DePaul Law Review

Volume 12
Issue 2 *Spring-Summer 1963*

Article 23

Torts - Minor Held to Adult Standard - Betzold v. Erickson, 35 Ill. App.2d 203, 182 N.E.2d 342 (1962)

DePaul College of Law

community. Even though a recent case[31] stated that agricultural and residential lands which are economically sound could not be condemned by the Port Authority of Seattle for an industrial project, the overall trend seems to indicate that some day the "Public Use" requirement may be met by a showing of a greater benefit from the new use than was being received from the old.

[31] Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P. 2d 171 (1959).

TORTS–MINOR HELD TO ADULT STANDARD

A thirteen year old defendant, Paul Erickson, with his mother's permission, drove the family pickup truck to meet a friend, Lawrence Johnson. The boys were returning home in their own vehicles after a completed day of swimming. Erickson was following 100 to 150 yards behind the Johnson car at a speed of between 30 to 35 miles per hour along a dusty road. The plaintiff, Fannie Betzold, traveling in an opposite direction, was unable to see the road because of the dust raised by the oncoming Johnson car. Consequently, she stopped alongside a ditch on the right side of the road. The plaintiff testified that the defendant's truck, which was swaying to the right and to the left, went off the road into the ditch colliding head-on into the plaintiff's automobile. The jury found that the defendant was not guilty of negligence after the instruction that the defendant was to be measured by the degree of care "which an ordinarily prudent child of his age, experience, intelligence and capacity would have exercised . . . under the same or similar circumstances." The appellate court held that the instruction was "decisive of this case" and reversed the decision saying that under these or similar circumstances the only standard of care the defendant could be judged by is the standard of care required and expected of licensed drivers. *Betzold v. Erickson*, 35 Ill. App. 2d 203, 182 N.E. 2d 342 (1962).

Thus stands a somewhat unique problem. In what instances is an adult standard applicable to a minor who is charged with actionable negligence?[1]

There is no precedent for the *Betzold* decision in Illinois. However, in

[1] The most common situation involving a minor is when the question is whether or not he is guilty of contributory negligence. The great weight of authority shows that in these instances a child is only required to use the degree of care that an ordinarily prudent child of the same capacity would use in the same situation. Allen v. Colaw, 27 Ill. App. 2d 304, 169 N.E. 2d 670 (1960); Molnar v. Slattery Contracting Co., 8 N.Y. App. Div. 2d 95, 185 N.Y.S. 2d 449 (1959); Bolar v. Maxwell Hardware Co., 205 Cal. 396, 271 P. 97 (1928); Maskaliunas v. C&W I.I.R.R., 318 Ill. 142, 149 N.E. 23 (1925). It is unusual for a minor to be charged with actionable negligence as compared to the number of cases involving a minor's contributory negligence.

Dellwo v. Pearson[2] where a twelve-year-old defendant who was operating a powerboat injured a woman, the Minnesota Supreme Court had to decide what standard of care would be applicable to the defendant. The trial court gave an instruction not unlike that given in the *Betzold* case. The Supreme Court held that "*in the operation of an automobile, airplane, or powerboat, a minor is to be held to the same standard of care as an adult.*"[3]

Seemingly this decision results in a double standard for it is also held that ". . . *a child is only required to exercise that degree of care which the great mass of children of the same age ordinarily exercise. . . .*"[4] This rule is strongly supported by several leading cases. In *Singer v. Marx*[5] the nine-year-old defendant was throwing rocks, one of which struck the plaintiff in the eye as she passed by on her bicycle. In determining whether or not the defendant was negligent the court said that he must be judged by the standard of care which would ordinarily be exercised by children of like age, capacity and experience. It would seem that the court felt that throwing rocks or stones is an activity which is common to most nine year old boys.[6] In *Briese v. Maechtle*[7] the injury occurred during recess when the ten-year-old defendant was playing tag and the plaintiff was playing marbles. The defendant, being chased by another boy, ran around the school house and accidentally bumped into the plaintiff injuring the latter's eye. The court said that a minor is responsible for his torts as is an adult. However, the court continued

> marked difference between the tests of negligence as applied to the act of an adult and the same act . . . by a child. The rule is that a child is only required to exercise that degree of care which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child.[8]

[2] Dellwo v. Pearson, 259 Minn. 452, 107 N.W. 2d 859 (1961).

[3] *Id.* at 458, 107 N.W. 2d at 863. (Emphasis added.)

[4] Briese v. Maechtle, 146 Wis. 89, 91, 130 N.W. 893, 894 (1911) (emphasis added).

[5] Singer v. Marx, 144 Cal. App. 2d 637, 301 P. 2d 440 (1956).

[6] In Kuhns v. Brugger, 390 Pa. 331, 135 A. 2d 395 (1957), a twelve-year-old defendant who was playing with a gun that was negligently left accessible to him accidently shot an infant. The courts said that it was most important to consider the capacity of the child to recognize the great danger involved in the use of a gun. They held that the child was not to be judged by adult standards and that it was necessary to measure the defendant's act by a standard which could reasonably have been expected of a child of like age, experience and intelligence. It is not unusual for young children to see a gun in an open drawer and pick it up and examine it.

[7] Briese v. Maechtle, 146 Wis. 89, 130 N.W. 893 (1911).

[8] *Id.* at 91, 130 N.W. at 894.

In *Hoyt v. Rosenberg*,[9] a twelve-year-old defendant was engaged in the common childhood game of kick-the-can. During the course of the game the defendant kicked the can which struck the plaintiff in the face. In deciding the case, the court said, "the test is, and must be, not what an adult would have there done or what the results indicate should have been done, but what an ordinary child in that situation would have done.[10] There is a striking similarity between *Singer*, *Briese* and *Hoyt v. Rosenberg*. In all three instances the children were engaged in activities which are common only to children.

When minors are engaged in dangerous adult activities the fact that they are held to a higher standard of care was indicated in the *Dellwo* and *Betzold* cases. These cases are illustrative of the fact that the courts are recognizing that there are certain activities, such as driving motor vehicles, which should be undertaken with at least the normal minimum degree of competence[11] and that they "will hold the child defendant who is engaging in dangerous adult activities to the standard of the reasonably prudent adult."[12] This was supported in *Karr v. McNeil*[13] where a minor defendant, while driving an automobile, struck a ten-year-old boy. The court said that the defendant was under the same obligations as an adult while driving an automobile and if she violated the standards set by law she may properly be held liable. Here the minor was engaged in an activity which is common only to adults.

When the court is presented with negligence of a minor, the issue is to determine what standard of care is applicable. When a minor is partaking in activities common to childhood that child should be measured by a standard commensurate with his experience, capacity and general understanding. When engaged in dangerous adult activities, that same child should be held to the standard of care of an adult. Therefore, we see, as in the *Briese* and *Hoyt* cases, where the children were engaged in childhood activities, the courts measured the child by the standard of behavior to be expected from a child of like age, experience and intelligence.[14]

[9] Hoyt v. Rosenberg, 80 Cal. App. 2d 500, 182 P. 2d 234 (1947).

[10] *Id.* at 507, 182 P. 2d at 238.

[11] Apparently accepting this statement are Wilson v. Shumate, 296 S.W. 2d 72 (Mo. 1956); Karr v. McNeil, 92 Ohio App. 458, 110 N.E. 2d 714 (1962); Hill Trans. Co. v. Everett, 145 F. 2d 746 (1st Cir., 1944); *contra*, Charbonneau v. MacRury, 84 N.H. 501, 153 A. 457 1931).

[12] 2 HARPER & JAMES, LAW OF TORTS, 927 (1956).

[13] Karr v. McNeil, 92 Ohio App. 458, 110 N.E. 2d 714 (1952).

[14] Heath v. Madsen, 273 Wis. 628, 79 N.W. 2d 73 (1956). Here a ten-year-old girl, in tightening a saddle girth for the plaintiff was measured by the standard of case expected from a child of like age, experience, and intelligence. Also see RESTATEMENT OF TORTS § 283, comment e.

However, when a minor is operating a motor vehicle as in the *Betzold* and *Dellwo* cases, that minor should be judged by the standards of an adult.[15] The Minnesota Court, in the *Dellwo* opinion, made a fine statement of reason for the difference.

> To give legal sanction to the operation of automobiles by teen-agers with less than ordinary care for the safety of others is impractical today, to say the least. We may take judicial notice of the hazards of automobile traffic, the frequency of accidents, the often catastrophic results of accidents, and the fact that immature individuals are no less prone to accidents than adults. While minors are entitled to be judged by standards commensurate with age, experience, and wisdom when engaged in activities appropriate to their age, experience, and wisdom, it would be unfair to the public to permit a minor in the operation of a motor vehicle to observe any other standards of care and conduct than those expected of all others. A person observing children at play with toys, throwing balls, operating tricycles or velocipedes, or engaged in other childhood activities may anticipate conduct that does not reach an adult standard of care or prudence. However, one cannot know whether the operator of an approaching automobile, airplane, or powerboat is a minor or an adult, and usually cannot protect himself against youthful imprudence, even if warned. Accordingly we hold that in the operation of an automobile, airplane, or powerboat, a minor is to be held to the same standard of care as an adult.[16]

[15] Wittmier v. Post, 78 S.D. 520, 105 N.W. 2d 65 (1960) dictum. Also see RESTATEMENT OF TORTS, TENTATVE DRAFT No. 4, § 283, comment c.

[16] Dellwo v. Pearson, 259 Minn. 452, 458, 107 N.W. 2d 858, 863 (1961).

TRUSTS–CHARITABLE TRUSTS: ILLEGAL PURPOSE

In his will, the testator set up a trust "to be used for the care, support, medical attention, education, sustenance, maintenance or custody of such minor Negro child or children, whose father or mother, or both, have been incarcerated, imprisoned, detained or committed in any federal, state, county, or local prison or penitentiary as a result of the conviction of a crime or misdemeanor of a political nature."[1] A violation of the Smith Act[2] would constitute such a crime. A grandnephew, hoping to derive the trust proceeds through the law of intestate succession, now challenges the validity of the trust. The District Court upheld the Superior Court's decision that the trust was invalid. Upon appeal to the Supreme Court, the order was reversed in favor of the administrator. *In Re Robbins' Estate*, 57 Cal. Rep. 2d 765, 371 P. 2d 573 (1962).

[1] *In re* Robbins' Estate, 57 Cal. 2d 765, 766, 371 P. 2d 573 (1962). The Court quotes from the trust.

[2] 18 U.S.C. § 2385. This act deals with advocating the overthrow of the U.S. Government.