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THE ADULT ACTIVITIES DOCTRINE IN NEGLIGENCE LAW

WILLIAM BINCHY†

The adult activities doctrine holds children to an adult reasonable care standard when they engage in certain “adult” activities. While the doctrine works well in cases of children driving cars, motorcycles, and power boats, courts encounter conceptual problems when applying it to other activities. Nevertheless, the doctrine is firmly entrenched in negligence law. This Article examines the application of the adult activities doctrine in the United States and common law jurisdictions and the various policy rationales used to support it.

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INTRODUCTION

One of the more intractable problems confronting the courts in negligence litigation is how to reconcile the objective norm of reasonableness with subjective personal factors.¹ These personal factors include mental² or physical disability,³

1. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 16.1-.8 (1956); Bannerman, *Negligence—The Reasonable Man and the Application of the Objective Test in Anglo-American Jurisprudence*, 6 U. GHANA L.J. 69 (1969); Edgerton, *Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849 (1926); Green, *The Negligence Issue*, 37 YALE L.J. 1029 (1928); James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1 (1951); Parsons, *Negligence, Contributory Negligence and the Man Who Does Not Ride the Bus to Clapham*, 1 MELBOURNE U.L. REV. 163 (1957); Reynolds, *The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature,"* 23 OKLA. L. REV. 410 (1970); Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927); Terry, *Negligence*, 29 HARV. L. REV. 40 (1915). For an empirical analysis of the judicial process involved in determining liability for negligence, see Green, *The Reasonable Man: Legal Fiction For Psychosocial Reality?*, 2 L. & Soc. REV. 241 (1968).

2. Courts and legislatures have been reluctant to permit any substantial degree of deference to mental disability, whether for illness or retardation, in determining liability in negligence proceedings. The policy rationales for this approach have been widely criticized as lacking conviction. See Ague, *The Liability of Insane Persons in Tort Actions*, 60 DICK. L. REV. 211, 221-28 (1956); Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9, 34 n.38 (1924); Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52, 64-66 (1960); Ellis, *Tort Responsibility of Mentally Disabled Persons*, 1981 AM. B. FOUND. J. 1079, 1084-90; Hornblower, *Insanity and the Law of Negligence*, 5 COLUM. L. REV. 278, 282-83 (1905); Picher, *The Tortious Liability of the Insane in Canada . . . With a Comparative Look at the United States and Civil Law Jurisdictions and a Suggestion for an Alternative*, 13 OSGOODE HALL L.J. 193, 226-29 (1975); Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 GEO. WASH. L. REV. 17 (1981); Comment, *The Tort Liability of Insane Persons for Negligence: A Critique*, 39 TENN. L. REV. 705 (1972); cf. Sharpe, *Mental State as Affecting Liability in Tort*, 23 CHITTY'S L.J. 46, 46-47 (1975) (discussion of the M'Naghton Rule and an individual's ability "to appreciate the nature and quality" of his or her act in determining liability). Another approach, in favor of the fully objective reasonable person test, has also been articulated by commentators whose sympathies lie with the mentally disabled. See, e.g., Alexander & Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME LAW. 24, 35 (1967). A somewhat more debatable thesis, premised on the utilitarian concern that a subjective standard "would probably exacerbate the problems of social segregation and stigmatization of the mentally ill" has been articulated recently. Note, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153, 166 (1983). One may question why the price of integration into a resistant community with capriciously vacillating attitudes should be paid by vulnerable and deinstitutionalized disabled persons rather than the larger community. *Id.* at 165.

3. Courts have recognized that some physical disabilities require special application of the reasonableness standard, making allowance for the particular disability. See W.P. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 32, at 175-76 (5th ed. 1984) [hereinafter cited as *PROSSER & KEETON*]; *RESTATEMENT (SECOND) OF TORTS* § 283C (1963).

For a general discussion of the position of the physically disabled in the law of

old age,⁴ and youthfulness.⁵ In this Article, we will examine an important aspect of the last factor: the adult activities doctrine.⁶

The adult activities doctrine imposes an adult standard of care on minors performing adult activities. These activities include driving automobiles, motorcycles, and powerboats. The doctrine also extends to activities other than those involving motorized road or water transport, but as we shall see, the courts have had considerable difficulty in articulating clear conceptual guidelines to cope with activities off the highway. Although the adult activities doctrine has received wide support throughout the United States, it has not been subjected to sustained critical analysis. Several policy rationales have been put forward by the courts and commentators. These ratio-

negligence, see Weisiger, *Negligence of the Physically Infirm*, 24 N.C.L. REV. 187 (1946); Note, *Negligence: Physical Defects as Affecting the Standard of Care in Civil and Criminal Cases*, 30 KY. L.J. 220, 220-22 (1942); Note, *The Limits of Objectivity in Negligence*, 28 KY. L.J. 242 (1940); 34 N.C.L. REV. 142 (1955). On specific aspects, see Kraig, *Heart Attack as a Defense in Negligence Actions*, 12 CLEV.-MAR. L. REV. 59 (1963); Lowry, *The Blind and the Law of Tort: The Position of a Blind Person as Plaintiff in Negligence*, 20 CHITTY'S L.J. 253 (1972); Pert, *Epilepsy and the Law*, 7 CLEV.-MAR. L. REV. 280, 292-96 (1958); Smith, *Medico-Legal Facets of Epilepsy*, 31 TEX. L. REV. 765, 773-76 (1953); Note, *The Epilepsies: Their Effect on the Biological Family, the State-Decreed Family, and Civil Liability in California*, 13 SAN DIEGO L. REV. 978, 1012-21 (1976). For a critical analysis of the negligence standard in relation to blind and other disabled persons, see tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841 (1966).

4. See *Johnson v. St. Paul City Ry.*, 67 Minn. 260, 262, 69 N.W. 900, 901 (1897); PROSSER & KEETON, *supra* note 3, § 32, at 176, 182; J. FLEMING, *THE LAW OF TORTS* 107-08 (6th ed. 1983); F. HARPER & F. JAMES, *supra* note 1, § 16.8 (analyzing subnormal faculties of old age). *But see* *Roberts v. Ring*, 143 Minn. 151, 173 N.W. 437 (1919) (the negligence of a 77-year-old defendant with defective sight and hearing is to be "judged by the standard of care usually exercised by the ordinarily prudent normal man").

5. See generally Bohlen, *supra* note 2; Gray, *The Standard of Care for Children Revisited*, 45 MO. L. REV. 597 (1980); Keet, *Contributory Negligence of Children*, 12 CLEV.-MAR. L. REV. 395 (1963); Shulman, *The Standard of Care Required of Children*, 37 YALE L.J. 618 (1928); Comment, *Capacity of Minors to be Chargeable with Negligence And Their Standard of Care*, 57 NEB. L. REV. 763 (1978); Note, *Contributory Negligence of Children*, 18 S.C.L. REV. 648 (1966).

6. See PROSSER & KEETON, *supra* note 3, § 32, at 181-82. See generally Galihier, *Degree of Care Required of Minors While Performing Adult Tasks*, 17 DEF. L.J. 657 (1968); *The Minor Motorist—A Double Standard of Care?*, 2 IDAHO L. REV. 103 (1965) [hereinafter cited as *The Minor Motorist*]; Note, *A Proposal for a Modified Standard of Care for the Infant Engaged in an Adult Activity*, 42 IND. L.J. 405 (1967) [hereinafter cited as *Adult Standard of Care Applied*]; Note, *supra* note 5, at 655-56; 35 ALB. L. REV. 606 (1971); 26 ARK. L. REV. 243 (1972); 24 ARK. L. REV. 379 (1970); 47 B.U.L. REV. 450 (1967); 1962 DUKE L.J. 138; 33 TENN. L. REV. 533 (1966); 3 TULSA L.J. 186 (1966).

nales, however, have often seemed more in the nature of rationalizations than coherent and considered conclusions.

This Article gives a brief account of the historical development of the doctrine in the United States and other common law jurisdictions. It then critically examines the various policy rationales for the adult activities doctrine. Finally, it provides an analysis of the conceptual frailties of the doctrine.

I. NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE OF CHILDREN

In Minnesota it is well established that the standard used to determine the contributory negligence of a child is one which takes account of the child's age, mental capacity, and experience.⁷ This approach is echoed throughout the United States.⁸

7. *Hughes v. Quarve & Anderson Co.*, 338 N.W.2d 422, 426 (Minn. 1983) (approving jury instruction requiring jury to compare 16-year-old plaintiff's actions with "those of other boys his age, with like intelligence, training and experience, under like circumstances"); *Toetschinger v. Innot*, 312 Minn. 59, 64, 250 N.W.2d 204, 207 (1977) (considering the contributory negligence of five-year-old plaintiff and approving jury instruction referring to age, intelligence, training, and experience); *Rosvold v. Johnson*, 284 Minn. 162, 163, 169 N.W.2d 598, 599 (1969) (approving jury instruction referring to "that care which a five-year-old child of the same age, intelligence, training and experience would have used"); *Aldes v. St. Paul Ball Club*, 251 Minn. 440, 443, 88 N.W.2d 94, 97 (1958) (in determining whether 12-year-old patron at baseball park had voluntarily accepted risk of injury from hazards inherent in the sport, stating, "The workings of the mind of a boy of his age are not susceptible of ironclad rules. For this reason the law imposes upon him the duty to act only with the degree of care commensurate with his age, experience, and judgment"); *Norby v. Klukow*, 249 Minn. 173, 181, 81 N.W.2d 776, 782 (1957) (approving jury instruction that 14-year-old tractor driver should be held "only to that standard of care that can be expected of an ordinarily prudent boy of his age under the same or similar circumstances"); *Mortenson v. Hindahl*, 247 Minn. 356, 361, 77 N.W.2d 185, 188 (1956) (stating as the general rule that a child should be held to "only the degree of care which may be reasonably expected of a child of his age, intelligence, and experience"); *Knox v. City of Granite Falls*, 245 Minn. 11, 17, 72 N.W.2d 67, 72 (1955) (approving jury instruction holding seven-year-old to "only that degree of care commensurate with her age, intelligence and experience"); *Watts v. Erickson*, 244 Minn. 264, 268, 69 N.W.2d 626, 628 (1955) (four-year-old is not required to exercise the same degree of care as an adult); *Pettit v. Lifson*, 238 Minn. 349, 355, 57 N.W.2d 34, 38 (1953) (minor required to exercise "only that degree of care and vigilance which reasonably may be expected of one of his age and mental capacity"); *Steinke v. Indianhead Truck Line*, 237 Minn. 253, 257, 54 N.W.2d 777, 779 (1952) (15-year-old obligated to use "only that degree of care which an ordinarily prudent boy of that age, intelligence, and experience can reasonably be expected to exercise *under the same or similar circumstances*") (emphasis in original); *TePoel v. Larson*, 236 Minn. 482, 494, 53 N.W.2d 468, 469 (1952) (it was for the jury to decide whether nine-year-old acted "with that degree of care commensurate with his age and intelligence"); *Warning v. Kanabec County Co-operative Oil Ass'n*, 231 Minn. 293, 298, 42 N.W.2d 881, 883

All common law jurisdictions defer at least to the age of the

(1950) (child bound to exercise “the degree of vigilance that an ordinarily prudent boy of his age, mental capacity, and intelligence is capable of using”); *Audette v. Lindahl*, 231 Minn. 239, 242, 42 N.W.2d 717, 719 (1950) (stating the “well established rule that children are obligated to use *only that degree of care which would ordinarily be exercised by a child of that age, experience and intelligence*, under the same or similar circumstances”) (emphasis in original); *Demmer v. Grunke*, 230 Minn. 188, 196, 42 N.W.2d 1, 6 (1950) (15-year-old girl obligated to use “that degree of care which an ordinarily prudent girl of her age, intelligence and experience can reasonably be expected to exercise under the same or similar circumstances” while riding her bike); *Squillace v. Village of Mountain Iron*, 223 Minn. 8, 9, 26 N.W.2d 197, 199 (1946) (approving jury instruction referring to “the degree of care that is commonly used by children of like age and capacity”); *Deach v. St. Paul City Ry.*, 215 Minn. 171, 176, 9 N.W.2d 735, 738 (1943) (applying the “degree of care common to children of like age, intelligence, and experience”); *Turenne v. Smith*, 215 Minn. 64, 68, 9 N.W.2d 409, 410-11 (1943) (child is bound to exercise such care, judgment, and discretion as might reasonably be expected from one of his “age, experience, and mental capacity”); *Thomsen v. Reibel*, 212 Minn. 83, 85, 2 N.W.2d 567, 568 (1942) (jurors to judge whether child exercised a degree of care commensurate with his age, capacity, and understanding); *McCarthy v. City of St. Paul*, 201 Minn. 276, 280, 276 N.W. 1, 2-3 (1937) (13-year-old held to standard of “the ordinarily prudent boy of his age, capacity, and intelligence”); *Carlson v. Sanitary Farm Dairies*, 200 Minn. 177, 184, 273 N.W. 665, 668 (1937) (child to exercise “such care and vigilance as might reasonably be expected of one of his age and mental capacity”); *Eckhardt v. Hanson*, 196 Minn. 270, 275, 264 N.W. 776, 778 (1933) (affirming lower court instruction that a six-year-old boy must exercise a degree of care commensurate with his age, capacity, and understanding); *Peterson v. Miller*, 182 Minn. 532, 536, 235 N.W. 15, 17 (1931) (in holding that 15-year-old pedestrian ought not to have been held guilty of contributory negligence as a matter of law for breaching statutory requirement to yield right of way to automobile, the court noted, “The injured girl was naturally impulsive and not of the guarded judgment of older people”); *Shotts v. Standard Oil Co.*, 181 Minn. 386, 389, 232 N.W. 712, 714 (1930) (approving jury instruction that plaintiff nine-year-old boy was “not required to exercise the same degree of care as would be required of an adult person” but was required “to exercise only that degree of care which an ordinarily careful prudent child of his age and experience would exercise under the same or similar circumstances”); *Olesen v. Noren*, 161 Minn. 113, 114, 201 N.W. 296, 296 (1924) (eight-year-old boy “bound to use such care as children of his age, capacity, and knowledge are capable of exercising”); *Hughes v. Minneapolis St. Ry.*, 146 Minn. 268, 271, 178 N.W. 605, 606 (1920) (11-year-old boy held to standard of “the ordinary prudent boy of 11”); *Erickson v. W.J. Gleason & Co.*, 145 Minn. 64, 67, 176 N.W. 199, 200 (1920) (“child of immature years . . . is bound to use such care as children of his age, capacity, and intelligence are capable of exercising”); *Hannula v. Duluth & I.R. Ry.*, 130 Minn. 3, 8, 153 N.W. 250, 252 (1915) (approving jury instruction stating standard as “such a degree of care and vigilance as might reasonably be expected of one of his age and mental capacity”); *Benedict v. Minneapolis & St. L. Ry.*, 86 Minn. 224, 231, 90 N.W. 360, 363 (1902) (though children may be liable for contributory negligence, the law does not require the same degree of care on the part of a child as of an adult); *Barg v. Bousfield*, 65 Minn. 355, 357, 68 N.W. 45, 45 (1896) (boy required to exercise “such care and discretion as a boy of his age and experience should exercise, and no more”); *Powers v. Chicago, M. & St. P. Ry.*, 57 Minn. 332, 333, 59 N.W. 307, 307 (1894) (after warning, a 13-year-old boy of similar age, intelligence, and experience would not have tried to jump onto moving train); *Twist v. Winona & St. P. Ry.*, 39 Minn. 164, 168, 39

minor in assessing his or her contributory negligence. As to whether the intelligence and experience of the child should also be taken into account, the position is less clear. Courts in Canada⁹ and Ireland¹⁰ clearly have regard to these factors. In

N.W. 402, 405 (1888) (child responsible for "such care and vigilance as may reasonably be expected of one of his age and capacity" and the want of that degree of care is negligence); *Ludwig v. Pillsbury*, 35 Minn. 256, 257, 28 N.W. 505, 506 (1886) (13-year-old did not exercise "such care and vigilance as could reasonably be expected from one of his age and capacity").

In Minnesota, a child of "tender years" is not conclusively presumed to be incapable of contributory negligence. In *Toetschinger*, 312 Minn. 59, 250 N.W.2d 204, the supreme court, by a five-to-four majority, affirmed this position. See Comment, *Contributory Negligence of Young Children—Minnesota Adheres to the Massachusetts Rule*, 5 WM. MITCHELL L. REV. 213 (1979).

In *Toetschinger*, the court stated, "The trial judge, who has the opportunity of observing the situation firsthand, can direct that the child involved, because of tender years, inexperience, or the subtleties of the danger to be apprehended, cannot be held to be contributorily negligent under the circumstances of the given case." *Toetschinger*, 312 Minn. at 69, 250 N.W.2d at 210.

In *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980), the court upheld a directed verdict to the effect that the plaintiff, a child just under five years old, was incapable of appreciating the risk that her pajamas would ignite immediately and burn rapidly upon coming in contact with an electric stove, and thus was not comparatively at fault for the injuries she sustained.

There is considerable uncertainty as to the age at which a child should cease to be judged by a standard different from that of an adult. In *Benedict*, 86 Minn. 224, 90 N.W. 360, the supreme court affirmed a ruling that a 16-year-old train passenger had been guilty of contributory negligence when he protruded his head from the train. Justice Lovely's comments are worthy of attention:

The general rule that it is for the jury to determine the capacity of a minor to exercise discretion and judgment, and whether the failure to do so is contributory negligence, cannot reasonably be applied in cases where such persons are infants only in legal theory. An infant at 14 years, under the policy of our law, has sufficient discretion to select a guardian . . . and is capable of malice which would subject him to penal consequences for crime when above the age of 12 It would seem to follow that the mere fact alone that the infant is above that age, though under 21, would not presumptively absolve him from the consequence of contributory negligence. While an infant over 12 years might not have sufficient capacity to appreciate the risk of a dangerous situation, owing to peculiar individual characteristics affecting his capacity, yet we are unable to hold that a youth 16 years of age, traveling alone on a railway train, is not, as a matter of law, endowed with sufficient intelligence and discretion to avoid the consequences of acts which the law considers culpably negligent.

Id. at 231, 90 N.W. at 363; see also *Ludwig*, 35 Minn. at 256-57, 28 N.W. at 505-06.

8. See PROSSER & KEETON, *supra* note 3, § 32, at 179-82; RESTATEMENT (SECOND) OF TORTS § 283A (1963); Gray, *supra* note 5, at 600; Shulman, *supra* note 5, at 620-21.

9. The leading decision is *McEllistum v. Etches*, 6 D.L.R.2d 1 (1956). More recent applications of this subjective test include *Houle v. Calgary*, 26 Alta. 2d 34 (1983); *Young v. Sanford*, 61 N.S.R.2d 16 (1983); *Wessell v. Kinsmen Club of Sault Ste. Marie Ontario Inc.*, 137 D.L.R.3d 96, 108 (Ont. 1982); *Strehlke v. Camenzind*, [1980] 4 W.W.R. 464 (Alta. Q.B.); *Wade v. Canadian Nat'l Ry.*, 80 D.L.R.3d 214, 222-23 (Can. 1977) (Laskin, C.J.C., dissenting, with whom Spence and Dickson, J.J.

Australia, the position is hopelessly confused in the wake of a 1966 decision.¹¹ This decision appeared to tilt against these elements, and to refer only to the age of the child in assessing his or her contributory negligence. A somewhat similar uncertainty exists in New Zealand.¹² In England, the balance of authority is against taking the intelligence or experience of the child into account.¹³

concurrent). In the Ontario High Court decision of *Heisler v. Moke*, 25 D.L.R.3d 670, 673-74 (Ont. 1971), Judge Addy showed a preference for a more objective test, which would refer only to the age of the child. In light of *McEllistrum*, however, he reluctantly applied the test of age, intelligence, and experience. A few decisions have flirted with a more objective test. See Edwards, Hopkins & White, *Annual Survey of Canadian Law: Torts: Part I*, 14 OTTAWA L. REV. 152, 187 n.194 (1982). See generally Dunlop, *Torts Relating to Infants*, 5 W. ONT. L. REV. 116, 117-20 (1966); Alexander, *Tort Liability of Children and Their Parents*, in 2 STUDIES IN CANADIAN FAMILY LAW 845, 855-58 (D. Mendes da Costa ed. 1972).

10. See *Brennan v. Savage Smythe & Co.*, [1982] I.L.R. 223 (Sup. Ct.); Fleming v. Kerry County Council, [1960] Ir. Jur. Rep. 69 (Sup. Ct.); McNamara v. Electricity Supply Bd., [1975] I.R. 1 (Sup. Ct. 1974); B. McMAHON & W. BINCHY, IRISH LAW OF TORTS 66-71 (1981); M. McMAHON & W. BINCHY, CASEBOOK ON THE IRISH LAW OF TORTS, 23-26 (1983); Binchy, *A Minor Confusion: Children and the Law of Negligence*, 74 INC. L. SOC. OF IR. GAZETTE 7 (1980).

11. *McHale v. Watson*, 115 C.L.R. 199 (Austl. 1966), *aff'g* 111 C.L.R. 384 (1964) (Windeyer, J.), *noted in* 3 ADEL. L. REV. 118 (1967). Applying the "age only" test are *Mye v. Peters*, 68 N.S.W. St. R. 298 (C.A. 1967); *Broadhurst v. Millman*, [1976] Vict. R. 208 (1975); *Charles v. Zadow*, 28 S. Austl. St. R. 492 (Sup. Ct. 1981); see *Beasley v. Marshall*, 17 S. Austl. St. R. 456 (Sup. Ct. 1977). Other decisions have articulated a hybrid test. See *Chan v. Fong*, 5 S. Austl. St. R. 1 (Sup. Ct. 1973) (Walters, J.); *Cameron v. Commissioner for Rys.*, 57 Queensl. R. 480 (Sup. Ct. 1964) (Lucas, J.). Still others have applied the test of age, intelligence, and experience. See *Westmoreland v. Schultz*, 2 S. Austl. St. R. 286n. (1972) (Mitchell, J.); *Wiech v. Amato*, 6 S. Austl. St. R. 442 (Sup. Ct. 1973) (Zelling, J.). Several courts have expressed uncertainty as to precisely what standard should be applied under *McHale*. See, e.g., *Wiech*, 6 S. Austl. St. R. at 445; *Andrews v. Armit* (No. 2), 2 S. Austl. St. R. 273, 282 (Sup. Ct. 1971) (en banc) (Bray, C.J.).

12. See *Ralph v. Henderson & Pollard Ltd.*, [1968] N.Z.L.R. 759 (Sup. Ct. 1967) (Richmond, J.).

13. *Jones v. Lawrence*, [1969] 3 All E.R. 267, 270-71 (1968); *Gough v. Thorne*, [1966] 1 W.L.R. 1387, 1390-92 (C.A. 1964); *Liddle v. Yorkshire (North Riding) County Council*, [1934] 2 K.B. 101, 125 (C.A. 1933); *Lay v. Midland Ry.*, 34 L.T.R. 30 (Ex. Div. 1875); see *Culkin v. McFie & Sons, Ltd.*, [1939] 3 All E.R. 613, 621 (Liverpool Summer Assizes 1939); see also *Yachuk v. Oliver Blais Co.*, [1949] A.C. 386 (P.C.). But see *Clark v. Chambers*, [1878] 3 Q.B. 327 (1878); *Hughes v. Macfie*, 159 Eng. Rep. 308 (1863); *Lynch v. Nurdin*, [1841] 1 Q.B. 29, 113 Eng. Rep. 1041 (1841). In *Gorely v. Codd*, [1967] 1 W.I.R. 19 (1966), a mentally retarded child of 16 1/2 years was held liable for injuring a friend with an airgun, but the decision contains no clear analysis of the principles of liability. Judge Neild's discussion of the child's mental capacity might suggest that this factor was considered in the determination of the question of his negligence but the specific references to the issue of negligence do not even refer to the age of the child, let alone his capacity. *Id.* at 21, 25-26. For a general discussion of the position in England, see Black, *The Tort Liabil-*

The number of decisions in which the negligence of a child has been considered is surprisingly small.¹⁴ Though some courts¹⁵ and commentators¹⁶ have considered that a more onerous standard should be applied, the balance of authority is in favor of applying the same standard to both negligence and contributory negligence.¹⁷ In 1980, the Superior Court of Pennsylvania held that the same test should apply to both contributory negligence and negligence.¹⁸ It rejected as "completely speculative in nature"¹⁹ the argument that contributory negligence usually involves a child's comprehension of the acts or neglect of people around him, and that it takes greater maturity and judgment to comprehend and avoid danger created by others than to avoid danger created by one's own acts.²⁰ The court retorted:

It is just as easily argued (and just as speculative), that greater maturity and more sophisticated judgment [are] required for a child to recognize that another will be harmed by his conduct than for a child to develop the ability to recognize danger to himself from another's conduct because the latter ability derives from an instinct for self preservation, which is developed at an early age. . . . The critical point is that the condition of maturity is equally applicable to the acts of the child regardless of whether he is labeled plaintiff or defendant, and in either case the same standard should be applied.²¹

ity of Children Under the Laws of England and France, 6 C.I.L.S.A. 365, 367-68 (1973); Fridman, *Children and Negligence*, 117 NEW L.J. 35 (1967); Scott, *Children and Negligence*, 116 NEW L.J. 1394 (1966).

14. See James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 786 n.74 (1950).

15. *E.g.*, *Zuckerbrod v. Burch*, 88 N.J. Super. 1, 8-9, 210 A.2d 425, 429 (1965) (minimum standard of liability should be applied even to infants).

16. Shulman, *supra* note 5, at 619; James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 554-56 (1948).

17. See *Faith v. Massengill*, 104 Ga. App. 348, 121 S.E.2d 657 (1961); PROSSER & KEETON, *supra* note 3, at 181; 38 OR. L. REV. 268, 275 (1959); *cf. McHale*, 115 C.L.R. at 222 (Menzies, J., dissenting) (criticism of *Charbonneau v. MacRury*, 84 N.H. 501, 153 A. 457 (1931)).

18. *Dunn v. Teti*, 280 Pa. Super. 399, 403-04, 421 A.2d 782, 784-85 (1980).

19. 280 Pa. Super. at 404, 421 A.2d at 784.

20. See *Zuckerbrod*, 88 N.J. Super. at 8-9, 210 A.2d at 429.

21. 280 Pa. Super. at 404, 421 A.2d at 484-85 (citations omitted). The court also rejected the argument that in contrast to cases of alleged negligence of children, children should be protected from losses due to their own immaturity in spite of their contributory negligence and especially against an admittedly negligent adult defendant. The court's analysis merged with its consideration of Pennsylvania's conclusive

In a 1919 Minnesota decision a different approach was followed.²² The court in *Roberts v. Ring* applied the subjective test of "the degree of care commonly exercised by the ordinary boy of his age and maturity" when considering the contributory negligence of a minor plaintiff.²³ But the court went on to add, "It would be different if he had caused injury to another. In such a case he could not take advantage of his age and infirmities."²⁴ An interesting, and as yet unresolved, issue is the precise status of this dictum in light of subsequent developments²⁵ in relation to the adult activities doctrine.

II. THE ADULT ACTIVITIES DOCTRINE

A. On the Highway

If we accept as a general rule that the subjective considerations of age, mental development, and experience should be applied to determine the negligence of a child, the question arises as to whether this approach should necessarily apply where the minor is involved in such an adult activity as driving an automobile. Formerly, the courts were of the view that it should. Thus, in *Charbonneau v. MacRury*,²⁶ the New Hampshire Supreme Court applied this standard to a seventeen-year-old defendant, licensed to drive the automobile in which he injured the plaintiff. The court considered that to require the defendant to meet a higher standard of care would be to require him to exceed his capabilities, "to transcend the natural expectation, to possess a reason which he did not have and to do what one of his age, experience, opportunity, and capacity would not have done."²⁷ This approach was echoed in a number of subsequent decisions where the defendant had been engaged in the operation of some instrumentality normally operated by adults.²⁸

presumption of incapacity under the age of seven years. The court considered that the need for "a practical and simple rule to achieve expediency in the determination of capacity . . . is equally apparent in cases of actionable negligence" as it is in cases of contributory negligence. *Id.* at 404, 421 A.2d at 785.

22. *Roberts v. Ring*, 143 Minn. 151, 173 N.W. 437 (1919).

23. *Id.* at 152, 173 N.W. at 438.

24. *Id.* at 153, 173 N.W. at 438.

25. See *infra* notes 34-43 and accompanying text (discussion of *Dellwo v. Pearson*).

26. 84 N.H. 501, 153 A. 457 (1931), cited in 79 U. PA. L. REV. 1153 (1931).

27. *Id.* at 508, 153 A. at 461.

28. *Lehmuth v. Long Beach Unified School Dist.*, 53 Cal. 2d 544, 555, 348 P.2d 887, 894 (1960) (18-year-old towing trailer behind automobile); *Mosconi v. Ryan*, 94

The subjective approach in respect to automobiles began to crumble in the face of specific statutory provisions relating to safety standards for driving, which referred to "every person"²⁹ without making any explicit exception for youthful operators. Courts began to interpret these provisions as imposing the same standard on all drivers, adults and children alike.³⁰ In *Biddle v. Mazzocco*,³¹ the view was expressed that the standard of care applicable to the operator of a motor vehicle "is precisely the same, regardless of age, sex, experience, or mental or physical ability."³²

The leading decision³³ is *Dellwo v. Pearson*³⁴ where, in 1961, the Supreme Court of Minnesota decided whether a minor was liable for injuring the plaintiff when operating a boat with an

Cal. App. 2d 227, 230-31, 210 P.2d 259, 261-62 (Dist. Ct. App. 1949) (defendant a 16-year-old driver of automobile); *Gunter v. Claggett*, 65 Cal. App. 2d 636, 641, 151 P.2d 271, 273 (Dist. Ct. App. 1944) (plaintiff an 18-year-old motorcyclist; subjective standard applied); *Overlock v. Ruedemann*, 147 Conn. 649, 654-55, 165 A.2d 335, 337-38 (1960) (17-year-old girl driving father's automobile); *Harvey v. Cole*, 159 Kan. 239, 243, 153 P.2d 916, 919 (1944) (17-year-old licensed driver of automobile); *Norby v. Klukow*, 249 Minn. 173, 181, 81 N.W.2d 776, 782 (1957) (15-year-old tractor driver); *Sheets v. Pendergrast*, 106 N.W.2d 1, 6 (N.D. 1960) (defendant a 17-year-old driver of automobile; gross negligence determined by subjective test); *Chernotik v. Schrank*, 76 S.D. 374, 379-80, 79 N.W.2d 4, 7 (1956) (defendant a 16-year-old female driver of automobile). Not all decisions were so generous to child drivers. *See, e.g., Peterson v. Miller*, 182 Minn. 532, 534, 235 N.W. 15, 16-17 (1931) (no deference afforded to youthfulness of defendant automobile driver, a high school student of unspecified age).

29. *See, e.g., Mo. REV. STAT. § 304.010, subd. 1* (Supp. 1985).

30. *See Hill Transp. Co. v. Everett*, 145 F.2d 746, 747-48 (1st Cir. 1944) (in determining vicarious liability of employer of 18-year-old bus driver, the adult test should be applied in deciding whether driver had been negligent; "we see no reason why an employer of minors should be put in a more advantageous position with respect to the torts of his servants than one who employs adults"); *Elliot v. Jensen*, 187 Cal. App. 2d 389, 394, 9 Cal. Rptr. 642, 646 (Dist. Ct. App. 1960) (same duty is imposed by law on all licensed drivers and there is no distinction made as to ages); *Nelson v. Carriere*, 68 So. 2d 801, 802 (La. Ct. App. 1953) (assumes that the standard for a 15-year-old licensed driver of an automobile should be that of an adult); *Karr v. McNeil*, 92 Ohio App. 458, 462-63, 110 N.E.2d 714, 717 (1952) (19-year-old had same obligations as adult when operating a motor vehicle); *Nelson v. Arrowhead Freight Lines*, 99 Utah 129, 133-34, 104 P.2d 225, 228 (1940) (statute allowing 16-year-olds to drive assumes discretion and physical capacity equal to an adult). *But see Simmons v. Holm*, 229 Or. 373, 396-97, 367 P.2d 368, 382 (1961) (point not resolved); *Biddle v. Mazzocco*, 204 Or. 547, 556-58, 284 P.2d 364, 369 (1955).

31. 204 Or. 547, 284 P.2d 364.

32. *Id.* at 557, 284 P.2d at 369.

33. *See Galiher, supra* note 6, at 661; Comment, *Recommended: An Objective Standard of Care for Minors in Nebraska*, 46 NEB. L. REV. 699, 702 (1967); *see also* 47 B.U.L. REV. 450, 451 (1967) (new trend away from subjective standard).

34. 259 Minn. 452, 107 N.W.2d 859 (1961).

outboard motor.³⁵ The court conceded that the subjective standard was proper and appropriate to assess the contributory negligence of a child,³⁶ but stated that “this court has previously recognized that there may be a difference between the standard of care that is required of a child in protecting himself against hazards and the standard that may be applicable when his activities expose others to hazards.”³⁷ The court noted that, in the modern world, motor vehicles are readily available and so the court would “be skeptical of a rule that would allow motor vehicles to be operated to the hazard of the public with less than the normal minimum degree of care and competence.”³⁸

In the central passage of the decision, Justice Loevinger stated:

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

35. *Id.* at 453, 107 N.W.2d at 860.

36. *Id.* at 457, 107 N.W.2d at 862-63. In *Miller v. State*, 306 N.W.2d 554 (Minn. 1981), however, the Minnesota Supreme Court held, “This statement did not . . . limit our holding in *Dellwo* to minor defendants. Rather, it indicated that the standard of care of a child was only proper when minors are ‘engaged in activities appropriate to their age, experience, and wisdom,’ . . . operating a motor vehicle not being one of such activities.” *Id.* at 555 (citations omitted).

Miller leaves the law of Minnesota regarding the standard to be applied in determining the negligence and contributory negligence of children in an uncertain state. It is clear at least that where children engage in such activities as driving an automobile, airplane, or powerboat, an adult standard determines both their negligence (*Dellwo*) and contributory negligence (*Miller*). It is equally clear that where children engage in “activities appropriate to their age, experience, and wisdom,” such as “play[ing] with toys, throwing balls, operating tricycles or velocipedes, or . . . other childhood activities,” *Dellwo*, 259 Minn. at 458, 107 N.W.2d at 863, the standard of care appropriate to children will be applied. But these two opposite types of activities scarcely exhaust the range of possible conduct in which children may engage. Children every day perform actions which fall within a middle range; they ride horses, *Mortenson v. Hindahl*, 247 Minn. 356, 77 N.W.2d 185 (1956), or bicycles, they cross streets, attend churches, temples or synagogues, and baseball games, *Aldes v. Saint Paul Ball Club*, 251 Minn. 440, 88 N.W.2d 94 (1958). The dictum in *Roberts v. Ring*, 143 Minn. 151, 152-53, 173 N.W. 437, 438 (1919), would apply the adult standard in cases where the child is the defendant. *Miller* is capable of an even broader interpretation, extending the adult standard to determine contributory negligence as well as negligence in these cases. This would be a radical development which would abrogate the adult activities doctrine since the adult standard would be imposed on a child not because the activity was in any sense an adult one, but merely because it was not a distinctively childish one.

37. 259 Minn. at 457, 107 N.W.2d at 863 (citing *Roberts*, 143 Minn. at 152, 173 N.W. at 438).

38. *Id.*

judicial notice of the hazards 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. 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, throwing balls, operating tricycles or velocipedes, or engaged in other childhood activities may anticipate conduct that does not reach an adult standard of care or prudence. However, one cannot know whether the operator of an approaching automobile, airplane, or powerboat is a minor or an adult, and usually cannot protect himself against youthful imprudence even if warned. 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.³⁹

The court conceded that there undoubtedly were problems attendant upon the rule but argued that there were problems in any rule that might be adopted on the question.⁴⁰ It noted that the most recent tentative revision of the *Restatement*⁴¹ had adopted a broader rule, whereby a child would be held to the adult standard whenever he or she engaged "in an activity which is normally undertaken only by adults, and for which adult qualifications are required."⁴² The court considered it unnecessary in the case before it to adopt a rule in such a broad form and therefore expressly left open the question

39. *Id.*

40. *Id.*

41. RESTATEMENT (SECOND) OF TORTS, § 283A comment c (Tent. Draft No. 4, 1959).

42. 259 Minn. at 459, 107 N.W.2d at 863. It is interesting to note that in a related area of tort law, the Minnesota Supreme Court in *Felcyn v. Gamble*, 185 Minn. 357, 241 N.W. 37 (1932), held that the family automobile doctrine should not be extended to motorboats. *Accord* *Grindstaff v. Watts*, 254 N.C. 568, 119 S.E.2d 784 (1961). *Contra* *Quattlebaum v. Wallace*, 156 Ga. App. 519, 275 S.E.2d 104 (1980); *Stewart v. Stephens*, 225 Ga. 184, 166 S.E.2d 890 (1969). See generally PROSSER & KEETON, *supra* note 3, § 73, at 524-27; *Fridman, The Doctrine of the "Family Car: A Study in Contrasts*, 8 TEX. TECH L. REV. 323, 329-30 (1976); *Saseen, Motorboat Collisions and the Family Purpose Doctrine*, 2 GA. ST. B.J. 473 (1966); *Comment, Agency's Stepchild: The Family Purpose Car Doctrine*, 3 GA. ST. B.J. 112, 114-19 (1966); 1962 DUKE L.J. 138, 142.

whether or not that rule should be adopted in Minnesota. It concluded that it was sufficient for the present to say that no reasonable differentiation between different types of motor vehicles could be made and that "a rule requiring a single standard of care in the operation of such vehicles, regardless of the age of the operator, appears to us to be required by the circumstances of contemporary life."⁴³

Dellwo v. Pearson was followed one year later by *Nielsen v. Brown*.⁴⁴ There the Oregon Supreme Court imposed an adult standard of care in determining whether a sixteen-year-old licensed driver of an automobile had been guilty of gross negligence in its operation. The court was clearly influenced by the statutory requirement to have a license to drive an automobile.⁴⁵

In 1962, the Illinois Appellate Court in *Betzold v. Erickson*⁴⁶ was called on to decide the standard of care that should be applied to a thirteen-year-old driver of a truck, where the statute prohibited granting a license to a person of that age.⁴⁷ The

43. 259 Minn. at 459, 107 N.W.2d at 863-64.

44. 232 Or. 426, 374 P.2d 896 (1962).

45. The court wrote:

To adopt the suggested rule of the Restatement so far, at least, as the operation of automobiles by minors is concerned, may be an innovation on the law of Oregon, but if so it is one that is justified by "the circumstances of contemporary life" We may agree that, as the New Hampshire court said in the *Charbonneau* case in respect to their statute, when the legislature of this state provided that a license to operate an automobile shall not be issued to any person under the age of 16 years . . . it did not undertake to deal with the rule of care. Nevertheless, we think that the statute could have been enacted only upon the assumption that it is reasonably consistent with the public safety to permit children 16 years of age and over to drive automobiles upon the public highways. In this respect no distinction has been made between children covered by the statute and adults. This being the policy implicit in the law, we think it to be not only logical but salutary to judge the behavior of children in a case of this kind by the same standard that is applied to adults. And we see no reason for a different rule where the question is not merely one of ordinary negligence, but of gross negligence or reckless driving.

At the time of the accident out of which this case arose the defendant was nearly 17 years of age. There is nothing to suggest that she was not an entirely normal person physically and mentally. She had previously driven for a year under a learner's permit . . . and for nearly a year under an operator's license. It is our view that when she assumed the responsibility of driving an automobile pursuant to a license issued by the state, she put off the things of a child for the purpose of that activity and should be held accountable for injury to another caused by departure from standards expected to be observed by persons of mature years.

232 Or. at 451-52, 374 P.2d at 908 (citations omitted).

46. 35 Ill. App. 2d 203, 182 N.E.2d 342 (1962).

47. *Id.* at 209, 182 N.E.2d at 345.

court imposed the adult standard, arguing that the statute, in effect, declares that persons below the statutory age "do not possess the requisite care and judgment to operate motor vehicles on the public highways without endangering the lives and limbs of other persons."⁴⁸ The court stated that the statute was designed to protect the public lawfully using the highways.⁴⁹

The court recognized that the failure to have a driver's license "does not of itself necessarily establish a causal connection between the operation of the motor vehicle and the injury."⁵⁰ Nevertheless, it argued:

the defendant had no right to be operating the truck in question. All 13 year olds fall within the same category so there can be no standard of care for such persons under the same or similar circumstances. The only standard of care that he could be judged by, is the standard of care required and expected of licensed drivers. We are of the opinion that this is the degree of care that defendant was required to exercise and not that of a child of his age, experience and capacity generally.⁵¹

The approach thus favored by the Illinois court is unusual. Courts in the United States generally do not consider a mere failure to obtain a license as determinative of the driving ability of the driver.⁵²

There is, moreover, something curious about making the attempted statutory exclusion of particular persons from performing a specific activity the sole ground for holding those persons to a standard necessarily inconsistent with the capacities attributed to those persons by the statute. The *Betzold* court surely had little justification for attributing to the legislature what amounts to a retributive and vindictive attitude towards unlicensed teenage drivers when the statutory provision

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 209-10, 182 N.E.2d at 345.

52. *See* Mahowald v. Beckrich, 212 Minn. 78, 2 N.W.2d 569 (1942) (lack of driver's license is not evidence of driver negligence); PROSSER & KEETON, *supra* note 3, § 36, at 226; *cf.* Goss v. Allen, 70 N.J. 442, 451, 360 A.2d 388, 394 (1976) (Schreiber, J., dissenting) (licensure is not relevant in determining standard of care). *See generally* Gregory, *Breach of Criminal Licensing Statutes in Civil Litigation*, 36 CORNELL L.Q. 622 (1951) (negligence arising from breach of licensing statutes).

generally implies a humanitarian concern for the welfare of all road users.

The adult activities doctrine has been widely applied.⁵³ It is most frequently found in cases involving children driving automobiles,⁵⁴ motorcycles,⁵⁵ motor scooters,⁵⁶ tractors,⁵⁷

53. Cf. PROSSER & KEETON, *supra* note 3, § 32, at 182 (“now the rule in half the states”).

54. *Gunnells v. Dethrage*, 366 So. 2d 1104 (Ala. 1979) (minor defendant held to adult standard); *Neudeck v. Bransten*, 233 Cal. App. 2d 17, 43 Cal. Rptr. 250 (1965) (16-year-old defendant driver held to adult standard); *Wagner v. Shanks*, 56 Del. 555, 194 A.2d 701 (1963) (minor driver held to adult standard); *Dawson v. Hoffmann*, 43 Ill. App. 2d 17, 192 N.E.2d 695 (1963) (17-year-old driver held to same standard of care as adult); *Ryan v. C. & D. Motor Delivery Co.*, 38 Ill. App. 2d 18, 186 N.E.2d 156 (1962) (adult standard applied in determining contributory negligence of 19-year-old driver); *Allen v. Ellis*, 191 Kan. 311, 380 P.2d 408 (1963) (16-year-old driver held to adult standard of care); *Constantino v. Wolverine Ins. Co.*, 407 Mich. 896, 284 N.W.2d 463 (1979) (minor driver held to same standard of conduct as adult); *Miller v. State*, 306 N.W.2d 554 (Minn. 1981) (adult standard applied in determining contributory negligence of minor driver); *Wollaston v. Burlington N., Inc.*, 612 P.2d 1277 (Mont. 1980) (17-year-old driver held to adult standard in determining contributory negligence); *Reiszel v. Fontana*, 35 A.D.2d 74, 312 N.Y.S.2d 988 (1970) (17-year-old defendant driver held to adult standard); *Carano v. Cardina*, 115 Ohio App. 30, 184 N.E.2d 430 (1961) (adult standard applied to 17-year-old driver in negligence claim); *Baxter v. Fugett*, 425 P.2d 462 (Okla. 1967) (emphasis on statutory requirements); *Nielsen*, 232 Or. 426, 374 P.2d 896 (16-year-old driver held to same standard as adult); *Krahn v. LaMeres*, 483 P.2d 522 (Wyo. 1971) (16-year-old driver held to adult standard of care); cf. *Smedley v. Piazzolla*, 59 A.D.2d 940, 399 N.Y.S.2d 460 (1977) (adult standard not applied to child under four years old who released emergency brake of automobile or placed vehicle in gear); Comment, *supra* note 33, at 706 n.37 (anticipating issue arising in *Smedley v. Piazzolla*). But cf. *Mahon v. Heim*, 165 Conn. 251, 332 A.2d 69 (1973) (subjective standard appropriate to children applied to determine negligence of 17-year-old driver of truck; any change in the law should be effected by legislature). See generally 97 A.L.R.2d 872 (1964) (discussion of primary and contributory negligence of minors engaged in operating motor vehicles).

55. *Harrelson v. Whitehead*, 236 Ark. 325, 365 S.W.2d 868 (1963) (15-year-old plaintiff driver held to adult standard in contributory negligence claim); *Prichard v. Veterans Cab Co.*, 63 Cal. 2d 727, 408 P.2d 360, 48 Cal. Rptr. 904 (1965) (17-year-old plaintiff operating motorcycle in course of work held to adult standard); cf. *McNall v. Farmers Ins. Group*, 181 Ind. App. 501, 392 N.E.2d 520 (1979) (15-year-old driver held to adult standard); *Daniels v. Evans*, 107 N.H. 407, 224 A.2d 63 (1966) (19-year-old driver held to adult standard in contributory negligence claim), noted in 9 ARIZ. L. REV. 134 (1967); *Williams v. Esaw*, 214 Kan. 658, 522 P.2d 950 (1974) (14-year-old driver held to adult contributory negligence standard); *Davis v. Waterman*, 420 So. 2d 1063 (Miss. 1982) (13-year-old driver held to adult contributory negligence standard); *Tipton v. Mullinix*, 508 P.2d 1072 (Okla. 1973) (14-year-old driver held to adult standard of care); 47 B.U.L. REV. 450, 450 (contributory negligence of 19-year-old plaintiff determined by adult standard).

It is worthy of note that “it is uniformly held” that automobiles—the prime example of the adult activities doctrine—are not inherently dangerous instrumentalities. *Grindstaff v. Watts*, 254 N.C. 568, 571, 119 S.E.2d 784, 786-87 (1961). Of

course, parents and others may be held liable for entrusting automobiles to a child or other person whom they have reason to believe to be incompetent. *Id.* at 571-72, 119 S.E.2d at 787; 2 SHEPARD'S CAUSES OF ACTION 313-66 (1983); Kent, *Parental Liability for the Torts of Children*, 50 CONN. B.J. 452, 462 (1976); 1962 DUKE L.J. 138, 142 n.22. In a number of decisions the courts have held that parents who permit their unlicensed children to drive are guilty of negligence per se. Liability is generally imposed on these parents where the minor's negligent driving causes injury. See *Chiniche v. Smith*, 374 So. 2d 872 (Ala. 1979); *Hardwick v. Bublitz*, 254 Iowa 1253, 119 N.W.2d 886 (1963); *Kempf v. Boehrig*, 95 Wis. 2d 435, 290 N.W.2d 562 (Ct. App. 1980); *cf. Carter v. Montgomery*, 226 Ark. 989, 296 S.W.2d 442 (1956) (no liability to parent as unlicensed child entirely innocent of any negligence). In some cases, courts have rested parental liability on the incompetence, rather than the negligence, of the driver. See, e.g., *Nault v. Smith*, 194 Cal. App. 2d 257, 14 Cal. Rptr. 889 (1961). This approach has received support among the commentators. See e.g., Woods, *Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability*, 20 ARK. L. REV. 101, 109-10 (1966); Note, *Negligent Entrustment in Alabama*, 23 ALA. L. REV. 733, 750-51 (1971). This distinction is of some importance in relation to the adult activities doctrine. If the minor's incompetence, rather than negligence, is the test, then the question of parental liability will not be deflected into the irrelevant issue of whether the minor's negligence is to be determined by the adult or the child standard of care.

56. *Medina v. McAllister*, 202 So. 2d 755, 759 (Fla. 1967) (minor old enough to be granted motor vehicle operator's license "should be held to assume responsibility for care and safety in its operation in the light of adult standards, whether the minor is charged with primary or contributory negligence"); *Garatoni v. Teegarden*, 129 Ind. App. 500, 154 N.E.2d 379 (1958) (15-year-old motor scooter driver held to adult contributory negligence standard); *Adams v. Lopez*, 75 N.M. 503, 407 P.2d 50 (1965) (16-year-old driver held to adult contributory negligence standard), noted in 3 TULSA L.J. 186, 186 (1966); *Powell v. Hartford Accident & Indem. Co.*, 217 Tenn. 503, 398 S.W.2d 727 (1966) (14-year-old minor held to adult contributory negligence standard). In *Powell*, the dissent wrote:

The majority Opinion seems . . . to approbate the so-called rule of reason based upon the "adult activity" theory. This, to my mind, is to kneel at the feet of the Golden Calf in the favor of a soporific phrase. After prolonged consideration, I am unable to demarcate the beginning or ending of the import or impact of this dubious phrase.

Id. at 736 (Creson, J., dissenting); see also 33 TENN. L. REV. 533, 533 (1966) (discussing *Powell*); *cf. City of Austin v. Hoffman*, 379 S.W.2d 103 (Tex. Civ. App. 1974) (children over 14 held to adult standard of care; children under 14 held to children's standard of care).

57. *Jackson v. McCuiston*, 247 Ark. 862, 448 S.W.2d 33 (1969) (relying in part on the fact that 14-year-old tractor driver had been trained in operation of tractor), noted in 24 ARK. L. REV. 379, 379 (1970); *Goodfellow v. Coggburn*, 98 Idaho 202, 204, 560 P.2d 873, 875 (1977) (in spite of statutory exemption permitting unlicensed person to operate farm machines temporarily on highway, general statutes regulating operation of motor vehicles did "not indicate any intent to exempt children from their requirements"); *cf. Mack v. Davis*, 76 Ill. App. 2d 88, 221 N.E.2d 121 (1966) (17-year-old plaintiff, driving a farm tractor on public highway, not held to adult standard due to nature of the activity and his inexperience). In an action against the employer for failure to instruct plaintiff as to the operation of a tractor, the *Mack* court applied a standard of care appropriate to a minor, stating:

[T]he activity here involved is not of the same nature as the driving of automobiles on our public streets. The operation of farm tractors is fre-

trucks,⁵⁸ motorized go carts,⁵⁹ snowmobiles,⁶⁰ and minibikes.⁶¹ The adult standard, however, has not generally been applied to children riding bicycles,⁶² in spite of the dangers associated

quently entrusted to minors. The substantial part of the operation is not on public highways and involves no particular hazard or danger to the public generally.

Id. at 125-26; *Norby v. Klukow*, 249 Minn. 173, 81 N.W.2d 776 (1957) (applying to a 14-year-old driver of a tractor the standard of care of "an ordinarily prudent boy of his age under the same or similar circumstances").

58. *Betzold*, 35 Ill. App. 2d 203, 182 N.E.2d 342 (13-year-old defendant truck driver held to standard of care of adult licensed driver).

59. *Ewing v. Biddle*, 141 Ind. App. 25, 216 N.E.2d 863 (1966) (11-year-old go-cart driver held to adult contributory negligence standard).

60. *Robinson v. Lindsay*, 92 Wash. 2d 410, 598 P.2d 392 (1979) (13-year-old experienced snowmobile driver held to adult standard of conduct). The Washington Supreme Court imposed an adult standard based on whether the child engaged in an "inherently dangerous" activity rather than an adult activity.

Such a rule protects the need of children to be children but at the same time discourages immature individuals from engaging in inherently dangerous activities. Children will still be free to enjoy traditional childhood activities without being held to an adult standard of care. Although accidents sometimes occur as the result of such activities, they are not activities generally considered capable of resulting in "grave danger to others and to the minor himself if the care used in the course of the activity drops below that care which the reasonable and prudent adult would use"

Id. at 413, 598 P.2d at 394 (citing *Daniels*, 107 N.H. at 408, 224 A.2d at 64 (minor held to standard of adult where activity can result in grave danger to others or himself)).

61. *Fishel v. Givens*, 47 Ill. App. 3d 512, 362 N.E.2d 97 (1977) (14-year-old minibike driver held to adult standard in contributory negligence claim); *Perricone v. DiBartolo*, 14 Ill. App. 3d 514, 302 N.E.2d 637 (1973) (13-year-old driver held to adult standard in contributory negligence claim).

62. *Williams v. Gilbert*, 239 Ark. 935, 395 S.W.2d 333 (1965) (seven-year-old bicycle rider held to standard of someone his own age and intelligence); *Davis v. Bushnell*, 93 Idaho 528, 465 P.2d 652 (1970) (eight-year-old held to like child's standard of care); *Conway v. Tamborini*, 68 Ill. App. 2d 190, 215 N.E.2d 303 (1966) (14-year-old held to like child's standard of care); *Bixenman v. Hall*, 251 Ind. 527, 242 N.E.2d 837 (1968) (13-year-old held to like child's standard of care); *Ransom v. Melegi*, 18 Mich. App. 476, 171 N.W.2d 482 (1969) (12-year-old held to like child's standard of care); *Caradori v. Fitch*, 200 Neb. 186, 189, 263 N.W.2d 649, 652 (1978) ("We are not prepared, even assuming the wisdom of the Minnesota rule, to place the activity of bicycling in the same category as power boating"); *cf. Murchison v. Sykes*, 223 Miss. 754, 78 So. 2d 888 (1955) (nine-year-old not held to adult standard). *Contra Ewing*, 141 Ind. App. at 31, 216 N.E.2d at 866-67 (listing bicycles along with motor vehicles as potentially dangerous instrumentalities); *Sagor v. Joseph Burnett Co.*, 122 Conn. 447, 190 A. 258 (1937) (child held to adult standard in violation of traffic statute). In *Warning v. Kanabec County Co-operative Oil Ass'n*, 231 Minn. 293, 42 N.W.2d 881 (1950), the Minnesota Supreme Court applied the subjective standard of "the degree of vigilance that an ordinarily prudent boy of his age, mental capacity, and intelligence is capable of using" when considering the contributory negligence of a 10-year-old bicyclist. *Id.* at 298, 42 N.W.2d at 883. The same approach was favored in *Steinke v. Indianhead Truck Line*, 237 Minn. 253, 54 N.W.2d 777 (1952), where a 15-year-old bicyclist was held guilty of contributory negligence

with this activity for young and old alike.⁶³

B. Off the Highway

1. Use of Guns

The adult activities doctrine has proved difficult to apply once the perspective shifts away from the highway.⁶⁴ In *Purtle v. Shelton*,⁶⁵ the majority of the Arkansas Supreme Court held that an adult standard of care should not be applied to a sixteen-year-old defendant who injured a companion with a high-powered rifle when hunting.⁶⁶ The court had "no doubt" that deer hunting is a dangerous sport,⁶⁷ but could not say that deer hunting is an activity normally engaged in only by adults. According to the court, "A child may lawfully hunt without a hunting license at any age under sixteen. . . . We know, from common knowledge, that youngsters only six or eight years old frequently use .22 caliber rifles and other lethal firearms to hunt rabbits, birds; and other small game."⁶⁸

The court argued that if it imposed an adult standard in the circumstances of the present case, it would have to be prepared to explain why the same rule should not apply where the gun was an ordinary shotgun, where the minor was hunting rabbits, or where a six-year-old was shooting at tin cans with an air rifle, "[n]ot to mention other dangerous activities, such as the swinging of a baseball bat, the explosion of firecrackers, or the operation of an electric train."⁶⁹ The majority was "unwill-

as a matter of law, when in spite of substantial familiarity with the area, he darted out in front of the defendant's vehicle. *Id.* at 257-59, 54 N.W.2d at 780.

It is interesting to note that the courts have not extended the family automobile doctrine to bicycles. *Pflugmacher v. Thomas*, 34 Wash. 2d 687, 209 P.2d 443 (1949); *cf. Calhoun v. Pair*, 197 Ga. 703, 30 S.E.2d 180 (1944) (per curiam); 14 WAKE FOREST L. REV. 699, 706 (1978) (discussing *Calhoun*).

63. *Cf. Goss v. Allen*, 70 N.J. 442, 453 n.2, 360 A.2d 388, 394 n.2 (1976) (Schreider, J., dissenting).

64. According to the court, "It appears . . . from the cases, that the most critical factor, in balance, in requiring greater care by minors, seems to be the motor-powered nature of the vehicle which was being operated by the teenager." *Fishel v. Givens*, 47 Ill. App. 3d 512, 519, 362 N.E.2d 97, 102 (1977).

65. 251 Ark. 519, 474 S.W.2d 123 (1971), noted in 26 ARK. L. REV. 243, 243 (1970); see also Annot., 47 A.L.R.3d 620 (1973).

66. Justice Fogelman strongly dissented. *Purtle*, 251 Ark. at 523, 474 S.W.2d at 126 (Fogelman, J., dissenting).

67. *Id.* at 522, 474 S.W.2d at 125.

68. *Id.*

69. *Id.* at 522, 474 S.W.2d at 126.

ing to lay down a brand-new rule of law, without precedent and without any logical or practical means of even surmising where the stopping point of the new rule might ultimately be reached."⁷⁰ Subsequent decisions regarding the use of guns are in accord.⁷¹

The courts have refused to apply the adult standard, not only where the shooting is related to hunting, but also in cases where no question of a hunting rationale arises. Thus, in *LaBarge v. Stewart*,⁷² the standard appropriate to children was applied where a revolver fired when its sixteen-year-old owner was attempting to demonstrate to a fifteen-year-old guest how Russian roulette was played.⁷³ Also, in *Thoman v. Iman*,⁷⁴ the same standard was applied where an eleven-year-old child took a shotgun (which was there to protect the family against intruders) from his parents' bedroom and accidentally killed his young cousin.⁷⁵ In the latter case, however, the court referred to the fact that "[i]n the rural districts of this state children . . . have always used guns both for target practice and hunting under differing circumstances" as a reason for not imposing the adult standard.⁷⁶

2. Sports

In *Goss v. Allen*,⁷⁷ the New Jersey appellate court applied the adult standard of care to a seventeen-year-old skier. The

70. *Id.* at 522-23, 474 S.W.2d at 126; *cf.* *Jackson v. McCuiston*, 247 Ark. 862, 448 S.W.2d 33 (1969) (earlier decision imposing adult standard on minor who drove a tractor).

71. *LaBarge v. Stewart*, 84 N.M. 222, 225-26, 501 P.2d 666, 670 (1972); *Thomas v. Inman*, 282 Or. 279, 285-86, 578 P.2d 399, 403 (1978); *Prater v. Burns*, 525 S.W.2d 846, 851 (Tenn. Ct. App. 1975); *cf. In re S.W.T.*, 277 N.W.2d 507, 514 n.4 (Minn. 1979) (court emphasized that it did "not decide standard of care applicable in civil cases involving juvenile misuse of firearms").

It is well established that parents and other persons who leave guns within easy access of children may be liable in negligence if the children inflict injury. *See Gargiulo, Liability for Leaving a Firearm Accessible to Children*, 17 CLEV.-MAR. L. REV. 472 (1968); *Braun, Fireworks, Explosives, Guns, and Minors*, 15 CLEV.-MAR. L. REV. 566, 574 (1966).

72. 84 N.M. 222, 501 P.2d 666 (Ct. App. 1972).

73. *Id.* at 225-26, 501 P.2d at 670.

74. 282 Or. 279, 578 P.2d 399 (1978).

75. *Id.* at 285, 578 P.2d at 401.

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

77. 134 N.J. Super. 99, 338 A.2d 820 (Sup. Ct. App. Div. 1975).

supreme court reversed.⁷⁸ It found nothing in the record to support the appellate court's conclusion that skiing was an activity which might be dangerous to others and was normally undertaken only by adults.⁷⁹ The supreme court considered it "judicially noticeable that skiing as a recreational sport, save for limited hazardous skiing activities, is engaged in by persons of all ages."⁸⁰

The court did not dispute the general proposition that "certain activities engaged in by minors are so potentially hazardous as to require that the minor be held to an adult standard of care."⁸¹ It considered that "[d]riving a motor vehicle, operating a motor boat and hunting would ordinarily be so classified."⁸² The court noted, without further clarification, that as to the activities mentioned, New Jersey law requires that a minor must be licensed and must first demonstrate the requisite degree of adult competence.⁸³

The dissent is worthy of particular attention since it goes to the core of the conceptual rationale for the adult activities doctrine proffered by the majority. Justice Schreiber considered that there were "several inherent difficulties in and inequitable consequences"⁸⁴ of the rule adopted by the majority:

What criteria are to be employed by the jury to ascertain whether an activity is 'potentially hazardous'? If a 'potentially hazardous' activity is one which results in serious or permanent injury, then almost any activity might fall within that category. The injured person who has lost the sight of an eye resulting from a carelessly thrown dart, a stone, or firecracker, the death caused by a bicycle, or an individual seriously maimed due to an errant skier—all are indisputable proof of 'potentially hazardous' activity. The majority prescribes no guideline except to imply that whenever licensing is required, the 'potentially hazardous' test is met. But the State does not impose a licensing requirement on all 'potentially hazardous' activities and whether one has a license or not is often not relevant in measuring conduct of

78. *Goss v. Allen*, 70 N.J. 442, 360 A.2d 388 (1976), noted in 30 *RUTGERS L. REV.* 790 (1977).

79. 70 N.J. at 447, 360 A.2d at 391.

80. *Id.* at 447, 360 A.2d at 390.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 453, 360 A.2d at 394 (Schreiber, J., dissenting).

a reasonably prudent person. Whether the driver of an automobile is licensed, for example, is not relevant in adjudicating if the automobile was being driven in a reasonable prudent manner.⁸⁵

The imposition of an adult standard on a child was taken to its furthest extent in the New York decision of *Neumann v. Shlansky*.⁸⁶ The plaintiff was struck on the knee by a golf ball driven by the defendant, an eleven-year-old boy. The boy had "taken lessons and play[ed] regularly at his club."⁸⁷ He was playing a par three hole of about 170 yards and the plaintiff was within 150 to 160 yards of him, leaving the green of the hole, when he struck the shot. The defendant shouted "fore" but was not heard by the plaintiff.⁸⁸

The trial judge charged the jury that the defendant was to be held to the standard of care of an adult and not to the usual standard of care of a child. The jury returned a verdict for the plaintiff. The defendant's motion to set aside the verdict and for a new trial on the grounds that the jury charge was erroneous as a matter of law was denied.⁸⁹

Justice Marbach considered that the analogy to driving an automobile was sufficiently strong to apply the same increased standard of care:

Just as a motor vehicle or other power-driven vehicle is dangerous, so is a golf ball hit with a club. Driving a car, an airplane or powerboat has been referred to as adult activity even though actively engaged in by infants. . . . Likewise, golf can easily be determined to be an adult activity engaged in by infants. Both involve dangerous instruments. . . . No matter what the age of a driver of a car or a driver of a golf ball, if he fails to exercise due care serious injury may result. Driving a car, it is true, is not a game as golf may be. However, golf is not a game in the same way that football, baseball, basketball or tennis is a game. It is a game played by an individual which in order to be played well demands an abundance of skill and personal discipline, not to mention constant practice and dedication. Custom, rules and etiquette play an important role in this game.

85. *Id.* at 453-54, 360 A.2d at 394 (Schreiber, J., dissenting) (footnote omitted).

86. 58 Misc. 2d 128, 294 N.Y.S.2d 628 (Cty. Ct. 1968), *aff'd*, 63 A.D.2d 587, 312 N.Y.S.2d 951 (App. Term 1970), *aff'd*, 36 A.2d 540, 318 N.Y.S.2d 925 (1971).

87. 58 Misc. 2d at 129, 294 N.Y.S.2d at 634.

88. *Id.* at 128, 294 N.Y.S.2d at 630.

89. *Id.*

Foremost among these is the fact . . . that one does not hit a ball when it is likely that the ball could or will hit someone else for the obvious reason that someone could get hurt.⁹⁰

The court stressed that the defendant had considerable experience in learning and playing golf, sometimes in the company of adults, which meant that "[t]his particular infant defendant was for all purposes on the golf course as an adult golfer."⁹¹ This reference to the individual circumstances of the defendant bears a striking similarity to the subjective test, which the court was at pains to reject. It met this by arguing, unconvincingly, that in contrast to the approach it favored, the subjective standard "does not adequately consider the objective nature of the game, the inherent risks involved and the undisputed fact that a golf ball is a dangerous missile capable of inflicting grievous harm no matter who hits it."⁹²

In his concluding remarks, Justice Marbach appeared to backtrack from the clear adherence to the view that an adult standard should be imposed. He stated:

When you have, as we have here, a situation where there is potentially an inherently dangerous object hit by someone who despite his age is for all practical purposes just like an adult on the golf course then it is this Court's opinion that he should be treated like an adult and held to an adult standard of care. It may be true that, hypothetically, a six year old could appear on the course for the first time and hit a ball which would hurt someone and the objective standard might not be applicable, but that would be the exception rather than the rule. People who play golf on a golf course know or should know that a golf ball can cause serious injury just as a car may cause serious injury and they should exercise the same degree of care.⁹³

The effect of this equivocation is difficult to assess. Apparently it concedes that the adult standard is not to be applied to all children who play golf. If it is not to apply to a first-time player aged six years, what about one aged seven, eight, or eleven, the age of the plaintiff in the present case?⁹⁴ Of course many six-year-old children, apart from having little physical

90. *Id.* at 132-33, 294 N.Y.S.2d at 634 (citations omitted).

91. *Id.* at 133, 294 N.Y.S.2d at 634-35.

92. *Id.* at 133-34, 294 N.Y.S.2d at 635.

93. *Id.*

94. For commentary on the *Neumann* case, see 33 ALB. L. REV. 434 (1969).

competence when attempting to strike a golf ball, will not appreciate the dangers to others involved in their act. In contrast, an eleven-year-old child will have a far greater understanding of these dangers. The real negligence of the defendant in this case lies, not in making a poor shot, but in *deciding to make a shot at all* at the time he did. Was not the court, therefore, in spite of its invocation of the adult activities doctrine, making a distinction which may be more easily understood—and indeed—supported by reference to the classic standard applicable to children? On appeal, the supreme court affirmed in a single sentence, “In short, when an infant participates with adults in a sport ordinarily played by adults, on a course or field ordinarily used by adults for that sport, and commits a primary tortious act, he should be held to the same standard of care as the adult participants.”⁹⁵

This criterion for the imposition of an adult standard of care seems both too broad and too narrow: too broad because it extends to all sports played by adults, many of which have no inherent dangers for others; too narrow because it requires that the child’s tortious act be committed when he or she is participating with adults in the sport. Assuming for the moment that the adult standard is ever appropriate for children, there seems little sense in making its application dependent on the contingent and largely irrelevant question of whether or not the minor is accompanied by an adult when he or she acts carelessly.

Justice Gulotta, in dissent, did not think “a valid analogy can be drawn between driving a golf ball and driving an automobile. It is true that harm can result from either, but so can it from baseball, football, archery and many other activities and surely we cannot have a special rule for each.”⁹⁶ Nor could he accept that golf was an activity normally engaged in only by adults. Natural experience contradicted this assertion: many teenagers were accomplished golfers, and members of school teams often attained scores of championship caliber.⁹⁷ On further appeal, the New York Supreme Court, Appellate Division, affirmed in a memorandum decision.⁹⁸

95. 63 Misc. 2d at 587, 312 N.Y.S.2d at 951 (citations omitted).

96. *Id.* at 589, 312 N.Y.S.2d at 953 (Gulotta, J., dissenting).

97. *Id.*

98. 36 A.2d 540, 318 N.Y.S.2d 925 (1971).

C. *The Adult Activities Doctrine in Other Common Law Jurisdictions*

The adult activities doctrine has had a varied reception in other common law jurisdictions. The most coherent analysis has been presented in Canada, where the influence of the United States developments on this subject has been strong. The issue has not yet arisen in England, a lacuna that possibly reflects a more pervasive paucity of judicial or academic interest in that country in the whole question of negligence and contributory negligence of children. The Australian and New Zealand courts have attempted to consider the question, but a thorough conceptual and policy analysis has yet to be presented in these countries.

In the Canadian case of *Ryan v. Hickson*,⁹⁹ the Ontario High Court determined the standard of care appropriate to snowmobile drivers aged twelve and fourteen years old. The court quoted with approval¹⁰⁰ a passage from a textbook by a leading Canadian authority concerning the liability of children engaged in adult activities.¹⁰¹ Although of the opinion that it should not take into account whether or not "the activity in which the infant is engaged in is one that is normally insured,"¹⁰² the court considered that "the other principles expressed in the [quoted] passage seem eminently

99. 55 D.L.R.3d 196 (Ont. 1974); see Binchy, *Annual Survey of Canadian Law Part 2: Torts-II*, 9 OTTAWA L. REV. 339, 347-348 (1977); Davies, *Torts*, ANNUAL SURVEY OF COMMONWEALTH LAW 1976, 392 (H. Wade ed. 1978).

100. 55 D.L.R.3d at 202.

101. The *Ryan* court quoted one commentator:

Special rules for children make sense, especially when they are plaintiffs; however, when a young person is engaged in an adult activity, which is normally insured, the policy of protecting the child from ruinous liability loses its force. Moreover, when the rights of adulthood are granted, the responsibilities of maturity should also accompany them. In addition, the legitimate expectations of the community are different when a youth is operating a motor vehicle than when he is playing ball. . . . Consequently, there has been a movement toward holding children to the reasonable man standard when they engage in adult activities. A more lenient standard for young people in the operation of motor vehicles, for example, was thought to be 'unrealistic' and 'inimical to public safety.' When a society permits young people of 15 or 16 . . . the privilege of operating a lethal weapon like an automobile on its highways, it should require of them the same caution it demands of all other drivers.

Id. (quoting A. LINDEN, CANADIAN NEGLIGENCE LAW 33-34 (1972) (footnote omitted)).

102. 55 D.L.R.3d at 202.

reasonable.”¹⁰³ Since snowmobiles are “no less a lethal weapon”¹⁰⁴ than automobiles when used by persons lacking skill, these principles of the adult activities doctrine are “equally applicable to snowmobiles as to automobiles . . . whether or not such vehicles are in use on or off the highway.”¹⁰⁵

In New Zealand, the issue has arisen in two cases. In *Tauranga Electric Power Board v. Karora*,¹⁰⁶ the court of appeal held that a seventeen-year-old cyclist should be held to the same contributory negligence standard as an adult when failing to observe traffic regulations relating to cycling on the left side of the highway. Chief Justice Myers discussed this important issue in the following passage which merits extended quotation:

The negligence alleged . . . against the . . . boy consisted of various breaches of the traffic regulations relating to bicycles, and if those breaches were made out it is difficult to see *prima facie* how they could be anything else than cogent evidence of negligence. The question now involved, however, is simply whether as a matter of law the deceased boy was entitled to be excused by the jury from the consequences of his negligence on the ground that the law does not require the same degree of care to be exercised by a normal youth of sixteen or seventeen years of age when riding a bicycle as an adult person [U]nder our law every person of or over the age of fourteen years is in substantially the same position so far as responsibility to the criminal law is concerned Moreover, a person of the age of fifteen years is entitled, subject to satisfactory evidence of his qualifications, to a motor-driver's license It would be idle to contend, therefore, that a motor-driver of sixteen or seventeen years was entitled on account of his youth to be excused from the consequences of his negligence as such driver. Now, seeing the [law] applies to

103. *Id.*

104. *Id.*

105. *Id.*; cf. *Bernard v. Thompson*, 12 Nfld. & P.E.I. 452, 458 (P.E.I. 1976) (court did not consider the age of a young minicyclist in determining the issue of her contributory negligence). The decision did not, however, specifically address the issues raised in *Ryan*.

106. [1939] N.Z.L.R. 1040; see 18 CAN. B. REV. 67, 68 (1940); cf. Campbell, *Criminal Law*, in *NEW ZEALAND: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* 361, 375 (J. Robson ed. 2d ed. 1967) (common law presumptions on the criminal capacity of children).

'every rider' of a bicycle and the bicycles are used and ridden by thousands of young persons, I can see no reason in principle why any lower standard of care should be permitted in the case of a normal person of sixteen or seventeen years old than in the case of a person of or over the age of twenty-one years, or why the age of the younger person should be a factor in deciding whether or not he has committed a breach of the regulations and has thereby been guilty of negligence.¹⁰⁷

The Chief Justice considered that two Australian decisions¹⁰⁸ relied upon by the trial judge were not relevant as they were employment cases "to which special considerations may apply."¹⁰⁹ Chief Justice Myers conceded that "[t]here might well be a question of some difficulty in the case of a very young child who sustains an injury by accident while riding a bicycle or tricycle"¹¹⁰ but considered that that question could be left open for determination when it might arise.

Tauranga Electric Power Board may be contrasted with the later decision of *Ralph v. Henderson & Pollard Ltd.*¹¹¹ The *Ralph* court declined to hold that the trial judge should have articulated an adult standard of care when directing the jury on the question of the contributory negligence of a sixteen-year-old employee injured by an unfenced saw at his place of employment. The court did not dispute the correctness of imposing an adult standard where a child defendant "engaged in dangerous adult activities such as driving a car or handling industrial equipment."¹¹² The court did not consider that this principle could apply to the instant case as there was "no question of the plaintiff's work being harmful to others."¹¹³ The court noted that the jury had been left "entirely . . . to decide for themselves"¹¹⁴ the standard of care which the ordinary, reasonable person of the age and experience of the plaintiff should have

107. [1939] N.Z.L.R. at 1044-45.

108. See *Watson v. Charles Anderson & Co.*, 8 N.S.W. St. R. 100 (1908); *Hunt v. Brassware Ltd.*, 26 N.S.W. St. R. 449 (1926). In both cases, the plaintiff was a child employed by the defendant and was injured when operating machinery in the course of his employment. In both cases, the court took account of the child's immaturity.

109. [1939] N.Z.L.R. at 1045.

110. *Id.* at 1045-46.

111. [1968] N.Z.L.R. 759 (Sup. Ct. 1967). *Tauranga* was apparently not cited to the court.

112. [1968] N.Z.L.R. at 763.

113. *Id.*

114. *Id.*

exercised in the circumstances. It was a question of fact for the jury to decide whether that standard should be fixed at any lower level than would be expected from an adult, and added that for all they knew, "they may have well accepted the latter standard."¹¹⁵

In Australia two decisions are worthy of note. In *Tucker v. Tucker*,¹¹⁶ South Australia's supreme court imposed liability on a sixteen-and-a-half-year-old driver of a motor vehicle. The court paid no attention to the driver's age, and determined the question of the driver's negligence in accordance with the adult standards, although there was evidence that the driver possibly lacked the intelligence of an adult.¹¹⁷ The decision is of poor analytic quality and provides no principled basis for imposing the adult standard.

A contrasting approach was favored by the supreme court of Victoria in *Broadhurst v. Millman*.¹¹⁸ The full court held that the trial judge erred in failing to clearly instruct the jury that in determining whether the plaintiff cyclist, aged fifteen and a half years, had been guilty of contributory negligence, the age of the cyclist was a relevant consideration.¹¹⁹ Neither *Tucker* nor *Tauranga Electric Power Board* was cited in this decision and may well not have been brought to the court's attention.

III. THE ADULT ACTIVITIES DOCTRINE: A CRITIQUE

We must now attempt to analyze the adult activities doctrine critically. Are its policy rationales sound? Is it conceptually clear? Is it a worthwhile contribution to tort law or should other strategies be preferred?

The starting point of our analysis must surely emphasize that, as a general principle, justice requires us to give due regard to the physical and psychological limitations on children's capacity. Unless the arguments in favor of the adult activities doctrine are compellingly clear, there are good grounds to be cautious about accepting so radical a repudiation of the fault requirement, with the imposition of liability on children based

115. *Id.*

116. [1956] S. Austl. St. R. 297 (Sup. Ct. 1956) (Reed. J.).

117. *Cf. id.* at 303.

118. [1976] Vict. R. 208 (Sup. Ct. 1975).

119. Judges Gowans, Menhennitt, and Dunn considered that, in view of the way the trial had been handled generally, an implicit reference to the age of the cyclist could be read into the trial judge's instructions to the jury. *Id.* at 208.

on a standard which they are unable to attain.¹²⁰

In analyzing the problems, we must keep a proper sense of proportion. Many adult activities doctrine proponents argue as though an adult standard of care, as an invariable or at least a general rule, is a necessary prerequisite to the imposition of liability on a teenage driver. This is far from the case. Many teenage drivers will be held negligent under the standard of care appropriate to children. This standard is sensitive to the child's mental development and experience, it is true, but few teenagers today could credibly contend that they were unaware of the dangers of the highway and the necessity to drive with due regard for the safety of others.¹²¹ Moreover, it seems clear that the standard of care appropriate to children will not permit a teenage driver to gain exemption from liability on the basis that the accident was attributable to a rash or impulsive character.¹²²

The actual number of cases, therefore, where an adult stan-

120. For considerations of the relationship between ethical and legal ascriptions of responsibility, see Chapman, *Ethical Issues in the Law of Tort*, 20 U.W. ONT. L. REV. 1, 16-17 (1982). It is worth noting that in *In re S.W.T.*, 277 N.W.2d 507 (Minn. 1979), the Minnesota Supreme Court held that in juvenile proceedings determining whether two juveniles had committed delinquent acts consisting of aiding and abetting second degree manslaughter by shooting a rifle across the Mississippi River, the juvenile court erred in applying the adult standard of care. Justice Wahl observed:

Considerations relevant in establishing the standard of care applicable to a juvenile defendant in a *civil* case such as *Dellwo* . . . —legal recognition of the conduct (e.g., operation of motor vehicles), the hazards involved, the expectations of the general public in encountering the operator, and the facilitation of recovery by the injured party—are not clearly relevant in a *criminal* case. The purpose of a criminal prosecution is a determination of guilt or innocence of the accused and subsequent deterrence and rehabilitation. Further, it is anomalous to premise an adjudication of a child's delinquency on failure to conform his conduct to adult standards.

Id. at 514 (footnote and citation omitted) (emphasis in original). In a footnote, Justice Wahl added: "We emphasize that we do not decide the standard of care applicable in *civil* cases involving juvenile misuse of firearms." *Id.* at 514 n.4 (emphasis in original).

121. Courts have on occasion been unduly indulgent to teenage drivers when determining what they should be expected to know about the dangers of driving. See, e.g., *Mosconi v. Ryan*, 94 Cal. App. 2d 227, 210 P.2d 259 (1949); *Chernotik v. Schrank*, 76 S.D. 374, 79 N.W.2d 4 (1956); cf. 42 IND. L.J. 405, 407-08 (1967). This commentator argues not for the imposition of an adult standard of care, but for an appropriate application of the knowledge test in relation to children. *Id.*

122. See PROSSER & KEETON, *supra* note 3, § 32, at 176-77; see also RESTATEMENT (SECOND) OF TORTS § 283A comment b (1965):

'Intelligence' includes other mental capacities, but does not include judgment, which is an exercise of capacity rather than the capacity itself. The fact that the child is mentally retarded, or that he is unusually bright for his years, is to be taken into account; but once such account is taken, the child is

dard of care will yield a different result than that of the child's standard will not be very great. Of those cases where a difference would result, some will involve the imposition of liability on a third party—a parent or other person—who has supplied the teenager with a car. Indeed, it is precisely those cases where the teenager is *lacking* in mental development and experience, and thus has a chance of being exempted under the standard of care appropriate to children, that the prospects of a successful action against the third party will be very strong.

With these preliminary words of caution, let us now examine the various policy rationales put forward in support of the adult activities doctrine.

A. *The Insurance Rationale*

The insurance rationale proposes that “when a young person is engaged in an adult activity, which is normally insured, the policy of protecting the child from ruinous liability loses its force.”¹²³ The basis of this rationale is the view that, however inadequate the conceptual justification for imposing an adult standard on children for injuries resulting from adult activities may be, this inadequacy does not matter and no real injustice will be done because the child will generally be insured when performing these activities.

Perhaps the insurance rationale has the most widespread support. It has, however, been subjected to some criticisms.

still required to exercise the judgment of a reasonable person of that intelligence.

Id.; cf. Ellis, *supra* note 2, at 1102-04.

Where the child is young, courts have on occasion included the capacity for self-control as an element to be taken into account. See, e.g., *Marfyak v. New England Transp. Co.*, 120 Conn. 46, 51, 179 A. 9, 11 (1935); *Lederer v. Connecticut Co.*, 95 Conn. 520, 526, 111 A. 785, 787 (1920); *Brennan v. Fair Haven & Westville Ry.*, 45 Conn. 284, 298 (1877). Gray, *supra* note 5, at 602-03, welcomes this approach which would seem to be in accord with the process of maturation of children. *Id.*; see also Schoeman, *Childhood Competence and Autonomy*, 12 J.L. STUDIES 267, 268-69 (1983) (developmental psychologists' writings show correlation between age and judgment capacities).

123. A. LINDEN, *CANADIAN TORT LAW* 126 (3rd ed. 1982). For a discussion of insuring children engaged in adult activities, see Dunlop, *supra* note 9, at 119; James, *supra* note 16, at 554-55; 35 ALB. L. REV. 606, 610-11 (1971) (conceding strength of opposing arguments); 1962 DUKE L.J. 138, 141-42; Comment, *supra* note 33, at 704-05; 24 OHIO ST. L.J. 401, 403-04 (1963).

For a detailed analysis of the history and present status of automobile insurance legislation in Minnesota, see M. STEENSON, *MINNESOTA NO-FAULT AUTOMOBILE INSURANCE* (1982 & Supp. 1983).

As one commentator has pointed out, "[N]ot all children are insured. Not all children can qualify for insurance coverage. Nor can the insurer's position be ignored, since in the last analysis the increasing cost of insurance protection is borne by the insured public."¹²⁴

Whatever the merits of the insurance rationale may be, it is worth noting that the insurance dimension has no necessary relationship to the adult activities doctrine.¹²⁵ Of course the classic adult activity, driving a motor vehicle, may well have a connection with insurance (although not in all cases); but other activities arguably adult, such as playing golf, do not have an insurance connection to anything like the same extent. It seems the adult activities doctrine loses its credibility not only in terms of its conceptual formulation but also in terms of its supporting policy rationale once we leave the highway.

B. *The Reasonable Expectations Rationale*

The second widely articulated argument in favor of the adult activities doctrine is based on the legitimate expectations of the victim.¹²⁶ Thus, for example, in *Daniels v. Evans*,¹²⁷ the court interpreted provisions of the New Hampshire motor vehicle code as indicating "an intent on the part of our Legislature that all drivers must, and have the right to expect that others using the highways, regardless of their age and experi-

124. 42 IND. L.J. 405, 413 (1967).

125. One commentator suggests:

Concern for the catastrophes that may be caused by such adult activities as driving automobiles hints that the true distinction is not between what adults and children normally do, but between activities more or less prone to result in significant injury. It might even be reasonable to speculate that an adult standard is applied to activities more prone to serious injury, notably driving, because these are also activities which are more typically accompanied by liability insurance coverage.

Comment, *supra* note 5, at 770-71. The commentator also notes:

More useful could be an approach which places less emphasis on the adultness or childishness of a certain activity; an approach which instead considers the practicalities of compensating the person injured—whether adult or child—if the person causing the injury has resources or insurance which make compensation possible. In realistic terms, this approach would be most significant where the minor is the defendant and is covered in his activity by a family liability policy. Since it is the insurer's, not the child's, money which is sought by the injured adult plaintiff, there is some argument that the insurer ought not be able to invoke its insured's tenderness of years to prevent the plaintiff's recovery.

Id. at 790.

126. See A. LINDEN, *supra* note 123, at 126-27; Comment, *supra* note 33, at 707.

127. 107 N.H. 407, 224 A.2d 63 (1966).

ence, will, obey the traffic laws and thus exercise the adult standard of ordinary care."¹²⁸

But can road users assume that other users of the highway will exercise the adult standard of care? Surely not. On the contrary, it seems more convincing to argue that road users must be aware that among the motoring community there are drivers—adult and minor—who are incompetent, criminally reckless,¹²⁹ intoxicated,¹³⁰ feeble, or distracted.¹³¹ More spe-

128. *Id.* at 410, 224 A.2d at 65; see Seidelson, *supra* note 2, at 20-21; see also Neu-deck v. Bransten, 233 Cal. App. 2d 17, 21-22, 43 Cal. Rptr. 250, 253 (1965) (minor held to adult standard of care); Edwing v. Biddle, 141 Ind. App. 25, 31, 216 N.E.2d 863, 867 (1966); Gunnells v. Dethrage, 366 So. 2d 1104, 1106 (Ala. 1979); cf. Dellwo v. Pearson, 259 Minn. 452, 458, 107 N.W.2d 859, 863 (1961) ("one cannot know whether the operator of an approaching automobile, airplane, or powerboat is a minor or an adult, and usually cannot protect himself against youthful inprudence even if warned"). Justice Loevinger's argument in *Dellwo* is that the absence of legitimate expectations on the part of the victim should be the basis of the imposition of an adult standard of care. *Id.*

129. In 1983, the Minnesota State Patrol made 1127 arrests for careless driving and 1125 arrests for reckless driving. These figures do not include arrests made by local or county police. Telephone interview with Joan Lundberg, Minnesota State Patrol Statistician (Feb. 8, 1985).

130. In Minnesota, for example, the licenses of 43,500 people were revoked for drunk driving offenses in 1984, amounting to one in fifty Minnesota drivers. Minneapolis Star & Trib., Feb. 21, 1985, at 1A, col. 1.

As to the incidence of collisions and injury where motor vehicles are stolen, see Peck, *An Exercise Based on Empirical Data: Liability for Harm Caused by Stolen Automobiles*, 1969 WIS. L. REV. 909.

131. The issue of whether motorists should reasonably anticipate being involved in a collision has been discussed in the context of persons who fail to wear available seat belts. Throughout most common law jurisdictions apart from the United States, the position commanding general support is that they should. In Yuan v. Farstad, 66 D.L.R.2d 295, 301-02 (B.C. 1967), Justice Munroe stated, "Can a person reasonably anticipate that when driving his car in a city he may be involved in a collision? The answer to that question, I think, must be in the affirmative." *Id.*

A contrasting view was taken in Reineke v. Weisgerber, [1974] 3 W.W.R. 97, 113:

Having said earlier that no final consensus has yet been reached by the research people in the field of automobile safety, the proposition that a person driving down the highway on his proper side of the road is entitled to assume that other persons using the highway will obey the laws of the road still appeals to me and it is not negligence not to strap oneself in a seat like a dummy, a robot or an astronaut.

Id.; see also Binchy, *supra* note 99, at 347-48; Slattery, *Seat Belts and Contributory Negligence*, 4 DALHOUSIE L.J. 96, 100 (1977); McCann, *The Seat Belt Defence in Canada*, 42 SASK. L. REV. 75, 80-81 (1977); 49 CAN. B. REV. 475 (1971).

In England, differing views have been expressed on the general question. See 53 CAN. B. REV. 113, 117-18 (1975). Compare O'Connell v. Jackson, [1971] 3 W.L.R. 463 (moped rider ought reasonably "to have foreseen the possibility of being involved in an accident albeit that he himself drove with the greatest care") with Challoner v. Williams, [1974] R.T.R. 221 (Shaw, J.).

cifically, if they turn their attention to youthful drivers, they will probably be aware of the tendency among young people (whether still in their teens or in their early twenties) to drive fast and, on occasion, dangerously.¹³² They will also have to appreciate that inexperience is a necessary feature of some teenage driving. The only assurance from the law on which they may legitimately rely is that the young driver, if duly licensed, has succeeded in passing a driving test. Whatever conclusions they care to draw from this fact, it is scarcely a convincing argument to suggest that drivers may rely on the likelihood that young drivers will drive with care and competence when it is common knowledge that as a group they are less likely to do so than drivers of more mature years.

The argument may also be criticized on the basis that it largely ignores the contingent and surprising ways in which accidents occur when minors are engaging in childhood activities. Often the potential victim of injury may be able to do little or nothing to protect himself or herself from harm by prior precautions: how can one protect oneself against a careless shot from a slingshot fired by a neighbor's child, or a hurtling toy, or a strategically placed marble on the floor? There is evidence that playgrounds are a more aggressive environment for child play than are open spaces.¹³³ The courts throughout the common law world have long accepted that children at play in school can inflict injuries on each other (and on their teachers and other persons) in circumstances where the school authorities could not reasonably have foreseen the incident.¹³⁴ To contrast the dangerous adult world with the

132. In 1983, there were 211,584 licensed teenage drivers in Minnesota, making up 7.4% of all Minnesota drivers. DEPARTMENT OF PUBLIC SAFETY, MOTOR VEHICLE CRASH FACTS 72 (1983). Teenage drivers accounted for 13.2% of all crashes that year and 11.1% of all fatal crashes. *Id.* at 26. See generally James & Dickinson, *supra* note 14, at 775; Comment, *supra* note 33, at 704; 3 TULSA L.J. 186, 187 (1966).

133. See Bahr, *Tort Law and the Games Kids Play*, 23 S.D. L. REV. 275, 296 (1978) (citing I. OPIE & P. OPIE, CHILDREN'S GAMES IN STREET AND PLAYGROUND 12-13 (1969)).

134. See, e.g., *Underhill v. Alameda Elementary School Dist.*, 133 Cal. App. 733, 24 P.2d 849 (1933):

[I]t is . . . a matter of common knowledge that children participating in such games and in fact in any form of play may injure themselves and each other, and that no amount of precaution or supervision on the part of parents or others will avoid such injuries.

Id. at 735, 24 P.2d at 851. For discussion of the standard of care owed by school authorities to students, see Barnes, *Tort Liability of School Boards to Pupils*, in STUDIES IN CANADIAN TORT LAW 189 (L. Klar ed. 1977); Binchy, *Schools' Liability for Negligence:*

safe world of childhood activities is to create a distinction possibly based on an idealistic view of childhood but certainly one which has little foundation in fact.

C. *The Inherent Danger Rationale*

Let us now consider the rationale for the adult activities doctrine which concentrates on the particular danger to others of the activity in which the minor engages. This approach was most clearly articulated by the Washington Supreme Court in *Robinson v. Lindsay*.¹³⁵ “[W]hen the activity a child engages in is inherently dangerous . . . the child should be held to an adult standard of care.”¹³⁶

There are two main difficulties with this approach. First, it offers no clearly principled basis for imposing an adult standard of care on minors who happen to engage in inherently dangerous activities while applying a more sensitive standard to minors engaged in other activities which, though not inherently dangerous, are on particular occasions extremely dangerous, possibly more so than some “inherently dangerous” activities.¹³⁷ Secondly, there are many definitional uncertain-

Part I, 78 INC. L. SOC. OF IRE. GAZETTE 153, 155-57 (1984); Hamson & Hoyano, *The “Prudent Parent”: The Elusive Standard of Care*, 18 U. BRIT. COLUM. L. REV. 1 (1984); Kimball, *Compulsion Without Protection or Recourse: The Case for No-Fault Accident Insurance for School Children*, 1975 UTAH L. REV. 925; Lowe, *The Liability of Teachers and School Authorities for Injuries Suffered by Students*, 13 U. QUEENS. L.J. 28 (1983); Comment, *School District Liability for Negligent Supervision of the California Student*, 3 J. JUV. L. 120, 127-34 (1979); Comment, *Teacher’s Liability for Pupils’ Injuries—Duty of Supervision*, 19 ME. L. REV. 111 (1967); Comment, *Torts: Schools’ Liability for Negligent Supervision of Students*, 19 WASHBURN L.J. 189 (1979).

135. 92 Wash. 2d 410, 598 P.2d 392 (1979).

136. *Id.* at 413, 598 P.2d at 393-94; *cf.* *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859 (1961):

Certainly in the circumstances of modern life, where vehicles moved by powerful motors are readily available and frequently operated by immature individuals, we should be skeptical of a rule that would allow motor vehicles to be operated to the hazard of the public with less than the normal minimum degree of care and competence.

Id. at 457-58, 107 N.W.2d at 863 (footnote omitted).

137. Why should a 15-year-old causing havoc in a schoolyard by riding his bicycle at 25 m.p.h. be held to a more indulgent standard than a 15-year-old licensed motorcyclist driving at 15 m.p.h. on the highway? See Comment, *supra* note 5, at 770. If the answer is that he should not, and that both should be held to an adult standard of care, the concept of inherently dangerous activity would go very much further than the adult activities doctrine as currently understood by the courts. *Cf. supra* note 62 and accompanying text (adult standard generally not applied to bicycling).

ties surrounding the concept of an inherently dangerous activity.

It may be argued that driving a car or a motorcycle is not generally an inherently dangerous activity. Of course it may become so where the driver is an immature teenager of poor mental development, or for that matter, when a drunken fifty-year-old is at the wheel. But it would not necessarily be so where the driver is a mature fifteen-year-old with plenty of experience in the responsible use of automobiles. If what constitutes an inherently dangerous activity must inevitably depend on the individual circumstances of the actor, we have a doctrine far different from the adult activities doctrine currently applied by the courts. For, on this analysis, there should be no simplistic imposition of an adult standard of care on every teenage driver. Instead, in every case the court would have to determine whether, having regard to the driver's particular circumstances, the activity in which he or she engaged was an inherently dangerous one. Apart from the complexity that this procedure would involve, it would also have the ironic result that those very factors which generally relieve a child from the attribution of negligence or contributory negligence—his or her age, intelligence, and mental development—would be the millstone subjecting the child to an adult standard of care.¹³⁸

The way of avoiding these difficulties would be to hold that certain activities invariably are inherently dangerous, without

138. In *Robinson*, 92 Wash. 2d at 413, 598 P.2d at 394, Chief Justice Utter argued that the inherently dangerous activity rule "protects the need of children to be children but at the same time discourages immature individuals from engaging in inherently dangerous activities." *Id.* Whether Chief Justice Utter was serious about the deterrent function of the rule is not clear; but it is doubtful whether this argument has any substantial force. *Cf.* 42 IND. L.J. 405 (1967):

If a child who engages in an adult activity cannot comprehend prospectively the hazards he creates, it certainly cannot be assumed that the application of a more stringent standard of care will deter him from imprudence. Therefore, the prime purpose for imposing a more exacting standard for measuring child conduct is to assure that fewer injuries will go uncompensated rather than to deter minors from creating hazards.

Id. at 410-11 (footnote omitted); *accord* 35 ALB. L. REV. 606, 611 (1971); 47 B.U.L. REV. 450, 454-55 (1967). *Contra*, 33 TENN. L. REV. 533, 536-37 (1966).

Skepticism as to the deterrent effect of tort liability for "random human frailties like inattentiveness . . . on the road" has recently been expressed by Fleming, *Is There a Future for Torts?*, 44 LA. L. REV. 1193, 1198 (1984). *See* Brown, *Deterrence and Accident Compensation Schemes*, 17 W. ONT. L. REV. 111, 140-43 (1979); Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421 (1969) (both concluding that fear of civil liability is an ineffective deterrent).

regard to context. Driving an automobile thus would be categorized as inherently dangerous, whether the driver is young and immature or is adult, experienced, and expert. The price of this approach, of course, is the loss of credibility where the activity is being performed by a competent person. It is true that, even in such circumstances, the activity has a potential for danger but almost every activity has this potential. It is the total context that determines the degree of dangerous potential of an activity. Thus, where an expert driver drives an automobile down a suburban road at 5:00 a.m. on a sunny summer morning, the potential for danger is small, less in fact than if a cyclist were to travel at high speed along a busy sidewalk. This type of comparison is the essence of negligence law. It would unduly restrict courts if particular activities have to be categorized as inherently dangerous without regard to the actual likelihood or gravity of injury, the social utility of the activity on the particular occasion and the cost of prevention.

D. *The Violation of Statute Rationale*

The argument relating to licensing requirements and statutory violation constituting negligence per se has been invoked by several courts¹³⁹ and commentators¹⁴⁰ in favor of imposing a standard which has no regard for the youthfulness of the minor driver. As we have seen, the argument usually proceeds

139. See *Wilson v. Shumate*, 296 S.W.2d 72, 77 (1956); *Daniels v. Evans*, 107 N.H. 407, 410, 224 A.2d 63, 65 (1966); *Karr v. McNeil*, 92 Ohio App. 458, 464, 110 N.E.2d 714, 716-17 (1952); *Baxter v. Fugett*, 425 P.2d 462, 464 (Okla. 1967); *Powell v. Hartford Accident & Indem. Co.*, 217 Tenn. 503, 508, 398 S.W.2d 727, 832-33 (1966) (against a strong dissent by Creson, J.); *Nelson v. Arrowhead Freight Lines*, 99 Utah 129, 133-34, 104 P.2d 225, 227-28 (1940). But see *Simmons v. Holm*, 229 Or. 373, 395-97, 367 P.2d 368, 378-79 (1961).

140. See, e.g., *The Minor Motorist*, *supra* note 6, at 110:

Any argument for the retention of a double standard of care for children must ultimately come down to the proposition that a child, because of his limited reason and experience, cannot be expected to meet the adult standard of reasonable and prudent action under all circumstances, so he should be protected from loss if his action were reasonable for one of his like age, intelligence and experience. But the statutory rules of the road define and establish a standard of conduct from which a departure is a civil offense for which liability is imposed, involving no question of intent, discretion, or *mens rea*. Logically, therefore, since only the actual conduct is examined to determine whether the statute has been violated, the reasons for protecting the child have no application.

Id.; cf. Comment, *supra* note 33, at 706-07 (conceding force of statutory argument but proposing common law alternative as it would extend the range of adult standard still wider).

on the basis that, since the statute makes no express allowance for a more subjective standard of care for minor drivers, none should be inferred. If minor drivers do not like this, it is said, they are always free to decline to take the wheel. Moreover, where minor drivers neglect to obtain a license, their failure may properly be regarded as a breach of statute on which to base civil liability. Where they are simply too young to be entitled to a license, if they then venture onto the highway unlicensed they must raise their standard to that appropriate to those who are permitted to drive.

The policy questions regarding civil liability for statutory violations,¹⁴¹ of course, are enormous, ranging far beyond the modest confines of the problems posed by minor drivers of motor vehicles. So far as minor drivers are concerned, the argument savors of a conclusion rather than a substantive policy. Indeed, the moral equities are far from clear.¹⁴² It has been argued that where an adult standard is imposed on a licensed teenage driver there is a

failure of legal and moral fault to coincide. The minor defendant is being held to a standard of care which for him, may be unattainable. This may be particularly unfair where the legislature and Department of Motor Vehicles have previously determined his fitness as an operator without specifically holding him to the adult standard of care.¹⁴³

This may not be the strongest of arguments, but it goes at

141. For general discussion of the policies underlying such liability, see PROSSER & KEETON, *supra* note 3, § 33 at 220-22; FLEMING, *supra* note 4, at 117-28; Alexander, *Legislation and the Standard of Care in Negligence*, 42 CAN. B. REV. 243 (1964); Buckley, *Liability in Tort for Breach of Statutory Duty*, 100 L.Q. REV. 204 (1984); Fricke, *The Juridical Nature of the Action Upon the Statute*, 76 L.Q. REV. 240 (1960); James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95 (1950); Linden, *Tort Liability for Criminal Nonfeasance*, 44 CAN. B. REV. 25 (1966); Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); MORRIS, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949); *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914); Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MODERN L. REV. 233 (1960).

142. *Cf.* Comment, *supra* note 5:

[One] rationale for the adult activities exception in cases in which minors were driving motor vehicles has been the absence of a dualistic standard of care in state rules-of-the-road statutes. While it is certainly correct that separate standards for children and adults do not exist, the opinions employing this argument lack clarity as to the relevance of their absence to court-made negligence law. Indeed, the law generally is replete with special standards for children.

Id. at 771 (footnotes omitted).

143. 35 ALB. L. REV. 606, 611 (1971) (footnotes omitted).

least some way towards neutralizing the sometimes rather facile invocations of negligence per se as a rationale for the imposition of an adult standard of care on minor drivers.

E. The Responsibilities of Maturity Rationale

Let us now consider a weaker argument which has been put forward in favor of the adult activities doctrine. It is that "when the rights of adulthood are granted, the responsibilities of maturity should also accompany them."¹⁴⁴ This argument has force to the extent that it is reasonable to expect of teenagers that they be conscious of the need to take care where the activity in which they engage is dangerous. But children do not become any more mature simply because they are permitted to engage in dangerous activities.

The concept of granting the rights of adulthood merits closer examination. Possibly the issuance of a driver's license may be regarded in this light, but no court or commentator has argued that the adult activities doctrine should be limited to licensed drivers: indeed, the absence of a license has not deterred the courts from imposing an adult standard of care.¹⁴⁵

If the adult activities doctrine can be justified, it seems a dubious strategy to rest this justification, even in part, on the grant of adult rights. There are simply too many cases involving teenage joyriders and children driving in defiance of parental instructions to give any substantive credibility to this approach.

IV. CONCEPTUAL ANALYSIS

Let us turn to consider the actual concept of an adult activity. Whatever the strengths or weaknesses of the various policy rationales for the doctrine, if the actual criteria for determining what is an adult activity are not sound, then we must hesitate before endorsing the doctrine.

According to the second Restatement of Torts, two elements

144. A. LINDEN, *supra* note 101, at 33; *cf. The Minor Motorist, supra* note 6, at 111: "When a minor assumes responsibility for the operation of so potentially dangerous an instrument as an automobile, he should 'put off the things of a child,' and assume responsibility for its *careful* and *safe* operation in the light of adult standards." *Id.* (emphasis in original); *see also* Adams v. Lopez, 75 N.M. 503, 507, 407 P.2d 50, 52 (1965); Galiher, *supra* note 6, at 667.

145. *See, e.g.,* Betzold v. Erickson, 35 Ill. App. 2d 203, 182 N.E.2d 342 (1962).

must be established before an activity is considered to be an adult one. First, it must be one which is "normally undertaken only by adults";¹⁴⁶ second, it must be one "for which adult qualifications are required."¹⁴⁷ These two requirements appear reasonably satisfactory when they are prescribed in combination, but they are far less convincing when considered in isolation. The first requirement has been criticised even by proponents of the doctrine. Thus, the Arkansas Trial Lawyers Association, as amicus curiae in *Purtle v. Shelton*,¹⁴⁸ suggested that this requirement was

difficult in application. It centers the inquiry on what is in reality an artificial issue. Whether only adults normally engage in such an activity . . . bears little relationship to its propensity for danger to others. Certainly one faced with danger by the activity of another does not worry whether the activity is normally engaged in only by adults.¹⁴⁹

Moreover, in cases applying the adult activities doctrine, courts on occasion have adopted a directly contrary policy analysis. Thus, in *Neumann v. Shlansky*,¹⁵⁰ when imposing an adult standard on an eleven-year-old golfer, the court stressed that it was "not uncommon today that teenagers are outstanding amateur golfers Members of high school teams in this area regularly shoot scores of championship caliber, as do competitors in 'junior' golf."¹⁵¹

It is difficult from any standpoint to justify the rationale for the requirement that the activity be one normally undertaken only by adults. Could it be to ensure that the activity is in fact one for which adult qualifications are required? If this is the

146. RESTATEMENT (SECOND) OF TORTS § 283A comment c (1965).

147. *Id.*

148. 251 Ark. 519, 474 S.W.2d 123 (1971).

149. Brief for The Arkansas Trial Lawyers Association as Amicus Curiae, *Purtle v. Shelton*, 241 Ark. 519, 474 S.W.2d 123 (1971), *quoted in* 27 ARK. L. REV. 243, 247 (1972).

150. 58 Misc. 2d 128, 294 N.Y.S.2d 628 (Cty. Ct. 1968), *aff'd*, 63 Misc. 2d 587, 312 N.Y.S.2d 947 (App. Term 1970), *aff'd*, 36 A.D.2d 540, 318 N.Y.S.2d 925 (1971).

151. 58 Misc. 2d at 134, 294 N.Y.S.2d at 635; *see also* 20 SYRACUSE L. REV. 823, 826 (1969) (discussion of *Neumann*). Commentators who are proponents of the adult standard have also invoked the large numbers of minors participating in activities of an adult nature as a reason for imposing, rather than declining to impose, the adult standard of care. *See, e.g.*, Galihier, *supra* note 6, at 659; Comment, *supra* note 33, at 703; *cf. id.* at 708 (conceding that "'adult activity' may not seem a proper term for all of the activities in which" an adult standard will be imposed on a minor).

object, it fails on two counts. It confuses the rule with its proof and gratuitously creates anomalies.

The second element, that the activity be one for which adult qualifications are required, may seem at first sight to be a reasonable one. Yet on further examination it appears to suffer from a considerable degree of ambiguity. Most striking is the notion of qualifications. This suggests, but does not explicitly require, a public or societal endorsement of the capacity of the individual concerned.¹⁵² One thinks immediately of professional qualifications and, by way of extension, licensing qualifications.¹⁵³ Yet it is clear from the decisions that the doctrine is not premised on such an endorsement. The decisions dealing with driver's licenses lend but partial support to this interpretation.

Another interpretation of adult qualification would be that the term seeks to bring out the need for maturity and skill, hallmarks of adulthood, which certain activities require. If this is what the term means, one may wonder why the proponents of the doctrine are content simply to impose an adult standard

152. Cf. BLACK'S LAW DICTIONARY 1116 (5th ed. 1979), which defines "qualification" as "[t]he possession by an individual of the qualities, properties, or circumstances, natural or adventitious, which are inherently or legally necessary to render him eligible to fill an office or to perform a public duty or function."

153. Cf. RESTATEMENT (SECOND) TORTS § 283A comment c, which states of a child engaging in an adult activity:

As in the case of one entering upon a professional activity which requires special skill . . . he may be held to the standard of adult skill, knowledge, and competence, and no allowance may be made for his immaturity. Thus, for example, if a boy of fourteen were to attempt to fly an airplane, his age and inexperience would not excuse him from liability for flying it in a negligent manner. The same may be true where the child drives an automobile.

Id. This passage is of considerable interest since it adds force to the belief that the word "qualification" is indeed intended to suggest something more than simple capacity. The comment stresses at the outset an analogy with persons entering upon a professional activity which requires special skill, yet makes no attempt to explain why this analogy is a helpful one.

It is doubtful whether in fact it is. One reason why the standard of care of a professional person is more objective than that of the reasonable adult person is that, in practicing as a professional, an individual holds himself or herself out as having a certain objectively determined degree of competence. Cf. *Lewis v. Soriano*, 374 So. 2d 829 (Miss. 1979). There is but a tenuous parallel between this element of "holding out" and a minor's "representation" of himself or herself as having an adult degree of care. Whatever credibility this analogy may have in regard to driving, when the fact that a child is at the wheel may not be apparent to other road users, it has far less credibility in relation to many activities off the highway. An 11-year-old golfer surely does not "represent" that he or she has an adult degree of competence, and other golfers would indeed be rash to come to this conclusion.

of care on minors engaging in these activities. If these activities really require an adult's maturity and skill, then it is difficult to see why children should be permitted to engage in them at all. Is not the true position that adulthood is not a factual precondition of capacity to engage in these activities, but simply that these activities require a high degree of care, which many minors can attain relatively easily but some do not?¹⁵⁴ It would be convenient for the proponents of the doctrine if some psychological threshold based on age could be postulated, but if we think of golf, for example, it makes no sense to approach the capacity question in these terms.

It is worth examining a particular aspect of the adult activity concept that seems to embarrass its proponents. This relates to the situation in which a young child, neither a teenager nor a toddler, performs the adult activity. Should the adult standard apply to this child? If so, what are the policy implications? If not, why not?

So far we have seen only glimpses of this problem in either the decisions or the academic analysis. It will be recalled that in *Neumann v. Shlansky*, the court observed, "It may be true that, hypothetically, a six-year-old could appear on the [golf] course for the first time and hit a ball which would hurt someone and the objective standard might not be applicable, but that would be the exception rather than the rule."¹⁵⁵ In the New York decision of *Smedley v. Piazzolla*,¹⁵⁶ in 1977, a three-year-old child interfered with the controls of a car, causing it to go into motion. The court declined to apply the adult standard of care. The memorandum of the court stated:

The cases which set forth [this] rule deal with minors who have knowingly and intentionally driven an automobile or participated in other activities. In the instant case there is no claim that the infant defendant, who was not yet four years old at the time of the accident, operated the car in the true sense of the word, or that he was capable of doing so at

154. The adult activities doctrine has at least had the beneficial effect of raising the issue as to whether it is desirable to permit young teenagers to drive on the highway. If, as the doctrine appears to accept, driving calls for a high degree of maturity, perhaps the better approach might be to raise the minimum age of eligibility for a driving license.

155. 58 Misc. 2d 128, 134, 294 N.Y.S.2d 628, 635 (Cty. Ct. 1968), *aff'd*, 63 Misc. 2d 587, 312 N.Y.S.2d 951 (App. Term 1970), *aff'd*, 34 A.D.2d 1016, 318 N.Y.S.2d 925 (1971).

156. 59 A.D.2d 940, 399 N.Y.S.2d 460 (1977).

his age. At most he might have released the emergency brake or placed the car in gear. This is not the kind of case that the courts had in mind when they held that an infant may be held to the adult standard.¹⁵⁷

One suspects that the court may have been relieved that the young child had not in fact driven the car: the imposition of an adult standard of care seems even instinctively to be quite inappropriate. When we examine our instinctive responses, we can gain some insight into the true basis of the adult activities doctrine. Is not the real reason why a young child should not be held to an adult standard that, unlike the teenager, he or she normally will have no substantial awareness of the dangers of the activity; the need for caution; and the obligation, if lacking competence, to refrain from the activity or, in the alternative, the knowledge that he or she will be held accountable for his or her negligence? If this is so, the true rationale of the doctrine is far more modest, but equally more convincing, than many of its proponents would have us believe. For there is a great deal to be said in favor of holding teenagers to a high degree of appreciation of the dangers of the highway and of their obligation to take care when driving cars and other vehicles. Indeed, on this view, there is much to be said in favor of holding teenage cyclists to a very high degree of care, higher than has been apparent in many of the decisions. The question of the appropriate standard of care of teenage cyclists has little, if anything, to do with whether cycling is an activity normally engaged in only by adults.

CONCLUDING OBSERVATIONS

Our analysis of the adult activities doctrine suggests that it is based on questionable policy rationales and that its conceptual structure is ambiguous and arbitrary. Why, therefore, should the doctrine have taken such a hold? Possibly judicial concern for the victims of injury on the highway explains a great deal; but the easy equivalence of an adult standard of care with all adult activities must have calmed the apprehension of many judges who would otherwise have been disturbed about imposing a standard on children which they are unable to attain. The doctrine affords a facile answer to the problems of teenage drivers but loses its credibility once the activity moves from the

157. *Id.* (citation omitted).

highway. The policy questions will not go away if the doctrine is set aside, but at least they may be confronted clearly without the mediation of a doctrine which should never have been permitted to entwine itself so noxiously among the general principles of liability in negligence law.