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Degree of Care Owed by a Motorist to Children on the Highway - Contributory Negligence - Bozman v. State, Use of Cronhardt

DEGREE OF CARE OWED BY A MOTORIST TO CHILDREN ON THE HIGHWAY — CONTRIBUTORY NEGLIGENCE

Bozman v. State, use of Cronhardt[1]

An action was brought under the local version of Lord Campbell's Act against Bozman by Cronhardt, the equitable plaintiff, for the wrongful death of his infant son, not quite eight years of age. The boy, astride his bicycle in broad day-light, came out into Green Spring Avenue, a concrete highway, from the driveway adjacent to his grandmother's home, and was struck by the car driven by the defendant, as he came onto the highway. Defendant, by his own testimony (and that was the only testimony in the case as to actual speed), was traveling between thirty-five and forty miles per hour in a forty-five miles per hour speed zone,[2] and was about seventy-five feet from

[1] 177 Md. 151, 9 A. (2) 60 (1939). See also a more recent case, Stafford v. Zake, 20 A. (2d) 144 (Md., 1941).

[2] At the time of the accident (May 30th, 1938), Md. Code Supp. (1935) Art. 56, Sec. 194(4) was then in force allowing a 45 m. p. h. speed limit on rural highways; since then, by Md. Code (1939) Art. 56, Sec. 196(4) the speed on such highways has been fixed at a 50 m. p. h. maximum.

the boy when he first saw him. Defendant immediately applied his brakes. According to the plaintiff's evidence the skid marks in the roadway measured fifteen feet up to the point of impact and from that point sixty additional feet to the place where the car finally stopped. After a verdict for the plaintiff, defendant appealed, urging that the trial court erred in refusing his demurrer prayer and his contributory negligence prayer. *Held:* Affimed.

The Court of Appeals, in sustaining the lower court's rulings, held that excessive speed, which may constitute negligence if it contributes to the accident, may be inferred from such testimony as that the brakes were put on too late, or that the car did not stop until it had gone an extraordinary distance after the brakes were applied. Notwithstanding that the only evidence of actual speed was offered by Bozman himself (and that was certainly within the lawful limits), and that the infant sister of the deceased, aged ten years, testified only that the car of the defendant was being driven "very fast", the Court said that the skidding of an automobile after collision is a "circumstance of evidential value in reference to the rate of speed or whether the car was under control".[3] The skidding in the instant case was only fifteen feet up to the point where the youngster was struck and sixty feet from the point of impact. The Court of Appeals in effect held that such testimony was sufficient evidence of negligence to take the case to the jury.

The case presents two general problems: (1) Did the plaintiff meet the burden imposed upon him of showing negligence on the part of defendant? (2) Was the infant boy free of all contributory negligence?

As to the first problem, or the degree of care owed by a motorist to children, there is no presumption of negligence against a motorist from the mere fact that he strikes a child.[4] The burden remains on the plaintiff to show that the defendant committed a breach of his duty and was thereby negligent.[5] Simply because a child is struck by an automobile while playing in the street, or road, does not entitle him to damages, nor entitle his parents to compensation for his death. In the past, the Maryland Court,

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[3] Citing 2 BLASHFIELD, AUTOMOBILE LAW, Sec. 11; Ellis v. Sanberg, 41 Cal. App. 506, 182 P. 792 (1919).

[4] Slaysman v. Gerst, 159 Md. 292, 150 A. 728 (1930); Mullikin v. Baltimore, 131 Md. 363, 102 A. 469 (1917).

[5] Baltimore, etc. R. Co. v. Schwindling, 101 Pa. 258, 263 (1882).

using the scale of degrees of care,[6] has seemed to apply to automobile cases the same rules of law governing the responsibility owed to children as they applied in earlier cases where children were injured by the operation of railroad trains.[7] The infancy of the plaintiff does not enhance either the degree of care or the measure of damages to be awarded from the failure of the defendant to use ordinary care.[8] The driver of an automobile owes no special degree of care to a child; but he must use ordinary care and diligence under all the circumstances commensurate with the standard of behaviour to be anticipated from the infant.[9] After seeing the child, he is chargeable with the knowledge that the infant may not act as an adult would act under the same circumstances, and must govern his own actions accordingly.[10]

Several Maryland cases demonstrate the applicability of these rules. In *Ottenheimer v. Molohan*,[11] one of the leading Maryland cases on the negligence of motorists where children have been injured, the Court of Appeals said:

> "The well known habit of children while playing (at the side of the road) to become oblivious to dangers

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[6] Note, *The Tort Liability of the Proprietor of a Passenger Elevator* (1939) 3 Md. L. Rev. 353, 358, n. 17. The majority of jurisdictions including Maryland have adopted the "degree of care" negligence doctrine. The degree of care owed will vary with the relationship involved. Thus, a mere bailee owes the duty of "ordinary care", while the obligation to exercise the "highest degree of care" is imposed upon the common carrier. There can be little doubt but that a substantial difference exists between the various levels of care in the minds of many of the courts which apply them. In this connection, see note, *Degrees of Care* (1919) 19 Columbia L. R. 166. In the case of State, etc., v. Norfolk and Western Rwy. Co., 151 Md. 679, 688, 689, 135 A. 827, 831 (1927), the Court held that a prayer imposing upon the driver of an automobile the duty to exercise "the highest degree of care and skill practicable under all circumstnaces" was erroneous in setting too high a degree of care for the driver to maintain in reference to a guest in his car.

[7] Bannon v. B. and O. R. R., 24 Md. 108, 125 (1866).

[8] *Supra*, n. 7.

[9] In the recent case of Abbott v. Railway Express Agency, 108 Fed. (2) 671 (C. C. A. 4th, 1940), it was held that, under the Maryland law, in view of the fact that children are not expected to use the same care as adults, the driver of an automobile must anticipate the actions of children that would constitute negligence in adults. The duty owed by the driver of an automobile to children is ordinary care and caution in such amount as the particular situation demands. Hevermale v. Houck, 122 Md. 82, 89 A. 314 (1913); Deford v. Lohmeyer, 147 Md. 472, 128 A. 454 (1925).

[10] Geiselman v. Schmidt, 106 Md. 580, 68 A. 202 (1907); United Rwys. v. Carneal, 110 Md. 211, 72 A. 771 (1909); Ottenheimer v. Molohan, 146 Md. 175, 126 A. 127 (1924); Dervin v. Frenier, 91 Vt. 398, 100 A. 760 (1917); Mulhern v. Phila. Homeade Bread Co., 257 Pa. 22, 101 A. 74 (1917); Patrick v. Deziel, 223 Mass. 505, 112 N. E. 223 (1916); Silberstein v. Showell Fryer Co., 267 Pa. 298, 109 A. 701 (1920).

[11] 146 Md. 175, 126 A. 127 (1924).

> of this character should have been a warning to the defendant to slow down and turn as far away as practicable under the circumstances."

In *Wickman v. Bohle*,[12] a boy on a bicycle while turning into a narrow lane to his right was struck from the rear by the defendant motorist. The Court found the defendant negligent and held that the slowing down of the boy on the bicycle before turning was sufficient to put the defendant on notice so that he might anticipate the boy's possible actions.

Again in the case of *Mahan v. State, use of Carr*,[13] where a child of three years of age, walking along the shoulder of a suburban highway was struck and killed by a taxicab, the Court of Appeals said:

> "The rights of one operating a vehicle and a pedestrian on public highways are mutual, reciprocal and equal. Neither may use it in disregard of the right of the other to use it, and each must accommodate his movement to the other's lawful use of it, each must anticipate the other's possible presence and each must recognize the dangers inherent in the manner in which it may lawfully be used by the other."

But a driver is not compelled so to operate his car that it can be stopped instantly when a child unexpectedly runs in front of it.[14] In *R. and L. Transfer Co. v. State, use of Schmidt*,[15] where a child sledding down an alley sped out into the street into the path of an oncoming truck and was killed, the Court of Appeals in reversing the lower Court's rulings held that the driver of the truck, operating at a low rate of speed, was free of negligence, since there was no duty on him to look up the alley or to have anticipated that children would be sledding on a concrete alley.

In the *Bozman* case, the deceased infant certainly had a right to be upon and use the highway; and in the exercise of due care, he had a right to cross the road on his bicycle.[16] Even though a boy is riding his bicycle on the

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[12] 173 Md. 694, 196 A. 326 (1938).
[13] 172 Md. 373, 191 A. 575 (1937).
[14] Borland v. Lenz, 196 Iowa 1148, 194 N. W. 215 (1923); Lovett v. Scott, 232 Mass. 541, 122 N. E. 646 (1919); McAvoy v. Kromer, 277 Pa. 196, 120 A. 762 (1923); Goff v. Clarksbury Dairy Co., 86 W. Va. 237, 103 S. E. 58 (1920).
[15] 160 Md. 222, 153 A. 87 (1931).
[16] Miles v. State, use of Wistling, 174 Md. 292, 198 A. 724 (1938); Edwards v. State, use of Buy, 166 Md. 217, 170 A. 761 (1934).

highway solely for amusement he is rightfully there.[17] However, it would be imposing upon a motorist an inexorable burden to require him so to operate his car that it could be stopped instantly at the moment a child unexpectedly runs in front of it from some hidden lane or corner.[18] In this case we have none of those factors by which the defendant could have been put on notice of the child's presence and thus have become bound to act in anticipation of the child. Yet, the lower Court's rulings in allowing the case to go to the jury were sustained and evidence of skid marks in the roadway,[19] coupled with the testimony of an infant witness that the car was being driven "very fast",[20] was held sufficient to make out a prima facie case of negligence.

Thus, while the Maryland Court of Appeals seems to insist that children and adults are to be treated alike, in that only ordinary care is owed to both under all the circumstances, it appears that, in these cases where children have been injured or killed, the Court takes a much more liberal view both as to the quantum and quality of the facts involved in determining whether the defendant has met the norm of vigilance, caution, and skill demanded of him, than if the same circumstances surrounded the injury of an adult.

As to the second, or contributory negligence question, the usual rule is that to withdraw the case from the consideration of the jury on the ground of contributory negligence of the deceased, the evidence must be such as to show some act so decisively negligent as to leave no room for difference of opinion thereon by reasonable minds.[21] In the *Bozman* case, the Court summarily disposed of the question by approving of the child's actions and saying that the deceased infant did, from the evidence, look up and down the road before he started across. This indi-

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[17] Coope v. Scannell, 238 Mass. 288, 130 N. E. 494 (1921).

[18] *Supra*, n. 14.

[19] In the case of Wolfe v. State, use of Brown, 173 Md. 103, 194 A. 823 (1937), the Court of Appeals said: "Skidding is not in itself, and without more, evidence of negligence . . . nor is the mere speed, certainly within lawful limits, apart from circumstances in connection with which it is to be considered ordinarily evidence of negligence. . . . Skidding may be evidence of negligence if it appears that it was caused by a failure to take reasonable precaution to avoid it, when the conditions at the time made such a result probable in the absence of such precaution. . . ." Fillings v. Diehlman, 168 Md. 306, 177 A. 400 (1935).

[20] See Note, *Testimony by Observer as to Speed of Moving Object* (1941) 5 Md. L. Rev. 307.

[21] Jones v. Wayman, 169 Md. 670, 182 A. 417 (1936).

cated a certain degree of care on his part, since he was apparently unaware of the approaching danger.

As to the negligence of an infant, the Courts have uniformly held that a child of tender years is not required to conform to the standard of behaviour which it is reasonable to expect of an adult, but his conduct is to be judged by the standard of behaviour to be expected from a child of like age, intelligence, and experience.[22] He cannot be required to exercise, or be held to any higher degree of care than might be expected for his years.[23] Considerations that are sufficient to protect a person of mature age from a conclusive imputation of negligence apply with greater force to the action of a child as regards contributory negligence;[24] while some facts which may constitute contributory negligence on the part of an adult may not do so in the case of a child of tender years, nevertheless an infant must exercise such precautions for his own safety as would ordinarily be attributable to one of his age.[25]

In Maryland it has been judged to be a jury question as to whether a child of tender years is guilty of contributory negligence. The jury must be instructed that he is only expected and required to exercise that degree of discretion and judgment which a normal child of his age with average intelligence would ordinarily use under such circumstances.[26] To make a child guilty of contributory negligence where he is struck by an automobile, he must have known of the car's approach in time, or by the use of reasonable diligence should have known of it in time to avoid the accident.[27]

The actions of the deceased infant in the instant case were in accord with the course of movements approved by the Court of Appeals in the case of *Bielski v. Rising*.[28] There the Court held that where a boy of ten years of age was pushing a wagon across the street and looked when he left the sidewalk and saw the truck a block away, but looked no more, he was not guilty of contributory negligence as a matter of law. But, the instant case is of particular interest because of the dictum "a child of four years

[22] *Supra*, n. 13.
[23] B. and O. R. R. v. Fryer, 30 Md. 47 (1869); McMahon v. Northern Central Rwy., 39 Md. 438 (1874); United Rwys. v. Carneal, 110 Md. 232, 72 A. 771 (1909); W., B. and A. R. R. v. State, use of Kolish, 153 Md. 119, 138 A. 484 (1927). See RESTATEMENT, TORTS, Sec. 283e.
[24] Deford v. Lohmeyer, 147 Md. 472, 478, 128 A. 454, 456 (1925).
[25] *Supra*, n. 4.
[26] Zulver v. Roberts, 162 Md. 636, 161 A. 9 (1932).
[27] Taxicab Co. v. Emmanuel, 125 Md. 246, 93 A. 807 (1915).
[28] 163 Md. 492, 163 A. 207 (1932).

of age can not be guilty of contributory negligence under any circumstances" and the citation of the case of *Mahan v. State, use of Carr*,[29] as authority for this ruling.

The *Mahan* case involved the action for wrongful death of a boy of *three* years of age, and though the Court affirmed the action of the trial Court in refusing the contributory negligence prayer offered in the case, because it would have imposed on the infant of three years the same measure of care and caution that would have been required of a reasonably prudent adult, the Court in no way suggested in its opinion that it would have been improper to grant a contributory negligence prayer drawn in accordance with the law, merely because of the age of the deceased infant.

The *Mahan* case recognizes that in Maryland one of tender years *may* be guilty of negligence barring his recovery, citing *United Railways v. Carneal*,[30] but he is not to be held to the same measure and kind of care that would be required of a normal person of full age[31] but only to that degree of care which should be exercised by one of his own age. The opinion stated that "the great weight of authority is opposed to the proposition that a child of a little over four years of age can be guilty of contributory negligence", and cited *State, use of Kolish, v. W., B. & A. R. R.*[32] (the first *Kolish* case) as authority for that statement.

The Court certainly made that statement in the first *Kolish* case but did not stop there. It said further that *although* the proposition was opposed to the great weight of authority *it found support in Maryland* in the case of *United Rwys. v. Carneal*.[33] The *Carneal* case held that the question of contributory negligence of an infant *not quite three years of age* was properly submitted to the jury; and both the *Kolish* cases held that the question of contributory negligence of a child of four and one-half years of age was properly submitted for the consideration of the jury.

In the case of *Zulver v. Roberts*[34] the Court of Appeals said:

> "It seems clear that the weight of authority in this country outside of our state supports such a contention

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[29] *Supra*, n. 13.
[30] 110 Md. 211, 72 A. 771 (1909).
[31] W., B. and A. R. R. v. State, use of Kolish, 153 Md. 119, 124, 137 A. 484, 485 (1927); State, use of Kolish, v. W., B. and A. R. R., 149 Md. 443, 460, 131 A. 822, 829 (1926).
[32] *Supra*, n. 31.
[33] *Supra*, n. 30.
[34] 162 Md. 636, 640, 641, 161 A. 9, 10, 11 (1932).

(that a boy of seven years, as a matter of law, cannot be charged with contributory negligence), some of the courts holding that children under the age of six are incapable of contributory negligence while the apparent majority fix seven as the age below which they are conclusively presumed to be incapable. This, however, is *not the rule of this jurisdiction,* it being here held that the question is one to be submitted to the jury under proper instructions. In these cases[35] the question of contributory negligence of children as young as three years old has been submitted for determination by a jury . . ." (Italics supplied).

Thus we have the *Bozman* case stating as dictum that in Maryland a child of four years of age cannot be guilty of contributory negligence under any circumstances, relying on the dictum in the *Mahan* case as authority. That case cites the case of *United Rwys. v. Carneal*[36] whose decision was definitely to the contrary, and the other Maryland authority supports the *Carneal* case.

In its earlier holdings, the Maryland Court, as it acknowledges,[37] is contra the vast majority of cases throughout the country. Most of the United States jurisdictions adhere to the "use of reason" doctrine in determining whether a child is capable of being guilty of contributory negligence or not, and hold that children under seven years of age are incapable of being guilty of such fault.[38] However, recent cases in at least five other States, in addition to Maryland, reject the rule that a child less than *seven* years is incapable of committing such negligence.[39] The "seven year age" rule, it has been asserted,

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[35] B. and O. R. R. v. State, use of Fryer, 30 Md. 47 (1869); Wise v. Ackerman, 76 Md. 375, 25 A. 424 (1892); State v. Wash., B. and A. Electric R. Co., 149 Md. 443, 131 A. 822 (1925); Wash., B. and A. R. Co. v. State, etc., 513 Md. 119, 138 A. 484 (1927); United Rwys. v. Carneal, 110 Md. 211, 72 A. 771 (1909).

[36] *Supra,* n. 30, 33, 36.

[37] 148 Md. 443.

[38] Claren v. Gillespie, 250 Ill. App. 53 (1928); Belcher, Admr., v. Smyth Co., 243 Ill. App. 65 (1926); Tupman's Admr. v. Schmidt, 200 Ky. 88, 254 S. W. 199 (1923); Johnson v. Herring, 89 Mont. 420, 300 Pac. 535 (1931); Flickinger v. Phillips, 221 Iowa 837, 267 N. W. 101 (1936); Chitwood v. Chitwood, 159 S. C. 109, 156 S. E. 179 (1930); and see note *Contributory Negligence of Young Children* (1937) 44 W. Va. L. Quart. 55.

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

is borrowed from the criminal law and is but arbitrary at best.[40] 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.

With this state of the authorities, the Maryland rule rests in the cases discussed above. The dictum in the *Bozman* case, which we are discussing, might be considered as an expression by the Court of Appeals of an inclination to hold a child of four years of age, or under, free from the blemishes of contributory negligence. However, in view of the *Zulver* case, the first *Kolish* case, the recognition of these cases in the *Mahan* case, and the definite holding of the *Carneal* case, that a child not yet three years of age can be guilty of contributory negligence, it might be better viewed that the dictum in the instant case is but a misinterpretation of a prior incomplete quotation, rather than an expression of policy by the Court of Appeals, by which we could be guided in the future.[41]

Hence, the position of Maryland remains with the minority jurisdictions which allow the negligence *vel non* of an infant of such tender years to be decided by the jury under the proper instructions that such infant is only to be held to the same degree of care which children of like age and intelligence would be expected to exercise.

[40] Note, *Contributory Negligence of Young Children* (1937) 44 W. Va. L. Q. 55, 57.

[41] See a recent case, Stafford v. Zake, 20 A. (2d) 144 (Md., 1941).