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Contributory Negligence of Young Children

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STUDENT NOTES

CONTRIBUTORY NEGLIGENCE OF YOUNG CHILDREN

The law in West Virginia on the subject of contributory negligence of very young children was in doubt before the recent case of *Marsh v. Riley*[1] was decided, and, instead of being settled by that decision, the doubt has been increased. In *Marsh v. Riley*, an infant plaintiff, four years and four months old, was involved. The court said, though the statement was not necessary to the decision: "Moreover, a child of such tender years cannot be guilty of contributory negligence." This dictum, in itself, is not remarkable. A majority of jurisdictions, by holding and dicta, subscribe to a similar view.[2] The West Virginia court had used language to the same effect before,[3] and such, until 1922, had been its rule for half a century. From these utterances of the court, it was apparent that the rule extended to all children under seven years of age.[4]

In *Prunty v. Tyler Traction Co.*,[5] there was an intimation that the rule had changed. In that case, under the particular circumstances, it was held not to be error to refuse to submit to a jury the question of contributory negligence of a child three years and three months old, but a statement, not necessary to the decision, was added that, under other circumstances, a child of three years and three months might be contributorily negligent, and that, in some cases, it would be properly a jury question. This intimation of the court's departure from its long established rule was confirmed ten years later in *Pierson v. Liming*.[6] There the judgment

[1] 188 S. E. 748 (W. Va. 1936). The child was badly burned when its clothing caught fire from a heater in a common bathroom maintained by tenants.

[2] Some recent cases are: Sinclair Refining Co. v. Gray, 191 Ark. 175, 83 S. W. (2d) 820 (1935); Delivery Co. v. Turley, 44 Ga. App. 32, 160 S. E. 517 (1931); Dipino v. Gulino and Son, 154 So. 772 (La. 1934); Farrel v. Hidish, 132 Me. 57, 165 Atl. 903 (1933); Lesage v. Largey Lumber Co., 99 Mont. 372, 43 P. (2d) 896 (1935); Hogan v. Etna Concrete Block Co., 325 Pa. 49, 188 Atl. 763 (1936); Chitwood v. Chitwood, 159 S. C. 109, 156 S. E. 179 (1930); Walkup v. Covington, 18 Tenn. App. 117, 73 S. W. (2d) 713 (1934). For other cases see (1936) 107 A. L. R. 71 *et seq.*

[3] Washington v. B. & O. R. Co., 17 W. Va. 190 (1880); Gibson v. City of Huntington, 38 W. Va. 177, 18 S. E. 447 (1893); Dicken v. Liverpool Salt and Coal Co., 41 W. Va. 511, 23 S. E. 582 (1895); Gunn v. Ohio R. Co., 42 W. Va. 676, 26 S. E. 546 (1896); Parrish v. City of Huntington, 57 W. Va. 286, 50 S. E. 416 (1905); Ewing v. Lanark Fuel Co., 65 W. Va. 726, 65 S. E. 200 (1909).

[4] Particularly dictum in Ewing v. Lanark Fuel Co., 65 W. Va. 726, 65 S. E. 200 (1909).

[5] 90 W. Va. 145, 167 S. E. 131 (1922); See Note (1922) 28 W. VA. L. Q. 303.

[6] 113 W. Va. 145, 167 S. E. 131 (1932).

of the lower court was reversed on the ground that an instruction failed to take clearly to the jury the question of contributory negligence of a child six years and three months old. The opinion declares that "Whether a child is capable of exercising any care is determined by its age, intelligence, experience, discretion, previous training, maturity, alertness, and the nature of the danger encountered."[7] The rule that a child under seven years can not be chargeable with contributory negligence was definitely abandoned. Four years later, in *Marsh v. Riley*, where the child was a month older than the infant plaintiff in the *Prunty* case, the court voiced the above dictum that a child of such tender years can not be contributorily negligent.

As a consequence of these conflicting expressions, there is considerable confusion as to what the law may be in this jurisdiction. It does not necessarily follow from *Marsh v. Riley* that the court has abandoned the doctrine of *Pierson v. Liming*, nor that there has been a return to the rule that a child less than seven years old is incapable of contributory negligence. Probably no court would deny that there is an age at which a child is incapable of being negligent. The *Prunty* case indicated this age to be something less than three years and three months. But the latest expression in West Virginia indicated this age to be above three years and four months, and is a flat denial of the earlier proposition. Whether or not the court was aware of this, it would appear, from a consideration of *Marsh v. Riley*, that the court went back to an 1895 decision[8] to find a holding on a question of imputed negligence, found there also a dictum on contributory negligence, and adopted it without consideration of its more recent decisions. The language of this early opinion which the court cites in *Marsh v. Riley*, is similar to that of the latter. It states: "I do not think the negligence of the parent can be imputed to this child, two years and ten months old, or that it can be guilty of contributory negligence."

The court, in *Pierson v. Liming*, makes the assertion that a majority of courts follow the rule there announced. As to a child of six years and three months, the assertion may be well founded; but as to a child of five years and three months, a recent Wisconsin

[7] See Dupuis v. Heider, 113 Fla. 679, 152 So. 659 (1934), using similar language.

[8] Dicken v. Liverpool Salt and Coal Co., 41 W. Va. 511, 23 S. E. 582 (1895).

case[9] finds the "overwhelming weight of authority" the other way, in accord with the proposition that a child of that age is incapable of contributory negligence. These two positions are indicative of the zone which gives the courts most difficulty. Recent decisions in several states are in line with the Wisconsin case.[10] Some jurisdictions still apply the rule to all children under seven years of age.[11] Another court takes the position that, under particular circumstances, a child of eight years can not be chargeable with contributory negligence.[12]

On the contrary, at least five late decisions in other states[13] reject the rule that a child under seven years old is incapable of contributory negligence. It is asserted that this rule, borrowed from the criminal law, is arbitrary. The supreme court of Florida, in a recent case, takes this position, and adopts the reasoning of an earlier Vermont case.[14] It is suggested that more capacity is required to understand the nature of a criminal act than is necessary to the exercise of care for one's own safety. The time at which children cease to be incapable of care can not be arbitrarily determined, say these courts. But, actually, whether the determining age is set at seven, six, five, four or three years and three months, there is still an arbitrary determination made. In a late case, the Minnesota court, giving approval to the view taken in Massachusetts,[15] that contributory negligence of a child less than seven years old may be a question for the jury, says: "It does not cast upon the public any and all risks that may be created by the carelessness of a child. Still, it does not . . . . hold a child to a degree of care not commensurate with its age and experience." This seems to

[9] Ruka v. Zierer, 195 Wis. 285, 218 N. W. 358 (1928).

[10] Brzyski v. Schreiber, 314 Pa. 353, 171 Atl. 614 (1934); Johnson v. Herring, 89 Mont. 420, 300 Pac. 535 (1931); McKinney v. Winterstein, 122 Neb. 679, 241 N. W. 112 (1932); Seidlik v. Schneider, 122 Neb. 763, 41 N. W. 535 (1932); Flickinger v. Phillips, 221 Iowa 837, 267 N. W. 101 (1936); see Dipino v. Gulino; Lesage v. Largey Lumber Co., both *supra* n. 2.

[11] Claren v. Gillespie, 250 Ill. App. 53 (1928); Belcher, Adm'r v. Smyth Co., 243 Ill. App. 65 (1926); Tupman's Adm'r v. Schmidt, 200 Ky. 88, 254 S. W. 199 (1923); Johnson v. Herring; Flickinger v. Phillips, both *supra* n. 10; Chitwood v. Chitwood, 159 S. C. 109, 156 S. E. 179 (1930).

[12] Brzyski v. Schreiber, 314 Pa. 353, 171 Atl. 614 (1934); Thomas v. Southern Penn. Traction Co., 270 Pa. 146, 112 Atl. 918 (1921).

[13] Dupuis v. Heider, 113 Fla. 679, 152 So. 659 (1934); Garis v. Eberling, 18 Tenn. App. 1, 71 S. W. (2d) 215 (1934); Morris v. Furniture Co., 207 N. C. 358, 117 S. E. 13 (1934); Thornton v. Ionia Fair Ass'n, 229 Mich. 1, 200 N. W. 958 (1924); Arivabeno v. Nuse, 12 N. J. Misc. 729, 174 Atl. 691 (1934); Eckhardt v. Hansen, 196 Minn. 270, 264 N. W. 776 (1936).

[14] Johnson's Adm'r v. Rutland R. Co., 93 Vt. 132, 106 Atl. 682 (1918).

[15] Sullivan v. Boston El. R. Co., 192 Mass. 37, 78 N. E. 382 (1906).

urge that the public should be protected from acts of children. It is as reasonable to assert that children, less capable of exercising care, ought to be protected from the carelessness of individual members of the public. This seems to be one basis at least for the recognized presumption that small children have not been negligent, even where the presumption is not conclusive. Most of the courts which deny a conclusive presumption admit a rebuttable one.[16] It should be kept in mind that, at any event, the negligence of a defendant must be established before there may be a recovery. There is no question involved of burdening an innocent public with the careless acts of small children.

The decisions in few states are sufficiently numerous to indicate where particular courts draw the line. Massachusetts holds that a child of three years and one month is incapable of contributory negligence.[17] But, of a child of four years, the same court asserts that, while a child of that age is too young to possess much prudence, it can not be said, as a matter of law, that such a child is incapable of exercising any care.[18] A few courts might conceivably go this far. Perhaps these courts feel, as the West Virginia court suggests in *Prunty v. Traction Co.*, that, at any event, no reasonable jury is likely to find a child of very tender years guilty of contributory negligence sufficient to bar recovery against an adult wrongdoer. By way of dictum, at least, the West Virginia court now seems to adopt the view of this supposed reasonable jury.

C. L. C.

THE MODERN TENDENCY TOWARD THE PROTECTION OF THE AESTHETIC

While recognizing as nuisances those things which are unduly offensive to the senses of smell or hearing,[1] equity has generally refused to recognize as nuisances those things which are offensive to the eye or aesthetic tastes,[2] even when the presence of the thing

16 Boykin v. Coast Line R. Co., 211 N. C. 113, 189 S. E. 177 (1936).
17 Rondeau v. Kay, 282 Mass. 452, 184 N. E. 926 (1933).
18 McDonough v. Vazzela, 247 Mass. 552, 142 N. E. 831 (1924).

1 CLARK, EQUITY (1924) § 203; WOOD, LAW OF NUISANCES (2d ed. 1883) § 3.
2 WOOD, LAW OF NUISANCES §§ 3, 7; Ross v. Butler, 19 N. J. Eq. 294, 303, 97 Am. Dec. 654 (1868); Lane v. City of Concord, 70 N. H. 485, 49 Atl. 687 (1900); Whitmore v. Brown, 102 Me. 47, 65 Atl. 516 (1906); Woodstock Burial Ground Ass'n v. Hager, 68 Vt. 488, 35 Atl. 431 (1896); Houston Gas & Fuel Co. v. Harlow, 297 S. W. 570 (Tex. Civ. App. 1927).