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## NEGLIGENCE - CONTRIBUTORY NEGLIGENCE - INFANT PLAINTIFF'S VIOLATION OF STATUTE

Wayne E. Babler  
*University of Michigan Law School*

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NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — INFANT PLAINTIFF'S VIOLATION OF STATUTE — A nine-year old boy, who ran out into the street without looking in both directions, and thus violated a statute,<sup>1</sup> was injured by an automobile the driver of which was allegedly negligent. *Held*, it is not negligence as a matter of law for a nine-year old boy to step into the street without looking both ways, notwithstanding the penal statute. *Michalsky v. Gaertner*, 53 Ohio App. 341, 5 N. E. (2d) 181 (1937).

The courts differ as to the effect of the violation of a penal statute. If the statute is to protect the class of persons of which the injured party is a member

<sup>1</sup> Ohio Gen. Code (Page 1926), § 6310-36: "Pedestrians shall not step into or upon a public road or highway without looking in both directions to see what is approaching." *Ibid.*, § 6310-37: "Whoever violates any provision of General Code 6310-15 to 6310-40, respectively, shall be fined not more than \$25.00 and for a second offense shall be fined not less than \$25.00 nor more than \$100.00."

from the type of injury which he has suffered, many courts, including Ohio, hold that a violation of the statute is negligence per se;<sup>2</sup> others hold it is prima facie negligence;<sup>3</sup> and some courts hold that it is merely evidence of negligence.<sup>4</sup> There is also a difference as to the standard of care by which a child's negligence will be judged. In a few states the courts have applied the chronological distinctions of the criminal law in determining civil liability, saying that a child under seven years of age is incapable of negligence, as a matter of law, and a child between the ages of seven and fourteen is presumed to be incapable of contributory negligence.<sup>5</sup> The majority of the courts, including Ohio, hold that the question of negligence of an infant is a jury question, determined by the degree of care which is common to children of like age, intelligence, and experience.<sup>6</sup> The theoretical reason for this favored position of a child is said to be that liability for damage caused by negligence is based upon the fault of doing the act while realizing that the probable consequence will be injury to another, and where mental capacity negatives the possibility

<sup>2</sup> *Schell v. Dubois*, 94 Ohio St. 93, 113 N. E. 664 (1916); *Variety Iron & Steel Works Co. v. Poak*, 89 Ohio St. 297, 106 N. E. 24 (1914); *Mechler v. McMahon*, 184 Minn. 476, 239 N. W. 605 (1931); 2 TORTS RESTATEMENT, § 286 (1934). Cf. *Newcomb v. Boston Protective Department*, 146 Mass. 596, 16 N. E. 555 (1888), and *Johnson v. Boston & M. R. R.*, 83 N. H. 350, 143 A. 516 (1928). As to the special care a defendant should exercise toward a discovered child, or in looking out for a child when children are likely to be present, see 25 MICH. L. REV. 681 (1927).

<sup>3</sup> *Rawson v. Stiman*, 133 Me. 250, 176 A. 870 (1935); *Miller v. Burch*, 254 Ill. App. 387 (1929); SALMOND, TORTS, 9th ed., § 129 (1936).

<sup>4</sup> *Carlock v. Westchester Lighting Co.*, 268 N. Y. 345, 197 N. E. 306 (1935); *Jones v. New York, N. H. & H. R. R.*, 275 Mass. 139, 175 N. E. 487 (1931). There is a Massachusetts statute specifically affecting many cases involving this problem. *Patrician v. Garvey*, 287 Mass. 62, 190 N. E. 9 (1933). For a collection of the cases, see note, L. R. A. 1915E 500. For a distinction based on whether the violation is by plaintiff or defendant, see, Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317 at 339 (1914); *Mechler v. McMahon*, 184 Minn. 476, 239 N. W. 605 (1931). The statute may only suggest a rule of conduct. *Mathes v. Schwing*, 169 La. 272, 125 So. 121 (1929); *Morr v. Merkle*, 47 Ohio App. 533, 192 N. E. 279 (1932).

<sup>5</sup> CLARK and MARSHALL, CRIMES, 3rd ed., 113 (1927). *Wolczek v. Pub. Service Co.*, 342 Ill. 482, 174 N. E. 577 (1930); 74 UNIV. PA. L. REV. 79 (1925).

<sup>6</sup> *Lehman v. Eureka Iron & Steel Works*, 114 Mich. 260, 72 N. W. 183 (1897); *Camando v. N. Y. St. Rys.*, 247 N. Y. 111, 159 N. E. 879 (1928). Cf. *Russo v. Charles S. Brown Co.*, 198 Mass. 473, 84 N. E. 840 (1908). Many courts apply this general rule, but hold that as a matter of law a child below a specified age is incapable of contributory negligence. *Temple Lumber Co. v. Living*, (Tex. Civ. App. 1927) 289 S. W. 746; *Von Saxe v. Barnett*, 125 Wash. 639, 217 P. 62 (1923). 2 TORTS RESTATEMENT, §§ 283, 464 (1934). There may be a distinction as to whether the child is a plaintiff or defendant. *Shulman*, "The Standard of Care Required of Children," 37 YALE L. J. 618 (1928). For a summary and collection of the cases, see Wilderman, "Presumptions Existing in Favor of the Infant In re: The Question of an Infant's Ability to be Guilty of Contributory Negligence," 10 IND. L. J. 427 (1935); L. R. A. 1917F 10.

of such fault, there should not be liability.<sup>7</sup> When a penal statute has the legal effect of making the doing of an act negligence per se, there is no question of realization of probable consequences, and therefore such fault is not an element of liability.<sup>8</sup> Thus, it may be argued, the reason for the special basis of liability of an infant is not present, and the infant should be held to be contributorily negligent, as a matter of law, when it has violated a statute which, if violated by an adult, would establish contributory negligence per se.<sup>9</sup> However, the reasons for the view that violation of a statute is negligence per se are: the legislature has determined what is due care in the specific situation;<sup>10</sup> a reasonably prudent man would not do the act prohibited by the statute, since the legislature has condemned the act as dangerous;<sup>11</sup> and a jury should not have the power to set aside the acts of the legislature, and determine when a person should or should not violate a statute.<sup>12</sup> In testing the principal case with these reasons there are the questions whether the legislature intended to determine what is due care for an infant in the specific situation; whether a reasonably prudent infant would violate the statute; or whether the legislature intended the statute to be equally applicable to adults and infants.<sup>13</sup> Since the statute is a criminal statute, this might be the logical situation in which to apply the criminal law age distinctions mentioned above.<sup>14</sup> It is submitted that

<sup>7</sup> Bohlen, "Liability in Tort of Infants and Insane Persons," 23 MICH. L. REV. 9 at 31 (1924); SALMOND, TORTS, 9th ed., § 17 (1936): "In general the principle would seem to be that a minor who is incapable of forming a culpable intention or of realizing the probable consequences of his conduct is relieved from liability in those cases in which fault is essential to liability, but that wherever a liability is imposed irrespective of fault, he is as fully liable as a normal adult."

<sup>8</sup> Leathers v. Blackwell Durham Tobacco Co., 144 N. C. 330, 57 S. E. 11 (1907); 1 THOMPSON, NEGLIGENCE, 2d ed., 12 (1901); Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317 at 328 (1914): "A new statutory 'nuisance' has thus been created in every sense in which that word has legal significance; and the proposition that he who violates the statute or ordinance does so at his peril is only an application of the principle that an action lies in favor of one who has suffered a private injury from a public nuisance."

<sup>9</sup> Hanscomb v. Goodale, 81 N. H. 150, 124 A. 458 (1923). Violation of the statute involved in the principle case, Ohio Gen. Code (Page 1926), §§ 6310-36, has been held to be negligence per se. Souder v. Hassenfeldt, 48 Ohio App. 377, 194 N. E. 47 (1934).

<sup>10</sup> POLLOCK, TORTS, 13th ed., 25 (1929).

<sup>11</sup> Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317 at 323, 326 (1914).

<sup>12</sup> Evers v. Davis, 86 N. J. L. 196 at 203, 90 A. 677 (1914); 1 THOMPSON, NEGLIGENCE, 2d ed., § 11 (1901); 5 LABATT, MASTER AND SERVANT, 2d ed., 5953 (1913).

<sup>13</sup> SALMOND, TORTS, 9th ed., c. 15 (1936).

<sup>14</sup> 2 TORTS RESTATEMENT, § 286, comment (c), p. 753 (1934): "If the statute or ordinance is one which makes an act or a failure to act a criminal offense but which makes no provision for civil liability, a particular act or omission does not create civil liability unless it is of such a character or done under such circumstances as to make it criminally punishable." For example, if the act should be done by a child

the more reasonable view is that an infant's mental capacity is determinative of his prudence, regardless of the legislature's labeling of a particular act as dangerous, and that, in the absence of express provisions to the contrary, the legislature never intended to take away from the infant the common-law right to be judged by a special standard, viz. that care which would be exercised by a similar child of like age, intelligence, and experience.<sup>15</sup> The result in the principal case is within the modern trend to favor children, as shown by the attractive nuisance doctrine,<sup>16</sup> statutes prohibiting child labor,<sup>17</sup> duties incumbent upon adults to use care in proportion to the immaturity of discovered children,<sup>18</sup> and the not so modern limited liability in the making of contracts.<sup>19</sup>

under seven years of age, there would be no criminal responsibility—therefore no civil liability?

<sup>15</sup> *Erie R. R. v. Swiderski*, 117 C. C. A. (3d) 17, 197 F. 521 (1912). Accord: *Fry v. Southern Pub. Util. Co.*, 183 N. C. 281, 111 S. E. 354 (1922) (dictum); *Von Saxe v. Barnett*, 125 Wash. 639, 217 P. 62 (1923) (five-year old who violated statute was too young to be contributorily negligent); *Mathes v. Schwing*, 169 La. 272, 125 So. 121 (1929) (statute merely an admonition to be cautious); *Tully v. Philadelphia, W. & B. R. R.*, 2 Pennewill (18 Del.) 537, 47 A. 1019 (1900) (eight-year old trespasser); *Fightmaster v. Mode*, 31 Ohio App. 273, 167 N. E. 407 (1928) (thirteen-year old violated statute and ordinance). *Contra*: *Scalf v. Eicher*, 11 Cal. App. (2d) 44, 53 P. (2d) 369 (1935) (fifteen-year old violated statute—negligence per se); *Hanscomb v. Goodale*, 81 N. H. 150, 124 A. 458 (1923) (a "boy" plaintiff rode a bicycle faster than ten miles per hour); *Osgood v. Maxwell*, 78 N. H. 35, 95 A. 954 (1915) (thirteen-year old injured while illegally sliding down hill); *Campbell v. Sargent*, 186 Minn. 293, 243 N. W. 142 (1932) (fifteen-year old precluded from recovering if he did not have a lamp on his bicycle as provided by statute); *Jackson v. Lomas*, 60 Mont. 8, 198 P. 434 (1921) (ten-year old plaintiff was *in pari delicto* with the defendant merchant who illegally sold him firecrackers); *Rowe v. Hammond*, 172 Mo. App. 203, 157 S. W. 880 (1913) (nine-year old violating ordinance recovered only on "humanitarian rule"); *Corbett v. Scott*, 243 N. Y. 66, 152 N. E. 467 (1926) (boy under sixteen operated motorcycle contrary to statute).

However, the Ohio Supreme Court has refused to find an exception for a police officer violating a statute, it having held that a traffic officer who violated a general statute and several ordinances relating to speed and traffic rules was contributorily negligent as a matter of law. *Swoboda v. Brown*, 129 Ohio St. 512, 196 N. E. 274 (1935). Criticized: 2 LAW J. OHIO ST. UNIV. 184 (1936); 49 HARV. L. REV. 154 (1935). For a collection of cases in regard to contributory negligence of child injured while employed contrary to child labor statute, see 20 L. R. A. (N. S.) 876 (1909). For cases involving contributory negligence of children injured by explosives bought in violation of the law, see 60 A. L. R. 434 at 441 (1929).

<sup>16</sup> *Carr v. Oregon-Washington R. R.*, 123 Ore. 259, 261 P. 899, 60 A. L. R. 1434 at 1444 (1927). For the application of this doctrine in Ohio, see 8 UNIV. CIN. L. REV. 537 (1934).

<sup>17</sup> *Stehle v. Jaeger Auto Mach. Co.*, 225 Pa. 348, 74 A. 215 (1909); *Marino v. Lehmaier*, 173 N. Y. 530, 66 N. E. 572 (1903); *Hodfield-Penfield Steel Co. v. Sheller*, 108 Ohio St. 106, 141 N. E. 89 (1923); cases collected in 20 L. R. A. (N. S.) 876 (1909).

<sup>18</sup> 25 MICH. L. REV. 681 (1927).

<sup>19</sup> 20 IOWA L. REV. 785 (1935). However, compare with the statutes providing

It also accords with the trend to limit the doctrine of contributory negligence.<sup>20</sup>

*Wayne E. Babler*

for civil liability of parents for the automobile accidents of their incompetent minor drivers. 48 HARV. L. REV. 498 (1935).

<sup>20</sup> Mole and Wilson, "A Study of Comparative Negligence," 17 CORN. L. Q. 333, 604 (1932); Demuth, "Derogation of the Common Law Rule of Contributory Negligence," 7 ROCKY MOUNT. L. REV. 161 (1935).