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TORTS

*Minors Under the Age of Seven • Incapable
of Primary Negligence or Intentional
Torts • Conclusive Presumption*

DeLuca v. Bowden, 42 Ohio St. 2d 392, 329 N.E.2d 109 (1975)

DELUCA, THE PLAINTIFF in this action, had suffered eye injuries when Ayers and Coffman, minors under the age of seven, had cocked and fired a BB gun in his direction. In the subsequent complaint for damages for the injury inflicted, DeLuca named Bowden, the owner of the gun, who on several previous occasions allowed the two to play with it, as a defendant along with Ayers and Coffman. The trial court, upon motion, granted summary judgment on behalf of the two minors under seven, leaving only Bowden as a defendant.

The court of appeals, however, reversed the grant of summary judgment for the two minor children, stating "that although a minor under the age of seven is not responsible for damages resulting from his negligence . . . such minor could be liable for an intentional tort. . . ."¹ Upon reconsideration, the appellate court affirmed the granting of summary judgment in favor of Coffman, who apparently only cocked the gun. Ayers thereafter appealed to the Ohio Supreme Court.

The only question considered by the supreme court was "whether a child under the age of seven is liable for primary negligence or for an intentional tort."² The court noted the general incapacity of a child of this age to act with reason and foresight,³ and further expressed its own reluctance to attach blame to a child "in any sense comparable to the blame attachable to an adult."⁴ For these reasons it held that such a child shall be conclusively presumed incapable of both primary negligence and intentional tort.

In so holding, Ohio joins a distinct minority of states which follow this view.⁵ Previous case authority governing a young child's primary liability in Ohio was less than conclusive, yet the sparse number of decisions indicative of Ohio's stance espoused a view contrary to that now adopted. It had been stated by way of dictum that "an infant is responsible for his own torts . . . ,"⁶

¹ *DeLuca v. Bowden*, 42 Ohio St. 2d 392, 393, 329 N.E.2d 109, 110 (1975).

² *Id.* at 394, 329 N.E.2d at 110.

³ *Id.* at 394, 329 N.E.2d at 111.

⁴ *Id.* at 395, 329 N.E.2d at 111.

⁵ See cases cited notes 25 and 47 *infra*.

⁶ *Lacker v. Ewald*, 8 Ohio N.P. 204, 11 Ohio Dec. 337 (C.P. 1901), affirming a demurrer of the father of an infant (no age indicated) who wilfully killed plaintiff's dog with his father's gun. See also *Ringhaver v. Schlueter* 23 Ohio App. 355, 357, 155 N.E. 242, 242 (1927), citing *Lacker* in dismissing a complaint against the father of a child of tender years (no age stated) who rolled a rubber casing over plaintiff's child during play.

and that the question of whether a six-year-old child is capable of a negligent act is for the jury.⁷ More recently, the court of appeals, although dealing with the liability of children 13 and 14 years of age, held that a minor who commits a tort is liable at *any* age.⁸ The Ohio Supreme Court, although reversing the decision on other grounds, affirmed the correctness of the lower court's statement of the law.⁹

Thus, *DeLuca* clearly repudiates these earlier positions by approving an absolute rule against the imposition of liability. The court's holding with respect to primary negligence stems from its prior decision in *Holbrock v. Hamilton Distributing Inc.*¹⁰ In that case, the court found, that "in view of the general incapacity of children under seven,"¹¹ a child of this age is incapable of *contributory* negligence as a matter of law.¹² This conclusion of incapacity, while derived from the diminished ability of an infant to appreciate the consequences of his actions,¹³ also takes into consideration the public policy of permitting an infant plaintiff to recover for his injuries.¹⁴ The latter consideration is lacking in *DeLuca*. Nevertheless, the court rejected the significance of this factor in concluding that "the practical need for some simple and just rule is the same in this case as in *Holbrock*."¹⁵

Whether or not the need is actually the same, the court chose to treat the negligence issues in both cases on equal grounds since "the acts which constitute negligence are the same, whether that negligence is primary or secondary, and so too is the level of capacity and understanding necessary to a finding of negligence."¹⁶ To treat the issues otherwise, by allowing a distinction merely from the differing status of a minor as either a plaintiff or a defendant, could possibly lead to inconsistent results.¹⁷

⁷ *Ludtke v. Lake Shore & M.S. Ry. Co.*, 14 Ohio C. Dec. 120, 126 (1902), *rev'd on other grounds*, 69 Ohio St. 384, 69 N.E. 653 (1904) (in dictum involving the question of contributory negligence of a minor).

⁸ *Allstate Fire Ins. Co. v. Singler*, 9 Ohio App. 2d 102, 104, 223 N.E.2d 65, 66 (1967) (intentionally setting a fire to boxes while trespassing).

⁹ 14 Ohio St. 2d 27, 30, 236 N.E.2d 79, 81 (1968).

¹⁰ 11 Ohio St. 2d 185, 228 N.E.2d 628 (1967).

¹¹ *Id.* at 189, 228 N.E.2d at 630.

¹² *Id.*

¹³ *DeGroodt v. Skrbina*, 111 Ohio St. 108, 113, 144 N.E. 601, 603 (1924).

¹⁴ *Bellefontaine & Indiana Ry. Co. v. Snyder*, 18 Ohio St. 399, 408 (1868).

¹⁵ *DeLuca v. Bowden*, 42 Ohio St. 2d 392, 394, 329 N.E.2d 109, 111 (1975).

¹⁶ *Id.*

¹⁷ *Jorgensen v. Nudelman*, 45 Ill. App. 2d 350, 352, 195 N.E.2d 422, 424 (1963), illustrating that any distinction between contributory and primary negligence is absurd and inconsistent by the following example: In an action by an infant against an infant defendant, where both are injured and the defendant counterclaims against the plaintiff, both may ultimately be deemed incapable of contributory negligence (because of a conclusive presumption), yet both may theoretically recover since both are capable of primary negligence.

Other states have established seven as the age limit with respect to contributory negligence,¹⁸ yet the question whether this age limit is applicable to primary negligence is not determinable from case law in those states. Some courts have alleviated this ambiguity by expressly providing that the age or standard should be uniformly applied to both plaintiff and defendant minors.¹⁹ Whether a double standard exists in other jurisdictions²⁰ is subject to debate due to the infrequency of decisions which involve child defendants.²¹

DeLuca has thus formulated a consistent standard and clarified the status of the law in Ohio. The standard adopted however does not have widespread support. The general rule is that a child's age, intelligence, and experience under the circumstances should be specially considered²² inasmuch as there is a general public interest for their welfare and protection. "[T]he rule is equally applicable to child defendants."²³ A minority of states have set certain age limits below which children are considered incapable of primary negligence,²⁴ yet only seven states other than Ohio have set the age as high as seven.²⁵

The establishment of seven as the age below which negligence is legally impossible is subject to criticism. In addition to the setting of an age at a higher level than would be preferred,²⁶ it has been criticized as imposing a purely

¹⁸ See, e.g., *Willoughby v. Stiltz*, 387 S.W.2d 10 (Ky. Ct. App. 1965) (dictum); *Burns v. Eminger*, 81 Mont. 79, 261 P. 613 (1927); *Walston v. Greene*, 247 N.C. 693, 102 S.E.2d 124 (1958); *Sexton v. Noll*, 108 S.C. 516, 57 S.E. 129 (1918); cf. *Bush v. New Jersey & N.Y. Transit Co.*, 30 N.J. 345, 153 A.2d 28 (1959) (rebuttable presumption).

¹⁹ See, e.g., *Jorgensen v. Nudelman*, 45 Ill. App. 2d 350, 195 N.E.2d 422 (1963); *Queen Ins. Co. v. Hammond*, 374 Mich. 655, 132 N.W.2d 792 (1965); *Hamel v. Crosietier*, 109 N.H. 505, 256 A.2d 143 (1969). *Contra*, *Roberts v. Ring*, 143 Minn. 151, 152, 173 N.W. 437, 438 (1919).

²⁰ See generally 38 ORE. L. REV. 268 (1959), for a discussion of cases relevant to the double standard theory.

²¹ Note, *Contributory Negligence of Children in Indiana: Capacity and Standard of Care*, 34 IND. L.J. 511, 512-13 n. 15 (1959), concluding, "[t]he Indiana courts generally hold that an infant is liable for his torts, but no discussion of his standard of care has been found."

²² E.g., *Singer v. Marx*, 144 Cal. App. 2d 637, 642, 301 P.2d 440, 443 (1956). See also RESTATEMENT (SECOND) OF TORTS § 283A, at 14 (1965).

²³ RESTATEMENT (SECOND) OF TORTS § 283A, comment (a), at 14 (1965).

²⁴ See *Ellis v. D'Angelo*, 116 Cal. App. 2d 310, 253 P.2d 675 (1953) (four years); *Hamel v. Crosietier*, 109 N.H. 505, 256 A.2d 143 (1969) (dictum—five and one-half); *Verni v. Johnson*, 295 N.Y. 436, 68 N.E.2d 431 (1946) (four); *Connor v. Houtman*, 350 P.2d 311 (Okla. 1960) (five); *Shaske v. Hron*, 266 Wis. 384, 63 N.W.2d 706 (1954) (five and one-half).

²⁵ *Hatch v. O'Neill*, 231 Ga. 446, 202 S.E.2d 44 (1973) (thirteen); *Jorgensen v. Nudelman*, 45 Ill. App. 2d 350, 195 N.E.2d 422 (1963); *Fabre v. Lumbermen's Mut. Cas. Co.*, 167 So. 2d 448 (La. Ct. App. 1964); *Scottish Union & Nat'l Ins. Co. v. Prange*, 154 So. 2d 623 (La. Ct. App. 1963) (dictum); *Queen Ins. Co. v. Hammond*, 374 Mich. 655, 132 N.W.2d 792 (1965); *Seidlik v. Schneider*, 122 Neb. 763, 765, 241 N.W. 535, 536 (1932) (dictum); *Kuhns v. Brugger*, 390 Pa. 331, 340, 135 A.2d 395, 401 (1957) (dictum). See also WIS. STAT. ANN. § 891.44 (1966), which states: "It shall be conclusively presumed that an infant minor who has not reached the age of 7 shall be incapable of being guilty of contributory negligence or of any negligence whatsoever."

²⁶ "The weight of authority is in favor of a conclusive presumption of incapacity with respect

mechanical and arbitrary standard²⁷ which does not adequately reflect the differing rates of development exhibited by children.²⁸ There remains a question of whether any correlation between the rates of development of a child's sense of right and wrong, and his perception of danger and judgment of speeds exists.²⁹ Such objections and considerations lend credence to Justice Celebrezze's dissenting opinion that such a simple standard as this is prone to reach inaccurate results.³⁰

The greater significance of *DeLuca*, however, must be attributed to the imposition of a limit on a child's liability for an intentional tort. Although some exception is frequently applied when the negligence of a child is under scrutiny,³¹ no similar modification is accorded when the issue is one of intent. A distinction is generally asserted by the courts that, although a minor may be incapable of negligence due to his incapacity to foresee the consequences of his carelessness, foreseeability is not determinative for some intentional torts where the only intent required is that intent to do the physical act,³² or that intent to inflict an offensive bodily contact.³³ A lesser degree of maturity is necessary for the latter,³⁴ such that the courts cannot, as a matter of law, declare a child incapable of forming such intent.³⁵

While some appellate courts in Ohio had previously adhered to this view on the issues of trespassing children³⁶ and other "force type torts,"³⁷ the

to children between three and four years of age." Annot., 107 A.L.R. 4, 100 (1937) (concerning primarily contributory negligence).

²⁷ James, *The Qualities of the Reasonable Man in Negligence*, 16 MO. L. REV. 1, 24 (1951).

²⁸ *DeLuca v. Bowden*, 42 Ohio St. 2d 392, 397, 329 N.E.2d 109, 112 (1975) (Celebrezze, J., dissenting).

²⁹ 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 16.8, at 926 (1956). See also *Tyler v. Weed*, 285 Mich. 460, 280 N.W. 827 (1938), in which both the majority and dissenting opinions discuss the history, development, and reasoning of the issue of age limits for contributory negligence.

³⁰ 42 Ohio St. 2d 392, 397, 329 N.E.2d 109, 112.

³¹ See notes 22 and 24 *supra*.

³² *Allstate Fire Ins. Co. v. Singler*, 9 Ohio App. 2d 102, 104, 223 N.E.2d 65, 66 (1967), *rev'd on other grounds*, 14 Ohio St. 2d 27, 236 N.E.2d 79 (1968) (trespass); see Annot., 67 A.L.R.2d 570, 573 (1959).

³³ *E.g.*, *Ellis v. D'Angelo*, 116 Cal. App. 2d 310, 317, 253 P.2d 675, 678 (1953); *Baldinger v. Banks*, 26 Misc. 2d 1086, 1087, 201 N.Y.S.2d 629, 631 (Sup. Ct. Tr. Term 1960); *cf.* RESTATEMENT (SECOND) OF TORTS § 16, at 27 (1965).

³⁴ *Jorgensen v. Nudelman*, 45 Ill. App. 2d 350, 353, 195 N.E.2d 422, 425 (1963).

³⁵ *Cleveland Park Club v. Perry*, 165 A.2d 485, 488 (D.C. Mun. Ct. App. 1960).

³⁶ See *Leesman v. Moser*, 32 N.E.2d 448 (Ohio Ct. App. 1935); *King v. Cipriani*, 32 N.E.2d 446 (Ohio Ct. App. 1935); *Ludden v. Columbus & Cincinnati Midland R.R. Co.*, 7 Ohio N.P. 106, 9 Ohio Dec. 793 (C.P. 1900) (all three decisions finding an infant plaintiff not a trespasser despite the courts' assertions that infants may, in other instances, be legally capable).

³⁷ *Shiflet v. Segovia*, 40 Ohio App. 2d 244, 318 N.E.2d 876 (1974), in which the allegation was

supreme court has chosen to disregard this distinction. It has instead completely absolved infants under seven and, as a result, those persons injured have only a limited recourse under Ohio law.³⁸ This is contrary to the law of most jurisdictions, which consider the question of whether an infant under seven is capable of forming the requisite intent³⁹ as a factual determination.⁴⁰

The *DeLuca* court's rationale for its position rests upon the blamelessness of the child. The court supported its rationale by analogizing to the common law treatment of infants accused of crimes and by comparing the blameworthiness of an act of God with that of a child of tender years.⁴¹ The former reference has been discredited as a biblical departure having no legal or logical substance,⁴² while the latter is without a logical nexus between those natural occurrences and the acts attributed to a minor.⁴³

CONCLUSION

Notwithstanding this vulnerable basis, the rule formulated may not be entirely unsound when due consideration is given to the generally low incidence of intentional injuries from this segment of the populace, the lower risk of severe injuries, and the policy of protecting infants and young families

found sufficient to state a cause of action against a minor (no age indicated) for intentionally throwing a rock.

³⁸ OHIO REV. CODE ANN. § 3109.09 (Page 1972), allows an action against the parents of an infant who wilfully damages the property of the plaintiff (recovery limited to \$2,000). Thus, by its language, the legislature expresses its acknowledgment that a finding of wilful intent is possible for the purposes of this statute.

³⁹ *Ellis v. D'Angelo*, 116 Cal. App. 2d 310, 317, 253 P.2d 675, 678 (1953), which allowed an action for battery against a four-year-old boy for pushing his babysitter. See 27 So. CAL. L. REV. 214 (1953) for a discussion of the *Ellis* case.

⁴⁰ *Weisbart v. Flohr*, 260 Cal. App. 2d 281, 67 Cal. Rptr. 114 (1969) (reversing a judgment in favor of a seven-year-old boy who fired an arrow at a girl intending to scare her—assault & battery); *Seaburg v. Williams*, 16 Ill. App. 2d 295, 148 N.E.2d 49 (1958), *aff'd on other grounds*, 23 Ill. App. 2d 25, 161 N.E.2d 576 (1959) (allegation that a six-year-old child set fire to a garage was sufficient to state a cause of action for an intentional tort but not a negligent tort); *Munden v. Harris*, 153 Mo. App. 652, 664, 134 S.W. 1076, 1080 (1911) (dictum—infant is civilly liable for damages for a trespass); *Baldinger v. Banks*, 26 Misc. 2d 1086, 201 N.Y.S.2d 629 (Sup. Ct. Tr. Term 1960) (six-year-old boy who pushed a girl is capable of intent for a battery); *Garratt v. Daley*, 46 Wash. 2d 197, 279 P.2d 1091 (1955), *aff'd*, 49 Wash. 2d 499, 304 P.2d 681 (1956) (finding a child five and one-half years old liable for battery for pulling a chair out from under the plaintiff); *Huchting v. Engel*, 17 Wis. 230 (1863) (six-year-old held liable for trespass for breaking down shrubbery and destroying flowers). See also *Bohlen, Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924), for an historical analysis of trespass and intent in conjunction with an infant's status.

⁴¹ *DeLuca v. Bowden*, 42 Ohio St. 2d 392, 395, 329 N.E.2d 109, 111 (1975).

⁴² W. PROSSER, LAW OF TORTS § 32, at 156 (4th ed. 1971). Furthermore, this analogy is faulty inasmuch as the object of a criminal action is punishment, whereas the object of a civil action is compensation. Therefore, the intent required for criminal responsibility is of a higher degree than the intent necessary for civil liability. W. CLARK & W. MARSHALL, LAW OF CRIMES § 6.12, at 440 (7th ed. 1967).

⁴³ *DeLuca v. Bowden*, 42 Ohio St. 2d 392, 396, 329 N.E.2d 109, 112 (1975) (Brown, J., concurring).

from financial and legal headaches.⁴⁴ These considerations are wholly speculative and would not seem to outweigh the policy of allowing a party to recover for his injuries. It has been said that the law of torts is primarily concerned with the compensation of an injured party rather than the moral guilt of the wrongdoer.⁴⁵ This is interpreted to mean that liability should not be imposed merely because one acts culpably but causes no injury. Yet where injury actually results from the act of another, as long as some degree of a wrong is evidenced, it would seem from this proposition that the law of torts would seek to compensate for the injury incurred.

Since it is generally recognized that infants maintain the ability and awareness to form the requisite intent,⁴⁶ only scant support has been given to the imposition of an absolute limit on an infant's liability for an intentional tort.⁴⁷ As Justice Celebrezze notes in his dissenting opinion,⁴⁸ regardless of the moral culpability of an infant, it is his act which causes injury and therefore it is he who should be held responsible. To say that an infant under seven is incapable of a legal wrong "is to ignore common sense as well as common experience."⁴⁹

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⁴⁴ *But see* James, *Accident Liability Reconsidered: Impact of Liability Insurance*, 57 *YALE L.J.* 549, 554-56 (1948), in which the author, although dealing primarily with auto-caused injuries, suggests liability insurance more often than not covers any injuries an infant may cause.

⁴⁵ W. PROSSER, *LAW OF TORTS* § 134, at 996 (4th ed. 1971).

⁴⁶ *See* notes 22 and 24 *supra*.

⁴⁷ *See* *Queen Ins. Co. v. Hammond*, 374 Mich. 655, 132 N.W.2d 792 (1965), where two infants under seven were conclusively presumed incapable of both a negligent and an intentional tort for setting a fire (two judges dissenting); *cf.* *Hatch v. O'Neill*, 231 Ga. 446, 202 S.E.2d 44 (1973) (affirming the dismissal of an action against a nine-year-old who fired a rock with a slingshot, the court held that a child who has not reached the age of criminal responsibility [13] is not liable for any tort) (three judges dissenting). The court based its decision on a construction of a state statute (GA. CODE ANN. § 105.1806 [1968]) which provides: "Infancy is no defense to an action for a tort, provided the defendant has not arrived at those years of discretion and accountability prescribed by this Code for criminal offenses."

⁴⁸ 42 Ohio St. 2d 392, 397, 329 N.E.2d 109, 112.