an age, probably in the vicinity of six, as the arbitrary criterion of capacity for contributory negligence, thus reverting to the weaknesses of the common-law rule.[14] It would seem that it would be safe to apply the rule of the principal case to all children, not because there is not any age group incapable as a matter of law of contributory negligence, but because the selection of any specific age is open to the objection of arbitrariness. It should be pointed out that a safeguard is to be found in the ability of the judge to direct a finding where only one reasonable inference can be drawn from the facts.[15]

Russel T. Walker

[7] Barger v. Bissell, 188 Mich. 366, 154 N. W. 107 (1915).

[8] Love v. D. J. & C. R. R., 170 Mich. 1, 135 N. W. 963 (1912). See also Zylstra v. Graham, 244 Mich. 319, 221 N. W. 318 (1928).

[9] Easton v. Medema, 246 Mich. 130, 224 N. W. 636 (1929).

[10] United Rys. & Electric Co. v. Carneal, 110 Md. 211, 72 A. 771 (1909), child under 3 capable of contributory negligence; McDonough v. Vozzela, 247 Mass. 552, 142 N. E. 831 (1924), 4 years, 5 months—capable of contributory negligence; Dowd v. Tighe, 209 Mass. 464, 95 N. E. 853 (1911), 3 years, 8 months—capable of contributory negligence.

[11] Caroline County v. Beulah, 153 Md. 221, 138 A. 25 (1927), not extended to six months old baby; Rondeau v. Kay, 282 Mass. 452, 184 N. E. 926 (1933), not extended to child 3 years, 1 month of age. See also, Washington B. & A. E. R. R. v. State for use of Scolish, 153 Md. 119, 137 A. 484 (1927).

[12] Flintoff v. Muskegon Traction & Lighting Co., 208 Mich. 527, 175 N. W. 438 (1919); Trudell v. Grand Trunk Ry., 126 Mich. 73, 85 N. W. 250 (1901).

[13] 74 UNIV. PA. L. REV. 79 (1925); 26 MICH. L. REV. 811 (1928); 8 MINN. L. REV. 73 (1923); 15 N. C. L. REV. 75 (1936); 2 DAKOTA L. REV. 402 (1929).

[14] Note 13, supra.

[15] 74 UNIV. PA. L. REV. 79 at 81 (1925); 15 N. C. L. REV. 75 at 78 (1936).