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Torts: Standard of Care Applied to Minors in the Operation of Dangerous Instrumentalities

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TORTS: STANDARD OF CARE APPLIED TO MINORS IN THE OPERATION OF DANGEROUS INSTRUMENTALITIES

The recent case of *Adams v. Lopez*[1] involved a collision between a motor scooter operated by a minor and an automobile operated by an adult. The appellant minor was held to the same standard of care as an adult. Appellant complained of the instructions of the lower court that a minor operator of a motor vehicle is held to the same degree of care as an adult. In upholding the instructions, the New Mexico Supreme Court stated that when a minor operates a motor scooter, he assumes the responsibility of an adult for that activity.[2]

It has long been established in this country that the standard of care of an adult in negligence cases is that of a reasonably prudent man.[3] Oklahoma has accepted this standard of care as a requirement of its adults, a standard concededly objective.[4]

A split of authority appeared, however, in applying a standard of care to minors. Most of the cases illustrating this split deal with the minor's contributory rather than primary negligence. Some early decisions of the American courts agree with the objective standard of care as applied to minors.[5] However, the majority of the earlier cases adopted the subjective standard of care for minors in negligence cases, whether such negligence be contributory or primary.[6]

It is recognized that the courts in applying the subjective standard of care to a minor's conduct are really applying a combination of both standards. They are applying a subjective standard to the child's physical

[1] 75 N.M. 503, 407 P.2d 50 (1965).

[2] In looking at the problem from the Appellee's point of view, the court stated: "Neither drivers nor pedestrians have any way of ascertaining whether the driver of any other vehicle is a child or an adult, nor can such driver be expected to guard against the operation of such a dangerous instrumentality merely because it is operated by a minor." *Id.* at ———, 407 P.2d at 52.

[3] *E.g.*, Bizzell v. Booker, 16 Ark. 308 (1855); Fox v. Town of Glastenbury, 29 Conn. 204 (1860); Chicago, St. P. & K. C. Ry. v. Ryan, 62 Ill. App. 264 *aff'd*, 165 Ill. 88, 46 N.E. 208 (1896); Olwell v. Milwaukee St. Ry., 92 Wis. 330, 66 N.W. 362 (1896).

[4] *E.g.*, Raimer v. Donelson, 200 Okla. 695, 199 P.2d 1018 (1948); Oklahoma Gas & Elec. Co. v. Wilson, 172 Okla. 540, 45 P.2d 750 (1935); Talliaferro v. Atchison, T. & S. F. Ry., 61 Okla. 27, 160 Pac. 69 (1916).

[5] When an infant carelessly shoots another, he is liable for the injury as though an adult. It is not necessary that the plaintiff should establish by direct evidence either an intention to commit the injury or that the infant was at fault. Conway v. Reed, 66 Mo. 346, 27 Am. Rep. 354 (1877); *Accord*, Neal v. Gillett, 23 Conn. 437 (1855); Peterson v. Hafner, 59 Ind. 130, 26 Am. Rep. 81 (1877); Saun v. Coffelt, 79 Va. 510 (1884); See Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

[6] Western & A. R.R. v. Young, 83 Ga. 512, 10 S.E. 197 (1889); Illinois Cent. R.R. v. Slater, 129 Ill. 91, 21 N.E. 575 (1889); Consolidated Traction Co. v. Scott, 58 N.J.L. 682, 34 Atl. 1094 (1896); Briese v. Maechtle, 146 Wis. 89, 130 N.W. 893 (1911); Kucera v. Merrill Lumber Co., 91 Wis. 637, 65 N.W. 374 (1895). These cases developed the subjective rule applicable to children.

and mental development which is applied objectively as he is expected to act as a reasonably prudent child similarly situated.[7]

Juries usually are instructed that this standard of care is what is reasonable to expect of children of like age, intelligence, and experience.[8] The capacity of the individual child to comprehend the danger and form a reasonable judgment is considered, but is measured against the conduct of a reasonable child of like circumstances. Although the rule has overtones of both objectivity and subjectivity, it is more subjective than objective. This is so since some consideration is given to the stage of development of the child, whereas the objective rule merely measures one against a hypothetical reasonably prudent man without any subjective consideration at all. It is in this context that subjective standard is used in this note.

This subjective standard of care holds that a minor, although liable for his negligence, need not have conducted himself with adult prudence and circumspection, but need have acted only as a reasonable person of his age and experience would have under similar circumstances.[9]

This loosely termed subjective standard of care appeared to be satisfactory and equitable in those early days of our country which were new to motorized conveyances of any type. When this standard was developing, the operation of dangerous instrumentalities such as automobiles, powerboats or airplanes by minors, if not unheard of, was practically non-existent. In our modern mechanized civilization, the operation of dangerous instrumentalities by minors has become relatively commonplace. So, unfortunately, has the disproportionate number of accidents accompanying these operations.[10]

While automobiles, powerboats, and airplanes are dangerous machines, the use of which is attended by serious danger to persons and property, they cannot be placed in the same category as ferocious animals, dynamite, and other dangerous contrivances and agencies. Therefore, the rules of law applicable to dangerous instrumentalities do not apply.[11]

But for the purpose of this note, automobiles, powerboats or airplanes will be referred to as dangerous instrumentalities. This will not be in the sense of imposing absolute liability upon the owners or operators

[7] See 27 AM. JUR. INFANTS § 91 (1940); Schulman, *The Standard of Care Required of Children,* 37 YALE L.J. 619 (1927-1928); 2 HARPER & JAMES, TORTS § 168, at 926 n.11 (1956).

[8] *E.g.,* McCain v. Bankers Life & Cas. Co., 110 So. 2d 718 (Fla. Dist. Ct. App. 1959); Maker v. Wellin, 214 Ore. 332, 327 P.2d 793 (1958); see RESTATEMENT (SECOND), TORTS § 283A (1965).

[9] See cases cited note 6 *supra.*

[10] "During 1959, drivers under twenty years of age were involved in 13.0% of the total accidents in the United States although they comprised only 7.2% of the total drivers." National Safety Council, Accident Facts 51 (1960).

[11] Fisher v. Fletcher, 191 Ind. 529, 133 N.E. 834 (1922); Jones v. Hoge, 47 Wash. 663, 92 Pac. 433 (1907).

thereof for injuries caused thereby to others, but in the sense that high degree of care must be exercised by those operating them.[12]

Because of the desire of courts to protect the public and their awareness of growing juvenile motorized negligence, increased dissatsfaction with the subjective standard of care as applied to primarily negligent minors became evident.[13]

The *Restatement*[14] stated a standard of care rule that was much broader than any applied by the courts but which seemed to be motivated by the plethora of juvenile negligence litigation. This broad view would not be evident however from an examination of Section 283A, of the *Restatement:* "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances."[15]

It appeared that the *Restatement* favored the so-called "subjective" standard applied to children, thereby following the well established rule. However, Comment C to this section clearly shows its intent and complete departure from the well established rule.

Comment C represents a radical departure from the subjective standard of care. There is no allowance made whatsoever for the child's age, mental development, or any subjective characteristics by which he was formerly judged. It seems to favor the rationale that if a youngster considers himself qualified to engage in an adult activity, then he must be prepared to conduct himself with an adult of objective standard of care or suffer the consequences for a deviation therefrom. It appears to resolve the often paradoxical situation of the courts recognizing that a negligent minor, though licensed by the State to engage in a potentially dangerous activity, such as driving, may not be held to the same standard of care to which his adult counterparts are held. This despite the fact that they are engaging in the same activity. It erases all considerations formerly allowed age, and applies only the strictly objective or adult standard to a child engaging in an activity which is normally undertaken by adults, and which calls for adult qualifications. It may be seen then that the application of the rule is manifold and extends broadly to all adult activities which minors might engage in.

Many of the courts disagree with the *Restatement* and apply the subjective standard of care, even to those activities where an objective standard might be more appropriate.[16] That this standard is inappropriate, if

[12] McNear v. Pacific Greyhound Lines, 63 Cal. App. 2d 11, 146 P.2d 34 (1944).

[13] See Annot., 97 A.L.R.2d 872, 876-82 (1964).

[14] RESTATEMENT (SECOND), TORTS § 283A (1965).

[15] *Ibid.*

[16] The vast majority of early cases dealt with the contributory negligence of minor plaintiffs. These decisions were uniform in making allowance for the child's age, experience and intelligence. See Harper, TORTS § 282 (1933); Annot., 174 A.L.R. 1080 (1948); Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924); Terry, *op. cit. supra* note 5.

not downright unfair to the public at large who have been injured by negligent minors, seems too obvious to question.

The vast majority of cases relaxing the standard of conduct of children involves conduct on the part of the child which would bar his recovery because of his contributory negligence. However, the weight of authority applied the same standard to determine his negligence when he was a defendant.[17]

Charbonneau v. MacRury[18] was one of the first decisions to discuss comprehensively the problem of what standard of care to apply to a primarily negligent minor in the operation of an automobile. The case faced the problem of the future in this regard, but appeared to resolve it unsatisfactorily. It applied the subject standard of care to a 17 year old automobile driver who was primarily negligent in its operation. Although exhaustively justifying its decision, it succeeded in beclouding the issue for years.

The *Charbonneau* case appears to be the comparatively modern model for the subjective applied to minors in the operation of dangerous instrumentalities. This was illustrated by the court in discussing the standard of care to be applied to minors:

> Either a new standard denoting the average person of the minor's age and development must be taken as the yardstick, or else allowance must be made for the minor's stage of development as one of the circumstances incident to the application of the general rule of reasonable care.[19]

The court felt constrained to follow the latter or basically subjective test.

Since 1931, the *Charbonneau* decision has been followed in a great number of jurisdictions.[20] A growing number of courts, however, began to reflect a trend recognizing the need for an appropriate rule of care. The courts appeared to be noticing the sobering fact that the loosely termed "subjective standard", as applied to minors in negligence actions, although possessed of objective overtones, was anachronistic at best and completely unfair at worst. If the minor was to be held to a subjective standard of care, why hold him to an objective standard in licensing requirements? If the legislatures of the states set objective qualifications of competency for the minor, why should the courts set subjective standards of safety for him? Doesn't justice demand a single objective standard

[17] *E.g.*, Overlock v. Ruedemann, 147 Conn. 649, 165 A.2d 335 (1960); Seeds v. Chicago Transit Authority, 346 Ill. App. 472, 105 N.E.2d 126 (1952); Kuhn v. Brugger, 340 Pa. 331, 135 A.2d 395 (1957); Chernotik v. Schrank, 76 S.D. 374, 79 N.W.2d 4 (1956).

[18] 84 N.H. 501, 153 Atl. 457 (1931).

[19] *Id.* at _____, 153 Atl. at 463.

[20] *E.g.*, Grenier v. Town of Glastonbury, 118 Conn. 477, 173 Atl. 160 (1934); Harvey v. Cole, 159 Kan. 239, 153 P.2d 916 (1944); Archuleta v. Jacobs, 43 N.M. 425, 94 P.2d 706 (1939); see Annots., 174 A.L.R. 1170 (1948); 73 A.L.R. 1277 (1931).

to be applied to all who operate dangerous instrumentalities?

Disappointingly, and far from the broad concept of a single standard of care by all in the operation of dangerous instrumentalities as urged by the *Restatement*,[21] the courts that so held the minor to the strictly objective standard were concerned for the most part with automobile situations. They did not encompass the operation of any instrumentality but the automobile; hence the rule put forth by the courts was usually on narrow grounds.[22]

The decision that made great strides forward in broadening the objective or adult standard in its application to minors in the operation of dangerous instrumentalities such as automobiles, powerboats, or airplanes was *Dellwo v. Pearson*.[23]

For the first time since the *Charbonneau* decision set the mode of leniency of the courts towards the minor negligent motorist, a court examined the rationale of the subjective standard of care. It was the opinion of the court in the *Dellwo* case that the subjective standard of care was unrealistic and should be disavowed.[24] The decision analyzed and approved the objective standard of care as applied to minors. It indicated the activities to which it would be applied when it stated, "Accordingly, we hold 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."[25]

Although broadening considerably the objective standard in its operation, the court while discussing the broader rule of the *Restatement* with approval did not adopt it. It expressly left open the question whether it should adopt the broader rule that would hold a child to adult standards whenever he engages in an activity which is normally undertaken only by adults and for which adult qualifications are required. It was obviously felt that the fact situation at hand which elicited a much broaded application of the objective standard of care did not call for a rule broader in scope than its decision at the time. However, the decision was definitely indicative of the modern trend.

This trend, now solidified by the *Dellwo* decision, continued in a number of cases which followed its lead, thereby accelerating the modern trend of pointing towards, though not expressly adopting the *Restatement* view.[26]

[21] RESTATEMENT (SECOND), TORTS § 283A (1965).

[22] Wilson v. Shumate, 296 S.W.2d 72 (Mo. 1956); Karr v. McNeil, 92 Ohio App. 458, 110 N.W.2d 714 (1952); Nelson v. Arrowhead Freight Lines, Ltd., 99 Utah 129, 104 P.2d 225 (1940); see Fleming, *The Quality of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 25 (1951).

[23] 259 Minn. 452, 107 N.W.2d 859 (1961).

[24] *Ibid.*

[25] *Id.* at _____, 107 N.W.2d at 863.

[26] *E.g.*, Betjold v. Ericson, 35 Ill. App. 2d 203, 182 N.E.2d 342 (1962); Allen v. Ellis, 191 Kan. 311, 380 P.2d 408 (1963); Renegar v. Cramer, 350 S.W.2d 663 (Tex. Civ. App. 1962).

Nielsen v. Brown,[27] a recent case, exhaustively examined and justified the *Dellwo* trend towards the *Restatement's* single standard of care concept. This case went even farther than *Dellwo* in the adoption of the *Restatement* rule but did so on narrower grounds. While impliedly adopting the Rule, it applied it only to the operation of automobiles by minors: "This being the policy implicit in the law, we think it to be not only logical but salutary to the judge the behavior of children in a case of this kind by the same standard that is applied to adults."[28]

The *Nielsen* case, in holding a minor to the strictly objective standard of care while in the operation of potentially dangerous instrumentalities, did much to hasten agreement as to the standard in regards a primarily negligent minor.

It appears the Oklahoma court has not yet faced a fact situation similar to the *Adams* case. The courts have had the opportunity, however, to pass on the standard of care applied to a minor's contributory negligence.

In an early case,[29] the Oklahoma Supreme Court in discussing the alleged contributory negligence of an eight year old stated:

> And regardless of this constitutional provision, the rule supported by the weight of authority and the better reason is that whether the child has sufficient capacity to understand the danger involved in a certain act so as to make him capable of being guilty of contributory negligence, is ordinarily a question for the jury, and it is also for the jury to determine under all the facts whether a child exercised such care and discretion as might reasonably be expected of one of his age, capacity, and experience in the situation in which he was placed. . . .[30]

The subjective standard was apparently approved in this case. This was followed through the years by the Oklahoma courts without any apparent trend towards an objective standard irrespective of the age or development of the minor.[31]

The current view of the court which is directly in agreement with its earlier observations appears to be summarized in *Keltch v. Strunk*.[32] In this case, the lower court's instruction that the plaintiff minor was not to be held to the same standard of care as an adult, but to one determined by his age, capacity, and experience under the circumstances, was upheld.

[27] 232 Ore. 426, 374 P.2d 896 (1962).
[28] *Id.* at _____, 374 P.2d at 908.
[29] Missouri K. & T. Ry. v. Perino, 89 Okla. 136, 214 Pac. 907 (1923).
[30] *Id.* at 139, 214 Pac. at 910.
[31] Connor v. Houtman, 350 P.2d 311 (Okla. 1960); Keltch v. Strunk, 295 P.2d 785 (Okla. 1956); Morris v. White, 177 Okla. 489, 60 P.2d 1031 (1936); Davis v. Bailey, 62 Okla. 86, 19 P.2d 147 (1933); Jenkins v. Davis, 111 Okla. 191, 239 Pac. 135 (1925).
[32] 295 P.2d 785 (Okla. 1956).

From the foregoing discussion of cases, it may be inferred that the Oklahoma courts would probably apply the subjective standard of care test to a minor primarily negligent in the operation of dangerous instrumentalities when the situation arises.

It has been shown that the American courts never appeared troubled in applying the truly objective or "reasonable man" test as a standard of care to those adults primarily negligent. Considerable division was encountered, however, when a litigant in a negligence action happened to be a minor. The earliest cases applied an objective standard of care to all litigants, their minority notwithstanding. Subsequent decisions repudiated the objective standard as applied to minors, and applied instead a rule subjective in its consideration of the individual and his characteristics but objective in its application. There has been much confusion and disharmony of the courts in determining just what standard of care to apply to minors.

The early cases dealt mainly with the contributory negligence of minors and the standard of care applied was in that context. With the increased use of dangerous instrumentalities by minors and the inevitable accident rise, the need was recognized for an appropriate rule of care to be applied to those activities.

One of the leading cases to encounter a primarily negligent minor motorist was *Charbonneau v. MacRury.* This case arrived at a standard of care which it felt to be appropriate under the circumstances. It stated that his subjective qualities should be examined; nevertheless measuring him against a minor similarly situated. As distinguished from the adult standard, it was a subjective standard of care. This decision was followed for many years and is still followed in many jurisdictions. It appeared to disregard the realities of our motorized society by paradoxically holding an adult to a strictly objective standard of care divested of any subjective consideration. On the other hand, it held a minor engaged in the same activity, presumed to be as capable as the adult through licensing, to a much less exacting standard in which subjectivity played a major part. The case seemingly ignored the increased operation of dangerous instrumentalities by primarily negligent minors, and the need for an equitable standard of care to be applied.

Dellwo stripped the subjectivity from the standard of care test. It held minors to an adult or strictly objective standard, while they are engaged in the operation of automobiles, powerboats, or airplanes. The case clearly illustrated the illogic of two standards of care; one more exacting than the other to be applied to individuals engaging in the same activity. An unreasoning distinction based on one factor only—age! Admittedly not as broad as the *Restatement* view, the decision summarized the dissatisfaction with the subjective standard. The case appeared to react to the disproportionate increase in accidents by minors.