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Contributory Negligence of Children

*James H. Keet, Jr.**

WE WILL DEAL PRIMARILY with the child of tender years and will touch only briefly on the teen-ager in the field of contributory negligence. We will first examine the characteristics of younger children which the courts have emphasized in applying the doctrine of contributory negligence and then review the rationale underlying the way in which the courts have applied the doctrine to the child. We will find that the "capacity" of a child to be contributorily negligent has presented problems which are related to the standard of care which the child, if capable of contributory negligence, must observe in order not to be barred by this defense.

Analysis by the Courts

The American Judge has joined with Lewis Carroll and Mark Twain in expounding many ideas on what, in addition to puppy dog tales, are the elements and ingredients of a young child. The subject is challenging and extremely important in the field of contributory negligence law.

The courts have sketched in character lines revealing the elements of young children. Prudence is notably absent. Impulsiveness predominates. As one judge has observed, "A prudent 4 year old boy would be an unattractive anomaly." [1] The child is "expected to act upon childish instincts and impulses." [2] The judge expects to find "impulsiveness, indiscretion, and disregard of danger." [3] The child is looked upon as incapable of choosing between the right and the wrong, between care and recklessness, since he is a "creature of impulse and impetuosity," with "no habits of deliberation and forethought," and with no regard for warnings.[4]

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[1] Le Febvre v. United States, 178 F. Supp. 176, 178 (D. C., D. Md. 1959).

[2] Bagdad Land and Lumber Co. v. Boyette, 104 Fla. 699, 140 So. 798, 800 (1932).

[3] Burger v. Missouri Pac. Ry. Co., 112 Mo. 238, 249, 20 S. W. 439, 441 (1892).

[4] Von Saxe v. Barnett, 125 Wash. 639, 217 P. 62, 64 (1923). See also Government Street Ry. Co. v. Hanlon, 53 Ala. 70 (1875).

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The bench views the child as necessarily lacking in the knowledge of physical cause and effect relationships which is usually acquired only through experience.[5] While a child may have all of the knowledge of an adult relative to a danger which will attend a particular act, he is not regarded as necessarily having the prudence, thoughtfulness and discretion of an adult to avoid the danger.[6] It takes a stronger indication of danger to alert a child.[7] He does not have as much capacity for weighing and relating the factors in a given situation and realizing that there is a substantial likelihood that his conduct will bring these factors into combined and cooperating effect to his injury.[8]

Jurists have toyed with the interesting question of whether modern children are smarter and better able to appreciate the danger and risk in a given situation. In *Hellstern v. Smelowitz*,[9] the court, noting that there was once a time when "the age of discretion of an infant was determined to begin when the infant was able to count up to 12 pence and to measure an ell of cloth. Y. B. 12 and 13 Edw. III, R. S. 236 (1339)," opined that "the ripening of the mental faculties of children in general must, we think, have been accelerated by the progressive enlargement of a child's scope of observations and experiences in our modern environment." This same thought is expressed in *Eckhardt v. Hanson*,[10] to the effect that modern children of tender years have more opportunities to observe and be aware of danger because of the influence exercised upon them by moving pictures, radio and other modern inventions and conditions.

Perhaps child psychologists would violently disagree. A child of frontier days, continually required to care for himself and cope with many dangers which the modern child is not ex-

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[5] Bagdad Land and Lumber Co. v. Boyette, *supra* note 2.

[6] Burger v. Missouri Pac. Ry., *supra* note 3.

[7] City of Jacksonville v. Stokes, 74 So. 2d 278, 279 (Fla. 1954).

[8] Novicki v. Blaw-Knox Co., 304 F. 2d 931, 933 (3rd Cir. 1962), a good example of the typical naive mental processes where the child, although knowing full well that a hand caught between the gears would be injured, testified "we were not planning to stick our hand in the machine" and, when asked, "You knew that if you put your finger in between the gears you'd get hurt, didn't you?" answered, "Yes. But we weren't thinking about getting hurt or nothing." Compare Vitale v. Smith Auto Sales Co., 101 Vt. 477, 144 A. 380 (1929). A 9 year old boy, allegedly a "congenital imbecile," who was held not "so lacking in mentality that he was incapable of exercising some degree of care for his own safety."

[9] 17 N. J. Super. 366, 86 A. 2d 265, 270-271 (1952).

[10] 196 Minn. 270, 264 N. W. 776 (1936).

posed to, might well have been a much keener and more circumspect individual. The modern child who, while he is exposed to the dangers of the automobile and other modern mechanical devices, does not have the experiences which would tend to sharpen his instincts and senses and capacity for realization of risk and danger.[11]

It may be that jurists, at least in automobile cases, initially reasoned that the automobile was of such comparative newness that it was too much to expect children to appreciate the danger and avoid it. As we have progressed into the automobile age, the judge may have subconsciously come to consider this fact as one of the expected parts of a child's existence which has acclimated the child to the danger of the automobile.

It is difficult to believe that child psychology has, merely by reason of certain mechanical progress in our civilization, been essentially changed. While in some ways he may well realize that certain things such as the automobile hold a great deal of danger, he is still nevertheless a creature of impulse who does not consider the possible danger of a combination of factors which to the more experienced adult mind would present a very present danger. He is still going to "follow a bait as mechanically as a fish." [12]

The Rationale of Judicial Leniency

The status of children of tender years has from time immemorial been recognized in law to be different from that of one of more mature years.[13] It has been easy, therefore, for the judge to feel justified in giving the plaintiff child the benefit of his

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[11] Note the opposing view of McAllister, J., in Tyler v. Weed, 285 Mich. 460, 280 N. W. 827, 837 (1938):

> But in our opinion, it cannot be said in view of distinguished authorities who hold contrary views that this is a matter of which a court can take judicial notice. Such statements are not generally accepted. One cannot say arbitrarily that the mental growth, intelligence, awareness, capability, and judgment of a modern child under seven years of age, are more developed because of such external stimuli. It is not agreed that the development of the child mentality depends upon such considerations."

Also to this effect is Verni v. Johnson, 295 N. Y. 436, 68 N. E. 2d 431, 432 (1946) in which the court, referring to the rule of conclusive presumption of incapacity in children between three and four, stated:

> It is not an unjust rule or one which changing conditions make obsolete. No reason appears for changing it.

[12] United Zinc and Chemical Co. v. Britt, 258 U. S. 268, 66 L. Ed. 615, 617 (1922).

[13] McDonald v. City of Spring Valley, 285 Ill. 52, 120 N. E. 476 (1918).

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comparative lack of capacity for taking care of himself, especially when we consider that the courts have tended to water down the defense of contributory negligence.[14] There is a tendency to adopt a "double standard" as between the negligence of the defendant (the objective standard) and the subjective standard (which ordinarily would favor the plaintiff) in adult plaintiff cases,[15] thus it is all the more understandable that the courts would relax the defense of contributory negligence in favor of the child plaintiff.

It has been urged that individuals should not be considered at legal fault for failing to live up to a standard which as a practical matter they cannot meet.[16] This reasoning explains in part the leniency of the courts in continuing to place the child plaintiff in a more favorable climate in the field of contributory negligence.[17]

The child is under certain disabilities which should be taken into account in determining whether he should be deprived of his cause of action where his conduct, while not meeting the standard of care required by adults, nevertheless meets a standard of "childish care." This is the most that can be asked of the child as a matter of fairness and ethics.[18]

While it has been reasoned that human sympathy is not the basis for the special rules applicable to children in this area,[19] courts are, after all, human beings with a tendency to express fondness toward children.[20]

The rules in favor of children have been justified on the basis that since the child is lacking in judgment and discretion,[21]

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[14] James and Dickenson, Accident Proneness and Accident Law, 63 Harv. L. Rev. 769 (1950).

[15] James, The Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1, 2 (1951), which points out that the "double standard" is probably an effective psychological force with juries even where it is not, as such, submitted to the jury in instructions, since juries will tend to resolve doubts on both issues (negligence and contributory negligence) in favor of plaintiffs, whether they be children or adults.

[16] *Ibid.*

[17] Charbonneau v. MacRury, 84 N. H. 501, 153 A. 457 (1931).

[18] Annot., 77 A. L. R. 2d 917 (1961).

[19] Annot., 174 A. L. R. 1080 (1948).

[20] Deming v. City of Chicago, 321 Ill. 341, 151 N. E. 886 (1926); the very name "child" evokes thoughts of sympathy and feeling for this being of comparative incapacity, to the extent that it has even been questioned whether it is error for the trial court to refer to the plaintiff as a "child."

[21] Cox v. Hugo, 52 Wash. 2d 815, 329 P. 2d 467 (1958).

the doctrine of contributory negligence should not apply to children except where they are of sufficient "knowledge, experience, intelligence, judgment, and discretion to be capable to some extent of deliberating and acting upon its own experience and judgment." [22] A contrary approach would often free the defendant from liability in situations where he should have foreseen that his act or omissions might result in harm to children and it would be improper to permit him to bring harm to a child and not be answerable in damages.[23]

Courts which have allowed the jury to consider the mental shortcomings of the subnormal adult have no doubt found it easy to apply the same standard to children. In each category, the plaintiff is incapable, because of mental incapacity, to look out for himself as well as a competent adult.[24]

Analysis by the Jury

The nature, capacity, and duty of the child have been considered questions of fact peculiarly within the province of the jury. The jury's "knowledge of human nature generally and of children in particular" is felt to make the jury a proper forum for the determination of these facts.[25] It has been stated that the determination of the degree of care which may be expected in children is based on factors which the jury can weigh "in the light of their experience at least as well as judges" and that it does not require any "special training or learning which judges are supposed to possess in higher degree." [26]

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[22] Von Saxe v. Barnett, *supra* note 4, 217 P. 62, 64.

[23] Jackson v. Jones, 224 La. 403, 69 So. 2d 729, 733 (1953), in which the court, applying a conclusive presumption of incapacity, as to a boy age seven injured on a pile of lumber, stated:

> To hold otherwise would effectually abolish the duty of care placed upon the contractor in this case—that is, that he should have foreseen that the children of the school would be attracted to and would go upon the unguarded lumber which was inherently dangerous to them.

[24] James, *op. cit. supra* note 16 (and cases cited in footnotes 132 and 133):

Wiles v. Motor Club of America, 67 Ohio L. Abs. 397, 121 N. E. 2d 167 (Ohio Com. Pl. 1953);
Noel v. McCaig, 174 Kan. 677, 258 P. 2d 234 (1953);
Emory University v. Lee, 97 Ga. App. 680, 104 S. E. 2d 234 (1958).

Although mere adult "dullness of mind" has been held not a good reason to apply a relaxed standard to him (Worthington v. Mencer, 96 Ala. 310, 11 So. 72 (1892)) the courts have generally ruled that an adult mental incompetent will not be held to the same standard of care as a competent adult.

[25] Greene v. DiFazio, 148 Conn. 419, 171 A. 2d 411, 414 (1961).

[26] Camardo v. N. Y. State Rys., 247 N. Y. 111, 159 N. E. 879, 881 (1928).

The jury has been equated with the "common experience of the public" and, therefore, is eminently qualified to decide fact questions where it is urged that the child plaintiff failed to observe a certain standard of conduct.[27]

While the courts have generally viewed the jury as qualified to decide the fact questions involving the alleged contributory negligence of children, there has not been a tendency to entrust to the jury the testimony of expert witnesses on child psychology.[28] This is apparently founded in a belief of the courts that such testimony would tend to confuse and unduly occupy the jury without proportionate benefit.[29] Testimony from expert child psychologists as to proven physical characteristics should not be unduly confusing or time-consuming and should, on the basis of fairness to the party wishing to utilize it, be admissible. Compare the approach in *Tyler vs. Weed*,[30] in which the court urges that protection of the child "should not in these days be frittered away by the hazards of metaphysical reflection, or the necessarily dubious speculation of juries in such cases." While Judge McAllister recognized that in his state (Minnesota) the reading of scientific works to the jury was not permissible, he concluded that this should not preclude the appellate court from using scientific works and books in determining that children under the age of seven years are conclusively presumed incapable of contributory negligence.

The jury alone without expert testimony is at least qualified to decide what should be done in certain fact situations which involve characteristics of children bearing on the questions of whether there was capacity for contributory negligence and whether the child observed the required standard of care. The courts have tended to entrust these matters to the juryman instead of deciding them as a matter of law.[31]

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[27] McCain v. Bankers Life and Casualty Co., 110 So. 2d 718, 722 (Fla. 1959).

[28] Annot., 77 A. L. R. 2d 917 (footnote 13) (1961) where it is stated "apparently there has been little attempt to investigate the question on a factual basis by resorting to studies of child development by psychologists or educators" in referring to the question of capacity.

[29] Compare, James and Dickenson, *op. cit. supra,* note 15 at 784.

[30] *Supra* note 11 at 838.

[31] Annot., 77 A. L. R. 2d 917, 932 (1961).

The Capacity Conundrum—In General

As we have noted above, children have a favored status relative to contributory negligence because they have less capacity (and sometimes no capacity) for appreciating and avoiding danger. It is, therefore, unfair to hold them to the same standard of care as an adult. We must determine, therefore, what factors make a child less capable than the adult.

It is necessary in each case to determine whether the particular child, at the time of the occurrence, had such knowledge, experience, judgment and other similar characteristics, that he should be held to some duty of care. Since children vary widely within the same age group, it is necessary to consider factors other than age. While some indication as to the judgment, discretion, and intelligence of the particular child, age does not alone answer the question. As stated in *Sorrentino v. McNeill,*[32] "the civil irresponsibility of a young child is not regarded as an invariable concomitant of a certain age—except it be little, if any, beyond swaddling clothes—to be arbitrarily fixed upon such age alone, but is to be determined as existing or not, from all the applicable circumstances, like any other question of fact." His discretion to heed and his power of self-control constitute the predominate element.[33]

The question becomes one of whether the particular child is "able" to act "unreasonably" under the circumstances, in light of his age, training, judgment and other relevant factors which apply to him. In *Bush v. New Jersey and New York Transit Co.,*[34] it is stated that trial practicality requires that courts designate the age at which the trial court should allow the jury to determine the question of capacity, "absent any special attribute possessed by the child" and that most courts have drawn the line at some point for purposes of certainty and trial expediency.[35]

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32 122 S. W. 2d 723, 725 (Tex. Civ. App. 1938).

33 Lederer v. Connecticut Co., 95 Conn. 520, 111 Atl. 785 (1920); Grenier v. Town of Glastonbury, 118 Conn. 477, 173 A. 160 (1934); and other cases collected in Annot., 107 A. L. R. 1, 44, et seq. (1937).

34 30 N. J. 345, 153 A. 2d 28, 33 (1959).

35 The line is not easily drawn and "there is a wide diversity of judicial opinion as to a definite or fixed age that is sufficient to constitute a child sui juris, so as to charge it with contributory negligence." Walston v. Greene, 247 N. C. 693, 102 S. E. 2d 124, 126 (1958). Ruling that evidence of the child's attending Sunday school and church, enrollment in kinder-

(Continued on next page)

Even though the child is aware of the danger and an adult would be barred by contributory negligence in not avoiding such danger, the child may not have the required prudence, thoughtfulness and discretion to avoid the danger. He must also "appreciate" the danger in the sense of understanding the implications of the danger.[36]

The question is not whether the child is capable of just any negligence but whether he was capable of appreciating the particular danger with which he was confronted at the time of his injury.[37]

Relative to realizing the risk involved, it has been stated that the child must realize that his conduct will bring certain factors, of which he well may have knowledge, into combined and cooperating effect to his injury.[38] This same line of reasoning is found in *Hollman vs. Atlantic Coast Line R. Co.*,[39] where the court reasoned that the plaintiff, age nine, may have *known* the danger of being on a railroad track when an engine passed, but may have lacked the discretion to appreciate the imprudence of attempting to cross the track under the circumstances. The court ruled that the mere fact that he was familiar with the railroad crossing was not sufficient to overcome the presumption of "want of discretion" which his age implied.

One of the most important factors to be considered on the question of capacity is the nature of the danger to which the child is exposed. As noted in *Birmingham and A. R. Co. v. Mattison*,[40] some children at the age of seven will better understand

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(Continued from preceding page)

garten, and certain other attributes were considered not sufficient to "distinguish this child from the average child of his age" and therefore the presumption had not been overcome, the court noted additional factors which would be relevant such as attending school, being taught safety regulations, experience in caring for himself in traffic, and any other evidence of his physical and mental capabilities. The court indicated that the factors in Dillman v. Mitchell, 13 N. J. 412, 99 A. 2d 809 (1953) (in which there was evidence that the child attended kindergarten and went to school and to the store by himself and had crossed the highway many times and had been told to watch traffic and understood that he must be careful) would improve the defendant's case.

[36] Annot., 77 A. L. R. 2d 917, 928 (1961); U. S. v. Stoppelmann, 266 F. 2d 13 (8th Cir. 1959); Novicki v. Blaw-Knox Co., *supra* note 8; Hines v. Milosivich, 68 Cal. Rep. 2d 520, 157 P. 2d 45 (1945).

[37] Annot., 174 A. L. R. 1080, 1134, 1135 (1948).

[38] See Novicki v. Blaw-Knox Co., *supra* note 8.

[39] 201 S. C. 308, 22 S. E. 2d 892 (1942).

[40] 166 Ala. 602, 52 So. 49 (1909).

the dangers of trains and automobiles than others will at the age of fourteen.[41]

There is no clear-cut statement in the cases as to whether the jury is to determine the question of capacity on the same basis as it determines the question of whether the child has lived up to the required standard of care. Nor is there any definitive rule which in effect says that the jury, *if* it finds the child capable of contributory negligence, *must* find that the child failed to observe the standard of care required of it.[42]

Capacity Presumptions

Most courts have recognized that children three years of age or under cannot be guilty of contributory negligence, i.e., the courts in such cases apply a conclusive presumption of incapacity. As to ages from four up to thirteen, the courts have adopted various approaches. Some, using the so-called "Illinois Rule," have applied the conclusive presumption to children beyond six years, thus extending the common law rule which gave children the benefit of such presumption until they reached age seven, by analogy to the criminal law principle that children under seven were not "capable" of crime. Others have applied the "Massachusetts Rule" that in this age bracket there should be a rebuttable presumption of incapacity, which, however, can be overcome by production of substantial evidence to show capacity. The courts have differed as to the effect of the rebuttable presumption. Some hold that where defendant produces sufficient evidence, the presumption disappears and will not be considered

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[41] The court reasoned that a child raised in the city may be perfectly capable of understanding and avoiding the danger of streetcars, railroads and crowded streets, but insensible to the danger of farm machinery and equipment such as a foot adz or a scythe blade. By the same token, a child raised on a farm would be familiar with and much more sensible to the danger of farm machinery than to the danger of crowded streets in a city. See also: Boyer v. Northern Pac. Coal Co., 27 Wash. 707, 68 P. 348 (1902), which recognizes the importance of experience with dangerous appliances in a case of a boy of fourteen of average intelligence, in which the court discounted the factor of age when compared with natural intelligence and past experience; Kehler v. Schwenk, 144 Pa. 348, 22 A. 910, 912 (1891) (responsibility depends upon the knowledge and experience of the child, and on the character of the danger to which he is exposed); and collection of many cases relative to a variety of dangers which are usually encountered by the child in Annot., 107 A. L. R. 1, 11-40 (1937).

[42] Compare Patterson v. Palley Mfg. Co., 360 Pa. 259, 61 2d 861 (1948): "The care and caution required of a child is measured by his capacity to see and appreciate danger, and he is held only to such measure of such discretion as is usual in those of his age and experience."

as evidence.[43] Others hold that the presumption acts as evidence and the trial court cannot as a matter of law do anything but send the case to the jury on the question of contributory negligence, with the result that the child is protected from being found contributorily negligent as a matter of law.[44]

As the child reaches the age of fourteen and over, the courts have rather consistently applied a presumption of capacity for observing the same standard of care as that of an adult, which, however, can be overcome by evidence showing that the child had less discretion and judgment than an adult, thus entitling him to be judged by the standard of care applicable to children.

It has been stated that the considerations relevant to overcoming the rebuttable presumption of incapacity are substantially similar to those considered in establishing the standard of care to be required of a child, such as evidence as to his special capacity, intelligence and training.[45] There is, however, no definitive principle that merely because there is sufficient evidence to rebut the presumption of incapacity, the child *must* be considered as having failed to meet the standard of care required of him.

The mere fact that the child is capable of contributory negligence should not of itself defeat his right of recovery. Capacity is concerned with the child's ability to appreciate danger and to avoid it. The standard of care, on the other hand, is concerned with his obligation to *use* this ability. Thus the jury should be charged that it has a double question to decide—that is, (1) capacity and (2) whether the child lived up to the required standard of care.[46] This would probably work for the child's benefit since it places a more onerous duty on the jury. Since defendant usually has the burden of proof on the issue, there are two hurdles he has to jump, thus increasing his burden.

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[43] Shaw v. Perfetti, 125 S. E. 2d 778 (W. Va. 1962); Grant v. Mays, 129 S. E. 2d 10 (Va. 1963).

[44] Roberts v. Taylor, 339 S. W. 2d 653 (Ky. 1960). The same result was reached in 257 N. C. 611, 127 S. E. 2d 214 (1962) which approved Wilson v. Bright, 255 N. C. 329, 121 S. E. 2d 601, 603 (1961), where a nine year old bicyclist tangled with defendant's automobile and the court ruled that "non-suit on the ground of contributory negligence was not permissible."

[45] Annot., 77 A. L. R. 2d 917, 927 (1961).

[46] *Ibid.* at 927, suggesting, on the other hand, that perhaps the best approach is to submit to the jury the simple question of whether the child has acted reasonably under all of the circumstances, including its age, development, experience, discretion and physical and mental development.

The Illinois Rule v. The Massachusetts Rule

The "Illinois Rule," which gives a conclusive presumption of incapacity to children (usually up to seven years of age) has in recent years been on the defensive.[47] The attack has been mainly on the grounds that it enforces a rule "contrary to fact"[48] and that it leads to the unbecoming conclusion that one day's difference in age determines whether the child is or is not capable of contributory negligence.[49] In *Hellstern v. Smelowitz*[50] the court, stating that the rule rests on the "moss-covered stump of an antiquated rule of criminal law which declined to acknowledge the existence of any capacity in a child under seven years of age to distinguish between right and wrong," reasoned that a boy one day under seven years of age might be guilty of the most flagrant contributory negligence and yet evidence of his exceptional precosity and breadth of judgment and experience could not be introduced "to overcome the illusory presumption of baby-like puerility."[51]

The above cases, which adopt the "Massachusetts Rule," point up the proposition that age alone should not be the determining factor of capacity in cases involving children over the age to which all courts accord the benefit of the conclusive presumption of incapacity. From the standpoint of realism, this approach seems to be based on much more solid ground. The basic question is whether the child has the intelligence, experience, training, discretion and alertness to appreciate and avoid the danger.[52]

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[47] Note the distinction between applying a conclusive presumption of incapacity that under the circumstances the child is not capable of contributory negligence as a matter of law. Benning v. Schlemmer, 57 Ohio App. 457, 14 N. E. 2d 941 (1937).

[48] See Dillman v. Mitchell, 13 N. J. 412, 99 A. 2d 809 (1953).

[49] Dogen v. Lamb, 75 S. D. 7, 59 N. W. 2d 550 (1953).

[50] 17 N. J. Super. 366, 86 A. 2d 265, 270 (1952).

[51] See also the terse dissent of Potter, J., in Tyler v. Weed, *supra*, 280 N. W. 840, stating:

> The court announced a rule, supported neither by the canon law, the civil law, the common law, or other law, which excludes intelligence and experience in determining culpability and disregards the rule that everyone is bound to use that degree of care which a reasonably prudent person of like age, intelligence and experience should ordinarily use under like circumstances. 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 discarded.

[52] McCain vs. Bankers Life and Casualty Co., 110 So. 2d 718 (Fla. App. 1959). The experience of the child encompasses his previous training in safety and also the association which he has had with older children in the family. Hadley v. Morris, 35 Tenn. App. 534, 249 S. W. 2d 295 (1951).

The "Illinois Rule," however, has been stoutly and with a great deal of persuasion defended on the basis of the child's impulsive nature and lack of sense perception, with needs of his own and a mentality adapted to his needs; the avoidance of the danger of shifting standards and the confusion and inconsistency which often marks jury decisions; simplicity and administrative expediency. There is a further policy reason that a negligent defendant should not be allowed to escape on the ground that an infant who is not fully aware of the consequences of his acts was also negligent, since defendant was the one who placed the injurious force in operation. The public has an interest in seeing that the infant be recompensed for such loss rather than having the entire expense borne by the public as so often happens; the complications of modern civilization with its crowding traffic and premium on speed has lessened the odds in favor of safety for infants.[53]

The Hybrid Standard of Care

While it has been stated that there is no ideal standard by which it can be determined whether a given child in a particular case exercised the measure of care which the law requires there has developed a more or less standard phraseology in defining the standard of care required of children. The standard is usually couched in terms of requiring the care reasonably to be expected under the same or similar circumstances from the ordinary child of like age, intelligence, and experience.[54] It has been likened to the ordinary, reasonable man standard used for adults, with the exception that "special qualifications and incapacities of the child may be taken into consideration." [55]

There is some question as to whether the so-called adult standard is objective in the sense that it is not subject to the same exception that qualities of the individual person involved may be taken into consideration.[56]

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[53] Tyler v. Weed, *supra* note 12; Wilderman, Contributory Negligence of Infants, 10 Ind. L. J. 427 (1935).

[54] Annot., 107 A. L. R. 1, 44 (1937); Annot., 174 A. L. R. 1080, 1083 (1948); Annot., 77 A. L. R. 2d 917, 930 (1961); Restatement, Torts, par. 283, Comment e, and para. 464.

[55] Annot. 77 A. L. R. 2d 917, 930 (1961).

[56] Goodman v. Norwalk Jewish Center, Inc., 145 Conn. 146, 139 A. 2d 812 (1958), taking account of the "personal equation" of plaintiff's lack of coordination caused by prior fractures.

In the *Charbonneau* case[57] it is asserted that "the fundamental rule of reasonable conduct remains constant, but the circumstances of the age and stage of development of the individual in the process of his growth during his minority are important considerations in applying the rule," which was approved in *Grenier vs. Town of Glastonbury*[58] (Conn.).

An instruction that children of tender years "are bound only to use that degree of care which ordinarily prudent children of that age and like intelligence are accustomed to use under the circumstances," while held not error, has been criticized on the ground that the experience of the jurors with the facts in question (which presented a situation which was not of common experience) might differ and therefore the jurors might be confused in trying to determine to what degree of care a child of plaintiff's age was accustomed to use in such circumstances.[59] The court stated that a more accurate test might be one which would require the jurors to ascertain, from their own experience with children, the care and prudence which children of that age might reasonably be expected to exercise. The standard, thus, would be based on what the jury would reasonably *expect* such a child to exercise and not what the jury might find that the children of like age, intelligence and experience actually exercised under the circumstances in question. This test would be an objective one which would, theoretically, not be based on the individual experience of each juror but on what the jury determined would be reasonable conduct which the public should require of the child under the circumstances.[60]

Such a standard was criticized as being a "confusion of the objective standard of care, and the individual standard of care of a particular child" in Judge McAllister's opinion in *Tyler v.*

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[57] *Supra* note 17.

[58] *Supra* note 33.

[59] Neas v. Bohlen, 174 Md. 696, 199 A. 852 (1938).

[60] Grant vs. Mays, 129 S. E. 2d 10, 13 (Va. 1963), should be compared with Neas vs. Bohlen, *supra* note 59. The Annot., 77 A. L. R. 2d 917 (1961), seems to follow the reasoning in the latter case in saying that most courts would agree that such a child is required to exercise, for his own safety, the standard of care reasonably to be expected under the same or similar circumstances, from the ordinary child of like age, intelligence and experience and that the mental operation to be performed in applying the test is similar to that in formulating the "ordinary, reasonable man" used as a test of adult care, with the exception that special qualifications or capacities of the child may be taken into consideration.

Weed,[61] in which he seems to have misinterpreted such an instruction as requiring the jury to find what a prudent, careful child of the same age, intelligence, ability and understanding "*would do* under the circumstances" instead of what such child would be "*expected to do.*" Be this as it may, it is clear that he would not prescribe and require "novel standards of care" or "more severe obligations of conduct than prevailed in the Middle Ages." [62]

The juror would have as much difficulty in following standard of care instructions in adult cases framed similarly to the one in *Neas vs. Bohlen.* Yet the courts have not hesitated to direct the jury to determine whether the adult has exercised such care "as is usually exercised by ordinarily prudent persons in the same or similar circumstances." [63]

There would seem to be no logical difference between the standards in this respect. The juror would be as much confused in the case of an adult as he would be in the case of a child in determining what the average person (adult or child) actually does in certain factual situation rather than in what he is expected to do as a matter of community valuation.

While the standard of care applied to a child is objective in the sense that it applies the standard of children of the same capacity acting as ordinarily prudent children under the same circumstances, the standard is in some respects subjective. For example, the child owes a greater duty than the average child of his age if he has more than the average capacity and intelligence for a child of his age. He must use the capacity and intelligence which he has.[64] This is merely another way of saying that the child must live up to the standard of an older child if the child has the understanding, knowledge, etc., which an older child would have. This measurably discounts the factor of age,

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[61] *Supra* note 11.

[62] Tyler v. Weed, *supra* note 11 at 838.

[63] Fork Ridge Busline vs. Matthews, 58 S. W. 2d 615, 617 (Ky. 1933).

[64] Marius v. Motor Delivery Co., 131 N. Y. Supp. 357, 360, 146 App. Div. 608 (1911); Western and A. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912 (1888); Thomas v. Oregon Short Line R. Co., 47 Utah 394, 154 P. 777 (1916). In Turner v. City of Moberly, 224 Mo. App. 683, 26 S. W. 2d 997 (1930), the court stated that mere knowledge that injury might result without appreciation of the risk is not sufficient, but if the danger is so obvious that an ordinarily prudent child of the same capacity for knowing and appreciating the danger or risk would have known and appreciated it under the same or similar circumstances, then the child is held to have constructive knowledge and appreciation.

which is only one factor to be considered in connection with the experience, of the child.[65]

While the courts have recognized that a child is a creature of impulse, they have been unwilling to excuse him from his duty of care just because his action was the result of "irresistible impulse" (a concept more commonly encountered in the field of criminal law).[66]

The standard of care applied to children purports to hold the child to the intelligence and capacity expected of the fictional child having the characteristics of the plaintiff. In all likelihood the jury will in its own mind emphasize certain sympathy-producing factors in the case, in the child's favor, even though the fictional child is laid before them as the model to which the child-plaintiff must conform.

Teen-Agers

If the plaintiff is a teenager of fourteen or beyond his capacity, discretion, knowledge and experience may be taken into consideration in determining whether he exercised due care unless it clearly appears that he possessed these elements to the same extent as an ordinary adult. In *Lundy v. Brown*[67] the court stated that the age of adult capacity cannot be determined with sufficient "medical accuracy," but it is universally recognized that it is not reached at the age of fourteen. Until a minor has reached the state of maturity showing him to be capable of using the judgment of a reasonably prudent adult, his conduct

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[65] Annot. 107 A. L. R. 1, 40. While the elements of age and experience have been approved as proper elements to determine the degree of care required of a child, doubt has been expressed as to whether they should be included in a jury instruction. Seward v. York, 124 Colo. 512, 239 P. 2d 301, 305 (1951) (the court stated that it might have been well to exclude these elements, but the inclusion of them was not prejudicial error); Charbonneau, *supra* note 17 (held not error to refer to age and experience as constituting the standard of conduct); and Cassens v. Tillberg, 294 Ill. App. 168, 13 N. E. 2d 644 (1938) (instruction including elements of age, capacity and discretion to recognize and avoid dangers held error since it omitted element of "experience"); Hurzon v. Schmitz, 262 Ill. App. 337 (1931).

[66] Riley v. Holcomb, 187 Kan. 711, 359 P. 2d 849, 855 (1961), holding that an instruction that "boys will not be charged with negligence when they merely follow the irresistible impulses of their own natures, instincts common to all boys" was properly refused even though the jury might have found that what the child did was what a boy of like age (9), capacity, discretion, knowledge, and experience would ordinarily do under like circumstances, and that he was merely following his irresistible impulses, an instinct common to all boys. See also Ackerman v. Advance Petroleum Transport, 304 Mich. 96, 7 N. W. 2d 235 (1942).

[67] 305 Ky. 721, 205 S. W. 2d 498 (1947).

is not to be measured by the same standard as that of a mature person, but by such judgment and experience as children of similar age, experience and judgment would use under the circumstances.[68]

The adult standard of care has been applied where the child has been injured while engaging in activity normally undertaken by adults. For example, the court has frowned on youthful defiance or disregard of physical laws where he is engaging in the "adult activity" of alcoholic consumption. He is expected "to be aware of the fact that the voluntary imbibing of the amount of wine which he necessarily must have consumed would end in the dire results which followed therefrom"—which is, maybe, a way of saying that he had better know his "capacity."[69] Similarly, he is expected to know certain things about an automobile if he is going to drive one.[70] The perils of water must also be given due respect by the child, even before he arrives in his teens.[71] Courts have divided on how to view the teen-ager who violates a driving statute or ordinance. In *Wilson vs. Shumate,*[72] it was held error to instruct the jury that in considering whether or not plaintiff was guilty of contributory negligence, the jury should take into consideration her age, her intelligence and discretion, under a statute which put a duty of care on "every person." *Nielsen vs. Brown*[73] concluded that plaintiff, a female of nearly seventeen, "put off the things of a child" in assuming the responsibility of driving.[74] Very recently there has appeared

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[68] This same principle was applied to a 15-year-old in Laseter v. Clark, 54 Ga. App. 669, 189 S. E. 265 (1936), even though the child was presumptively charged with diligence for his own safety when peril was palpable and manifest.

[69] Robinson v. Fidelity and Casualty Co. of New York, 135 So. 2d 607, 611 (La. App. 1961).

[70] Redding vs. Morris, 105 Ga. App. 152, 123 S. E. 2d 714 (1961), where the court, affirming a directed verdict for defendant, held a teen-ager (16) chargeable with such diligence as might be fairly expected of the class and condition of which he belongs, noting that he "should appreciate the danger of driving an automobile with defective brakes and a defective accelerator." There was a smell of alcohol in this case which makes the result all the more understandable.

[71] City of Evansville v. Blue, 212 Ind. 130, 8 N. E. 2d 224 (1937), a healthy boy of 11 is deemed to know the perils of deep water and that it is negligent for one who is not a good swimmer to venture into deep water.

[72] 296 S. W. 2d 72 (Mo. 1957).

[73] 374 P. 2d 896, 908 (Ore. 1962).

[74] For collection of numerous cases on effect of violation of statute or ordinance see Annot., 174 A. L. R. 1170 (1948).

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a tendency to hold minor automobile drivers to an adult standard of care, in at least five states.[75]

Conclusion

The judge, giving due weight to the mysterious characteristics of the younger child, accords to him great leeway, but the rationale for doing so is somewhat obscure. The jury, considered competent to judge on many matters in what could well be considered the field of child psychology, is usually allowed to be the one to say whether the child has the capacity to be, and has been, contributorily negligent. The area of capacity contains troublesome problems of *when* to use the conclusive presumption of incapacity and *how* to use rebuttable presumptions. The "childish" standard of care, although rather uniformly formalized, is a peculiar mixture of the objective and subjective, but, like the adult standard, depends on what society expects as reasonable, considering all the circumstances but having the child's characteristics as additional factors. The teenager and the automobile have created problems over which the courts have been unable to arrive at a uniform approach.[76]

(*Continued from preceding page*)

See Simmons vs. Holm, 367 P. 2d 368 (Ore. 1961), ruling that a child, age fourteen, was not guilty of negligence per se where he rode his bike contrary to statute and collided with a car, but recognizing that he was not "free from a general duty to obey the statute."

Compare: Moak vs. Black, 230 Miss. 337, 92 So. 2d 845 (1957) (Error to instruct verdict for defendant if jury found that plaintiff bicyclist, age nine, violated left turn statute, in absence of proof of exceptional capacity for his age or faculty of judgment in such degree as removed him from this class); Glassman vs. Keller, 291 Ill. App. 262, 9 N. E. 2d 289 (1937) (proper to refuse an instruction which directed verdict for defendant if plaintiff rode bicycle on sidewalk in violation of ordinance and if such violation proximately contributed to his injuries).

75 Allen v. Ellis, 380 P. 2d 408 (Kans. 1963); Harrelson v. Whitehead, 365 S. W. 2d 868 (Ark. 1963); Carano v. Carano, 115 Ohio App. 33 (1961); Dellwo v. Pearson, 107 N. W. 2d 859 (Minn. 1961); Betzold v. Erickson, 182 N. E. 2d 342 (Ill. App. 1962); all reported in Oleck, Negl. & Comp. Serv. (Vol. 8, No. 1, Oct. 1, 1962, et seq.).

76 But see text, *supra* at n. 75.