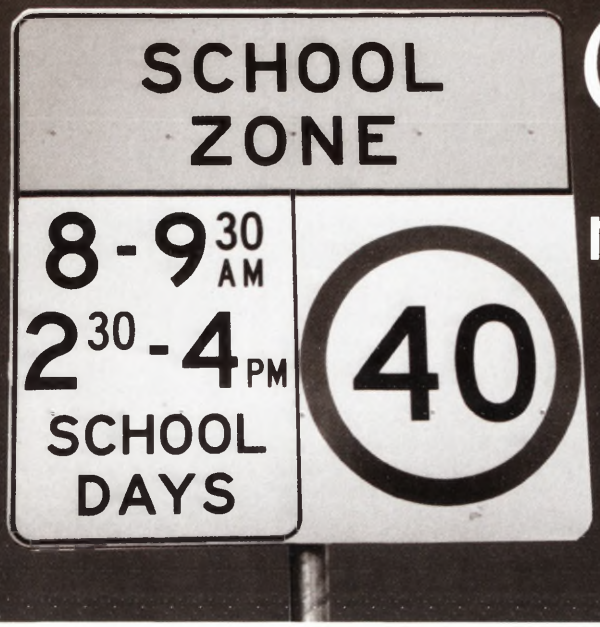
ANTHONY WRIGHT, QLD



Contributory negligence *and* infants

Various common law decisions have shown that the courts generally determine an infant plaintiff's contributory negligence by considering the level of knowledge and understanding expected of a child the same age.

INTRODUCTION

To what degree are infants responsible for their actions? Generally, it has been held in various jurisdictions in Australia and also the High Court[1] that a minor's duty of care for themselves is nil until about five years of age.

This usually means that no reduction in damages can arise from contributory negligence in personal injury claims when the plaintiff is below five years old.

A child's state of understanding and knowledge is the most important factor in assessing the appropriate reduction for contributory negligence matters. A similar process will also apply to claims involving people without capacity.[2]

This paper will examine decisions from various jurisdictions and the comparative reductions for contributory negligence.

REVIEW OF THE COMMON LAW

While it is generally accepted that a minor who is aged five or below will not be held contributory negligent, there are a number of old cases from England where minors aged between three and four have had their claims reduced because of their own negligence.[3]

In contrast, decisions from Australian courts have been reluctant to hold minors guilty of contributory negligence until at least the age of five. In Australia, the youngest children found guilty of contributory negligence were in *Joseph v Swallow & Ariell Pty Ltd*,[4] where a child aged five years and nine months was held guilty of contributory negligence for running across the street in front of an oncoming vehicle, and in *Bullock v Miller*,[5] where a five-and-a-half-year old had his damages reduced 10% for riding his bike ▶

Anthony Wright is a Solicitor at McInnes Wilson Lawyers in Brisbane **PHONE** 07 3229 4138 **EMAIL** awright@mcw.com.au

onto the road without paying due care and attention.

In *Griffiths v Doolan*,[6] a child aged five-and-a-half ran in front of a truck and was held 10% responsible. In contrast to *Joseph*, *Bullock* and *Griffiths*, the decision in *Beasley v Marshall*[7] found that a child aged four years and eight months was not negligent when he attempted to cross the roadway and was struck by an oncoming vehicle.

McHale v Watson[8] is the seminal authority in Australian courts for contributory negligence and minors. The proceedings arose after the defendant, aged 12 years and two months, threw a metal object, which struck the plaintiff in the eye, causing severe personal injury.

The plaintiff sued in trespass and negligence. The trial judge held that the defendant did not intentionally throw the object directly at the plaintiff. Rather, it was thrown at a nearby pole, which caused the object to ricochet at a tangent into the plaintiff's eye.

The High Court also held that the defendant was not negligent, affirming the decision of Justice Windeyer in the Victorian Supreme Court. Acting Chief Justice McTeirnan said:

'It was right for the trial judge to take into account [the defendant] Barry's age in considering whether he did foresee, or ought to have foreseen, that the so-called dart might not stick in the post but be deflected from it towards [the plaintiff] Susan who was in the area of danger in the event of such occurrence.'[9]

The High Court said that a child is expected to conform only to the standard appropriate for children of the same age, intelligence and experience. Negligence can in no way be attributed to the child if the minor is unlikely or unable to understand the likely consequences of his or her actions.[10]

Practically, the application of *McHale v Watson* is quite broad. Problems that may arise depend on the facts of each individual case. Does the particular child have the age, experience and capacity to understand the consequences of his or her actions?

The following decisions aim to shed more light on certain cases and the degree to which each minor was held somewhat liable for their actions.

In *Goode v Thompson & Anor*,[11] Justice Ambrose held a 12-year-old boy 20% responsible for the severe injuries he sustained when he failed to keep a proper lookout as he crossed the road in front of the defendant's motor vehicle.

Justice Ambrose followed the previous decision of the New South Wales Court of Appeal in *Gunning v Fellows*.[12] In that case, another 12-year-old boy sped down a driveway on his pushbike onto the road. The defendant's vehicle collided with the plaintiff. The child was held 25% responsible by way of contributory negligence. This apportionment was upheld on appeal.

As stated above, the factual circumstances of each individual case will dictate the apportionment of liability between the minor plaintiff and the defendant. In *Mye v Peters*,[13] a minor aged five years and eight months was held not to be contributory negligent when he was hit by a vehicle after he got off a school bus and darted across the road.

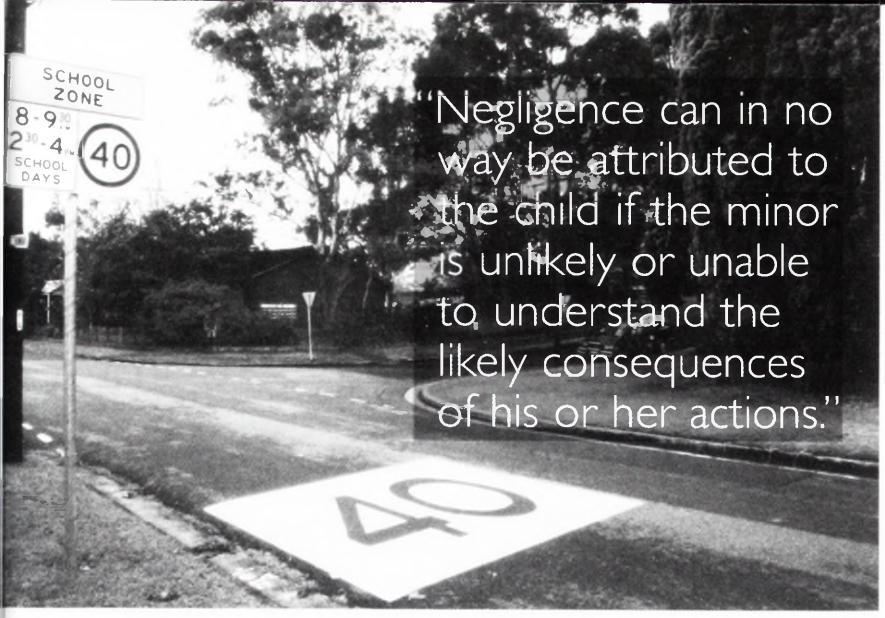
In *Rowes Bus Service Pty Ltd Cowan; Sufong v Cowan*,[14] a 17-year-old schoolgirl had her damages reduced by 40% for contributory negligence after she moved out from behind a parked bus and was struck by an oncoming car.

The decision in *Madigan v Hughes & Ors*[15] focused on the negligence attributable to a young boy aged 11 years and eight months when the traffic accident occurred. The infant plaintiff sustained severe injuries when he rode his bike across a T-intersection and was struck by an oncoming vehicle. The child had failed to give way to his right and had contravened the usual traffic laws. Justice Abadee stated:

'The standard of care when an infant or child is involved in an accident is an objective one to be measured in accordance with the principles laid down by the High Court in McHale v Watson and ... Fellows.'[16]

Important factors were considered to establish the plaintiff's degree of responsibility. It was held by the court that the infant plaintiff was, in fact, quite an experienced rider. His family rode regularly and competently, he had specific knowledge of the road rules and he was aware of bicycle safety. The plaintiff had completed a bike safety course at school just three weeks before the accident occurred.

Furthermore, the plaintiff's younger brother, with whom he was riding at the time, 'yelled out' at him to stop before proceeding through the intersection. However, the plaintiff rode through



"Negligence can in no way be attributed to the child if the minor is unlikely or unable to understand the likely consequences of his or her actions."

it at about 20 kilometres an hour, without giving way.

Taking these factors into consideration, Justice Abadee held that the infant plaintiff was guilty of contributory negligence, and damages were accordingly reduced by 40%.

In *Ryan v Pledge*,[17] Justice Dunford found an infant plaintiff 10% negligent following a motor vehicle accident. The nine-and-a-half-year-old plaintiff had stepped out from a nature strip, which divided a highway and service road, into the path of the defendant's vehicle. Justice Dunford made an important point:

'The plaintiff was nine-and-a-half years old...and should have been aware of the need to be careful when, and to look both ways before, crossing a road, and indeed she had been taught to do so.'[18]

HAS THE DEFENDANT BREACHED THE DUTY OF CARE OWED TO THE INFANT?

Further to the decisions referred to above, there have been instances when the plaintiff has failed to establish that the defendant has breached its duty of care.

It does not follow that if an infant is struck by a motor vehicle, the child will automatically recover from the defendant's insurer with some reduction for contributory negligence. It is imperative to firstly consider if the defendant has, in fact, breached any duty of care owed to the minor plaintiff.

In *Derrick v Cheung*,[19] the High Court dismissed the plaintiff's entire claim on the basis that the defendant was driving at a safe speed and that the accident was unavoidable.

The plaintiff, who was aged 21 months at the time of the accident, suddenly emerged[20] from between two parked vehicles. The defendant was travelling at 10 to 15 kilometres an hour less than the speed limit and braked as soon as she noticed the infant on the road. Despite the defendant's attempts to avoid collision, the car skidded into the plaintiff.

The High Court found that even if the defendant had been travelling at a slightly slower speed, the collision still would have been unavoidable. The defendant had not breached any duty of care it owed to the infant plaintiff.

The decision of *Derrick v Cheung* is similar to Justice Underwood's finding in *Johnson v Johnson*[21] in the Tasmanian Supreme Court. In that case, a motorist struck a seven-and-a-half-year-old boy when he rode his bike onto the road. The minor was held to be a 'skilled'[22] rider.

The crucial finding was that the defendant had not driven in an unsafe and negligent manner in the circumstances. He was driving below the speed limit when the child sped onto the road.

CONCLUSION

It can be seen from these various common law decisions that depending on the facts of each particular case, the finding of contributory negligence by a plaintiff infant is, for the most part, determined by the level of knowledge and understanding expected of a child the same age.

Other factors to consider, particularly in motor vehicle cases, are the child's previous interaction with road rules and the depth of the child's knowledge. It is not implicit that the knowledge of one child is the same as another child the same age. Contributing factors will be the child's education, family background and general knowledge.

Most matters involving children and the reduction of damages for contributory negligence arise from pedestrian motor vehicle accidents. Injuries in these types of accidents are normally severe. Any percentage reduction in the plaintiff's award for contributory negligence can prove to be a significant sum of compensation in your client's hand. PL

Endnotes:

1. *McHale v Watson* (1966) 115 CLR 199.
2. ibid, para 12; *American Restatement of the Law of Tort*, para 283.
3. In *Cass v Edinburgh & District Tramways Co Ltd* (1909) SC 1068, a boy of three years and eight months was struck by a tram car and held to be guilty of contributory negligence.
4. (1933) 49 CLR 578.
5. (1987) 5 MVR 55.
6. [1959] Qd R 304.
7. (1977) 17 SASR 456.
8. (1966) 115 CLR 199.
9. ibid, para 16.
10. Fleming, *The Law of Torts*, 1965, pp 117-118.
11. (2001) QSC 287.
12. (1997) 25 MVR 97, para 28, p 9.
13. (1967) 2 NSWR 578.
14. (1999) 29 MVR 430.
15. [1999] NSWSC 183.
16. ibid, para 90.
17. [2001] NSWSC 259.
18. ibid, para 48.
19. [2001] HCA 48.
20. ibid, para 4 - the infant plaintiff's movement onto the road was a 'darting one'.
21. (1997) unreported.
22. ibid, para 5.