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Contributory Negligence of Children - Miller v. Graff

CONTRIBUTORY NEGLIGENCE OF CHILDREN

Miller v. Graff[1]

The Plaintiff, a little girl age four, was struck by the Defendant's westbound taxicab as she was crossing a street from South to North in the middle of the block. From a directed verdict for the Defendant, the Plaintiff appealed. The Court, after deciding that there was sufficient evidence of negligence, from skidmarks and other evidence of speed, to allow the case to go to the jury, said:

> "It is also plain that the child in this case cannot be held guilty of contributory negligence as a matter of law. In considering the question of contributory negligence, the Court recognizes that a child is required to exercise only that degree of care which a reasonably careful child of the same age and intelligence would exercise under similar circumstances. The mere fact that a young child, when frightened or bewildered, turns around in the street near one sidewalk and starts to come back to the other sidewalk when called by the screams of a parent is not necessarily evidence of negligence. In this case the child was only four years old at the time of the accident. We have definitely held that a child four years old cannot be guilty of contributory negligence under any circumstances."[2]

It is the place which this holding assumes in relation to the line of Maryland precedents on the point which makes the absolute rule here of some interest.

In support of the holding the Court cited *Mahan v. State*,[3] and *Bozman v. State*.[4]

The *Mahan* case dealt with a three year old boy who was killed while walking along a rural street. The Court, in discussing the appeal from the refusal of the Defendant's contributory negligence prayer, said:

> "For while in this state a child of tender years may be guilty of negligence . . ., it is not held to the same measure and kind of care that would be required of a

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[1] 196 Md. 609, 78 A. 2d 220 (1951).
[2] *Ibid*, 619.
[3] 172 Md. 373, 191 A. 575 (1937).
[4] 177 Md. 151, 9 A. 2d 60 (1939), noted 5 Md. L. Rev. 414, 418 (1941), which discusses also the Mahan case, *supra*, n. 3.

> normal person of full age . . ., but only to that degree of care which should be exercised by one of his age. . . ."[5]

The Court nevertheless went on to say:

> "The great weight of authority is opposed to the proposition that a child a little over four years of age can be guilty of contributory negligence."[6]

In the *Bozman* case the child was a boy of eight years. As part of its discussion of the lower court's refusal of a directed verdict for contributory negligence, the Court said:

> "Moreover, a child of tender years is not held to the same measure and kind of care required of a reasonably prudent adult, but only to that degree of care which children of the same age would be expected to use under similar circumstances. Thus, a child four years of age cannot be guilty of contributory negligence under any circumstances."[7]

It can be noted, therefore, that the absolute holding in the *Miller* case is based upon two statements by way of *dicta*, the former acknowledged to be at variance with the then established Maryland rule, and the latter a purely gratuitous one, inapplicable to the facts before the Court.

In opposition to the case noted, there are a number of Maryland cases which hold that the question of the contributory negligence of a child of four or less is one for the jury under proper instructions. The Maryland case, formerly considered the classic in this area, is that of *United Railways Co. v. Carneal*.[8] There the Plaintiff was a little girl not quite three years of age. Yet the Court held:

> "In spite of the negligence of the plaintiff or of the parents of the plaintiff, lawfully imputable to her, she was still entitled to recover unless the jury should find that after the motorman saw, or could have seen, her peril he could not, by the exercise of ordinary care, have avoided the accident. So far as her conduct was concerned, she could only be held to such a degree of care as might be expected from one of her age and intelligence."[9]

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[5] *Supra*, n. 3, 385.
[6] *Ibid.*
[7] *Supra*, n. 4, 155.
[8] 110 Md. 211, 72 A. 771 (1909).
[9] *Ibid*, 230.

And further:

> ". . . we think the question of contributory negligence was properly left to the jury."[10]

The traditional rule was also applied in an even earlier case where the infant plaintiff was a child of two years and two months.[11] In fact, the only absolute ruling before the *Miller* case as to a minimum age below which a child cannot as a matter of law be held guilty of contributory negligence was *Caroline County v. Beulah*,[12] where the Court said:

> "Obviously, a child six months old takes no care for its own safety, . . ."[13]

Thus, prior to the principal case, the well established rule that a child is required to exercise that degree of care commensurate with its age, intelligence and experience[14] seems to have been applied in all cases without regard to the tender years of the Plaintiff.

The disparity between the former Maryland rule and that of other jurisdictions was specifically pointed out by the Court in *Zulver v. Roberts*.[15] There a seven year old boy, while sleigh riding, collided with the Defendant's car. It was held that:

> "The first contention in respect to the court's ruling on the prayers is that a boy of seven years of age, as a matter of law, cannot be charged with contributory negligence. It seems clear that the weight of authority in this country outside of our state supports such a contention, 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."[16]

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[10] *Ibid*, 231.
[11] Balt. City Pass. Co. v. McDonnell, 43 Md. 534, 551 (1876).
[12] 153 Md. 221, 138 A. 25 (1927).
[13] *Ibid*, 226.
[14] Coughlan v. B. & O. R.R. Co., 24 Md. 84 (1866); B. & O. R.R. Co. v. Breinig, 25 Md. 378 (1866); B. & O. R.R. Co. v. State, 30 Md. 77 (1869); Balt. City Pass. Co. v. McDonnell, *supra*, n. 11; United Railways Co. v. Carneal, *supra*, n. 8; Balto. & O. R. Co. v. State, 141 Md. 520, 119 A. 244 (1922); Ottenheimer v. Molohan, 146 Md. 175, 126 A. 97 (1924); Slaysman v. Gerst, 159 Md. 292, 150 A. 728 (1930).
[15] 162 Md. 636, 161 A. 9 (1932).
[16] *Ibid*, 640.

This lack of conformity of the Maryland rule was also pointed out in *State v. Wash. B. & A. R. Co.*[17] That case involved the possible negligence of an infant plaintiff of four years, two months and seven days, approximately the same age as the Plaintiff in the principal case. There the Court stated:

> "... and for that reason we do not deem it necessary to discuss them (Defendant's prayers) farther than to say that while the proposition submitted by the first prayer, that a child a little over four years old can be guilty of contributory negligence, is opposed to the great weight of authority . . ., it finds support in the case of *United Rwys. Co. v. Carneal*. . . ."[18]

The holding was reaffirmed on a subsequent appeal.[19]

The question of a national weight of authority on this problem of a minimum age below which a child cannot be held guilty of contributory negligence as a matter of law is not at all uniform. It can generally be said that the cases hold there is an absolute minimum age, but they are not in agreement as to where to draw the line. One text writer has stated:

> "Undoubtedly there is an irreducible minimum, perhaps somewhere in the neighborhood of three years of age, but it can scarcely be fixed by any rules laid down in advance, without regard to the particular case."[20]

Another text concludes:

> "The application of this presumption to relieve a child who is three years, or less than three years, of age from a charge of personal contributory negligence is supported by the weight of authority, as might be expected in view of the extremely immature persons involved, but it must be observed that some authorities have intimated that even a person not more than three years old may be held guilty of contributory negligence under some circumstances."[21]

However, there are cases holding that infants of four, five, six, and indeed, even some few holding that children of

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[17] 149 Md. 443, 131 A. 822 (1926).
[18] *Ibid*, 459.
[19] Wash. B. & A. Elec. R. Co. v. State, 153 Md. 119, 124, 137 A. 484 (1927).
[20] PROSSER, TORTS (1941), 231.
[21] 38 AM. JUR., NEGLIGENCE, Sec. 205, p. 888.

seven, years of age are conclusively presumed incapable of contributory negligence.[22]

It therefore appears that *Miller v. Graff*,[23] has in effect reversed the line of earlier Maryland cases and has moved this jurisdiction away from its former very extreme position to one more in conformity with the opinions of other states.

As a practical matter this new holding will not make much difference. The former rule allowed the jury to consider whether a Plaintiff of four years or less was guilty of contributory negligence. Since the standard of reasonable care for such infants is such a slight one, it is most likely that juries would find the standard had been met by an injured child, while the Court of Appeals could hardly say that it had not been met as a matter of law. Thus the result produced by the new rule will in most cases be the same as that under the old one, except that it removes the possibility of a verdict for the Defendant in an extremely flagrant case.

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[22] 107 A. L. R. 4, 71, 174 A. L. R. 1080, 1103.
[23] *Supra*, n. 1.