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# The Contributory Negligence Defense as Applied Against Children in Indiana

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# THE CONTRIBUTORY NEGLIGENCE DEFENSE AS APPLIED AGAINST CHILDREN IN INDIANA

## INTRODUCTION

The question of children's contributory negligence has been considered in the Indiana courts many times in the past century.[1] The question generally arises when a tort action for damages is brought for a child's injuries or wrongful death. If the defendant in such an action alleges that the child was partly at fault, the question of the child's contribution to his own harm becomes a critical issue.[2]

In Indiana, contributory negligence is considered an affirmative defense and the burden of proving the defense is on the defendant.[3] The general statement of the defense is that although the defendant has violated a duty, has been negligent, and would otherwise be liable, the plaintiff is denied recovery because his own unreasonable conduct was a contributing legal cause to the harm he has suffered.[4]

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1. *See, e.g.*, Bixenman v. Hall, 251 Ind. 527, 242 N.E.2d 837 (1968); Bottorff v. South Constr. Co., 184 Ind. 222, 110 N.E. 977 (1916); Lanoux v. Hagar, 159 Ind. App. 646, 308 N.E.2d 873 (1974); Indianapolis Ry. v. Williams, 115 Ind. App. 383, 59 N.E.2d 586 (1945); Indianapolis Traction and Terminal Co. v. Croly, 54 Ind. App. 566, 96 N.E. 973 (1911).

2. There are a limited number of cases that deal with the primary negligence of children. However, it is outside the scope of this note to determine whether the principles Indiana applies to children's contributory negligence also apply to children's primary negligence. The Restatement (Second) of Torts treats the primary and contributory negligence of children in a similar manner. *Compare* RESTATEMENT (SECOND) OF TORTS § 283A, comment a & b (1965), *with* RESTATEMENT (SECOND) OF TORTS § 464, comment e (1965). *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 157-60 (3d ed. 1964) (hereinafter cited as PROSSER).

3. Schmidt v. Liesenfet, 379 F.2d 380 (7th Cir. 1967): Memorial Hosp. of South Bend v. Scott, 261 Ind. 27, 300 N.E.2d 50 (1973). Though Indiana now considers contributory negligence to be an affirmative defense with the burden of proof and pleading on the defendant, this is not the only way to approach the issue. Some jurisdictions require that the plaintiff plead and prove due care. *E.g.*, West Chicago St. R.R. v. Liderman, 187 Ill. 463, 58 N.E. 367 (1900). In fact, Indiana, prior to 1943, required the plaintiff to plead and prove that he was without negligence. *See* Heiny v. Pennsylvania R.R., 221 Ind. 367, 47 N.E.2d 145 (1943); *See also* Note, *Pleading of Contributory Negligence in Indiana*, 23 IND. L.J. 511 (1948). This view has some merit since the contributory fault of the plaintiff can be considered a defect in plaintiff's cause of action. Thus, to require the plaintiff to plead a cause of action free from defect is not totally unreasonable.

4. "Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." Memorial Hosp. of South Bend v. Scott, 261 Ind. 27, 36-37 300 N.E.2d 50, 56 (1973); RESTATEMENT (SECOND) OF TORTS § 463 (1965).

In essence, proof that the plaintiff unreasonably contributed to his own injury bars him from recovery regardless of the negligence of the defendant.[5] The defense operates as a penalty on the plaintiff and, in states such as Indiana, which refuse to recognize comparative negligence, it operates as an absolute bar to recovery.[6]

There has been a general consensus among Indiana jurists throughout the state's history that the immaturity of the child plaintiff should be given special consideration whenever contributory negligence is alleged.[7] It has always been agreed that some effort should be made to limit the use of the defense against the young who are not yet fully capable of protecting themselves against the dangers of the world.[8] There has been considerable disagreement, however, over exactly how the immaturity of a child plaintiff should be taken into account. Also, there has been disagreement over exactly what steps the courts should take to limit the defendant's use of the defense against immature and sometimes helpless children.[9]

As a result of such disagreements, Indiana has been unable to completely and consistently follow any one method of dealing with children charged with contributory negligence. Consequently, Indiana currently applies a unique combination of two major approaches to the children's contributory negligence problems in use throughout the nation today.[10] These two approaches are known as the

5. Memorial Hosp. of South Bend v. Scott, 261 Ind. 27, 300 N.E.2d 50 (1973); PROSSER, *supra* note 2, at 427.

6. Booher v. Alhom, Inc., 156 Ind. App. 192, 198, 295 N.E.2d 841, 849 (1973); PROSSER, *supra* note 2, at 427.

7. "The cases . . . all recognize the rule that children of tender years are not to be treated as persons of mature years." Indianapolis, P. & C. R.R. v. Pitzer, 109 Ind. 179, 180, 6 N.E. 310, 312 (1886). Every Indiana case cited throughout this note that deals with the children's contributory negligence issue either explicitly or implicitly supports the textual and quoted material. *See* note 21 *infra*.

8. An early case that acknowledged that the contributory negligence defense should not be applied against children as it would be against adults was Louisville, N. A. & C. Ry. v. Sears, 11 Ind. App. 654, 38 N.E. 837 (1895). The court stated that children are not to be treated as adults when charged with contributory negligence.

9. Two Indiana Supreme Court cases illustrate these disagreements. An early case, *Bottorff v. South Const. Co.* represented the view that the courts should only look at the age of the child to determine whether he has the capacity to be contributorily negligent. 184 Ind. 222, 110 N.E. 977 (1916). A more recent case, *Bixenman v. Hall*, represented the view that the education, judgment, and intelligence of the child should be considered along with age. 251 Ind. 522, 242 N.E.2d 837 (1968). These two cases represent the two different points of view that have found support at various times in Indiana history.

10. *See* notes 165-202 *infra* and accompanying text for a discussion of current Indiana law.

Massachusetts method[11] and the Illinois method.[12] This note examines the Indiana cases that deal with the problem of children's contributory negligence. The more recent decisions favoring the Massachusetts method are compared to those at the turn of the century when the Illinois method was favored.[13]

The comparison reveals that Indiana has basically abandoned the arbitrary but administratively expedient Illinois approach for the more flexible and accomodating Massachusetts method.[14] The comparison reveals, however, that one portion of the Illinois approach has not yet been abandoned. The unabandoned portion of the Illinois approach deals specifically with children below age seven and still must be considered today when dealing with the issue of children's contributory negligence.[15]

Though policy considerations are stressed,[16] this note mainly explains the mechanics of the Illinois[17] and Massachusetts[18] apoproaches. Each approach is discussed in terms of the way it has been utilized throughout Indiana's history. Finally, this note explains the current combination of the two approaches used in Indiana today,[19] and suggests possible ways current law might be modified in the future.[20]

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11. *See* notes 124-64 *infra* and accompanying text for a discussion of the Massachusetts method.

12. *See* notes 80-123 *infra* and accompanying text for a discussion of the Illinois method.

13. The 1968 case, *Bixenman v. Hall*, represents the current trend to favor the Massachusetts method. 251 Ind. 527, 242 N.E.2d 837 (1968). *See* notes 124-64 *infra* and accompanying text for a discussion of *Bixenman* and the Massachusetts method. *Bottorff v. South Const. Co.* represented the position of the Indiana Supreme Court at the turn of the century when the Illinois approach was favored. 184 Ind. 222, 110 N.E. 977 (1916). *See* notes 80-123 *infra* and accompanying text for discussion of *Bottorff* and the Illinois approach.

14. *See* notes 124-64 *infra* and accompanying text for a discussion of the partial abandonment of the Illinois method in favor of the Massachusetts method.

15. *See* notes 165-202 *infra* and accompanying text for a discussion of the combination of the Massachusetts and Illinois approaches currently in use in Indiana.

16. *See* notes 21-77 *infra* and accompanying text for a discussion of policy considerations.

17. *See* notes 80-123 *infra* and accompanying text for a discussion of the Illinois method.

18. *See* notes 124-64 *infra* and accompanying text for a discussion of the Massachusetts method.

19. *See* notes 165-202 *infra* and accompanying text for a discussion of current state law.

20. *See* notes 203-13 *infra* and accompanying text for a discussion of the proposed modifications.

## I. POLICY REASONS FOR GIVING CHILDREN SPECIAL CONSIDERATION WHEN CHARGED WITH CONTRIBUTORY NEGLIGENCE

Though there is a general consensus among Indiana jurists that the immaturity of a child plaintiff should be given special consideration whenever contributory negligence is alleged, little is mentioned in the cases to explain *why* children should be given such special consideration.[21] The courts point out that children are given special treatment regarding their contract, property, and criminal rights.[22] Beyond this, however, the courts have made little effort to justify giving such special consideration to children charged with contributory negligence.[23]

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21. The following is an example of the typical reasons the courts give to explain *why* children should be given special consideration:

> The cases . . . all recognize the rule that children of tender years are not to be treated as persons of mature years. This is a reasonable and humane rule, and any other would be a cruel reproach to the law, but the law merits no such reproach, for throughout all its branches, whether of tort or contract, there runs, like the marking red cord of the British navy, a line distinguishing children of years too few to have judgment or discretion from those old enough to possess and exercise those faculties. This is a doctrine taught by every man's experience, and sanctioned by our law. A departure from it would shock every one's sense of justice and humanity.

Indianapolis, P. & C. R.R. v. Pitzer, 109 Ind. 179, 180, 6 N.E. 310, 312 (1886).

22. The courts have pointed out other areas of the law where children are given special consideration:

> Our law protects children from the injurious effects of their contracts. It limits their liability for torts. It protects their property and personal rights by legislation and judicial decision. Courts are now considered "parens patriae" the supreme guardian of all infants. . . .
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> . . . .
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> Everywhere, [childhood] is known as the impressionable period when the future adult may be molded in health, stature, morals, religion and wisdom. . . . Our law . . . has organized Juvenile Courts on the theory that the regular criminal code and procedure is too stern and rigid to be applied to children.

Plotzki v. Standard Oil Co. of Indiana, 228 Ind. 518, 540-42, 92 N.E.2d 632, 643 (1950) (Gilkinson, J. dissenting) (citations omitted).

23. Other writers have noted the same lack of justification by the courts:

> [Apparently] there is a strong policy in favor of protecting children from losses attributable to their immaturity. It would be quite plausible . . . for a court to be more lenient toward children whose injuries are attributable, not only to their immaturity, but also to conceded tortious conduct on the part of the defendant. . . . Yet the cases do not [explain why]. . . . The opinions are replete with loose language, sometimes altogether

It can reasonably be argued that if such limited justification is acceptable to the courts, there is no need to attempt to derive any further justification.[24] However, it seems inadequate to conclude that children should be given special treatment when charged with contributory negligence simply because children have been given special treatment in other areas of the law in the past. To derive a more appropriate explanation of why children should be given special treatment, it is necessary to focus on the inherent differences between children and adults.

It cannot be denied that children differ greatly from adults. Besides the differences in physical capacity, the more legally significant differences in mental capacity are also readily observable.[25] Whether these obvious differences should merit any special consideration is a policy question that cannot be easily answered. Initially there appear to be three possible methods of dealing with these differences when children are charged with contributory negligence.[26] First, refuse to recognize any significance in the differences and continue to apply the defense against children in the

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unnecessary, sometimes equivocal, sometimes incomplete, and sometimes even contradictory. . . .

Shulman, *The Standard of Care Required of Children*, 37 YALE L.J. 618, 619 (1927).

. . . Children do generally exercise a lesser caution for their own safety than do adults. [T]his is common knowledge, [and everyone should be] charged with the knowledge of it.

*Id.* at 619 n.3.

24. *See generally* Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924); Shulman, *The Standard of Care Required of Children*, 37 YALE L.J. 618 (1927).

25. The physical differences between children and adults are not relevent to this discussion. The courts consistently make allowances for blindness, deafness, and other physical handicaps. Goodman v. Norwalk Jewish Center, 145 Conn. 146, 139 A.2d 812 (1958) (crippled, lacking coordination on crutches); Apperson v. Lazro, 44 Ind. App. 186, 87 N.E. 97 (1918) (sight impaired); Mahan v. New York, 172 Md. 373, 191 A. 575 (1937) (short stature, unable to see over hood of auto); Otterbeck v. Lamb, 85 Nev, 456, 456 P.2d 855 (deaf). If a child's physical condition has any bearing on the reasonableness of the child's conduct, the physical condition can be given the same consideration as any other physical disability. *See generally*, Broek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L.. REV. 841 (1966); Weisiger, *Negligence of the Physically Infirm*, 24 N.C.L. REV. 187 (1945).

26. There actually are more than three possible methods of dealing with children charged with contributory negligence. However, to simplify discussion only those possibilities which are compatible with current legal realities will be discussed. The first and second options represent antipodal extremes that no court follows. The third option represents a range of possibilities between these two extremes. PROSSER, *supra* note 2, at 157-68.

same way it is normally applied against adults.[27] Second, conclude that in order to give adequate consideration to children's limited capacities the defendant must be completely prohibited from using the defense against them.[28] Third, compromise and give some special consideration to the child plaintiff yet still allow the defendant a limited opportunity to make use of the defense.[29] Though the first two methods of dealing with children charged with contributory negligence basically have been rejected in favor of the third, the correctness of that choice is better revealed by illustrating the problems inherent in the first two choices.

### A. *The Policy Consequences of Refusing to Grant Children Special Consideration In Spite of Their Immaturity.*

The easiest way to deal with a child charged with contributory negligence is to deny the child any special consideration and apply the defense against the child as it is normally applied against an adult. Contributory negligence, as applied against adults in Indiana, is defined as unreasonable conduct on the part of the plaintiff which is a contributing legal cause to the harm suffered.[30] For the adult, unreasonable conduct is defined as conduct falling below that of a reasonable adult of ordinary prudence.[31] If no special consideration is given to a child charged with contributory negligence the usual adult standard would apply. Thus, to establish contributory negligence the defendant would only need to prove that the child's conduct was below that normally expected of a reasonably prudent adult under similar circumstances, and that such unreasonable conduct was a contributing legal cause of the child's injury. Rarely can the conduct of an immature child be considered reasonable by adult standards.[32] Children are simply not as capable of protecting themselves as are adults.[33] Thus, using an adult standard would

27. *See* notes 30-40 *infra* and accompanying text for a discussion of the first option.

28. *See* notes 41-56 *infra* and accompanying text for a discussion of the second option.

29. *See* notes 57-77 *infra* and accompanying text for a discussion of the third option.

30. *See* note 4 *supra* for Indiana's definition of contributory negligence.

31. *See* Memorial Hosp. of South Bend v. Scott, 261 Ind. 27, 300 N.E.2d 50 (1973); Bixenman v. Hall, 251 Ind. 527, 242 N.E.2d 837 (1968).

32. *See* Bohlen, *supra* note 24; PROSSER *supra* note 2, at 157-60; Shulman, *supra* note 24, at 618-19. Note, *Contributory Negligence of Children*, 18 S.C.L. REV. 648 (1966).

33. *See* Bohlen, *supra* note 24; PROSSER, *supra* note 2, at 157-60; Shulman, *supra* note 24, at 618-19. Note, *supra* note 32.

make it easy for the defendant to prove a child contributorily negligent in most cases.[34] Consequently, to ignore the immaturity of children and apply the defense against them as against adults, conceivably would deny many children compensation, and many otherwise negligent defendants would escape liability.[35]

These consequences are contrary to the two main functions of tort law:[36] providing a forum in which an injured party may be compensated for harm done to him by another;[37] and, insuring that the one responsible for the injury is made to compensate the injured and is deterred from continuing such harmful conduct in the future.[38] However, if children are denied special treatment, many of those charged with contributory negligence might be denied compensation for their injuries,[39] and many otherwise negligent defendants might escape liability for their negligence.[40] Though denying children

34. *See* PROSSER, *supra* note 2, at 157-60; Shulman, *supra* note 24, at 618-19.

35. If a child cannot meet the adult standard and is found contributorily negligent, it follows that the child will not be compensated by the defendant. The defendant's successful proof of contributory negligence will operate as an absolute bar to the plaintiff's recovery. *See* note 6 *supra* and accompanying text for discussion of the penalty aspect of the defense. Furthermore, if the defendant is successful at proving the child contributorily negligent, the defendant will escape liability. However, if the defendant uses an adult standard (which is beyond the child's capacity to meet) to prove that the child acted unreasonable, the defendant will realize an unfair advantage over the child. Shulman, *supra* note 24, at 618-19; *See also* notes 21-22 *supra* and accompanying text for an Indiana view on the fairness of treating children as adults.

36. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72 (1942), *reprinted in* SELECTED ESSAYS ON THE LAW OF TORTS 72 (1955); *See* PROSSER, *supra* note 2, at 1-27.

37. Seavey, *supra* note 36, at 72-74; *See* PROSSER, *supra* note 2, at 127.

38. Seavey, *supra* note 36, at 72-74; *See* PROSSER, *supra* note 2, at 16-23; Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

39. *See* note 34 and 35 *supra* and accompanying text for an earlier discussion of the effect refusing to give children special consideration has on the issues of compensation and liability.

40. It is argued that people will alter their conduct if they know that failure to do so might subject them to legal liability. It is therefore a function of tort law to deter people from conducting themselves in certain harmful ways by making it known that they might face legal liability if they engage in such conduct. *See* Seavey, *supra* note 36, at 72-74. Intentional conduct might be deterred, but there is some question whether negligent conduct can be deterred. *See* Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 681-82 (1934). Though inadvertant (non-thinking) conduct might be impossible to deter, certain types of negligent conduct can be deterred. *Id.* An example of a type of negligent conduct that might be deterred is the typical case where a property owner maintains an attractive nuisance on his property. The knowledge that he may be held liable for injuries to a child attracted to the premises may cause the property owner to fence in his property or otherwise make it safer. *See generally* Plotzki v. Standard Oil Co. of Indiana, 228 Ind. 518, 92 N.E.2d 632 (1950). Thus, if it is known that any liability for injuries to children can easily be escaped through the use of the

special consideration and applying the defense against them as if they were adults might be the easiest way of dealing with the children's contributory negligence issue, it will necessarily contravene the two main functions of tort law.

### B. *The Policy Consequences of Completely Prohibiting The Defendant From Using The Defense Against Children.*

Another conceivable way of dealing with children charged with contributory negligence is to conclude that in giving adequate consideration to their limited capacities the defendant's use of the defense against them must be completely prohibited. Prohibiting the use of the defense against all children, a group which represents a considerable portion of the population,[41] would necessarily challenge or undermine much of the foundation underlying the defense. To determine exactly how the defense would be undermined by such an approach, it is first necessary to consider how the defense works and why it was developed.[42]

Though various theories have been advanced in support of the contributory negligence defense,[43] no one theory alone can completely explain it.[44] Some courts have stated that the purpose of the

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contributory negligence defense, no one will be deterred from continuing any harmful conduct.

41. Children under age eighteen represent approximately 29.6% of the total United States population. All those under age twenty-one represent approximately 37.4% of the total population. Of the 216.8 million people in the United States, 64 million are under eighteen years old and 81 million are under twenty-one years old. U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE STATISTICAL ABSTRACT OF THE UNITED STATES: 1978 (99th ed. 1978).

42. An early analysis of the development of the contributory negligence defense was completed by Francis H. Bohlen in 1908.

> The opinions in the earliest cases upon contributorily negli-gence . . . offer no indication that the court is aware that any new doctrine is being announced. There is, therefore, no discussion of general principles, no logical argument applying such principles to the particular facts and showing that they necessitate the result reached by the court. All attempts to ascertain upon what legal principle the defense of contributory negligence is based, are therefore efforts *ex post facto*, to explain and account for a result already reached apparently unconsciously.

Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908). Other writers have reached the same conclusions. *See also* Lowndes, *supra* note 40; PROSSER, *supra* note 2, at 427.

43. *See* notes 44 and 45 *infra* for a discusson of the theories that have been advanced to support the defense.

44. PROSSER, *supra* note 2, at 428. *See also* Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1947).

defense is to punish the plaintiff for his own misconduct and discourage him from similar conduct in the future.[45] Other courts have said that the negligence of the plaintiff is an intervening or insulating cause between the negligence of the defendant and the plaintiff's injury that essentially makes the negligence of the defendant irrelevant.[46] The theories themselves are of little consequence. What matters is the legal policy that seems to underlie the various theories supporting the defense and how that policy will be affected if the court prohibits the defendant from using the defense against children.

Essentially, the basic legal policy underlying the contributory negligence defense is that all individuals in society are to be held, to some extent, responsible for their own self-harming conduct.[47] Viewed in conjunction with the policy underlying negligence law in general, the policy underlying the contributory negligence defense becomes more clear. Underlying the basic negligence action is the notion that each individual is to be held legally responsible for the consequences his negligent actions may have on others.[48] The companion policy that underlies the defense of contributory negligence requires that each individual bear some responsibility for the self-harming consequences of his own negligent conduct.[49] Accordingly, a plaintiff proved to have been an unreasonable contributing legal cause of his own harm, even a slight cause will be deemed to bear the responsibility for his own injuries. Consequently, the plaintiff will not be allowed to recover compensation from the defendant even

45. Though it has sometimes been argued that contributory negligent plaintiffs are denied recovery in order to punish them for their misconduct, this notion has been soundly criticized. For a discussion of the penalty theory *see* Bohlen, *supra* note 42 at 233-34; Lowndes, *supra* note 42, at 679-81. *See also* PROSSER, *supra* note 2, at 427.

46. A number of writers have supported the theory that the plaintiff's misconduct becomes the proximate cause of his own injury thereby making the conduct of the defendant unimportant. Bohlen, *supra* note 42, at 233-34; Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3 (1927); Lowndes, *supra* note 40; PROSSER, *supra* note 2, at 427-28.

47. The extent to which each individual is to be held responsible for his own self-harming conduct will vary depending on the circumstances. PROSSER, *supra* note 2, at 428. *See generally* Bohlen, *supra* note 42, at 233-35. For example, if the doctrine of last clear chance is applicable, the court may be able to apply the doctrine and avoid holding a plaintiff responsible for conduct which he otherwise might be held fully responsible. PROSSER, *supra* note 2, at 437. *See also* MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940).

48. *See* Seavey, *supra* note 36, at 72-74; *See also* Terry, *supra* note 38.

49. *See* note 47 *supra* and accompanying text for a discussion of the policy underlying the contributory negligence defense.

though the defendant may also have been partly responsible for the injury.[50]

Refusing to hold children responsible for any unreasonable contribution to their own injuries necessarily contravenes the policy that each individual ought to be held responsible for his own self-harming conduct. By definition, prohibiting application of the contributory negligence defense against children is contrary to the legal policy behind the defense. Accordingly, a child who knows he will in no way be held responsible for his conduct may be encouraged to be careless and irresponsible.[51] On the other hand, a child who knows he may be held responsible for his own injurious conduct may arguably be encouraged to be a careful and responsible person.[52] Whether any one child is actually encouraged to be more careful if he is held contributorily negligent does not matter. A child

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50. A plaintiff may be held to bear the full responsibility of an injury even though he may only have been a minor cause.

> The hardship of the doctrine of contributory negligence upon the plaintiff is readily apparent. It places upon one party the entire burden of a loss for which two are, by hypothesis, responsible. The negligence of the defendant has played no less a part in causing the damage; the plaintiff's deviation from the community standard of conduct may even be relatively slight, and the defendant's more extreme; the injured man is in all probability, for the very reason of his injury, the less able of the two to bear the financial burden of his loss; and the answer of the law to all this is that the defendant goes scot free of all liability, and the plaintiff bears it all.

PROSSER, *supra* note 2, at 443.

51. If a person is encouraged to be careful by being held responsible for his self-harming conduct, then a person not held responsible for his self-harming conduct might arguably be encouraged to be careless. It is doubtful whether this is realistic. However, Prosser acknowledges that such an argument can be used to support continued use of the contributory negligence defense. PROSSER, *supra* note 2, at 443-44.

52. The purpose of holding a person responsible for his own self-harming conduct is to encourage him to be more responsible in the future. PROSSER, *supra* note 2, at 443. *See* note 40 *supra* for a discussion of the principle of deterrence. However, Prosser and others would argue that the idea of deterrence is unrealistic.

> [It is no] answer to say that the contributory negligence rule promotes caution by making the plaintiff responsible for his own safety. It is quite as reasonable to say that it encourages negligence, by giving the defendant reason to hope that he will escape the consequences. Actually any such idea of deterrence is quite unrealistic. In the usual case, the negligence on both sides will consist of mere inadvertance or inattention, or an error in judgment, and is quite unlikely that forethought of any legal liability will in fact be in the mind of either party.

PROSSER, *supra* note 2, at 444. *See* Lowndes, *supra* note 42, at 681-82. Though Prosser points out the defects in the principle of deterrence, he nonetheless acknowleges that it is used to justify the contributory negligence defense. PROSSER, *supra* note 2, at 443.

held free from all legal responsibility will have no incentive to conduct himself with care other than the natural incentive of fear of personal injury.[53] Even if irresponsibility is only slightly encouraged, such encouragement will necessarily be contrary to the policy underlying the defense.[54] Furthermore, even slight encouragement of irresponsible conduct in children will contravene society's tacit goal to train and educate its children to be responsible self-protecting and self-sufficient adults.[55] Completely prohibiting the use of the defense against children frustrates the basic policy underlying the contributory negligence defense.[56] Thus, the option to prohibit the use of the defense against children is essentially no more practical than the first option to totally refuse children special consideration.

### C. *The Policy Consequences of Giving Some Special Consideration To Children While Still Allowing The Defendant Limited Use of The Defense*

A third way to deal with the problem[57] of children's contributory negligence is to give special consideration to the immaturity of the child while allowing the defendant an opportunity to make limited use of the defense.[58] Since, by definition, using the defense against children is not prohibited under this option, the

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53. If the threat of being held legally responsible for the consequences of his actions deters a person from harmful conduct, it does so only as long as the person is aware of the threat. If there is no threat or the person is not made aware of the threat there can be no deterrence. PROSSER, *supra* note 2, at 443-44. *See* Lowndes, *supra* note 42, at 681-83. If there is no threat of legal responsibility, there can be no deterrence. Thus, if there is no external legal sanction, any incentive to act carefully will have to come from the individual himself, such as a fear that carelessness will lead to personal injury. PROSSER, *supra* note 2, at 443-44.

54. If carelessness and irresponsibility are only slightly encouraged, such encouragement will be contrary to the purpose of the defense, which is to encourage carefulness and responsibility. PROSSER, *supra* note 2, at 443-44. *See also* Lowndes, *supra* note 42, at 681-83.

55. *See* Plotzki v. Standard Oil Co. of Indiana, 228 Ind. 518, 540-42, 92 N.E.2d 632, 642 (1950) (Gilkinson, J., dissenting).

56. PROSSER, *supra* note 2, at 443-44. *See also* Lowndes, *supra* note 42, at 681-83.

57. This third option is really not one option at all, but rather it holds within itself a multiplicity of lesser alternatives. *See* notes 57-77 *infra* and accompanying text for details.

58. *See generally* Bixenman v. Hall, 251 Ind. 527, 242 N.E.2d 837 (1968); Bottorff v. South Const. Co., 184 Ind. 221, 110 N.E. 977 (1916); Hobby Shops, Inc. v. Drudy, 161 Ind. App. 699, 317 N.E.2d 473 (1974); Indianapolis v. Williams, 115 Ind. App. 383, 59 N.E.2d 586 (1945).

defendant is allowed to prove unreasonable conduct on the part of the plaintiff. To accomodate the child's special needs, the adult standard is replaced by a special standard which focuses the jury's attention on the individual child's limited mental capacity.[59] Under this option, the immaturity of the child is given special consideration by the jury, and yet the defendant still has an opportunity to escape liability if he can prove that the child unreasonably contributed to his own harm.

Unlike the first option to refuse children special consideration, this option gives the child plaintiff a substantial opportunity to recover compensation for his injuries.[60] Since the reasonableness of the child plaintiff's conduct is judged by what is reasonable for a child of the same mental capacity, the chance of finding that the child acted reasonably is better than if his conduct were judged by an adult standard.[61] Under this approach there is a greater chance that the child will not be found to have unreasonably contributed to his own harm and as a result the child will less likely be denied compensation for his injuries. Also, in contrast to the first option to refuse children special consideration, since the reasonableness of the plaintiff's conduct is determined according to the child's mental capacity under this approach, the defendant's chances of escaping liability by using the defense is reduced.[62] As a result, the defendant and those in a similar position, might arguably be more discouraged from continuing similar harmful conduct[63] than if the courts applied adult standards to the children and granted few recoveries.[64] Accordingly, unlike the first option which contravenes the functions of the

59. The care that must be exercised by a child in Indiana is measured by the care that "children of like age, knowledge, judgment and experience would ordinarily exercise under like conditions and circumstances." Tabor v. Continental Baking Co., 110 Ind. App. 633, 641, 38 N.E.2d 257, 260 (1942); *e.g.*, Town of Argos v. Harly, 114 Ind. App. 290, 49 N.E.2d 552 (1943).

60. *See* Seavey, *supra* note 36, at 72-4; *see also* Terry, *supra* note 38.

61. *See generally* authorities cited at note 60 *supra*.

62. *See generally* authorities cited at note 40 *supra* for a discussion of the deterrence principle.

63. If a child's conduct is determined according to an adult standard, the chances are great that the child will fail to meet that standard and will be found contributorily negligent. On the other hand, if the standard is designed to accomodate the capacity of the child, the chances that the child will meet the standard will be much greater. If the child's chances of meeting the standards are greater, the defendant's chances of proving contributory negligence and escaping liability will necessarily be reduced. PROSSER, *supra* note 2, at 443-44.

64. *See generally* authorities cited at note 40 *supra* for a discussion of the deterrence principle.

tort action by refusing children any special consideration, this option provides children any special consideration, this option provides children with a fair opportunity to be compensated for their injuries and effectively discourages future harmful conduct by the defendant.

Compared to the second option to prohibit the use of the defense against children, the third compromise option also proves to be preferable. Looking into a child's conduct to determine if it is reasonable in view of the child's maturity is certainly more compatable with the policy that each person ought to be held responsible for his own self-harming conduct, than is the option to prohibit looking into the reasonableness of the child's conduct.[65] Thus, unlike the second option, the third option is also compatable with the legal policy underlying the contributory negligence defense, that everyone be held responsible for his self-harming conduct.

As a result of its fairness and compatability with basic policy, the third compromise option is favored in the Indiana courts.[66] However, there has been considerable disagreement on exactly how this type of approach should be applied.[67] The disagreement has arisen because this third option is really not one option at all, but rather it suggests a multiplicity of lesser alternatives.[68] One jurisdiction following this approach might choose to give extensive consideration to the immaturity of children,[69] while another might choose to give only moderate consideration.[70] Indeed, the exact amount of special consideration given to children charged with contributory negligence varies from jurisdiction to jurisdiction.[71] All

65. *See* notes 47-56 *supra* for a discussion of the policy underlying the contributory negligence defense and the effect that granting special consideration to children has on the policy.

66. *See* cases cited at note 58 *supra.*

67. *See* note 9 *supra* for a discussion of these disagreements.

68. *See* note 26 *supra* for a discussion of how the three options relate to each other.

69. *E.g.*, Giacoble v. Boston Elevated Ry., 215 Mass. 224, 102 N.E. 322 (1913) (illustrating the Massachusetts method).

70. The Illinois method is illustrated in Chicago City Ry. v. Tuohy, 196 Ill. 410, 63 N.E. 997 (1902).

71. The following is a sampling of various jurisdictions illustrating some of the different approaches possible: Harden v. United States, 485 F. Supp. 380 (D. Ga. 1980) (age fifteen capacity is question for jury); Proctor v. United States, 443 F. Supp. 113 (D. Ala. 1977) (under seven no capacity); Talley v. J. & L. Oil Co., ___ Kan. ___, 579 P.2d 706 (1978) (under nine no capacity); White v. Nicosia, 351 So. 2d 234 (La. Ct. App. 1977) (capacity is a factual issue); Kirby v. Carson, 400 Mich. 585, 256 N.W.2d 400 (1977) (under seven no capacity); Toetschinger v. Ihnot, 250 N.W.2d 204 (Minn. 1977)

that is required to fit within the broad terms of the option is that the special consideration given to the child not be so great that it prohibits the use of the defense nor so little that the child ends up treated as an adult.

Of the many possible variations open to the courts under the broad language of the third option, only two have received wide support in Indiana.[72] One approach, known as the Illinois method, found strong support at the turn of the centruy at a time when the courts were concerned with administrative expedience.[73] The other approach, which is favored today, is known as the Massachusetts method.[74] The Massachusetts approach, as applied in Indiana, reflects a contemporary concern with insuring that a fair and equitable balance is struck among the various competing policies so that no one policy is favored more than another.[75] Indiana's use of the Illinois and Massachusetts methods is discussed in detail in order to explain the present state of the law concerning children's contributory negligence in Indiana[76] and predict its future.[77]

## II. THE ILLINOIS AND MASSACHUSETTS METHODS AS EACH RELATES TO THE LAW IN INDIANA TODAY

There has been general agreement in Indiana that an immature child charged with contributory negligence should be granted some type of special consideration by the courts and that use of the defense against children should be limited.[78] However, there has never been complete agreement on how much special consideration is needed or to what extent the defense should be limited. One approach to the problem that Indiana favored at the turn of the cen-

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(under seven capacity is a question of fact); Caparoco v. Lambert, ___ R.I. ___, 402 A.2d 1180 (1979) (capacity is a factual issue).

72. *See generally* cases cited in note 71 *supra* for examples of possible variations open to the courts under the broad language of the third option.

73. *See* notes 80-123 *infra* and accompanyiung text for a discussion of the Illinois method.

74. *See* notes 124-64 *infra* and accompanying text for a discussion of the Massachusetts method.

75. *See* notes 124-64 *infra* and accompanying text for a discussion of the policy orientation of the Massachusetts method.

76. *See* notes 165-202 *infra* and accompanying text for a discussion of current law.

77. *See* notes 203-13 *infra* and accompanying text for a discussion of the proposed modifications to make contributory negligence fairer.

78. *See* notes 7 and 21 *supra* for a discussion of the consensus between Indiana jurists.

tury has sometimes been referred to as the Illinois method or the "arbitrary" method.[79]

### A. *The Illinois Method And Early Indiana Law*

The Illinois method of dealing with an immature child charged with contributory negligence is analogous to the approach the common law utilized when considering the capacity of a child to commit a crime.[80] The Indiana version of the approach was first explicitly stated in *Bottorff v. South Constr. Co.* in 1916:

> It has been laid down by the law writers and the courts that the time of infancy is divided into three periods, during each of which different presumptions prevail; the first is that up to the age of seven years, during which the infant is conclusively presumed to be incapable of understanding the nature of the crime and can in no way be held responsible therefore; the second is that between the ages of seven and fourteen years. An infant between these ages is presumed to be incapable of committing crime, but the presumption may be rebutted by proof that the infant possessed sufficient discretion to be aware of the nature of the act. The third period is after the age of fourteen years when the infant is presumed to be capable of committing a crime and can be held the same as an adult. It seems that the greater weight of authority is to the effect that the same rule applies in negligence cases.[81]

It is apparent from this statement that in 1916 children under age seven were considered to be without the capacity to understand the harmful consequences of their conduct and hence were conclusively presumed incapable of being contributorily negligent.[82] Similarly, children between the ages of seven and fourteen were also presumed to be without the capacity to understand the consequences of

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79. Note, *Contributory Negligence of Children In Indiana: Capacity And Standard Of Care*, 34 IND. L.J. 511 (1959).

80. *Id.* at 656.

81. Bottorff v. South Constr. Co., 184 Ind. 221, 227, 110 N.E. 977, 983 (1916). It has been argued that much of what was said in *Bottorff* was dicta. Note *supra* note 79. Since *Bottorff* dealt specifically with the question of the contributory negligence of a fourteen-year-old and a twelve-year-old. By Indiana's own definition, any discussion of the liability of children of other ages is dictum. 184 Ind. at 227, 110 N.E. at 983. This dictum was subsequently followed, however, and for a time became authoritative law. Brush v. Public Serv. Co., 106 Ind. App. 544, 21 N.E.2d 83 (1939); Kent v. Interstate Pub. Serv. Co., 97 Ind. App. 13, 168 N.E. 465 (1929).

82. Bottorff v. South Constr. Co., 184 Ind. 221, 110 N.E. 977 (1916).

their conduct. However, this presumption was considered rebuttable and children in this age range could be found contributorily negligent if first proven to have sufficient capacity to appreciate the particular danger.[83] Also apparent from the court's statement in *Bottorff* is that children over fourteen were automatically considered to possess the capacity to understand the full consequences of their conduct and as a result were presumed capable of being contributorily negligent.[84] However, what was not so apparent was exactly how these presumptions operated in an actual trial setting and what standard of care was applied those found capable of contributory negligence.

The Illinois approach is actually more arbitrary than it might first appear. The trial judge is required to classify each child as a member of one of the three age groups.[85] The decision is based solely on the age of the child. The judge has little or no discretion in the matter.[86] If the child is below age seven the court automatically presumes that the child does not possess the capacity to be contributorily negligent and the defendant is precluded from using the defense.[87] At the other age extreme, if the child is above age four-

83. *Id.*

84. *Id.*

85. Note, *supra* note 79.

86. It is appropriate here to point out a confusing and exasperating eccentricity of the Indiana courts. The confusion arises from Indiana's use of the term *sui juris* and its negative *non sui juris* in reference to children's capacity to be contributory negligent. According to BLACK'S LAW DICTIONARY 1286 (5th ed. 1979), the term *sui juris* is a latin term meaning under no legal disability. In the 19th and early 20th centuries, Indiana began using the term *sui juris* with reference to children's capacity to be contributorily negligent. *E.g.*, Dull v. Cleveland, Cincinnati, Chicago, & St. Louis Ry., 21 Ind. App. 571, 52 N.E. 1013 (1899). Correspondingly, the term *non sui juris* was used to refer to a child's incapacity to be contributorily negligent. *E.g.*, City of Elwood v. Addison, 26 Ind. App. 28, 59 N.E. 47 (1900). The exact meaning of the terms became clouded when the courts, after making a finding of *non sui juris*, needlessly discussed standard of care in *obitur dictum*. *E.g.*, Indianapolis St. Ry. v. Schomberg, 164 Ind. 11, 72 N.E. 1041 (1905). The use and misuse of these terms have caused needless confusion. This writer believes there is ample support for a conclusion that *sui juris* was meant to be synonymous with *capacity*, and that *non sui juris* was meant to be synonymous with *incapacity*. Indianapolis St. Ry. v. Schomberg, 115 Ind. App. 383, 59 N.E.2d 586 (1945) (thorough discussion of these terms). *See* Cole v. Searfoss, 49 Ind. App. 334, 97 N.E. 345 (1912); Keller v. Gaskill, 9 Ind. App. 670, 36 N.E. 303 (1894); *see also*, Note, *supra* note 79, at 514-19. To alleviate confusion, these latin terms will not be used in this Note, rather, their English counterparts will be used instead. This is consistent with more recent Indiana decisions, which use the latin terms less frequently. Morre v. Rose-Hulman Inst. of Tech. 165 Ind. App. 165, 331 N.E.2d 462 (1975); Hobby Shops, Inc. v. Drudy, 161 Ind. App. 699, 317 N.E.2d 473 (1976).

87. Chicago City Ry. v. Tuohy, 196 Ill. 410, 63 N.E. 997 (1902).

teen the court automatically presumes that the child has the same capacity to be contributorily negligent as an adult.[88] Once found to have an adult capacity, the jury then is instructed to measure the reasonableness of the child's conduct by what a reasonable adult of ordinary prudence would have done under the same circumstances.[89] If the child is between age seven and fourteen, the court is required to instruct the jury to presume that the child was not capable of contributory negligence.[90] The defendant, however, is allowed to prove to the jury that the child did in fact possess the capacity to understand the nature of his conduct and is capable of contributory negligence.[91] It is not clear whether the jury is then to be instructed to measure the reasonableness of the child's conduct by an adult standard or by a lesser standard adjusted to the capacity of the plaintiff.[92] What is clear, however, is that as a practical matter the Illinois approach is essentially arbitrary, with the age of the child serving as the decisive factor for determining how the child will be treated.[93]

Of the several policy reasons that might be advanced to support such an arbitrary approach the most obvious one is that the Illinois approach furthers the goal of administrative expediency.[94] At neither age extreme is there needed any evidence of the child's individual abilities or incapacities. The only proof needed in order to determine which of the three categories the child fits into is proof of the child's age. Once age is properly proven the court quickly decides how the child is to be treated.[95] If the child is proven to be below age seven, the contributory negligence issue ceases to be important in the trial.[96] If the child is proven to be above age fourteen, proof of contributory negligence proceeds just as if the plaintiff were an adult.[97] Even the court's problems with children age seven

88. Peterson v. Chicago Consol. Traction Co., 231 Ill. 324, 83 N.E. 159 (1907).

89. *Id.*

90. Thomas v. Price, 81 Ill. App. 3d 542, 401 N.E.2d 651 (1980); Hardy v. Smith, 61 Ill. App. 3d 441, 378 N.E.2d 604 (1978); Piechalak v. Liberty Trucking Co., 58 Ill. App. 2d 289, 208 N.E.2d 379 (1965).

91. *See generally* cases cited note 90 *supra.*

92. *See generally* cases cited note 90 *supra.*

93. Note, *supra* note 78.

94. Wilderman, *Presumptions Existing In Favor Of The Infant In Re: The Question Of An Infant's Ability To Be Guilty Of Contributry Negligence*, 10 IND. L.J. 427 (1935).

95. *See* notes 81-93 *supra* and accompanying text for a discussion of the mechanics of the Illinois approach.

96. Chicago City Ry. v. Tuohy, 196 Ill. 410, 63 N.E. 977 (1902).

97. Peterson v. Chicago Consol. Traction Co., 231 Ill. 324, 83 N.E. 159 (1907).

to fourteen are simplified. Since these children are presumed incapable of contributory negligence they are treated as incapable, unless the defendant wants to challenge the presumption. If the presumption is challenged and rebutted there may be some difficulty in deciding what standard of care to apply, but once that standard is determined the process of proving unreasonable conduct under that standard and proving contributing cause proceeds as usual.[98]

Other policy reasons that might be advanced to support the Illinois approach are not so obvious. Since the practical effect of the Illinois approach is to divide children into three groups which are each treated differently, it seems plausible that each of the three groups can be supported on different policy grounds. The first group, those below age seven, are well protected under the Illinois approach. Use of the defense against those below age seven is completely prohibited.[99] Since the defense cannot be used against those under seven, they cannot be denied compensation because of contributory negligence. Consequently, there is no conflict with the policy to provide compensation for injury.[100] Likewise, since the defendant cannot rely on the defense as a means of escaping liability he might arguably be discouraged from continuing the harmful activity in the future. This would be consistent with the policy of deterrence.[101] On the other hand, refusing to look into the conduct of the very young would not be consistent with the policy underlying the contributory negligence defense, that all individuals in society are to be held to some extent responsible[102] for their own self-harming conduct. However, in the case of the very young this inconsistency might be justifiable since those under seven would probably not be capable of understanding or living up to the responsibility.[103] Since the contributory negligence defense cannot be used to

98. *See generally* cases cited note 22 *supra*.

99. Bottorff v. South Constr. Co., 184 Ind. 221, 110 N.E. 977 (1916).

100. *See generally* notes 34-40 *supra* and accompanying text for a discussion of the policy of compensation.

101. *See generally* notes 32-35 *supra* and accompanying text for a discussion of the policy of deterrence.

102. *See generally* notes 47-56 *supra* and accompanying text for a discussion of why a refusal to consider whether a child is contributorily negligent contravenes the purpose of the defense.

103. Prosser points out that it is unreasonable to assume that an adult acting carelessly is, or should be, meditating on the consequences his actions may have on a future lawsuit. PROSSER, *supra* note 2, at 428. If it is unreasonable to assume an adult meditates on the legal consequences of his conduct, it cannot be reasonable to assume that a child meditates about such things. *Id.*

deny compensation for their injuries, children below age seven are not held responsible for their self-harming conduct, and since the defendant cannot rely on the defense to escape liability he may be encouraged to discontinue his harmful conduct.

The second group, those between the ages of seven and fourteen, is also protected under the Illinois approach. However, the presumption that children in this age group are incapable of contributory negligence is rebuttable.[104] Once the child is proven capable of contributory negligence it is unclear whether the reasonableness of the child's conduct then is to be judged by an adult standard or a lesser standard adjusted to the capacity of the individual child.[105] A child plaintiff would have a better opportunity for compensation if he could have his conduct judged according to a special standard than if his conduct is compared to an adult standard of reasonableness. However, a child judged according to an adult standard can still be considered to have some opportunity for compensation since he must first be proven capable of understanding and appreciating the consequences of his conduct before the defendant can proceed to prove unreasonable contributory conduct.[106] Thus, the treatment of children in this second group is also consistent with the general policy to provide a plaintiff a forum through which he may be compensated for his injuries. Similarly, defendants who are sued by children in this age group, knowing that it may not be easy to prove contributory negligence and escape liability, might arguably be discouraged from continuing their harmful conduct in the future. This would be in accord with a general policy of deterrence.[107] Also, since there is the possibility that a child in this age group may be found capable of contributory negligence there is a chance that the reasonableness of his conduct will be an issue. Therefore, the policy that every individual should be held to some extent responsible for his own self-harming conduct is potentially furthered.[108]

Those in the third group, which includes children above age fourteen, are afforded no special consideration under the Illinois ap-

104. Bottorff v. South Constr. Co., 184 Ind. 221, 110 N.E. 977 (1916).

105. Note, *supra* note 79.

106. *See generally* notes 34-40 *supra* and accompanying text for a discussion of the policy of compensation.

107. *See generally* notes 32-35 *supra* and accompanying text for a discussion of the policy of deterrence.

108. *See generally* notes 47-56 *supra* and accompanying text for a discussion of the policy underlying the defense.

proach.[109] Though children slightly above age fourteen are not normally thought of as being adults, they are treated as if they were adults under this approach.[110] Since they probably cannot measure up to the adult standard, children in this age group will undoubtedly be denied compensation more often than if the reasonableness of their conduct was judged according to their individual capacities.[111] Similarly, a defendant sued by a child of this age group might possibly find it fairly easy to prove contributory negligence under an adult standard, and as a result might find little reason to discontinue the harmful conduct that led to the plaintiff's injury.[112] However, treating children in this age group as adults could possibly have the long term effect of coercing younger children to conduct themselves as reasonable adults. Therefore, though the defendant's harmful conduct may not be deterred, the policy that each person be held responsible for his own self-harming conduct is conceivably furthered.[113]

Though the various policies mentioned are all given different emphasis depending on which age group attention is focused, it should be recalled that the chief policy underlying the entire Illinois approach is administrative expediency.[114] No policy other than administrative expediency can adequately explain why children are divided into three age groups in such an arbitrary manner.[115] Moreover, the administrative expediency of the approach has been a point that has received considerable praise. The Illinois method has been heralded as yielding uniform and predictable results.[116] It is contended that the practicing attorney needs this consistency in order to determine the merits of each client's case.[117] The supporters of the Illinois approach argue that the benefits of administrative simplicity far outweigh any alleged shortcomings.[118]

Critics of the Illinois approach, on the other hand, do not feel that the arbitrariness and inflexibility of the approach is justified by

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109. Bottorff v. South Constr. Co., 184 Ind. 221, 110 N.E. 977 (1916).

110. *Id. See also* cases cited in note 90 *supra*.

111. *See generally* notes 34-40 *supra* and accompanying text for a discussion of the policy of compensation.

112. *See generally* notes 32-35 *supra* and accompanying text for a discussion of the policy of deterrence.

113. *See generally* notes 47-56 *supra* and accompanying text for a discussion of policy underlying the defense.

114. *See* Wilderman, *supra* note 94.

115. *Id. See also* PROSSER, note 2 *supra*, at 158-59.

116. *See* Wilderman, *supra* note 94.

117. *Id.*

118. *Id.*; Walston v. Greene, 247 N.C. 693, 102 S.E.2d 124 (1958).

its administrative expediency.[119] The critics have argued that the capacity of a child to understand and avoid particular dangers does not depend so much on age as it does on mental development.[120] They argue that it is wrong to consider only age to the neglect of other important indicators of a child's capacity.[121] Besides age, they favor consideration of the child's educational background, judgment, and experience.[122] Because of these criticisms, the Illinois approach gradually began to lose favor in Indiana.[123]

### *B. The Massachusett's Method And Recent Indiana Law.*

Though the Indiana courts appeared to favor the Illinois method at the turn of the century, the approach soon lost support. After the Indiana Supreme Court announced its version of the approach in *Bottorff v. South Constr. Co.* in 1916, it was followed only twice in subsequent cases before the appellate court.[124] Many of the defects in the Illinois method began to make themselves apparent in the 1940's.[125]

A particularly revealing case of the 1940's concerned a sixteen year old boy with a proven mental capacity of a normal twelve year

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119. In Johnson's Adm'r v. Rutland R. R., 93 Vt. 132, 135, 106 A. 682, 685 (1919), the Illinois approach was soundly criticized:

> While the rule has merit of simplicity, it is purely arbitrary and lacks the sanction of reason and experience . . . . The test of age alone is not sufficient. Much depends on the circumstances of the situation of the particular case, especially the mental development and previous training and experience of the child.

120. "A rule that age, not sense; years, not intelligence; length of life, not experience, should govern responsibility for human action is unsound and should be disgarded." Tyler v. Weed, 285 Mich. 460, 280 N.W. 27, 840 (1938) (Potter, J., dissenting).

121. In Hellstern v. Smelowitz, 17 N.J. Super. 366, 377, 86 A.2d 265, 271 (1952), the court stated:

> Under the so-called Illinois rule a boy who is one day under seven years of age, may be guilty of the most flagrant contributory carelessness and yet evidence of his exceptional precocity and breadth of judgment and experience cannot by introduced to overcome the illusory presumption of baby like puerility.

*Id.*

122. *See generally* Note, *supra* note 79.

123. *Id.*

124. Brush v. Public Serv. Co., 106 Ind. App. 544, 21 N.E.2d 83 (1939); Kent v. Interstate Pub. Serv. Co., 97 Ind. App. 13, 168 N.E. 465 (1929).

125. Indianapolis Ry. v. Williams, 115 Ind. App. 383, 59 N.E.2d 586 (1945); Town of Argos v. Harly, 114 Ind. App. 290, 49 N.E.2d 552 (1943); Tabor v. Continental Baking Co., 110 Ind. App. 633, 38 N.E.2d 257 (1942).

old.[126] Such an atypical child could not be conveniently classified into one of the three Illinois age groups. The dilemma posed by this atypical child seriously challenged the theory underlying the Illinois method. If the mental age of such a child is acknowledged, the child should be treated as a member of the seven to fourteen age group. However, if chronological age is the only factor examined, such a child must be treated as a member of the above fourteen age group. The court avoided this troublesome problem and simply allowed the jury to decide whether the child had the capacity to be contributorily negligent without actually categorizing the child.[127] In the cases that followed, however, it became clear that the Illinois approach, as stated in *Bottorff*, could no longer be accepted as an accurate statement of the law in Indiana.[128]

The approach that emerged to dominate children's contributory negligence law today in Indiana is known as the Massachusetts method.[129] Under the Massachusetts method a court does not determine a child's capacity simply on evidence of the child's age. Age is considered, but other factors such as the child's intelligence, educational background, and judgment are also examined.[130] Under the Massachusetts approach a child's capacity to be contributorily negligent is ascertained by looking at the whole child[131] and determining whether the particular child was able to recognize and cope with the particular danger that confronted him at the time of his injury.[132] Where reasonable minds cannot differ the determination is made by the court.[133] Where there is a possibility that reasonable minds can differ the jury determines whether the individual child possessed the capacity to be contributorily negligent.[134]

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126. Wise v. Southern Ind. Gas & Elec. Co., 109 Ind. App. 681, 34 N.E.2d 975 (1941).

127. *Id.* This is the appellate courts' view of the trial court's proceedings.

128. *See generally* cases cited in note 125 *supra*.

129. *E.g.*, Giacoble v. Boston Elevated Ry., 215 Mass. 224, 102 N.E. 322 (1913)(illustrating the Massachusetts method).

130. Berdos v. Tremont & Suffolk Mill, 209 Mass. 489, 95 N.E. 876 (1911).

131. A child's capacity is ascertained by examining the whole child, including the child's educational background, intelligence, and judgment as well as age. Note, *supra* note 79.

132. The court determines what the child's capacity was at the time he was confronted by the danger which led to his injury. The court is not concerned with the child's capacity at the time of trial. *See* Wozniczka v. McKean, 144 Ind. App. 471, 247 N.E.2d 215 (1969)(action by adult for injuries sustained when child).

133. Stewart v. Jeffries, 159 Ind. App. 693, 309 N.E.2d 443 (1974).

134. Indianapolis Ry. v. Williams, 115 Ind. App. 383, 59 N.E.2d 586 (1945); *Ac-*

Once a child plaintiff is determined to possess the requisite capacity to be contributorily negligent,[135] the defendant is then allowed to prove unreasonable conduct on the part of the child that was a contributing legal cause of the child's injury.[136] However, under the Massachusetts approach, unlike the Illinois approach, a special child's standard of care is used to measure the reasonableness of the child's conduct.[137] Under the Massachusetts approach, the standard of care required of a child to avoid being held contributorily negligent is "such care as a child of like age, intelligence, and experience would ordinarily exercise under like circumstances."[138] Though appearing objective,[139] the standard is actually fairly subjective, because it takes into account the variances in capacity between children of different ages, and also the variances in knowledge, judgment, and experience between children of the same age group.[140]

Even though the knowledge, judgment, and experience of

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*cord* Heiny Adm'x v. Pennsylvania R.R., 221 Ind. 367, 47 N.E.2d 145 (1943); *see e.g.*, Swanson v. Schroat, 169 Ind. App. 80, 85, 345 N.E.2d 872, 879 (1976).

135. In other words, once it is determined that the child was able to recognize and cope with the particular danger that confronted him, then the defendant is allowed to prove unreasonable conduct.

136. In 1974 Judge Garrard stated: "Knowledge and appreciation of the peril are essential elements of contributory negligence." Hobby Shops, Inc. v. Drudy, 161 Ind. App. 699, 709, 317 N.E.2d 473, 479 (1974); Note, *supra* note 32; *accord* PROSSER, *supra* note 2, at 157-60.

137. Petroski v. NIPSCO, 171 Ind. App. 14, 354 N.E.2d 736 (1976); Moore v. Rose-Hulman Inst. of Tech. 165 Ind. App. 165, 331 N.E.2d 462 (1975); Hobby Shops, Inc. v. Drudy, 161 Ind. App. 699, 317 N.E.2d 473 (1974); Indianapolis Ry. v. Williams, 115 Ind. App. 383, 59 N.E.2d 586 (1945).

138. Petroski v. NIPSCO, 171 Ind. App. 14, 354 N.E.2d 736 (1976). This would be an appropriate jury instruction. *Id.*

139. The following is an accurate representation of how the standard is articulated under the Massachusetts approach:

> The mental capacity, the knowledge and experience of the particular child, are to be taken into consideration in each case. These qualities are individualized— subjective—*but only* for the purpose of determining whether the child was capable of perceivng the risk of injury to himself and of avoiding the danger. Beyond that, there is an objective standard. In determining whether or not his conduct was proper in view of his intelligence, knowledge, and experience, his conduct is to be compared with that of the cafeful and prudent child of similar qualities. Just as in the case of adults, one of the qualities of the standard "reasonable man" is consistent carefulness of prudence, so in the case of infants, the element of prudence is standardized.

Shulman, *supra* note 24, at 620 (emphasis in original).

140. *Id.* PROSSER, *supra* note 2, at 158.

children were not considered under the Illinois approach, each is of prime importance under the Massachusetts approach.[141] Each factor goes to a separate aspect of mental capacity. Knowledge goes to the child's educational background; judgment refers to the child's ability to use such knowledge appropriately; and experience goes to the child's skill at applying his education and judgment.[142] Age is only a secondary factor, and is basically used to focus the factfinder's attention on the difference between what children in general might do in a given situation as compared to what children of one particular age would do in the same situation.[143] Thus, the Massachusetts approach treats the child's age as secondary to his knowledge, judgment, and experience.

The differences between the two approaches can best be illustrated by again considering the case of a child age sixteen with the mental capacity of a twelve year old.[144] Unlike the Illinois approach, the Massachusetts approach is flexible enough to deal with such a child. Under the Massachusetts approach the court first determines whether the child was capable of recognizing and dealing with the particular danger that confronted him.[145] Once the child is determined to be capable of contributory negligence, the jury then determines whether the child acted reasonably for a child of such age, intelligence, and experience.[146] The standard that a court would direct the jury to apply in this situation would be such care as would be reasonable for a child with the knowledge, judgment, and experience of a twelve year old.[147] Chronological age would be disregarded and the jury's attention would be focused on what would be reasonable for a twelve year old rather than what would be reasonable for a sixteen year old. Therefore, the mentally deficient child receives better accomodation under the Massachusetts approach

141. Petroski v. NIPSCO, 171 Ind. App. 14, 354 N.E.2d 736 (1976).

142. *Id.*; Moore v. Rose-Hulman Inst. of Tech. 165 Ind. App. 165, 331 N.E.2d 462 (1975); Hobby Shops, Inc. v. Drudy, 161 Ind. App. 699, 317 N.E.2d 473 (1974); Indianapolis Ry. v. Williams, 115 Ind. App. 383, 59 N.E.2d 586 (1945).

143. *E.g.*, Hollowell v. Greenfield, 142 Ind. App. 344, 216 N.E.2d 537 (1966).

144. Wise v. Southern Ind. Gas & Elec. Co., 109 Ind. App. 681, 34 N.E.2d 975 (1941).

145. *See* note 135 *supra* and accompanying text for a discussion of the process used to determine a child's capacity.

146. *See* cases cited in note 142 *supra*.

147. *See* notes 141-43 *supra* and accompanying text for an analysis of the relative importance of chronological and mental age under the Massachusetts approach.

than he would under the more arbitrary Illinois method.[148]

While the Massachusetts approach is more flexible and accomodating than the Illinois method, administrative expediency and predictability are sacrificed.[149] Unlike the Illinois approach, the Massachusetts approach vests considerable discretion in the trial court.[150] A court utilizing the Massachusetts approach is not locked into any arbitrarily predetermined result. The court is free to consider all aspects of the child in determining what special treatment the child is to be afforded. Consequently, the results are not as predictable[151] as under the Illinois approach. In addition, the Massachusetts approach is more time consuming than the Illinois method. It takes more time to hear proof of a child's intelligence and educational background than it does to simply hear proof of the child's age. It also takes more time to evaluate the additional evidence.[152] While the Massachusetts approach is more flexible and accomodating than the Illinois method, it is also tends to be more time consuming and the results are ultimately less predictable.

Although the policy goal of administrative expediency is not strongly advanced under the Massachusetts approach, some of the other policy goals are reinforced. For instance, under the Massachusetts approach the child plaintiff is provided a fair opportunity for compensation.[153] In every case the child's capacity to be contributorily negligent is individually evaluated.[154] If the child is found capable of contributorily negligent then the reasonableness of the child's conduct is determined according to an individual and subjective standard of care that takes the child's age, knowledge, judgment, and experience into account.[155] Therefore, it cannot be argued that children are being unfairly refused compensation under the Massachusetts approach.

In addition, since the plaintiff will have a fair opportunity for compensation,[156] the defendant will not be able to rely on the con-

148. *See* cases cited in note 142 *supra.*

149. Note, *supra* note 32.

150. *Id.*

151. *Wilderman, supra* note 94.

152. *Id. See generally* Note, *supra* note 32.

153. *See generally* notes 34-40 *supra* and accompanying text for a discussion of the policy of compensation.

154. Petroski v. NIPSCO, 171 Ind. App. 14, 354 N.E.2d 736 (1976).

155. *Id.*

156. *See generally* notes 32-35 *supra* and accompanying text for a discussion of policy of deterrence.

tributory negligence defense as an easy way to escape liability.[157] The defendant, therefore, may be inclined to consider altering his own conduct to avoid similar negligence suits in the future.[158] Furthermore, the child, while given special treatment, is still not completely allowed to escape responsibility for contributing on his own harm. Hence, despite all the special consideration given the child under the Massachusetts approach, the policy underlying the defense that all individuals should be held responsible for their own self-harming conduct still operates to insure that the child does not unfairly escape responsibility for his own negligence.[159] Thus, the policies of compensation and deterrence, as well as the policy of holding each person responsible for his own self-harming conduct, are all mutually reinforced under the Massachusetts approach.

While the Massachusetts approach is compatible with the various policies mentioned above, it has been praised primarily for its flexibility and accomodating nature.[160] Unlike the Illinois approach, the Massachusetts approach permits a more complete, albeit subjective, analysis of the abilities and disabilities of each individual child.[161] On the other hand, this more accomodating approach is often criticized for focusing too much attention on the characteristics of each particular child plaintiff. Since a decision in any one case relies heavily on the facts of that particular case, the holding will have little precedential value.[162] Similar cases with slightly different fact situations may have different results. This leads to confusion among the courts and among practicing attorneys attempting to estimate the merits of their cases before going to court.[163]

Despite these minor criticisms, Indiana has favored the Massachusetts method in recent years.[164] However, the transition from the Illinois method to the Massachusetts method is not yet complete. At present Indiana uses some portion of both methods.

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157. *See generally* notes 47-56 *supra* and accompanying text for a discussion of general policy underlying the defense.

158. *See* PROSSER, *supra* note 2, at 443-44; *see also* Lowndes, *supra* note 40, at 679-81.

159. *Id.*

160. Note, *supra* note 32.

161. *Id.* Shulman, *supra* note 24.

162. Wilderman, *supra* note 94; *see generally* Note, *supra* note 32.

163. Wilderman, *supra* note 94.

164. Petroski v. NIPSCO, 171 Ind. App. 14, 354 N.E.2d 736 (1976); Lanoux v. Hagar, 159 Ind. App. 646, 308 N.E.2d 873 (1974); Stewart v. Jeffries, 159 Ind. App. 693, 309 N.E.2d 443 (1974); Hollowell v. Greenfield, 142 Ind. App. 344, 216 N.E.2d 537 (1966).

## III. THE STATE OF THE LAW IN INDIANA 1982: A BLEND OF THE ILLINOIS APPROACH AND THE MASSACHUSETTS APPROACH.

Though the *Bottorff*[165] version of the Illinois method had some following in the years subsequent to its pronouncement,[166] the approach gradually began to lose favor.[167] In 1968, in *Bixenman v. Hall*,[168] the Indiana Supreme Court substantially altered its approach to the problem of children's contributory negligence. *Bixenman* was the court's first major decision on the issue of children's contributory negligence since 1916 and a great deal of the earlier *Bottorff* ruling was essentially rejected. In *Bixenman*[169] the various *Bottorff* presumptions applicable to children age seven to the age of majority were rejected in favor of the more accomodating Massachusetts method. However, the *Bottorff* presumptions applicable to children under age seven were not rejected or even considered in the case.

*Bixenman* dealt specifically with a thirteen year old bicyclist who violated a traffic safety statute. The court held that the thirteen year old possessed the requisite capacity to be contributorily negligent, and that the standard of care applicable was the degree of care ordinarily exercised by a thirteen year old of similar mental capacity.[170] Additionally, the court indicated that it also favored applying the Massachusetts approach to children between the ages of fourteen and eighteen. The court made a special effort to point out that children between the ages of fourteen and eighteen should be judged according to a children's standard and not an adult standard of care.[171] However, nothing was mentioned about the *Bottorff* treatment of children under age seven.[172] Although *Bixenman* explicitly rejected the Illinois method of categorical treatment of children between the ages of seven and fourteen, and implicitly rejected the categorical treatment of those above age fourteen, it left unaltered the presumption regarding children below age seven.

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165. Bottorff v. South Constr. Co., 184 Ind. 221, 110 N.E. 977 (1916).

166. Brush v. Public Serv. Co., 106 Ind. App. 554, 21 N.E.2d 83 (1939); Kent v. Interstate Pub. Serv. Co., 97 Ind. App. 13, 168 N.E. 465 (1929).

167. Plotzki v. Standard Oil Co. of Ind., 228 Ind. 518, 92 N.E.2d 632 (1950)(attractive nuisance case discussing *Bottorff*); *see also* Indianapolis Ry. v. Williams, 115 Ind. App. 383, 59 N.E.2d 586 (1945).

168. Bixenman v. Hall, 251 Ind. 527, 242 N.E.2d 837 (1968).

169. *Id.*

170. *Id.*

171. *Id.* at 529, 242 N.E.2d at 840.

172. *Id.*

As a result of *Bixenman* and other recent decisions,[173] it can be concluded that the Illinois approach, except the presumption regarding children below age seven, has either been explicitly or implicitly rejected. Since *Bixenman* dealt with a child in the seven to fourteen age group and only ruled on the treatment of children within that age group, there is a weak argument that the court's discussion of those age fourteen to eighteen was only *dictum*.[174] Nevertheless, the Indiana appellate court has found the *Bixenman* language persuasive.

In 1975 the appellate court held that a sixteen year old was entitled to the special consideration of a child and was not required to meet an adult standard of reasonableness.[176] To support its decision, the court looked to the Indiana Code which fixed age eighteen as the age of legal majority.[177] The court reasoned that since the legislative treated those under eighteen as minors and not adults,

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173. Smith v. Diamond, ____ Ind. App. ____ , 421 N.E.2d 1172 (1981); Petroski v. NIPSCO, 171 Ind. App. 14, 354 N.E.2d 736 (1976); Lanoux v. Hager, 159 Ind. App. 646, 308 N.E.2d 873 (1974); Stewart v. Jeffries, 159 Ind. App. 693, 309 N.E.2d 443 (1974); Hobby Shops, Inc. v. Drudy, 161 Ind. App. 699, 317 N.E.2d 473 (1974).

174. The court indicated that it favored treating those between fourteen and eighteen as children, not as adults. Since the conduct of a thirteen-year-old was under consideration in *Bixenman* and not the conduct of fourteen to eighteen-year-olds, it might be argued that the court's statement about older children is dictum similar to the dictum in *Bottorff*. There are considerable differences between the two cases. *Bottorff* dealt with capacity in an arbitrary manner, *Bixenman* did not. *Bottorff* attempted to arbitrarily determine the capacity of children not before the court. *See* note 81 *supra*. *Bixenman*, on the other hand, dealt with the capacity issue in a non-arbitrary manner. *Bixenman* stated that when a child is accused of contributory negligence he will not be found to have an adult's capacity until age eighteen. Instead, he will be considered to have a child's capacity and be required to exercise the care of a child of like age, knowledge, judgment, and experience. The *Bixenman* court had a child before it and simply stated how a child should be treated when accused of contributory negligence. Viewed from this perspective, the argument that *Bixenman* is dictum has limited support. Bixenman v. Hall, 251 Ind. 527, 242 N.E.2d 837 (1968).

175. Moore v. Rose-Hulman Inst. of Tech., 165 Ind. App. 165, 331 N.E.2d 462 (1975).

176. *Id.* The sixteen-year-old was involved in a child's activity. Had he been involved in an adult activity the standard of care might have been different. In dictum *Bixenman* indicated that children engaged in adult activity should be judged by an adult standard of care. In the situation of a sixteen-year-old driving a car, for example, society has an overriding interest in holding all who operate vehicles to a high standard of care. It is therefore necessary to assume the sixteen-year-old has the capacity to meet such a standard. Bixenman v. Hall, 251 Ind. 527, 242 N.E.2d 837 (1968). The *Bixenman dictum* concerning children involved in adult activities was subsequently affirmed in 1979. McNall v. Farmers Ins. Group, ____ Ind. App. ____, 392 N.E.2d 520 (1979).

177. IND. CODE ANN. § 34-1-67-1 (Supp. 1980).

the same individuals should not be required to meet an adult standard of care when charged with contributory negligence.[178] Also in 1976, the appellate court expressly overruled two earlier cases to the extent that they supported the *Bottorff* requirement that children, age fourteen and over, be held to an adult standard of care.[179]

The *Bottorff* presumption that children below age seven are incapable of contributory negligence has never specifically been repudiated by any Indiana court. Other than one recent appellate court decision that held a five year old incapable of contributory negligence, there have been no other recent decisions in the state courts directly dealing with the issue of children below the age of seven.[180] However, there have been two federal court decisions dealing directly with those below age seven.[181]

The Seventh Circuit, interpreting Indiana law, held that the *Bottorff* rule, that children under age seven are conclusively presumed incapable of contributory negligence, is still valid law in Indiana.[182] The court, in accordance with the rule, held that a six year old could not be held contributorily negligent despite proof that the child was of superior intelligence.[183] The court concluded that the common law presumption still in effect in Indiana concerning those below age seven precluded considering anything but age as determinative of the child's capacity.[184] The court was careful to distinguish an earlier Seventh Circuit ruling concerning an eight year old with the proven mental capacity of a five year old.[185] In the earlier case, the court held that Indiana law allowed the consideration of factors other than age to determine the capacity of the child, and that an eight year old with the proven mental capacity of a five year old could thereby be considered incapable of contributory

178. Moore v. Rose-Hulman Inst. of Tech., 165 Ind. App. 165, 331 N.E.2d 462 (1975).

179. Petroski v. NIPSCO, 171 Ind. App. 14, 354 N.E.2d 736 (1976). *Petroski* overruled the following two cases to the extent they appear contra to the *Petroski* decision: Brush v. Public Serv. Co., 106 Ind. App. 554, 21 N.E.2d 83 (1939); Kent v. Interstate Pub. Serv. Co., 97 Ind. App. 13, 168 N.E. 465 (1929).

180. Wozniczka v. McKean, 144 Ind. App. 471, 247 N.E.2d 215 (1969).

181. Mann v. Anderson, 447 F.2d 533 (7th Cir. 1971); Echevarria v. United States Steel Corp., 392 F.2d 885 (7th Cir. 1968).

182. Mann v. Anderson, 447 F.2d 533 (7th Cir. 1971).

183. *Id.*

184. *Id.*

185. Echevarria v. United States Steel Corp., 392 F.2d 885 (7th Cir. 1968).

negligence.[186] In distinguishing this earlier case, the Seventh Circuit noted that Indiana does allow consideration of factors other than age to determine capacity if the child in question is above age seven, but stated that if the child is below age seven the common law presumption applies and only age can be considered.[187] The federal courts have recognized that even though Indiana favors a Massachusetts approach for children above age seven, the state still uses the Illinois approach when dealing with children under the age of seven.[188]

The current combination of the Illinois and Massachusetts approaches, though somewhat confusing, is not completely without policy justification. Exactly what these policies are is revealed by a brief review of the special policy orientation of each approach. Even though it lacks administrative expediency, the Massachusetts approach is both flexible and accommodating and is based on sound policy grounds.[189] The special standard of care the court develops for each child takes time to administer but it insures that the child has a fair opportunity to be compensated for his injuries.[190] Likewise, it insures that the defendant is not allowed to take unfair advantage of the child and arguably encourages the defendant to be more careful in the future.[191] Moreover the child is still expected to act reasonably for his capacity and is not allowed to unfairly escape responsibility for unreasonable self-harming conduct.[192] The Illinois approach, on the other hand, is quick and easy to administer, although it is somewhat arbitrary.[193] Age is determinative and the other indicators of a child's capacity are ignored. The older child is not given adequate consideration, while the very young child is given so much special consideration that the defendant is powerless against him. However, the Illinois approach is administratively expedient. While

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186. *Id.*

187. Mann. v. Anderson, 447 F.2d 533 (7th Cir. 1971).

188. *Id.*

189. *See generally* notes 148-52 *supra* and accompanying text for a discussion of the expediency of the Massachusetts method.

190. *See generally* notes 153-55 *supra* and accompanying text for a discussion of the way the Massachusetts approach satisfies the policy of compensation.

191. *See generally* note 158 *supra* and accompanying text for a discussion of the Massachusetts method and the policy of deterrence.

192. *See generally* note 159 *supra* and accompanying text for a discussion of the Massachusetts approach and the policy underlying the contributory negligence defense.

193. *See generally* notes 85-98 *supra* and accompanying text for a discussion of the expediency and arbitrariness of the Illinois approach.

the price of expediency may be high, it can be argued that Indiana is justified at least in retaining the conclusive presumption that children below age seven are incapable of contributory negligence.[194]

Those in favor of complete abandonment, however, would argue that it is unfair to completely deny the defendant an opportunity to use the defense against children below age seven.[195] Though a child below age seven may not have the capacity of an adult, they would argue that he may be capable of recognizing and avoiding obvious dangers, such as a fire or a moving vehicle. Accordingly, such a child should be held responsible for unreasonable conduct in connection with such dangers if those dangers are proven not to be beyond his individual capacity to understand.[196]

Those in favor of retaining the presumptions, on the other hand, would argue that in most situations a child under age seven can usually be considered incapable of recognizing and avoiding most dangers.[197] Furthermore, they would argue that since most people would agree that the majority of children below age seven do not have the capacity to deal with the world in a responsible manner, it would be better to retain the presumption than waste valuable court time attempting to use proof other than age to show mental capacities of children below age seven.[198] Though the arugments on both sides have merit, Indiana presently retains the administrative expediency of the conclusive presumption that children below age seven are incapable of contributory negligence.

While Indiana has retained some of the administrative expediency of the Illinois method, most of the arbitrariness of the approach has either been completely abandoned or has been mitigated by incorporating the more accomodating Massachusetts approach. The arbitrary division between those below fourteen, once presumed rebuttably incapable of contributory negligence, and those above age fourteen, once considered capable of bearing the responsibility for their unreasonable conduct as adults, no longer exists in Indiana.[199] Rather than treat a child as a child one day and then as

194. Wilderman, *supra* note 94.

195. Hellstem v. Smelowitz, 17 N.J. Super. 366, 86 A.2d 271 (1952).

196. *See generally* Mann v. Fairbourn, 12 Utah 2d 342, 366 P.2d 603 (1961).

197. *See generally* Chicago City R. Co. v. Tuohy, 196 Ill. 410, 63 N.E. 997 (1902); Dixon v. Stringer, 277 Ky. 347, 126 S.W.2d 448 (1939).

198. *See generally* Chicago City R. Co. v. Tuohy, 196 Ill. 410, 63 N.E. 997 (1902).

199. Bixenman v. Hall, 251 Ind. 527, 242 N.E.2d 837 (1968); Moore v. Rose-Hulman Inst. of Tech., 165 Ind. App. 165, 331 N.E.2d 462 (1975).

an adult the day after he turns fourteen, the Indiana courts now develop a special standard of care for each child that corresponds to the child's mental capacity, not just his age. As the mental capacities of a child increase from age seven to age eighteen, the standard of care developed by the court becomes progressively closer to that of an adult's.[200] Thus, in the final transition from the most demanding child standard to an adult standard at age eighteen, the difference in standards of care will be hardly noticeable.

Similarly the transition from the point where a child is presumed incapable of contributory negligence at age six, to the point where he may be proved capable of contributory negligence at age seven, will hardly be discernible under the current Illinois-Massachusetts combination.[201] Of those children between age seven and eighteen found to possess the requisite capacity to be contributorily negligent, the youngest children with the lowest mental capacity will be judged according to the least demanding standard of care. The standard developed for and applied to a normal nine year old will be stricter than the standard applied to an eight year old. The younger the child the less demanding the standard.[202] Therefore, the transition will be smooth from the period of life where the child is presumed incapable of contributory negligence to the period when the child is progressively held more and more responsible for his conduct as his mental capacity increases.

While the combination of the Massachusetts and Illinois approaches currently used in Indiana satisfies most of the major policy concerns, the transition to using the Massachusetts approach is not yet completed. If the current approach remains unchanged, neither child plaintiff nor adult defendant would suffer any great prejudice. It is doubtful, however, that this area of the law will remain unaltered for long. Furthermore, the current approach, though satisfying most policy considerations, could still be approved.

## IV. ANTICIPATED MODIFICATIONS OF THE CONTRIBUTORY NEGLIGENCE DEFENSE AS APPLIED TO CHILDREN

The combination of the Massachusetts and Illinois approaches

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200. Bixenman v. Hall, 251 Ind. 527, 242 N.E.2d 837 (1968); Moore v. Rose-Hulman Inst. of Tech., 165 Ind. App. 165, 331 N.E.2d 462 (1975).

201. Bixenman v. Hall, 251 Ind. 527, 242 N.E.2d 837 (1968); LaNoux v. Hagar, 159 Ind. App. 646, 308 N.E.2d 873 (1974); Stewart v. Jeffries, 159 Ind. App. 693, 309 N.E.2d 443 (1974).

202. Bixenman v. Hall, 251 Ind. 527, 242 N.E.2d 837 (1968); Stewart v. Jeffries, 159 Ind. App. 693, 309 N.E.2d 443 (1974).

currently used in Indiana, though basically consistent with legal policy, is still susceptable to improvement. There are two aspects of the current law which could be revised to make the defense more equitable for both plaintiff and defendant. First, the courts could abandon the presumption concerning children below age seven and extend the Massachusetts approach to include children of all ages.[203] Second, the courts or legislature could formally adopt a procedure to apportion the cost of the injury according to the relative contribution of each party.[204]

Extendng the Massachusetts approach to cover children below age seven would give the defendant a better opportunity to show that the child plaintiff is capable of bearing the responsibility for unreasonable contribution to his own injuries. Though most young children may not have the capacity to recognize and deal with all dangers, many children below age seven may be able to recognize and understand certain dangers.[205] A typical example would be the dangers inherent in a body of water. Many, but not all children, are capable of recognizing these dangers.[206] Accordingly, it would be fair to allow the defendant to prove that the child's unreasonable conduct toward such comprehensible dangers contributed to his injury.

Under current Indiana law, the defendant would not be allowed to offer such proof. However, if the Massachusetts approach was extended to include children below age seven, the defendant would have the opportunity to prove that such a child contributed to his own harm. Alternatively, the conclusive presumption of incapacity could be reduced to a rebuttable presumption. Children below age seven, though presumed incapable of contributory negligence, could be found contributorily negligent if they were proven to possess sufficient capacity to appreciate the particular danger. The only difference between this alternative and an extension the Massachusetts approach would be the language. The mechanics would not differ. Thus, the simplest way of eliminating the inequity of prohibiting the defendant from using the defense against children below age seven, would be to extend the coverage of the

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203. *See* notes 195-98 and accompanying text for a discussion of the pros and cons of eliminating the presumption regarding children below age seven.

204. *See* notes 47-56 *supra* and accompanying text for a discussion of why a refusal to consider whether a child is contributorily negligent contravenes the purpose of the defense. *See also* Lowndes, *supra* note 42; PROSSER, *supra* note 2, at 443-45.

205. Harness v. Church Members Life Ins. Co., 241 Ind. 672, 175 N.E.2d 132 (1961)(six-year-old capable of understanding the danger of water).

206. *Id.*

Massachusetts approach to include children below age seven as well as those above age seven.

Beyond extending the coverage of the Massachusetts approach, another modification that might make Indiana law more equitable, would be the adoption of a procedure to apportion the cost of the injury according to the relative contribution of each party.[207] Though Indiana has consistently rejected the formal adoption of comparative negligence,[208] the current Indiana approach to the children's contributory negligence problem is in essense a limited form of comparative negligence. The current approach to the contributory negligence of children above age seven is to weigh the relative responsibilities of each party according to the relative capabilities of each, yet ultimately the cost of the injury for which both parties are partly responsible is placed on only one party.[209] While considerable effort is expended comparing responsibility, attempts to apportion damages are refused. A comparative negligence approach would apportion the damages between the parties according to each party's responsibility for the injury.[210] A formal change to comparative negligence would have a positive effect on the area of children's contributory negligence. A child, only partly responsible for his injury, would bear part but not all of the burden of the injury. Viewed another way, a defendant found partly to blame for a child's injury would not be able to completely escape responsibility for the injury simply because the child also acted unreasonably.[211] Apportionment of the costs of a child's injury according to the relative responsibilities of each party has worked well in other states and it would work in Indiana.[212] Though the Indiana courts have been reluctant to change to comparative negligence, and probably will not do so in the near future,[213] such a change would be a logical step toward fulfilling the policy goals the state already en-

207. PROSSER, *supra* note 2, at 443-45.

208. Booher v. Alhom, Inc., 156 Ind. App. 192, 295 N.E.2d 841 (1973).

209. PROSSER, *supra* note 2, at 443-45.

210. *Id.*

211. A situation appropriate for the application of comparative negligence is the fact situation in Harden v. U.S., 485 F. Supp. 380 (D.C. Ga. 1980). The case involved a fifteen-year-old who was shot by a park ranger. The fifteen-year-old was shot while participating in a fraternity hazing at a wilderness park. The boy was negligent, but the park ranger that shot him was also negligent. The court applied Georgia's comparative negligence law and apportioned the damages between the parties.

212. *Id.*

213. Booher v. Alhom, Inc., 156 Ind. App. 192, 295 N.E.2d 841 (1973).

dorses. Furthermore, comparative negligence principles could be used experimentally when dealing with children before such principles were applied in cases involving only adults. One can only speculate on whether Indiana will eventually adopt comparative negligence or will even extend the Massachusetts approach to include children of all ages. Nevertheless, both changes would be consistent with current trends.

## CONCLUSION

Historically there has been considerable disagreement over the appropriate approach to the children's contributory negligence problem. The current Indiana combination of the Massachusetts and Illinois approaches, to a limited extent, successfully incorporates the best aspects of both methods. Though much of the administrative simplicity of the Illinois approach was abandoned, the most justifiable portion that dealt with children below age seven was retained.[214] However, most of the arbitrariness of the Illinois approach has given way to the more flexible and accomodating Massachusetts approach. In Indiana no child below age eighteen is unfairly penalized by the contributory negligence defense. Children below age seven are granted the ultimate in special consideration since the defendant is completely prohibited from using the defense against them.[215] Similarly, those between age seven and eighteen are given special consideration, though the defense can be used against them.[216] In every case where a child is between the ages of seven and eighteen, the individual child's capacity to be contributorily negligent is evaluated. Then, the reasonableness of the child's conduct is determined according to an individualized and subjective standard of care.[217] Under current Indiana law all children are given a fair opportunity to recover compensation for their injuries. In most cases where children are above age seven, the defendant is given a fair chance to use the defense to prove that the plaintiff

214. Only the federal courts have ruled on whether Indiana has retained the presumption regarding those below age seven, Indiana courts have not specifically dealt with the issue. Mann v. Anderson, 447 F.2d 533 (7th Cir. 1971). Nevertheless, the Seventh Circuit's argument seems logical, accurate, and persuasive.

215. *Id.*

216. Bixenman v. Hall, 251 Ind. 527, 242 N.E.2d 837 (1968); Stewart v. Jeffries, 159 Ind. App. 693, 309 N.E.2d 443 (1974).

217. Bixenman v. Hall, 251 Ind. 527, 242 N.E.2d 837 (1968); Moore v. Rose-Hulman Inst. of Tech. 165 Ind. App. 165, 331 N.E.2d 462 (1975); LaNoux v. Hagar, 159 Ind. App. 646, 308 N.E.2d 873 (1974); Stewart v. Jeffries, 159 Ind. App. 693, 309 N.E.2d 443 (1974).

should bear the greater responsibility for the injury.[218] Though the combination of the Massachusetts and Illinois approaches that Indiana now utilizes satisfies most major policy concerns, the transition to a total adoption of the Massachusetts approach is not yet complete. If the Indiana courts wish to complete that transition some changes must still be made. In addition to a complete adoption of the Massachusetts approach, the adoption of comparative negligence principles would also be consistent with the policies underlying the approach Indiana now utilizes. It appears that such changes will eventually be made, but one can only speculate as to when.

*David W. Holub*

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218. The only situation where a child above age seven could not be proven contributorily negligent would be if the child's mental capacity was below that of a seven-year-old. Echevarria v. U.S. Steel Corp., 393 F.2d 885 (7th Cir. 1968). Since a federal decision is not binding on the Indiana courts, *Echevarria* may only be persuasive authority in an action brought in state court.