27/69

SUPREME COURT OF VICTORIA

TSIOPLOS v BURMAN

McInerney J

14 November 1969

CIVIL PROCEEDINGS – MOTOR VEHICLE ACCIDENT – COMPLAINANT WAS AN INFANT AGED 2 YRS AND 7 MTHS – INFANT WAS SUED BY HER NEXT FRIEND FOR PERSONAL INJURIES – FINDING BY MAGISTRATE THAT THE INFANT WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WHETHER MAGISTRATE IN ERROR.

HELD: Order nisi absolute. Order set aside and the complainant awarded the full assessment with costs.
1. It is a conclusion of law that a very young child cannot be guilty of negligence.

2. Accordingly, the Magistrate's finding that the infant was 80% to blame was wrong.

McINERNEY J: The complainant, an infant aged 2 years and 7 months at the date of the accident, sued by her next friend for personal injuries received when struck by the motor car of the defendant. The claim was for $1000 but the Magistrate assessed damages at $204.15. He further held that the complainant was guilty of contributory negligence, and apportioned the responsibility for the accident 20% to the defendant and 80% to the complainant, awarding her $40.83 plus costs.

In those circumstances, a finding that the complainant was 80% to blame is a somewhat remarkable finding and in my view, was clearly wrong. Whether the finding was wrong because there could not, on the material before the Court, have been any evidence from which the Magistrate could have drawn an inference of negligence, as was held in *Cronan v Hepburn* [1958] VicRp 21; [1958] VR 112; [1958] ALR 405, or whether as was said by Lord Denning MR in *Gough v Thorne* [1966] EWCA Civ 5; [1966] 3 All ER 398 at p399; [1966] 1 WLR 1387, it is a conclusion of law that a very young child cannot be guilty of negligence does not seem to be material.

I think those two propositions are merely two ways of expressing the same truth. Clearly the Magistrate erred in making a finding of contributory negligence, and then apportioning the responsibility to the 2 year 7 month old child as being 80%.

How that came about is not entirely clear. I am told by Mr Blackburn, who appeared as counsel for the defendant in the Court below, that the defendant's legal advisers did not in fact know the age of the child until after the evidence of her date of birth was given by the parents, and that the legal advisers of the complainant had put forward a defence of contributory negligence, knowing no more than that the complainant was a child. I accept Mr Blackburn's statement on that point, and I accept also his statement that when the Magistrate made this finding, Mr Hore-Lacy of counsel for the complainant, endeavoured to point out to the magistrate that in the case of a child 2 years and a few months, a finding of contributory negligence ought not to be made.

I am not sure how the Stipendiary Magistrate came to arrive at the conclusion he did. The observations in his reasons for judgment in which he said that the main responsibility was with the parents, suggests that he may have been applying the doctrine of identification, which for a long time was applied so as to identify a young child with the negligence of his guardian and so deprive the infant of his action. This doctrine, which had its origin in the well-known case of *Thorogood v Bryan* in [1849] EngR 758; 137 ER 452; (1849) 8 CB 115, was discredited in the decision of *Mills v Armstrong: The Bernina* (1888) 13 AC 1, and to use the words of the editors of *Winfield on Torts* (7th Edition) p240, in 1933 the decision in *Oliver v Birmingham Omnibus Co Ltd* (1933) 1 KB 35, 'drove the last nail in its coffin'. . .

[Ed note: The Magistrate's order was set aside and the complainant awarded the full assessment of $204.15 with costs. A further discussion took place between Counsel and the Judge on the power to make an order investing the moneys received by the infant, his attention being drawn to the fact that Rule 27 in Chapter II of the *Justices Act Rules* applies only to proceedings in the Ordinary Jurisdiction. His Honour stood the matter down to enable Counsel to verify the position to enable the defendant to discharge himself from liability.]
