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Negligence--Children Under Disability--Infant Three Years and Two Months Old Conclusively Presumed Incapable of Negligence (Verni v. Johnson, 295 N.Y. 436 (1946))

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should be moulded to accomplish equitable results. The court therefore held that an equitable result would be brought about if the policy were regarded as reinstated, any necessary adjustments being made with respect to premiums and dividends, and if the surrender value were credited to the company as of the date the company paid it to the insured. Plaintiff then would recover the balance of the total value of the insurance.

B. H. A.

NEGLIGENCE—CHILDREN UNDER DISABILITY—INFANT THREE YEARS AND TWO MONTHS OLD CONCLUSIVELY PRESUMED INCAPABLE OF NEGLIGENCE.—Defendant, approaching an intersection while driving along in his automobile, struck the plaintiff's son who darted out from between two parked cars into the path of defendant's automobile. The child died that same day. At the trial, evidence was introduced showing the deceased to have been brighter and more mentally alert than the normal child of his age. The court submitted to the jury the question of defendant's negligence while driving the automobile which struck the child, and also an issue as to the contributory negligence of the deceased, who was an infant of three years and two months at the time of the accident. Plaintiff's counsel requested a charge that "a child of the age of three years and two months is *non sui juris* and incapable of being guilty of negligence." The request was refused and the jury brought in a verdict for the defendant. The Appellate Division affirmed the lower court's verdict [1] and plaintiff appeals by permission to the Court of Appeals. *Held,* reversed and a new trial granted. A child of the age of three years and two months is *non sui juris* and incapable of being guilty of negligence. *Verni v. Johnson,* 295 N. Y. 436, 68 N. E. (2d) 431 (1946).

At what age a child is presumed to be incapable of contributory negligence has long divided the courts.[2] In the United States, the weight of authority, as regards a child between three years and four years of age is in favor of a conclusive presumption of incapacity.[3] However, many courts hold that age alone does not determine whether a child is *sui juris* but that experience, maturity, and intelligence also enter into the picture and it is a question for the jury to decide.[4] It

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[1] 269 App. Div. 997, 58 N. Y. S. (2d) 382 (2d Dep't 1945).

[2] "The law does not disregard variations in capacity among children of the same age, and does not arbitrarily fix an age at which the duty to exercise some care begins or an age at which an infant must exercise the same care as an adult." Camardo v. New York State Ry., 247 N. Y. 111, 116, 159 N. E. 879, 880 (1928).

[3] Note (1937) 107 A. L. R. 4, 100.

[4] Leach v. St. Louis-San Francisco R. R., 48 F. (2d) 722 (C. C. A. 6th, 1931) (experience, mental capacity and particular circumstances of case);

must be remembered that the degree of care required by an infant of tender years is not to be confused with that required by an adult, but is to be measured by the maturity and capacity of the individual.[5] The conduct of a child of tender years is judged by the standard of behavior one would expect from a child of like age, intelligence, and experience.[6]

But if the care required of a child is to be measured by such considerations as its maturity, capacity, discretion, and knowledge, there must, of course, be an age at which no care can be required of a child, an age at which the doctrine of contributory negligence can have no application. In *Jacobs v. Koehler Sporting Goods Co.*,[7] the court held that an infant may be of such tender years as to be incapable of personal negligence and at such age the infant is termed *non sui juris*. In the case of very young children, one or two years old, the question seldom arises, but as we progress above those ages, there are so many conflicting decisions as to make futile any attempt to set the age of which it can be said that the conclusive presumption of incapacity ceases.

D. L.

PARENT AND CHILD—PARENT'S LIABILITY FOR LEGAL SERVICES FURNISHED THE CHILD—RIGHT OF CLIENT TO DISCHARGE ATTORNEY.—Defendant's seventeen year old daughter was indicted on criminal charges. Defendant retained an attorney to defend his daughter. There was some evidence to indicate that the attorney hired by the defendant did not take all necessary precautions for the protection of his client. The daughter, prior to the termination of the criminal proceedings against her, discharged the attorney secured by the defendant and retained counsel of her own choice. This second attorney is the plaintiff in this action. The plaintiff predicates his action for the recovery of the value of his professional services upon an implied promise on the part of the defendant to pay for necessaries furnished to his infant daughter. At the close of a jury trial the Municipal Court dismissed the plaintiff's complaint on its merits, holding that as a matter of law the defendant had fur-

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Marfyak v. New England Transportation Co., 120 Conn. 46, 179 Atl. 9 (1935) (age, experience and judgment); Lesage v. Largey Lumber Co., 99 Mont. 372, 43 P. (2d) 896 (1935) (experience, intelligence and capability); Davis v. Bailey, 162 Okla. 86, 19 P. (2d) 147 (1933) (intelligence, experience, discretion, previous training, maturity, alertness, and nature of danger encountered); Camardo v. New York State Ry., 247 N. Y. 111, 159 N. E. 879 (1928) (age and capacity); *see* PROSSER ON TORTS (1941) § 36, HARPER, THE LAW OF TORTS (1933) § 141.

[5] Finkelstein v. N. Y. C. and H. R. R. R., 41 Hun 34, 40 (1886).

[6] RESTATEMENT, TORTS § 283.

[7] 208 N. Y. 416, 102 N. E. 519 (1913).