



Winter 1965

Contributory Negligence—Minor Plaintiff—Drowning Cases—No Presumption of Negligence—Mellas v. Lowdermilk, 58 N.M. 363, 271 P.2d 399 (1954); Martinez v. C. R. Davis Contracting Co., 73 N.M. 474, 389 P.2d 597 (1964)

Thomas L. Bonham

Recommended Citation

Thomas L. Bonham, *Contributory Negligence—Minor Plaintiff—Drowning Cases—No Presumption of Negligence—Mellas v. Lowdermilk, 58 N.M. 363, 271 P.2d 399 (1954); Martinez v. C. R. Davis Contracting Co., 73 N.M. 474, 389 P.2d 597 (1964)*, 5 NAT. RES. J. 172 (1965).

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COMMENTS

CONTRIBUTORY NEGLIGENCE—MINOR PLAINTIFF—DROWNING CASES—NO PRESUMPTION OF NEGLIGENCE*—A minor is not required to exercise as high a degree of care for his own protection as an adult. Due care of a minor need be only that degree of care commensurate with his age,¹ maturity, intelligence, and experience.² This deviation from the "reasonable man" standard is justified on the grounds that, in the absence of evidence to the contrary, a minor is lacking in judgment, *i.e.*, his normal state is that of recognized incapacity.³

As a child grows older his "capacity," or ability to protect himself, normally increases. Measuring this increase is, of course, a difficult task. A few jurisdictions have established a system of rebuttable presumptions for this purpose. This system provides that a child under the age of seven lacks the maturity to be capable of being guilty of contributory negligence;⁴ a child between seven and fourteen has such requisite maturity; and minors above the age of fourteen may be chargeable as an adult⁵ or unable to recover under the attractive

* *Mellas v. Lowdermilk*, 58 N.M. 363, 271 P.2d 399 (1954); *Martinez v. C.R. Davis Contracting Co.*, 73 N.M. 474, 389 P.2d 597 (1964).

1. Although only "age" is mentioned in some cases, this is because courts presume, in the absence of a claim of inferiority, that the child has the intelligence and experience common to children of its age. *Verdon v. Crescent Auto. Co.*, 80 N.J.L. 199, 76 Atl. 346 (Sup. Ct. 1910).

2. *Thompson v. Anderman*, 59 N.M. 400, 285 P.2d 507 (1955); *Archuleta v. Jacobs*, 43 N.M. 425, 94 P.2d 706 (1939).

3. *Charbonneau v. MacRury*, 84 N.H. 501, 153 Atl. 457 (1931), Annot., 73 A.L.R. 1266 (1931). This opinion is a scholarly discussion of both primary and contributory negligence of a minor.

4. *Wilderman, Presumptions Existing in Favor of the Infant in Re: The Question of an Infant's Ability to be Guilty of Contributory Negligence*, 10 Ind. L.J. 427 (1935); 65 C.J.S. *Negligence* § 218 (1950).

5. *Sheetz v. Welch*, 89 Ga. App. 749, 81 S.E.2d 319 (1954). In dicta the court stated that a fourteen year old boy was presumptively chargeable as an adult in the operation of a motorcycle, applying Ga. Code Ann. § 105-204 (1956):

Due care in a child of tender years is such as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation under investigation.

In *Davis v. Jones*, 60 N.M. 470, 292 P.2d 773 (1956), the jury found a fourteen year old boy guilty of contributory negligence in the operation of a motorcycle. Without referring to any presumption, the finding was affirmed on appeal. The court simply stated that the boy was capable of riding and controlling a motorcycle and old enough to know and appreciate the danger.

nuisance doctrine.⁶ Such a system has been criticized as being arbitrary, mechanical, and contrary to fact.⁷ New Mexico follows what is considered the better view and refuses to adopt any system of presumptions based solely on the age of the child. Rather, the New Mexico court has recognized that the age at which mental and physical maturity is reached is dependent upon many factors each varying with the particular child.⁸ Accordingly, it has been held that even a seventeen year old should not have his standard of care measured by adult standards.⁹

Despite the general disfavor of presumptions based solely on age, other presumptions regarding the capacity of a minor to recognize and avoid particular dangers are widely accepted. For example, if the minor participates in athletics¹⁰ or engages in an activity usually reserved for adults, such as drinking¹¹ or driving,¹² he is expected to be capable of coping with the incident dangers. A minor is also presumed to be aware, at an early age, of those hazards common to nature.¹³ The most common application of this presumption has been to the danger of drowning.¹⁴ Before 1964, the leading New Mexico

6. *Keck v. Woodring*, 201 Okla. 665, 208 P.2d 1133 (1948); *Louisville & N.R.R. v. Hutton*, 220 Ky. 277, 295 S.W. 175 (1927), Annot., 53 A.L.R. 1328 (1927).

7. For a general criticism of this system of presumption see: Shulman, *The Standard of Care Required of Children*, 37 Yale L.J. 618 (1928); 1 Thompson, *Commentaries on the Law of Negligence* §§ 307-18 (2d ed. 1901); also, 38 Am. Jur. *Negligence* § 205 (1941).

8. *Thompson v. Anderman*, 59 N.M. 400, 285 P.2d 507 (1955). This case involved a plaintiff thirteen years old but having the mentality of a ten year old. The plaintiff was injured in traffic after having been let off defendant's bus in a dangerous location. The court commented that although maturity cannot be measured with mathematical accuracy, it is universally recognized that it is not reached at the age of thirteen.

9. *McMullen v. Ursuline Order of Sisters*, 56 N.M. 570, 246 P.2d 1052 (1952). A directed verdict for the defendant, based on a finding that the plaintiff was guilty of contributory negligence as a matter of law, was reversed on appeal. The defendant school had allowed the plaintiff and other students to help mine shale for a school project. At the entrance to the "mine" was an overhang of some five feet supported by what appeared to be solid rock. The plaintiff was injured when this overhang collapsed. After commenting that the plaintiff was inexperienced in mining and had not seen the mine previously, the court concluded that a jury could reasonably find him free of contributory negligence. From a reading of the fact situation one could surmise that the hazard was, in fact, so latent that an adult might not recognize the danger.

10. *Englehart v. Phillips*, 136 Ohio St. 73, 23 N.E.2d 829 (1939).

11. *Robinson v. Fidelity & Cas. Co.*, 135 So. 2d 607 (La. App. 1961).

12. See *Robinson v. Kathryn*, 23 Ill. App. 2d 5, 161 N.E.2d 477 (1959), Annot., 74 A.L.R.2d 1089 (1960); and cases cited in note 5 *supra*.

13. Prosser, *Trespassing Children*, 47 Calif. L. Rev. 427 (1959).

14. See *McKenna v. City of Shreveport*, 16 La. App. 234, 133 So. 524 (1931); see also cases cited in Prosser, *Trespassing Children*, 47 Calif. L. Rev. 427, 456 (1959). Dean Prosser goes on to itemize similar dangers such as fire, falling from heights, or into excavations, ordinary visible machinery, sliding or caving soil, etc.

decision expounding this presumption was *Mellas v. Lowdermilk*.¹⁵ The court in *Mellas* established, by way of dicta, a presumption that a nine year old plaintiff had the capacity to comprehend and avoid the dangers associated with a body of water. However, a later New Mexico case¹⁶ declined to follow *Mellas* on this point, and it can safely be said that there exists no presumption in New Mexico regarding the age at which a minor is held to appreciate dangers common to bodies of water. The decision not to follow *Mellas* was a proper one.

In *Mellas*, a nine year old plaintiff drowned while swimming in defendant's irrigation pond. Although the defendant knew the pond was used for swimming, he had not opened the pond for public use; "no trespassing" signs had been posted on the fences surrounding the premises. Furthermore, the pond was located in a relatively isolated area. The trial court entered judgment upon a verdict for the plaintiff. The New Mexico Supreme Court on appeal, *held*, Reversed.¹⁷ The supreme court found no basis for a finding of the defendant's primary negligence. Furthermore, the court recognized the weight of authority holding that, in the absence of an unusual element of danger, bodies of water were patent dangers and not attractive nuisances.¹⁸ This ruling, it was felt, was consistent with public policy:

[B]odies of water . . . are extremely useful in this state, not only to defendants and to the mining industry in the necessary and proper conduct of their business, but to livestock men, farmers and fruit growers . . . and are indispensable for the maintenance of life and property.¹⁹

The supreme court in *Mellas* went on to say that the plaintiff could not have recovered in any event. Even had the defendant been negligent there was "nothing in the record to contravene the legal pre-

15. 58 N.M. 363, 271 P.2d 399 (1954).

16. *Martinez v. C.R. Davis Contracting Co.*, 73 N.M. 474, 389 P.2d 597 (1964).

17. *Mellas v. Lowdermilk*, 58 N.M. 363, 369, 271 P.2d 399, 402 (1954).

18. The *Mellas* decision was followed on the question of attractive nuisance in *Foster v. United States*, 183 F. Supp. 524 (D.N.M. 1959), *aff'd without opinion*, 280 F.2d 431 (10th Cir. 1960). Recovery was sought for the drowning of children aged four and seven in a canal maintained by the United States Government. The court assumed that the canal was not a "dangerous instrumentality," but, conceding it had been, in any event the danger should have been apparent to the mother.

19. *Mellas v. Lowdermilk*, 58 N.M. 363, 369, 271 P.2d 399, 403 (1954).

sumption that . . . a boy nine years old, *had the capacity to comprehend and avoid the danger*. . . ."²⁰ and failure to do so made the plaintiff guilty of contributory negligence as a matter of law.

Ten years later, *Martinez v. C. R. Davis Contracting Co.*²¹ was decided. In *Martinez*, a fourteen year old plaintiff drowned in a pool formed by rain filling an excavation. Unlike *Mellas*, the defendant's negligence was well established. The pool was not in an isolated area but rather was located in a city street, the excavation having been made for the purpose of constructing a sewer line. The defendant-contractor had failed to put up barricades, there were insufficient watchmen in the area, and the defendant had actual knowledge that children played in and around the excavation.

On the issue of contributory negligence, it appeared that the plaintiff lived near the excavation and that he had been warned by his parents to stay away from the area because of the danger. The evidence introduced concerning the plaintiff's capacity was that he was of average intelligence for his age and made average grades in school. The plaintiff was also a beginning swimmer. The jury was given the standard instruction as to the degree of care required of a minor and returned a verdict for the plaintiff. Relying on the decision in *Mellas v. Lowdermilk*, the defendant appealed, contending that the plaintiff was guilty of contributory negligence as a matter of law. The supreme court on appeal, *held*, Affirmed.²² The supreme court stated that if reasonable minds could differ as to whether the child realized the risk in coming within the dangerous area the decision should be affirmed; there being no reason for a different rule where ponds or lakes are involved than where other dangerous instrumentalities cause the injury. Further, the supreme court said, insofar as *Mellas* states a rule of due care of a minor differently, it is not controlling.

It may be noted that the *Mellas* case was tried on the attractive nuisance theory and the *Martinez* opinion did not mention this doctrine, but applied general negligence law. The New Mexico Supreme Court did not draw and has not drawn any meaningful distinctions between the two areas of law,²³ and for the purpose of discussing the

20. *Id.* at 366, 271 P.2d at 401. (Emphasis the court's.)

21. 73 N.M. 474, 389 P.2d 597 (1964).

22. *Id.* at 477, 389 P.2d at 599. Two justices dissented. One found no breach of a legal duty owing to plaintiff, and the second dissented on the grounds that the plaintiff was contributorily negligent as a matter of law.

23. See *Klaus v. Eden*, 70 N.M. 371, 375, 374 P.2d 129, 131 (1962): "As a matter of

contributory negligence of older children there appear to be none.²⁴ In either legal theory the capacity of the minor to appreciate the particular risk and whether he used due care to avoid his injury are generally considered to be questions of fact.²⁵ The attitude of the courts appears to be that the jury's knowledge of human nature generally, and of children in particular, makes the jury so qualified to resolve these issues that even expert testimony as to children's behavior would be a mere waste of time.²⁶

The courts also recognize, however, the tendency of a jury to be overly sympathetic with child-plaintiffs. This temptation is especially strong if the jury realizes that an obviously negligent defendant will be completely exonerated if contributory negligence is found.²⁷ Factors improperly and perhaps unreasonably influencing the mind of the jury supposedly will have less effect upon the mind of the judge. His training has "impressed upon his mind the necessity of fixed laws, and has taught him how destructive of these is the yielding to sympathy."²⁸

Confronted with these divergent views, the courts' problem is to develop a system of criteria to be used to determine whether a particular situation is properly decided as a matter of law, as in the *Mellas* case, or by the jury, as in *Martinez*. Traditionally, if a minor in possession of all his faculties fails to avoid a simple or obvious hazard, the court will find him contributorily negligent as a matter of law. A minor, it is contended, by the time he reaches his teens and

fact, we see nothing different in the so-called law of attractive nuisance and the general law of negligence, except that involved is a recognition of the habits and characteristics of very young children." Cf. *McFall v. Shelley*, 70 N.M. 390, 374 P.2d 141 (1962).

24. See *Hoff v. Natural Ref. Prods. Co.*, 38 N.J. Super. 222, 118 A.2d 714, 722 (Super. Ct. 1955):

There has been a pronounced tendency on the part of many courts to equate the factor of appreciation of the risk or danger by the child plaintiff in this kind of case [attractive nuisance] with the defense of contributory negligence. . . . While it is comprehensible that, conceptually, there are separate and distinct considerations, the first going to the existence of the duty from the defendant to the particular plaintiff and the other to a defense, assuming the existence of a primary duty . . . it is obvious that the capacity of a particular child to perceive and appreciate the risk in a specific situation is an integral component of the concept of contributory negligence.

25. 1 Thompson, *Commentaries on the Law of Negligence* §§ 316-18 (2d ed. 1901); see also the cases collected in Annot., 77 A.L.R.2d 932 (1961).

26. Keet, *Contributory Negligence of Children*, 12 Clev.-Mar. L. Rev. 395 (1963).

27. James, *Contributory Negligence*, 62 Yale L.J. 691 (1953). Although James was writing about adult plaintiffs, would not the same be true, *a fortiori*, when the plaintiff is a child?

28. 3 Cooley, *Torts* § 481 (4th ed. 1932).

probably before, knows as well as an adult that fire will burn, a wasp will sting, water will drown, a locomotive will kill, or cold will freeze, and he may be held to know these things as a matter of law.²⁹

This contention has been used not only to determine whether the plaintiff was contributorily negligent, but also in deciding if the defendant should be liable for the injury. Because a great many of the child-plaintiff cases are tried on the attractive nuisance theory, a great many defendants are owners or occupiers of land. There should be certain categories of dangers that are so obvious that the landowner may safely assume that any child who is of sufficient age to be without parental supervision will appreciate these dangers and avoid them. Bodies of water are one such category of danger, being not only obvious hazards, but also so common, natural, and necessary that they are not the kind of "dangerous instrumentalities" that are attractive nuisances.³⁰ Only three jurisdictions have held otherwise and then only when the water serves no useful purpose³¹ or is located where numbers of young children are known to play.³²

The general pattern under the traditional analysis, then, is that it is difficult for an older child-plaintiff to recover for drowning. Additional factors may be present in a given situation to create exceptions. If the body of water is made abnormally dangerous by some unusual characteristic, the risk of injury is so increased that liability may follow. Certainly the fact that the body of water is abnormally dangerous presupposes that it is no longer a common and obvious hazard; and, therefore, the main reason for denying recovery either disappears or diminishes.

If it can be shown that the body of water was unusually dangerous and that the defendant was primarily liable for the resulting injury, it remains to be decided whether the question of the plaintiff's contributory negligence should be decided by the court or by the jury. The propriety of submitting the case to the jury is usually determined by interrelating the factors of (a) the degree of maturity of the child and (b) the latency, or *per contra*, the obviousness of the hazard. If

29. See *McGee v. Wabash R.R.*, 214 Mo. 530, 114 S.W. 33 (1908).

30. Annot., 8 A.L.R.2d 1254 (1948); *Lockridge v. Standard Oil Co.*, 124 Ind. App. 257, 114 N.E.2d 807 (1953); *Bass v. Quinn-Robbins Co.*, 70 Idaho 308, 216 P.2d 944 (1950); *Emond v. Kimberly-Clark Co.*, 159 Wis. 83, 149 N.W. 760 (1914).

31. *Banker v. McLaughlin*, 146 Tex. 434, 208 S.W.2d 843 (1948); *Renno v. Seaboard Air Line Ry.*, 120 S.C. 7, 112 S.E. 439 (1922).

32. *Peters v. City of Tampa*, 115 Fla. 666, 155 So. 854 (1934).

a question is raised by such an analysis upon which fair-minded men could reasonably differ, the case is submitted to the jury.³³

A few examples illustrate this interrelation of factors. In cases where the water itself is not visible because of a collection of scum or refuse on the surface, the question is best left to the jury.³⁴ Likewise, the jury should decide the question if the hazard is a swift undercurrent in a swimming area.³⁵ In such instances, the maturity of the plaintiff is incidental in comparison to the latency of the hazard; it being unlikely that even an adult could be expected to recognize the danger. The plaintiff may be injured by wading into a sudden drop off,³⁶ by relying upon a "false bank" which thaws and collapses,³⁷ or by diving against a pipe beneath the surface of a swimming pool.³⁸ Although more obvious, these hazards are still not so patent as to preclude a teenage plaintiff from having a jury determination of his contributory negligence. Conversely, the addition of a danger no more latent than slippery sides on an otherwise ordinary dirt reservoir is not sufficient to prevent the dismissal of the complaint of a fourteen year old plaintiff.³⁹ *A fortiori*, if no unusual danger is involved, the obviousness of the danger of drowning prevents recovery by children fourteen and over as a matter of law.⁴⁰

The fact that the *Martinez* case escapes this traditional approach is best pointed out by comparing the attitude of the New Mexico court in that case to the attitude of the Texas Supreme Court in

33. *Hoff v. Natural Ref. Prods. Co.*, 38 N.J. Super. 222, 118 A.2d 714 (Super. Ct. 1955). In this opinion Justice Conford compiled a cross sampling of cases involving different kinds of attractive nuisances and plaintiffs from thirteen to fifteen years old.

34. *Cicero State Bank v. Dolese & Shepard Co.*, 298 Ill. App. 290, 18 N.E.2d 574 (1939); *cf. Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943).

35. *Perkins v. Byrnes*, 364 Mo. 849, 269 S.W.2d 52 (1954).

36. *City of Altus v. Millikin*, 98 Okla. 1, 223 Pac. 851 (1924). However, the plaintiff will not get to the jury even if he is younger (under eleven) and has been somehow warned of the drop off. See *Phipps v. Mitze*, 116 Colo. 288, 180 P.2d 233 (1947).

37. *Windsor Reservoir & Canal Co. v. Smith*, 90 Colo. 464, 21 P.2d 1116 (1933).

38. *Liguori v. City of Philadelphia*, 351 Pa. 494, 41 A.2d 563 (1945).

39. *Massie v. Copeland*, 149 Tex. 319, 233 S.W.2d 449 (1950).

40. The particular age at which a minor plaintiff is charged with awareness of the danger varies from jurisdiction to jurisdiction. See *City of Evansville v. Blue*, 212 Ind. 130, 8 N.E.2d 224 (1937) (eleven); *Turner v. City of Moberly*, 224 Mo. 683, 26 S.W.2d 997 (1930) (fourteen); *McFarland v. Grau*, 305 S.W.2d 91 (Mo. App. 1957) (fifteen); *Adams v. Brookwood Country Club*, 16 Ill. App. 2d 263, 148 N.E.2d 39 (1958). *Adams* refused to follow *Cicero State Bank v. Dolese & Shepard Co.*, 298 Ill. App. 290, 18 N.E.2d 574 (1939) (see note 34 *supra*), which had allowed a fourteen year old to recover for drowning after falling through what appeared to be solid ground and denied recovery to a nine year old who drowned in a stream "as dangerous as any other stream but not more so." *But see contra, Smith v. Evans*, 178 Kan. 259, 284 P.2d 1065 (1955) (thirteen year old plaintiff).

Massie v. Copeland.⁴¹ Both cases involved a fourteen year old plaintiff who drowned in an utterly useless body of water located in a populous area. In both cases, the defendant's primary negligence having been established,⁴² the contributory negligence of the plaintiff was a decisive factor. Although the fact patterns of both cases were substantially identical, the results were not. Martinez was allowed to recover, but in *Massie* the Texas Supreme Court took judicial notice that

a normal fourteen year old boy is of high school age. He is well advanced in Boy Scout activities if a member of that organization. If not a member of it, he nevertheless has spent enough time outdoors to understand its attractions and its dangers.⁴³

The Texas court held that the plaintiff was guilty of contributory negligence as a matter of law.

Martinez is the prime example of the postulate that the New Mexico Supreme Court is very liberal in allowing the child-plaintiff the individualized determination of his negligence afforded by a jury verdict.⁴⁴ The objective of such a policy seems to have merit. When a court substitutes its judgment for that of the jury of what is to be expected of a particular child there always exists the possibility that a court might be mistaken. If a court is, in fact, mistaken, then a negligent defendant is exonerated. Assuming one of the goals of jurisprudence to be the prevention of the recurrence of misfortunes like drownings, it seems better to give the plaintiff the benefit of the doubt afforded by a jury determination, even though the jury might be sympathetic to the plaintiff. The plaintiff is motivated by his own instincts of self preservation to prevent such recurrences; the defendant should have the incentive created by an imposition of liability.

When the *Mellas* opinion created the presumption that children nine or older are contributorily negligent if they should drown in an

41. 149 Tex. 319, 233 S.W.2d 449 (1950).

42. Texas has applied the attractive nuisance doctrine to similar water hazards. See *Banker v. McLaughlin*, 146 Tex. 434, 208 S.W.2d 843 (1948); note 31 *supra*.

43. *Massie v. Copeland*, 149 Tex. 319, 322, 233 S.W.2d 449, 452 (1950).

44. In connection with this liberal policy see also *Zamora v. J. Korber & Co.*, 59 N.M. 33, 278 P.2d 569 (1955). The defendant in the *Zamora* case sold a rifle to the twelve year old plaintiff in violation of a city ordinance. The plaintiff was injured when he fired the rifle at a rock and the rebounding bullet struck his eye. The plaintiff testified that he had fired guns on several occasions and knew that they were extremely dangerous. On this evidence the trial court directed a verdict for the defendant on the grounds that the plaintiff was guilty of contributory negligence. The supreme court reversed, holding that, in spite of the plaintiff's own statements, the question should be resolved by the jury.

open body of water, it did so needlessly. The presumption was merely a buttressing argument to the finding that the defendant was not negligent. This same presumption has been used in this same manner in other jurisdictions, the end result being likewise unnecessary statements that children of seven "instinctively" know the dangers of drowning—a very tenuous position at best.⁴⁵ Perhaps other courts feel that without such a presumption it will be difficult to find satisfactory criteria by which to limit defendants' liability. In any event, the *Mellas* presumption has been interred in New Mexico. Since *Mellas* occupied an incongruous place in New Mexico's generally liberal scheme of determining the contributory negligence of a child-plaintiff, few should mourn its passing.

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45. See, e.g., *Betts v. City & County of San Francisco*, 108 Cal. App. 2d 701, 239 P.2d 456 (1952); *Polk v. Laurel Hill Cemetery Ass'n*, 37 Cal. App. 624, 174 Pac. 414 (1918).