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REASSESSING THE NEGLIGENCE STANDARD OF CARE FOR MINORS

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Most American jurisdictions have two different standards of care, the adult "reasonable person under the circumstances" standard and the more individualized child standard of care for situations where the negligence of a minor causes injuries.[1] Courts and commentators claim that the adult standard is used when a minor was engaged in an adult activity.[2] An analysis of the cases involving the use of firearms and motor vehicles by minors demonstrates that the use of different standards of care for minors is not based upon whether the activity is engaged in mostly by adults. In reality, courts apply the adult standard only if a minor was operating a motor vehicle.[3] Furthermore, in creating a two-tiered system of assessing the negligence of minors, the courts have made unjustified distinctions. The courts' misapplication of the negligence standards for minors is the result of their reliance upon inappropriate protective notions about certain dangerous activities, such as hunting, in deciding which standard of care to use.

This Article will examine and critique this two-tiered system. First, the Article will describe the two standards of care. Then, it will focus upon courts' application of the child standard of care to minors' use of firearms and their application of the adult standard of care to minors' use of motor vehicles. The final part of this Article will examine the rationales underlying the child standard of care. It will show that a two-standard system should be retained. It will also show, however, that the child standard of care is only appropriate for a limited group of activities: carefree activities where, even if the minor uses poor judgment, harm to others is very unlikely. The remaining activities are those which are likely

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1. *See* W. Prosser & W. Keeton, The Law of Torts 179-81 (5th ed. 1984); Gray, *The Standard of Care for Children Revisited*, 45 Mo. L. Rev. 597, 604-20 (1980). The majority of states do not apply negligence principles to children three years old and under. Gray, *supra*, at 598. Most states do apply negligence principles to children seven years or older. *Id.* at 598-99. Jurisdictions vary greatly in their treatment of children between the ages of three and seven charged with negligence. *Id.* The scope of this Article is limited to a discussion of the standard of care to be applied to minors found by courts to be old enough to be capable of negligent conduct.

2. *See infra* notes 9-12 and accompanying text.

3. *See infra* notes 13-23 and accompanying text.

to cause serious harm to others unless the child uses mature judgment. The adult standard of care should apply to these dangerous activities.

I. DEFINING THE STANDARDS OF CARE

The Restatement (Second) of Torts' definitions for the two standards of care are representative of those most courts use.[4] A child must use the same degree of care as a reasonable child "of like age, intelligence, and experience under like circumstances."[5] An adult must act like a "reasonable person under like circumstances."[6] Accordingly, it is easier to conform to the child's standard of care than to the adult's standard.[7]

Comment c to Restatement (Second) of Torts section 283A states that the exception to the child standard of care "arise[s] where a child [is] engage[d] in an activity which is normally undertaken only by adults, and for which adult qualifications are required."[8] Courts hold a minor engaged in this kind of activity to the adult standard of care.[9] This is most commonly described as the adult activity exception.[10] It is of modern origin, having been widely recognized by courts in the 1960s and 1970s.[11]

4. *See, e.g.*, Uddo v. Parker, 31 Cal. Rptr. 745, 748 (Ct. App. 1963); Dellwo v. Pearson, 107 N.W.2d 859, 863 (Minn. 1961); Neumann v. Shlansky, 294 N.Y.S.2d 628, 633-34 (1968); Thomas v. Inman, 282 Or. 279, 285-86, 578 P.2d 399, 403 (1978); Robinson v. Lindsay, 598 P.2d 392, 393-94 (Wash. 1979).

5. Restatement (Second) of Torts § 283A (1965).

6. Restatement (Second) of Torts § 283 (1965).

In defining "child," the Restatement negatively implies that an adult is a person of such mature years as to be capable of exercising the judgment, intelligence, knowledge, experience, and prudence demanded by the standard of the reasonable person. *Id.* at § 283A comment a.

Many commentators and courts, however, have defined adult more arbitrarily as any person over the legal age of majority, typically 18. *See, e.g.*, Goss v. Allen, 360 A.2d 388, 391 (N.J. 1976).

7. Commentators have described and defended the child standard as having both subjective and objective facets. They note that, although the standard considers the particular child's "age, intelligence and experience," the standard remains objective by applying a "reasonable person with these particular attributes under the circumstances" test. *See* Shulman, *The Standard of Care Required of Children*, 37 Yale L.J. 618, 622-23 (1928); Note, *A Proposal for a Modified Standard of Care for the Infant Engaged in an Adult Activity*, 42 Ind. L.J. 405, 407 (1966-67) [hereinafter cited as *A Proposal for a Modified Standard of Care*]; Note, *Standard of Care Applied to Minors in the Operation of Dangerous Instrumentalities*, 3 Tulsa L.J. 186, 187 (1966). They claim that a factfinder can distinguish the semi-objective test from a purely subjective test that would either ask what the particular child in question would have been ordinarily expected to do under the circumstances or whether the child acted in good faith. *See* Shulman, *supra*, at 625. Even if the defenders of the child standard of care are correct in stating that the test, in fact, has a meaningful objective component, consideration of the particular child's age, intelligence, and experience in most cases will substantially increase the likelihood that courts will not find the child's conduct to be negligent. When the child's age, intelligence and experience are factors which are considered in determining whether the child acted reasonably under the circumstances, the fairness difficulties discussed *infra* at note 96 are greatly reduced. The child is more likely to be capable of meeting this standard.

8. Restatement (Second) of Torts § 283A comment c (1965).

9. *See id.*

10. *See, e.g.*, Gunnells v. Dethrage, 366 So. 2d 1104, 1105 (Ala. 1979); Farm Bureau Ins. Group v. Phillips, 323 N.W.2d 477, 478 (Mich. 1982). *See generally A Proposal for a Modified Standard of Care, supra* note 7.

11. *See generally* Annot., 97 A.L.R.2d 872 (1964).

Courts have restricted the adult activity exception to one set of activities: those involving motorized vehicles of any kind.[12] The operation of automobiles,[13] tractors,[14] snowmobiles,[15] motorboats,[16] motorcycles,[17] motorscooters,[18] go carts,[19] mopeds,[20] and minibikes[21] have all been held to be adult activities. The strict limits on the kind of activities uniformly held to fall within the exception present one obvious basis for criticizing its present description. Motorized activities are not activities "normally undertaken only by adults";[22] neither do all motorized activities require adult qualifications. Thus, from the outset, the description of which activities fall within an exception to the usual child standard of care rule is inaccurate and misleading.

Furthermore, based on the number of negligence cases involving minor drivers, the adult standard of care probably is now applied in the majority of negligence cases involving minors.[23] In other words, based on frequency of application, the adult standard of care is not the exception but the rule. If the adult activity exception were renamed the motorized

12. There is only one decision involving a non-motorized activity in which the adult standard of care was applied to a minor defendant. In Neumann v. Shlansky, 58 Misc. 2d 128, 294 N.Y.S.2d 628 (1968), *aff'd*, 63 Misc. 2d 587, 312 N.Y.S.2d 951 (App. Term 1970), *aff'd*, 318 N.Y.S.2d 925 (App. Division 1971), the trial court held that golfing was an adult activity and, therefore, the 11-year-old defendant golfer should be held to an adult standard of care. Three other courts have stated that the adult standard of care is not applicable to minor golfers. *See* Meyer v. Smith, 428 S.W.2d 612, 613 (Ky. 1968); Gremillion v. State Farm Mut. Ins. Co., 331 So. 2d 130, 132 (La. 1976); Kirchoffner v. Quam, 264 N.W.2d 203, 207 (N.D. 1978).

13. *See, e.g.*, Nielsen v. Brown, 232 Or. 426, 374 P.2d 896 (1962).

14. *See, e.g.*, Jackson v. McCuiston, 448 S.W.2d 33 (Ark. 1969); Goodfellow v. Coggburn, 560 P.2d 873 (Idaho 1977).

15. *See, e.g.*, Robinson v. Lindsay, 598 P.2d 392 (Wash. 1979).

16. *See, e.g.*, Dellwo v. Pearson, 107 N.W.2d 859 (Minn. 1961).

17. *See, e.g.*, Black v. Quinn, 646 S.W.2d 437 (Tenn. Ct. App. 1982).

18. *See, e.g.*, Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965); Powell v. Hartford Accident & Indem. Co., 398 S.W.2d 727 (Tenn. 1966).

19. *See, e.g.*, Ewing v. Biddle, 216 N.E.2d 863 (Ind. 1963).

20. *See, e.g.*, Terre Haute First Nat'l Bank v. Stewart, 455 N.E.2d 362 (Ind. App. 1983).

21. *See, e.g.*, Perricone v. Di Bartolo, 302 N.E.2d 637 (Ill. App. 1973).

22. At least one state permits minors to drive motor vehicles on public roads as early as age 14. *See* Tenn. Code Ann. § 55-7-105(1) (1980). The age of majority in Tennessee is 18. Tenn. Code Ann. § 1-3-105(29) (Supp. 1984).

In most states the legal unrestricted driving age is 15 or 16. *See, e.g.*, La. Rev. Stat. Ann. § 32:407 (1984) (age 15); Miss. Code Ann. § 63-1-9 (1983) (age 15); Or. Rev. Stat. § 482.110 (1984) (age 16). Minors frequently drive snowmobiles, go-carts, motorboats, tractors and various other types of motorized vehicles.

23. A high percentage of negligence cases involve motor vehicles. *See* F. Harper & F. James, The Law of Torts 733 (1956); R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim 13-14 (1965). Minors are heavy users of motor vehicles. In 1980, persons under age 20 comprised 9.8% of America's automobile drivers. Accident Facts, National Safety Council (1981). Furthermore, a disproportionate percentage of drivers under age 20 are involved in automobile accidents. In 1980, they were involved in 15.8% of the fatal accidents and 16.8% of all accidents. *Id.; see also* James & Dickinson, *Accident Proneness and Accident Law*, 63 Harv. L. Rev. 769, 775 (1950). Minors do not, however, engage in a number of other activities where negligence cases frequently arise, such as in the areas of professional malpractice and products liability.

vehicle rule, it would more accurately describe the activities to which courts presently apply the adult standard of care. Such relabelling, however, only reinforces the more fundamental problem with courts' present categorization of activities. Neither "adult" nor "motor vehicle" accurately describes the activities to which the adult standard should apply. As will be demonstrated, a broader label such as the dangerous activities rule would provide a more accurate description.

II. A CRITIQUE OF THE DIFFERENT STANDARDS FOR MINORS' USE OF FIREARMS AND MOTOR VEHICLES

Based on the number of recently reported cases, minors' operation of motor vehicles is the activity most frequently resulting in harm to others; minors' misuse of firearms follows a distant second.[24] In cases involving minor drivers, courts have rejected the child standard of care.[25] In contrast, where minors have injured others while using firearms, modern courts have uniformly imposed the child standard of care.[26] The following review of the firearms cases shows that the arguments used to distinguish firearms from motor vehicles are analytically unsound. There is no principled justification for applying a child standard of care to one set of dangerous activities and an adult standard of care to another.

A. Historical Overview of the Standard of Care

Until the beginning of the twentieth century most courts applied the adult standard of care to all persons sued for negligence, including minors who accidentally injured others with firearms.[27] Very few suits for firearms injuries were reported during the nineteenth century. One commentator from that time stated:

24. One annotation on which standard should be applied to minors who use motor vehicles mentions at least 35 cases. Annot., 97 A.L.R.2d 872 (1964). The only other annotation concerning the standard of care to be applied to minors engaged in a particular type of activity is one concerning their use of weapons. It cites only to six cases two of which involve airguns. Annot., 47 A.L.R.3d 620 (1973).

25. *See, e.g.*, Harrelson v. Whitehead, 365 S.W.2d 868 (Ark. 1963); Nielsen v. Brown, 232 Or. 426, 374 P.2d 896 (1962); Garatoni v. Teegarden, 154 N.E.2d 379 (Ind. App. 1958); Powell v. Hartford Accident & Indem. Co., 398 S.W.2d 727 (Tenn. 1966); Costantino v. Wolverine Ins. Co., 284 N.W.2d 463 (Mich. 1979).

26. *See infra* note 36 and accompanying text.

27. For example, in Conway v. Reed, 66 Mo. 346 (1877), the defendant, the plaintiff, and other boys aged 12 to 13 years were playing together with a gun. While the gun was in defendant's possession it fired, striking the plaintiff's leg, which was later amputated. The Supreme Court of Missouri affirmed a jury verdict of $1,000, stating "[a]n infant is liable for a tort in the same manner as an adult." *Id.* at 350. The court concluded that precedent supported applying an adult standard to children who accidentally shoot others. *Id.* at 351.

> The common use of firearms by people of all classes and ages, which is characteristic of this country, has of course led to the infliction of a vast number of injuries from negligence in their use. But, for various reasons, the number of litigated cases arising out of such injuries have been comparatively few; and the number of cases presenting any question of law which could make them worthy of report, are still fewer.[28]

During the transition from the horse-drawn era to the more dangerous era of motorized transportation, the more lenient child standard of care first appeared. In the early part of the twentieth century state courts universally adopted the child standard of care for minor plaintiffs charged with contributory negligence in activities such as crossing the street or riding a bicycle.[29] This was a reaction to the increasing frequency and seriousness of injuries to children caused by motorized transportation. Most courts, without explaining why, also adopted the child standard of care for minor defendants charged with negligence while engaged in motorized activities.[30]

The question of whether the child standard should also apply to minors who accidentally injured other persons with firearms was not addressed by an appellate court until the 1957 decision, *Kuhns v. Brugger*.[31] In *Kuhns*, the twelve-year-old defendant accidentally shot and seriously injured his twelve-year-old cousin with their grandfather's pistol.[32] *Kuhns*, following the majority rule that the child standard of care applied to activities engaged in by minors, stated that "it was necessary to inquire whether [the defendant's] conduct was such as should reasonably have been expected of a child of like age, intelligence and experience."[33]

When *Kuhns* was decided in 1957, most courts were still applying the child standard of care to both minor plaintiffs and defendants involved in automobile accidents.[34] The adult activity exception to the child standard of care began its ascendancy in 1961 with the decision in *Dellwo v. Pearson*.[35] It then received a strong boost when the Restatement (Second) of Torts adopted it in 1965. Since that time the four state courts which have directly addressed the issue of which standard to apply to

28. T. Shearman & A. Redfield, On Negligence (3d ed. 1874).

29. *See* Gray, *supra* note 1, at 604-20; James & Dickinson, *supra* note 23, at 789. *See generally* Annot., 107 A.L.R. 4, 12-40 (1937).

This widespread adoption of the more lenient subjective standard of care was spurred on by its application in two United States Supreme Court cases, Railroad Company v. Gladman, 82 U.S. (15 Wall.) 401 (1872) and Railroad Company v. Stout, 84 U.S. (17 Wall.) 657 (1873).

30. *See* F. Harper & F. James, *supra* note 23, at 768 n.9.

31. 135 A.2d 395 (Pa. 1957).

32. *Id.* at 398.

33. *Id.* at 401.

34. *See* Annot., 97 A.L.R.2d 872, 875 n.7 (1964).

35. 107 N.W.2d 859 (Minn. 1961).

firearms have rejected the adult standard.[36] All of these courts had adopted the adult standard for motorized vehicles prior to deciding their firearms cases.[37]

B. Firearms Cases Contrasted to Motor Vehicle Cases

The following analysis of each firearms case highlights the difficulties and inconsistencies in each court's reasoning in support of its adoption of the adult standard for motor vehicles when contrasted with its rejection of it for firearms. None of the distinctions these courts make between use of motor vehicles and use of firearms survives critical examination.

1. The Frequency of Harm Rationale

In *LaBarge v. Stewart,*[38] a New Mexico Court of Appeals wrongful death case, the plaintiff alleged that the defendant, aged sixteen, was negligent when he shot the plaintiff's daughter in the head while showing her how to play Russian roulette.

> Thinking the bullet was opposite the firing pin, and that he could safely pull the trigger five times the defendant pointed the gun barrel downward about one-inch from [the plaintiff's daughter's] head, and pulled the trigger with 'medium fast' rapidity. . . . The gun fired the fourth time the defendant pulled the trigger.[39]

The *LaBarge* court found the trial court correctly instructed the jury to apply the child standard of care to the defendant's conduct. In so doing,

36. Purtle v. Shelton, 474 S.W.2d 123 (Ark. 1971); LaBarge v. Stewart, 84 N.M. 222, 501 P.2d 666 (Ct. App. 1972); Thomas v. Inman, 282 Or. 279, 578 P.2d 399 (1978); Prater v. Burns, 525 S.W.2d (Tenn. Ct. App. 1975).

One federal court also directly addressed this issue. In Stephan v. Martin Firearms, 353 F.2d 819 (2d Cir. 1965), one of the defendants was a 15-year-old boy who, while hunting, accidentally shot and seriously injured the plaintiff. The court of appeals, applying Connecticut law, affirmed the decision for defendant because "the jury . . . had sufficient grounds for finding the shooting accidental and [defendant] not negligent according to the standard of care set for those his age." *Id.* at 824-25. There was no discussion of why the child standard was applied even though there was no Connecticut precedent addressing the adult activity exception.

The court of appeals cited to only one Connecticut case, Wood v. O'Neil, 90 Conn. 497, 97 A. 753 (1916) in support of its decision. *Wood* was one of the rare early cases involving a minor defendant who injured someone with a gun. How the accident in *Wood* occurred was greatly disputed, and the Connecticut Supreme Court affirmed the decision for defendant because, based on the evidence, the jury could have found either that the plaintiff's decedent was contributorily negligent or that the defendant's negligence was not the proximate cause of the accident. *Id.* at 501, 97 A. at 754. *Wood* did not discuss what standard of care applied to either the plaintiff's decedent or the defendant but it seems likely that, because the supreme court believed that at least the defendant and possibly both minors were negligent, it applied the more demanding adult standard of care.

37. Harrelson v. Whitehead, 365 S.W.2d 868 (Ark. 1963); Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965); Nielsen v. Brown, 232 Or. 426, 374 P.2d 896 (1962); Powell v. Hartford Accident & Indem. Co., 398 S.W.2d 727 (Tenn. 1966).

38. 84 N.M. 222, 501 P.2d 666 (Ct. App. 1972).

39. *Id.* at 223, 501 P.2d at 667.

it expressly declined to expand the New Mexico Supreme Court's motor vehicle adult standard holding in *Adams v. Lopez*[40] to cover a minor's use of firearms. It implied that the main reason[41] for applying the adult standard in *Adams* was not present in *LaBarge*. The *LaBarge* court quoted from *Adams* the following oft-repeated passage from *Dellwo v. Pearson*:[42]

> To give legal sanction to the operation of automobiles by teen-agers with less than ordinary care for the safety of others is impractical today, to say the least. We may take judicial notice of the hazard of automobile traffic, the frequency of accidents, the often catastrophic results of accidents, and the fact that immature individuals are no less prone to accidents than adults.[43]

Automobile accidents occur much more frequently than firearm accidents. Based on this fact, much of what is stated in *LaBarge*'s quotation from *Dellwo* reasonably distinguishes the use of cars from the use of guns and might persuasively be used to limit the applicability of the adult standard to minors involved in automobile accidents. But *Dellwo* was not an automobile case. It imposed liability under the adult standard on a twelve-year-old defendant whose operation of an outboard motorboat injured the plaintiff. In *Dellwo*, the defendant's propeller became entangled in the plaintiff's fishing line causing her fishing reel to hit the side of her boat. The reel came apart and part of it flew into the plaintiff's glasses, injuring her eye.[44]

The *Dellwo* hazard frequency and graveness rationale for applying the adult standard seems more applicable to firearms than motorboats; minors appear to injure others accidentally through their use of firearms more often and more seriously than through their use of motorboats. Never-

40. 75 N.M. 503, 407 P.2d 50 (1965).

41. The *LaBarge* court also noted both the importance of drivers' licensing statutes and the danger of opening the floodgates if it broadened the adult activities exception. 84 N.M. at 226, 501 P.2d at 670.

42. 107 N.W.2d 859 (Minn. 1961).

43. 84 N.M. at 226, 501 P.2d at 670 (quoting *Adams*, 75 N.M. at 507, 407 P.2d at 52, which quoted *Dellwo*, 107 N.W.2d at 863). *See also* Nielsen v. Brown, 232 Or. 426, 447, 374 P.2d 896, 906 (1962) (quoting the same passage from *Dellwo*).

The New Mexico Supreme Court in *Adams* expanded the impact of the quoted *Dellwo* dicta relating to automobiles beyond the limits the *Dellwo* court intended. In *Dellwo*, the court expressly limited the applicability of the adult standard to minor defendants. 107 N.W.2d at 863. On the other hand, *Adams* involved the contributory negligence of a 16-year-old who, while riding on his motor scooter, collided with defendant's automobile. All or nothing contributory negligence was still the rule in New Mexico when *Adams* was decided. The effect of applying the adult standard to plaintiff's contributory negligence in *Adams*, therefore, was to increase the likelihood that the plaintiff's recovery would be completely barred as it in fact was. The *Adams* court's adoption of the adult standard of care where the minor involved was the plaintiff typifies the phenomenon, discussed *supra* note 100 and accompanying text, of courts refusing to recognize any policy differences for distinguishing between minor plaintiffs and defendants.

44. 107 N.W.2d at 860.

theless, the *LaBarge* court used the reasoning that the *Dellwo* court gave for applying the adult standard of care to minor motorboat operators to explain why application of the adult standard to minor users of firearms was inappropriate.

Many courts embracing *Dellwo*'s above-quoted dictum state, as did the *Dellwo* court, that "in the operation of an automobile, airplane or powerboat, a minor is to be held to the same standard of care as an adult."[45] Singling out these activities raises the question of why the adult standard should apply to them but not to motorless dangerous activities such as firing a gun. *Dellwo* is the only reported motorboat accident case involving a minor defendant; there is no reported case in which a minor pilot accidentally injures someone. It is apparent, therefore, that despite the *Dellwo* rationale, the distinction between motorized and motorless activities is not based on how frequently minors engage in a particular activity.

2. The Precedent and Adult Activity Rationales

In the Oregon decision, *Thomas v. Inman*,[46] the plaintiff brought a wrongful death action against an eleven-year-old boy who accidentally shot and killed the plaintiff's son, aged ten. The plaintiff's son, the defendant, and another boy had played together unsupervised for some time when the following occurred:

> [The defendant] then went into his parent's bedroom and took a shotgun from underneath the bed. He inspected the chamber of the shotgun twice and saw that it was empty; he therefore assumed that the gun was not loaded. He did not know there was a magazine underneath the chamber which contained shells. He had never fired the gun before. [The defendant] pumped the shotgun, pointed it down the hall in the general direction of the other boys, although not at anyone or anything in particular, and pulled the trigger. The shot from the .12 gauge shotgun struck decedent.[47]

The plaintiff urged the Oregon Supreme Court to extend its earlier holding in *Nielsen v. Brown*[48] that an adult standard applies to minor defendants involved in automobile accidents to this situation involving a gun. The court rejected this request.[49] Instead, for the first time it expressly applied the child standard to minor defendants. Prior to *Thomas* the issue

45. *Id.* at 863. *See also* Goodfellow v. Coggburn, 560 P.2d 873, 875 (Idaho 1977); Nielsen v. Brown, 232 Or. 426, 448, 374 P.2d 896, 908 (1962). *Accord* W. Prosser & W. Keeton, *supra* note 1, at 181.

46. 282 Or. 279, 578 P.2d 399 (1978).

47. *Id.* at 281-82, 578 P.2d at 401.

48. 232 Or. 426, 374 P.2d 896 (1962).

49. *Id.* at 286, 578 P.2d at 403.

of whether the child standard should apply to the negligence of minor defendants as well as to the contributory negligence of minor plaintiffs had been left open in Oregon.[50]

The court gave only two reasons for refusing to extend *Nielsen:* no other state had applied the adult standard to use of firearms; and driving was an adult activity while use of firearms was not.[51] The first reason carries little analytical weight. Only four other courts in the United States had specifically addressed the issue of applying the adult standard to the use of firearms by minors and their decisions were not binding on the Oregon court.[52] The second reason is based on erroneous assumptions. While it is true, as the court noted, that children in rural areas frequently learn to use guns at an early age,[53] it is equally true they learn to use motorized vehicles, including highly sophisticated and dangerous farm equipment, at an early age.[54] Thus, the Oregon Supreme Court's statement that "the principal reason for not extending the rule in this case is that the handling of guns in Oregon is not 'an activity which is normally undertaken only by adults'" is of doubtful validity.[55]

3. The Hunting Accident Cases—The Right to Hunt Rationale

The two remaining firearm cases both involve hunting accidents. In discussing the standard of care applicable to minors who use firearms, a distinction can be made between hunting accidents and most other forms of gun accidents. Typically, the minor involved in a hunting accident is more experienced in the use of firearms. Hunting by minors is also frequently subject to some form of licensing.[56]

How these differences between hunting accidents and other gun accidents should cut is unclear. Arguably, because minors who hunt with guns are often experienced and subject to governmental regulation, they are analogous to minor users of automobiles. The two courts which have

50. *Id.* at 285 n.3, 578 P.2d at 403 n.3.

51. *Id.* at 286, 578 P.2d at 403.

52. *See supra* note 36.

53. *Thomas,* 282 Or. at 286, 578 P.2d at 403.

54. *See, e.g.,* Jackson v. McCuiston, 448 S.W.2d 33 (Ark. 1969), in which a 14-year-old tractor operator injured his 9-year-old friend. The court applied the adult standard to the defendant whom the court stated had "regularly operated all different types of farm tractors since he was twelve years of age." *Id.* at 35. *See also* Goodfellow v. Coggburn, 560 P.2d 873 (Idaho 1977) (13-year-old tractor operator killed when defendant's car colided with the tractor—adult standard of care applied to the tractor driver).

55. *Thomas,* 282 Or. at 286, 578 P.2d at 403.

56. *See, e.g.,* N.J. Stat. Ann. § 23:3-4.7 (West 1984); Tenn. Code Ann. § 70-2-102(a) (1983); Wis. Stat. Ann. § 29.09(1) (West 1984). Hunting statutes vary widely among jurisdictions. Some states do not regulate hunting by minors at all. *See, e.g., Purtle,* 474 S.W.2d at 125 ("A child may lawfully hunt without a hunting license at any age under sixteen").

There is a growing trend towards states requiring some type of safety instruction prior to licensing hunters. *See, e.g.,* N.J. Stat. Ann. § 23:3-4.2 (West 1984); Tenn. Code Ann. § 70-2-108(a) (1983).

decided hunting cases, however, have reached the opposite conclusion; for them hunting by minors of all ages is deserving of lenient treatment.[57]

In *Purtle v. Shelton*,[58] the Arkansas Supreme Court applied a child standard of care to a seventeen-year-old defendant who accidentally injured a sixteen-year-old plaintiff during a deer hunting expedition. In so doing, the court distinguished a prior case in which it had extended its automobile adult standard of care rule to an unlicensed fourteen-year-old who had injured a nine-year-old while operating a tractor-propelled stalk cutter.[59] In the earlier case, the court held that operation of farm equipment, unlike use of firearms, was an activity "normally engaged in only by adults."[60] The *Purtle* court stated, in contrast to the conclusion in relation to farm equipment, that it could not "conscientiously declare, without proof and on the basis of mere judicial notice, that only adults normally go deer hunting."[61] "We know, from common knowledge, that youngsters only six or eight years old frequently use .22 caliber rifles and other lethal firearms."[62]

The *Purtle* court's defining of adult activities to include motorized farm equipment and exclude firearms is no more defensible than was the Oregon court's similar categorization in *Thomas*. Arguably, children as young as six or eight also frequently drive farm equipment. It seems likely that the true reason for the disingenuous line-drawing by the *Purtle* and *Thomas* courts is the one given in the other hunting decision, *Prater v. Burns*.[63]

In *Prater*, the thirteen-year-old defendant's shotgun accidentaly discharged and killed a fourteen-year-old boy as the defendant was leaving to go hunting. The Tennessee Court of Appeals based its refusal to apply an adult standard to a minor hunter's conduct primarily on the public policy of encouraging young children to hunt. "[T]he established public policy of this state is that a child of any age may possess, own, use and employ a gun for hunting . . . without meeting any requirement as to age, ability, experience, knowledge or *judgment* in the use of the weapon."[64]

57. *Purtle*, 474 S.W.2d at 125; Prater v. Burns, 525 S.W.2d 846, 851 (Tenn. Ct. App. 1975).

58. 474 S.W.2d 123 (Ark. 1971). Vigorous criticism of the court's refusal to apply the adult standard of care in *Purtle* can be found in Judge Fogelman's dissent. *Id.* at 126-30; Note, *Torts—The Standard of Care Required of a Minor Using Dangerous Instrumentalities*, 26 Ark. L. Rev. 243 (1972).

59. *Purtle*, 474 S.W.2d at 125 (distinguishing Jackson v. McCuiston, 448 S.W.2d 33 (Ark. 1969)).

60. Jackson v. McCuiston, 448 S.W.2d 33, 35 (Ark. 1969).

61. *Purtle*, 474 S.W.2d at 125.

62. *Id.*

63. 525 S.W.2d 846 (Tenn. Ct. App. 1975).

64. *Id.* at 851 (emphasis added). This assertion is certainly open to reassessment based on a recently enacted Tennessee statute which states:

> Every person born on or after January 1, 1969, before hunting shall possess, in addition to all other licenses and permits required, proof of satisfactory completion of an agency approved hunter education course, except this provision shall not

This statement seems to suggest that minors should be immune from any tort liability resulting from hunting accidents. Instead, it was used to justify different standards of care for minors who drove motor vehicles and minors who used guns.

Among modern courts there appears to be a deep-rooted romantic abhorrence of any rule that might deter youngsters from hunting. Decisions rejecting the adult standard based on these feelings miss the important point that it is unlikely that anyone would sue a young hunter unless an insurance company was going to pay any damages awarded.[65] Furthermore, there is no evidence that the adult standard has deterred minors drom driving automobiles.[66] Similarly it is very unlikely that the adult standard would deter minors from hunting.

4. The Licensing Rationale

Some courts distinguish between driving and hunting because of the different licensing requirements for the two activities.[67] For example, the Tennessee Court of Appeals in *Prater* argued that, in contrast to Tennessee's hunting statutes, statutes concerning the licensing of drivers clearly evidenced the legislature's implied intent that all drivers should be held to the same standard of care when sued in negligence.[68] It pointed out that the requirements for obtaining a driver's license included tests of skill and ability while a child could obtain a hunting license by just paying a fee. A number of other courts, including the Tennessee Supreme Court, however, have discredited and rejected such licensing rationales.[69]

The Tennessee Supreme Court first applied the adult standard of care to a minor in *Powell v. Hartford Accident and Indemnity Company.*[70] The defendant in *Powell* alleged that the negligence of the plaintiff, aged fourteen, contributed to the collision between the defendant's car and the plaintiff's motor scooter.[71] The *Powell* court noted that driving was subject to extensive regulation. Nevertheless, it stated explicitly that licensing of minor drivers was not the basis for its adoption of the adult standard

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apply to persons under ten (10) years of age accompanied by an adult at least twenty-one (21) years of age. For the purpose of this section, "accompanied" is defined as being able to take immediate control of the hunting device.

Tenn. Code Ann. § 70-2-108(a) (1984).

65. *See infra* notes 102-106 and accompanying text.

66. *See supra* note 23.

67. *See, e.g.*, Allen v. Ellis, 380 P.2d 408, 412-13 (Kan. 1963); Adams v. Lopez, 75 N.M. 503, 507, 407 P.2d 50, 52 (1965).

68. 525 S.W.2d at 851.

69. *See, e.g.*, Uddo v. Parker, 31 Cal. Rptr. 745, 748-50 (Ct. App. 1963); Charbonneau v. MacRury, 153 A. 457, 461-62 (N.H. 1931); Nielson v. Brown, 231 Or. 426, 448, 374 P.2d 896, 908 (1962); Powell v. Hartford Accident & Indem. Co., 398 S.W.2d 727, 731-33 (Tenn. 1966).

70. 398 S.W.2d 727 (Tenn. 1966).

71. *Id.* at 729.

but "merely evidence of the public policy that supports the common law."[72]

The licensing rationale which the Tennessee Court of Appeals used in *Prater* also directly conflicts with that court's own assessment of the function of licensing in a case decided after *Prater*. In *Black v. Quinn*,[73] the defendant alleged that plaintiff, aged eleven, was contributorily negligent. The plaintiff and his friend, who were both unlicensed, had been riding their motorcycles on some undeveloped property. They drove off the property and onto a public road. The plaintiff collided with the defendant's car as he attempted to pass her.[74]

Rejecting the plaintiff's argument that the *Powell* adult standard of care exception was only applicable to licensed minor drivers, the court of appeals noted in *Black* that the supreme court "expressly disallowed the licensing rationale as a basis for its decision."[75] And, yet, in *Prater* the court of appeals took great pains to contrast the type and extent of licensing procedures for motor vehicles to those for guns.[76] The *Prater* licensing rationale is simply irreconcilable with that same court's rejection of such a rationale in *Black*.

In general, the licensing rationale for an adult activity exception is an analytical red herring. Courts which apply the adult standard to minor drivers based on their state licensing statutes justify their actions by claiming that these statutes evidence a legislative intent to apply the same duty of care to minor drivers as to adults.[77] There are three problems with such a claim. First, there is typically no evidence whatsoever that the legislature actually intended to affect the common law standards of care for children and adults in tort actions when they enacted licensing statutes.

Second, if courts really believed that legislatures intended licensing statutes to specify a uniform standard of care, it would logically follow that anyone who injured another while driving without a license would be subject to a negligence per se or at least an evidence of negligence analysis. This, however, is not how most courts view violations of licensing statutes. Instead, the majority rule is that driving without a license has no causal connection and is irrelevant to the issue of whether a person,

72. *Id.* at 732.
73. 646 S.W.2d 437 (Tenn. Ct. App. 1982).
74. *Id.* at 438.
75. *Id.* at 439.
76. 525 S.W.2d at 851.
77. For example, in Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965), the court said:
> We have carefully considered the statutes of this State permitting the licensing of minors to operate motor vehicles and conclude that they do not provide different standards for minors and adults. A mere reading of our motor vehicle licensing statutes makes it obvious that they were enacted for the protection of the public.

Id. at 507, 407 P.2d at 52.

adult or child, acted unreasonably under the circumstances.[78] It is hard to reconcile this with court claims that these same licensing statutes were enacted with the legislative purpose of changing the common law child standard of care as it applies to minor drivers who are old enough to obtain drivers' licenses.

Finally, the licensing rationale is frequently ignored by courts which previously embraced it. The Tennessee experience discussed earlier is not atypical. While using licensing to justify its adoption of the adult standard of care exception as to licensed minor drivers, at a later date the same court will blithely expand its application of the exception to unlicensed motor vehicle activities.[79]

5. The Floodgate Rationale

The *Purtle* court suggested a final rationale for limiting the adult standard of care to the use of motor vehicles: the ugly specter of opening up the floodgates of liability if it classified hunting as an adult activity.[80] This raises the question of what exactly would happen if those floodgates were opened.

At present the rule in most jurisdictions is that if a minor's use of a motorized vehicle results in a civil suit for accidental injury, the adult standard of care will apply to the minor.[81] Most accidents in which minors sue or are sued involve motorized vehicles. Thus, when courts first embraced the adult activity rule as applying to automobile use by minors,

78. *See* W. Prosser & W. Keeton, *supra* note 1, at 226. *See, e.g.*, Giles v. Gardner, 249 So. 2d 824, 827 (Ala. 1971); Hertz Driv-Ur-Self System v. Hendrickson, 121 P.2d 483, 484 (Colo. 1942); Prichard v. Collins, 15 S.W.2d 497, 499 (Ky. 1929).

Professor Charles Gregory, the author of the only major article concerning the impact of violation of licensing statutes on civil liability, agrees that violations of licensing statutes should be inadmissible on issues of negligence. Gregory, *Breach of Criminal Licensing Statutes in Civil Litigation*, 36 Cornell L.Q. 622 (1951). He argues, however, that the reason for this is not that there is no causal connection between driving without a license and the defendant's alleged act of negligence. Instead he asserts:

> [A] licensing statute is not a safety statute and, therefore, is not the kind of statute the breach of which amounts to negligence *per se*. It does not specify the standard or correct way to do anything; while driving without a license does not signify in any conceivable way that at the time in question such driving did not come up to the approved standard in any respect. This is true because a licensing statute does not stipulate what standard conduct on the road should be. . . .

Id. at 634-35. *Accord* W. Prosser & W. Keeton, *supra* note 1, at 223.

79. *Compare* Harrelson v. Whitehead, 365 S.W.2d 868, 869 (Ark. 1963) (15-year-old motorcyclist held to adult standard based in part on licensing statutes) *with* Jackson v. McCuiston, 448 S.W.2d 33, 35 (Ark. 1969) (14-year-old tractor operator held to adult standard where no licensing statute involved).

80. 472 S.W.2d at 126.

81. *See supra* notes 12-21 and accompanying text.

they opened the floodgates. The child standard of care was from that moment on effectively limited to the exceptional cases.[82]

III. THE RATIONALES FOR THE CHILD STANDARD OF CARE

Examination of the firearms cases highlights the inappropriateness of applying one standard of care to some dangerous activities and another standard of care to others. None of the rationales for this distinction hold up under close scrutiny. The same standard of care, therefore, should apply to all dangerous activities of minors regardless of whether they involve motor vehicles.

This still leaves open the question of which standard of care ought to apply to dangerous activities. Are courts and commentators correct when they say that the adult standard of care should apply to certain activities involving minors? Why has the child standard of care been losing ground in recent years? Are there any activities to which it still ought to apply?

These questions cannot be answered without first considering the reasons that the child standard of care has been viewed as the norm for minors during the twentieth century. Courts and commentators provide three major rationales to support the child standard of care where a minor is sued for negligence: protection, welfare, and fairness. The Restatement (Second) of Torts refers to two of these, commenting that its special standard for children "arises out of the public interest in their welfare and protection."[83] The Restatement says that the protection rationale justifies the child standard of care because it prevents child defendants from always entirely bearing the consequence of their actions.[84] The Restatement and commentators say the child standard is also justified by a welfare rationale because it allows children to mature and develop skills by engaging in various activities.[85] The third rationale for the child standard of care is fairness. Many children do not have the capacity to meet the adult standard of care. The child standard alleviates the unfairness of holding them to a standard of care which they are unable to meet.

The following analysis of these rationales shows that they no longer support the application of the more lenient child standard of care to most activities of minors which result in negligence suits. The protection and welfare rationales are irrelevant under modern tort doctrine; the fairness rationale only relates to carefree play activities.

82. In addition to use of firearms, courts have rejected the adult standard of care when minors have injured others while engaging in the following dangerous activities: skiing, Goss v. Allen, 70 N.J. 442, 360 A.2d 388 (1976); making a fire, Farm Bureau Ins. Group v. Phillips, 323 N.W.2d 477 (Mich. App. 1982); and bicycling, Roberts v. Fisher, 455 P.2d 871 (Colo. 1969).

83. Restatement (Second) of Torts § 283A comment b (1965).

84. *Id.* at comment a.

85. Note, *Torts: Application of Adult Standard of Care to Minor Motor Vehicle Operators*, 1962 Duke L.J. 138, 139; *A Proposal for a Modified Standard of Care*, *supra* note 7, at 408.

A. A Critique of the Protection Rationale

Courts and commentators had widely supported the protection rationale because it softened the effects of the all or nothing contributory negligence defense.[86] When virtually all jurisdictions followed the contributory negligence rule, its harshness cried out for exceptions. Children were frequently injured in accidents for which they were in part to blame.[87] During the late nineteenth century and early twentieth century most of the child negligence cases involved injured minor plaintiffs charged with contributory negligence.[88] Without some means of excepting them from the usual contributory negligence rule, child plaintiffs would probably have lost many of these cases. By altering the standard of care to take into account their age, intelligence, and experience, courts enabled child plaintiffs to recover in situations where, had they been held to the reasonable person under the circumstances standard, they would have been found contributorily negligent.

Within the past twenty years contributory negligence has gone into dramatic decline, replaced in most jurisdictions by some form of comparative negligence.[89] Rules created to ameliorate the severity of contributory negligence are no longer necessary; for example, last clear chance has frequently been held, either by statute or case law, to be inapplicable where states have adopted comparative negligence.[90] Similarly, the present child standard of care rules may no longer be necessary or appropriate in the age of comparative negligence.

B. A Critique of the Welfare Rationale

The welfare rationale for the child standard of care is intended to allow children to learn by doing.[91] Practical hands-on experience is considered an essential part of the learning process for children to mature into responsible adults.[92] Such experience is necessary for the development of judgment and essential skills. It is not clear, however, that the application or non-application of the child standard of care affects minors' willingness

86. Restatement (Second) of Torts § 283A comment a (1965).

87. *See* Shulman, *supra* note 7, at 618.

88. *Id.* at 618-19. *See, e.g.*, Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657 (1873) (defendant railroad alleged contributory negligence of six-year-old plaintiff injured on railroad's unlocked turntable); Railroad Co. v. Gladman, 82 U.S. (15 Wall.) 401 (1872) (defendant trolley car company alleged contributory negligence of seven-year-old plaintiff injured trying to cross in front of horse-drawn trolley).

89. *See* W. Prosser & W. Keeton, *supra* note 1, at 471.

90. *See, e.g.*, Or. Rev. Stat. § 18.475 (1983); French v. Grigsby, 571 S.W.2d 867 (Tex. 1978). *See generally* W. Prosser & W. Keeton, *supra* note 1, at 477.

91. *See supra* note 85.

92. Note, *supra* note 85, at 139; *A Proposal for a Modified Standard of Care, supra* note 7, at 408.

to engage in various activities. Whatever evidence there is points the other way.[93]

Under the welfare rationale, when courts decided that the child standard of care no longer applied to motorized activities, minors should have been deterred from driving. There is nothing to suggest that application of the adult standard of care to minor motor vehicle operators has had any measurable impact on the numbers or the frequency of individual use.[94] In general, it seems extremely unlikely that minors consider the legal standard of care in negligence cases when they decide whether to engage in a particular activity. The welfare rationale, therefore, does not support the retention of the child standard of care in firearms cases.

C. The Limited Vitality of the Fairness Rationale

The previous discussion of the protection and welfare rationales shows that they do not justify use of the child standard of care. Analysis of the fairness rationale, however, will show that the child standard of care is appropriate for a limited group of activities.

In discussing the fairness rationale, this Article addresses separately the two fundamentally different categories of activities in which minors engage. It will show that the fairness rationale is inapplicable to dangerous activities such as hunting, driving, and making a fire. It will also show that the fairness rationale is applicable to carefree activities such as running and playing ball, hopscotch, and tag.

1. Dangerous Activities and the Fairness Rationale

Where minors injure others, application of an adult standard of care frequently increases the likelihood that they will be found liable. Finding liability in such cases is arguably unfair because many minors are incapable of meeting the adult standard of care. The unfairness argument supports a more individualized standard of care which takes into account the minor's immaturity.[95] One difficulty with applying an individualized standard to minors' conduct, however, is that courts hold other classes of defendants who are incapable of exercising mature judgment to the reasonable person standard. The insane, the mentally retarded, alcoholics, and the elderly are all, at least in theory, held to the adult standard of care[96] despite the unfairness of applying this standard which they are unable to meet.

93. *See* Ross, Settled Out of Court 42-43 (2d ed. 180).

94. *See supra* note 23.

95. Dorais v. Paquin, 98 N.H. 159, 304 A.2d 369, 371 (1973); W. Prosser & W. Keeton, *supra* note 1, at 179.

96. *See* Restatement (Second) of Torts § 283 (1965) ("Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under

Another difficulty with the fairness rationale is highlighted in the leading case concerning the adoption of the motorized vehicle rule, *Dellwo v. Pearson*.[97] It points out that applying the child standard of care may cause greater unfairness to the persons whom minors injure. Thus, the unfairness to minors where an adult standard of care is applied to their injurious conduct is arguably outweighed by the unfairness to the injured party when the child standard is applied.

> While minors are entitled to be judged by standards commensurate with age, experience, and wisdom when engaged in activities appropriate to their age, experience, and wisdom, it would be unfair to the public to permit a minor in the operation of a motor vehicle to observe any other standards of care and conduct than those expected of all others. A person observing children at play with toys, . . . or engaged in other childhood activities may anticipate conduct that does not reach an adult standard of care or prudence. However,

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like circumstances"); Restatement (Second) of Torts § 283B (1965) ("Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances"). *Compare* W. Prosser & W. Keeton, *supra* note 1, at 176-78, which points out that there are a few cases in which old age has been considered as a factor in applying the standard of care. All these cases, however, involved elderly plaintiffs who were charged with contributory negligence. *See, e.g.*, Garner v. Crawford, 288 So. 2d 886 (La. App. 1973); Brunner v. John, 274 P.2d 581 (Wash. 1954). Similarly, where contributory negligence has been alleged against an insane or mentally retarded plaintiff, many courts have considered the mental disability as a factor in determining whether the plaintiff acted reasonably under the circumstances. *See* Ellis, *Tort Responsibility of the Mentally Disabled*, 1981 A.B.F. Research J. 1079, 1090. *Compare* Lynch v. Rosenthal, 396 S.W.2d 272 (Mo. App. 1965) (contributory negligence alleged) *and* Emory Univ. v. Lee, 104 S.E.2d 234 (Ga. App. 1958) (contributory negligence alleged) *with* Breunig v. American Family Ins. Co., 173 N.W.2d 619 (Wis. 1970) (negligence alleged) *and* Johnson v. Lambotte, 363 P.2d 165 (Colo. 1961) (negligence alleged). Thus, as to elderly and mentally disabled persons, courts are applying a more lenient standard of care to plaintiffs than to defendants. Contrast this dual standard with most courts' insistence on applying a uniform standard of care to minor plaintiffs and minor defendants. *See infra* note 100.

The Restatement's authors distinguish children from other categories of persons because, as to children, there is a "wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them." Restatement (Second) of Torts § 283A comment b (1965). This explanation, however, is equally applicable to at least some of the groups listed above; for those groups to which it is inapplicable expert testimony is available to fill the information gap. Nevertheless, with the lone exception of children, courts reject the unfairness argument and hold defendants with mental disabilities to the reasonable person standard which they are incapable of meeting.

In contrast, exception for children is not made in the intentional tort area. There, most courts hold both children and mentally disabled adults responsible for the injuries they cause even though, at least arguably, they are incapable of forming the requisite intent. *Compare* Weisbart v. Flohr, 260 Cal. App. 2d 281, 67 Cal. Rptr. 114 (1968) (seven-year-old defendant); Horton v. Reaves, 526 P.2d 304 (Colo. 1974) (three- and four-year-old defendants); Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955) (5-year-old defendant) *with* Kaicer v. Marrero, 324 So. 2d 717 (Fla. Dist. Ct. App. 1976) (mentally defective defendant liable for assault and battery); McGuire v. Almy, 8 N.E.2d 760 (Mass. 1937) (mentally defective defendant liable for assault and battery); *In re* Meyer's Guardianship, 261 N.W. 211 (Wis. 1935) (mentally defective defendant liable for arson). *See generally* Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 Mich. L. Rev. 9 (1924).

97. 107 N.W.2d 859 (Minn. 1961).

> one cannot know whether the operation of an approaching automobile, airplane, or powerboat is a minor or an adult, and usually cannot protect himself against youthful imprudence even if warned.[98]

The equities being compared are quite different when the minor is the injured plaintiff. There, as some courts and commentators have sug-

98. *Id.* at 863.

This excerpt from *Dellwo* suggests that a plaintiff injured by a minor driver could not reasonably have expected that an approaching driver was a minor. It then goes on to assert, however, that even if a plaintiff did know defendant was a minor, this would not help plaintiff protect himself from the minor's immature judgment and, therefore, should not be determinative of what standard of care should be applied to the minor defendant. Thus, for the *Dellwo* court, whether the minor defendant was known to the plaintiff to be a minor or whether he appeared to be an adult would make no difference to what standard of care was applied to the defendant.

One commentator disagrees with the *Dellwo* court on this point and has suggested that "in addition to the nature of the minor's activity, the reasonable expectations of the other actor" should be considered in determining whether to apply the adult or child standard of care. Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 Geo. Wash. L. Rev. 17, 46 (1981).

Interestingly enough, Seidelson concluded that persons injured by minor drivers should reasonably expect that the adult standard of care will apply to all drivers and that these reasonable expectations justify applying the adult standard of care to all minor drivers. *Id.* at 20. Thus, Seidelson's reasonable expectation test appears to go to whether the injured person should reasonably expect that a particular standard of care will be applied rather than going to whether the injured person should reasonably expect that the other party may be a minor who has a lesser judgment capacity.

After discussing the standard of care for minor motor vehicle operators, Seidelson analyzed a firearms case, *Purtle*, 474 S.W.2d 123, discussed *supra* notes 58-62 and accompanying text. In *Purtle*, a 17-year-old defendant was held to the child standard of care in a suit for negligence by a 16-year-old plaintiff whom the defendant accidentally shot while they were out hunting together. Seidelson, *supra*, at 24. Seidelson claimed that the application of the child standard of care in *Purtle* was appropriate because the plaintiff knew the defendant and, therefore, knew he was a minor. He concluded that "it probably would not be unfair to impute to the plaintiff knowledge that his teenaged hunting companion might not possess the maturity of judgment of an adult. Consequently, it could be said that plaintiff had no reasonable expectation that defendant would act with that maturity of judgment at the time of the operative facts." *Id.* The test for reasonable expectation here seems to differ from the one used for motor vehicles. Here, the plaintiff should reasonably have expected that the defendant might act with the lesser judgment than that of an adult.

As a result of using different tests for drivers than for users of firearms, Seidelson would apply an adult standard of care to all minor drivers and only some minor users of firearms, those about whom the injured party did not have actual or constructive knowledge of their minority. It is difficult to understand why the reasonable expectations test applied to persons injured by minor motor vehicle operators should differ from the test applied to persons injured by minor users of firearms.

Even if a uniform reasonable expectations test were adopted, such a test would require a case-by-case determination of whether the plaintiff knew or should have known that the defendant was a minor. There would be no certainty as to which standard applied to any category of activities. This problem would be compounded when, as frequently is the case, the injured party was also a minor. Even if a minor plaintiff knew the minor defendant it is not at all clear that he should have reasonably expected that the defendant would use less than adult judgment. Would the test for a minor plaintiff's reasonable expectation be whether a child of like age, intelligence, and experience would have expected that the defendant would use substandard judgment?

Although Seidelson argued that the reasonable expectation test would be a question of law for the court, *id.* at 46, it sounds much more like a question of fact that should be left to the factfinder to determine. The unpredictability of such a test would probably only make this area even more murky and analytically dissatisfying.

gested,[99] it may be fairer to apply the child standard of care to any negligent conduct of the plaintiff that contributed to the accident. It is probably more unfair to hold the injured minor to a standard of care which he is incapable of meeting than it is to require the person who negligently injured the minor to show the minor did not meet the child standard of care. After all, in such a case the likelihood of the injuring wrongdoer compensating the young injured party would be reduced by applying the unmeetable adult standard to the minor's conduct.

Most courts, however, have rejected a dual standard dependent on whether the minor is the plaintiff or the defendant.[100] Their application of an adult standard to both plaintiff and defendant child motor vehicle operators suggests that there may be another policy reason besides fairness for applying the adult standard where a dangerous activity is involved.

2. The Impact of Liability Insurance on the Fairness Rationale

The real policy reason for courts applying the adult standard of care to dangerous activities becomes apparent when a more fundamental, pragmatic question about suing minors for torts is addressed. Why are minors ever sued by persons they negligently harm? Typically, a minor will have very few assets; therefore, if a child defendant were solely obligated to pay the judgment, the plaintiff would collect little or nothing. Obviously in such cases injured persons would not sue minor tortfeasors.

But minor drivers are frequently sued by people whom they injure.

99. *See Dellwo*, 107 N.W.2d at 862-63. *See generally* F. Harper & F. James, *supra* note 23, at 904; James, *Accident Liability Insurance Reconsidered: The Impact of Liability Insurance*, 57 Yale L.J. 549, 554-56 (1948); Shulman, *supra* note 7, at 619.

100. W. Prosser & W. Keeton, *supra* note 1, at 181.

The few courts which have attempted to justify their refusal to apply a dual standard to minor motor vehicle operators have stated that they see no rational distinction between minor plaintiffs and minor defendants. *See* Goss v. Allen, 360 A.2d 388, 391 (N.J. 1976); Thomas v. Inman, 282 Or. 279, 285 n.3, 578 P.2d 399, 403 n.3 (1978). Furthermore, some courts claim that the dual standard would be too complicated to administer and apply. *See, e.g., Goss*, 360 A.2d at 391.

These explanations ring hollow when the majority of courts' negligence standards of care for the insane and the mentally retarded are examined. Like many minors, many mentally disabled persons are incapable of meeting the usual reasonable person under the circumstances standard of care. The majority of courts apply a dual standard to mentally disabled persons: a subjective standard of care which considers the actual mental disability of the actor is applied to plaintiffs; the usual objective adult standard of care is applied to defendants. Ellis, *supra* note 96, at 1090. It appears to be no more rational and no less complicated to apply the dual standard to mentally disabled persons than it would be to apply it to minor motor vehicle operators.

Compare Ellis' analysis of why the dual standard exists as to mentally disabled persons. *Id.* at 1090-92. Ellis concluded this analysis by stating: "Whatever the true explanation for the existence of a subjective standard in contributory negligence cases, the rule stands as a sharp and puzzling contrast to the standard for defendants." *Id.* at 1092. To this can be added that the standards of care applied to mentally disabled persons stand in sharp and puzzling contrast to the standards applied to minor motor vehicle operators

The explanation is *not* that their parents are vicariously liable. Most states do not allow tort recovery against parents for the negligence of their children.[101] Parents, however, typically have insurance coverage for the motorized activities of their children.[102] In most jurisdictions the opposing party is entitled to discover the existence of such coverage.[103] It is highly probable that behind most minor defendants stand their parents' insurance companies.

Courts rarely mention insurance coverage in their discussions of what standard of care should be applied.[104] Yet such coverage is undoubtedly an important pragmatic factor. Compensation to the injured party is the main function of the tort system;[105] insurance is an effective and well-accepted way of carrying out that function. Courts, therefore, should and probably have considered the almost certain presence of liability insurance when they have moved to an adult standard of care for minor drivers.[106]

In another area of recent dramatic change in tort law, family immunities, many courts have openly stated that the major reason for abolishing such immunities is the almost certain presence of liability insurance in cases where one family member sues another for personal injuries.[107]

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101. W. Prosser & W. Keeton, *supra* note 1, at 913.

102. *Id. See also* F. Harper & F. James, *supra* note 23, at 768-69; James, *supra* note 99, at 550.

103. Fed. R. Civ. P. 26(b)(2). Insurance coverage is usually discoverable and, thus, a major factor to consider when deciding whether to sue the injuring party. *See* Smith, *The Misgenetic Union of Liability Insurance and Tort Process in the Personal Injuries Claim System,* 54 Cornell L. Rev. 645 (1969). In contrast, at the trial stage of a tort action, the factfinder is not permitted to consider whether "a person was or was not insured against liability . . . upon the issue of whether he acted negligently or otherwise wrongfully." Fed. R. Evid. 411. The reasons given for this rule are: (1) that the existence or non-existence of insurance coverage is irrelevant to the issue of whether someone acted unreasonably; and (2) that juries might use the insurance coverage to decide the case on improper grounds. Fed. R. Evid. 411 comment. These concerns go to the problem of the factfinder misusing information about insurance coverage in a particular case. This misuse of information problem is not present when a court weighs public policy factors in deciding whether a general rule of law should be changed. Therefore, it is appropriate for a court to consider both the widespread use of liability insurance for certain activities and the likelihood that minors who are sued will have insurance coverage.

104. W. Prosser & W. Keeton, *supra* note 1, at 593-94. *See also* Atkins, *Impact of Enterprise Liability,* 20 La. L. Rev. 50, 51 (1959).

105. W. Prosser & W. Keeton, *supra* note 1, at 7.

106. *See* Smith, *supra* note 103, at 680 (emphasis added), which states:

> Although at first glance the liability of infants . . . may seem an unlikely area in which to find the influence of insurance, that insurance has in fact resulted in the imposition of liability where none would otherwise exist under the principles of the tort process is well documented. The assumed availability of and resort to insurance is the *only* explanation for the recent appearance of minors in the appellate reports as defendants with respect to "adult" activities, including but not limited to the driving of automobiles.

107. [W]hen the modern wave of decisions began to engulf the family immunities, the existence or the possibility of liability insurance began to be stated in nearly all of the overruling cases, as one of the primary reasons for change.

W. Prosser & W. Keeton, *supra* note 1, at 595. *Cf.* James, *supra* note 99, at 553, which was written almost 30 years earlier:

> A specific situation . . . where, in hard fact, the insurance factor is really the

Courts have found that the preservation of family harmony, a public policy used to support such immunities, is now more likely to support the abolition of family immunities because of the probable existence of insurance coverage. The New Jersey Supreme Court in *Immer v. Risko*[108] stated:

> The presence of insurance militates against the possibility that the interspousal relationship will be disrupted since a recovery will in most cases be paid by the insurance carrier rather than by the defendant spouse. . . . Domestic harmony may be more threatened by denying a cause of action than by permitting one where there is insurance coverage.[109]

Just as insurance coverage moots the family harmony arguments in the family immunities area, it moots the fairness arguments which courts so frequently make when they consider whether to abandon the child standard of care for a particular activity. Because it is not the child defendant who must pay for the damages caused, the arguments that the child in reality is unable to meet the adult standard is irrelevant in most cases. Similarly, where child plaintiffs contribute to their own injuries, the insurance companies which provided coverage to the plaintiffs' parents and the defendants will typically be sharing the damage costs under some form of comparative negligence.

In the case of the child defendant, the payment of damages falls directly on the insurance company which pays the judgment and indirectly on the defendant's parents whose premiums are likely to increase. It falls even more indirectly upon all parents who have insurance coverage for their children's motorized activities through increased rates for minor drivers as a group.[110] If fairness is an important factor in deciding what standard of care to apply, it is the fairness to the parents and insurance companies who pay for the injuries caused by minor drivers that is relevant but never addressed.[111]

> dominant one, yet where most (though not all) of the judicial reasoning ignores this factor and turns on considerations which the fact of insurance has really made quite irrelevant, is the field of intra-family suits for negligence. Recovery by the unemancipated minor child against his parent is almost uniformly denied for a variety of reasons which involve the integrity of the family unit and the family exchequer and the importance of parental discipline. But in truth, virtually no such suits are brought except where there is insurance. And where there is, none of these threats to the family exist at all.

108. 267 A.2d 481 (N.J. 1970).

109. *Id.* at 484-85. *Accord* Tamashiro v. DeGama, 51 Haw. 74, 77, 450 P.2d 998, 1001 (1969) (parental immunity abolished); Balts v. Balts, 142 N.W.2d 66, 75 (Minn. 1966) (parental immunity abolished); France v. A.P.A. Transport Corp., 267 A.2d 490, 493 (N.J. 1970) (parental immunity abolished); Gelbman v. Gelbman, 23 N.Y.2d 434, 435-36, 297 N.Y.S.2d 529, 530-32, 245 N.E.2d 192, 193-94 (1969) (parental immunity abolished).

110. *See* James, *supra* note 99, at 555-58.

111. *Id.* at 552-53.

Increasing insurance premium rates for parents who insure their children's motor vehicle operations is not substantially inequitable. First, the increased cost to the parents is relatively small, especially in comparison to the actual cost of the harm their children caused. Second, parents of minor motor vehicle operators are the appropriate group to bear the burden of this increased cost; their children are typically economically dependent upon them and it is usually a parental decision whether to permit a child to drive.

When focusing on a business entity such as an insurance company, it is incongruous to consider the type of personal fairness issues which exist in relation to individual actors such as minor motor vehicle operators and the people they injure. If the standard of care for a particular group of insureds is made stricter, an insurance company can make sure that, as a result, it does not bear an unfair economic burden. It does this by adjusting the rates it charges for coverage of that group.

Shifting the focus from children to parents and insurance companies attenuates and depersonalizes the fairness issue. It then becomes apparent that fairness is not a valid rationale for determining which standard of care is appropriate.

Rejection of the fairness rationale makes it easier to justify the widely followed rule that the adult standard applies to everyone involved in accidents involving motorized vehicles. The risk-spreading function of insurance coverage is a very strong reason for applying the adult standard of care to all minor drivers. It is, however, an equally strong reason for extending the adult standard of care to minors who engage in any dangerous activity because, as stated earlier, the main reason for suing minors is that they are covered by their parents' insurance policies.[112]

VI. CONCLUSION

States should retain the dual system of standards of care for children. Which standard is applied should continue to be based on the type of activity involved. The distinction, however, should not be between adult and child activities or between motor vehicle and other activities; instead the distinction should be between dangerous and carefree activities.

112. For example, in *Thomas v. Inman*, 282 Or. 279, 578 P.2d 399 (1978), discussed *supra* notes 46-55 and accompanying text, the reason plaintiff sued the 11-year-old defendant who accidentally shot and killed 10-year-old plaintiff's decedent was that the defendant was covered by his parents' homeowners insurance policy. Letter from William Ferguson, Esq. of Medford, Oregon, to the writer (1984). *See generally* G. Couch, On Insurance § 44:265 (2d ed. 1982).

Homeowner's insurance policies frequently insure children of the homeowner against liability for injuries to others, including gunshot and fire injuries. This may extend to injuries off the premises, such as bicycle injuries. *Cf.* James, *supra* note 99, at 556 n.21, which suggests that liability insurance covers even carefree activities of children: "So far as play accidents go, just about the same possibilities of loss distribution exist through the modern Comprehensive Liability Policy."

The only legitimate rationale for drawing distinctions between the actions of children and adults is the fairness rationale. The fairness rationale, however, does not support application of the child standard of care to all the activities of children. It has been shown to be particularly inapplicable to minor defendants. First, on balance, the equities favoring the injured party outweigh those favoring the minor defendant. Second, fairness to the minor need not be considered at all in most cases because minor defendants are usually covered by their parents' insurance policies.

The fairness rationale has also provided little support for applying the child standard of care to minor plaintiffs who engage in dangerous activities. There, however, the fairness rationale might still be relevant if minor plaintiffs had to pay for the injuries they suffered. The rationale becomes irrelevant in most cases if, as courts seem to have presumed in refusing to distinguish between minor plaintiffs and defendants, minor plaintiffs are typically covered by insurance. In cases involving minor defendants or minor plaintiffs engaged in dangerous activities, therefore, the appropriate standard is the adult standard of care.

In contrast, the child standard of care should be applied when the child was involved in a carefree activity. When a negligence suit involves a minor engaged in a carefree activity, that minor is inevitably the injured plaintiff. By definition, carefree activities are those which are unlikely to cause harm to others. Such activities, however, often lead the minor into harmful contact with an actor engaged in a dangerous activity. As a result, minors are frequently injured while engaging in carefree activities. For example, operators of motor vehicles often collide with minors who are engaged in carefree activities.[113]

For carefree activities, the balancing of the fairness rationales for the injured minor and the injuring defendant is likely to favor the minor. Here, as in the case of minor plaintiffs who engage in dangerous activities, it is probably more unfair to hold the injured minor to a standard he cannot meet than it is to make the defendant show the minor did not meet the more individualized child standard of care. Unless insurance moots the fairness issue, therefore, the child standard of care appears to be the appropriate one for carefree activities.

Does insurance moot the fairness issue? How frequently minor plaintiffs

113. *See, e.g.*, Ranard v. O'Neil, 531 P.2d 1000 (Mont. 1975) (eight-year-old pedestrian); Fightmaster v. Mode, 167 N.E. 407 (Ohio App. 1928) (13-year-old pedestrian); Forrest v. Turlay, 125 Or. 251, 266 P. 229 (1928) (11-year-old pedestrian). *Cf.* Maker v. Wellin, 214 Or. 332, 327 P.2d 793 (1958) (12-year-old bicyclist). *Maker* is representative of the many decisions which have involved injured minor bicyclists. Bicycling is one of the most troublesome activities to categorize. It does not fit neatly into either the carefree or dangerous activity category. It seems likely, however, that if courts were to use these categories they would place bicycling into the carefree category because minors usually are injured plaintiffs in bicycling cases and may not be insured; therefore, the fairness rationale is present.

are covered by insurance is difficult to ascertain. As previously noted, minors are typically only sued if they are insured. On the other hand, whether a minor is insured is probably unrelated to why minors bring lawsuits. The possibility that some minors who engage in carefree activities do not have medical or health insurance that will cover them if they are injured by others combined with the fairness rationale justifies the application of the more lenient child standard of care. If, at some time in the future, minors injured in carefree activities are also shown to be normally covered by insurance, the child standard of care can be abandoned entirely.