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> A rule that age, not sense; years, not intelligence; length of life, not experience, should govern responsibility for human action is unsound and should be discarded.[1]

INTRODUCTION

Allison and Kathy are in kindergarten. One afternoon, Kathy comes to play at Allison's house, where Allison shows Kathy a trick she learned from her older brothers: A Bic lighter and a can of hairspray make a fun "blow torch" effect. Allison has played this "game" several times, and she once had a brief scare when a small pile of leaves caught fire. When Allison's parents discovered the fire, they scolded her and told her never to play with fire again. Allison did not heed the warning. Tragically, on the day that Kathy comes to play, the girls set Allison's tree house on fire and both girls are severely burned. They each sue the hair spray manufacturer for failing to provide a child-proof can. In its defense, the manufacturer argues its liability, if any, should be reduced by the amount of the girls' comparative negligence. Allison, however, is two months younger than Kathy and was only 4 years, 11 months, 29 days old as of the day of the accident. Citing the rule that a child below the age of five is *incapable* of exercising any degree of care for her own safety,[2] Allison argues that, due to her age, she cannot be charged with comparative negligence.

Is Allison's position correct? Must the issue of 5-year-old Kathy's comparative fault go to the jury, while Allison is immune from any examination of her own conduct? This Article discusses past legal precedent and modern theories of child psychology bearing on the issue of the appropriate standard of care required of young children.

Part I presents the various policy rationales implicated in the determination of the standard of care required of minors.[3] No court

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1. Tyler v. Weed, 280 N.W. 827, 840 (Mich. 1938) (Potter, J., dissenting).
2. Yarborough v. Berner, 467 S.W.2d 188, 190 (Tex. 1971); Christian v. Goodwin, 188 Cal. App. 2d 650, 655, 10 Cal. Rptr. 507, 510 (1961).
3. *See infra* notes 11-158 and accompanying text.

or legal commentator has explicitly articulated a theory of child development to support an analysis of the appropriate standard of care the law should exact from children. Part I of this Article represents a first attempt to do so. Modern research in child psychology suggests that young children have the capacity to act negligently in situations with which they are familiar and that children vary widely in this capacity.[4]

Moreover, the article examines the "law and economics" view of tort law which suggests that a legal rule recognizing young children's capacity for negligence will cause caregivers to refrain from socializing their child about safety in order to reduce the child's liability exposure. This contention, however, is not supported by the research in child psychology.[5]

Part I also explores the notion that age-based presumptions of incapacity are justified on the ground that they promote judicial economy,[6] and concludes that a rule based on expediency which ignores the findings in child psychology is manifestly unfair. It imposes different standards of care on children of similar capacity, unjustly denies recovery to plaintiffs injured by minors, and, in contravention of principles of comparative fault, requires a party partially at fault for injuries to pay one hundred percent of damages.

Part II introduces the two existing judicial approaches to the problem of children and negligence.[7] First, the Illinois rule looks no further than a minor's age to determine capacity and sets an arbitrary age (usually seven) below which children are considered incapable of negligence as a matter of law. In contrast, courts that have adopted the Massachusetts rule have balked at setting a "bright line" age which conclusively determines a child's capacity for negligence. These courts look to the particular circumstances of each case or the particular child's knowledge and experience to determine the standard of care required of minors. The Illinois rule

4. *See infra* notes 52-114 and accompanying text.
5. *See infra* notes 115-132 and accompanying text.
6. *See infra* notes 133-158 and accompanying text.
7. *See infra* notes 159-207 and accompanying text.

is inconsistent with theory and research in child psychology, while the Massachusetts rule comports with sound theories of child development. Part II shows that there is much confusion in the case law that is attributable to the different assumptions regarding child development embraced by courts.[8] Courts erroneously interpret decisions which declare young minors incapable of negligence as holding that *all* children of the child's age are incapable of negligence in *all* circumstances. Courts also mistakenly overlook or narrowly apply decisions which suggest there cannot be an arbitrary age of discretion below which minors are conclusively deemed incapable of negligence.

Part III presents the development of the law in California as an illustration of the problems that plague this area of negligence law.[9] Early California case law endorsed the flexible Massachusetts rule. The supreme court and the courts of appeal established a formula that was workable and which effectively and fairly dealt with a wide range of factual situations involving minors. By endorsing a subjective standard of care and rejecting arbitrary rules which fix an age of discretion without regard to the circumstances of each case, California courts rejected attempts by minor plaintiffs to absolve themselves of a duty of due care on the basis of age in instances where there was sufficient evidence of capacity. At the same time, California courts declined to hold a minor liable for contributory negligence in the absence of sufficient evidence showing that the child had the capacity for exercising due care. Over time, however, unanimity among the courts on the issue of the standard of care required of children dissipated. New rules of negligence law emerged which relieved some minors of any duty of due care for their own or others' safety on the basis of chronological age alone, regardless of the minor's knowledge and experience. As such, California has applied *both* the Illinois and Massachusetts rules to children of the same age, therefore embracing conflicting legal rules and inconsistent theories of child psychology.

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8. *See infra* notes 188-207 and accompanying text.
9. *See infra* notes 208-337 and accompanying text.

Finally, Part IV offers a proposal for courts which fairly resolves disputes involving young children charged with negligence.[10] Drawing from the findings in child psychology, the proposed approach protects children from unreasonable liability standards while holding them accountable for their actions where the facts justify it.

I. THE PUBLIC POLICIES WHICH INFLUENCE THE STANDARD OF CARE REQUIRED OF MINORS

An adult's conduct is measured by an objective "reasonable person" standard, whereby the adult's knowledge and experience is irrelevant to whether he acted negligently.[11] In contrast, it was long ago recognized that children should be held to a less stringent standard of care than competent adults.[12] Subjective factors are critical in cases involving minors, and courts have applied a standard of care that is part subjective and part objective. The subjective component tests whether the particular child had the capacity, i.e., sufficient knowledge and experience, to appreciate the risk of injury.[13] If so, the objective element of the standard tests the child's conduct against that care which a child of like age, knowledge, capacity, and experience would exercise under similar circumstances.[14]

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10. *See infra* notes 338-365 and accompanying text.

11. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 176-77 (5th ed. 1984) [hereinafter PROSSER & KEETON]. *See generally* Warren A. Seavey, *Negligence — Subjective or Objective?*, 41 HARV. L. REV. 1, 4 (1927) ("The law does not consider . . . whether one is capable of distinguishing what the community calls right from what it calls wrong; nor does it consider whether one is able to resist protecting his own interests at the expense of another's. Thus 'fault' becomes a failure to exercise the will or the improper exercise of it with reference to a standard will and a standard valuation of desireables and undesireables. There is no subjective legal fault.").

12. Harry Shulman, *The Standard of Care Required of Children*, 37 YALE L.J. 618, 618 (1928) (cases cited therein); *see also* Sioux City & Pacific R. R. Co. v. Stout, 84 U.S. 657, 660 (1874). *See generally* Annotation, *Modern Trends as to Contributory Negligence of Children*, 32 A.L.R.4th 56 (1984) (cases collected therein).

13. *See* Shulman, *supra* note 12, at 625.

14. *Id. See generally* RESTATEMENT (SECOND) OF TORTS § 464(2) (1965); PROSSER & KEETON, *supra* note 11, § 65. One commentator has advocated the adoption of a purely subjective standard against which to judge a child's conduct. Oscar S. Gray, *The Standard of Care for Children*

This standard of care, however, has not been applied to children of all ages. Consequently, minors below a certain age (usually seven) often are not required to exercise any care for their own or others' safety.[15] Various policy rationales have been advanced to justify immunizing a particular class of children from liability for negligence. Briefly, these reasons are: The inability of young children to command the requisite mental capacity for negligent conduct; the positive social consequences of insulating young children from the results of their own conduct; and the conservation of judicial resources.[16]

A. Child Psychology

Courts and commentators who have fashioned rules that set the standard of care for children have adopted certain assumptions about child psychology.[17] For example, those who endorse a conclusive presumption rule based on age only embrace the notion

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Revisited, 45 MO. L. REV. 597, 602 (1980). Under this approach, "*this child's* capacity, however it may have been limited, [should be] the standard by which the child should be judged, not the conduct or capacity of others." *Id.* (emphasis in original).

15. Harper, James and Gray have suggested that "the prevailing view is to set an age below which a child is held to be incapable of contributory negligence, regardless of whether there is a theoretical basis for considering any age as one below which contributory negligence is always impossible." FOWLER V. HARPER, ET AL., THE LAW OF TORTS § 16.8, at 438, 440-60 n.19 (2d ed. 1986) [hereinafter HARPER, ET AL.]. However, the way in which they have categorized the cases is flawed. They sought to determine which courts have found three-, four-, and five-year-olds incapable of contributory negligence. *Id.* at 437-39. This method of categorization overlooks a crucial element in all negligence cases involving minors, namely, the question whether there was *evidence* to support a charge of contributory negligence in the first place. *See infra* notes 188-207 and accompanying text (discussing this fundamental error of interpretation).

16. Absolving children from liability for negligence has also been justified by analogy to the criminal law, which refuses to hold children under seven liable for a criminal act. *See* Jones v. Strickland, 77 So. 562, 565 (Ala. 1917); Swindell v. Hellkamp, 242 So. 2d 708, 710 (Fla. 1971); Chicago City Ry. Co. v. Tuohy, 63 N.E. 997, 1003 (Ill. 1902); Dunn v. Teti, 421 A.2d 782, 784 (Pa. Super. Ct. 1980). *But see* CAL. PENAL CODE § 26 (West 1988) (children under 14 are rebuttably presumed incapable of committing a crime). The Oklahoma Supreme Court, for example, has explicitly applied a criminal statute to a civil case. *See* Strong v. Allen, 768 P.2d 369, 372 n.1 (Okla. 1989). However, this rationale has come under widespread attack on the ground that the mental capacity necessary to commit a crime is fundamentally different from the mental capacity requirement in negligence law. *See, e.g.*, PROSSER & KEETON, *supra* note 11, § 32 ("the analogy of the criminal law is certainly of dubious value where neither crime nor intent is in question").

17. *See infra* note 24 and accompanying text.

that children are impulsive, cannot foresee the consequences of their actions, and that chronological age alone is sufficient as a measure of mental capacity.[18] Conversely, proponents of a rule which bases the standard of care on knowledge, experience, *and* age recognize that children do have the capacity to inhibit impulses and foresee consequences of action, but that children vary widely in this capacity.[19] They view chronological age as an insufficient indicator of mental ability.[20]

This section analyzes these two competing portraits of children against the backdrop of modern research in child psychology. The discussion presents a brief overview of the role of psychology in constructing legal rules, highlights trends in thinking among child psychologists, reviews the modern research on a child's capacity to foresee the consequences of action and regulate behavior, and outlines the various factors in addition to age that influence a child's mental development.

1. An Overview of Psychology and the Law

In recent years, findings in psychology have made their way into various legal debates.[21] This phenomena is part of a larger trend in legal scholarship that seeks insights into resolving legal questions from academic disciplines outside the law, particularly the social sciences and humanities.[22] Few legal issues need more

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18. *See infra* notes 24 & 160-174 and accompanying text.

19. *See infra* notes 175-187 and accompanying text.

20. *Id.*

21. *See, e.g.*, Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 437-38 (1990) (citing the impact of findings in cognitive psychology on various legal debates).

22. *See, e.g.*, JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS, at xxi (1985) ("We here view social science as an analytic tool in the law, familiarity with which will heighten the lawyer's professional effectiveness and sharpen the legal scholars' insights. The principal alternative to this 'inside' perspective on the relationship of social science to law is the 'law and society' or 'sociology of law' approach which seeks to understand the functioning of 'law' as a social system."); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) (showing that Kafka's fictitious world casts a different shadow over the legitimacy of legal transactions than a view of the world based on autonomy). Recent scholarship has even looked to metamathematics. *See* Mark R. Brown & Andrew C. Greenberg, *On Formally Undecidable*

enlightenment from the social sciences, particularly psychology, than the question of the appropriate standard of care required of minors. As one commentator has noted: "Apparently there has been little attempt to investigate the question [of a child's capacity] on a factual basis by resorting to studies of child development by psychologists or educators. A 'Brandeis brief' on the subject might serve to clarify some of the presumptions and assumptions indulged by the courts."[23]

The central reason underlying the application of different standards of care for minors is the notion that very young children do not have the *capacity* for negligent conduct because minors cannot foresee the potentially dangerous consequences of their actions, are impulsive, and do not possess sufficient discretion to avoid harm.[24] Proponents of this view contend that absent the

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Propositions of Law: Legal Indeterminacy and the Implications of Metamathematics, 43 HAST. L. J. 1439, 1487 (1992) ("Gödel's proof reveals that the law cannot be a determinate formal system. Like mathematics, the law is either incomplete and must look outside itself for guidance, or it is inconsistent and contradicts itself. As a mechanical system, the law is and must be indeterminate.").

23. Annotation, *Modern Trends as to Contributory Negligence of Children*, 77 A.L.R.2d 917, 920 n.13 (1961). *Cf.* HARPER, ET AL., *supra* note 15 § 16.8, at 440 n.18; Taylor v. Bergeron, 449 P.2d 147, 150 (Or. 1969) (O'Connell, J., concurring) ("Very probably there are psychological studies throwing light upon the manner in which children of various ages can be expected to react to various circumstances involving danger but we have not been able to find them.").

24. *See* Gault v. Tablada, 400 F. Supp. 136, 140 (S.D. Miss. 1975), *aff'd*, 526 F.2d 1405 (5th Cir. 1975); Kopera v. Moschella, 400 F. Supp. 131, 135 (S.D. Miss. 1975), *aff'd*, 526 F.2d 1405 (5th Cir. 1975); Untalan v. Glass, 190 Cal. App. 2d 474, 476, 12 Cal. Rptr. 1, 2 (1961); Christian v. Goodwin, 188 Cal. App. 2d 650, 652-53, 10 Cal. Rptr. 507, 508-09 (1961); Ellis v. D'Angelo, 116 Cal. App. 2d 310, 315-16, 253 P.2d 675, 678 (1953); Benallo v. Bare, 427 P.2d 323, 324 (Colo. 1967); Tupman's Adm'r v. Schmidt, 254 S.W. 199, 200 (Ky. Ct. App. 1923); Tyler v. Weed, 280 N.W. 827, 835 (Mich. 1938); Graham v. Rolandson, 435 P.2d 263, 267 (Mont. 1967); Walston v. Greene, 102 S.E.2d 124, 126 (N.C. 1958); Holbrock v. Hamilton Distrib., Inc., 228 N.E.2d 628, 629-30 (Ohio 1967); Taylor v. Bergeron, 449 P.2d 147, 150 (Or. 1969) (O'Connell, J., concurring); Dunn v. Teti, 421 A.2d 782, 785 (Pa. Super. Ct. 1980); Kuhns v. Brugger, 135 A.2d 395, 404 (Pa. 1957); MacConnell v. Hill, 569 S.W.2d 524, 527 (Tex. Ct. App. 1978); Yarborough v. Berner, 467 S.W.2d 188, 190 (Tex. 1971); Endicott v. Rich, 348 S.E.2d 275, 277 (Va. 1986); Cox v. Hugo, 329 P.2d 467, 469 (Wash. 1958). *See also* United Zinc & Chem. Co. v. Van Britt, 258 U.S. 268, 275 (1922) (Justice Holmes commenting that children indulge temptation "as mechanical as a fish"); Maskaliunas v. Chicago & W.I.R. Co., 149 N.E. 23, 26 (Ill. 1925) (children are "as irresponsible as dumb animals"). *But see* David W. Holub, Note, *The Contributory Negligence Defense as Applied Against Children in Indiana*, 16 VAL. U. L. REV. 319, 322 (1982) ("[C]ourts have made little effort to justify giving such special consideration to children charged with contributory negligence.").

Some courts have also held that young children are *non sui juris*, which is defined as "[l]acking the legal capacity to act for oneself." BLACK'S LAW DICTIONARY 1058 (6th ed. 1990); *see* Echevarria v. United States Steel Corp., 392 F.2d 885, 888-89, 892 (7th Cir. 1968); Verni v. Johnson, 68 N.E.2d

capacity to exercise care for one's own safety, charging children with a standard of care they cannot meet would be manifestly unfair.[25] With a few exceptions,[26] courts and legal commentators have cited no psychological authority for the proposition that young minors do not have the mental capacity for negligence. In fact, some courts have looked no further than their own "common sense" for guidance on this issue.[27] In the following discussion,

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431, 432 (N.Y. 1946); Meyer v. Inguaggiato, 16 N.Y.S.2d 672, 674 (N.Y. App. Div. 1940).

25. *See, e.g.*, Chicago City Ry. Co. v. Wilcox, 27 N.E. 899, 903 (Ill. 1891) ("To guard against an unseen danger, or one which has not come within the sphere of his observation, requires an exercise of reason and reflection of which so young a child [6-year-old] is seldom capable, and for which the law, administered on humane principles, will scarcely hold him responsible."); Note, *Contributory Negligence of Children in Indiana: Capacity and Standard of Care*, 34 IND. L.J. 511, 514 (1959) [hereinafter *Capacity and Standard of Care*] ("A child cannot be incapable of contributory negligence and still be held to a standard of care.").

26. In Tyler v. Weed, 280 N.W. 827 (Mich. 1938), the Michigan Supreme Court cited the early views of European child psychologists in support of a seven year "bright line" rule. The court commented:

> What is there in actual fact, science, or research to justify a different treatment of children under the age of seven years from those that have passed this age? One cannot fail to be impressed with the fact that these conclusions which crystalized [*sic*] centuries ago regarding the special status of a child of this age, have been confirmed by present day observers and scientists in the specialized field of child care, education and psychology. In recent times, the studies of Alfred Binet, in France, Hans Gross, in Austria, Jean Piaget, in Switzerland, and Maria Montessori, in Italy, have brought a new light upon the mysterious mind of the child, and have elucidated many of the obscure areas in the understanding of mental development and growth in infancy and adolescence.
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> . . . [T]he age of seven years marks a transitional line in the mental development of children. In the copious and rich literature devoted to the subject, there repeatedly recurs the emphasis upon this age as marking the inception of thought and reason, the commencement of exchange of ideas, the beginning of concepts of justice. Authorities hold that this age marks the passage from the period of self-centered speech and thought to verbal understanding and social thought and cooperation. In short, the age of seven years can be said to be the threshold over which a human being passes from the realm of imagination and dream to the world of reality and fact.

Id. at 832; *see also* Toetschinger v. Ihnot, 250 N.W.2d 204, 222 (Minn. 1977) (Yetka, J., dissenting) (same); *cf.* DeLuca v. Bowden, 329 N.E.2d 109, 112, 113 nn.2 & 3 (Ohio 1975) (Celebrezze, J., dissenting) (noting findings by child psychologists which suggest child under 7 is capable of committing an intentional tort); Gray, *supra* note 14, at 601 n.24 (citing to a 1964-1965 study of 9-12 year olds living on the Isle of Wight which concluded that "a variety of identifiable factors other than those contained in the standard judicial formulas . . . define the standard of care for children.").

27. *See* Ellis v. D'Angelo, 116 Cal. App. 2d 310, 316, 253 P.2d 675, 678 (1953) ("We are satisfied from our own common knowledge of the mental development of 4-year-old children . . . that they have not at that age developed the mental capacity for foreseeing the possibilities of their inadvertent conduct"); *see also* Christian v. Goodwin, 188 Cal. App. 2d 650, 652-53, 10 Cal. Rptr. 507, 509 (1961) (same).

we briefly review the trends in thinking among child psychologists and present research on the capacity of children to foresee the consequences of their acts and regulate their behavior in accord with rules of safety and interpersonal contact.[28]

2. *Trends in Child Psychology*

In the past twenty years, there have been fundamental changes in the way psychologists view children. Prior to the 1970s, the work of Swiss psychologist Jean Piaget was the dominant paradigm among developmental psychologists. Piaget sought to understand the developmental "laws" that affect a child's ability to reason deductively.[29] He wanted to describe the mental processes that led a child to (1) impose propositional logic on the way in which classes and relations in the physical world are comprehended, and (2) construct mental schemata that serve as guides for future interactions with the physical world.[30] Piaget's four age-based stages of development offer a detailed description of how children acquire this capacity.[31]

Central to Piaget's view of development is the child's interaction with the physical world. "[R]eality is built up by intelligence, which means that reality, as it appears to the child, is the fruit of a genuine collaboration between the mind and the world

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28. It is beyond the scope of this article to summarize the evidence in the medical literature.

29. BARBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE 3-106 (1958) [hereinafter THE GROWTH OF LOGICAL THINKING].

30. *Id.* at 335 (Piaget sought to understand what led children to "superimpose[ ] propositional logic on the logic of classes and relations" and to "control . . . operational schemata which [the child] will use repeatedly in experimental and logico-mathematical thinking.").

31. According to Piaget's theory, the *sensorimotor* period begins at birth and proceeds to age 2. In this stage, children develop the cognitive ability to understand the physical world by interacting with it. During the *preoperational* period--ages 2 through 7--children acquire certain representational skills such as language, mental imagery, and drawing but can only view the world from their own perspective. In the *concrete operational* period, children between 7 and 11 are able to assume another person's point of view and solve problems involving concrete objects, but are not yet capable of considering all logically possible outcomes nor comprehend abstract concepts. Finally, in the *formal operational* period children aged 11 and older are able to reason logically and understand theoretical as well as concrete possibilities. *See* THE GROWTH OF LOGICAL THINKING, *supra* note 29, at 342-50.

around it."[32] Piaget thought that the physical world was comprised of logical relations, and that, by acting within this logical sphere, a child acquires the capacity for logical thinking.[33] For Piaget, a child reaches the cognitive milestone of deductive reasoning at about the age of fourteen or fifteen.[34]

Moreover, for Piaget, children under the age of seven adhere to "childish notions" of the world because they do not understand the objective relations underlying physical occurrences.[35] For instance, Piaget explained a child's failure to understand certain physical phenomena in this way:

> For to do no more than combine the data supplied by immediate perception is to forget the part played in perception by the self or by the personal point of view: it is, therefore, to take a false absolute instead of objective relations as a foundation for reasoning. Thus when a child says that a boat floats because it is heavy, he does so because, in his mind, the weight of the boat has not been compared to its volume nor to the weight of the water, but has been evaluated as a function of the subject's own point of view, taken as absolute. In the same way all those instances of reasoning which bear upon the concepts of force, life, and movement, will be found to contain false absolutes, mere pre-relations, simply because the laws of physics have not been desubjectified.[36]

In other words, Piaget believed that children under the age of seven are incapable of understanding the physical world because they have not grasped the conceptual underpinnings of physical phenomena. From the perspective of a young child, "[t]he concepts of life, of weight, of force, of movement, etc., are not concepts properly so called, they are not defined by means of exact logical

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32. JEAN PIAGET, THE CHILD'S CONCEPTION OF PHYSICAL CAUSALITY 256 (1951) [hereinafter THE CHILD'S CONCEPTION OF CAUSALITY]; *see also id.* at 272 (understanding causality "is the result of a sort of bodily contact between the organism and the world, which is prior to consciousness of self . . .").

33. JEAN PIAGET & BARBEL INHELDER, THE CHILD'S CONCEPTION OF SPACE 454-57 (1948) [hereinafter THE CHILD'S CONCEPTION OF SPACE].

34. THE GROWTH OF LOGICAL THINKING, *supra* note 29, at 335.

35. THE CHILD'S CONCEPTION OF CAUSALITY, *supra* note 32, at 253.

36. *Id.* at 293.

additions or multiplications."[37] As a result, Piaget believed children under seven are unable to foresee the consequences of action because they are incapable of "hypothetico-deductive reasoning."[38] A young child cannot plan his behavior because he is "not able to handle the complete range of interpropositional operations; as a result, even though he may observe the genesis of implication, exclusion, etc., we do not yet find him able to organize a systematic proof conforming to the schema 'all other things being equal'. . . ."[39] In addition, from Piaget's perspective, the capacity to grasp these concepts is an all-or-nothing proposition: Either a child is capable of understanding objective relations and using this knowledge to behave intelligently across all tasks and situations or the child is not.[40]

Piaget's views have been challenged by cognitive psychologists who question his basic assumption that intelligent thought and action require that a child have the capacity to reason deductively. A host of researchers have disputed Piaget's conclusions about young childrens' understanding of a variety of phenomena.[41] Critics of Piaget have noted, for example, that a child need not grasp the concept of physics to understand cause-effect relationships.[42] In addition, cognitive psychologists have contested Piaget's belief that mental capacity is an all-or-nothing phenomena. Rather than view competence as consistent across task domains, researchers have asserted that "[c]ognitive development . . .

37. *Id.* at 292.

38. THE GROWTH OF LOGICAL THINKING, *supra* note 29, at 56.

39. *Id.*

40. *See, e.g.*, THE CHILD'S CONCEPTION OF CAUSALITY, *supra* note 32, at 258-73 (discussing the rigid stages of development that lead a child to reason causally); *see also* ROBERT S. SIEGLER, CHILDREN'S THINKING 54 (1986) [hereinafter CHILDREN'S THINKING] ("Within Piaget's theory, an 8-year-old ideally would grasp all concrete-operations-level concepts — conservation of liquid quantity, class inclusion, seriation, and so on — and would fail to grasp all formal-operations-level concepts — thinking in terms of all possible combinations, conserving motion, and so on.").

41. CHILDREN'S THINKING, *supra* note 40, at 52-3.

42. Merry Bullock et al., *The Development of Causal Reasoning, in* THE DEVELOPMENTAL PSYCHOLOGY OF TIME 209, 219 (William J. Friedman ed., 1982) ("without precise knowledge of elementary physics, explanations will be less precise and, according to the Piagetian position, less advanced developmentally").

involve[s] advances in skills and knowledge in particular domains, rather than increases in general capacity."[43]

Moreover, cognitive psychologists have objected to age-based descriptions of cognitive capacity.[44] These child psychologists recognize that children vary widely in their mental development and do not move magically from one developmental stage to another simply because they have celebrated a birthday.[45] Critics of Piaget argue he paid scant attention to individual differences in the rate of progress through the stages of development,[46] greatly underestimated children's capacity for understanding and learning ability,[47] and "devoted little attention to the role of the social world in providing structure to reality or in helping the child make sense of it."[48] Unlike Piaget, who assumed children's thinking was qualitatively and structurally different from that of an adult,[49] cognitive psychologists presume that the *structure* of children's thinking is identical to adults and that differences in capacity are

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43. BARBARA ROGOFF, APPRENTICESHIP IN THINKING: COGNITIVE DEVELOPMENT IN SOCIAL CONTEXT 6 (1990) [hereinafter APPRENTICESHIP IN THINKING]; *see also* JOHN R. ANDERSON, COGNITIVE PSYCHOLOGY AND ITS IMPLICATIONS 416 (2d ed. 1985) ("the improvement in children's intellectual abilities depend[s] upon increased knowledge of what to do rather than increased ability to do it").

44. ANDERSON, *supra* note 43, at 403, 421 ("Obviously a child does not suddenly change on an 11th birthday from [one stage to another]. There are large differences among children and cultures, and the ages given are just rough figures.").

45. *Id.*

46. ELEANOR E. MACCOBY, SOCIAL DEVELOPMENT: PSYCHOLOGICAL GROWTH AND THE PARENT-CHILD RELATIONSHIP 21 (1980) (Piaget "paid little attention to individual differences in rates of progress through the developmental stages").

47. CHILDREN'S THINKING, *supra* note 40, at 53, 56 ("Piaget's observations . . . tend to underestimate children's understanding."); *cf.* Iris Levin, *The Development of Time Concepts in Young Children: Reasoning about Duration*, 48 CHILD DEV. 435, 442-43 (1977) (a change in the characteristics of the experiment showed that 5-year-olds had a better understanding of time than Piaget assumed); JEROME KAGAN, THE NATURE OF THE CHILD 234 (1984) (same; involving a 6-year-old).

The methodology used to test a child's mental capacity also changed. Piaget's data consisted primarily of childrens' *verbal* responses. *See, e.g.*, THE CHILD'S CONCEPTION OF CAUSALITY, *supra* note 32, at 1. Over time, however, researchers discovered that incompetency on Piagetian tasks resulted more from a lack of verbal skills than a deficiency in mental ability. *See* Bullock et al., *supra* note 42, at 219 ("there always remains the distinct possibility that children's poor explanations reflect their limited verbal skills, and/or inadequate understanding of what constitutes a good or satisfactory explanation [of causality]").

48. APPRENTICESHIP IN THINKING, *supra* note 43, at 5.

49. *See* THE CHILD'S CONCEPTION OF CAUSALITY, *supra* note 32, at 253-54.

due to the child's limited grasp of language, knowledge, and experience rather than some inherent defect or immaturity in thought processes.[50] Accordingly, new understandings of childrens' cognitive ability have challenged the old view that children are incapable of understanding their environments or behaving in an intelligent manner. Indeed, "[d]iscoveries of unsuspected cognitive strengths in infants and young children have been one of *the* leading stories in the recent study of cognitive development."[51]

3. *The Modern View of Planning: The Capacity to Foresee and Avoid the Harmful Consequences of One's Actions*

Viewed from the standpoint of cognitive psychology, very young children are more sophisticated in their thinking than previously assumed. Cognitive psychologists who have studied the mental processes necessary for negligent conduct have found that

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50. *See* Bullock et al., *supra* note 42, at 218-21, 251. *Compare* Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989) (arguing that jurors use scripts and schemas to interpret evidence and decide cases) *with* Katherine Nelson, *Social Cognition in a Script Framework*, *in* SOCIAL COGNITIVE DEVELOPMENT: FRONTIERS AND POSSIBLE FUTURES 97, 116 (John H. Flavell & Lee Ross eds., 1981) ("children's knowledge of the social world is script based") *and* Ellin Kofsky Scholnick, *Why are new Trends in Conceptual Representation a Challenge to Piaget's Theory?*, *in* NEW TRENDS IN CONCEPTUAL REPRESENTATION: CHALLENGES TO PIAGET'S THEORY 41, 52-7 (Ellin Kofsky Scholnick ed., 1983) (children employ schemata in processing information).

Piaget also used the concept of a schema to describe mental development and reasoned that a schema of action "is an internalized act of imitation, a copy or transfer, not of the object as such, but of the motor response required to bring action to bear upon the object." THE CHILD'S CONCEPTION OF SPACE, *supra* note 33, at 294. Piaget's use of the concept, however, differs significantly from the way in which it is used in cognitive psychology. *See* Nelson, *supra*, at 100 ("The particular level of knowledge about the world, particularly the social world, that the current use of schemata is meant to capture, is neglected in Piaget's conception, for the very reason that Piaget is concerned with the child's construction of a logically consistent knowledge system, and such a system does not well describe the social relationships that the child is engaging in [citations].").

51. CHILDREN'S THINKING, *supra* note 40, at 52 (original emphasis); *see also* Rochel Gelman, *Cognitive Development*, 29 ANN. REV. PSYCHOL. 297, 298-319 (1978) (presenting studies that dispute the traditional view that children under 5 are "remarkably inept"); *cf.* Karen Wynn, *Addition and Subtraction by Human Infants*, 358 NATURE 749, 750 (1992) ("The results from the three experiments support the claim that 5-month-old human infants are able to calculate the precise results of simple arithmetical operations.").

young children *can* foresee the consequences of their actions.[52] An area of child research especially applicable to the question of whether children have the capacity for negligence is the ability of children to *plan*, which is broadly defined as "a set of complex conceptual activities that anticipate and regulate behavior."[53] To plan, then, is to understand and anticipate the causal connection between actions and outcomes.[54] Accordingly, if young children have the capacity to plan, then they have the capacity to foresee the consequences of their actions.[55]

There are three key ingredients to planning: A child must (1) have the ability to understand cause and effect relationships in the physical world; (2) believe that actions produce outcomes in the physical world; and (3) have the ability to exercise self-regulation.[56] These three factors will be discussed in the following sections.

a. Recognition of cause and effect

For a child to have the capacity to plan, the child must understand that causes precede their effects.[57] Some courts which have endorsed a rule declaring young children incapable of

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52. *See infra* notes 57-96 and accompanying text.

53. Ellin Kofsky Scholnick & Sarah L. Friedman, *The Planning Construct in the Psychological Literature, in* BLUEPRINTS FOR THINKING: THE ROLE OF PLANNING IN COGNITIVE DEVELOPMENT 3 (Sarah L. Friedman et al. eds., 1987) [hereinafter *The Planning Construct*]; *see also* Henry W. Wellman et al., *The Early Development of Planning, in* CHILDREN'S SEARCHING: THE DEVELOPMENT OF SEARCH SKILL AND SPATIAL REPRESENTATION 123, 126 (Henry M. Wellman ed., 1985) (planning "requires evidence of looking ahead").

54. Rodney R. Cocking & Carol E. Copple, *Social Influences on Representational Awareness: Plans for Representing and Plans as Representation, in* BLUEPRINTS FOR THINKING: THE ROLE OF PLANNING IN COGNITIVE DEVELOPMENT 428 (Sarah L. Friedman et al. eds., 1987).

55. The definition of planning is the same as the legal definition of foreseeability, which is "[t]he ability to see or know in advance." BLACK'S LAW DICTIONARY 649 (6th ed. 1990).

56. *The Planning Construct, supra* note 53, at 6 ("Several planning theorists claim that the content of plans is determined by a person's model of physical and psychological causation."); *see id.* at 17 ("The motivation to plan has to be coupled with the capacity for self-control and self-regulation if planning is to occur").

57. Ellin Kofsky Scholnick & Sarah L. Friedman, *Planning in Context: Developmental and Situational Considerations*, ____ INT'L J. BEHAV. DEV. (forthcoming 1993) (manuscript at 24, on file with authors) [hereinafter *Planning in Context*] ("Planning depends on having an adequate causal model of a domain.").

exercising due care for their safety have asserted that "[c]hildren are necessarily lacking in the knowledge of physical causes and effects."[58] This is the view articulated by Piaget.[59] However, modern research in child psychology shows that young children do understand cause-effect relationships.[60] And, most importantly, as a child's environment requires more complex causal reasoning, the child's capacity to make accurate cause-effect judgments depends upon his familiarity with the given situation.[61] "[Y]oung children can be reasonable about their choice of possible causes, that they do assume that a mechanism of some kind relates cause to effect, that they do recognize that causes precede their effects . . .

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58. Bagdad Land & Lumber Co. v. Boyette, 140 So. 798, 800 (Fla. 1932); Taylor v. Bergeron, 449 P.2d 147, 150 (Or. 1969) (O'Connell, J., concurring); *see, e.g.*, City of Jacksonville v. Stokes, 74 So. 2d 278, 279 (Fla. 1954); Connell v. Petri, 30 So. 2d 922, 923-24 (Fla. 1947); Pendarvis v. Pfeifer, 182 So. 307, 309 (Fla. 1938); Burnett v. Allen, 154 So. 515, 519 (Fla. 1934).

59. THE CHILD'S CONCEPTION OF CAUSALITY, *supra* note 32, at 303 (Piaget found that children under 7 are "precausal" and therefore cannot understand cause-effect relationships.).

60. Bullock et al., *supra* note 42, at 251 (3-year-olds reason causally); Merry Bullock & Rochel Gelman, *Preschool Children's Assumptions About Cause and Effect: Temporal Ordering*, 50 CHILD DEV. 89, 96 (1979) ("We conclude from this study that children as young as 3 years notice and use temporal order when reasoning about a mechanical sequence of events"); Frank Keil, *The Development of the Young Child's Ability to Anticipate the Outcomes of Simple Causal Events*, 50 CHILD DEV. 455, 460 (1979) (1½- and 2½- year-olds understand simple causal events.); Anna Kun, *Evidence for Preschoolers' Understanding of Causal Direction in Extended Causal Sequences*, 49 CHILD DEV. 218, 221 (1978) ("[T]he present investigation strikingly demonstrates that . . . the notion that causes precede their effects in time is clearly comprehended by children as young as 3 years of age."); Alan M. Leslie, *Spatiotemporal Continuity and the Perception of Causality in Infants*, 13 PERCEPTION 287, 303 (1984) ("So far the evidence suggests that infants around 7 months of age encode various degrees of spatiotemporal continuity or discontinuity between two moving entities."); Lisa M. Oakes & Leslie B. Cohen, *Infant Perception of a Causal Event*, 5 COGNITIVE DEV. 193, 205 (1990) (10-month-olds perceive causal events); *see also* Barbara A. Younger & Leslie B. Cohen, *Developmental Change in Infants' Perception of Correlations among Attributes*, 57 CHILD DEV. 803, 810 (1986) ("10-month-old infants [process correlations among attributes]").

61. *See, e.g.*, Bullock et al., *supra* note 42, at 251 ("[T]he development of causal understanding is more a process of learning where, when, and how to apply the rules of reasoning rather than figuring out what those rules might be."); Bullock & Gelman, *supra* note 60, at 96 (study of 3- to 5- year-olds; "young children need considerable experience with unfamiliar events before they will render confident [cause-effect] judgments"); Keil, *supra* note 60, at 460 (study of 1½- and 2½- year-olds concludes that "to understand increasingly complex physical events, the child must have a *prior knowledge* of each of the conceptual components of such events") (emphasis added). *See generally* Michael D. Berzonsky, *The Role of Familiarity in Children's Explanations of Physical Causality*, 42 CHILD DEV. 705, 711 (1971) (study of children between the ages of 6 years, 3 months and 7 years, 5 months, in which the authors concluded "that a child's familiarity with the objects or events he is being questioned about is a *decisive* factor in causal reasoning.") (emphasis added).

provided care is taken to use events the child might know about."[62]

b. Recognition of self as a causal actor

The child's capacity to act with due care is dependant upon his knowledge that his actions have consequences in the world. Developmental psychologists have shown that children as young as two years of age understand that their behavior has consequences in the physical and social world, and this understanding becomes more sophisticated in domains with which they are well acquainted.[63] Early in life, children begin to view themselves as causal actors within the social and physical worlds and recognize that they can 'make things happen.'[64]

c. Ability to exercise self-regulation

A common view among supporters of age-based presumptions of incapacity is that young children are impulsive and cannot control their behavior in safety conscious ways.[65] As one court

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62. Gelman, *supra* note 51, at 312 (emphasis added).

63. Michael Lewis, *Ways of Knowing: Objective Self-Awareness or Consciousness*, 11 DEV. PSYCHOL. 231, 237-39 (1991) (between 8-9 months and 2½ years, the child "knows that certain actions lead to certain consequences, knows what it is like when s/he engages other people. The child knows what it is like when s/he falls"; beyond 2½ years of age, the child develops "true means-end capacity and causality. They allow the child to come to recognize these means-ends relationships and, therefore, to have . . . objective intentions.").

64. Celia A. Brownwell & Claire B. Kopp, *Common Threads, Diverse Solutions: Concluding Commentary*, 11 DEV. REV. 288, 298 (1991) ("[I]nfants begin to understand causation, to make inferences, and to represent . . . self and other as causal agents . . . 'I make things happen.' . . . By integrating across interactive and communicative experiences, the physically bounded self in a physically bounded world now becomes organized as a social and causal self in a social and causal world.").

65. *See* Chicago City Ry. Co. v. Wilcox, 27 N.E. 899, 903 (Ill. 1891); Tupman's Adm'r v. Schmidt, 254 S.W. 199, 200 (Ky. Ct. App. 1923); Kuhns v. Brugger, 135 A.2d 395, 404 (Pa. 1957); Endicott v. Rich, 348 S.E.2d 275, 277 (Va. 1986); Cox v. Hugo, 329 P.2d 467, 469 (Wash. 1958). One commentator has argued that children under the age of seven should be conclusively declared incapable of negligence because:

> While the infant may have knowledge of the possibility of injury when he runs in front of a moving trolley, the writer contends that he fails to consider the full consequences, the immediacy of the danger and the severity of the consequences. The infant acts on impulse. Seldom, if ever, does the infant stop to consider the full consequences of any act.

said: "[A] child under seven years of age is conclusively presumed to lack the capacity to manage his own affairs which includes, among other things, the capacity to look out for his own safety."[66]

Child psychologists have studied children's capacity to engage in self-regulation, which "involves flexible and adaptive control processes that can meet quickly changing situational demands."[67] If young children have the capacity for self-regulation, then they can control their impulses. Contrary to the view of courts supporting a conclusive presumption rule, child psychologists suggest that children, at a very young age, have the capacity to regulate their behavior, understand rules about safety and friendly interpersonal contact, and regulate their behavior in accord with these rules.[68]

Beginning at a very young age, children have the capacity to control their behavior in response to a caregiver request, although

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> The possibility that he may be crippled for life or even killed is not appreciated. All that concerns the infant is his present desire. Deliberation and a sensible choice of alternatives in the light of future consequences are not the attributes of one of tender years.

Louis H. Wilderman, *Presumptions Existing in Favor of the Infant Re: The Question of an Infant's Ability to be Guilty of Contributory Negligence*, 10 IND. L.J. 427, 435 (1935). Like Piaget, Wilderman's model of child psychology assumes that capacity is an all-or-nothing phenomena. Current theory and research, however, suggests capacity is context-bound and differs across tasks depending upon the child's familiarity with the situation. *See* ANDERSON, *supra* note 43, at 421; APPRENTICESHIP IN THINKING, *supra* note 43, at 6. Moreover, we question whether this "rational actor" standard of care is the appropriate one, since cognitive psychologists have shown that *adults* cannot comply with it. *See, e.g.*, Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases, in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 1982) (noting various cognitive errors that lead to errors in judgment). Even assuming adults could meet this standard of care, Wilderman's argument was really comparing the psychology of a child to that of an adult, not a 7 year, 1 day old. Thus, Wilderman's view of child psychology merely reinforces the undisputed position that children should be held to a less stringent, subjective standard of conduct. That Wilderman articulated an unrealistic standard is evidenced by the fact that only two justices of a seven member court have adopted it in the fifty-seven years since the article was published. *See* Tyler v. Weed, 280 N.W. 827, 835, 838 (Mich. 1938) (approvingly citing Wilderman's article).

66. Graham v. Rolandson, 435 P.2d 263, 267 (Mont. 1967).

67. Claire B. Kopp, *The Growth of Self-Regulation: Caregivers and Children, in* CONTEMPORARY TOPICS IN DEVELOPMENTAL PSYCHOLOGY 34, 38 (Nancy Eisenberg ed., 1987).

68. J. Heidi Gralinski & Claire B. Kopp, *Everyday Rules for Behavior: Mothers' Requests to Young Children*, ___ DEV. PSYCHOL. (forthcoming May 1993) (manuscript at 24-25, 26, 28-29, on file with authors).

voluntary regulation of action rarely occurs.[69] Over time, however, children develop the capacity to control behavior on their own and require "fewer externally mediated cues and reminders."[70] Ultimately, the child develops the capacity to exercise self regulation, which involves "recognition that an object has an association with a prohibition, an instruction to the self about that prohibition, and an action that is consonant with the instruction."[71] The ability to engage in self-regulation has been shown to occur in children as young as thirteen to fifteen months[72] and thirty months.[73] This ability emerges no later than the third year of life.[74] Young children are more likely to have the capacity to exercise self-regulation in situations they know require it.[75] For example, during peer interaction fifteen-month old children already engage in a regulatory "act/watch" process in which they pause to process feedback from their interaction.[76]

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69. Kopp, *supra* note 67, at 38 (From birth to 12 months, "children are highly dependent upon the caregiver for reminder signals about acceptable behaviors.").

70. *Id.*

71. *Id.* at 44.

72. *Id.* ("Self-initiated compliance emerges at *about* 13-15 months of age to very specific situations.") (emphasis added); Donelda J. Stayton et al., *Infant Obedience and Maternal Behavior: The Origins of Socialization Reconsidered*, 42 CHILD DEV. 1057, 1068 (1971) ("It seems likely that the conditions that foster simple compliance in the first year may also promote internalized controls in the second year.").

73. Brian E. Vaughn et al., *The Emergence and Consolidation of Self-Control from Eighteen to Thirty Months of Age: Normative Trends and Individual Differences*, 55 CHILD DEV. 990, 999, 1001 (1984) ("The advance in the capacity to delay seen as children get older is related to changes in cognitive and language abilities seen over the period from 18-30 months"; "The capacity to delay or inhibit responsiveness to attractive stimuli can be readily, though fleetingly, observed in 18 month old children.").

74. Kopp, *supra* note 67, at 45 (components of self-regulation "emerge no later than the third year of life for normally developing children who are reared in supportive environments"); *see also* Marjorie A. Reed et al., *Inhibitory Self-Control in Preschool Children*, 30 MERRILL-PALMER Q. 131, 143 (1984) ("Our data show that 3-year-olds exhibit reasonable levels of internal inhibition").

75. *See generally The Planning Construct*, *supra* note 53, at 18 ("self-regulation needs to be coupled with the other component [of planning]: knowledge of when planning helps").

76. Edward Mueller & Thomas Lucas, *A Developmental Analysis of Peer Interaction Among Toddlers*, *in* FRIENDSHIP AND PEER RELATIONS 223, 233 (Michael Lewis & Leonard A. Rosenblum eds., 1975) ("[T]he [15 month old] infant is seldom continuously active in his exploration. Instead, his actions are punctuated by pauses during which he appears to process the feedback deriving from the actions. . . . [This "act/watch" rhythm is] a regulatory pattern that the infant imposes on his interaction with various aspects of his environment.").

Researchers have also found that, in the early years of a child's life, caregivers devote much attention to ensuring the child's survival through everyday requests for compliance with rules for safety.[77] These findings are not surprising because, as a child's locomotor skills develop, he is exposed to more danger without an understanding of how to avoid such danger.[78] A rule system designed to protect the child from harm is therefore essential to the child's survival.[79]

The theoretical picture describing the acquisition of the capacity to engage in self-regulation predicts that young children do in fact regulate their behavior in safety conscious ways. Unfortunately, developmental psychologists have devoted little attention to the empirical question of whether children comply with safety rules in the absence of a caregiver request.[80] This gap of scholarship could explain the failure by litigants and courts to marshall evidence from psychology to clarify the confusion in child negligence law. Modern empirical research, however, indicates that young children *do* have the capacity to avoid harming themselves and others. A recent study demonstrated that upon mothers' demands that their thirteen-month-old child not touch dangerous things, not climb on furniture, and refrain from going into the street without holding hands, the children complied with these safety demands.[81] The authors concluded that "[a]lthough we anticipated some emphasis on safety rules because of mothers' anecdotal reports in previous research, we were unprepared for the powerful role it played in

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77. Gralinski & Kopp, *supra* note 68, at 26 (mothers demand compliance with safety rules beginning at 13 months); Kopp, *supra* note 67, at 35, 41 (teaching of child about safety usually occurs in the second and third years of life). *See generally* Leon Kuczynski et al., *A Developmental Interpretation of Young Children's Noncompliance*, 23 DEV. PSYCHOL. 799, 805 (1987) ("after the child's first year, parents begin to hold children responsible for their actions"); Thomas G. Power & M. Lynn Chapieski, *Childrearing and Impulse Control in Toddlers: A Naturalistic Investigation*, 22 DEV. PSYCHOL. 271, 274 (1986) ("during the second year of life, mothers place numerous demands on their infants for impulse control and that these demands are strictly enforced").

78. Kopp, *supra* note 67, at 41.

79. *See, e.g.*, Stayton et al., *supra* note 72, at 1066 ("As an infant moves about to investigate his world, his mother must be able to control his actions across an enlarged and often hazardous environment.").

80. Gralinski & Kopp, *supra* note 68, at 26 (maternal concerns for safety "stand in marked contrast to developmentalists' disregard for safety issues . . .").

81. *Id.* at 13.

mothers' overall rule systems."[82] Moreover, early in life, children are socialized about the rules governing interpersonal behavior and are taught to control their aggressive behavior toward adults, other children, and animals.[83] Maternal requests for compliance with safety and interpersonal rules are increased and elaborated upon as the child develops.[84]

The fact that thirteen-month-old children complied with their mothers' demands for compliance with safety and interpersonal rules is an insufficient reason to hold that young children can plan to avoid harming themselves and others because the thirteen-month-olds' compliance was motivated by the mother, not the child himself.[85] Theories of socialization, however, suggest that training a child to care for his safety and refrain from harming others is a *long-term* socialization goal that elicits caregiver-child interactions aimed at ensuring *self-initiated* behavior control.[86] This indicates that rules about personal safety and friendly interpersonal contact play a central role in caregiver-child interactions beginning early in life. While the data on the circumstances surrounding the transition from externally- to internally-motivated compliance with safety and interpersonal rules is limited, current research suggests that children between the ages of three and four "were in transition

82. *Id.* at 26.

83. *Id.* at 13.

84. *Id.* at 25-26.

85. *Id.* at 29.

86. *See, e.g.*, Margaret K. Bacon & Richard D. Ashmore, *A Consideration of the Cognitive Activities of Parents and their Role in the Socialization Process, in* THINKING ABOUT THE FAMILY: VIEWS OF PARENTS AND CHILDREN 3, 9 (Richard D. Ashmore & David M. Brodzinsky eds., 1986) (motivation to socialize children regarding dangers such as falling, drowning, or burning "appears to be universal"); Leon Kuczynski, *Socialization Goals and Mother-Child Interaction: Strategies for Long-Term and Short-Term Compliance*, 20 DEV. PSYCHOL. 1061, 1062-63 (1984) (examples of long-term socialization goals include "violations against the values or moral standards of society or behaviors that are physically dangerous"); Robert A. LeVine, *Parental Goals: A Cross-Cultural View*, 76 TCHRS. C. REC. 226, 230-31 (1974) ("[t]he physical survival and health of the child" is a universal child-rearing goal); *cf.* Joan E. Grusec & Leon Kuczynski, *Direction of Effect in Socialization: A Comparison of the Parent's Versus the Child's Behavior as Determinants of Disciplinary Techniques*, 16 DEV. PSYCHOL. 1, 7 (1980) (among caregivers, running blindly into the street is considered a universal prohibition).

from partial compliance [with safety and interpersonal rules] to compliance on one's own."[87]

Young children, therefore, have the ability to plan, *especially when they are in an environment familiar to them.*[88] The young child's knowledge must be *specific* because general knowledge or general competence would not serve as an accurate measure of the capacity for planning under the particular circumstances presented to the child.[89] Stated differently, "changes in the adequacy of planning are described as changes in expertise, growing awareness of a domain, and practice in problem solving in it."[90] Thus,

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87. Gralinski & Kopp, *supra* note 68, at 28-29; Telephone interview with Lewis P. Lipsitt, Professor of Psychology and Medical Science, Brown University (Sept. 22, 1992) (children engage in self-regulatory defensive behavior "well before" the age of five).

88. Telephone interview with Ellin Kofsky Scholnick, Professor of Psychology, University of Maryland, College Park (Aug. 13, 1992); *see* M. Beth Casey et al., *Differentiating Preschoolers' Sequential Planning Ability from their General Intelligence: A Study of Organization, Systematic Responding, and Efficiency in Young Children*, 12 J. APPLIED DEV. PSYCHOL. 19, 28 (1991) ("children as young as 4 can show evidence of an ability to implement sequential plans"); Cocking & Copple, *supra* note 54, at 441 (children between the ages of 3 years, 5 months and 4 years, 10 months planned their drawings so that other children could understand them); Alison Gopnik, *Words and Plans: Early Language and the Development of Intelligent Action*, 9 J. CHILD LANGUAGE 303, 318 (1981) ("Children between 15 and 24 months old are trying to understand the nature of intelligent action — how plans succeed or fail, how to reject certain courses of action, and how to ensure that a plan that succeeded once will succeed again"); Judith A. Hudson & Robyn Fivush, *Planning in the Preschool Years: The Emergence of Plans from General Event Knowledge*, 6 COGNITIVE DEV. 393, 414 (1991) ("This research supports the notion that children's first planning efforts emerge within the context of familiar event routines."); Linda B. Spungen & Joan F. Goodman, *Sequencing Strategies in Children 18-24 Months: Limitations Imposed by Task Complexity*, 4 J. APPLIED DEV. PSYCHOL. 109, 119 (1983) (stating that children between 18 and 30 months of age are "capable of imposing some degree of structure upon new problems"); Wellman et al., *supra* note 53, 147 ("a basic ability to plan an extended course of action emerges quite early, comes most strongly and directly from our studies of planned searches in 3-, 4-, and 5-year-olds. In these studies, the first signs of planning appeared in 3-year-olds' performance. Suggestive evidence from younger age groups in other studies . . . raises the possibility that the origins of planning competence possibly lie with 1- and 2-year-olds."); *see also The Planning Construct*, *supra* note 53, at 8 ("As in any domain of problem solving, the child will appear more expert when the plans to be generated deal with familiar circumstances"); *Planning in Context*, *supra* note 57, at 20 ("Changes in the knowledge base contribute to cognitive development. Planning uses past knowledge to guide future behavior. Different planning tasks require different kinds of knowledge and pose different impediments or supports in use of information. Planning may appear earliest in situations which call upon the use of familiar scenarios in familiar contexts.").

89. *See, e.g.*, APPRENTICESHIP IN THINKING, *supra* note 43, at 6.

90. Sarah L. Friedman et al., *Reflections on Reflections: What Planning is and how it Develops*, *in* BLUEPRINTS FOR THINKING: THE ROLE OF PLANNING IN COGNITIVE DEVELOPMENT 515, 522 (Sarah L. Friedman et al. eds., 1987); *see also id.* at 526 (young children plan "when the tasks are drawn from domains that are so familiar to children that they can give rise to anticipatory plans.

contrary to Piaget's belief that children under the age of seven cannot plan, modern research in child psychology suggests that "children's behavior during play and during problem solving suggests that children *do* engage in planning *well before* adolescence."[91] Once in a familiar environment, very young children can decide to plan, know when to plan, choose a goal, formulate a plan, and execute and monitor the plan.[92] For instance, one researcher has argued that, as young as eighteen months, a child "reflects on his own behavior and experience and constructs a model of the world which includes his own actions. This model allows him to consider hypothetical actions and to predict the outcome of those actions."[93]

The findings in child psychology also suggest that young children have the capacity to control their impulses and regulate their behavior.[94] Not only are children socialized to care for their safety and the physical well-being of others beginning at a very young age, they also have the ability to regulate their behavior in accord with these demands.[95]

Research in child psychology therefore suggests that for young children, mental capacity is context-bound so that a child of almost

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Under such circumstances, the child can represent the situation and use the representation to map strategies"); Ann L. Brown & Judy S. DeLoache, *Skills, Plans, and Self-Regulation, in* CHILDREN'S THINKING: WHAT DEVELOPS? 3, 13-14 (Robert S. Siegler ed., 1978) ("The child's initial 'passivity' in many memory and problem-solving tasks, his failure to check and monitor ongoing activities, and his failure to make his own task analysis could be the direct result of gross inexperience on such tasks. This does not mean that young children are incapable of self-regulation, only that they tend not to bring such procedures to bear immediately on new problems").

91. Friedman et al., *supra* note 90, at 525-26 (emphasis added).

92. *See supra* note 88 (listing studies showing young children have the capacity to plan).

93. Gopnik, *supra* note 88, at 314.

94. *See supra* notes 65-87 and accompanying text.

95. The developmental picture of a child's capacity to regulate his behavior in interpersonal situations is not complete. Telephone interview with Claire B. Kopp, Professor of Psychology, University of California, Los Angeles (Oct. 13, 1992). Gralinski and Kopp's research represents the only attempt to study a child's capacity to refrain from harming other children, adults, and animals. Further research is therefore necessary. *But see* Mueller & Lucas, *supra* note 76, at 233 (15 month-old children engage in "act/watch" rhythm in interpersonal interaction).

any age in a familiar situation is likely to have the capacity to foresee the consequences of his actions and regulate behavior.[96]

4. Individual Differences

A presumption of incapacity based on chronological age necessarily implies that age is a sufficient measure of a child's mental capacity. Therefore, one assumes that young children do not vary in their ability to foresee the consequences of their acts or in their capacity to regulate their behavior. It is true that not all young minors have the capacity to plan and avoid harming themselves and others. The findings reported here do not pretend to support the sweeping assertion that *all* young children are capable of negligent conduct. However, psychologists uniformly agree that there are wide individual differences between children.[97] Factors such as

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96. As with most research in psychology, the data from which the foregoing conclusions are drawn are collected under laboratory conditions. However, requirements for planning in the laboratory mirror those that children encounter in everyday situations. Telephone interview with Ellin Kofsky Scholnick, Professor of Psychology, University of Maryland, College Park (Oct. 14, 1992). The data, therefore, are reliable indicators of what a child will do outside of the controlled setting. Most importantly, however, laboratory experiments are likely to *underestimate* a child's capacity for planning because the laboratory environment is restrictive and sometimes "bloodless." *Planning in Context*, *supra* note 57, at 6. In contrast, "real life" situations contain more cues for action, more opportunities to get motivated to plan, and more mentally appetizing stimuli. *Id.* This suggests that "beliefs, attitudes, and motivations have a larger impact on the decision to plan in everyday tasks than in many laboratory problem solving situations." *Id.* at 12. *See also* Hasen, *supra* note 21, at 403-04 (addressing criticism that findings in a laboratory are insufficient to support a change in the assumptions embodied in a legal rule).

97. *See, e.g.*, *The Planning Construct*, *supra* note 53, at 4 ("planning may be optional and the decision whether or not to plan may be determined by individual differences on dimensions such as cultural or personal norms about the desirability of plans, familiarity with the context in which planning is called for, and the cognitive and motivational status of the individual"); *see also* Reed et al., *supra* note 74, at 141 ("The results of this study [of 3- to 4-year-olds] strongly support the existence of a characteristic level of inhibitory self-control that differs for each individual."); Vaughn et al., *supra* note 73, at 991 (in a study of the ability of 18- to 30-month-olds to exercise self-control, the authors concluded that "at any given age there will be a wide range in the degree to which individuals are able and/or motivated to exercise self-control"); *cf.* Rafael M. Díaz et al., *The Social Origins of Self-Regulation*, *in* VYGOTSKY AND EDUCATION: INSTRUCTIONAL IMPLICATIONS AND APPLICATIONS OF SOCIOHISTORICAL PSYCHOLOGY 127, 137 (Luis C. Moll ed., 1990) ("*It is a well-known fact* . . . that children vary in their capacity to regulate effectively different aspects of their perception, attention, memory, and problem-solving activity") (emphasis added).

the child's age,[98] previous experiences,[99] family environment,[100] cultural background,[101] mother-infant interaction,[102] peer influences,[103] television,[104] situational

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98. *See, e.g.*, Friedman et al., *supra* note 90, at 527 ("there are expected quantitative, age-related differences in planning").

99. *See Planning in Context*, *supra* note 57, at 20 ("The arenas in which this network [of goal setting] is influential may change with development, but *the nature of the network may be better characterized as a product of individual experience than of age.*").

100. *See, e.g.*, Ann V. McGillicuddy-De Lisi et al., *Familial Influences on Planning*, *in* BLUEPRINTS FOR THINKING: THE ROLE OF PLANNING IN COGNITIVE DEVELOPMENT 395, 423 (Sarah L. Friedman et al. eds., 1987) (in a study of children between the ages of 5½ and 7½, the authors concluded "the family can be viewed as the crucible for the onset and development of planning abilities. The family provides the most intensive milieu for an array of interpersonal experiences that lay the groundwork for subsequent social and individual activity."). *See generally* Bacon & Ashmore, *supra* note 86, at 13-26 (how a parent perceives a child's behavior influences how that parent interacts with and socializes the child); Luis M. Laosa, *Families as Facilitators of Children's Intellectual Development at 3 Years of Age: A Causal Analysis*, *in* FAMILIES AS LEARNING ENVIRONMENTS FOR CHILDREN 1, 4-7 (Luis M. Laosa & Irving E. Sigel eds., 1982) (family influences affecting a child's cognitive development).

101. *See generally* APPRENTICESHIP IN THINKING, *supra* note 43, at 13-18 ("the rapid development of young children into skilled participants in society is accomplished through children's routine, and often tacit, guided participation in ongoing cultural activities as they observe and participate with others in culturally organized practices. [¶] . . . [T]hrough children's everyday involvement in social life, 'lessons' regarding skilled and valued (or at least necessary) cultural activities are available to them."); Brownwell & Kopp, *supra* note 64, at 301 (recent "emphasis on the interface between social and cognitive development [among child psychologists], particularly that social contexts of development influence cognitions in formative ways, is an exciting innovation in discussion of the mechanisms underlying growth in the self system. It aptly reflects the recognition in psychology more widely that social and cultural contexts shape cognition, learning, and development."); *cf.* Ralph Barocas et al., *Social and Interpersonal Determinants of Developmental Risk*, 27 DEV. PSYCHOL. 479, 484 (1991) (In a study of 4-year-olds, the authors concluded that a "child's independent behavior is considered partly a product of the internalization of events that occur in interpersonal exchange. Thus, the opportunities and limits for much of the child's cognitive growth are defined by the world within which the child lives.").

102. *See generally* K. Alison Clarke-Stewart & Constance M. Hevey, *Longitudinal Relations in Repeated Observations of Mother-Child Interaction from 1 to 2½ Years*, 17 DEV. PSYCHOL. 127, 143 (1981) ("the results of the study revealed differences in mother-child interaction related to the child's increasing maturity"); K. Alison Clarke-Stewart et al., *Analysis and Replication of Mother-Child Relations at Two Years of Age*, 50 CHILD DEV. 777, 785 (1979) ("children's intelligence was more closely correlated with the mother's behavior — descriptive speech, positive play, nondirectiveness and nonrestrictiveness — than with her IQ or [socioeconomic status]"); Gralinski & Kopp, *supra* note 68, at 24-30 (socialization of children between the ages of 13 and 30 months is "directed toward ensuring child survival"); Laosa, *supra* note 100, at 33 (an "important discovery in this study is the *positive* influence that maternal modeling — that is, the mother's use of physical demonstration as a teaching strategy — appears to have on the child's intellectual development" (original emphasis)); *cf.* Susan Crockenberg & Cindy Litman, *Autonomy as Competence in 2-Year-Olds: Maternal Correlates of Child Defiance, Compliance, and Self-Assertion*, 26 DEV. PSYCHOL. 961, 969-71 (1990) ("strategies [of mother-child interaction] that are intrusive and power-assertive

demands,[105] and the frequency with which the child interacts with older children and adults[106] all play a role in the child's ability

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are typically ineffective in achieving a resolution that most parents would consider satisfactory, whereas strategies that combine a clear statement of what the parent wants with an acknowledgment of the child's perspective . . . are quite effective in both effecting compliance and avoiding defiance"); Cheryl Minton et al., *Maternal Control and Obedience in the Two-Year-Old*, 42 CHILD DEV. 1873, 1892 (1971) ("Lower-middle- and middle-class mothers in an urban setting are rather intrusive with their 2-year-olds, interrupting them every 6-8 minutes to remind them of behavior they should stop or a command they should heed").

103. *See, e.g.*, Cocking & Copple, *supra* note 54, at 458 ("by provoking the child to stand back from her drawing, peer critiques promote the tendency to take a reflective stance in relation to one's drawing").

Some courts have also recognized peer influences as important determinants of a child's capacity for negligence. *See* Petroski v. Northern Indiana Pub. Serv. Co., 354 N.E.2d 736, 746 (Ind. Ct. App. 1976) ("There was evidence that at least two other children had touched the upper [electric] wire prior to [plaintiff's] accident. There was evidence that several children had previously touched the bottom [electric] wire and that one child 'swang off of the lower wire one day like Tarzan.'"); Simmons v. Beauregard Parish Sch. Bd., 315 So. 2d 883, 886, 889 (La. Ct. App. 1975) ("While waiting for the school bus, [plaintiff] was apparently encouraged by other students to demonstrate his [model] volcano. [Plaintiff] in turn gave one or two demonstrations and while pouring powder for the second or third demonstrations, an explosion occurred and [plaintiff] was seriously injured."); *id.* (The court reasoned that this evidence probably led the jury to conclude that plaintiff did not "intentionally and voluntarily expose himself" to danger.) (emphasis deleted); *see* Taylor v. Armiger, 358 A.2d 883, 886 (Md. 1976) (citing testimony of parent that "when [children] are playing with another child, they may temporarily forget what they are constantly reminded of"); Guzman v. Guajardo, 761 S.W.2d 506, 510 (Tex. Ct. App. 1988) ("It thus appears that the jury's 'failure to find' negligence could have been based on that fact that [the deceased plaintiff], a seven-year-old, was following the lead of his older companions and yet was unable to react as quickly as they did when [defendant's] truck began to approach.").

104. *See generally* GEORGE COMSTOCK & HAEJUNG PARK, TELEVISION AND THE AMERICAN CHILD 139-40 (1991) ("Television . . . may contribute to what young persons believe in important ways, when it brings them information not available from alternative sources."); JUDITH VAN EVRA, TELEVISION AND CHILD DEVELOPMENT 198-99 (1990) ("Because of . . . increased access to [adult information], children are privy, at a very much younger age, to many adult behaviors that were unknown to previous generations of children at that age. Their access to adult information, however, does not bring with it, necessarily, a complete or 'adult' understanding of that information. Their ability to process and react to what they see is still constrained . . . by what they bring to the viewing situation in terms of developmental level, gender, range of experiences, socioeconomic level, perceived reality, and motivation for viewing.").

105. *See* William Gardner & Barbara Rogoff, *Children's Deliberateness of Planning According to Task Circumstances*, 26 DEV. PSYCHOL. 480, 486 (1990) (Four-year-old "[c]hildren adapted their deliberation in planning to the circumstances of the problem, suggesting that an important aspect of planning skills is adaptation of planning strategies to varying goals and tasks").

106. *See generally* APPRENTICESHIP IN THINKING, *supra* note 43, at 7-8 (children are "apprentices in thinking, active in their efforts to learn from observing and participating with peers and more skilled members of their society"); *id.* at 17 ("The infants' strategies [for learning] . . . appear similar to those appropriate for anyone learning in an unfamiliar culture: stay near a trusted guide, watch the guide's activities and get involved in the activities when possible and attend to any instruction the guide provides."); *cf. Planning in Context*, *supra* note 57, at 14 ("In tasks where the

to plan to avoid endangering themselves or others. However, no single variable is decisive in any given circumstance.[107] In particular, chronological age alone certainly cannot predict a child's capacity to plan and avoid danger or avoid harming others.[108]

5. Conclusions

The view among courts that young children are incapable of caring for their own well-being probably emerged from the influence of the developmental portrait painted by Piaget.[109] By the 1970s, however, child psychologists were uncovering cognitive strengths in young children and questioning the empirical and theoretical validity of Piaget's age-based theory of development.[110] Research in child psychology now suggests that chronological age alone is an insufficient measure of a child's

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society recognizes that advance preparation is needed, children are often taught to plan.").

107. Further research on the impact of each of these factors on a young child's ability to plan and heed warnings about safety is still necessary. The authors also suspect that preschool education has a significant impact on a child's ability to exercise due care, but were unable to locate research that discusses the relationship between schooling, planning, and self-regulation. *See, e.g.*, Honeycutt ex rel. Phillips v. Wichita, 796 P.2d 549, 558 (Kan. 1990) ("Safety habits are stressed in schools."); Toetschinger v. Ihnot, 250 N.W.2d 204, 210 (Minn. 1977) ("the exposure of young children to the hazards of daily living and to the opportunities for instruction has been increased by such developments as preschool instruction and kindergarten"). For a general discussion of the role of schools as "socializing agents," see, JOAN E. GRUSEC & HUGH LYTTON, SOCIAL DEVELOPMENT: HISTORY, THEORY, AND RESEARCH 242-51 (1988).

108. Telephone interview with John Flavell, Professor of Psychology, Stanford University (May 6, 1992). *See generally* Brown & DeLoache, *supra* note 90, at 13, 14, 30-31 ("accumulation of knowledge about how to think in an increasing array of problem situations is an outcome of experience with more and more complex problems. Young children's insensitivity to their problem-solving potential is the result of lack of exposure to such situations, rather than age per se."); Friedman et al., *supra* note 90, at 522 ("Children's cognitive skills change considerably between infancy and late adolescence owing to improvements in knowledge representation, increasing skill in knowledge acquisition, perception, and reasoning. These changes reflect maturation of component processes, exposure to schooling, and more experience with different domains."); *id.* at 533 ("Planning has many components; its evocation and application are influenced by cognitive, affective, and social factors and its content differs widely across domains"); Vaughn et al., *supra* note 73, at 999 ("Though self-control shows an age-related increase, simple age changes cannot explain these changes.").

109. *See, e.g.*, Tyler v. Weed, 280 N.W. 827, 832-33 & n.1 (Mich. 1938) (relying on Piaget as support for a rule which declared children under 7 conclusively incapable of negligence). *Tyler* was later followed by another Michigan court. Baker v. Alt, 132 N.W.2d 614, 620 (Mich. 1965).

110. ELLIN KOFSKY SCHOLNICK, NEW TRENDS IN CONCEPTUAL REPRESENTATION: CHALLENGES TO PIAGET'S THEORY? at xii (1983); CHILDREN'S THINKING, *supra* note 40, at 51-58.

capacity to foresee the consequences of action and to plan to avoid danger or refrain from harming others.[111] Some young children have the capacity to plan to avoid harming themselves in situations which they know are dangerous and the ability to plan to refrain from injuring others where they know that such behavior is not acceptable. Others do not.

A complete developmental account of a child's ability to plan and heed rules of safety and friendly interpersonal interaction has not been articulated. For instance, developmental psychologists do not yet know how frequently young children plan to avoid harming themselves and others nor the full range of safety behaviors young children are taught and follow.[112] Despite these limitations, however, emerging developmental picture supports the view that instruction on safety and friendly interpersonal contact plays a critical role in caregiver-child interactions, that young children have the capacity to follow these rules and foresee the consequences of their acts in situations familiar to them, and that there are individual differences in mental capacity among children of the same age.[113] For those unconvinced that these findings accurately portray a child's capacity for negligence, this Article serves as an

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111. *See supra* notes 97-108 and accompanying text.

112. Telephone interview with Claire B. Kopp, Professor of Psychology, University of California, Los Angeles (Oct. 13, 1992). We question whether the frequency with which young children plan to avoid harming themselves should impact the legal determination of the standard of care required of minors. All that is required to charge a minor with negligence is the *capacity* for negligent conduct and a finding of capacity is an implicit finding that young children do plan to avoid harming themselves and others.

113. Gralinski & Kopp, *supra* note 68, at 28 (finding that children complied with mothers' requests for compliance with safety and interpersonal rules); *see also supra* notes 97-108 and accompanying text (discussing the various factors affecting a child's capacity to plan and regulate behavior).

In light of recent discoveries of mental abilities once thought absent in a young child, it would not be surprising if researchers discovered that children initiate safe behaviors at a younger age. *See, e.g., supra* note 51. For example, a commentator has reasoned:

> Self-initiated compliance emerges at about 13-15 months of age to very specific situations [citations]. An example . . . involved forcefully telling [a young girl] not to touch a particular bush in the back yard (the berries from the bush are poisonous if eaten). At a later date, the child took her teddy bear to the bush and said, 'No! No!' Indeed, responses of children of this age to caregiver prohibitions often include reaching out and withdrawing or saying 'no' to themselves when they are in the vicinity of a desired object.

Kopp, *supra* note 67, at 44.

impetus for further research in this important area of child psychology.[114]

In short, a legal rule which conclusively presumes that young children are incapable of foreseeing the consequences of their acts or of controlling their impulses is not supported by theory and research in child psychology. Young children have the capacity to exercise due care in familiar situations. The standard of care required of children should, therefore, be determined on the basis of, among other factors, the child's familiarity with the specific injury-causing conduct. Consistent with the research in child psychology, prior knowledge of and experience with avoiding harm should be treated as critical indicia of a child's capacity to act with due care in the circumstances presented to him.

B. *The Potential Impact of Negligence Rules on the Conduct of Caregivers and Young Children*

Much has been written in recent years about the influence of tort law on individual behavior.[115] The "law and economics" theory of tort law posits that the tort system deters individuals from

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114. Skeptics of the conclusions advanced here may point out that it is common knowledge that adolescents frequently engage in risky behaviors and ignore warnings about safety. Thus, if knowledgeable teenagers take many risks, then less knowledgeable young children must certainly do so at an even higher rate. However, that adolescents take many risks does not necessarily imply that young children take more risks. Moreover, cognitive psychologists have shown that risk taking does not end with adolescence, but continues into adulthood. *See* Paul Slovic et al., *Fact Versus Fears: Understanding Perceived Risk*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463, 468, 478 (Daniel Kahneman et al. eds., 1982) ("Accurate perception of misleading samples of information might also be seen to underlie another apparent judgmental bias, people's predilection to view themselves as personally immune to hazards"; "misleading personal experiences may promote a false sense of security . . ."). Thus, the difference in risk taking across these three stages of life may reflect differences in the *type* of risks taken, not the frequency of their occurrence. *See, e.g.*, Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEV. REV. 1, 17-19 (1992) ("the assertion that adolescents do not consider sufficiently possible consequences in the distant future remains an interesting hypothesis for which there are yet no convincing data one way or the other. However, there is good empirical evidence [citation] that *adults* often display 'self-defeating' behavior by 'choosing immediate benefits, such as pleasure and relief, despite long-term costs of increased harm, loss or risk' [citation].") (emphasis in original). In any event, the fact that young children, like adolescents and adults, may ignore safety warnings is no reason to hold that they should be absolved of all responsibility for their own behavior.

115. *See, e.g.*, Symposium, *Alternative Compensation Schemes and Tort Theory*, 73 CAL. L. REV. 548 (1985).

engaging in behaviors that increase the probability of liability exposure.[116] This theory assumes that individuals are rational utility maximizers who include liability rules in their cost-benefit calculations before taking action.[117] From the law and economics vantage point, parents may shape their childrearing practices so as to reduce their child's liability exposure or maximize the potential for a tort recovery.[118]

Under this economic theory, absent a bright line rule, caregivers may not educate their child about avoiding danger so that, in the event the child is injured in an accident, the child's chances of recovering from the defendant are greater than if the child was well-informed about the dangerousness of his conduct. Likewise, a caregiver would not instruct a child to refrain from harming others because the child's liability for injuries he may inflict is greater if he knew of the rules governing safe interpersonal contact.[119] If this model of behavior is accurate, children will receive less guidance, will be injured in more preventable accidents, and society will be exposed to more reckless acts by more young children if a bright line age test is abandoned.

The behavioral assumption of the law and economics view of tort law, however, has been characterized as embracing an inaccurate depiction of adult psychology.[120] Critics have relied on research in cognitive psychology to suggest that adults cannot always make the optimal economic decision among available alternatives; adults do not have the capacity to analyze every available course of action and predict all consequences that may

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116. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 54-82 (1987) [hereinafter LANDES & POSNER]; *see also* Mark F. Grady, *A New Positive Economic Theory of Negligence*, 92 YALE L.J. 799, 799-800 nn.2 & 3 (1983).

117. *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 139, 143 n.2 (2d ed. 1977).

118. *See* LANDES & POSNER, *supra* note 116, at 126 ("Holding the child to the reasonable man standard should induce his parents to prevent him from driving whereas holding him to an individualized negligence standard might not."); *see also id.* at 129.

119. In the case of a child defendant, the caregiver also minimizes his exposure to liability because parents are personally liable for the injuries that result from their child's willful misconduct. *See, e.g.*, CAL. CIV. CODE § 1714.1 (West 1985) (parents liable up to $10,000).

120. Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677, 678-79 & nn.5 & 6 (1985).

flow from each potential decision.[121] People are inherently constrained by "human comprehensional capacity, time, and attention span."[122] Instead, adults are capable only of making utility-maximizing choices in a limited number of settings because thinking things through requires a broad array of analytical skills.[123] These skills can be brought to bear only on a limited number of choices that are available.[124] As a result, adults generally do not alter or mold their behavior in response to economic rewards and punishments within the tort system.[125]

The prediction that caregivers will place the liability interests of their child before the child's survival interests is inconsistent with research in child psychology.[126] Just as research in cognitive psychology has challenged the behavioral assumptions of law and

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121. *Id.* at 678 ("[P]eople cannot conceivably examine all possible ramifications of all possible choices. Incomplete information is the most frequently cited extrinsic constraint, but inherent limitations of human comprehensional capacity, time, and attention span also impose fundamental constraints on decisionmaking capabilities.") (footnotes omitted); *see also* Tversky & Kahneman, *supra* note 65, at 4-18 (documenting certain heuristics individuals use that lead to errors in prediction and estimation). Latin's methodology has not escaped criticism. *See* Richard A. Posner, *Can Lawyers Solve the Problems of the Tort System?*, 73 CAL. L. REV. 747, 747-54 (1985); LANDES & POSNER, *supra* note 116, at 9-14 (arguing the economic model does not require that individuals possess "superhuman" mental abilities).

Research in cognitive psychology has been used to undermine predictions of the law and economics model in other legal domains. *See, e.g.*, Hasen, *supra* note 21, at 404-24 (discussing the effect of "framing" – the way a choice is phrased affects the choice made – on the construction of fair and socially efficient legal rules); *see also id.* at 437-48 (discussing other areas of the law that have been analyzed through the prism of cognitive psychology).

122. Latin, *supra* note 120, at 678.

123. *Id.* at 679 (and studies cited therein) ("Thinking things through requires time, effort, and diverse evaluative skills, which means people cannot employ effective problem-solving behavior for more than a small subset of the choices they must make.").

124. *Id.*

125. *Id.* at 692-93; Hasen, *supra* note 21, at 423 ("Someone will not drive a car recklessly because she knows her insurance company will compensate her for the loss of any limbs."); *cf.* Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1718, 1744 (1982) ("[V]irtually all nonlawyers are ignorant of the doctrinal dispute between negligence and strict liability and do not know to which system they refer when they appeal in everyday language to 'fault' as a criterion of liability."). The leading proponents of the law and economics program have conceded as much. *See* LANDES & POSNER, *supra* note 116, at 12 ("We do not deny that people frequently are inattentive, clumsy, ignorant about the law and about accident probabilities, and so forth, and that these deficiencies blunt the effectiveness of tort law as a deterrent to careless behavior.").

126. *See supra* notes 77-87 and accompanying text (discussing research which demonstrates caregivers teach children rules of safety beginning at an early age).

economics, so too does the research in childrearing. Teaching young children rules of safety and interpersonal interaction dominate caregiver-child interactions in the early years of life to such an extent that it is clear no parent would place the child's liability interests, or the parents' economic interests, ahead of the child's survival interests.[127] The incentive for parents to ensure a child's survival and to minimize the amount of harm the child may cause others would exist independent of any liability rule in negligence law.[128]

In addition, if it were certain that caregivers would forego teaching safety and interpersonal rules because of the potentially high liability costs faced by knowledgeable youngsters, parents of older children who are not protected by a conclusive presumption of incapacity would arguably do the same. Similarly, parents of children in states applying the flexible standard of care to all children would behave differently than parents in states applying a conclusive presumption rule. However, the data do not specifically support or refute either hypothesis. What we do know is that parents universally teach their children the virtues of safety and friendly interpersonal contact. For example, mothers are just as likely to caution a four-year-old to refrain from running blindly into the street as an eight-year-old.[129]

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127. *Id.*

128. *See, e.g.*, Latin, *supra* note 120, at 688 ("The primary incentive for spectators to avoid being hit by balls is their desire to escape injury, and that incentive would exist regardless of the applicable liability rule."); *cf.* Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615, 632 n.18 (1981) ("Many individuals who claim 'all aspirin is alike' apparently pay the extra price for their children where the costs of lower quality are greater and therefore quality assurance is considered more important.").

129. Grusec & Kuczynski, *supra* note 86, at 6-7. Even assuming the economic model is correct and some caregivers may actually refrain from socializing their child to be safety conscious, the tort of negligent supervision provides a defendant with a separate indemnification action against the parent for any injuries caused by the child. *See generally* D'Amico v. Burns, 469 N.E.2d 1016, 1018-19 (Ohio Ct. App. 1984) (property owner maintained viable cause of action against parent of 7-year-old who threw objects down owner's sewer drain and seriously damaged property); Annotation, *Parents' Liability for Injury or Damage Intentionally Inflicted by Minor Child*, 54 A.L.R.2d 974 (1973) (and cases collected therein). Therefore, if a parent does shape his childrearing practices around liability rules in negligence law, a caregiver's overall liability costs would not be lessened by foregoing lessons on safety.

A conclusive presumption rule arguably promotes the strong public policy of ensuring that those young minors who are the most knowledgeable about safety and interpersonal behavior are not penalized for their superior knowledge. This argument, however, proves too much. If the most desirable legal rule is that which minimizes liability exposure for acts society deems socially responsible, then *all* children ought to be conclusively presumed incapable of negligence. Otherwise, older minors with superior knowledge and experience *not* protected by any conclusive presumptions of incapacity are more likely to be held accountable for their actions than those with inferior knowledge and experience.[130] Yet negligence law has always imposed liability in accord with an older child's knowledge, capacity, age, and experience.[131] There is nothing inequitable in having higher expectations for a child who is more capable, and imposing a higher standard of care on such a child.

In sum, rather than anchor a legal rule to a child's age alone, public policy is better served if all minors are responsible for their actions in conjunction with their level of knowledge, experience, capacity, *and* age.[132]

C. Judicial Economy

Some seek to justify an age-determined presumption of incapacity on the ground such a presumption promotes judicial economy. However, judicial economy alone is insufficient as a reason to adopt a bright line age rule. In addition to judicial

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130. PROSSER & KEETON, *supra* note 11, § 32 ("[T]he capacity of the particular child to appreciate the risk and form a reasonable judgment must be taken into account. This means that *more will be required of a child of superior skill or intelligence for his age*, and less of one who is mentally backward . . . .") (emphasis added & fns. omitted).

131. *Id.*; Shulman, *supra* note 12, at 621 ("The quality of [a child's] conduct must be commensurate with his superiority. . . . An increase in the requirements on the ground of superiority does not, however, negative the existence of a minimum standard to which children must conform.").

132. Landes and Posner suggest that "[t]he legal standard, which requires comparing the child plaintiff or defendant with children of similar age and development, seems as efficient as any alternatives that suggest themselves." LANDES & POSNER, *supra* note 116, at 129. However, Landes and Posner do not provide an analysis for this assertion. The authors have found no other law and economics proponent who has examined this question.

economy, other important public policy issues are implicated. Briefly, they are: Whether efficiency needs to be balanced with fairness; whether each case should be evaluated on the basis of a variety of factors, including chronological age; and whether the determination to absolve children from liability for negligence is a matter best left to the Legislature rather than the courts.

1. The Balance Between Efficiency and Fairness

Those who cite judicial economy as a sufficient justification for presumptions of incapacity based on age have reasoned that such rules are preferable because application of such an age-based rule is easy to apply.[133] While it is true that a rule which absolves a class of children from liability for negligence on the basis of chronological age expedites the judicial process, judicial economy *alone* is no reason to adopt a bright line rule presuming children to be incapable of exercising due care. "[T]he effect of a presumption should be determined by the value of the reasons which justify its existence"[134] and judicial expedience must be balanced with fairness.

The primary shortcoming of a bright line age rule is that it creates an internally inconsistent system of determining fault when analyzing the conduct of young children. Such a rule eliminates the subjective standard of care for some children, but retains it for others, depending upon whether the child has reached an arbitrary age. As one commentator observed: "The striking feature of the cases exempting an infant from liability merely because of his age is that immunity is granted because of a chronological under-development and not for any lack of individual capacity. In other

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133. Wilderman, *supra* note 65, at 435; J. Douglas Mertz, *The Infant and Negligence* Per Se *in Pennsylvania*, 51 DICK. L. REV. 79, 81 (1947); Tyler v. Weed, 280 N.W. 827, 835 (Mich. 1938); Holbrock v. Hamilton Distrib., Inc., 228 N.E.2d 628, 630 (Ohio 1967); Dunn v. Teti, 421 A.2d 782, 785 (Pa. Super. Ct. 1980).

134. Edmund M. Morgan, *Presumptions*, 10 RUTGERS L. REV. 512, 518 (1956); *see also* Note, *Presumptions in Iowa*, 44 IOWA L. REV. 147, 150 (1958) ("If . . . a presumption had no logical background but was created purely as a rule of procedural convenience, its repudiation by rebutting evidence would cause its disappearance as a presumption and there would be nothing left to sustain the fact which had been presumed.").

words[,] a strictly objective standard is applied."[135] By judging some children against a standard which takes into account more than just age, while judging younger children on the basis of age alone, the bright line rule unfairly promotes differential treatment of children who may, in reality, have the same capacity for negligence.[136]

Moreover, in a jurisdiction which recognizes a seven-year bright line rule, "one just having passed his seventh birthday but possessing little experience, intelligence or judgment, could be found guilty of [contributory] negligence."[137] The Michigan case of *DeCamp v. Fleckenstein*[138] is illustrative of this unfair result. There, an eight-year-old child with the mental age of a five-year, ten-month-old was hit by a car when he rode his bicycle into the street. The question of whether the plaintiff was contributorily negligent was submitted to the jury and the jury found for the defendant. On appeal, the plaintiff argued Michigan's seven year bright line rule referred to mental rather than chronological age, and that the trial court therefore erred in submitting the issue of contributory negligence to the jury.[139] A Michigan court of appeal rejected this argument and affirmed, holding the seven year rule referred only to chronological age.[140] The court explained that the trial court was "correct in deciding that it was a jury question which they would determine based on what a 'reasonably careful minor of like age, mental capacity, and experience would do or would not do under such circumstances.'"[141] *DeCamp* poignantly

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135. Bernard N. Katz, *The Standard of Care Required of Infants*, 25 TEMPLE L.Q. 478, 481 (1952).

136. *See, e.g.*, Burhans v. Witbeck, 134 N.W.2d 225, 227 (Mich. 1965) (relying, inter alia, on seven-year conclusive presumption rule and concluding that the question of whether a five-year-old could be liable under guest passenger statute should not be submitted to jury whereas seven-year-old's capacity to be guest passenger is a question for jury determination).

137. Dillman v. Mitchell, 99 A.2d 809, 811 (N.J. 1953); *see also* Patterson v. Cushman, 394 P.2d 657, 659-60 (Alaska 1964); Hellstern v. Smelowitz, 86 A.2d 265, 271 (N.J. Super. Ct. App. Div. 1952).

138. 181 N.W.2d 47 (Mich. Ct. App. 1970).

139. *Id.* at 49; *see* Baker v. Alt, 132 N.W.2d 614, 620 (Mich. 1965) (setting the age of seven as the age below which minors would be deemed incapable of negligence).

140. *DeCamp*, 181 N.W.2d at 49.

141. *Id.*

exemplifies the potential unfairness that can result from invoking chronological age alone as the decisive determinant of the standard of care required of minors.[142]

In addition, a bright line rule contravenes basic principles of comparative fault: A defendant partially at fault is held liable for one hundred percent of damages even when a young child's conduct contributes to the child's injury *regardless of whether the individual child actually had the capacity for exercising due care.*[143] As one court has noted: "[A] boy who is one day under

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142. *See also* Golden v. Register, 274 S.E.2d 892, 894 (N.C. Ct. App. 1981) (fourteen-year-8½-month-old not protected by 7-14 rebuttable presumption rule and therefore charged with adult standard of care and held contributorily negligent as a matter of law).

143. The treatment of children in negligence law has been intimately tied to the doctrine of contributory negligence, which completely barred a minor plaintiff's recovery if the child contributed in any way to his injuries. *See* PROSSER & KEETON, *supra* note 11, § 32, at 181. In the days of contributory fault, a bright line approach served as a precaution against a harsh forfeiture of a child's negligence action. *See, e.g.*, Tyler v. Weed, 280 N.W. 827, 834 (Mich. 1938) ("The burden is too heavy for the small child, and in such an unequal contest the law does not permit a wrongdoer to take advantage of the infant's difficulty and inadequacy."). Perhaps compassion induced courts to protect the very young from shouldering the entire financial burden of injuries for which they were only partly at fault. As one commentator asked: "The defendant is negligent. Why allow him to escape liability on the grounds that an infant, who is not *fully* aware of the consequences of any act, was also negligent?" Wilderman, *supra* note 65, at 440 (emphasis in original); *see also id.* at 436 ("If we agree that infants as a class are to be treated with leniency, why should we strive to relieve a negligent defendant whose only claim to be *absolved from liability* is based on the alleged fault of that group whom we seek to protect?") (emphasis added). Under these circumstances, an age-based presumption of incapacity is an effective but imperfect means of barring a tortfeasor from escaping liability because of the immaturity of the minor plaintiff. *See, e.g.*, Chicago City Ry. Co. v. Tuohy, 63 N.E. 997, 1005 (Ill. 1902) (a child's right to recovery "ought not to be taken away by childish prattle indulged in by him when trying to explain the cause of the injury received by him"); Dunn v. Teti, 421 A.2d 782, 785 (Pa. Super. Ct. 1980) ("a strong public policy exists to protect children from losses due to their own immaturity despite their contributory negligence, especially against an admitted negligent adult defendant"); *see also* T. Edward Icenogle, Comment, *Capacity of Minors to be Chargeable with Negligence and Their Standard of Care*, 57 NEB. L. REV. 763, 769 (1978) ("Well into the development of the child's special status in negligence law, courts were confronted with demands which conflicted with human sympathy for children and children's inherent failings of prudence.").

However, the doctrine of contributory negligence has been discarded in an overwhelming majority of American jurisdictions and has been replaced with principles of comparative negligence. VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.1, at 1-3 (2d ed. 1986). While no court has considered the effect of comparative negligence on the question whether conclusive age-based presumptions of incapacity still serve a useful public policy, such a presumption is inconsistent with basic principles of comparative fault. *See* James J. DesVeaux & Daniel C. Shapiro, *Negligence of Minors: Comparative Principles Replace Outdated Presumptions*, 34 FOR THE DEF. 6 (1992). To the extent courts immunized children from liability for negligence out of fear of barring a child's recovery, principles of comparative negligence should assuage those concerns. In fact, principles of

[the age at which he is presumed incapable of negligence] may be guilty of the most flagrant contributory carelessness and yet evidence of his exceptional precocity and breadth of judgment and experience cannot be introduced to overcome the illusory presumption of babylike puerility."[144]

This is precisely what happened in *Baker v. Alt.*[145] There, a six-year, ten-and-a-half month old boy was injured while he was riding his bike on the wrong side of the street and collided with an automobile. The plaintiff, who rode through a red light, "had been instructed by his parents to get off and 'walk' his bike across streets," and was "aware of the dangers attendant on what he was doing."[146] Despite this evidence of the child's knowledge of the dangerousness of his conduct, the Michigan Supreme Court refused to hold the minor responsible for his actions and held, "'an infant under seven years of age is incapable of contributory negligence.'"[147] The members of the *Baker* court ignored the facts before them and based their decision entirely on "the illusory presumption of babylike puerility" by stating that "[i]f an infant of [plaintiff's] age (6 years, 10½ months) can be guilty of

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comparative fault coupled with the flexibility of the subjective standard of care should operate to significantly reduce (if not eliminate) the possibility that a young child will be unjustly denied recovery. *See* Holub, *supra* note 24, at 352 ("A formal change to comparative negligence would have a positive effect on the area of children's contributory negligence. A child, only partly responsible for his injury, would bear part but not all of the burden of the injury"). *But see* Toney v. Marzariegos, 519 N.E.2d 1035, 1038 (Ill. App. Ct. 1988) (rejecting defendant's contention that comparative negligence obviated the need for a seven year "bright line" rule); Pino v. Szuch, 408 S.E.2d 55, 60 n.3 (W. Va. 1991) (holding the same age presumptions which immunized children from contributory negligence also apply to defense of comparative negligence).

144. Hellstern v. Smelowitz, 86 A.2d 265, 271 (N.J. Super. Ct. App. Div. 1952). *See also* Birmingham & A. R. Co. v. Mattison, 52 So. 49, 52 (Ala. 1909); White v. Nicosia, 351 So. 2d 234, 237 (La. Ct. App. 1977); Toetschinger v. Ihnot, 250 N.W.2d 204, 211 (Minn. 1977); Eckhardt v. Hanson, 264 N.W. 776, 777 (Minn. 1936); Dillman v. Mitchell, 99 A.2d 809, 811 (N.J. 1953); Quinby *ex rel.* Camardo v. New York State Rys., 159 N.E. 879, 881 (N.Y. 1928); Yun Jeong Koo v. St. Bernard, 392 N.Y.S.2d 815, 818 (N.Y. App. Div. 1977); Doyen v. Lamb, 59 N.W.2d 550, 551 (S.D. 1953); James B. Wilkens, *Contributory Negligence of Very Young Children*, 20 CLEV. ST. L. REV. 65, 67 (1971); L.B.C., Note, *Contributory Negligence of Children*, 7 U. PA. L. REV. 79, 82 (1925).

145. 132 N.W.2d 614 (Mich. 1965).

146. *Id.* at 619.

147. *Id.* at 620.

contributory negligence, [plaintiff] is a classic case of one who was so in fact."[148]

Thus, a conclusive presumption of incapacity based on chronological age imposes a standard of care on children that is indifferent to an individual child's knowledge and experience. Such a rule allows children who have the capacity for negligence to avoid responsibility for their actions because they have not attained a minimum age. The rule also holds children potentially liable for negligence who may not actually have the capacity for negligent conduct but have the misfortune of having surpassed the cutoff age. These results are manifestly unfair. The standard of care required of children should instead turn on the *particular* child's capacity for negligence, measured by the child's knowledge, experience, *and* age.

2. *The Need for a Case-By-Case Analysis*

A fact-intensive inquiry into the child's capacity for negligence has been labeled wasteful of judicial resources because few children of "tender years" have the requisite knowledge, experience, and capacity to understand and avoid danger and results reached under an age-based rule therefore will often be no different than those reached under a more flexible rule.[149] This view is not supported by the research in child psychology. As we have shown,

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148. *Id.* at 619; *see also* Johnson v. Koski, 234 N.W.2d 184, 187-88 (Mich. Ct. App. 1975) (6-year-old child who admitted that he knew that he should look both ways before crossing a street but forgot to do so and was hit by an automobile, not chargeable with contributory negligence because he was under the age of 7); Hunter v. City of Cleveland, 346 N.E.2d 303, 304 (Ohio 1976) (affirming 7-year bright line rule in case involving 6-year-old but held "[h]ad the plaintiff not been of such tender years, this court would have been compelled to find that the injuries were the result of his own conduct under the facts of this case").

149. Note, *Contributory Negligence of Children:* Miller v. Graff, 14 MD. L. REV. 167, 171 (1954) ("the result produced by [an age-based conclusive presumption] rule will in most cases be the same as that under [the more flexible subjective standard of care]"); Holub, *supra* note 24, at 349 (supporting the flexible application of the subjective standard of care, but noting criticism voiced by opponents that "since most people would agree that the majority of children below the age of seven do not have the capacity to deal with the world in a responsible manner, it would be better to retain the [conclusive] presumption than waste valuable court time attempting to use proof other than age to show mental capacities of children below age seven"); Chicago City Ry. Co. v. Tuohy, 63 N.E. 997, 1002-03 (Ill. 1902).

modern research suggests that children of almost any age have the capacity to plan to avoid harm in situations familiar to them and that children vary widely in this capacity.[150] Contrary to the view expressed by some courts and commentators who regard chronological age as a sufficient measure of mental capacity, child psychologists uniformly agree that age is only one of several factors that determine a child's capacity to exercise due care.[151] Thus, a rule which sets down a definite minimum age requirement for negligence seems to have "only its definiteness to commend it,"[152] and that is not enough.

Children should be held accountable for their actions commensurate with the particular child's knowledge, capacity, experience, and age. Courts should not ignore individual differences in mental ability among children and opt for an inflexible rule which absolves minors of a duty of due care just because they have not reached a certain minimum age. If, however,

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150. *See supra* notes 52-108 and accompanying text.

151. *See supra* notes 97-108 and accompanying text. Like child psychologists, some courts and commentators have also recognized that children learn basic rules about personal safety at a young age. *See* Killeen v. Harmon Grain Prod., Inc., 413 N.E.2d 767, 770 (Mass. Ct. App. 1980) ("Toothpicks, like pencils, pens, needles, knives, razor blades, nails, tools of most kinds, bottles and other objects made of glass, present obvious dangers to users, but they are not unreasonably dangerous, in part because the very obviousness of the danger puts the user on notice. *It is part of normal upbringing that one learns in childhood to cope with the dangers posed by such useful everyday items.*") (emphasis added); Johnson's Adm'r v. Rutland R. Co., 106 A. 682, 685 (Vt. 1919) ("It is a matter of common knowledge that many children under seven years of age have some intelligence of situations and circumstances affecting personal safety."); *accord* Griggs v. Bic Corp., 786 F. Supp. 1203, 1205 (M.D. Pa. 1992); Honeycutt *ex rel.* Phillips v. Wichita, 796 P.2d 549, 558 (Kan. 1990); *Capacity and Standard of Care*, *supra* note 25, at 519 ("It is a matter of common knowledge that many children under seven have some understanding of situations affecting their personal safety."); Idzi v. Hobbs, 186 So. 2d 20, 22 (Fla. 1966) ("[P]arents instruct their children early in their lives about the danger of fire and other common dangers."); Holub, *supra* note 24, at 351 ("Though most young children may not have the capacity to recognize and deal with all dangers, many children below the age of seven may be able to recognize and understand certain dangers. A typical example would be the dangers inherent in a body of water."); *cf.* Corcoran v. Village of Libertyville, 383 N.E.2d 177, 180 (Ill. 1978) ("Even if an owner or occupier knows that children frequent his premises, he is not required to protect against the ever-present possibility that children will injure themselves on obvious or common conditions. . . . The responsibility for a child's safety lies primarily with its parents, whose duty it is to see that his behavior does not involve danger to himself.").

152. Doyen v. Lamb, 59 N.W.2d 550, 551 (S.D. 1953); *see* Engett v. Neff, 43 N.W.2d 644, 647 (N.D. 1950).

such a rigid rule is deemed desirable, the decision is best left to the legislature, not the courts.

3. A Question for the Legislature

If there is to be a bright line age rule which conclusively declares some children incapable of negligence as a matter of law, the rule should be determined by the legislature, which is the proper body to define that class of individuals who should be immune from exercising due care for their own or others' safety.[153] Legislatures have fact finding capabilities not available to courts.[154] Moreover, legislatures, as representative bodies, are best able to find a public consensus regarding conflicting issues of public policy.[155] Accordingly, legislatures are best able to examine the competing arguments and changing circumstances affecting an issue that has confused courts and commentators for decades.[156]

In sum, the argument that some children should be immune from liability for negligence to promote judicial economy does not withstand analysis. Fairness dictates that *all* minors be held responsible for their actions in accord with their level of knowledge and experience. The notion that few children of "tender years" can appreciate danger and that society should bear the cost of acts committed by precocious children is inconsistent with modern theory and research in child psychology and sound public policy.

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153. *See, e.g.*, Walston v. Greene, 102 S.E.2d 124, 128 (N.C. 1958) (Rodman, J., dissenting) ("If children of an age compelled to attend school are to be relieved of all responsibility for their acts, I think it should be done by legislative action rather than by judicial decision."). *See generally* 1 SUTHERLAND STATUTORY CONSTRUCTION § 1.03, at 5 (4th ed. 1985) [hereinafter STATUTORY CONSTRUCTION] ("If there is an important difference [between the role of the Legislature and the courts], it is perhaps only that society has placed progressively greater reliance on legislative bodies and attempted to withdraw from the courts more of the function of determining . . . the principles under which individuals must live."). For example, Wisconsin has codified a 7-year-old "bright line" rule which insulates children seven years of age or younger from liability for negligence. *See* WIS. STAT. ANN. § 891.44 (West 1966). In most states, however, the rule has developed through common law evolution.

154. STATUTORY CONSTRUCTION, *supra* note 153, §§ 1.04-1.06.

155. *Id.*

156. *See infra* notes 188-207 and accompanying text (discussing the confusion that has permeated this area of negligence law).

From a policy perspective, it seems far more important to strive for equal treatment for those similarly situated than to adhere to a legal rule with no basis in child psychology and development.[157] Thus, limits on liability ought not be "fixed by rules laid down in advance without regard to the particular case."[158]

II. JUDICIAL APPLICATION OF THEORIES OF CHILD PSYCHOLOGY: THE ILLINOIS AND MASSACHUSETTS RULES

Two theories of a child's capacity to act negligently have found their expression in what have been termed the "Illinois" and "Massachusetts" rules.[159]

A. The Illinois Rule

Under the Illinois rule, the capacity of a child to appreciate risks depends solely upon age.[160] Courts which have adopted this method have borrowed from the criminal law and established a three-tiered system of presumptions based on chronological age: Minors below the age of seven are conclusively presumed incapable of negligence as a matter of law; those between the ages of seven and fourteen are rebuttably presumed incapable of negligence; and minors above fourteen are presumed to be capable of negligence.[161] The theory of child psychology underlying this

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157. *See supra* notes 52-114 and accompanying text.

158. PROSSER & KEETON, *supra* note 11, § 32; *see also* Honeycutt *ex rel.* Phillips v. Wichita, 796 P.2d 549, 554 (Kan. 1990) (rejecting minor plaintiff's contention that public policy is best served by creating a conclusive presumption of incapacity for children under seven and concluding "public policy is best served by submitting the claimed negligence of individual child plaintiffs for jury determination"); RESTATEMENT (SECOND) OF TORTS, § 283A, com. b (1965).

159. *See, e.g.*, Holub, *supra* note 24, at 332-44 (referring to the two rules employed by states as the Illinois and Massachusetts rules).

160. Holub, *supra* note 24, at 320-21; Honeycutt *ex rel.* Phillips v. Wichita, 796 P.2d 549, 551, 554 (Kan. 1990); Toetschinger v. Ihnot, 250 N.W.2d 204, 208-11 (Minn. 1977); Eckhardt v. Hanson, 264 N.W. 776, 777-78 (Minn. 1936).

161. The following states have adopted this system of presumptions: Alabama, Illinois, North Carolina, Ohio, Oklahoma, Pennsylvania, Virginia, and West Virginia. *See* Appendix A (discussing child negligence law in all fifty states and the District of Columbia).

rule is that chronological age is a sufficient measure of a child's capacity to refrain from impulsive behavior and an adequate gauge of a child's ability to foresee the potentially dangerous consequences of his actions.[162] Defenders of the Illinois rule also point out that the age standard, while inflexible and arbitrary, promotes judicial economy by making it easier for judges to dispose of cases involving minors accused of negligent conduct.[163]

Not all courts have adopted a "pure" form of the Illinois rule. Some courts have endorsed the policy rationale behind the Illinois rule and recognized the three-tiered system of presumptions, but have refused to adopt the analogy to the criminal law.[164] Moreover, the precise age at which children are deemed incapable of negligence has varied among the courts.[165] Other courts have set a different minimum cutoff age but rejected the "middle tier" rebuttable presumption rule for minors above the minimum age.[166]

The Michigan case of *Tyler v. Weed*[167] epitomizes the reasoning behind the presumption of incapacity for children under the age of seven. There, a six year, eight month old boy was injured after being hit by a car. The question of the child's contributory negligence was presented to the jury. The jury returned a verdict for the defendant and the plaintiff appealed, arguing that he was incapable of contributory negligence because he was under the age of seven. The Supreme Court of Michigan

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162. *See supra* note 24.

163. *See supra* notes 133-158 and accompanying text; *see also* Tyler v. Weed, 280 N.W. 827, 835 (Mich. 1938); Holbrock v. Hamilton Distrib., Inc., 228 N.E.2d 628, 630 (Ohio 1967); Dunn v. Teti, 421 A.2d 782, 785 (Pa. Super. Ct. 1980); Wilderman, *supra* note 65, at 435; Mertz, *supra* note 133, at 81.

164. *See, e.g.*, Walston v. Greene, 102 S.E.2d 124, 126 (N.C. 1958).

165. New York has set the minimum age at 4; Texas and California at 5; Colorado, Florida, and Washington at 6; Alabama, Illinois, Indiana, Kentucky, Michigan, Mississippi, Montana, North Carolina, Ohio, Oklahoma, Pennsylvania, West Virginia, Wisconsin, and Virginia at age 7; and Mississippi at age 8. *See* Appendix A (discussing the negligence rules adopted by all fifty states and the District of Columbia).

166. These states include: Indiana, Kentucky, Montana, and Washington. *See* Appendix A (enumerating the minimum age requirements of all fifty states and the District of Columbia).

167. 280 N.W. 827 (Mich. 1938).

agreed and reversed.[168] The court did not examine the particular plaintiff's capacity for negligence when it concluded that "children under the age of seven years are conclusively presumed to be incapable of contributory negligence."[169] As a justification for their holding, the *Tyler* court relied on prior Michigan case law, the developmental theory advanced by Piaget and others which suggests children under seven cannot command the requisite mental capacity for negligence, and the public policy which favors the protection of an infant's rights.[170]

The *Tyler* court declined to recognize the contrary Massachusetts rule because the rule had no basis in "reason, experience, observation or public policy," and it did not sufficiently protect the rights of infants.[171] In addition, the court rejected the notion that increased exposure to the perils of modern life makes children more capable of negligent conduct:

> [I]t seems an essay of some intellectual temerity to assume to know the mysterious and complex factors operating upon the mind of a changing infant, which bring about increased intelligence, awareness, and change of behavior, when such conclusions are arrived at without any evidence whatever. We cannot assume that modern inventions advance the growth of mind or increase the awareness, of the child of tender years. There is as much basis for the belief that such development is directly dependent upon age, in these early years of such swiftly marked changes of physical growth.[172]

Finally, the *Tyler* court found juries incapable of deciding the question of the contributory negligence of a child because "jury [members] . . . [cannot] know how a prudent child of such tender

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168. Only two members of the court held the judgment should be reversed on the ground the plaintiff was too young to be contributorily negligent. *Id.* at 838. Four justices concurred in the result but expressed serious reservations about the propriety of a seven year "bright line" rule. *Id.* at 838-39. One justice dissented. *Id.* at 840.

169. *Id.* at 838.

170. *Id.* at 828-37; *see also* DeLuca v. Bowden, 329 N.E.2d 109, 111 (Ohio 1975) (a rule must be adopted "which holds that members of society must accept the damage done by very young children to be no more subject to legal action than some force of nature or act of God").

171. *Tyler*, 280 N.W. at 836.

172. *Id.* at 837.

years should conduct himself, aside from the reflection of the prudent adult mind of what a child should do."[173]

Courts that have recognized some variant of the Illinois rule and have declared children under a certain age incapable of negligence as a matter of law, have relied on one or more of the policy rationales articulated in *Tyler* without expressly relying on that case.[174]

B. The Massachusetts Rule

The Massachusetts rule embraces a picture of child development that treats chronological age as only one of several factors involved in the determination of whether a minor has the capacity for negligent conduct.[175] The particular child's

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173. *Id.* at 834; *see also id.* at 838. This argument, however, proves too much. If an adult is incapable of judging a 6 year, 11 month, 29 day old, why should that same adult be considered capable of judging a 7 year, 1 day old?

174. The following courts have relied on the system of presumptions in the criminal law as a justification for absolving minors of any duty of due care. *See* Jones v. Strickland, 77 So. 562, 565 (Ala. 1917); Chicago City Ry. Co. v. Tuohy, 63 N.E. 997, 1003 (Ill. 1902); Swindell v. Hellkamp, 242 So. 2d 708, 710 (Fla. 1970); Strong v. Allen, 768 P.2d 369, 372 n.1 (Okla. 1989); Dunn v. Teti, 421 A.2d 782, 784 (Pa. Super. 1980).

Other courts have cited judicial economy as the primary justification for a bright line age rule. *See* Holbrock v. Hamilton Distrib., Inc., 228 N.E.2d 628, 630 (Ohio 1967); Dunn v. Teti, 421 A.2d 782, 785 (Pa. Super. 1980).

The vast majority of jurisdictions that have established age-based presumptions of incapacity have relied on childrens' inability to command the requisite mental capacity necessary for negligent conduct--i.e., the ability to foresee the consequences of their actions and inhibit their impulses. *See* Gault v. Tablada, 400 F. Supp. 140 (S.D. Miss. 1976), *aff'd*, 526 F.2d 1405 (5th Cir. 1975); Kopera v. Moschella, 400 F. Supp. 131, 135 (S.D. Miss. 1976), *aff'd*, 526 F.2d 1405 (5th Cir. 1975); Christian v. Goodwin, 188 Cal. App. 2d 650, 652-53, 10 Cal. Rptr. 507, 508-09 (1961); Untalan v. Glass, 190 Cal. App. 2d 474, 476, 12 Cal. Rptr. 1, 2 (1961); Ellis v. D'Angelo, 116 Cal. App. 2d 310, 315-16, 253 P.2d 675, 677 (1953); Benallo v. Bare, 427 P.2d 323, 324 (Colo. 1967); Tupman's Adm'r v. Schmidt, 254 S.W. 199, 201 (Ky. Ct. App. 1923); Graham v. Rolandson, 435 P.2d 263, 267 (Mont. 1967); Walston v. Greene, 102 S.E.2d 124, 126 (N.C. 1958); Verni v. Johnson, 68 N.E.2d 431, 432 (N.Y. Ct. App. 1946); Holbrock v. Hamilton Distrib., Inc., 228 N.E.2d 628, 629-30 (Ohio 1967); Taylor v. Bergeron, 449 P.2d 147, 150 (Or. 1969) (O'Connell, J., concurring); Kuhns v. Brugger, 135 A.2d 395, 405 (Pa. 1957); Dunn v. Teti, 421 A.2d 782, 785 (Pa. Super. 1980); Yarborough v. Berner, 467 S.W.2d 188, 190 (Tex. 1971); MacConnell v. Hill, 569 S.W.2d 524, 527 (Tex. Ct. App. 1978); Endicott v. Rich, 348 S.E.2d 275, 277 (Va. 1986); Cox v. Hugo, 329 P.2d 467, 469 (Wash. 1958).

175. Eckhardt v. Hanson, 264 N.W. 776, 777-78 (Minn. 1936); Toetschinger v. Ihnot, 250 N.W.2d 204, 208-11 (Minn. 1977); Honeycutt *ex. rel.* Phillips v. Wichita, 796 P.2d 549, 551, 554 (Kan. 1990); Holub, *supra* note 24, at 320-21.

knowledge and experience are also considered crucial indicia of a child's mental capacity.[176] Under this approach, whether a child has been negligent is a question for the jury unless only one inference regarding the child's capacity for negligence can be reasonably drawn from the evidence.[177] The jury weighs a child's conduct against that expected from a child of like age, knowledge, experience and capacity under the same or similar circumstances.[178] In addition, the Massachusetts rule recognizes that children vary widely in their capacity to act with sufficient care for their own or others' safety.[179] By acknowledging individual differences between children and comparing a minor with other children possessing virtually the same capacity for negligence, the Massachusetts approach is inherently flexible and

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176. Eckhardt v. Hanson, 264 N.W. 776, 777-78 (Minn. 1936); Toetschinger v. Ihnot, 250 N.W.2d 204, 208-11 (Minn. 1977); Honeycutt *ex rel.* Phillips v. Wichita, 796 P.2d 549, 551, 554 (Kan. 1990); Holub, *supra* note 24, at 320-21.

177. *See* Patterson v. Cushman, 394 P.2d 657, 660 (Alaska 1964); Grace v. Kumalaa, 386 P.2d 872, 877 (Haw. 1963); Sullivan v. Boston Elevated Ry. Co., 78 N.E. 382, 383 (Mass. 1906); Hamel v. Crosietier, 256 A.2d 143, 145 (N.H. 1969); Bush v. New Jersey & N. Y. Transit Co., 153 A.2d 28, 33 (N.J. 1959); Thompson v. Anderman, 285 P.2d 507, 515 (N.M. 1955); Doyen v. Lamb, 59 N.W.2d 550, 551 (S.D. 1953); Mann v. Fairbourn, 366 P.2d 603, 606 (Utah 1961); Beaucage v. Russell, 238 A.2d 631, 635 (Vt. 1968).

178. *See supra* notes 12-14 and accompanying text.

179. *See* Holcomb v. Galbraith, 513 S.W.2d 796, 798 (Ark. 1974); Beggs v. Wilson, 272 A.2d 713, 714 (Del. 1970); Holland v. Baltimore & Ohio R.R. Co., 431 A.2d 597, 604 (D.C. Ct. App. 1981) (Ferren, dissenting); Crane v. Banner, 455 P.2d 313, 317 (Idaho 1969); Davis v. Bushnell, 465 P.2d 652, 654 (Idaho 1970); Consol. City & C. P. Ry. Co. v. Carlson, 48 P. 635, 637 (Kan. 1897); Biggs v. Consol. Barb-Wire, 56 P. 4, 6 (Kan. 1899); Berdos v. Tremont & Suffolk Mills, 95 N.E. 876, 878 (Mass. 1911); Enget v. Neff, 43 N.W.2d 644, 647 (N.D. 1950); Hamel v. Crosietier, 256 A.2d 143, 145 (N.H. 1969); Hellstern v. Smelowitz, 86 A.2d 265, 271 (N.J. Super. Ct. App. Div. 1952); Thompson v. Anderman, 285 P.2d 507, 516 (N.M. 1955); Verni v. Johnson, 68 N.E.2d 431, 432 (N.Y. Ct. App. 1946) (Conway, J., dissenting); DeLuca v. Bowden, 329 N.E.2d 109, 112-13 & n.3 (Ohio 1975) (Celebrezze, J., dissenting); Dunn v. Teti, 421 A.2d 782, 785 (Pa. Super. Ct. 1980); Standard v. Shine, 295 S.E.2d 786, 787 (S.C. 1982); Wells v. McNutt, 189 S.W. 365, 365 (Tenn. 1916); Garis v. Eberling, 71 S.W.2d 215, 226 (Tenn. Ct. App. 1934); Johnson's Adm'r v. Rutland R. Co., 106 A. 682, 685 (Vt. 1919).

Curiously, some courts in states that have endorsed the Illinois Rule have noted that children vary in their capacity for negligence. *See* Woods v. United States, 197 F. Supp. 841, 843 (E.D. N.Y. 1961); Birmingham & A. R. Co. v. Mattison, 52 So. 49, 52 (Ala. 1909); Garcia v. Sooigan, 52 Cal. 2d 107, 112, 338 P.2d 433, 436 (1959); Williamson v. Garland, 402 S.W.2d 80, 82 (Ky. Ct. App. 1966); Quinby *ex rel.* Camardo v. New York State Rys., 159 N.E. 879, 881 (N.Y. 1928); Weidenfeld *ex rel.* Weidenfeld v. Surface Transp. Corp., 55 N.Y.S.2d 780, 784 (N.Y. App. Div. 1945).

does not impose unrealistic liability standards on young children.[180] Accordingly, the Massachusetts rule has found widespread support among legal commentators.[181]

The Kansas case of *Honeycutt ex rel. Phillips v. Wichita*[182] is illustrative. There, a six-year, four-month-old boy had his legs severed by a moving train as he attempted to board it on the way home from school. The plaintiff ignored warnings from his family and school to stay away from moving trains and failed to heed the instructions of the school safety patrol. At the beginning of trial, the plaintiff moved for partial summary judgment alleging he was too young to be comparatively negligent. The trial court granted the motion and the defendants appealed. The Supreme Court of Kansas unanimously reversed and held that "public policy is best served by submitting the claimed negligence of individual child plaintiffs for jury determination."[183] The court reviewed the law in other jurisdictions as well as the decisional law of Kansas and concluded that "the adoption of specific ages at which a child is incapable of negligence as a matter of law would not be beneficial or serve

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180. *See* Patterson v. Cushman, 394 P.2d 657, 658-60 (Alaska 1964); Brown v. Connolly, 62 Cal. 2d 391, 394-95, 398 P.2d 596, 598, 42 Cal. Rptr. 324, 326 (1965); Bush v. New Jersey & N.Y. Transit Co., 153 A.2d 28, 33, 35-36 (N.J. 1959).

181. *See* Holub, *supra* note 24, at 351-52; Icenogle, *supra* note 143, at 789; Wilkens, *supra* note 144, at 69, 73-74; *Capacity and Standard of Care*, *supra* note 25, at 519; DesVeaux & Shapiro, *supra* note 143, at 7; L.B.C., *supra* note 144, at 82-83; Arthur H. McQueen, Jr., Note, *Contributory Negligence of Children*, 18 S.C. L. REV. 648, 660 (1966); James H. Keet, Jr., *Contributory Negligence of Children*, 12 CLEV.-MARSHALL L. REV. 395, 405 (1963); Gerald L. Walter, Jr., *Significance of the Youthfulness of a Party in Louisiana Automobile Accident Cases*, 22 LA. L. REV. 487, 489 (1961); James W. Starnes, *Contributory Negligence of a Minor as a Matter of Law in Missouri*, 1959 WASH. U. L.Q. 281, 282 (1959); Note, *Contributory Negligence of Children*, 21 COL. L. REV. 697, 699-700 (1921) [hereinafter *Contributory Negligence of Children*]. *But see* Wilderman, *supra* note 65, at 440 ("To achieve [the] desire to protect the infant, it is necessary to establish a definite rule of law whereby the consideration of the question of an infant's guilt of contributory negligence should be determined by the Court, guided by certain definite presumptions. The problem should not be left to the jury."); Mertz, *supra* note 133, at 81 ("Fictitious and arbitrary as they may be, the presumptions are justified on the grounds of expediency and facility of administration.").

182. 796 P.2d 549 (Kan. 1990).

183. *Id.* at 554.

justice in Kansas."[184] Contrary to *Tyler* which applied the Illinois rule,[185] the *Honeycutt* court reasoned:

> School age children, from kindergarten on, must on occasion cross railroad tracks, busy streets, and highways, or pass by sites where heavy equipment is in use. Some play and ride their tricyles [*sic*], bicycles, skateboards, and roller skates on sidewalks along busy thoroughfares. Some play ball and other sports on or near streets carrying from light to heavy vehicular traffic. Safety habits are stressed in schools. 'Look both ways before crossing the street' is a familiar teaching. Safety patrols, on duty at busy intersections while children make their way to and from school, are a familiar sight.[186]

The court also recognized the wide diversity in mental capacity among children and credited jurors with the ability to bring this fact to bear on their decision: "Jurors are familiar with children, with their abilities, intelligence, and capacity at various ages, and thus are well equipped to determine the comparative fault of individual children of varying ages and under particular circumstances, as well as that of all other parties."[187]

In sum, the Massachusetts rule is flexible and imposes a standard of care on children commensurate with the particular child's knowledge, experience, capacity, and age. As such, the rule recognizes a theory of child psychology that is directly at odds with that endorsed by the Illinois rule. Only one of these rules can be reconciled with the consensus of modern research in child psychology.

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184. *Id.* at 559.

185. 280 N.W. 827, 837 (Mich. 1938); *see supra* notes 160-174 and accompanying text (discussing the *Tyler* decision and the Illinois rule).

186. *Honeycutt*, 796 P.2d at 558; *see also* Eckhardt v. Hanson, 264 N.W. 776, 778 (Minn. 1936); Grace v. Kumalaa, 386 P.2d 872, 877 (Haw. 1963); Yun Jeong Koo v. St. Bernard, 392 N.Y.S.2d 815, 818 (N.Y. 1977). *But see* Tyler v. Weed, 280 N.W. 827, 837 (Mich. 1938) (rejecting the view that modern society can enhance a child's mental capacity); Verni v. Johnson, 68 N.E.2d 431, 432 (N.Y. Ct. App. 1946) (rule protecting children from denial of recovery from injuries caused by minor's immaturity is a rule "which changing conditions [do not] make obsolete").

187. *Honeycutt*, 796 P.2d at 559.

C. *Analysis of Both Rules in Light of Modern Research in Child Psychology*

The Illinois rule is inconsistent with theory and research in child psychology. The rule is contrary to the "well known fact" among child psychologists that chronological age alone is insufficient as a measure of a child's capacity to foresee the consequences of action and regulate behavior in safety conscious ways.[188] Moreover, the rule endorses the unsupportable proposition that *all* children under seven in *all* circumstances are incapable of negligence. Theory and research in cognitive psychology show otherwise and suggest that children have the mental capacity to engage in negligent conduct in situations familiar to them.[189] The Illinois rule endorses the view that children under seven are not sufficiently socialized to care for their own safety. Theories of socialization and recent empirical research dispute this contention. Accordingly, the Minnesota Supreme Court stated: "[T]he implicit premise of the Illinois rule, i.e., that children are unable to exercise due care for their own safety before reaching the age of seven, simply does not square with the way responsible people manage their affairs and those of their families in Minnesota today."[190]

The Massachusetts rule, on the other hand, is consistent with the view among cognitive child psychologists. The rule acknowledges individual differences and recognizes that the question whether a child has acted negligently depends upon the circumstances of the case, the child's knowledge and experience (i.e., familiarity) as they relate to those circumstances, *and* chronological age.

The fact that the Illinois and Massachusetts rules endorse such radically different theories of child development probably explains

188. Díaz et al., *supra* note 97, at 137; *see also supra* notes 97-108 and accompanying text (listing the various factors that influence a child's ability to plan and regulate behavior).

189. *See supra* notes 52-96 and accompanying text.

190. Toetschinger v. Ihnot, 250 N.W.2d 204, 210 (Minn. 1977).

the great deal of confusion that marks this area of negligence law.[191] At the heart of this confusion is the way in which courts have interpreted decisions which declared a particular child incapable of contributory negligence as a matter of law *under the particular facts of the case.* Rather than recognize that the plaintiff in the prior case was deemed incapable of negligence only because there was no *evidence* to support the charge, some courts have erroneously construed such precedent to hold that *all* children of the plaintiff's age under *any* circumstances are incapable of contributory negligence as a matter of law.[192] For example, in *Schmidt v. Allen,*[193] the Missouri Supreme Court affirmed a new trial order in favor of the four-year-old plaintiff and stated that "[s]ince plaintiff was a four year old child, no issue of contributory negligence was involved."[194] The court did not discuss the evidence of the plaintiff's capacity, but instead relied only on *Messer v. Gentry*[195] and *Reynolds v. Kinyon*[196] as support for this proposition.[197] However, in neither *Messer* nor *Reynolds* was there evidence which would have supported a charge of contributory negligence. The *Messer* court rejected the contention that the four-year-old plaintiff could be guilty of contributory negligence "*under the facts in this case.*"[198] And in *Reynolds,* the defendant *admitted* that the two-year, five-month-old was "so

191. *See, e.g.,* Graham v. Rolandson, 435 P.2d 263, 267 (Mont. 1967) ("The law [regarding the standard of care required of minors] is in hopeless and irreconcilable conflict.").

192. *See, e.g.,* White v. Nicosia, 351 So. 2d 234, 236 (La. Ct. App. 1977) ("[W]e disagree with plaintiff's assertion of an absolute jurisprudential rule that a seven-year old child is incapable of contributory negligence. A more accurate statement is that no Louisiana court has ever found a seven-year old child to be contributorily negligent.").

193. 303 S.W.2d 652 (Mo. 1957).

194. *Id.* at 658.

195. 290 S.W. 1014 (Mo. Ct. App. 1927).

196. 222 S.W. 476 (Mo. 1920).

197. *Schmidt,* 303 S.W.2d at 658.

198. *Messer,* 290 S.W. at 1016 (emphasis added).

young as to be incapable of any act of negligence."[199] Numerous other courts have made the same mistake.[200]

In addition, courts have simply disregarded or narrowly applied policy language that rejects fixing an arbitrary age below which minors are considered incapable of negligence as a matter of law. Rather than interpret such language as expressing a *public policy* applicable in all cases, courts have distinguished these cases on the basis of the minor plaintiff's age alone. The New York case of *Verni v. Johnson*[201] is an example. There, the question of the contributory negligence of a three-year-old was submitted to the jury. The New York Court of Appeal reversed, holding that "a three-year-old child is conclusively presumed to be incapable of negligence."[202] To reach this result, the *Verni* court declined to apply language from its earlier decision in *Quinby ex rel. Camardo*

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199. *Reynolds*, 222 S.W. at 479.

200. In Palms v. Shell Oil Co., 332 A.2d 300, 303 (Md. Ct. Spec. App. 1975), Le Febvre v. United States, 178 F. Supp. 176, 178 (D. Md. 1959), and Mulligan v. Pruitt, 223 A.2d 574, 579 (Md. Ct. App. 1966), Maryland courts relied on Miller v. Graff, 78 A.2d 220 (Md. Ct. App. 1951) and Mahan v. State, 191 A. 575 (Md. Ct. App. 1937), for the proposition that children under certain ages are presumed incapable of negligence. Neither case supports the conclusive presumption rule. *See Miller*, 78 A.2d at 224 ("The mere fact that a young child, when frightened or bewildered, turns around in the street near one sidewalk and starts to come back to the other sidewalk when called by the screams of a parent *is not necessarily evidence* of negligence.") (emphasis added). Under these circumstances, the court refused to hold 4-year-old guilty of contributory negligence as a matter of law. *Id. Mahan*, 191 A. at 580-81 ("The prayer could have been refused on the ground that there was . . . *no evidence legally sufficient to show that the child was guilty of any negligence contributing to the accident.*") (emphasis added). The appellate court affirmed the trial court's refusal to submit question of 3-year-old's contributory negligence to the jury where defendant sought to charge minor plaintiff with an adult standard of care. *Id.*

Similarly, in later cases, the Oregon Supreme Court relied on Macdonald v. O'Reilly, 78 P. 753, 757 (Or. 1904), for the proposition that children under the age of five are incapable of negligence as a matter of law. Oviatt v. Camarra, 311 P.2d 746, 751 (Or. 1957); Kudrna v. Adamski, 216 P.2d 262, 263 (Or. 1950). *Macdonald* does not so hold. The *Macdonald* court confined its holding to the particular facts before it, and it did not hold that *all* children under five in *all* circumstances are incapable of negligence. *See Macdonald*, 78 P. at 757 ("[N]o one will . . . contend that a child of . . . 4½ years . . . has reached such a degree of judgment, intelligence, or discretion as to be deemed capable of negligence *in playing on a pile of lumber or timber left in the public street near his home.*") (emphasis added). Nor could the minor in *Kudrna* have been contributorily negligent because she was a passenger in a car when two automobiles collided. *Kundra*, 216 P.2d at 262; *see also id.* ("The *sole* question for decision is whether the plaintiff, at the time of the accident was being transported by the defendant as his 'guest'.") (emphasis added).

For a more complete accounting of these types of interpretive errors, see, Appendix A.

201. 68 N.E.2d 431 (N.Y. Ct. App. 1946).

202. *Id.* at 432.

v. New York State Rys.,[203] which expressly rejected any rule of law which fixed an arbitrary age at which a duty to exercise due care begins.[204] The *Verni* court noted that the child in *Camardo* was older (four years, ten months) than the *Verni* child, thereby rendering the policy language in *Camardo* inapplicable.[205]

California case law is replete with similar errors of interpretation. California courts of appeal now seem to have settled on a variant of the inflexible Illinois rule and have declared children under five incapable of negligence.[206] Yet a review of the development of this area of California negligence law suggests that the California Supreme Court has consistently endorsed the more flexible Massachusetts rule and has rejected any rule which reduces the standard of care required of children to chronological age alone.[207] The competing lines of cases in California on this

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203. 159 N.E. 879 (N.Y. Ct. App. 1928).

204. *Id.* at 880-81; *see also* Meyer v. Inguaggiato, 16 N.Y.S.2d 672, 673-74 (N.Y. App. Div. 1940) (ignoring policy language in *Camardo* and holding that "the submission of the question to the jury [in *Camardo*] was proper with respect to a child of the age of four years and ten months. The child here was more than a year younger. But there *is* an arbitrary period of time during which it must be said, as a matter of law, that a child is non sui juris.") (emphasis added). No justice who decided *Camardo* also decided *Verni*.

205. *Verni*, 68 N.E.2d at 432; *see also* Clark v. Circus-Circus, Inc., 525 F.2d 1328, 1329-31 (9th Cir. 1975) (holding that language in Quillian v. Mathews, 467 P.2d 111, 113 (Nev. 1970) (involving a 6-year-old), which suggested that the law does not "establish a fixed and arbitrary rule" for minors charged with negligence, did not apply to 4½-year-old); Jones v. Strickland, 77 So. 562, 565 (Ala. 1917) (ignoring language from Birmingham & A. R. Co. v. Mattison, 52 So. 49, 52 (Ala. 1909), that "[t]here is no inflexible rule by which we can determine the capacity, of all children, under all circumstances, for observing and avoiding danger"); Yarborough v. Berner, 467 S.W.2d 188, 190 (Tex. 1971) (narrowly applying language in Sorrentino v. McNeill, 122 S.W.2d 723, 725 (Tex. Ct. App. 1938) that "the civil irresponsibility of a young child is not regarded as an invariable concomitant of a certain age – except it be little if any beyond swaddling clothes – to be arbitrarily fixed upon such age alone"); Gray, *supra* note 14, at 611 (citing case of Taylor v. Armiger, 358 A.2d 883, 889 (Md. 1976), as applying to children above the age of five even though the court expressly rejected any rule which fixes an age of discretion without regard to the circumstances of the case); *cf.* Yun Jeong Koo v. St. Bernard, 392 N.Y.S.2d 815, 817-18 (N.Y. App. Div. 1977) (court stated that there is a conclusive presumption that children under the age of four are incapable of negligence and that "'[n]o rule of law fixes an arbitrary age at which a particular degree of care may be expected . . .'").

206. CALIFORNIA JURY INSTRUCTIONS: CIVIL No. 3.35, Use Note; People v. Berry, 1 Cal. App. 4th 778, 785, 2 Cal. Rptr. 2d 416, 420 (1991).

207. *See* Brown v. Connolly, 62 Cal. 2d 394, 395, 398 P.2d 596, 598, 42 Cal. Rptr. 324, 326 (1965); Courtell v. McEachen, 51 Cal. 2d 448, 454-55, 334 P.2d 870, 873 (1959); Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 139-40, 138 P. 712, 717 (1914); *see also* Cummings v. City of Los Angeles, 56 Cal. 2d 258, 263, 363 P.2d 900, 903, 14 Cal. Rptr. 668, 671 (1961) (stating that the

issue suggest that, in addition to errors in legal analysis, current theory and research in child psychology ultimately casts doubt on the California courts' view that all children under five are incapable of negligence under all circumstances.

III. An Overview Of The Law Regarding Young Children In California Negligence Law

A. The Early Rule: A Flexible Subjective Standard Applied to Children of all Ages

Early decisions by the California Supreme Court and courts of appeal endorsed the flexible Massachusetts rule. In *Cahill v. E. B. & A. L. Stone Co.*,[208] a twelve-year-old child was severely injured after he jumped on a moving push car positioned on a railroad track. While playing on the car, the child's foot was crushed beneath the wheel. The child sued the railroad company, and the trial court sustained the defendant's demurrer without leave to amend. On appeal, the plaintiff argued that the railroad company was negligent in maintaining the push car because the company knew children played on the car, but failed to take precautions to prevent serious injury. The railroad company countered that the plaintiff was twelve years old, chargeable with the same standard of care required of an adult, and contributorily negligent as a matter of law.[209]

The California Supreme Court disagreed with the railroad company and reversed the trial court, holding:

> *There is no precise age at which, as a matter of law, a child is to be held accountable for all his actions to the same extent as one of full age.* . . . The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger, is one of fact, falling within the province of a jury to determine. . . . *We*

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subjective standard of care provides children with sufficient protection against unjustified denials of recovery).

208. 153 Cal. 571, 96 P. 84 (1908).

209. *Id.* at 576-77, 96 P. at 86-87.

> *cannot say, as a matter of law, at what age a boy would be possessed of such intelligence, foresight and judgment as to charge him with contributory negligence in a case like the present.*[210]

In reaching this conclusion, the court relied on two early Kansas cases, *Consolidated City & C. P. Ry. Co. v. Carlson*[211] and *Biggs v. Consolidated Barb-Wire Co.*[212] In *Carlson* (involving a ten year old) and *Biggs* (involving a 14 year old), the defendant claimed the minor plaintiff was guilty of contributory negligence as a matter of law. Both courts rejected this contention and endorsed a rule that would preclude establishing an exact age at which young children are presumed capable of contributory negligence.[213] One of the justifications for this rule was the court's view that "there is great difference in the capacity of different children at the same age, owing as well to differences in education and surroundings as to natural capacity."[214]

In *Cahill*, the California Supreme Court made a public policy determination that differences in capacity among children counseled against setting a maximum age at which, as a matter of law, a child would no longer enjoy the protections of a subjective standard of care which takes the child's age and experience into account. The court explained: "It may be conceded that many boys of the age of twelve years would have perceived the danger . . . which led to his injury. There is, however, no conclusive presumption that a twelve-year-old boy is able to foresee such danger, or that he has sufficient wisdom to avoid it."[215]

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210. *Id.* at 577, 96 P. at 84 (emphasis added). This holding was later reiterated in an appeal following the trial that resulted from this appeal. *See* Cahill v. E.B. & A.L. Stone Co., 167 Cal. 126, 139, 138 P. 712, 717 (1914).

211. 48 P. 635 (Kan. 1897).

212. 56 P. 4 (Kan. 1899).

213. "We know of no precise age at which a child may be said, as a matter of law, to have acquired such knowledge and discretion as to be fully accountable for all his acts." *Consol. City & C. P. Ry. Co.*, 48 P. at 637.

214. *Id.*

215. *Cahill*, 153 Cal. at 577, 96 P. at 84; *cf.* David L. Shane, Case Notes, 26 S. CAL. L. REV. 335, 337 n.22 (1953) ("*As to the maximum age*, most decisions under the majority view conclude that there is no precise age at which an infant becomes the equivalent of an adult, and in every case the question is one of fact. This is the view in California.") (emphasis added).

If, under *Cahill*, there was no precise age at which a young child was presumed to possess the "intelligence, foresight and judgment" of an adult, there could not logically be an exact age at which a child is presumed to *lack* the capacity for negligence. In both instances, the child's age alone would not be the decisive factor, nor would the question of capacity be one of law for the court, unless only one inference could be reasonably drawn from the evidence. Indeed, as the California Supreme Court said early on: "Immunity from responsibility does not exist in the case of a minor simply from the fact that he is a minor. His conduct by reason of his immature years is only measured by a different standard."[216]

A number of California courts, faced with plaintiffs of various ages, have endorsed the policy determination made in *Cahill*.[217] For example, in *Opelt v. Al. G. Barnes Co.*,[218] a ten-and-a-half year old boy was scratched by a leopard after he walked under a guard rope at a circus to get a closer look at the animal. The trial court, sitting as the trier of fact, returned a verdict in favor of the defendant circus, concluding that the plaintiff was guilty of contributory negligence. He was "a bright, intelligent, and alert

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216. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 140, 138 P. 712, 717 (1914).

217. *See also* Mecchi v. Lyon Van & Storage Co., 38 Cal. App. 2d 674, 685-86, 102 P.2d 422, 427 (1940), *disapproved on other grounds*, 50 Cal. 2d 617, 327 P.2d 897 (1958) (5-6 year old); Van Der Most v. Workman, 107 Cal. App. 2d 274, 278, 236 P.2d 842, 844 (1951) (10 year old); Carrillo v. Helms Bakers, Ltd., 6 Cal. App. 2d 299, 304, 44 P.2d 604, 606 (1935) (5 year old); McKay v. Hedger, 139 Cal. App. 266, 272, 34 P.2d 221, 224 (1934) (5 years, 7 months; refusing to hold plaintiff was incapable of negligence as a matter of law); Woodman v. Hemet Union High Sch. Dist., 136 Cal. App. 544, 548-49, 29 P.2d 257, 259-60 (1934) (12 year old); Barrett v. Harman, 115 Cal. App. 283, 286, 1 P.2d 458, 459-60 (1931) (11 year old); Patania v. Yellow-Checker Cab. Co., 102 Cal. App. 600, 603, 283 P. 295, 297 (1929) (11 year old); Katz v. Helbing, 205 Cal. 629, 636, 271 P.2d 1062, 1065 (1928) (11 year old); Moeller v. Packard, 86 Cal. App. 459, 467-68, 261 P. 315, 318-19 (1927) (8½ year old); Greeneich v. Knoll, 73 Cal. App. 1, 7, 238 P. 163, 165 (1925) (13 years, 11 months); Sanders v. Toberman, 192 Cal. 13, 15, 218 P. 394, 395 (1923) (8 year old); Charves v. Terminal Rys., 44 Cal. App. 221, 224, 186 P. 154, 155 (1919) (5 year old); Todd v. Orcutt, 42 Cal. App. 687, 690-91, 183 P. 963, 964-65 (1919) (9 year old); Mayne v. San Diego Elec. Ry. Co., 179 Cal. 173, 177, 175 P. 690, 692 (1918) (7 year, 8 month old). *See also* Brown v. Connolly, 62 Cal. 2d 391, 394-95, 398 P.2d 596, 597-98, 42 Cal. Rptr. 324, 325-26 (1965); Daun v. Truax, 56 Cal. 2d 647, 654-55, 365 P.2d 407, 411-12, 16 Cal. Rptr. 351, 355-56 (1961) (5 year, 8 month old); Courtell v. McEachen, 51 Cal. 2d 448, 454, 334 P.2d 870, 873 (1959) (5 year, 9 month old); Jones v. Wray, 169 Cal. App. 2d 372, 375, 337 P.2d 226, 228 (1959) (5 year, 3 month old); Baugh v. Beatty, 91 Cal. App. 2d 786, 793, 205 P.2d 671, 675 (1949) (4 year old).

218. 41 Cal. App. 776, 183 P. 241 (1919).

boy" who knew that the "leopard was dangerous and ferocious, and that the guard rope was placed to keep people away from the animals because they were dangerous."[219]

On appeal, the plaintiff argued the evidence was insufficient as a matter of law to support a finding of contributory negligence. The court of appeal rejected this contention. While recognizing that "'[y]outh is ever the time of heedlessness, of impulsiveness, and of forgetfulness,'"[220] the court of appeal held, "the law imposes upon minors the duty of giving such attention to their surroundings, and care to avoid danger, as may fairly and reasonably be expected from persons of their age and capacity."[221] The court concluded, "[w]e cannot say, as [a] matter of law, that the plaintiff entered into the forbidden space . . . without a full appreciation of the dangers and risk, and without sufficient judgment to know how to avoid them. These matters, and the further question whether or not he duly exercised such judgment as he possessed, were considerations of fact."[222] *Opelt* thus followed *Cahill*, and stands for the proposition that the law does not set an age at which young children are presumed capable *or* incapable of exercising due care.[223]

Similarly, in *Todd v. Orcutt*,[224] a nine-year-old boy was injured when he emerged from behind a parked vehicle to cross the street and was hit by a car. At trial, the defendant raised the defense of contributory negligence. The plaintiff did not introduce any evidence suggesting he was incapable of negligence, but merely asserted he could not be legally responsible for his actions due to his "tender years." After a bench trial, the trial court found the plaintiff was negligent and, therefore, entered judgment for the defendant. The plaintiff appealed, arguing he was incapable of

219. *Id.* at 780, 183 P. at 242.

220. *Id.* at 781, 183 P. at 243 (quoting Guyer v. Laundry Co., 171 Cal. 761, 763, 154 P. 1057, 1058 (1916)).

221. *Id.*

222. *Id.*

223. *Id.*

224. 42 Cal. App. 687, 183 P. 963 (1919).

negligence as a matter of law because of his young age.[225] The court of appeal disagreed and affirmed, holding:

> The ultimate question of *fact* is: Was [the plaintiff] guilty of contributory negligence? And we must assume that, in solving that question, the court applied the correct rule of law, which is that plaintiff was required to exercise the same degree of care, no more and no less, than would be expected from a child of his age, or which children of his years ordinarily exercise under like circumstances, *taking into consideration not only the boy's age, but his capacity for understanding.*[226]

In reaching this conclusion, the *Todd* court extensively analyzed and rejected the "tender years" rule which immunizes children from liability for negligence on the basis of the child's age alone.[227] The court recognized that, upon a proper factual showing, "[a]n infant may be so very young that, like an idiot or a lunatic, no negligence may legally be imputed to him."[228] However, that the child was very young was not sufficient to absolve the minor of any duty of due care. The child's age was "only a probative fact, as much so as if, had he been an adult, he were blind or deaf."[229] Thus, *Todd* rejected any rule that would excuse a child from exercising due care on the basis of age alone:

> The rule is that the defense of contributory negligence may be invoked in actions by or on behalf of children who are of an age sufficient to exercise discretion for the avoidance of injury to themselves. *The law does not fix this age of discretion.* It may depend upon the character of the injury, the circumstances under which it occurred, and the size, intelligence, and capacity of the child.[230]

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225. *Id.* at 690, 183 P. at 964.

226. *Id.* at 691, 183 P. at 965 (emphasis added).

227. *Id.*

228. *Id.* at 690, 183 P. at 964; *see also id.* ("Unless the child is *exceedingly young* it is usually left to the jury to determine the measure of care required of the particular child in the actual circumstances of the case.") (emphasis added).

229. *Id.* at 691, 183 P. at 965.

230. *Id.* at 690, 183 P. at 964; *accord* Smith v. Harger, 84 Cal. App. 2d 361, 369-70, 191 P.2d 25, 29-30 (1948); Graham v. Consol. Motor Transp. Co., 112 Cal. App. 648, 652, 297 P. 617, 618 (1931); Parra v. Cleaver, 110 Cal. App. 168, 171, 294 P. 6, 7-8 (1930); Patania v. Yellow-Checker Cab. Co., 102 Cal. App. 600, 604, 283 P. 295, 297 (1929); Moeller v. Packard, 86 Cal. App. 459,

Confirming the early rule that a child's capacity for negligence is a question of fact, some courts found the evidence in certain cases involving very young children was insufficient to support a nonsuit based on contributory negligence.[231] Consistent with these cases, the California Supreme Court *affirmed* a verdict in favor of a young plaintiff where the evidence was sufficient to support the plaintiff's claim of incapacity for contributory negligence.[232] On the other hand, California courts have rejected attempts by minor plaintiffs to avoid the consequences of their lack of due care where there was sufficient evidence the plaintiff under the particular

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467-68, 161 P.2d 315, 319 (1927); *see also* Opelt v. Al. G. Barnes Co., 41 Cal. App. 776, 781, 183 P. 241, 243 (1919) (10½-year-old).

231. *See Parra,* 110 Cal. App. at 171, 294 P. at 7 (court rejected defendant's contention that 16-month-old plaintiff was contributorily negligent as a matter of law and affirmed trial court's denial of defendant's motion for nonsuit). The court held "As Jose Parra was only sixteen months of age at the time of his injury *and as there was no evidence indicating that he had sufficient mind or understanding to enable him to be guilty of contributory negligence,* and as *the record is barren of any evidence pointing to contributory negligence on his part,* we cannot charge him with it.") *Id.* (emphasis added). *See also* Gonzales v. Davis, 197 Cal. 256, 258, 263, 240 P. 16, 18 (1925) (5-year-old; court reversed judgment of nonsuit in favor of defendant on ground there was enough evidence from which a jury could reasonably infer that the defendant was negligent and that his negligence proximately caused plaintiff's injuries).

Other California courts faced with five year old plaintiffs have submitted the issue of contributory negligence to the jury where there was sufficient evidence indicating the child had the capacity to understand the dangerous nature of the injury-causing conduct or the facts surrounding the cause of the accident were substantially in conflict. *See* Martinovic v. Ferry, 222 Cal. App. 2d 30, 34 Cal. Rptr. 692 (1963); Smith v. Wemmer, 217 Cal. App. 2d 226, 31 Cal. Rptr. 565 (1963); Daun v. Truax, 56 Cal. 2d 647, 365 P.2d 407, 16 Cal. Rptr. 351 (1961); Courtell v. McEachen, 51 Cal. 2d 448, 334 P.2d 870 (1959); Jones v. Wray, 169 Cal. App. 2d 372, 337 P.2d 226 (1959); Mecchi v. Lyon Van & Storage Co., 38 Cal. App. 2d 674, 102 P.2d 422 (1940), *disapproved on other grounds,* 50 Cal. 2d 617, 327 P.2d 897 (1958); Smith v. Harger, 84 Cal. App. 2d 361, 191 P.2d 25 (1948); Carrillo v. Helms Bakeries, Ltd., 6 Cal. App. 2d 299, 44 P.2d 604 (1935); McKay v. Hedger, 139 Cal. App. 266, 34 P.2d 221 (1934); Charves v. Terminal Rys., 44 Cal. App. 221, 186 P. 154 (1919). *But see* Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 777, 478 P.2d 465, 478, 91 Cal. Rptr. 745, 758 (1970) (holding that a child five years and seven months old, who drowned by following the direction of his parent, could not be charged with contributory negligence as a matter of law).

232. *See* Crane v. C.S. Smith Metro Mkt. Co., 23 Cal. 2d 288, 292, 298, 301, 144 P.2d 356, 359, 362 (1943) (affirming trial court's refusal to submit issue of contributory negligence to the jury where defendant did not rebut the assertion that 3-year-old plaintiff was "'wholly unable to appreciate or to guard or to protect herself against the dangerous appliance'").

circumstances of the case had the mental capacity for negligence.[233]

Finally, while the foregoing cases reaffirmed the general rule that a minor's negligence is a question of fact, some courts have found, based on factors including, but not limited to, the age of the child, that the defendant's claim of contributory negligence was unsupported by the evidence and must fail as a matter of law.[234] These cases are consistent with the general principle that a minor of virtually any age may be found negligent upon a sufficient factual showing of capacity to exercise due care.

However, unanimity among the California courts began to wane. While some courts continued to adhere to a flexible standard, others adopted a new rule of negligence which absolved minors of any duty of due care based solely on the minor's chronological age.

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233. *See* De Nardi v. Palanca, 120 Cal. App. 371, 376, 8 P.2d 220, 222 (1932) (7 year, 11-month-old; "there is nothing in the present case which enables us to say as a matter of law that the child was wanting in capacity to use ordinary care for her own safety"); Richardson v. Ribosso, 120 Cal. App. 641, 643, 8 P.2d 226, 226-27 (1932) (7 year, 11-month-old; "The rule is that though negligence will not be imputed to a child of tender years the question of the capacity of the particular child to exercise care in avoiding a particular danger is one of fact to be left to the jury"; "we must assume that the jury found the child capable and that his want of care under the circumstances was negligence."); Carrillo v. Helms Bakeries, Ltd., 6 Cal. App. 2d 299, 303-04, 44 P.2d 604, 606 (1935) (rejecting 5-year-old plaintiff's contention that the Supreme Court's decision in *Gonzales* established that child under 5 is conclusively presumed incapable of negligence; "It was long ago announced and is still maintained by our appellate courts that *there is no precise age at which, as a matter of law, a child is to be held accountable for all his actions to the same extent as one of full age*, and that the question as to the capacity of a child at a particular time to exercise care to avoid a particular danger is one of fact for the jury.") (emphasis added).

234. *See* Scandalis v. Jenny, 132 Cal. App. 307, 310-11, 22 P.2d 545, 547 (1933) (court implicitly recognized that 3-year-old plaintiff had the capacity for negligence but held that, under the circumstances of the case, there was insufficient evidence to support the contention that plaintiff proximately caused his injuries; "Was the plaintiff guilty of contributory negligence? To this question there can be but one answer, and that is in the negative. Even if it were negligence for a child of three years of age to stand in or near the center of a city street and look down, apparently unaware of the approach of an automobile, we are unable to see that such negligence contributed proximately to the injury . . . ."); Conroy v. Perez, 64 Cal. App. 2d 217, 225-26, 148 P.2d 680, 685 (1944) (holding that the trial court properly granted plaintiff's motion for new trial on ground that there was no evidence the 2 year, 8-month-old plaintiff had been negligent; "*While there is no precise age at which, as a matter of law, a child is to be held accountable for his actions*, it is obvious that a child of two years and eight months of age could not have sufficient capacity to be guilty of contributory negligence" under the circumstances of the case.) (emphasis added).

B. The Conflict in the Later Decisions

Over time, the California Supreme Court and courts of appeal continued to apply the flexible standard of care articulated by the early courts equally to all children.[235] Other courts of appeal, however, did not.[236] This back-and-forth between the lower appellate courts and the supreme court is attributable to a failure on the part of some lower courts to recognize statements of public policy in earlier cases which either expressly rejected any rule which set an arbitrary age of discretion or which held chronological age alone is an insufficient determinant of the standard of care required of children. Finding cases which rejected a bright line age rule distinguishable because of the plaintiff's age, these lower courts ruled that *no* child below the age of five, regardless of the circumstances or the child's knowledge and experience, could exercise any degree of due care for their own or others' safety.

1. The Continued Application of the Flexible Standard of Care

Following the rule established in the first few decades of this century, some California courts continued to hold that the question of contributory negligence was for the jury where sufficient evidence indicated the child had the capacity for negligent conduct under the circumstances of the case. In *Smith v. Harger*,[237] a five-year, nine-month-old boy was injured on school grounds when he was hit by a truck. On the day of the accident, the superintendent of buildings arranged to have dirt filled into low areas in the schoolyard. The teachers warned all the children about the danger posed by the work on the school yard. When it appeared the work would not be finished by the end of the school day, the teachers cautioned the children to go directly home after school and not stay

235. *See supra* notes 232-234 and accompanying text; *see infra* notes 237-249, 275-292, 309, 315-26 and accompanying text.

236. *See infra* notes 250-274, 293-314, 327-337 and accompanying text.

237. 84 Cal. App. 2d 361, 191 P.2d 25 (1948).

near the schoolyard.[238] After returning home from school, the plaintiff's mother told him he could not return to the schoolyard.[239] Without heeding any of these warnings, the plaintiff returned to the schoolyard, ran behind one of the trucks, and was hit and injured. The plaintiff sued the truck driver and his employer, charging them with negligence. The defendants responded with a defense of contributory negligence. The matter was submitted to a jury, which returned a verdict for the defendant. The plaintiff appealed, arguing that there was insufficient evidence to support the jury's finding of contributory negligence and that the "minor could not be found guilty of contributory negligence [as a matter of law] because of his age."[240]

The court of appeal rejected both contentions. The court found the facts sufficient to support a finding that the child, after being repeatedly warned by his teachers, knew the dangerousness of playing in the school yard and, therefore, had the capacity to foresee the potentially harmful consequences of his actions.[241] With regard to the plaintiff's second contention that his age insulated him from any finding of fault, the *Smith* court cited various California cases that rejected fixing an arbitrary age below which a child would be presumed incapable of negligence, and, thus, concluded that the trial court properly submitted the question of the minor's contributory negligence to the jury.[242]

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238. *Id.* at 365-66, 191 P.2d at 27.

239. It was never conclusively determined at trial whether the plaintiff later received permission to go to the schoolyard or went to the school without his mother's permission. *Id.* at 366, 191 P.2d at 27.

240. *Id.* at 369, 191 P.2d at 29. The plaintiff relied on Conroy v. Perez, 64 Cal. App. 2d 217, 148 P.2d 680 (1944) and Gonzales v. Davis, 197 Cal. 256, 240 P.2d 16 (1925) for this proposition. Neither case supports plaintiff's position. *See supra* notes 231 & 234.

241. *Smith*, 84 Cal. App. 2d at 369-70, 191 P.2d at 29.

242. *Id.* at 370, 191 P.2d at 29. The court relied on five central cases: Todd v. Orcutt, 42 Cal. App. 687, 690-91, 183 P. 963, 964 (1919) (9 year old; the law does not set a precise age of discretion; child's negligence a question of fact); Carrillo v. Helms Bakeries, Ltd., 6 Cal. App. 2d 299, 303-04, 44 P.2d 604, 606 (1935) (5 year old; no precise age at which a minor is to held capable or incapable of negligence; contributory negligence a question of fact); Mecchi v. Lyon Van & Storage Co., 38 Cal. App. 2d 674, 685-86, 102 P.2d 422, 427-28 (1940), *disapproved on other grounds*, 50 Cal. 2d 617, 327 P.2d 897 (1958) (5-6 year old; same); Walsh v. Van Tuyle, 21 Cal. App. 2d 302, 304, 69 P.2d 189, 190 (1937) (6-year-old); and Charves v. Terminal Rys., 44 Cal. App. 221, 224, 186 P. 154, 155 (1919) (5 year old; same).

The *Smith* decision was clear in suggesting that statements of public policy which rejected setting a precise age at which children would be charged with an adult standard of care applied equally to attempts by younger plaintiffs to avoid a duty of due care because of their "tender years."

This view of California case law was reaffirmed one year later in *Baugh v. Beatty*,[243] where it was held that the question whether a four-year-old "'knowingly and voluntarily'" invited injury was for the jury to determine.[244] In *Baugh*, a four-year-old boy was bitten by a chimpanzee while near a circus wagon cage. The boy sued the circus under a theory of negligence, and the jury was instructed that the plaintiff could not recover damages if he "knowingly or consciously"[245] placed himself in danger and his conduct "was the sole factor which produced the injury."[246] There was no evidence suggesting the plaintiff was incapable of appreciating the danger of venturing near the circus cage.[247] The jury returned a verdict in favor of the defendant circus and the plaintiff appealed, arguing that the instruction on contributory negligence incorrectly stated the law. The court of appeal agreed, reversed the defense verdict and remanded for retrial. Relying on *Opelt*,[248] the court concluded: "Whether a minor of tender years has conducted himself with the care and prudence due from on of

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In *La Fleur v. Hernandez*, the court of appeal rejected a 10-year-old plaintiff's contention that he was incapable of contributory negligence as a matter of law because of his age. 84 Cal. App. 2d 569, 573, 191 P.2d 95, 97 (1948). In dicta, the court commented that "[u]nless a child is of exceedingly tender years the measure of care required of it is usually left to the jury for determination." *Id.* The *La Fleur* court, however, was not presented with a plaintiff who, because of his age, was incapable of negligent conduct. Nor did the court define an age which could be considered "exceedingly tender."

243. 91 Cal. App. 2d 786, 205 P.2d 671 (1949).

244. *Id.* at 793, 205 P.2d at 675.

245. The instruction read: "'You are instructed that while the keeper of a wild animal is liable to the public for injuries occassioned [*sic*] by such animal, unless the injured party knowingly or consciously conducts himself so as to make the injury possible.'" *Id.* at 792, 205 P.2d at 675. The *Baugh* court found this instruction "grammatically erroneous, incomplete and meaningless." *Id.* at 792-93, 205 P.2d at 675.

246. *Id.* at 792-93, 205 P.2d at 675.

247. *Id.* at 788-89, 205 P.2d at 673.

248. 41 Cal. App. 776, 183 P. 241 (1919). *See supra* notes 175-181 and accompanying text (discussing the Massachusetts rule).

his years and experience is strictly a question of fact for the jury. Thus, the sole question for the jury to have determined was whether plaintiff knowingly and voluntarily invited the injury."[249] Thus, the four-year-old was not relieved of the duty of due care but, because of instructional error, his conduct was to be re-weighed by the jury on retrial.

2. *The Introduction of a Four Year "Bright Line" Test*

Despite prior courts' flexible application of a subjective standard of care, some California courts apparently found existing law insufficient to protect children from unjust denials of recovery. As a result, some courts of appeal endorsed the model of child development underlying the Illinois rule and carved out an exception in actions involving very young children.[250] In other words, a child under the age of five, or in some cases four, would be presumed incapable of negligence as a matter of law.

This "bright line" age test was first introduced in *Ellis v. D'Angelo*.[251] There, a four-year-old boy was sued for injuries sustained when the minor "negligently shov[ed] and push[ed] the plaintiff violently to the floor."[252] The plaintiff charged the minor defendant with negligence and battery. The trial court sustained the defendant's demurrer to both counts without leave to amend. The court of appeal reversed the judgment as to the battery cause of

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249. *Baugh*, 91 Cal. App. 2d at 793, 205 P.2d at 675.

250. People v. Berry, 1 Cal. App. 4th 778, 785, 2 Cal. Rptr. 2d 416, 420 (1991) (children under five); Casas v. Maulhardt Buick, Inc., 258 Cal. App. 2d 692, 700-01, 66 Cal. Rptr. 44, 49-50 (1968) (children under five); Bauman v. Beaujean, 244 Cal. App. 2d 384, 389-90, 53 Cal. Rptr. 55, 59 (1966) (children under five; dicta); Walker v. Fresno Distrib. Co., 233 Cal. App. 2d 840, 848, 44 Cal. Rptr. 68, 73 (1965) (children under four); Morningred v. Golden State Ltd. Co., 196 Cal. App. 2d 130, 137, 16 Cal. Rptr. 219, 224 (1961) (children under five); Untalan v. Glass, 190 Cal. App. 2d 474, 476, 12 Cal. Rptr. 1, 2 (1961) (children under five); Christian v. Goodwin, 188 Cal. App. 2d 650, 652-53, 10 Cal. Rptr. 507, 508-09 (1961) (children under 5 are presumed incapable of negligence); Morales v. Thompson, 171 Cal. App. 2d 405, 407-08, 340 P.2d 700, 702 (1959) (application of *Ellis* rule to minor plaintiff); Ellis v. D'Angelo, 116 Cal. App. 2d 310, 316, 253 P.2d 675, 678 (1953) (children under the age of 4 are incapable of personal negligence as a matter of law); *see also* Greene v. Watts, 210 Cal. App. 2d 103, 106, 26 Cal. Rptr. 334, 336-37 (1962) (extending bright line age rule to assumption of risk cases).

251. 116 Cal. App. 2d 310, 253 P.2d 675 (1953).

252. *Id.* at 312, 253 P.2d at 676.

action, but affirmed the judgment on the negligence count.[253] The court framed the question whether the defendant minor was negligent in the following manner: "[T]he question presented to the court is whether as a matter of common knowledge we can say that a child 4 years of age lacks the mental capacity to realize that his conduct which is not intended to bring harm to another may nevertheless be reasonably expected to bring about that result."[254] Without discussing the *particular* child's capacity, knowledge, or experience, the *Ellis* court answered this query in the negative and concluded:

> In the absence of compelling judicial authority to the contrary in the courts of this state we are satisfied that a 4-year-old child does not possess this mental capacity. . . . [¶] We are satisfied from our own common knowledge of the mental development of 4-year-old children that it is proper to hold that they have not at that age developed the mental capacity for foreseeing the possibilities of their inadvertent conduct which would rationally support a finding that they were negligent.[255]

In so holding, the *Ellis* court added a new rule to California negligence law, namely that *all* children under four, regardless of differences in age, knowledge, experience, and capacity, are absolved of any duty of due care for the safety of others.

The *Ellis* decision, however, contains several flaws. As a justification for the holding, the *Ellis* court distinguished the mental capacity for committing an intentional tort from that necessary for negligence.[256] The court made a distinction between *forming the intent* to harm another and *foreseeing* harmful consequences of

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253. *Id.* at 315-17, 320, 253 P.2d at 677-78, 680.

254. *Id.* at 315-16, 253 P.2d at 678.

255. *Id.* at 316, 253 P.2d at 678; *see also* People v. Berry, 1 Cal. App. 4th 778, 785, 2 Cal. Rptr. 2d 416, 420 (1991) (same); Greene v. Watts, 210 Cal. App. 2d 103, 106-07, 26 Cal. Rptr. 334, 336-37 (1962) (extending this reasoning to assumption of risk cases); Untalan v. Glass, 190 Cal. App. 2d 474, 476, 12 Cal. Rptr. 1, 2 (1961) (same); Christian v. Goodwin, 188 Cal. App. 2d 650, 652-53, 10 Cal. Rptr. 507, 508-09 (1961) (same); Morales v. Thompson, 171 Cal. App. 2d 405, 407-08, 340 P.2d 700, 701-02 (1959) (same).

256. *Ellis*, 116 Cal. App. 2d at 313-16, 253 P.2d at 676-78.

actions which were not intended to bring about harm.[257] In contrast, California Civil Code section 41 makes such a distinction, and provides that "[a] minor. . . is civilly liable for a wrong done by him. . . ."[258] The *Ellis* court believed that when the Legislature enacted this section, it "intended that a minor . . . should be liable in compensatory damages for his tortious conduct even though he was not capable of knowing the wrongful character of his act at the time he committed it."[259] Nonetheless, the court held the four-year-old minor defendant could be liable for tort damages arising only out of an alleged *battery*, but not out of negligence.[260] This distinction, approving a non-age-specific standard of care for children sued on an intentional tort theory while creating a bright line test for children sued on a negligence theory, advanced a distinction without a difference. If four-year-old children are capable of, and held to account for, committing an intentional tort, they certainly have the capacity to act negligently.[261]

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257. *Id.* at 315, 253 P.2d at 677.

258. CAL. CIV. CODE § 41 (West 1982).

259. *Ellis*, 116 Cal. App. 2d at 313, 253 P.2d at 676.

260. *Id.* at 317, 253 P.2d at 378. The court explained: "We certainly cannot say that a 4-year-old child is incapable of intending the violent or harmful striking of another. Whether a 4-year-old child [*intentionally* harmed someone] presents a fact question." *Id.* The *Ellis* court commented that the idea that a young child could be liable for his torts was "startling." *Id.* at 313, 253 P.2d at 676. *See generally* Donald J. Duffala, Annotation, *Modern Trends as to Tort Liability of Child of Tender Years*, 27 A.L.R.4th 15 (1984).

261. *See* DeLuca v. Bowden, 329 N.E.2d 109, 111 (Ohio 1975) (holding the seven year "bright line" rule insulating children from liability for negligence also applied to minors charged with committing intentional torts; "[t]he acts which constitute negligence are the same, whether that negligence is primary or contributory, and so too is the level of capacity and understanding necessary to a finding of negligence"); Queen Ins. Co. v. Hammond, 132 N.W.2d 792, 793 (Mich. 1965) (7-year conclusive presumption rule in negligence law applies to child's capacity for committing intentional torts); Robert E. Jones, Case Notes, *Infants — Torts — Willful Injuries — Four Year Old Liable for Battery*, 27 S. CAL. L. REV. 214, 216 (1954) ("The [*Ellis*] court found, as a matter of law, that the infant defendant was incapable of foreseeing a risk of harm from his conduct, yet overruled the demurrer to the battery count. It would seem more logical and consistent to hold the infant liable in either both situations or neither. *The same lack of mental development which makes it impossible for the infant to foresee the consequences of his act makes it equally impossible for him to refrain from the act*") (emphasis added); Francis H. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9, 32-33 (1924) ("Immaturity or deficiency which makes it impossible for the infant . . . to realize the consequences of his acts and to provide against their effects, makes it equally impossible for him to realize the necessity of refraining from acts of aggression. [¶] . . . Therefore, an infant . . . should either be liable for harm caused by conduct which falls short of the standard

Further, the legal authorities relied upon in *Ellis* do not support the court's holding. Without examining the facts or the reasoning in either *Crane v. C.S. Smith Metro Mkt. Co.*[262] or *Gonzales v. Davis*,[263] the court primarily relied on the fact that those courts held children of three and five, respectively, not guilty of contributory negligence as a matter of law.[264] A closer examination of these cases would have revealed that neither decision endorsed a bright line rule. The plaintiffs in *Gonzales* and *Crane* were found not guilty of contributory negligence *because there was no evidence of contributory negligence*, not because of their age alone.[265]

The *Ellis* court's attempt to distinguish contrary California authority is equally flawed. The court reasoned that *Baugh v. Beatty*,[266] involving a four-year-old, was distinguishable because the plaintiff's conduct was "more than negligence since it involve[d] the intentional taking of a risk and the opinion on its face indicates the court was making no clear distinction between mere negligent conduct and deliberate and premeditated conduct."[267] Yet, the very fact that the *Baugh* court made no such distinction proves the distinction was immaterial to that court's holding that whether a four year old child acts with due care for his safety is a question of fact dependent on the circumstances of each case.[268]

The *Ellis* court also distinguished *Opelt v. Al. G. Barnes Co.*[269] on the basis the plaintiff was ten years old.[270] This contention fundamentally misconstrues and improperly limits the holding in *Opelt*. The *Ellis* court flatly ignored *Opelt's* policy

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required of normal persons as well as for harm caused by an act done with the actual, but not culpable, intention of producing it, or he should not be liable for either.").

262. 23 Cal. 2d 288, 144 P.2d 356 (1943).
263. 197 Cal. 256, 240 P.2d 16 (1925).
264. *Ellis*, 116 Cal. App. 2d at 316, 253 P.2d at 678.
265. *See supra* notes 231 & 234 and accompanying text.
266. 91 Cal. App. 2d 786, 205 P.2d 671 (1949).
267. *Ellis*, 116 Cal. App. 2d at 316, 253 P.2d at 678.
268. *See supra* notes 243-249 and accompanying text.
269. 41 Cal. App. 776, 183 P. 241 (1919).
270. *Ellis*, 116 Cal. App. 2d at 316, 253 P.2d at 678.

argument that the law does not fix an arbitrary age at which minors are deemed capable or incapable of negligent conduct.[271] And even assuming *Opelt* is distinguishable on the basis of the plaintiff's age, the *Ellis* court's conclusion--that a four year old is presumptively incapable of negligence as a matter of law--does not logically follow. That the plaintiff in *Opelt* had the mental capacity to behave negligently does not mean that a child, by virtue of being younger, could therefore be declared *presumptively incapable* of negligence as a matter of law. The flexible Massachusetts rule endorsed by the early California decisions could not be so easily discarded.

Finally, the *Ellis* court inexplicably distinguished *Smith v. Harger*,[272] which affirmed a defense verdict in an action brought by a five-year-old, on the ground that "[t]he mental development of children from [age 5 and] forward is so rapid that cases such as *Smith* . . . , dealing with a 5-year-old child are not helpful to us."[273] The court cited no authority for this blanket statement which finds no support in the research on child psychology.[274]

The court of appeal in *Ellis* declined to follow a long line of California decisions which rejected age-based presumptions of incapacity. In so doing, the court offered an analysis of California law that is seriously flawed. *Ellis* therefore has the dubious distinction of being the first court to add confusion to the standard of care required of children in California. Such confusion could have been cleared up only by a clear statement from the supreme court.

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271. *Opelt*, 41 Cal. App. at 781, 183 P. at 243.

272. 84 Cal. App. 2d 361, 191 P.2d 25 (1948).

273. *Ellis*, 116 Cal. App. 2d at 316-17, 253 P.2d at 678. Three of the five authorities relied upon by the *Smith* court contain language similar to that in *Opelt*, namely that there is no precise age at which, as a matter of law, a child is considered capable or incapable of negligence. *See supra* notes 218-223, 242 and accompanying text.

274. *See supra* notes 52-114 and accompanying text.

3. *Affirmation of the Massachusetts Rule by the California Supreme Court*

Six years after *Ellis* was decided, the California Supreme Court revisited the question of the standard of care required of children, and in *Courtell v. McEachen*,[275] the court reaffirmed California's allegiance to the flexible "Massachusetts Rule."[276] In *Courtell*, a girl five years and nine months old was walking home from school with friends and stopped to play in a lot that contained some smoldering timbers. While playing, the girl's dress caught fire and she was severely burned. The trial court, on its own motion, instructed the jury that the girl could not have been contributorily negligent. The supreme court relied on *Cahill*[277] and reversed, holding that the question whether a child is capable of exercising due care under the circumstances is for the jury to decide.[278] The *Courtell* court declined to absolve the plaintiff of any duty of due care on the basis of age alone.[279] Relying on *Smith*[280] and *Carrillo v. Helms Bakeries, Ltd.*,[281] the court found that "courts have rejected the theory that a child of plaintiff's age, namely, between five and six, is incapable of contributory negligence as a matter of law."[282]

While the supreme court applied this rule to a child who was five years, nine months old, its reasoning was not limited to children over the age of five. The *Courtell* court established that,

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275. 51 Cal. 2d 448, 334 P.2d 870 (1959).

276. *Id.* at 454-55, 334 P.2d at 873.

277. Cahill v. E.B. & A. L. Stone, 167 Cal. 126, 138 P. 712 (1914); *see supra* notes 208-216 and accompanying text (discussing the *Cahill* decision).

278. *Courtell*, 51 Cal. 2d at 454, 334 P.2d at 873; *accord* Martinovic v. Ferry, 222 Cal. App. 2d 30, 35, 34 Cal. Rptr. 692, 694-95 (1963); Smith v. Wemmer, 217 Cal. App. 2d 226, 229-30, 31 Cal. Rptr. 565, 566-67 (1963); Daun v. Truax, 56 Cal. 2d 647, 659, 365 P.2d 407, 414, 16 Cal. Rptr. 351, 358 (1961).

279. *See Courtell*, 51 Cal. 2d at 454-55, 334 P.2d at 873.

280. Smith v. Harger, 84 Cal. App. 2d 361, 370, 191 P.2d 25, 29-30 (1948) (affirming defense verdict in action brought by 5 year, 9 month old); *see supra* notes 237-242 and accompanying text.

281. 6 Cal. App. 2d 299, 304, 44 P.2d 604, 606 (1935) (ruling that it was a reversible error for trial court to instruct jury that 5-year-old was presumed incapable of negligence; "It was long ago announced . . . that there is no precise age at which, as a matter of law, a child is to be held accountable for all his actions . . .").

282. *Courtell*, 51 Cal. 2d at 454, 334 P.2d at 873.

as a matter of public policy, the question of contributory negligence should be submitted to the jury if disputed issues of fact exist concerning the extent of a young child's capacity for negligent conduct.[283] In *Courtell*, there was a disputed issue of fact "whether plaintiff's dress caught fire because she played near flames or because she squatted down on embers, and a determination of this conflict was obviously essential in order to resolve the questions of plaintiff's capacity to exercise care for her safety and of her contributory negligence."[284] Under these circumstances, the supreme court was unequivocal:

> Contributory negligence is a matter bearing directly upon the outcome of a suit, and, where, as in the present case, *the facts are in dispute, there is no rational basis for permitting the judge, rather than the jury, to resolve that matter. So far has been called to our attention, the existence of such an exceptional power is not recognized anywhere.* [¶] The instruction that there was no contributory negligence on the part of plaintiff erroneously deprived defendants of a defense upon which they relied.[285]

This language was subsequently applied where a minor plaintiff, in the face of disputed issues of fact, sought to prevent the trial court from instructing the jury on contributory negligence. In *Jones v. Wray*,[286] a five-year, three-month-old boy was hit by a car and injured. There were no witnesses to the accident and there was no direct testimony as to how the plaintiff got into the street or whether the plaintiff was even in the street when the accident occurred.[287] The jury was instructed on the standard of care required of children, and they returned a verdict for the defendant. The plaintiff appealed and argued that it was reversible

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283. *Id.* at 455, 334 P.2d at 873.

284. *Id.* at 454-55, 334 P.2d at 873.

285. *Id.* at 455, 334 P.2d at 873 (emphasis added). *Courtell* is therefore squarely in line with the Massachusetts rule. Other courts and commentators have interpreted *Courtell* in this way. *See, e.g.*, Ashbaugh v. Trotter, 226 S.E.2d 736, 737 (Ga. 1976); Mundy v. Johnson, 373 P.2d 755, 759-60 (Idaho 1962); Quillian v. Mathews, 467 P.2d 111, 113 (Nev. 1970); Annotation, *supra* note 23, at 923.

286. 169 Cal. App. 2d 372, 337 P.2d 226 (1959).

287. *Id.* at 374, 337 P.2d at 227.

error for the court to refuse to "instruct the jury that a child of the age of 5 years and 3 months was not guilty of contributory negligence as a matter of law."[288] The appellate court rejected this contention.[289] The *Jones* court, finding a disputed issue of fact regarding contributory negligence, applied *Courtell* and held the issue of contributory negligence was for the jury to decide.[290]

Courtell seemed to send a clear signal to lower California courts that chronological age alone is insufficient as a determinant of the standard of care required of children, especially if there is a disputed question of fact whether the child had the capacity for or engaged in negligent conduct.[291] Unfortunately, the court's statement that children "between five and six"[292] are capable of negligence created the possibility that courts faced with children under five would ignore the public policy determination made by the court.

4. Extension of the "Bright Line" Test

Two years after the supreme court handed down *Courtell*, the court of appeal in *Christian v. Goodwin*[293] declined to apply *Courtell* in a case involving a four year, seven month old plaintiff.[294] *Christian* followed the "bright line" rule announced in *Ellis* and held that children under the age of five would be presumed incapable of contributory negligence as a matter of law.[295] In *Christian*, a boy four years and seven months old was struck by an automobile while crossing the street in response to a call from his mother. At trial, the jury returned a verdict in favor

288. *Id.*

289. The judgment was nevertheless reversed on the ground that the giving of some instructions and the refusal to give clarifying instructions on negligence constituted reversible error. *Id.* at 376-83, 337 P.2d at 228-32.

290. *Id.* at 375, 337 P.2d at 227 (quoting Courtell v. McEachen, 51 Cal. 2d 448, 455, 334 P.2d 870, 873 (1959)).

291. *Courtell*, 51 Cal. 2d at 454-55, 334 P.2d at 873.

292. *Id.* at 454, 334 P.2d at 873.

293. 188 Cal. App. 2d 650, 10 Cal. Rptr. 507 (1961).

294. *Id.* at 652-55, 10 Cal. Rptr. at 509-10.

295. *Id.* at 655, 10 Cal. Rptr. at 510.

of the defendant. The trial judge granted the plaintiff's motion for a new trial on the ground that the jury should have been instructed that a child under five is incapable of contributory negligence as a matter of law. The defendant appealed, arguing that the jury should decide whether a child under five is capable of contributory negligence. The court of appeal disagreed, holding:

> [W]e conclude that a child of the age of the minor plaintiff does not have sufficient capacity to be guilty of contributory negligence . . . and . . . the trial court properly granted a new trial on the ground it had erred in refusing plaintiffs' proferred [*sic*] instruction that a child of the age of the plaintiff is, as a matter of law, incapable of contributory negligence."[296]

Like *Ellis*, the *Christian* court did not examine the particular plaintiff's knowledge, capacity, or experience and did not indicate whether the defense introduced evidence which would support a finding that the plaintiff had sufficient knowledge and experience to exercise care for his own safety. Instead, the court began its analysis by quoting the flexible rule which held that the question of a particular child's capacity for negligence under the particular circumstances of each case is normally a question of fact.[297] The court then qualified that early rule and stated: "[T]here is the exceptional case in which the negligence of the infant becomes a matter of law for the court because of his 'exceedingly tender years.' . . . 'An infant may be so very young that no negligence may legally be imputed to him'. . . ."[298]

The *Christian* court relied on dicta in *La Fleur v. Hernandez*[299] and *Todd v. Orcutt*[300] as authority for this

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296. *Id.*

297. *Id.* at 652, 10 Cal. Rptr. at 509.

298. *Id.* at 652-53, 10 Cal. Rptr. at 509 (citations omitted).

299. 84 Cal. App. 2d 569, 573, 191 P.2d 95, 97 (1948) (The Court was faced with a 10-year-old and stated that: "Unless a child is of exceedingly tender years the measure of care required of it is usually left to the jury for determination."; however, the court did not indicate what age constituted "tender years").

300. 42 Cal. App. 687, 690, 183 P. 963, 964 (1919). The *Christian* court left out a portion of the language quoted from *Todd* without so indicating. The quote should have read: "An infant may be so very young that, *like an idiot or a lunatic*, no negligence may legally be imputed to him." *Id.*

passage.[301] Neither case supports the proposition that, by virtue of the child's age alone, the question of contributory negligence can be decided as a matter of law.[302] *Todd* expressly rejected any such rule.[303] Moreover, by endorsing the rule that *all* children of "very early years" (defined as children under five) do not have the capacity for negligence, the *Christian* court repeated the same mistake made in *Ellis*. The court ignored the weight of authority in California which held that whether a child had been negligent depended upon the *particular* child's mental ability, taking into account his age, knowledge, capacity, *and* experience to avoid harm under the *particular* circumstances of the case.

The *Christian* court looked to other California precedent to find support for an arbitrary age below which children would be declared incapable of negligence.[304] Aside from the flawed decision in *Ellis*, however, the decisions relied upon by *Christian* did not support a "bright line" age rule.[305] The court relied primarily on *Gonzales v. Davis*[306] for the proposition that a five-year-old is presumptively incapable of negligence.[307] However,

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at 690, 183 P. at 964 (emphasis added). Obviously, the phrase "like an idiot or a lunatic" indicates the *Todd* court was highlighting the importance of the mental development of a person, and not only, as the *Christian* court concluded, a person's age.

301. 6 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW § 806, at 161 (9th ed. 1988) ("In *Christian v. Goodwin* . . . the court, dealing with the period between 4 and 5 years, followed . . . prior California dicta in holding the child not capable and therefore not barred by contributory negligence.").

302. *See supra* notes 224-230 and accompanying text (discussing *Todd*); note 242 (discussing *La Fleur*).

303. As the *Todd* court explained, "[t]he law does not fix [an] age of discretion" and therefore the plaintiff's age is "*only* a probative fact, as much so as if, had he been an adult, he were blind or deaf. . . . [P]laintiff was required to exercise the same degree of care, no more and no less, than would be expected from a child of his age . . . taking into consideration *not only the boy's age*, but his capacity for understanding." *Todd*, 42 Cal. App. at 691, 183 P. at 964-65 (emphasis added).

304. Christian v. Goodwin, 188 Cal. App. 2d 650, 653-55, 10 Cal. Rptr. 507, 509-10.

305. Neither Gonzales v. Davis, 197 Cal. 256, 240 P.2d 16 (1925), Crane v. C.S. Smith Metro Market Co., 23 Cal. 2d 288, 144 P.2d 356 (1943), nor Conroy v. Perez, 64 Cal. App. 2d 217, 148 P.2d 680 (1944) support a "bright line" rule. All of these cases are consistent with the flexible "Massachusetts Rule." *See supra* notes 231, 232 & 234. In particular, the *Conroy* court unequivocally rejected any "bright line" rule when it stated: "*there is no precise age at which, as a matter of law, a child is to be held accountable for his actions* . . . . " *Conroy*, 64 Cal. App. 2d at 226, 148 P.2d at 685 (emphasis added).

306. 197 Cal. 256, 240 P.2d 16 (1925).

307. *Christian*, 188 Cal. App. 2d at 653-55, 10 Cal. Rptr. at 509-10.

Gonzales was consistent with the flexible Massachusetts rule and did not support the five year "bright line" rule.[308]

Most importantly, the *Christian* court flatly ignored the policy language contained in several of the cases it cited which rejected any rule fixing an arbitrary age of discretion.[309] The court circumvented this language by distinguishing those cases on the ground they involved children five years or older.[310] However, this perceived gap in the precedent is insufficient as a reason to establish a five year "bright line test". The clear weight of authority in analogous cases expressly rejected any "bright line" rule.[311]

Prior to *Ellis* and *Christian*, California courts took seriously the possibility that a young child may be denied recovery or held liable in tort under contributory or primary negligence theory.[312] Courts which applied the flexible Massachusetts rule nonetheless acknowledged that children are impulsive, heedless, and sometimes fail to protect themselves from danger.[313] Such considerations prevented courts from submitting the question of contributory

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308. *See supra* note 231 and accompanying text.

309. Mecchi v. Lyon Van & Storage Co., 38 Cal. App. 2d 674, 684-86, 102 P.2d 422, 427-28 (1940), *disapproved on other grounds*, 50 Cal. 2d 617, 327 P.2d 897 (1958); Van Der Most v. Workman, 107 Cal. App. 2d 274, 278, 236 P.2d 842, 844-45 (1951); Conroy v. Perez, 64 Cal. App. 2d 217, 226, 148 P.2d 680, 685 (1944); Carrillo v. Helms Bakeries, Ltd., 6 Cal. App. 2d 299, 303-04, 44 P.2d 604, 606-07 (1935); Mc Kay v. Hedger, 139 Cal. App. 266, 272, 34 P.2d 221, 224 (1934); Todd v. Orcutt, 41 Cal. App. 687, 690-91, 183 P. 963, 964-65 (1919); Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 139, 138 P. 712, 717-18 (1914).

310. *Christian*, 188 Cal. App. 2d at 653, 10 Cal. Rptr. at 509. As the court explained: "We have found no authority in this state relative to the contributory negligence of children over 4 and under 5." *Id.* The court did not cite Baugh v. Beatty, 91 Cal. App. 2d 786, 205 P.2d 671 (1949), which the *Ellis* court distinguished on the ground the *Baugh* court was discussing something more than contributory negligence. *See supra* notes 266-267 and accompanying text. As previously demonstrated, the *Ellis* court's reasoning was unpersuasive. *See supra* notes 266-268 and accompanying text.

311. *See supra* notes 208-234, 237-249, 275-290 and accompanying text.

312. *See, e.g.*, Opelt v. Al. G. Barnes Co., 41 Cal. App. 776, 782, 183 P. 241, 243 (1919) ("Just how far to apply the rule of accountability to a bright, ten year old boy at a circus, with the allurement and excitement attendant thereto, and keeping in mind the propensity to curiosity every normal boy possesses, was, no doubt, a matter of grave concern to the trial court, as it has been to us.").

313. *See* Brown v. Connolly, 62 Cal. 2d 391, 394-95 & n.2, 398 P.2d 596, 597-98 & n.2, 42 Cal. Rptr. 324, 325-26 & n.2 (1965); Todd v. Orcutt, 42 Cal. App. 687, 690-91, 183 P. 963, 964-65 (1919); Opelt v. Al. G. Barnes Co., 41 Cal. App. 776, 781-82, 183 P. 241, 242-43 (1919); Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138-41 (1914) 138 P. 712, 717-18 (1914).

negligence to the jury in the absence of sufficient evidence that the child had the capacity for negligent conduct under the particular circumstances of the case.[314] If such were the state of the record in *Christian*, the court could have reached the same result without adopting a "bright line" test.

After the "bright line" decisions, however, children have been presumed to have acted with sufficient care for their safety, no matter how egregious the conduct or how knowledgeable the child, simply because he or she is under the age of five. Accordingly, the *Ellis* and *Christian* decisions signalled a significant change in negligence law in California: The standard of care required of children had changed, so that some minors would be absolved of any duty of due care for their own or others' safety while other children, by virtue of attaining their fifth birthday, would be held fully accountable for all of their actions.

5. *The Flexible Standard of Care Provides Children with Sufficient Protection from Unreasonable Liability Standards*

Four years after *Christian* was decided, the question of whether the subjective standard of care provided children with sufficient protection against an unjustified charge of contributory negligence was again addressed by the California Supreme Court in *Brown v. Connolly*.[315] There, a six-year-old boy was seriously injured when he was struck by an automobile while riding his bicycle. The first trial resulted in a judgment for the defendant, but the judgment was subsequently reversed by the court of appeal due to instructional error.[316] On retrial, the trial court refused an instruction requested by the plaintiff that would have insulated the plaintiff from liability with a presumption of due care based solely on the plaintiff's

314. *See supra* notes 175-179, 218-223, 231-232, 234 and accompanying text.
315. 62 Cal. 2d 391, 398 P.2d 596, 42 Cal. Rptr. 324 (1965).
316. Brown v. Connolly, 206 Cal. App. 2d 582, 586-89, 24 Cal. Rptr. 57, 59-61 (1962).

age.[317] The jury was instead instructed on the standard of care required of children generally. The jury returned a defense verdict and the plaintiff appealed, arguing it was prejudicial error for the trial court to refuse to instruct the jury that the plaintiff, because of his young age, was entitled to a presumption of due care.

The supreme court, in an opinion written by Justice Mosk, disagreed: "There is no convincing authority in California . . . holding that a minor is entitled to a presumption of due care *solely by virtue of age.*"[318] Next, the court described a bifurcated test as a guide for trial judges in determining whether to submit the question of a child's contributory negligence to the jury.[319] The *Brown* court reasoned that there must first be sufficient evidence "the particular child had the capacity to act negligently."[320] Assuming capacity exists, the issue is submitted to the jury, which "tests the child's conduct by the standards of children of like age and maturity."[321] The supreme court found this test "reasonable and workable" because it "protects children from unreasonably

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317. *Brown*, 62 Cal. 2d at 400 n.2, 398 P.2d at 601 n.2, 42 Cal. Rptr. at 329 n.2 (McComb, J., dissenting). The proposed instruction read:

> The law presumes that [plaintiff] in his conduct at the time of and immediately preceding the accident was exercising ordinary care and was obeying the law.
>
> This presumption is a form of evidence. It will support a finding in accord with the presumption where there is no proof to the contrary; and it will support such a finding in the face of contrary evidence if your judgment so directs after weighing conflicting evidence.
>
> When such a conflict exists, it is the jury's duty to weigh the presumption and any evidence that may support it against the contrary evidence and to determine which, if either, preponderates. Such deliberations, of course, shall be related to and be in accordance with my instructions on the burden of proof.

Id.

318. *Id.* at 394, 398 P.2d at 598, 42 Cal. Rptr. at 326 (emphasis added); *see also id.* at 395, 398 P.2d at 598, 42 Cal. Rptr. at 326. The court, however, reversed the judgment because the trial judge erroneously prevented the child's psychiatrist from testifying on the child's behalf about the accident in which the child suffered from amnesia and therefore could not competently testify. *Id.* at 395-98, 398 P.2d at 598-600, 42 Cal. Rptr. at 326-28.

319. *Id.* at 395, 398 P.2d at 598, 42 Cal. Rptr. at 326.

320. *Id.* at 395, 398 P.2d at 598, 42 Cal. Rptr. at 326. The supreme court did not explicitly say who bore the burden of introducing such evidence. It appears that the plaintiff should bear the burden of demonstrating the child does not have the capacity for negligent conduct under the particular circumstances of the case. Upon such a showing, the burden would then shift to the defendant who must show the child was capable. *See infra* notes 338-365 and accompanying text (providing a more elaborate discussion of the evidentiary requirements for the first prong of the bifurcated test).

321. *Brown*, 62 Cal. 2d at 395, 398 P.2d at 598, 42 Cal. Rptr. at 326.

lofty liability standards while holding them liable when the facts justify it, and avoids the unsupportable conclusion that young children generally act with due regard for their own safety."[322]

The *Brown* court then described the way in which the bifurcated test should be applied.[323] In doing so, the supreme court expressly rejected the "bright line" test established by *Ellis* and *Christian*. Without citing either case, the court stated: "*The California rule . . . avoid[s] the arbitrary chronological age limits used in many states. In California the age of capacity is a factual question to be determined by the mentality and maturity of the particular child.*"[324] Thus, *Brown* represents an unequivocal affirmation of the flexible Massachusetts rule by categorically rejecting any rule that would determine a child's capacity for negligence on the basis of chronological age alone.[325]

Since the *Brown* court did not explicitly refer to either *Christian* or *Ellis*, California courts have faced the difficult task of resolving the analytical inconsistencies between *Brown* and the "bright line" decisions. Unfortunately, rather than analyze the reasoning behind both lines of cases, the courts of appeal merely confused the issue further by erroneously interpreting the supreme

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322. *Id.*

323. *Id.*

324. *Id.* at 395, 398 P.2d at 598, 42 Cal. Rptr. at 326 (emphasis added).

325. *Cf.* Fowler v. Seaton, 61 Cal. 2d 681, 394 P.2d 697, 39 Cal. Rptr. 881 (1964). In *Fowler*, the supreme court held that a 3 year, 10 month old could not be contributorily negligent as a matter of law. *Id.* at 687, 394 P.2d at 701, 39 Cal. Rptr. at 885. *Fowler*, however, is readily distinguishable. There, the court was faced with determining whether the plaintiff could invoke the doctrine of res ipsa loquitur. The plaintiff went to school and returned home with a large bruise on her forehead and crossed eyes. The trial court granted the defendant's motion for nonsuit. The supreme court reversed, holding "the jury could find that the doctrine of res ipsa loquitur applies *under the facts here involved.*" *Id.* at 686, 394 P.2d at 700, 39 Cal. Rptr. at 884 (emphasis added). The issue of the child's negligence was discussed only in the context of satisfying one of the requirements for invoking res ipsa loquitur, namely, that the plaintiff "show that the actions of the plaintiff did not contribute to the injuries." *Id.* at 690, 394 P.2d at 702, 39 Cal. Rptr. at 886. The court concluded, without citing authority, that the plaintiff, because of her age, could not be guilty of negligence. *Id.* This is not inconsistent with the holding in *Courtell* or *Brown* because the defense of contributory negligence was never raised. The defendant in *Fowler* attempted to defeat the invocation of the doctrine of res ipsa loquitur by arguing the defendant did not owe a duty of protection to the child. *Id.* at 687-88, 394 P.2d at 700-01, 39 Cal. Rptr. at 884-85. The defendant never introduced evidence that the plaintiff was capable of or did in fact engage in negligent conduct that proximately caused her injuries. *See id.* at 686-90, 394 P.2d at 699-702, 39 Cal. Rptr. at 883-86.

court's position in *Brown*--which was expressed without limitation or qualification--as applying only to children over the age of five.[326]

C. Modern Treatment of the Question of Children and Negligence in California

Without looking to the reasons behind the "bright line" rule, modern authorities seem to have accepted the *Christian* and *Ellis* approach, thus ignoring *Courtell* and *Brown* in cases involving children under five.[327] *Christian* was recently followed in *People v. Berry*.[328] In *Berry*, a two-year, eight-month-old boy was killed by a pit bull. The defendant was charged with involuntary manslaughter.[329] In his defense, the defendant claimed the child's death was an accident and that it was not reasonably foreseeable that the dog had violent propensities or would harm another person. The jury was instructed: "'A minor under the age of five years is, as a matter of law, not required to take any precautions which the circumstances permitted, nor which a reasonable person would

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326. *See* Walker v. Fresno Distrib. Co., 233 Cal. App. 2d 840, 848, 44 Cal. Rptr. 68, 73 (1965) (*Brown* "d[id] not purport to do away with the firmly established rule . . . that a child under four years of age is incapable of contributory negligence."); Casas v. Maulhardt Buick, Inc., 258 Cal. App. 2d 692, 701, 66 Cal. Rptr. 44, 50 (1968) (*Brown* does not "impair the well settled rule that 4-year-olds are incapable of negligence."); *see also* HARPER, ET AL., *supra* note 15, § 16.8, at 441-42 n.19 (stating that *Brown* applied to children above the age of five); Gray, *supra* note 14, at 605 (same).

327. *See* Untalan v. Glass, 190 Cal. App. 2d 474, 12 Cal. Rptr. 1 (1961) (3½ year old); Morningred v. Golden State Co., Ltd., 196 Cal. App. 2d 130, 16 Cal. Rptr. 219 (1961) (4 years, 1 month, 1 day old); Greene v. Watts, 210 Cal. App. 2d 103, 26 Cal. Rptr. 334 (1962) (3½ year old; extending the four year "bright line" to assumption of risk cases); Walker v. Fresno Distrib. Co., 233 Cal. App. 2d 840, 44 Cal. Rptr. 68 (1965) (approximately three years old); Bauman v. Beaujean, 244 Cal. App. 2d 384, 53 Cal. Rptr. 55 (1966) (3½ year old; plaintiff waived error by requesting an instruction on contributory negligence); Casas v. Maulhardt Buick, Inc., 258 Cal. App. 2d 692, 66 Cal. Rptr. 44 (1968) (4 year old); People v. Berry, 1 Cal. App. 4th 778, 2 Cal. Rptr. 2d 416 (1991) (2 year, 8 month old).

Moreover, the Use Note for BAJI 3.35 (the subjective standard of care instruction) instructs the courts to not give the standard of care instruction to children under five. Interestingly, *Brown* is absent from the list of authorities in the Use Note and Comment of BAJI 3.35.

328. 1 Cal. App. 4th 778, 2 Cal. Rptr. 2d 416 (1991).

329. *Id.* at 781, 2 Cal. Rptr. 2d at 417; *see* CAL. PENAL CODE § 192(b) (West 1988). The defendant was also charged with keeping a mischievous animal (CAL. PENAL CODE § 399), keeping a fighting dog (CAL. PENAL CODE § 597.5(a)(1)), and cultivating marijuana (CAL. HEALTH & SAFETY CODE § 11358 (West (1991)).

ordinarily take in the same situation.'"[330] The jury convicted the defendant of involuntary manslaughter and the defendant appealed, arguing that the instruction amounted to a directed verdict and relieved the prosecution of its burden of proof.

The court of appeal disagreed with the defendant and affirmed the trial court. The court reasoned that the prosecution had to prove beyond a reasonable doubt that the "victim lacked the *capacity* to take the precautions reasonably available."[331] Without examining the reasoning behind *Christian*, the *Berry* court looked no further than the plaintiff's age and held that the "sole" issue in the case was whether plaintiff was under the age of five and therefore relieved of any duty of exercising due care.[332] Finding the child under the age of five, the court rejected the defendant's contention that the prosecution failed to prove the child lacked the capacity for due care.[333]

The fact that the five year "bright line" age rule articulated in *Christian* has recently been applied is no reason to regard the matter as settled. No California appellate court has resolved the analytical inconsistency between the holdings in *Ellis*, *Christian* and their progeny on the one hand, and the supreme court's opinions in *Courtell* and *Brown* on the other.[334] The California Supreme Court has clearly endorsed the more flexible Massachusetts rule whereas some courts of appeal have explicitly followed a variant of the inflexible Illinois rule. Courts that have opted for the Illinois rule have either erroneously interpreted prior case law, mistakenly distinguished contrary authority, or ignored

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330. *Berry*, 1 Cal. App. 4th at 783, 2 Cal. Rptr. 2d at 419.

331. *Id.* at 784, 2 Cal. Rptr. 2d at 419 (original emphasis).

332. *Id.* at 785, 2 Cal. Rptr. 2d at 420.

333. *Id.*

334. In Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970), the California Supreme Court cited *Courtell*, *Christian*, and *Brown* for the proposition that "plaintiffs do not suggest that they were entitled to the requested instruction [precluding a jury finding of contributory negligence] simply by virtue of [plaintiff's] tender age . . ." *Id.* at 776, 478 P.2d at 478, 91 Cal. Rptr. at 758. The *Haft* court, however, was not faced with the issue whether the child, because of his or her "tender years," should or should not have been charged with contributory negligence. It is likely that the court was merely illuminating the various approaches California courts have taken on the subject. *See also* Welch v. Gardner, 187 Cal. App. 2d 104, 112, 9 Cal. Rptr. 453, 457 (1960) (citing *Ellis*, *Morales*, *Courtell* and *Baugh* as expressing conflicting rules in California).

policy language which rejected any rule setting an arbitrary age below which children would be considered incapable of negligence as a matter of law.[335]

Most importantly, however, theory and research in child psychology casts doubt on the view that children under the age of five are incapable of foreseeing the consequences of their acts.[336] Research shows that children well below the age of five have the capacity to exercise due care in situations familiar to them.[337] Thus, the position most consistent with the theory of child development presented here is that articulated by the supreme court in *Brown*, namely that whether a child has the capacity for negligence depends not only on a child's chronological age, but also upon the child's familiarity with the injury-causing conduct.

IV. A PROPOSAL FOR THE COURTS: REAFFIRM THE SUBJECTIVE STANDARD OF CARE AND APPLY IT EQUALLY TO CHILDREN OF ALL AGES

"In the field of tort law, reexamination of principles and overruling of older cases is probably more necessary and common than in any other."[338] This maxim is especially applicable to the

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335. *See supra* notes 251-274, 293-314, 326 and accompanying text.

336. *See* Untalan v. Glass, 190 Cal. App. 2d 474, 476, 12 Cal. Rptr. 1, 2 (1961); Christian v. Goodwin, 188 Cal. App. 2d 650, 652-54, 10 Cal. Rptr. 507, 508-10 (1961); Ellis v. D'Angelo, 116 Cal. App. 2d 310, 315-16, 253 P.2d 675, 677-78 (1953).

337. *See supra* notes 52-96 and accompanying text.

338. 9 BERNARD E. WITKIN, CALIFORNIA PROCEDURE § 797, at 770 (3d ed. 1985); *see, e.g.*, Warren A. Seavey, *The Waterworks Cases and Stare Decisis*, 66 HARV. L. REV. 84, 85, 86 (1952) ("Stare decisis is a principle rather than a rule. It looks toward certainty and continuity in the law; and, other things being equal, prior decisions should be followed. But stare decisis has never been a rule which demanded rigid adherence to precedent; the common law has not developed by a slavish adherence to prior decisions. . . . [¶] [P]recedent is a useful tool but a bad master."). *Compare* Verni v. Johnson, 68 N.E.2d 431, 432 (N.Y. Ct. App. 1946) ("The rule which refuses to allow such young children to be penalized for supposed faults has been followed in this court at least since 1868. [Citation.] It is not an unjust rule or one which changing conditions make obsolete.") *with* Beard v. Atchison, Topeka & Santa Fe Ry. Co., 4 Cal. App. 3d 129, 139, 84 Cal. Rptr. 449, 456 (1970) ("We think the dangers connected with moving trains, like those connected with runaway horses and wild animals, may be less generally understood by juveniles today than they were 70 years ago when the railroad was king of transportation and dominated youthful imaginations. . . . In view of the substantial role which awareness of the surroundings plays in determining what conduct is negligent, an awareness which is dynamic and not static, and which over the years gradually changes its aim,

analysis here because courts which have followed the Illinois rule have embraced an unsupportable theory of child development. Current theory and research in child psychology suggests that young children have the capacity for negligence in situations with which they are familiar.[339] Accordingly, courts should submit the question of comparative negligence to the jury if there is sufficient evidence indicating that the child was familiar with the circumstances presented to him.[340] Prior knowledge of and experience with the danger should be admissible to show the extent to which the child was familiar with the dangerous situation. A child's history of heeding or failing to heed warnings from parents and school should also be admissible to demonstrate capacity.[341]

In so doing, trial courts should apply a bifurcated test which first tests whether the child had the requisite knowledge of and experience with the injury-causing conduct, and then assesses the child's actions against what a child of similar age, capacity, knowledge, and experience would have done under the same or

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focus, and intensity, we think conduct which would be negligent as a matter of law in the railroad age may no longer be so in the space age — and vice versa — and precedents formulated in earlier times under different social conditions may no longer be persuasive or controlling."). *Cf.* Toetschinger v. Ihnot, 250 N.W.2d 204, 223 (Minn. 1977) (Yetka, J., dissenting) (arguing that older Minnesota decisions endorsing the "Massachusetts Rule" should be abandoned in favor of the "Illinois Rule" because "the doctrine of stare decisis . . . cannot ask that we make the same mistake twice. The law is a living thing. It must be stable, but it cannot stand still.").

339. *See supra* notes 52-96 and accompanying text.

340. *See, e.g.*, Peterson v. Taylor, 316 N.W.2d 869, 872 n.1 & 873 (Iowa 1982) (abandoning all presumptions of incapacity in favor of the more flexible "Massachusetts Rule"); T.Z. Standard v. Shine, 295 S.E.2d 786, 787 (S.C. 1982) (same).

341. *See, e.g.*, Mundy v. Johnson, 373 P.2d 755, 757 (Idaho 1962) (affirmed submission of question of contributory negligence to jury where there was evidence the child "had been observed exercising caution" when crossing the street where child was killed); Bush v. N.Y. Transit Co., 153 A.2d 28, 36 (N.J. 1959) ("experience in caring for himself in traffic" is relevant to show capacity for negligence); Dillman v. Mitchell, 99 A.2d 809, 811 (N.J. 1953) (5½-year-old who had previously safely crossed busy street where he was killed, held to have sufficient knowledge of danger to allow question of contributory negligence to go to the jury). *See generally* LaNoux v. Hagar, 308 N.E.2d 873, 876 (Ind. Ct. App. 1974) ("Schools and parents physically occupy most of a child's time and almost entirely share his early instruction. It was proper for counsel to make inquiry as to the extent of the child's instruction, knowledge and experience from one of the persons most qualified to answer, in this case his mother.").

similar circumstances.[342] To be excused from exercising due care, the minor plaintiff should have the burden of providing substantial evidence that the minor was incapable of negligent conduct. Upon a showing of incapacity, the burden should then shift to the defendant who must present substantial evidence indicating that the child had the capacity for negligent conduct. If the evidence regarding the child's familiarity with the danger is sharply conflicting, the jury should decide whether the preponderance of the evidence showed that the minor was chargeable with exercising some degree of caution and/or self-restraint.[343]

While a child's age is easy to determine, the nature of the child's knowledge and experience is not so readily quantifiable. The difficulty is in determining what *type* of knowledge and experience is sufficient to support a finding that the minor understood the dangerous nature of his conduct. Critics of the flexible standard of care have suggested that allowing a jury to decide this question unnecessarily promotes confusion and inconsistency in jury decisions.[344] This argument, however, is

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342. *See* Brown v. Connolly, 62 Cal. 2d 391, 395, 398 P.2d 596, 598, 42 Cal. Rptr. 324, 326 (1965); *see also* Patterson v. Cushman, 394 P.2d 657, 659-60 (Alaska 1964); Beggs v. Wilson, 272 A.2d 713, 714-15 (Del. 1970); Grace v. Kumalaa, 386 P.2d 872, 877 (Haw. 1963); Peterson v. Taylor, 316 N.W.2d 869, 873 (Iowa 1982); GRYC v. Dayton-Hudson Corp., 297 N.W.2d 727, 743 (Minn. 1980); Toetschinger v. Ihnot, 250 N.W.2d 204, 210 (Minn. 1977); Quillian v. Mathews, 467 P.2d 111, 113 (Nev. 1970); Bush v. New Jersey & N. Y. Transit Co., 153 A.2d 28, 33 (N.J. 1959); Yun Jeong Koo v. St. Bernard, 392 N.Y.S.2d 815, 818 (N.Y. App. Div. 1977); Mann v. Fairbourn, 366 P.2d 603, 606 (Utah 1961); Johnson's Adm'r v. Rutland R. Co., 106 A. 682, 685 (Vt. 1919).

The approach outlined in *Brown* is more efficient than that advocated in New Jersey and Iowa, which allow the *jury* to decide whether the child had the capacity for negligence and if so, whether the child practiced below the standard of care. *See Bush*, 153 A.2d at 33; *Peterson*, 316 N.W.2d at 873. Judicial resources are better conserved if the trial judge is granted the discretion to determine whether there is substantial evidence to support the contention the child had the capacity for negligent conduct.

343. *See, e.g.*, Courtell v. McEachen, 51 Cal. 2d 448, 454-55, 458, 334 P.2d 870, 873, 875 (1959); Grace v. Kumalaa, 386 P.2d 872, 877 (Haw. Sup. Ct. 1963); Hoff v. Natural Ref. Prods., 118 A.2d 714, 722 (N.J. Super. Ct. 1955); *see also* Shaw v. Perfetti, 125 S.E.2d 778, 785 (W. Va. 1962).

344. *See* Tyler v. Weed, 280 N.W. 827, 838 (Mich. 1938) (stating that the question of the contributory negligence of children should not be left to the "dubious speculation of juries"); Galloway v. McDonalds Restaurants of Nevada, 728 P.2d 826, 832 (Nev. 1986) (Steffen, J., dissenting) ("A jury should not be permitted to speculate on an issue that reason and experience place outside the realm of speculation."); Wilderman, *supra* note 65, at 435-46 ("The juror is impressed with the immediate facts and the infant's conduct in relation thereto and may not, unless clearly instructed by the court, go beyond those facts which are brought to his attention. The juror fails to

unpersuasive because permitting a jury to decide whether a child has been negligent can produce no more confusion and inconsistency than that which exists in any trial involving older children. Members of juries are familiar with the propensities of children.[345] The question of whether a child has been contributorily negligent is therefore well within the capacity of jurors to determine. Furthermore, "[t]he natural sympathy and concern of jurors for children of tender years will make it unlikely in the ordinary case that a jury--advised of the impact of its determination of comparative fault--will return a verdict precluding any recovery by the injured child."[346] Thus, children (and their guardians and attorneys) need not expect to lose all hope of recovery merely because a court is applying the Massachusetts rule rather than the Illinois rule.

Moreover, courts have not been silent on the standards governing review of a child's conduct. Courts have uniformly held that the plaintiff must have *specific* knowledge of the danger in order to submit the question of contributory negligence to the jury, and general knowledge or general competency has been deemed insufficient as a matter of law.[347] This view is consistent with the

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consider whether or not the infant plaintiff would have done what he did in this case had he the ability to temper his impulsive action with the judgment and discretion which comes with age and experience.").

345. *See* Holcomb v. Gilbraith, 513 S.W.2d 796, 798 (Ark. 1974); Green v. DiFazio, 171 A.2d 411, 414 (Conn. 1961); Mc Cain v. Bankers Life & Casualty Co., 110 So. 2d 718, 722 (Fla. 1959); Davis v. Bushnell, 465 P.2d 652, 654-55 (Idaho 1970); Mundy v. Johnson, 373 P.2d 755, 760 (Idaho 1962); Honeycutt *ex rel.* Phillips v. Wichita, 796 P.2d 549, 559 (Kan. 1990); Eckhardt v. Hanson, 264 N.W. 776, 778 (Minn. 1936); Jackson v. Butler, 155 S.W. 1071, 1081 (Mo. 1913); Quinby *ex rel.* Camardo v. New York States Rys., 159 N.E. 879, 881 (N.Y. 1928); PROSSER & KEETON, *supra* note 11, § 32, at 179; *Contributory Negligence of Children*, *supra* note 181, at 698 n.9; Keet, *supra* note 181, at 399-400, 409.

346. Toetschinger v. Ihnot, 250 N.W.2d 204, 210 (Minn. 1977) (footnote omitted).

347. *See, e.g.*, Alabama Power Co. v. Taylor, 306 So. 2d 236, 250 (Ala. 1975); Jones v. Strickland, 77 So. 562, 565 (Ala. 1917) ("The fact that an infant is shown to be bright, smart, and industrious is not sufficient to overcome the presumption of want of discretion."); Idzi v. Hobbs, 186 So. 2d 20, 22, 23 (Fla. 1966); Hollowell v. Greenfield, 216 N.E.2d 537, 540, 542-43 (Ind. Ct. App. 1966); Cathey v. De Weese, 289 S.W.2d 51, 56-57 (Mo. 1956); Armer v. Omaha & Council Bluffs St. Ry. Co., 37 N.W.2d 607, 611 (Neb. 1949); Bailey v. Williams, 346 S.W.2d 285, 288 (Tenn. Ct. App. 1960); Pino v. Szuch, 408 S.E.2d 55, 59 (W. Va. 1991). *But see* Sullivan v. Boston Elevated Ry. Co., 78 N.E. 382, 383 (Mass. 1906) (finding facts that 4 year, 3 month old was "'lively, . . . active and energetic'" and "walked at a 'pretty lively' gait" before running into defendant's car were sufficient to submit question of contributory negligence to the jury).

research in child psychology.[348] So, for example, a child who has been warned about staying away from a swimming pool may not be chargeable with knowledge of the dangers of playing on an ocean pier.

In addition, courts have held certain dangers are inherently obvious to children of any age.[349] Thus, even in jurisdictions which recognize age-based presumptions of incapacity, courts have applied other doctrines to deny recovery to young children whose injuries were caused by obvious or common dangers. For example,

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The same rule applies where a child has specific knowledge of a danger but is considered generally incompetent. *See, e.g.*, Capo v. L.A. Farm Bur. Mut. Ins. Co., 347 So. 2d 1189, 1191 (La. Ct. App. 1977) ("Plaintiff, to prove that [he] was a boy of less than average intelligence, adduced evidence that [he] had been held back in school twice. His parents said they considered him to be a slow learner. This falls far short of proving he was incapable of contributory negligence. The evidence shows that he had considerable experience in driving a tractor; he had been warned of the probable consequences of pulling over trees with a tractor and was aware that what he was doing was dangerous.").

348. *See supra* notes 52-114 and accompanying text.

349. *See* Griggs v. BIC Corp., 786 F. Supp. 1203, 1205 (M.D. Pa. 1992) (defendant not liable for failing to make lighter childproof because "[i]t is part of normal upbringing that one learns in childhood to cope with the danger posed by such useful everyday items [as a BIC lighter]"); Bojorquez v. House of Toys, Inc., 62 Cal. App. 3d 930, 933, 934, 133 Cal. Rptr. 483, 484 (1976) ("Slingshots have been used as toys and weapons since Old Testament times. . . . [¶] Is the potential danger of a slingshot generally known? Ever since David slew Goliath young and old alike have known that slingshots can be dangerous and deadly."); Holland v. Baltimore & O. R. Co., 431 A.2d 597, 603 & n.9 (D.C. 1981) ("There are certain obvious conditions that trespassing children can be expected to understand as a matter of law."); Dillman v. Mitchell, 99 A.2d 809, 811 (N.J. 1953) ("Most children of tender years have some grasp of any situation; the lurking dangers in some situations are obvious to them. To say that there is a conclusive presumption on their part is to enforce an iron-clad rule, which is contrary to fact."); Brannon v. Harmon, 355 P.2d 792, 794 (Wash. 1960) ("The inherent danger of fire cannot be doubted."); Stillwell v. Nation, 363 P.2d 916, 918 (Wyo. 1961) ("A child old enough to ride a bicycle knows the danger of riding against fences or other objects. Not seeing such an object is a matter not related to age."); RESTATEMENT (SECOND) OF TORTS § 339 cmt. j (1965) ("There are many dangers, such as those of fire and water, or of falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large."); *cf.* Lones v. Detroit, Toledo and Ironton R.R. Co., 398 F.2d 914, 925 (6th Cir. 1968) (Weick, C. J., dissenting) ("Generally speaking, it may be assumed that a person of whatever age is able to appreciate the obvious risks incident to any sport or activity in which he may able to engage with intelligence and proficiency and must act accordingly. If a child is able to play baseball capably, he must know that there is danger of being hit with ball or bat; if he is able to engage proficiently in the game of football, he must know that in playing the game there will occur violent physical contacts which may result in injury to him; if he is a proficient swimmer and diver, he must know of the danger of drowning and the danger of harm incidental to the use of diving apparatus."). *See generally* Annotation, *Comment Note--Age and Mentality of Child as Affecting Application of Attractive Nuisance Doctrine*, 16 A.L.R.3d 25 (1967); RESTATEMENT (SECOND) OF TORTS, § 339 (1965).

in *Davis v. Goodrich*,[350] a California court of appeal held that "the danger of falling is something that is deemed known and realized by children from an early age."[351] In *Davis*, a two-and-a-half year old boy climbed on a thirty-foot-high roller coaster not in use and was injured when he fell. The minor sued the owners of the land under the attractive nuisance doctrine. On appeal, the court commented that the risk of falling is sufficiently clear to a two-and-a-half year old that ordinarily a jury should decide whether the child actually appreciated the danger under the circumstances of the case so as to bar recovery.[352] However, the court of appeal affirmed a nonsuit in favor of the defendant landowner on the ground there was no evidence the landowner knew or should have known young children played upon or near the roller coaster.[353] The analysis in *Davis* comports well with the view among child psychologists who have found that children are socialized to avoid dangers such as falling beginning in the early years of life.[354]

That a particular danger is open and obvious may also absolve a defendant of any duty of care toward a child. In *Corcoran v. Village of Libertyville*,[355] a two-year-old boy fell into a ditch and suffered severe brain damage. The plaintiff brought suit against the owner of the ditch and those who managed, maintained and controlled the ditch under the "attractive nuisance" doctrine. The Illinois Supreme Court ruled that the plaintiff had no right to recovery and held that an owner of land who is aware that children frequent his property has no duty to protect children against obvious or common dangers.[356]

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350. 171 Cal. App. 2d 92, 340 P.2d 48 (1959).

351. *Id.* at 97, 340 P.2d at 51.

352. *Id.*; *see* Helguera v. Cirone, 178 Cal. App. 2d 232, 237, 3 Cal. Rptr. 64, 67 (1960) ("the danger of falling [is] something that is known and realized to all children from earliest infancy").

353. *Id.*

354. *See supra* note 86.

355. 383 N.E.2d 177 (Ill. 1978).

356. *Id.* at 180 (holding that the duty to protect children from danger lies with parents, not with those who own and control property). *But see* Garcia v. Sooigan, 52 Cal. 2d 107, 111-12, 338 P.2d 433, 435-36 (1959) (in dicta, the California Supreme Court suggests that a finding that a danger is common is insufficient to defeat a minor plaintiff's recovery).

More recently, in *Mathews v. City of Cerritos*,[357] a California court of appeal held summary judgment was proper where the child plaintiff understood the dangerous nature of his conduct.[358] In *Mathews*, an eight-year-old boy rode down a wet, grassy hill on his bicycle, ran into a drainage ditch, and was thrown from his bicycle into a wall. The minor sued the city, alleging that the park was in an unreasonably dangerous condition. In his deposition, however, the plaintiff admitted that he knew that riding down the hill was dangerous.[359] On this evidence, the trial court granted the city's motion for summary judgment and the court of appeal affirmed. The *Mathews* court held that "the danger of riding a bicycle down a very steep, wet, grassy hill is obvious from the appearance of the property itself, even to children exercising a lower standard of due care. . . . Even children instinctively recognize steepness of a hill and slipperiness of wet grass."[360]

Davis, *Corcoran*, and *Mathews* suggest that young children may be denied recovery in situations where the minor plaintiff's injuries are caused by obvious or common dangers. The reasoning is that young children understand very basic rules of safety beginning at an early age.[361] This view squares well with modern theory and research in child psychology.[362] In appropriate cases, plaintiffs and defendants may also appeal to these decisions to persuade a court to submit the question of a child's primary or comparative negligence to the jury.

Ultimately, if the trial court is satisfied that the defendant has presented substantial evidence from which a reasonable person could infer the child appreciated the injury-causing danger or that the evidence regarding the child's capacity for negligence is conflicting, the case should be submitted to a jury, which will then

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357. 2 Cal. App. 4th 1380, 4 Cal. Rptr. 2d 16 (1992).

358. *Id.* at 1383, 4 Cal. Rptr. 2d at 17.

359. *Id.* ("'Q. Did you know that [riding down the hill] was dangerous or that it was a pretty dangerous thing to do? . . . A. Yeah. By looking at it, it looked dangerous. But I thought I could make it. But I didn't.'").

360. *Id.* at 1385, 4 Cal. Rptr. 2d at 18.

361. *Davis*, 171 Cal. App. 2d at 97, 340 P.2d at 51; *Corcoran*, 383 N.E.2d at 180; *Mathews*, 2 Cal. App. 4th at 1385, 4 Cal. Rptr. 2d at 18.

362. *See supra* note 86.

apply the subjective standard of care. The jury should reduce the plaintiff's recovery in proportion to the percentage fault attributed to the minor. Conversely, if the trial court determines that the only inference that can be reasonably drawn from the evidence is that the child was wholly incapable of appreciating the risk of injury, the child should be declared incapable of comparative negligence as a matter of law.[363] Absent a showing of incapacity on the part of the plaintiff, the case should be submitted to the jury.[364] All of the factors relevant to the determination of comparative negligence should apply with equal force to children charged with primary negligence and with assumption of the risk.[365]

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363. *See, e.g.*, Grace v. Kumalaa, 386 P.2d 872, 877 (Haw. 1963) (absent a conflict in the evidence regarding a child's capacity for negligence, question of contributory negligence should be determined as a matter of law); GRYC v. Dayton-Hudson Corp., 297 N.W.2d 727, 743 (Minn. 1980) (holding 4 year, 10½ month old not guilty of comparative negligence as a matter of law because the minor "was incapable of appreciating the risk[ ] . . . that her pajamas would ignite immediately and burn rapidly when they came into contact with the electric burner"); Toetschinger v. Ihnot, 250 N.W.2d 204, 210 (Minn. 1977) ("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.").

364. *See* Welch v. Gardner, 187 Cal. App. 2d 104, 112-13, 9 Cal. Rptr. 453, 457-58 (1960); Singer v. Marx, 144 Cal. App. 2d 637, 643, 301 P.2d 440, 443 (1956); Baugh v. Beatty, 91 Cal. App. 2d 786, 792-93, 205 P.2d 671, 675-76 (1949); Galloway v. McDonalds Restaurants of Nevada, 728 P.2d 826, 828-29 & n.2 (Nev. 1986); Quillian v. Mathews, 467 P.2d 111, 113 (Nev. 1970); Shulman, *supra* note 12, at 622; *see also* White v. Nicosia, 351 So. 2d 234, 237 n.2 (La. Ct. App. 1977) (absent testimony regarding the child's capacity or incapacity for negligent conduct, court assumed 7 year, 11 month, 13 day old child "was one of normal intelligence and experience for his age").

365. *See* Greene v. Watts, 210 Cal. App. 2d 103, 106-07, 26 Cal. Rptr. 334, 336-37 (1962) (extending rationale in contributory negligence cases involving minors to assumption of the risk); Christian v. Goodwin, 188 Cal. App. 2d 650, 652, 10 Cal. Rptr. 507, 508 (1961); Ellis v. D'Angelo, 116 Cal. App. 2d 310, 314-15, 253 P.2d 675, 677-78 (1953); Bennett v. Gitzen, 484 P.2d 811, 812-13 (Colo. Ct. App. 1971) (extending rationale in contributory negligence cases involving minors to assumption of the risk); Smith v. Sapienza, 496 N.Y.S.2d 538, 540 (N.Y. App. Div. 1985) (extending rationale in contributory negligence cases involving minors to assumption of the risk); Dunn v. Teti, 421 A.2d 782, 784-85 (Pa. 1980) (rejecting contention that minor defendants should be treated differently from minor plaintiffs; upholding presumption of incapacity applies to minor defendants); Bohlen, *supra* note 261, at 31 ("If our law recognizes infants . . . as incapable of exercising that care for their own protection which is required of normal persons as a condition to their right to redress for injuries caused by the wrongful act of others, . . . it would be inconsistent and arbitrary to penalize them by requiring them to compensate others whom they injure by conduct which, . . . is, by reason of their incapacity, innocent in them."); Note, *A Proposal for a Modified Standard of Care for the Infant Engaged in an Adult Activity*, 42 IND. L.J. 405, 406 n.3 (1966) (cases and commentaries cited therein).

CONCLUSION

Modern theory and research in child psychology sheds new light on the appropriate standard of care that the law should require of children charged with negligence. At minimum, the findings question the central reason behind immunizing a class of young children from taking responsibility for their actions. Child psychologists suggest that the capacity to foresee the consequences of action and to regulate behavior depends upon the child's familiarity with the situation. Children also vary widely in this capacity. The position advanced by the Massachusetts rule is consistent with the research in child psychology and is the rule that should be followed. The findings in child psychology also undermine the law and economics prediction that caregivers will refrain from socializing their child about safety and friendly interpersonal contact in order to reduce the child's liability exposure. The judicial economy argument is also severely weakened because modern research in child psychology suggests that children of almost any age can foresee the consequences of their actions and regulate their behavior in safety-conscious ways.

Children of tender years should be protected from unreasonable liability standards. A "bright line" age rule, however, is not necessary to achieve this objective. The inherent flexibility of a subjective standard of care dictates that a minor cannot be liable for negligence absent sufficient evidence to support the charge.[366] Thus, the subjective standard of care offers young children adequate protection against legal standards based on unrealistic expectations.[367]

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366. *See, e.g.*, Shulman, *supra* note 12, at 622-25.

367. *See, e.g.*, Ballard v. Polly, 387 F. Supp. 895, 901 (D. D. C. 1975) (endorsing the Massachusetts rule and holding "[w]hile it is undisputed that the deceased child ran impulsively into the street, the evidence also shows that the child had never before negotiated traffic by himself. In the past he had always been escorted to and from school by his mother or his 3 eldest siblings, and had never been allowed to play in the street. It was apparent that, at the time of the accident, he became bewildered and frightened and, in an attempt to hurry back to school, had dashed into traffic. Such conduct was not unusual for a 5-year-old child suddenly alone and confronted for the first time with the task of crossing a busy street."; affirmed jury's conclusion that a 5-year, 10-month-old was not contributorily negligent); Cummings v. County of Los Angeles, 56 Cal. 2d 258, 263, 363 P.2d

So, should a jury be allowed to decide if Kathy *and* Allison are responsible for their actions? Research in child psychology dictates that a jury should. Courts that endorse the inflexible Illinois rule must eventually re-examine the reasoning behind establishing an age below which children are deemed incapable of negligence. They should reject "any Procrustean rule that, merely because a child has not reached some specified age, he or she is incapable of contributory negligence no matter what the situation, and no matter what the experience or capabilities of the child."[368] The model of child development presented here provides courts with sufficient authority to challenge an age-based conclusive presumption rule for young children. Contrary to the inflexible rule followed today in almost half of the states, the alternative approach proposed here would produce results more closely tied to the facts of each case rather than the child's attaining a "magical" minimum age.

900, 903, 14 Cal. Rptr. 668, 671 (1961) ("Children are judged by a special subjective standard and not by the objective standard [imposed on adults]. . . . The presumption of negligence or negligence *per se* . . . takes that protection away from the child. The *per se* negligence instruction . . . when applied to children, is totally inconsistent with the body of law that has grown up to protect children."); Fratzke v. Meyer, 398 N.W.2d 200, 202-03 (Iowa Ct. App. 1986) ("Nothing in [the decision to abandon all presumptions of incapacity based on age] changes the fact that a child . . . may suddenly and without care move into a place of danger . . . ."); White v. Nicosia, 351 So. 2d 234, 236-37 (La. Ct. App. 1977) (rejecting Illinois rule for the more flexible Massachusetts rule and holding that "it was not unreasonable for a normal [7-year, 11-month old] child . . . to fail to anticipate the possibility that a motorcycle operator would maneuver his vehicle in such a reckless and careless manner in an area where he had no right to be . . . ."; reversed judgment in favor of defendant and entered judgment in favor of minor plaintiff).

368. Galloway v. McDonalds Restaurants of Nevada, 728 P.2d 826, 829 (Nev. 1986).

APPENDIX A
THE VIEW AMONG AMERICAN JURISDICTIONS

ALABAMA

Alabama courts have applied a three-tiered system of presumptions and consider children under the age of seven incapable of exercising due care for their own safety.[369] Minors between the ages of seven and fourteen are rebuttably presumed incapable of negligence.[370] In order to rebut this presumption of incapacity, a defendant must present a "scintilla of evidence" that the child "possesses that discretion, intelligence, and sensitivity to danger which the ordinary child, who he is 14 years of age, possesses."[371]

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369. *See* Jones v. Strickland, 77 So. 562, 565 (Ala. 1917) (dicta; affirmed judgment for 11-year-old and rejected defendant's assertion that minor's violation of ordinance barred recovery); *accord* Proctor v. United States, 443 F. Supp. 133, 135 (N.D. Ala. 1977) (22 month old not capable of negligence; no evidence of contributory negligence; court affirmed judgment for defendant on ground evidence insufficient to support a charge of negligence).

370. *See* Fletcher v. Hale, 548 So. 2d 135, 138 (Ala. 1989) (10-year-old; reversible error for trial court to grant summary judgment in favor of defendant; fact that plaintiff was excellent swimmer did not establish minor understood risk as a matter of law; plaintiff's "mental ability did not seem to match her athletic ability").

371. King v. South, 352 So. 2d 1346, 1347 (Ala. 1977) (10-year-old; reversible error for trial court to submit question of contributory negligence to the jury where only evidence of capacity consisted of statements by plaintiff's sister that she "'imagined' [plaintiff] did the 'things that a normal ten year old did'" and plaintiff's father that "his son was a 'normal boy'"); *accord* Smith v. Bradford, 475 So. 2d 526, 529 (Ala. 1985) (13 year, 7½ month old; evidence that minor had "built his bicycle from scratch, collecting the parts and assembling them himself" and "rode his bike to school on the four-lane highway" on which he was killed constituted a "scintilla of evidence that [plaintiff] possessed the discretion, intelligence, and sensitivity to danger of an ordinary 14-year-old"); Senn v. Craig, 474 So. 2d 698, 699-700 (Ala. 1985) (10-year-old; judgment for defendant affirmed where "[t]here was some evidence in the record establishing the inference that [plaintiff's] capacity was that of an average or typical 14-year-old child"); McWhorter v. Clark, 342 So. 2d 903, 905 (Ala. 1977) (8-year-old; trial court erred in submitting question of contributory negligence to jury where the "evidence completely failed to address the maturity and sensibility of the deceased child"); Alabama Power Co. v. Taylor, 306 So. 2d 236, 250 (Ala. 1975) (10-year-old; proper for trial court to refuse to submit question of contributory negligence to the jury on ground that defendant did not present sufficient evidence to rebut presumption of incapacity; only evidence proffered by defendant was that plaintiff was "'well above average' or in the 'bright average range' on an 'IQ' test"; "'[t]he fact that an infant is shown to be bright, smart, and industrious is not sufficient to overcome the presumption of want of discretion.'").

ALASKA

There is a rebuttable presumption that children under the age of seven are incapable of negligence.[372]

ARIZONA

Children of various ages have been held conclusively incapable of negligence.[373] However, the defense of contributory negligence was not raised in any of these cases, therefore precluding those courts from instructing the jury on a theory with no evidentiary support.[374] The state supreme court has held that the evidence was insufficient to support a charge of contributory negligence against a six-year-old boy.[375] The court explained that "*not only the age of the child* but his individual capacity and experience are to be considered by the jury."[376]

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372. *See* Patterson v. Cushman, 394 P.2d 657, 659-60, 665 (Alaska 1964) (6-year-old; in cases involving minors charged with negligence, "there are two issues to be decided: (1) Whether the child has the capacity to be contributorily negligent, and (2) whether he was in fact contributorily negligent"; evidence sufficient to support the inference that child had the capacity for negligence where plaintiff "knew the danger from automobiles and had been warned by his parents to watch out for vehicles and not to play in streets.").

373. *See* Vigue v. Noyes, 550 P.2d 234, 236 n.1 (Ariz. 1976) (4½-year-old); Esquivel v. Nancarrow, 450 P.2d 399, 401, 402 (Ariz. 1969) (3½-year-old); Beliak v. Plants, 326 P.2d 36, 39 (Ariz. 1958) (5½-year-old); Womack v. Preach, 165 P.2d 657, 658-60 (Ariz. 1946) (4½-year-old); Nagle v. Conger, 456 P.2d 411, 414 n.3 (Ariz. Ct. App. 1969) (4½-year-old).

374. *See, e.g.*, Gilbert v. Quinet, 369 P.2d 267, 270 (Ariz. 1962) ("prejudicial error to give an instruction where there was no evidence to support the instruction").

375. *Id.* at 270.

376. *Id.* (emphasis added); *accord* Ruiz v. Falkner, 470 P.2d 500, 503 (Ariz. Ct. App. 1970) (8½-year-old). Similarly, in Luedtke v. Arizona Family Restaurants of Tucson, a court of appeal rejected the plaintiff's contention that, by virtue of his young age (6-year-old), he was absolved of all responsibility to act with due care. 763 P.2d 262, 265 (Ariz. Ct. App. 1988). The court found sufficient evidence to support a charge of contributory negligence: "there is evidence he looked both ways prior to going out into the street. The fact remains that there was an automobile to be seen if he had exercised a proper lookout." *Id.* The *Luedtke* court reasoned:

> The fact that the deceased was only six years old at the time of the accident does not, as a matter of law, foreclose the possibility that he was contributorily negligent. The decedent's young age *only* means that his conduct is to be judged according to that of a reasonable child of similar age, intelligence and experience under the circumstances.

Id. (emphasis added).

ARKANSAS

Courts have held some young children incapable of negligence.[377] Other courts have held that the question of a child's negligence is for jury determination.[378]

CALIFORNIA

Some courts of appeal have held that children under the age of five are conclusively presumed incapable of negligence.[379] However,

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377. *See* Wadsworth v. Gathright, 330 S.W.2d 94, 97 & n.2 (Ark. 1960) (2½-year-old); Smith v. Wittman, 300 S.W.2d 600, 601 (Ark. 1957) (child less than 4 years of age). However, in neither case was the defense of contributory negligence raised. And in *Wadsworth*, the court relied on Miles v. St. Louis I. M. & S. R. Co., 119 S.W. 837 (Ark. 1909), for the proposition that a 2½-year-old is conclusively presumed incapable of negligence. *Wadsworth*, 330 S.W.2d at 97 n.2. But, in *Miles*, the child's contributory negligence was not an issue in the case because the defendant asserted *the plaintiff's mother* was contributorily negligent. *Miles*, 119 S.W. at 839.

378. *See* Sams v. Pacific Indem. Co., 170 F. Supp. 909, 914-15, 917 (W.D. Ark. 1959) (10-year-old; "It is true that the infancy of a minor plaintiff does not preclude the defense of contributory negligence if the injured child failed to exercise that care ordinarily exercised by children of the same age, capacity, discretion, knowledge and experience under the same or similar circumstances"); Holcomb v. Galbraith, 513 S.W.2d 796, 797-98 (Ark. 1974) (14-year-old; "We need not here decide at what age the issue becomes one of law for we are dealing with a girl between the ages of 14 and 15 . . . . It is also true . . . that some children develop faster than others, but we know of no reason why jurors would be any less capable in determining those facts than a court."); Williams v. Gilbert, 395 S.W.2d 333, 335 (Ark. 1965) (7-year-old); Missouri Pac. R. Co. v. Lester, 242 S.W.2d 714, 716-17 (Ark. 1951) (5 year, 4 month old; "'Even though a child of tender years may be warned of the danger, it is still a question for the jury as to whether the child, considering its age and intelligence, had sufficient mental capacity to appreciate the danger after such warning.'"); Brotherton v. Walden, 161 S.W.2d 391, 392 (Ark. 1942) (14-year-old); Garrison v. St. Louis, I. M. & S. Ry. Co., 123 S.W. 657, 660-61 (Ark. 1909) (16-year-old); *cf.* Sherman v. Mountaire Poultry Co., 419 S.W.2d 619, 621 (Ark. 1967) (5-year-old; trial court properly refused plaintiff's request for a res ipsa loquitur instruction and held: "While a claim for injuries to a small child arising from the use of a vehicle is always complicated by the rule that a child of tender years can not be guilty of negligence, we can not say that every accident such as that involved here is one which experience teaches us will arise from a want of care on the part of the driver.")

379. *See* People v. Berry, 1 Cal. App. 4th 778, 785, 2 Cal. Rptr. 2d 416, 420 (1991) (2 year, 8 month old); Casas v. Maulhardt Buick, Inc., 258 Cal. App. 2d 692, 700-01, 66 Cal. Rptr. 44, 49-50 (1968) (4-year-old); Bauman v. Beaujean, 244 Cal. App. 2d 384, 390, 55 Cal. Rptr. 55, 59 (1966) (3½-year-old); Walker v. Fresno Distrib. Co., 233 Cal. App. 2d 840, 847-48, 44 Cal. Rptr. 68, 73 (1965) (approximately 3 years of age); Greene v. Watts, 210 Cal. App. 2d 103, 105-07, 26 Cal. Rptr. 334, 336-37 (1962) (3½-year-old; extending 5-year "bright line" rule to assumption of risk cases); Morningred v. Golden States Co., 196 Cal. App. 2d 130, 137, 16 Cal. Rptr. 219, 224 (1961) (4 year, 1 month, 1 day old); Untalan v. Glass, 190 Cal. App. 2d 474, 476, 12 Cal. Rptr. 1, 2 (1961) (3½-year-old); Christian v. Goodwin, 188 Cal. App. 2d 650, 655, 10 Cal. Rptr. 507, 510 (1961) (4 year, 7 month old); Morales v. Thompson, 171 Cal. App. 2d 405, 407-08, 340 P.2d 700, 701-02 (1959)

the California Supreme Court and other courts of appeal have held that the law does not fix a precise age below which children are deemed incapable of negligence.[380] The supreme court has also held that, where the evidence regarding a child's capacity for negligence is conflicting, the issue should be submitted to the jury.[381]

COLORADO

Children under the age of six are conclusively presumed incapable of negligence.[382] The same rule applies to a child's capacity to assume risks.[383] The law regarding a child's capacity to commit an intentional tort is not clear.[384]

(3 year, 11 months, 30 day old); Ellis v. D'Angelo, 116 Cal. App. 2d 310, 316, 253 P.2d 675, 678 (1953) (4-year-old); *see also* CALIFORNIA JURY INSTRUCTIONS: CIVIL No. 3.35, Use Note (7th ed. 1986).

380. *See* Brown v. Connolly, 62 Cal. 2d 391, 394-95, 398 P.2d 596, 597-98, 42 Cal. Rptr. 324, 325-26 (1965) (6-year-old); Smith v. Harger, 84 Cal. App. 2d 361, 370, 191 P.2d 25, 29-30 (1949) (5 year, 9 month old); Conroy v. Perez, 64 Cal. App. 2d 217, 226, 148 P.2d 680, 685 (1944) (2 year, 8 month old); Carrillo v. Helms Bakeries, Ltd., 6 Cal. App. 2d 299, 303-04, 44 P.2d 604, 606-07 (1935) (5-year-old); Charves v. Terminal Railways, 44 Cal. App. 221, 224, 186 P. 154, 155 (1919) (5-year-old); Todd v. Orcutt, 42 Cal. App. 687, 690-91, 183 P. 963, 964-65 (1919) (9-year-old); Opelt v. Al. G. Barnes Co., 41 Cal. App. 776, 781, 183 P. 241, 243 (1919) (10½-year-old). The California Supreme Court has held:

> "The California rule is similar to the general pattern [of holding children liable where there is evidence the child had the capacity for negligence] *while avoiding the arbitrary chronological age limits used in many states. In California the age of capacity is a factual question to be determined by the mentality and maturity of the particular child.*"

Brown, 62 Cal. 2d at 395, 398 P.2d at 598, 42 Cal. Rptr. at 326 (Mosk, J.) (emphasis added).

381. *See* Courtell v. McEachen, 51 Cal. 2d 448, 455, 334 P.2d 870, 873 (1959) (5 year, 9 month old); Jones v. Wray, 169 Cal. App. 2d 372, 375, 337 P.2d 226, 228 (1959) (5 year, 3 month old).

382. Benallo v. Bare, 427 P.2d 323, 324-25 (Colo. 1967) (6-year-old; proper for trial court to remove question of contributory negligence from jury).

383. *See* Bennett v. Gitzen, 484 P.2d 811, 812-13 (Colo. Ct. App. 1971) (reversible error for trial court to submit question whether 5 year, 9-month-old assumed risk to the jury).

384. *Compare* LeCoq v. Klemme, 476 P.2d 280, 281 (Colo. Ct. App. 1970) (reversible error for trial court to hold 7-year-old child not liable for his intentional torts as a matter of law) *with* Horton v. Reves, 526 P.2d 304, 308 (Colo. 1974) (in a case involving the alleged intentional tort by a 4- and 3-year-old, the Colorado Supreme Court held: "we believe that the law of this state should require, in the commission by the infant of the intentional act, an intent to make a harmful contact. . . . [T]he infant need not intend the consequences which actually follow, but it must appreciate the fact that the contact may be harmful"); *see also id.* (Kelley, J., concurring) ("In *Benallo* . . . we adopted a rule that a child six years of age or younger is incapable of being contributorily negligent

CONNECTICUT

Connecticut has no established age under which a child may be absolved of liability for negligence.[385]

DELAWARE

Children under the age of seven are rebuttably presumed incapable of negligence.[386]

DISTRICT OF COLUMBIA

There is no precise age below which a child is considered incapable of negligent conduct as a matter of law.[387]

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as a matter of law. If this is a reasonable presumption, then it seems to me that, at least, in the case of infants three and four years of age, we should hold, as a matter of law, that they are incapable of appreciating that their intentionally tortious contacts may be harmful.").

385. Colligan v. Reilly, 26 A.2d 231, 233 (Conn. 1942) (4 year, 4 month old; rejected plaintiff's contention she was too young to be contributorily negligent); Marfyak v. New England Transp. Co., 179 A. 9, 10-11 (Conn. 1935) (5½-year-old; rejected defendant's contention that minor should be judged on the basis of the minor's knowledge, capacity, and experience alone; court held standard of care that compares child to other children of similar age, knowledge, capacity, and experience under the same or similar circumstances was proper); Milledge v. Standard Mattress Co., 238 A.2d 602, 603 (Conn. Super. Ct. 1968) (3 year, 10 month old; rejected plaintiff's contention that she could not be charged with negligence because of her age; "In Connecticut there seems to be no fixed cutoff age below which the court holds a child incapable of contributory negligence"; the court endorsed a flexible rule that would require the trial judge "to determine whether to charge on the issue, as a matter of law, or leave it to the jury as an issue of fact.").

In Simon v. Nelson, 170 A. 796 (Conn. 1934), the Connecticut Supreme Court held that a 2-year-old boy owed "no duty of due care." *Id.* at 797. *Simon* is not inconsistent with the rule announced in *Colligan* and *Milledge* because in *Simon* the minor plaintiff could not possibly have been contributorily negligent; *he was a passenger in his father's car. Id.* at 796.

386. *See* Beggs v. Wilson, 272 A.2d 713, 714-15 (Del. 1970) (4½-year-old; reversible error for trial court to submit question of contributory negligence to the jury in the absence of evidence suggesting the minor had the capacity for negligent conduct; "In order to submit to the jury the question of contributory negligence, defendant must introduce sufficient evidence from which the jury could conclude that the child possessed perceptive abilities, development and judgment far greater than most children of his age"; under this rule, child cannot be held negligent *per se*).

387. National City Dev. v. McFerran, 55 A.2d 342, 344-45 (D.C. 1947) (5-year-old; reversible error for trial court to instruct jury that 5-year-olds are conclusively presumed incapable of negligence); *see also* D.C. Transit Sys. v. Bates, 262 F.2d 697, 700 (D.C. Cir. 1958) (6-year-old); United States v. Benson, 185 F.2d 995, 995 (D.C. Cir. 1950) (5 year, 7 month old); Capital Transit Co. v. Gamble, 160 F.2d 283, 284-85 (D.C. Cir. 1947) (5-year-old).

FLORIDA

Minors under the age of six are deemed incapable of negligence as a matter of law.[388]

GEORGIA

The statutory standard of care required of minors is "such care as the child's mental and physical capacities enable him to exercise in the actual circumstances of the occasion and situation under investigation."[389] The statute does not specify an exact age of discretion. In *Ashbaugh v. Trotter*,[390] the supreme court squarely addressed the question whether a minor six years and three months of age was "'too young to be guilty of contributory negligence.'"[391] The supreme court rejected any bright line age rule and disapproved of *Red Top Cab Co. v. Cochran*,[392] wherein it was held that a child under the age of six is conclusively

388. Swindell v. Hellkamp, 242 So. 2d 708, 710 (Fla. 1970) ("any . . . child under six years of age is conclusively presumed to be incapable of committing contributory negligence. This holding is compatible with the common law rule that a child under seven is conclusively presumed to be incapable of committing a crime inasmuch as a child must learn individual safety at an early age but social consciousness comes at a somewhat later age"; harmless error for trial court to instruct jury that 4 year, 7 month old could be charged with contributory negligence where evidence is insufficient to support finding of negligence on part of defendant driver); *accord* Metropolitan Dade County v. Dillon, 305 So. 2d 36, 39-40 (Fla. Dist. Ct. App. 1974) (6 year, 3 month old; affirmed six year "bright line" rule; evidence showed "'[T]here wasn't anything the little girl was doing wrong[;] . . . she was where she was supposed to be.'")

The scope of *Swindell* was subsequently limited in Reed *ex rel.* Lawrence v. Bowen, 503 So. 2d 1265 (Fla. Dist. Ct. App. 1986), *approved* 512 So. 2d 198 (Fla. 1987), where a Florida court of appeal held that a statute providing a dog owner immunity from liability if a plaintiff "mischievously or carelessly provoke[s] or aggravate[s] [a] dog" was not subject to the common law rule that children under six are presumptively incapable of negligence. *Bowen*, 503 So. 2d at 1267-69. The court affirmed a judgment in favor of the dog owners and held there was sufficient evidence from which a jury could have concluded the child provoked or aggravated the dog. *Id.* at 1269. Interpreting the statute, the court reasoned that "[a]lthough age is a factor to be considered, 'no definite number of years has been set when the age of discretion begins.' Rather, each case is individually evaluated considering 'the child's mental development, maturity, and extent to which the child exhibits intelligent discretion.'" *Id.* The court declined, however, to address the question whether their holding effectively undermined the decision in *Swindell*. *Id.* at 1268 n.4.

389. GA. CODE ANN. § 51-1-5 (1982).

390. 226 S.E.2d 736 (Ga. 1976).

391. *Id.* at 737.

392. 112 S.E.2d 229 (Ga. App. 1959).

presumed incapable of contributory negligence.[393] Instead, the court relied on a series of decisions in other American jurisdictions which endorsed the flexible Massachusetts rule:

> We are of the opinion that the plain language of the Code section must be applied and that the question of the infant's alleged negligence is one for the jury in this case under the appropriate instructions from the trial court. We think this is the correct rule in Georgia and also is the widely-held view throughout the country.[394]

Since *Ashbaugh* has been decided, three decisions have declared young children incapable of negligence as a matter of law.[395] However, none of these cases conflict with the rule in *Ashbaugh* because the defense of contributory negligence was not raised in either of the three cases.[396] Georgia courts have also rejected any

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393. *Id.* at 230-31.

394. *Id.*; *accord* Blackwell v. Cantrell, 315 S.E.2d 29, 31-32 (Ga. Ct. App. 1984) (6-year-old; trial court properly refused plaintiff's proffered instruction that would have declared plaintiff incapable of negligence because of his age); Davis v. Webb, 253 S.E.2d 820, 821-22 (Ga. Ct. App. 1979) (5 year, 10 month old; "Until the decision in . . . *Ashbaugh* . . . a child of the age of the plaintiff was conclusively presumed to be too young to be guilty of contributory negligence. However, in the *Ashbaugh* case the Supreme Court took into consideration code § 105-204 as to the due care of a child of tender years and held that the principle language of the statute must be applied"; trial court did not err in instructing jury on comparative negligence; under circumstances of case, the "jury was authorized to consider that the child may have been negligent in some manner").

395. *See* English v. 1st Augusta Ltd., 614 F. Supp. 1406, 1407 (D.C. Ga. 1985) (3-year-old); Valdosta Hous. Auth. v. Finnessee, 287 S.E.2d 569, 570 (Ga. Ct. App. 1981) (2½-year-old); Reed v. Dixon, 266 S.E.2d 286, 288, 289 (Ga. Ct. App. 1980) (1-year-old).

396. Moreover, the reasoning in *Ashbaugh* casts doubt on the soundness of a line of cases which held that children, because of their age alone, are conclusively presumed incapable of negligence. *See* Crosby v. Yawn, 227 S.E.2d 93, 94 (Ga. Ct. App. 1976) (2-year-old; reversible error for trial court to instruct jury that "there [is] no presumption of law that the plaintiff did or did not exercise due care, or that plaintiff did or did not have sufficient capacity to know the danger and to observe due care for his own protection"; rule announced in *Crawford*, that 4½-year-olds are presumed incapable of negligence, "must be applied to a child of two years."); Guthrie v. Boose, 213 S.E.2d 924, 927 (Ga. Ct. App. 1975) (4-year-old; affirmed judgment for defendant; defense of contributory negligence not raised); Harris v. Hardman, 212 S.E.2d 883, 885 (Ga. Ct. App. 1975) (2-year-old; affirmed judgment for plaintiff; defense of contributory negligence not raised); Teppenpaw v. Blaylock, 191 S.E.2d 466, 468-69 (Ga. Ct. App. 1972) (4-year-old; imputed negligence of babysitter to child therefore barring recovery); Mitchell v. Cox, 190 S.E.2d 154, 155 (Ga. Ct. App. 1972) (less than 3 years old; trial court properly denied defendant's motion for summary judgment; defense of contributory negligence not raised); Harris v. Combs, 101 S.E.2d 144, 148 (Ga. Ct. App. 1957) (7-year-old; proper for trial court to refuse defendant's motion for directed verdict; affirmed judgment for plaintiff); Christian v. Smith, 51 S.E.2d 857, 859-60 (Ga. Ct. App. 1949) (5-year-old;

rule which establishes a rebuttable presumption that children between the ages of seven and fourteen are incapable of negligence.[397] Each case is to be decided on the particular child's knowledge, experience, and capacity as well as the circumstances of the case.[398]

HAWAII

If the facts regarding a child's capacity for negligence are in conflict, the issue of contributory negligence should be submitted to the jury.[399]

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affirmed judgment for plaintiffs; plaintiff could not have been negligent because he was "ignorant of the approach of the truck" which killed him); Riggs v. Watson, 47 S.E.2d 900, 904-06 (Ga. Ct. App. 1948) (5 year, 2 month, 25 day old; reversible error for trial court to submit question of child's contributory negligence to the jury); Anthony v. Dutton, 36 S.E.2d 836, 837-38 (Ga. Ct. App. 1946) (4 year, 3 month, 2 day old; affirmed judgment for plaintiff); Locke v. Ford, 187 S.E. 715, 716 (Ga. Ct. App. 1936) (4½-year-old; affirmed judgment for plaintiffs; defense of contributory negligence not raised); City Ice Delivery Co. v. Turley, 160 S.E. 517, 520 (Ga. Ct. App. 1931) (4 year, 20 day old; affirmed judgment for plaintiff); Williams v. Jones, 106 S.E. 616 (Ga. Ct. App. 1921) (4-year-old; affirmed judgment for plaintiff; defense of contributory negligence not raised); City of Atlanta v. Whitley, 101 S.E. 2, 3 (Ga. Ct. App. 1919) (2½-year-old; affirmed judgment for plaintiff; plaintiff could not possibly have been contributorily negligent where sewer pipes "all of a sudden, and without warning" fell over on plaintiff and struck his right hip); Crawford v. Southern Ry. Co., 33 S.E. 826, 828-29 (Ga. 1899) (4½-year-old; reversible error to sustain defendant's demurrer to plaintiff's complaint on ground evidence showed defendant's negligence proximately caused plaintiff's injuries).

397. *See* Cummings v. Grubb, 363 S.E.2d 167, 170 (Ga. Ct. App. 1987); Anderson v. Happ, 222 S.E.2d 607, 609 (Ga. Ct. App. 1975); Brewer v. Gittings, 116 S.E.2d 500, 505-06 (Ga. Ct. App. 1960).

398. *See Cummings*, 363 S.E.2d at 170 (12-year-old; dicta); *Anderson*, 222 S.E.2d at 609 (11-year-old; affirmed judgment for plaintiff and holding question of contributory negligence is for the jury in cases involving minors under the age of 14); *Brewer*, 116 S.E.2d at 505-06 (7 year, 4 month old; "there is no presumption that the child did or did not exercise due care or does or does not have sufficient capacity to recognize danger or to observe due care").

399. *See* Grace v. Kumalaa, 386 P.2d 872, 877 (Haw. 1963) (6-year-old; rejected plaintiff's contention that Hawaii should recognize the Illinois rule that children under seven are incapable of negligence). The *Grace* court refused to extend their previous holding in Ellis v. Mutual Tel. Co., 29 Haw. 604 (1927), that children between the ages of 5 and 6 are presumed incapable of negligence, to cases involving children between the ages of 6 and 7. *Id.* at 623-24. However, *Ellis* is poor authority for a conclusive presumption rule. There, a 5-year-old boy was injured when the car driven by his mother collided with a truck. *Id.* at 605. The minor could not have been negligent under those circumstances. Thus, the general rule announced in *Grace* should apply to children under the age of six in the appropriate case. *Cf.* Sherry v. Asing, 531 P.2d 648, 661 (Haw. 1975) (noting that children of the same age vary in their capacity for negligence).

IDAHO

The question whether a child has been negligent is one of fact to be determined by the jury.[400]

ILLINOIS

Children under the age of seven are conclusively presumed incapable of negligence.[401] There is a rebuttable presumption that minors between seven and fourteen are incapable of committing negligent acts.[402] In *Diederich v. Walters*,[403] the Illinois

400. *See* Mundy v. Johnson, 373 P.2d 755, 757-60 (Idaho 1962) (4 year, 11 month, 13 day old; trial court properly submitted question of contributory negligence to the jury where the evidence showed child "had been warned by her parents of the danger involved in crossing streets; and had been observed exercising caution in so doing; that she with her sister and brother had walked to and from school . . . several times prior to the accident; and that she had been warned by her teacher at Bible school, the morning of the accident, not to go into the street"). Age alone is not the decisive factor in the determination whether a child has been negligent. *Id.*; *accord* Davis v. Bushnell, 465 P.2d 652, 654-55 (Idaho 1970) (8 year, 10 month old; trial court properly refused to hold plaintiff contributorily negligent as a matter of law for violating a statute; question was properly left to the jury); Crane v. Banner, 455 P.2d 313, 317 (Idaho 1969) (8-year-old; reversible error for trial court to grant summary judgment in favor of defendant; "Because [knowledge, experience, and discretion] vary so greatly among children and because children are naturally unpredictable and impulsive, it is especially difficult to judge their conduct as a matter of law. Instead, it is preferable to submit the issue of their conduct to a jury.").

401. *See* Mort v. Walter, 457 N.E.2d 18, 20-21 (Ill. 1983) (4-year-old; defendant did not dispute plaintiff's assertion of incapacity); Duffy v. Cortesi, 119 N.E.2d 241, 244 (Ill. 1954) (5-year-old; issue of whether child was contributorily negligent was not in the case; reversible error for trial court to give instruction that negligence of grandmother could be imputed to child to bar recovery); Chicago City Ry. Co. v. Tuohy, 63 N.E. 997, 1003 (Ill. 1902) (between 5 and 6; proper for trial court to instruct jury that minor was incapable of negligence; "there was no evidence tending to show that the [plaintiff] was a boy of sufficient intelligence or capacity to exercise any care for his own safety"); Turner v. Seyfert, 194 N.E.2d 529, 533 (Ill. App. Ct. 1963) (6-year-old; defendant presented no evidence suggesting the minor was contributorily negligent; reversed judgment in favor of defendant on ground that evidence was insufficient to support verdict).

402. *See* Diederich v. Walters, 357 N.E.2d 1128, 1130 (Ill. 1976); Strasma v. Lemke, 250 N.E.2d 305, 308 (Ill. App. Ct. 1969) (7 year, 10 month old; "failure of a child of such years to look before crossing a street will not bar recovery as a matter of law"); Kronenberger v. Husky, 231 N.E.2d 385, 386-87 (Ill. 1967) (10-year-old; reversible error for court of appeal to apply 13 year bright line in criminal law to civil suit for damages; jury was properly instructed as to standard of care required of 10-year-olds; affirmed jury verdict in favor of defendant); Piechalak v. Liberty Trucking Co., 208 N.E.2d 379, 383-84 (Ill. App. Ct. 1965) (9-year-old; questioning of plaintiff, her mother, and sister to rebut presumption of incapacity not improper because questions elicited testimony regarding plaintiff's mental capacity and experience in crossing streets); *see also* Toney v. Marzariegos, 519 N.E.2d 1035, 1038 (Ill. App. Ct. 1988) (5-year-old; rejecting defendants

Supreme Court exhaustively discussed the operation of the rebuttable presumption rule for minors between the ages of seven and fourteen.[404] The court held that, where sufficient evidence is presented to rebut the presumption of incapacity, the jury is *not* instructed that a rebuttable presumption exists.[405] "[I]n the case of a child above the age of 14 years the same rule shall be applied to him . . . as is applied to adults, his intelligence and experience being considered."[406]

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contention that principles of comparative fault obviate the need for a seven year bright line age rule; "we will not disturb a rule that our Supreme Court has so recently affirmed [in *Mort*]").

403. 357 N.E.2d 1128 (Ill. 1976).

404. *Id.* at 1130-32.

405. *Id.* The court reasoned:

> [A] rebuttable presumption may create a *prima facie* case as to the particular issue in question and thus has the practical effect of requiring the party against whom it operates to come forward with evidence to meet the presumption. However, once evidence opposing the presumption comes into the case, the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed. . . . [¶] However, where there is an absence of evidence to the contrary, the *prima facie* case created under the presumption will support a finding.

Id. at 1130-32 (original emphasis); *see, e.g.*, Friedman v. Park Dist. of Highland Park, 502 N.E.2d 826, 832-34, 836-37 (Ill. App. Ct. 1986) (8-year-old denied recovery for injuries caused from crash on sled; presumption of incapacity ceased to operate because the defendant introduced evidence the "plaintiff was familiar with the hill, having sledded on it on previous occasions and several times on the day of the injury prior to striking the post. Plaintiff testified she knew the fence, that it was clearly visible, and she made no attempt to avoid it"); Sramek v. Logan, 344 N.E.2d 47, 49-50 (Ill. App. Ct. 1976) (8-year-old; affirmed judgment for defendant; rejected plaintiff's assertion that defendant failed to rebut presumption of incapacity where plaintiff testified she knew to look both ways before crossing the street where she was injured; "it is difficult to believe that [plaintiff] could have looked before crossing and not have seen the [defendant's] vehicle approaching"); *see also* Corcoran v. Village of Libertyville, 383 N.E.2d 177, 180 (Ill. 1978) (2-year-old denied recovery on the ground land owners are "not required to protect against the ever-present possibility that children will injure themselves on obvious or common conditions").

406. Maskaliunas v. Chicago & W.I.R. Co., 149 N.E. 23, 26 (Ill. 1925) (dicta); *see* Dickeson v. Baltimore & Ohio Chicago Term R.R. Co., 245 N.E.2d 762, 764-65 (Ill. 1969) (14 year, 4 day old; rejected defendant's contention the minor should be charged with an adult standard of care and held contributorily negligent as a matter of law; question of minor's contributory negligence properly submitted to jury where evidence showed minor was "'less than average intelligence.'").

INDIANA

Minors under the age of seven cannot be negligent.[407] In *Bottorff v. South Const. Co.*,[408] the Indiana Supreme Court, in dicta, established the three-tiered system of presumptions characteristic of the "Illinois Rule."[409] However, no Indiana court has ever applied the rule announced in *Bottorff*.[410]

IOWA

The Supreme Court of Iowa abandoned all presumptions of incapacity based on chronological age for the more flexible Massachusetts rule.[411]

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407. Mann v. Anderson, 447 F.2d 533, 535-36 (7th Cir. 1971) (6-year-old; rejected defendant's argument that the seven year rule should be abandoned; "Defendant makes several plausible, even persuasive, arguments for a more flexible rule on the contributory negligence of minors. But such arguments should be addressed to the Indiana courts; the federal district court had no choice but to apply the well-established Indiana law"); Eschevarria v. United States Steel Corp., 392 F.2d 885, 887, 888-89, 892 (7th Cir. 1968) (8-year-old with mental age of 5½ held *non sui juris*--"[l]acking legal capacity to act for oneself"--and therefore recovery not barred); Smith v. Diamond, 421 N.E.2d 1172, 1176 n.3 (Ind. Ct. App. 1981) (dicta); Clayton v. Penn Cent. Transp. Co., 376 N.E.2d 524, 526 & n.1 (Ind. Ct. App. 1978) (4-year-old); Wozniczka v. McKean, 247 N.E.2d 215, 222 (Ind. Ct. App. 1969) ("It is undisputed in this case that the plaintiff was a five year old child, non sui juris.").

408. 110 N.E. 977 (Ind. 1916).

409. *Id.* at 978.

410. *Smith*, 421 N.E.2d at 1177 n.5; *see also* Kurowsky v. Deutsch, 533 N.E.2d 1210, 1213-14 (Ind. 1989) (refusing to apply *Bottorff* to 9-year-old defendant); Plotzki v. Standard Oil Co. of Indiana, 92 N.E.2d 632, 644-45 (Ind. 1950) (Emmert, J., dissenting) (*Bottorff* not applicable to 11-year-old); Baller By Baller v. Corle, 490 N.E.2d 382, 385 (Ind. Ct. App. 1986) (did not apply rebuttable presumption rule to 7-year-old); Niegos v. Indiana Harbor Belt R. Co., 116 N.E.2d 550, 554 (Ind. Ct. App. 1954) (not applying *Bottorff* to 10-year-old); *cf.* Dibortolo v. Metro Sch. Dist. of Washington, 440 N.E.2d 506, 511-12 (Ind. Ct. App. 1982) (reversible error for trial court to hold 11-year-old minor contributorily negligent as a matter of law where plaintiff had no experience with injury-causing conduct).

411. *See* Peterson v. Taylor, 316 N.W.2d 869, 872 n.1 & 873 (Iowa 1982) (7-year-old; "In applying the standard of care . . . the jury's first inquiry is a subjective one: What was the capacity of this particular child--given what the evidence shows about his age, intelligence and experience--to perceive and avoid the particular risk involved in this case? Once this has been determined, the focus becomes objective: How would a reasonable child of like capacity have acted under similar circumstances? The particular child in question can be found negligent only if his actions fall short of what may reasonably be expected of children of similar capacity."); *accord* Goetzman v. Wichern, 327 N.W.2d 742, 748 (Iowa 1982); Fratzke v. Meyer, 398 N.W.2d 200, 202-03 (Iowa Ct. App. 1986).

KANSAS

There is no precise age below which a child is deemed incapable of negligence.[412]

KENTUCKY

Children under the age of seven are considered incapable of negligent conduct as a matter of law.[413] In *Williamson v. Garland*,[414] a Kentucky court of appeal refused to follow a line of cases which established a rebuttable presumption that children between the ages of seven and fourteen are incapable of negligence.[415] Arguably, *Williamson*'s view that presumptions of incapacity are fictitious because children between the ages of seven

412. Honeycutt *ex rel.* Phillips v. Wichita, 796 P.2d 549, 559 (Kan. 1990) (6 year, 4 month old; reversible error for lower court to hold that child was incapable of negligence as a matter of law because of child's age).

413. Tupman's Adm'r v. Schmidt, 254 N.W. 199, 201 (Ky. Ct. App. 1923) (6 year, 1 month, 10 day old; reversed judgment of directed verdict in favor of defendants); *accord* Dowell v. Bivens, 586 S.W.2d 297, 300 (Ky. Ct. App. 1979) (in dicta, court states that 5-year-old plaintiff was incapable of negligence; defense of contributory negligence not asserted; affirmed judgment for defendant); Goff v. Horsley, 439 S.W.2d 937 (Ky. Ct. App. 1969) ("7-plus years of age"; affirmed judgment for defendant because "child had past his seventh birthday" and therefore was not protected by the presumption of incapacity); Brown v. Wilson, 401 S.W.2d 77, 79 (Ky. Ct. App. 1966) (4-year-old incapable of negligence; no evidence of contributory negligence; reversed judgment for defendant); Frederick v. Hall, 375 S.W.2d 400, 402 (Ky. Ct. App. 1964) (2½-year-old incapable of contributory negligence; no evidence of contributory negligence; reversed judgment in favor of defendant); Ward v. Music, 257 N.W.2d 516, 518 (Ky. Ct. App. 1953) (dicta); Lehman v. Patterson, 182 S.W.2d 897, 900 (Ky. Ct. App. 1944) (6-year-old; court correctly refused to instruct jury that plaintiff could be negligent); Dixon v. Stringer, 126 S.W.2d 448, 450 (Ky. Ct. App. 1939) (dicta).

414. 402 S.W.2d 80 (Ky. Ct. App. 1966).

415. *Id.* at 81-82; *see Ward*, 257 S.W.2d at 518; *Dixon*, 126 S.W.2d at 450; *Tupman's Adm'r*, 254 S.W. at 201; Sutton Const. Co. v. Lemaster's Adm'r, 3 S.W.2d 613, 615 (Ky. Ct. App. 1928). The court reasoned that "[i]t is quite obvious that the normal seven year old child should not be charged with the same degree of care to be expected of the normal 14 year old child, so the blanket rule of rebuttable presumption as to all children encompassed within these age limits lacks basis in reason." *Williamson*, 402 S.W.2d at 82. Thus, "when an issue is presented respecting the contributory negligence of a minor plaintiff seven or more years of age . . . the jury shall be instructed that the minor is charged with the duty to exercise care for his own safety, commensurate with that degree of care usually exercised by an ordinarily prudent minor of the same age, intelligence and experience of the plaintiff." *Id.* The court noted Prosser's criticism of the "multiples of seven" system of presumptions: "the great majority of courts have rejected such fixed and arbitrary rules of delimitation." *Id.* at 82 n.1.

and fourteen differ in knowledge, capacity, and experience should also apply to children below the age of seven.[416]

LOUISIANA

In *White v. Nicosia*,[417] a Louisiana appellate court held:

> An absolute rule setting minimum (or maximum) ages for being capable of negligence has largely been discarded . . . because it is illogical that a child, such as the one in this case whose age is seven years, eleven months and thirteen days, cannot be contributorily negligent under any circumstances, but could be if the accident had occurred 17 days later.[418]

Other courts have held children of various ages incapable of negligence.[419] These decisions, however, can be harmonized with *White* on the ground that no Louisiana court has been faced with a case in which there was *evidence* suggesting the child had the capacity to exercise due care.[420]

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416. No Kentucky court has ever been faced with a case where there was substantial evidence indicating a child under 7 had the capacity for and engaged in negligent conduct. This suggests that the 7-year rule is vulnerable to attack in an appropriate case. *Cf.* Johnson v. Brey, 438 S.W.2d 535, 538 (Ky. Ct. App. 1969) (erroneously relying on *Williamson* in dicta for the proposition that a 6-year-old is conclusively deemed incapable of negligence); Liberty Nat. Bank & Trust Co. v. Raines, 416 S.W.2d 719, 723 (Ky. Ct. App. 1967) (citing *Williamson* for the proposition that children under 7 cannot be negligent).

417. 351 So. 2d 234 (La. Ct. App. 1977).

418. *Id.* at 237 (court held that "it was not unreasonable for a normal child of [plaintiff's] age to fail to anticipate the possibility that a motorcycle operator would maneuver his vehicle in such a reckless and careless manner in an area where he had no right to be and in disregard of the rights and expectations of pedestrians and other motorists.").

419. Toups v. Sears, Roebuck & Co., Inc., 507 So. 2d 809, 818, 820 (La. 1987) (3-year-old); *accord* McFarland v. Indust. Helicopters, Inc., 502 So. 2d 593, 598 (La. Ct. App. 1987) (2-year-old); Babin v. Zurich Ins. Co., 336 So. 2d 900, 902 (La. Ct. App. 1976) (3½-year-old); Hernandez v. Toney, 289 So. 2d 318, 320-21 (La. Ct. App. 1973) (between 5 and 6 years of age); Garner v. Louisiana Farm Bureau Mut. Ins. Co., 281 So. 2d 860, 862-63 (La. Ct. App. 1973) (almost 6 years of age); Schexnayder v. Zurich Ins., 257 So. 2d 764, 765 (La. Ct. App. 1972) (3-year-old); Pea v. Smith, 224 So. 2d 37, 38 (La. Ct. App. 1969) (5-year-old); Cheramie v. Great Am. Ins. Co., 198 So. 2d 726, 728 (La. Ct. App. 1967) (6-year-old); Jackson v. Jones, 69 So. 2d 729, 732-33 (La. 1953) (7-year-old).

420. *See, e.g., White*, 351 So. 2d at 236 (rejecting plaintiff's contention Louisiana recognized a 7-year bright line age rule and commenting that "[a] more accurate statement is that no Louisiana court has ever found a seven-year old child to be contributorily negligent").

MAINE

The standard of care required of children is that care which a child of similar age and intelligence would ordinarily exercise under the same or similar circumstances.[421] There can be no hard and fast rule which sets the standard of care in every case.[422] There are two cases in which children have been held incapable of contributory negligence as a matter of law.[423] In neither of these cases, however, was the defense of contributory negligence raised.[424]

MARYLAND

In *Taylor v. Arminger*,[425] the Maryland Supreme Court explained that children vary in their capacity for negligent conduct and therefore, a rule which fixes a precise age at which a child is deemed incapable of negligence as a matter of law should not be adopted.[426] This policy determination in *Taylor* may not be

421. Ross v. Russell, 48 A.2d 403, 404, 405 (Me. 1946) (8-year-old); *accord* Tenney v. Taylor, 392 A.2d 1092, 1094 (Me. 1978) ("nearly six"; rejected plaintiff's contention that because of her age her damages should not be reduced in proportion to her fault; affirmed trial court's determination that minor plaintiff was 30% at fault).

422. *Id.*

423. *See* Martin v. Atherton, 116 A.2d 629, 630-31 (Me. 1955) (2-year-old; mother and child hit and injured when minor plaintiff was in mother's arms as mother crossed the street); Morgan v. Aroostook Valley R. Co., 98 A. 628, 629 (Me. 1916) (less than 2 years old; "It seems to be *conceded* that this child less than two years old, was not of sufficient age to exercise any care under any circumstances. And we think it should be so declared as a matter of law.") (emphasis added). *See also* Harrison v. Wells, 116 A.2d 134, 137 (Me. 1955) (3-year-old; affirmed directed verdict for defendant where "[t]here was no evidence . . . to show what the child was doing when he was struck by the truck, if in fact he came in contact with the truck, and nothing to show the actions of the operator, from which a jury could decide whether there was care or negligence").

424. *Martin*, 116 A.2d at 630-31; *Morgan*, 98 A. at 629.

425. 358 A.2d 883 (Md. 1976).

426. *Id.* at 888 (5 year, 8 day old; trial court erred in holding minor contributorily negligent as a matter of law; issue should have been submitted to the jury); *see also* State v. Barlly, 140 A.2d 173, 176-77 (Md. 1958) (5 year, 10-month-old; rejected Illinois rule and held children over the age of five are capable of negligence).

applied to all children, however.[427] In addition, prior to *Taylor*, Maryland courts held some children under five incapable of negligence in the absence of sufficient evidence to support the charge.[428] Other courts have submitted the question of contributory negligence to the jury in cases involving children under the age of five.[429]

MASSACHUSETTS

The question whether a child has been contributorily negligent is one of fact where the evidence is sufficient to support the charge.[430] In *Sullivan v. Boston Elevated Ry. Co.*,[431] the

427. At one point, the opinion suggests that the policy language only applies to children above the age of five. *Taylor*, 358 A.2d at 889. However, in light of the court's extensive discussion of the undesirability of fixing arbitrary ages of discretion, *see id.* at 887-89, it is not clear whether *Taylor* should be applied only to cases involving children above the age of five.

428. *See* Miller v. Graff, 78 A.2d 220, 224 (Md. 1951) (4-year-old; "The mere fact that a young child, when frightened or bewildered, turns around in the street near one sidewalk and starts to come back to the other sidewalk when called by the screams of a parent is not necessarily evidence of negligence."); Mahan v. State, 191 A. 575, 580-81 (Md. 1937) (no evidence of contributory negligence where 3-year-old child was walking with mother on the dirt shoulder of a road; there was "no evidence legally sufficient to show that the child was guilty of any negligence contributing to the accident"). These decisions have been erroneously interpreted to hold that *all* children under the age of five are incapable of negligence. *See* Le Febvre v. United States, 178 F. Supp. 176, 178 & n. 3 (D. Md. 1959) (4½-year-old who ran after ball and into the middle of a street "acted as a normal 4½ year old boy would act"; "A prudent 4 year old boy would be an unattractive anomaly"); Mulligan v. Pruitt, 223 A.2d 574, 576, 579 (Md. 1966) (2 year, 9 month old; even though the evidence regarding what the plaintiff was doing at the time of the accident was in conflict, court held "there is no need to consider contributory negligence" because of the plaintiff's age); Palms v. Shell Oil Co., 332 A.2d 300, 302-03, 304 (Md. Ct. Spec. App. 1975) (18-month-old; no need to consider the question of contributory negligence because of the plaintiff's age); *cf.* Richardson v. Scott, 194 A.2d 288, 290 (Md. 1963) (citing *Miller* for the proposition that "[b]oth parties agree [ ] that contributory negligence [is] not involved in [the] case").

Thus, courts may hold that *Taylor* and *Miller* and *Mahan* represent two lines of authority that are not inconsistent.

429. *See* State v. Washington B. & A. Elec. R. R. Co., 131 A. 822, 828-29 (Md. 1926) (reversible error for trial court to hold 4 year, 2 month old contributorily negligent as a matter of law; issue should have been submitted to jury); United Rys. & Elec. Co. v. Carneal, 72 A. 771, 775 (Md. 1909) (less than 3 years of age).

430. *See* Dennehy v. Jordan Marsh Co., 71 N.E.2d 758, 760 (Mass. 1947) (4 year, 5 month old; "While the plaintiff was 'too young to have much prudence,' [citations] he might 'have the capacity to exercise care for his own safety in the familiar and lesser dangers of his own yard.'"); Minsk v. Pitaro, 187 N.E. 224, 225 (Mass. 1933) (3 year, 8 month old; defendant requested instruction child was too young to exercise due care); Sullivan v. Boston Elevated Ry. Co., 78 N.E. 382, 383 (Mass. 1906) (4 year, month old); *cf.* Sughrue v. Bay State Ry., 119 N.E. 660, 661 (Mass. 1918) (2½-year-

Massachusetts Supreme Court commented, in dicta, that "[t]here doubtless is an age where the court can say as a matter of law that a child cannot exercise any care under any circumstances."[432] However, a rule which sets an arbitrary age of discretion without regard to the child's age, knowledge, experience, and the circumstances confronting the child has been rejected.[433]

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old too young "to be capable of caring for herself"; defendant did not assert a defense of contributory negligence, however).

431. 78 N.E. 382 (Mass. 1906).

432. *Id.* at 383.

433. Berdos v. Tremont & Suffolk Mills, 95 N.E. 876 (Mass. 1911). There, the Massachusetts Supreme Court rejected the plaintiff's contention that children under the age of fourteen ought to be presumed incapable of negligence. The court reasoned:

> There is some point in every life where these conditions are present in such degree as to deprive the child of capacity to assume risk intelligently, or to be guilty of negligence consciously. That point varies in different children for divers[e] reasons. *There is no hard and fast rule that at any particular age a minor is presumed to be able to comprehend risks or to be capable of negligence.* . . . [T]he sounder doctrine seems to be that age is an important though not decisive factor in determining capacity, and that the decision of that question is not helped or hampered by any legal presumption.

Id. at 878 (emphasis added). The court also rejected the defendant's contention that the plaintiff was contributorily negligent as a matter of law, finding the minor did not have sufficient knowledge of the injury-causing danger to bar his recovery. *Id.* The *Berdos* court reversed the trial court's granting of a directed verdict in favor of the defendant and held that the question of contributory negligence should have been submitted to the jury. *Id.* at 878-80. *Cf.* Killeen v. Harmon Grain Prod., Inc., 413 N.E.2d 767, 770 (Mass. App. Ct. 1980) ("Toothpicks, like pencils, pins, needles, knives, razor blades, nails, tools of most kinds, bottles and other objects made of glass, present obvious dangers to users, but they are not unreasonably dangerous, in part because the very obviousness of the danger puts the user on notice. It is part of normal upbringing that one learns in childhood to cope with the dangers posed by such useful everyday items.").

MICHIGAN

Children under the age of seven are conclusively presumed incapable of negligence.[434] The same rule applies to a child's capacity to commit an intentional tort.[435]

MINNESOTA

A rule which conclusively establishes that all children under the age of seven are incapable of negligence as a matter of law "does not square with the way responsible people manage their affairs and those of their families in Minnesota today."[436]

MISSISSIPPI

Children under the age of seven are conclusively presumed incapable of negligence.[437] Minors between the ages of seven and

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434. Baker v. Alt, 132 N.W.2d 614, 619 (Mich. 1965) (noting that "[i]f an infant of [plaintiff's] age (6 years, 10 ½ months) *can* be guilty of contributory negligence, [plaintiff] is a classic case of one who was so in fact.") (emphasis added); *accord* Robinson v. Russ, 226 N.W.2d 848, 850 (Mich. Ct. App. 1975) (3-year-old; reversed judgment of directed verdict in favor of defendant on ground "all reasonable men would not agree that the defendant's acts were prudent"); Bravo v. Chernick, 184 N.W.2d 357, 358 (Mich. Ct. App. 1970) (4-year-old; proper for trial court to refuse to allow questioning "which tended to show contributory negligence on the part of [plaintiff]"); *see also* DeCamp v. Fleckenstein, 181 N.W.2d 47, 49 (Mich. Ct. App. 1970) (7-year "bright line" rule refers to chronological, not mental, age; 8-year-old with mentality of 5-year, 10-month-old therefore not protected by presumption of incapacity).

435. *See* Queen Ins. Co. v. Hammond, 132 N.W.2d 792, 793 (Mich. 1965).

436. Toetschinger v. Ihnot, 250 N.W.2d 204, 210 (Minn. 1977) (5 year, 8 month old); *see also* GRYC v. Dayton-Hudson Corp., 297 N.W.2d 727, 743 (Minn. 1980) (trial court properly declared 4-year-old incapable of comparative negligence where evidence showed that child could not have appreciated the danger "that [plaintiff's] pajamas would ignite and immediately burn rapidly when they came in contact with [an] electric burner"); Eckhardt v. Hanson, 264 N.W. 776, 777 (Minn. 1936) (6 year, 6 day old; a seven year "bright line" age rule "is arbitrary and always open to the objection that one day's difference in age should not be the dividing line as to whether a child is capable of negligence or not").

437. Gault v. Tablada, 400 F. Supp. 136, 140 (S.D. Miss.), *aff'd*, 526 F.2d 1405 (5th Cir. 1975) (defendant conceded 6½-year-old was incapable even though the minor had been warned of the danger of playing near the pool in which the minor drowned); Kopera v. Moschella, 400 F. Supp. 131, 135 (S.D. Miss.), *aff'd*, 526 F.2d 1405 (5th Cir. 1975) (6-year-old incapable); Tidwell v. Ray, 208 F. Supp. 952, 954 (N.D. Miss. 1962) (defendant conceded 7-year-old was incapable of contributory negligence); *see also* Agregaard v. Duncan, 173 So. 2d 416, 418 (Miss. 1965) (without discussion or citation to authority, the Mississippi Supreme Court noted that the 6½-year-old could

fourteen are rebuttably presumed incapable of negligence.[438] Unless there is evidence of incapacity, children above the age of fourteen are presumed capable of negligence and charged with the same standard of care as competent adults.[439] Recently, however, the Mississippi Supreme Court has limited this system of presumptions.[440]

MISSOURI

Children between the ages of two and four have been held incapable of negligent conduct under the circumstances of the case.[441] In *Volz v. City of St. Louis*,[442] the supreme court, without citing any Missouri authority, noted that "a boy six years of age cannot be guilty of contributory negligence.";[443] this

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not be contributorily negligent; affirmed judgment for defendant on ground evidence insufficient to support charge defendant was negligent); Morris v. Boleware, 87 So. 2d 246, 248 (Miss. 1956) (8-year-old presumed incapable of negligence).

438. *See* Johnson v. Howell, 56 So. 2d 491, 492 (Miss. 1952) (8-year-old). The presumption may be overcome by proof, in which event it becomes a question of fact for the jury, but such proof must show the exceptional capacity of the child and his possession of the faculty of judgment in such degree as removes him from the class of infants presumptively held incapable of exercising discretion. *Id.*; *accord* Moak v. Black, 92 So. 2d 845, 852 (Miss. 1957) (9-year-old; no evidence the plaintiff was "of exceptional capacity for his age").

439. *See Moak*, 92 So. 2d at 851 (dicta); Cochran v. Peeler, 47 So. 2d 806, 810 (Miss. 1950) (14-year, 5-month-old).

440. In Davis v. Waterman, 420 So. 2d 1063, 1067 (Miss. 1982), the court held that "anyone operating any motor-propelled vehicle upon a public street or highway must follow the same 'rules of the road' and exercise the same standard of care as adults." The court noted the inconsistency of this holding with their prior decisions, and stated that "[f]uture cases involving contributory negligence of children under fourteen years of age will be decided" in accordance with their holding in *Davis*. *Id.* at 1067 & n.1.

441. *See* Price v. Bangert Bros. Rd. Builders, Inc., 490 S.W.2d 53, 56 (Mo. 1973) (4-year-old cannot be negligent "in the circumstances here"); Schmidt v. Allen, 303 S.W.2d 652, 658 (Mo. 1957) (4-year-old was holding mother's hand and was struck by automobile); Reynolds v. Kinyon, 222 S.W. 476, 479 (Mo. 1920) (between 2 and 3 years of age; "It is *admitted* that the child was so young as to be incapable of any act of negligence.") (emphasis added); Messer v. Gentry, 290 S.W. 1014, 1016 (Mo. Ct. App. 1927) (4-year-old could not have been contributorily negligent "under the facts in this case"); Hillerbrand v. May Mercantile Co., 121 S.W. 326, 328 (Mo. Ct. App. 1909) (4-year-old; defense of contributory negligence not raised).

442. 32 S.W.2d 72 (Mo. 1930).

443. *Id.* at 74.

passage, however, is dicta.[444] In cases involving older children, Missouri courts have declined, as a matter of public policy, to recognize age as the only measure of a child's capacity for due care.[445] Arguably, this same policy should apply to young children as well.

MONTANA

Minors below the age of seven are incapable of negligence.[446]

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444. *Id.* at 74. The plaintiff, who was 11 years of age, tried to rescue his younger brother (6 years of age) after his brother fell through ice and was drowning. As he was reaching to help is brother, the ice underneath the plaintiff broke and he fell into the water and drowned. *Id.* at 73. The jury returned a verdict for the plaintiff and the trial court granted the defendant's motion for new trial. The plaintiff appealed and the Missouri Supreme Court affirmed, holding that "[t]he drowning did not result from an unusual or hidden danger." *Id.* at 74. The court reasoned:

> A warning [posted by the park] in regard to the condition of the ice would not have imbued [the children] with greater knowledge than they had. The boys knew, or were presumed to know, that if the ice broke they would fall into the water, and that in water people drown.

Id. Volz is therefore not authority for a six-year "bright line" rule.

445. *See* United States v. Stoppleman, 266 F.2d 13, 18-20 (8th Cir. 1959) (11 year, 11 month old; evidence insufficient to support contention the plaintiff was contributorily negligent as a matter of law); Jackson v. Butler, 155 S.W. 1071, 1079, 1080 (Mo. 1913) (between 17 and 18 years of age; "There is no fixed rule of law by which to gauge, or scale by which to nicely weigh, the acts of a minor to determine if he is guilty of contributory negligence"; "[A child's] capacity, not his age, is the criterion by which his responsibility and conduct should be measured."); Moeller v. United Rys. Co., 147 S.W. 1009, 1012 (Mo. 1912) (12-year-old; "The court cannot specify the age to which a child, when attained, shall be held as liable in such case as a person of full maturity, because there are other facts to be taken into account--the peculiar circumstances of the particular case, the knowledge and experience of the child in reference to those circumstances, and his capacity to appreciate the danger"; reversed judgment that child was contributorily negligent as a matter of law; question should have been submitted to the jury); Wilson v. White, 272 S.W.2d 1, 6-7 (Mo. Ct. App. 1964) (13 year, 5½ month old; relying on *Jackson* and *Moeller* for the proposition that the law does not fix an age of discretion and that age is not the only measure of a child's capacity for negligence; rejecting defendant's contention that the minor appreciated danger and was therefore contributorily negligent as a matter of law).

446. Burns v. Eminger, 261 P. 613, 615 (Mont. 1927) (6 year, 3 month old); *see also* Graham v. Rolandson, 435 P.2d 263, 267-68 (Mont. 1967) (8 year, 6 month, 18 day old; affirmed 7 year "bright line rule", but refused to adopt the 7-14 rebuttable presumption rule; the law with regard to the standard of care required of minors between the ages of 7 and 14 is "in hopeless and irreconcilable conflict"); *accord* Ranard v. O'Neil, 531 P.2d 1000, 1001-02 (Mont. 1975) (8-year-old).

NEBRASKA

There can be no arbitrary rule which fixes an age below which children are considered capable or incapable of understanding and avoiding dangers.[447]

NEVADA

The Nevada Supreme court has held: "In our opinion it is not advisable to establish a fixed and arbitrary rule. . . . We prefer to treat the issue of contributory negligence of a child as a fact issue

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447. Camerlinck v. Thomas, 312 N.W.2d 260, 267-69 (Neb. 1981); Arner v. Omaha & Council Bluffs St. Ry. Co., 37 N.W.2d 607, 610 (Neb. 1949) (11 year, 3 month old); *accord* Korbelik v. Johnson, 227 N.W.2d 21, 24 (Neb. 1975) (5-year-old; "Even if a child is not capable of contributory negligence, if such child's conduct can be considered the sole proximate cause of his injury, there can be no recovery."); Bear v. Auguy, 83 N.W.2d 559, 567 (Neb. 1957) (14-year-old); Siedlik v. Schneider, 241 N.W. 535, 536 (Neb. 1932) ("A child of tender years--and it must be conceded that the [7-year-old] plaintiff was a child of tender years--is not chargeable with negligence or contributory negligence. [Citations.] That does not mean, however, that the defendant was the insurer of plaintiff's safety or that the defendant would be responsible for injuries received by the plaintiff which were caused by the recklessness or carelessness of the plaintiff alone with which there was no negligence on the part of the defendant. . . . In determining whether the defendant was negligent at all the jury might well, and should, be told they could consider the acts and conduct of the plaintiff considering his age, discretion and experience."). *But see* Wooley v. Kittle, 309 N.W.2d 805, 808 (Neb. 1981) (trial court properly cautioned jury that 6-year-old child was incapable of contributory negligence).

In Adams v. Welliver, 51 N.W.2d 739, 744-45 (Neb. 1952), the Nebraska Supreme Court held that the trial court properly submitted the question of a 9-year-old's contributory negligence to the jury. In its reasoning the court rejected conclusive presumptions based on age and stated:

> The cases determined by this court which hold that an infant of tender years is not chargeable with contributory negligence appear to be cases where the infant is shown to be 7 years old or less, *and where the evidence discloses the infant did not possess sufficient knowledge, discretion, and appreciation of the danger* . . .

Id. (emphasis added.) And in Camerlinck v. Thomas, the supreme court explained:

> The more recent cases . . . appear to uphold the rule that there is no arbitrary rule fixing the time at which a child during his minority may be wholly capable or incapable of understanding and avoiding dangers to be incountered [sic], and that whether or not negligence may be attributed to a minor is usually a matter for the jury. . . . [¶] It appears that the rule advocated by the [minor] defendant in this case which attempts to fix a minimum age below which a child is held incapable of negligence, is not the majority rule in this country . . .

312 N.W.2d at 267-69. The court further held that the 6-year-old defendant had sufficient knowledge of the dangers of throwing things at other children to the extent that the question of his negligence should have been submitted to the jury. *Id.* at 269.

for the jury . . . unless reasonable minds could come to but one conclusion from the evidence."[448]

NEW HAMPSHIRE

"The adoption of an exact age for any presumption either absolute or rebuttable is neither required nor desirable. . . ."[449]

NEW JERSEY

In *Dillman v. Mitchell*,[450] the New Jersey Supreme Court held that a child's age is not determinate of capacity, thereby refusing to establish a "bright line" age rule.[451] The New Jersey Supreme

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448. Quillian v. Mathews, 467 P.2d 111, 113 (Nev. 1970) (6-year-old). The *Quillian* court endorsed a bifurcated test which required that the trial court:

> [D]ecide initially whether reasonable minds could believe that the particular child has the capacity to exercise that degree of care expected of children of the same age, experience and intelligence in similar circumstances. Should the court determine that the child has such capacity, the jury is then to decide whether such care was exercised in the particular case. Should the court rule otherwise, then, of course, the issue of contributory fault would not be submitted for jury resolution.

Id. Five years after *Quillian* was decided, the Ninth Circuit Court of Appeals held that *Quillian* did not apply to a 4-year, 5-month, 26-day old minor who was struck by a chain suspended four feet off the ground while running to his mother. Clark v. Circus-Circus, Inc., 525 F.2d 1328, 1329 (9th Cir. 1975). In a concurring opinion, however, one justice noted that the court was bound by Nevada law and "that if and when the Nevada court gets around to deciding the precise question presented in this case, it will decide it differently than this court has done." *Id.* at 1333 (Hill, J., concurring); *see also id.* ("the rule of law which the California courts have adopted, that a child under 5 years of age cannot as a matter of law be guilty of contributory negligence, is a just and proper rule").

Indeed, the Nevada Supreme Court recently reiterated its view in *Quillian* in Galloway v. McDonalds Restaurants of Nevada, and applied the *Quillian* rule to a 3½-year-old. 728 P.2d 826, 828-29 (Nev. 1986). The court held, "we have expressly repudiated any Procrustean rule that, merely because a child has not reached some specified age, he or she is incapable of contributory negligence no matter what the situation, and no matter what the experience or capabilities of the child." *Id.*

449. Hamel v. Crosietier, 256 A.2d 143, 145 (N.H. 1969) (6 year, 10 month old); *accord* Corbeil v. Rouslin, 293 A.2d 760, 761 (N.H. 1972) (7-year-old); Perry v. Fredette, 261 A.2d 431, 432-33 (N.H. 1970) (8-year-old).

450. 99 A.2d 809 (N.J. 1953).

451. *Id.* at 811. The court explained that "the age of a child does not alone determine its capacity to care for itself and avoid dangers, and the law should not arbitrarily fix an age at which the duty to exercise some care begins." *Id.*; *see also* Hellstern v. Smelowitz, 86 A.2d 265, 270-71 (N.J. Super. Ct. App. Div. 1952) (5 year, 3½ month old; "Under the so-called Illinois rule a boy who is one day under seven years of age may be guilty of the most flagrant contributory carelessness and yet evidence of his exceptional precocity and breadth of judgment and experience cannot be

Court later elaborated upon their holding in *Dillman* and established a bifurcated test that should be employed when determining the contributory negligence of young children.[452]

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introduced to overcome the illusory presumption of babylike puerility."). In *Dillman*, the New Jersey Supreme Court held that the issue of the contributory negligence of a 5½-year-old was properly submitted to the jury. The court held the evidence regarding the child's capacity to care for his safety while crossing busy streets was sufficient. *Dillman*, 99 A.2d at 811. Specifically, the court ruled:

> The boy's father testified that his son understood what he was doing, he had crossed that highway many times, he had been told to watch traffic in crossing the street, he understood what was told him and always did so, he 'positively' understood that if there was traffic at that intersection he would have to watch.

Id.

452. Bush v. New Jersey & N.Y. Transit Co., 153 A.2d 28, 36 (N.J. 1959). In *Bush*, the court held that in the absence of evidence the 4 year, 1 month, 19 day old had the capacity for negligent conduct, a trial court commits reversible error if the question of contributory negligence is submitted to the jury. *Id.* The *Bush* court held:

> [A] child of less than seven years of age is rebuttably presumed to be incapable of negligence and hence the issue may not be submitted to the jury in the absence of evidence of training and experience from which the jury could infer that the child was capable of understanding and avoiding the danger of injury involved in the circumstances of the case.

Id. at 35. Next, the court specifically outlined the method for applying the rebuttable presumption rule and argued:

> If evidence of capacity is introduced, then the trial judge must determine if such evidence is sufficient so that reasonable men might disagree concerning the question of whether the child had the capacity to perceive the risk and avoid the danger to himself. If the answer is in the affirmative and if there is further evidence that the child did not act in a manner which would be expected of a child of similar age, judgment and experience, then the question of contributory negligence must be submitted to the jury. The trial court must instruct the jury that there is a presumption of incapacity, that it is first to determine whether there is such evidence sufficient to overcome the presumption of incapacity and to render the child capable of being contributorily negligent, and, then, if the jury finds that the child is capable, it must determine whether the child was contributorily negligent under the facts of the particular case.

Id. Finally, the *Bush* court outlined in broad strokes possible factors that may be introduced by defendants to show capacity on the part of a young child. These include: "his attending school, his being taught traffic safety regulations, his experience in caring for himself in traffic, and any other evidence of the child's physical and mental capabilities." *Id.* at 36. *Compare* Dillard v. Fue, 167 A.2d 423, 424-25 (N.J. Super. Ct. App. Div. 1961) (reversed trial court's decision to submit question of contributory negligence to jury where evidence showed 5-year, 3-month-old had not "ever been 'taught safety regulations' or that he had any 'experience in caring for himself in traffic.'") *with* Zuckerbrod v. Burch, 210 A.2d 425, 429 (N.J. Super. Ct. App. Div. 1965) (reversed judgment for minor defendant and held, "[w]e think the jury could have found that every normal 5½-year-old child knows that an object thrown in the direction of another may strike him and cause hurt and that he must take care to avoid it").

NEW MEXICO

In *Frei v. Brownlee*,[453] the New Mexico Supreme Court held that a five-year-old could not be charged with contributory negligence because of his "tender years."[454] However, the decision is questionable authority for a "bright line" rule because the plaintiff was injured while he was *a passenger in the automobile driven by his father*.[455] In another case, involving a thirteen-year-old with a mentality of a ten-year-old, the New Mexico Supreme Court held that there is no precise age that is determinate of capacity; however, the court ruled that the mental capacity required to be charged with an adult standard of care cannot be reached by age thirteen.[456]

453. 248 P.2d 671 (N.M. 1952).

454. *Id.* at 677; *accord* Latimer v. City of Clovis, 495 P.2d 788, 795 (N.M. Ct. App. 1972) (5-year-old).

455. *Frei*, 248 P.2d at 672. In other words, the plaintiff could not possibly have been contributorily negligent under the facts of the case. *Frei* was followed in Sanchez v. J. Barron Rice, Inc., 427 P.2d 240, 242 (N.M. 1967), where a 2-year-old child died from carbon monoxide poisoning. There too, however, the plaintiff could not have been contributorily negligent under the facts of the case. In *Sanchez*, the plaintiff died because the door to a gas furnace was not properly shut, therefore causing carbon monoxide fumes to circulate through plaintiff's house. *Id.* at 242-43.

456. Thompson v. Anderman, 285 P.2d 507, 516 (N.M. 1955). The court explained:"[i]t is a matter of common knowledge that the stage at which physical and mental maturity is reached varies with the individual and is dependent on many factors. *It cannot be determined with mathematical accuracy*, but it is universally recognized that it is not reached at the age of thirteen." *Id.* (emphasis added). Arguably, this language should apply to young children as well. *See also* Wilson v. Wylie, 518 P.2d 1213, 1216-17 (N.M. Ct. App. 1974) (question whether 7 year, 10 month old was contributorily negligent was properly submitted for jury determination).

NEW YORK

Children under the age of four are presumed incapable of negligence.[457] Children above four are chargeable with negligence.[458]

NORTH CAROLINA

Children under the age of seven are conclusively presumed incapable of negligence.[459] Minors between the ages of seven and fourteen are rebuttably presumed incapable of negligence.[460]

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457. *See* Verni v. Johnson, 68 N.E.2d 431, 432 (N.Y. 1946); Smith v. Sapienza, 496 N.Y.S.2d 538, 539-40 (N.Y. App. Div. 1985) (3½-year-old; extended 4-year "bright line" rule to assumption of risk cases); Galvin v. Cosico, 456 N.Y.S.2d 259, 260 (N.Y. App. Div. 1982) (in a medical malpractice action, 3 year, 10 month old held incapable of contributory negligence); Beekman Estate v. Midonick, 252 N.Y.S.2d 885, 887-88 (N.Y. App. Div. 1964) (3 year, 11 month old defendant held incapable under the rule announced in *Verni*); Meyer v. Inguaggiato, 16 N.Y.S.2d 672, 673-74 (N.Y. App. Div. 1940) (3 years, 7 months).

458. *See* Woods v. United States, 197 F. Supp. 841, 843-44 (E.D. N.Y. 1961) (4 year, 10 month old; child lacked appreciation of the danger of a truck backing up and therefore was not chargeable with contributory negligence); Quinby *ex rel.* Camardo v. New York State Rys., 159 N.E. 879, 880-81 (N.Y. 1928) (4 year, 10 month old; "no general rule can be deduced that at a definite and fixed age the basis for an inference that a child is incapable of caring for itself under particular circumstances fails"; "[t]he law does not disregard variations in capacity among children of the same age"); Dimino v. Burriesci, 509 N.Y.S.2d 86, 87 (N.Y. App. Div. 1986); Redmond v. City of New York, 439 N.Y.S.2d 200, 201 (N.Y. App. Div. 1981) (4 year, 10 month old); Egan v. Tambone, 437 N.Y.S.2d 713, 714 (N.Y. App. Div. 1981) (9-year-old); Yun Jeong Koo v. St. Bernard, 392 N.Y.S.2d 815, 817-18 (N.Y. App. Div. 1977) (4 year, 10 month old); Zaepfel v. City of Yonkers, 392 N.Y.S.2d 336, 338 (N.Y. App. Div. 1977) (8 year, 10 month, 2 week old): Trippy v. Basile, 354 N.Y.S.2d 235, 236 (N.Y. App. Div. 1974) (5½-year-old); Searles v. Dardani, 347 N.Y.S.2d 662, 665 (N.Y. App. Div. 1973) (4½-year-old); Snell v. Motor Vehicle Accident Indem. Corp., 310 N.Y.S.2d 828, 831 (N.Y. App. Div. 1970) (reversed judgment of nonsuit against 4-year-old); Ehrlich v. Marra, 300 N.Y.S.2d 81, 82 (N.Y. App. Div. 1969) (4 years, 10 months; question of child's contributory negligence should not have been submitted to the jury because the only proof that the child had been negligent consisted of an assertion by the defendant that the minor "was crossing the street at the direction and under the supervision of his mother"); Weidenfeld v. Surface Transp. Corp., 55 N.Y.S.2d 780, 783-84 (N.Y. App. Div. 1945) (child "just past his fourth birthday"); Day v. Johnson, 39 N.Y.S.2d 203, 207 (N.Y. App. Div. 1943) (4 year, 1 month, 7 day old).

459. *See* Walston v. Greene, 102 S.E.2d 124, 126 (N.C. 1958) (6 year, 9 month old); Mitchell v. K. W. D. S., Inc., 216 S.E.2d 408, 412 (N.C. Ct. App. 1975).

460. *See* Duvall v. United States, 312 F. Supp. 625, 632-33 (E.D. N.C. 1970) (7 year, 1 week old; "[t]here is no evidence in this case to show that plaintiff possessed any knowledge of danger in dealing with explosives or 'old bombs' . . . Plaintiff was not guilty of any negligence which in any way contributed to the accident."); Anderson v. Butler, 202 S.E.2d 585, 590 (N.C. 1974) (9-year-old; "a child between the ages of seven and fourteen may not be held guilty of contributory negligence

Minors above the age of fourteen are presumed to have the capacity for negligence and are charged with an adult standard of care.[461]

NORTH DAKOTA

There can be no precise age below which a child is considered incapable of negligent conduct as a matter of law.[462] "'A definite

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as a matter of law"); Hoots v. Beeson, 159 S.E.2d 16, 21 (N.C. 1968) (11-year-old; reversible error for trial court to not instruct jury regarding the 7-14 rebuttable presumption rule); Bell v. Page, 156 S.E.2d 711, 715 (N.C. 1967) (9-year-old; reversed judgment of nonsuit in favor of the defendant concluding "the issue of contributory negligence . . . is for determination by the jury"); Mercer *ex rel.* Mercer v. Crocker, 327 S.E.2d 31, 32 (N.C. Ct. App. 1985) (13-year-old; reversible error for trial court to direct verdict in favor of defendants; question whether minor was capable of negligence was for jury determination); Wallace *ex rel.* Magers v. Evans, 298 S.E.2d 193, 195 (N.C. Ct. App. 1982) (children of 7 and 11 years of age cannot be held contributorily negligent as a matter of law; reversed judgment of directed verdict in favor of defendant on ground the evidence was insufficient to support the trial court's finding); Allen v. Equity & Investors Management Corp., 289 S.E.2d 623, 625 (N.C. Ct. App. 1982) (8-year-old; reversible error for trial court to grant defendant's motion for summary judgment; "[d]efendants may offer evidence at trial to rebut the presumption and show [plaintiff's] capacity to exercise care for her own safety . . . [but] this issue is one which is properly determined not by the court but by the jury"); Adkins v. Carter, 252 S.E.2d 268, 270 (N.C. Ct. App. 1979) (11-year-old; reversible error for trial court to direct verdict in favor of defendant on question of contributory negligence); Lewis *ex rel.* Lewis v. Dove, 251 S.E.2d 669, 672-73 (N.C. Ct. App. 1979) (9-year-old; evidence did not show plaintiff was contributorily negligent as a matter of law; therefore trial court's denial of defendant's motion for directed verdict was proper); Johnson v. Clay, 248 S.E.2d 382, 385 (N.C. Ct. App. 1978) (9-year-old; whether presumption of incapacity has been rebutted is a question for the jury); Bell v. Brueggemyer, 242 S.E.2d 392, 393 (N.C. Ct. App. 1978) (13-year-old; because child between 7 and 14 cannot be contributorily negligent as a matter of law, reversible error for trial court to direct verdict in favor of defendant); Townsend v. Frye, 228 S.E.2d 56, 58 (N.C. Ct. App. 1976) (reversible error for judge to fail to instruct jury that 12-year-old is rebuttably presumed incapable of negligence).

461. *See* Izard v. Hickory City Sch. Bd. of Educ., 315 S.E.2d 756, 758-59 (N.C. Ct. App. 1984) (14-year-old contributorily negligent as a matter of law); Golden v. Register, 274 S.E.2d 892, 894 (N.C. Ct. App. 1981) (14 year, 8½ month old; plaintiff "did not have the benefit of the established rule that a person between the ages of seven and fourteen is presumed to be incapable of contributory negligence"; child held contributorily negligent as a matter of law because "[plaintiff] knowingly engaged in hazardous horseplay").

462. Enget v. Neff, 43 N.W.2d 644, 647 (N.D. 1950); *accord* Kleinjan v. Knutson, 207 N.W.2d 247, 250-52 (N.D. 1973) (rejected defendant's contention that 9½-year-old was contributorily negligent as a matter of law; followed *Schweitzer* and held issue was properly submitted for jury determination); Schweitzer v. Anderson, 83 N.W.2d 416, 419-20 (N.D. 1957) (reversible error for trial court to hold that 6 year, 11 month, 22 day old child was guilty of contributory negligence as a matter of law where child darted out between two cars, "admitted that he did not look for any cars before entering the street," and "that he had been told in school to cross streets only at intersections and not to enter a street from between parked cars"; issue of contributory negligence should have

age limit, arbitrarily fixed for application in all cases, would have only its definiteness to commend it.'"[463]

OHIO

Children under the age of seven are conclusively presumed incapable of negligence.[464] There is a rebuttable presumption that children between the ages of seven and fourteen are incapable of negligence.[465] Minors above the age of fourteen are not protected by any presumptions of incapacity, and the question of negligence is always one of fact.[466]

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been submitted to the jury); Moe v. Kettwig, 68 N.W.2d 853, 859-60 (N.D. 1955) (13-year-old; fact that plaintiff "had not made good progress in school," had failed his grade twice, and admitted school was "difficult for him" was properly considered by the jury in determining whether plaintiff met the standard of care required of him).

463. *Enget*, 43 N.W.2d at 647.

464. *See* Drayton v. Jiffee Chem. Corp., 395 F. Supp. 1081, 1091 (N.D. Ohio 1975), *aff'd*, 591 F.2d 352 (6th Cir. 1978) (1-year-old; defense of contributory negligence not raised); Hunter v. City of Cleveland, 346 N.E.2d 303, 304 (Ohio 1976) (6-year-old; child not capable and court noted: "Had the plaintiff not been of such tender years, this court would have been compelled to find that the injuries were the result of his own conduct under the facts of the case."); Holbrock v. Hamilton Distrib., Inc., 228 N.E.2d 628, 630 (Ohio 1967) (6 year, 4 month, 22 day old; reversible error for trial court to submit question of contributory negligence to the jury); Ramsey v. King, 470 N.E.2d 241, 244 (Ohio Ct. App. 1984) (3-year-old; reversed jury verdict in favor of defendant on ground the evidence was insufficient to support a finding the child tormented or abused a dog; strict liability dog bite statute does not set a precise age below which a minor can be declared incapable of teasing, tormenting, or abusing a dog but three-year-old, as opposed to five, six, or seven year olds, is presumptively incapable of such behavior); *cf.* DeLuca v. Bowden, 329 N.E.2d 109, 111 (Ohio 1975) (applying rule that child under 7 cannot be liable for negligence to children charged with intentional torts; "members of society must accept the damage done by very young children to be no more subject to legal action than some force of nature or act of God").

465. *See* Howland v. Sears, Roebuck & Co., 438 F.2d 725, 729-30 (6th Cir. 1971) (8-year-old; reversible error for trial court not to instruct jury that child between 7 and 14 is rebuttably presumed incapable of negligence); Sorriento v. Ohio Dept. of Transp., 577 N.E.2d 167, 171 (Ohio Ct. Cl. 1988) (11-year-old; evidence suggested plaintiff "did not exercise such care as children of like age, education, experience, and prudence"; plaintiff held 49% at fault for injuries).

466. *See* Lones v. Detroit, Toledo and Ironton R.R. Co., 398 F.2d 914, 918-20 (6th Cir. 1968) (15 year, 10 month old; rejected defendant's contention that minor was negligent *per se* and holding the jury properly instructed that minor expected to exercise that degree of care normally expected of a minor of like age, experience, and capacity).

OKLAHOMA

Oklahoma courts have adopted the three-tiered system of presumptions from the criminal law.[467] Accordingly, children under the age of seven are conclusively presumed incapable of negligence.[468] Minors between the ages of seven and fourteen are rebuttably presumed incapable of negligence.[469] Minors above the age of fourteen are presumed capable of exercising due care for their safety.[470]

OREGON

The question whether a five-year, nine-month-old was contributorily negligent was for the jury to determine.[471] In a case where a child under the age of five is found to have had knowledge of the dangerous nature of his conduct, cases that have declared children under five presumptively incapable of negligence offer thin support for absolving the minor of any duty of due care.[472]

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467. *See generally* OKLA. STAT. ANN. tit. 21, § 152(1)-(2) (West 1983).

468. *See* Strong v. Allen, 768 P.2d 369, 370 (Okla. 1989) (2-year-old; no evidence suggesting the child was capable of or engaged in negligent conduct); Hampton *ex rel.* Hampton v. Hammons, 743 P.2d 1053, 1061 (Okla. 1987) (5½-year-old; reversible error for trial court to sustain defendant's demurrer on ground child was of "tender years" and therefore incapable of contributory negligence; no evidence suggesting the minor understood the dangerous propensities of pit bull; plaintiff was deprived of having a jury decide whether defendant was guilty of common law negligence); Connor v. Houtman, 350 P.2d 311, 312-13 (Okla. 1960) (3 year, 9 month old defendant (plaintiff was 4 years of age); "the majority of courts hold that an infant under 5 years of age is incapable of negligence"; affirmed judgment in favor of minor defendant; evidence was insufficient to support contention that minor defendant understood danger of playing with bow and arrow).

469. *See* Lewis v. Dependent Sch. Dist. No. 10, 808 P.2d 710, 713 (Okla. Ct. App. 1990) (10-year-old; reversible error for trial court not to instruct jury that 10-year-old is rebuttably presumed incapable of negligence); Ramage Mining Co. v. Thomas, 44 P.2d 19, 23 (Okla. 1935) (11-year-old; same); City of Shawnee v. Cheek, 137 P. 724, 732 (Okla. 1913) (9-year-old; case involved application of the attractive nuisance doctrine).

470. *See, e.g.*, Keck v. Woodring, 208 P.2d 1133, 1135-36 (Okla. 1948) (reversible error for trial court to instruct jury on attractive nuisance doctrine where minor was 15 years of age and therefore capable of exercising judgment and discretion).

471. *See* Taylor v. Bergeron, 449 P.2d 147, 148 (Or. 1969).

472. *See* Oviatt v. Camarra, 311 P.2d 746, 751 (Or. 1957) (4-year-old incapable of negligence as a matter of law); Kudrna v. Adamski, 216 P.2d 262, 263 (Or. 1950) (same); Macdonald v. O'Reilly, 78 P. 753, 756-57 (Or. 1904) (4-year-old presumptively incapable of negligent conduct). The *Taylor* court refused to re-examine prior decisions which apparently held that children under the

PENNSYLVANIA

Pennsylvania courts have borrowed from the criminal law and established a three-tiered system of presumptions. Minors under the age of seven are conclusively presumed incapable of negligence.[473] There is a rebuttable presumption that children between the ages of seven and fourteen are incapable of negligence, with the presumption strongest the closer the child is to the age of seven and weakest as the child approaches fourteen.[474] Minors over the age of fourteen do not benefit from

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age of five are conclusively presumed incapable of negligence. However, it is doubtful whether any of these decisions is persuasive authority for a five-year conclusive presumption rule.

In *Macdonald*, a 4-1/2-year-old boy was playing on a pile of lumber when the lumber rolled down and crushed him. 78 P. at 754. The court affirmed the judgment for the minor and confined its holding to the facts before them:

> [N]o one will . . . contend that a child of the age of plaintiff's intestate - 4-1/2 years - has reached such a degree of judgment, intelligence, or discretion as to be deemed capable of negligence in *playing on a pile of lumber or timber left in the public street near his home.*

Id. at 757 (emphasis added). *Macdonald* therefore does not stand for the proposition that *all* 4-1/2-year-olds, under *all* circumstances, are incapable of exercising due care for their safety. Nevertheless, some forty years later, the Oregon Supreme Court relied on *Macdonald* in a case that did not even involve the question of contributory negligence on the part of the minor plaintiff. *See Kudrna*, 216 P.2d at 262, 263 ("The *sole* question for decision is whether the [4-year-old] plaintiff, at the time of the accident, was being transported by the defendant as his 'guest'" (emphasis added). And in *Oviatt*, the supreme court held it was reversible error for the trial court to submit the question of the 4-year-old plaintiff's contributory negligence to the jury, citing *Macdonald* and *Kudrna* in support of their holding that "a child under five years of age is incapable of negligence as a matter of law." *Oviatt*, 311 P.2d at 751; *see also* Nikkila v. Niemi, 433 P.2d 825, 827 (Or. 1967) (15-year-old; "A party's youth is taken into consideration when judging whether or not he knew or should have known of the danger, but it does not excuse his embarking on a course of knowingly dangerous conduct.").

473. *See* Geiger v. Schneyer, 157 A.2d 56, 57 (Pa. 1959) (6-year-old); Kuhns v. Brugger, 135 A.2d 395, 401 (Pa. 1957) (12-year-old defendant; in dicta, the Supreme Court outlined the various presumptions that apply to minors charged with negligence; evidence sufficient to support the conclusion the minor defendant was negligent in the handling of a pistol); Dunn v. Teti, 421 A.2d 782, 784-85 (Pa. Super. Ct. 1980) (5 year, 7 month old defendant; applying seven year "bright line" rule to minor defendants and holding: "Utilization of the presumptions [when the minor is a plaintiff only] . . . would result in holding a child less responsible for his acts when he is a plaintiff than when he is a defendant."); Smith v. Walderman, 164 A.2d 20, 22 (Pa. Super. Ct. 1960) (5- and 6½-year-old).

474. *See* Novicki v. Blaw-Knox Co., 304 F.2d 931, 933-34 (3d Cir. 1962) (10-year-old; reversible error for trial court to grant judgment notwithstanding the verdict for the defendant; court found that "it is not enough that [plaintiff] be aware of the separate facts that grease is slippery, gravity pulls a body down and meshing gears can crush flesh and bone. *He must also realize that there is a substantial likelihood that his conduct will bring these factors into combined and cooperating effect to his injury.*") (emphasis added); Rosa v. United States, 613 F. Supp. 469, 478 (M.D. Pa. 1985) (8½-year-old; judgment for minor plaintiff on ground defendant was wilfully

any presumptions unless there is evidence suggesting that the minor was incapable of exercising due care.[475]

RHODE ISLAND

The question whether a child has been contributorily negligent is for jury determination.[476]

SOUTH CAROLINA

The South Carolina Supreme Court abandoned all age-based presumptions fo incapacity and held that: "no arbitrary limits as to minimum age should be set. The capacities of children vary greatly, not only with age, but also with individuals of the same

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negligent and failed to present evidence rebutting the presumption of incapacity); Scarborough *ex rel.* Scarborough v. Lewis, 518 A.2d 563, 569 & n.9 (Pa. Super.Ct. 1986), *rev'd on other grounds*, 565 A.2d 122 (Pa. 1989) (11-year-old; reversed judgment for plaintiff on instructional grounds; substantial evidence indicated the child "realized that he could be seriously injured by boarding moving trains"); Ross v. Vereb, 392 A.2d 1376, 1379 (Pa. 1978) (11-year-old; court correctly submitted the question of contributory negligence to the jury; rejected defendants' assertion that plaintiff was contributorily negligent as a matter of law and holding the evidence was sufficient to support the jury's conclusion that the child was not negligent); White *ex rel.* Stevens v. Southeastern Pa. Transp., 518 A.2d 810, 816-17 (Pa. Super. Ct. 1986) (12-year-old; trial court properly instructed jury that minors between the ages of 7 and 14 are rebuttably presumed incapable of negligence; there was substantial evidence to support the jury's verdict); Berman *ex rel.* Berman v. Philadelphia Bd. of Educ., 456 A.2d 545, 549-50 (Pa. Super. Ct. 1983) (11-year-old; court found evidence insufficient to rebut presumption of incapacity and rejected defendant's contention that plaintiff assumed the risk and was contributorily negligent; court reasoned: "we find no evidence in the record that portrays [plaintiff] as a young boy possessed of superior intelligence thereby giving him exceptional perceptions of the risks and dangers of hockey. . . . [Plaintiff] was unable to witness any serious injury by which we could charge him with knowing the risk involved"); Leopold v. Davies, 369 A.2d 868, 870 (Pa. Super. Ct. 1976) (7½-year-old; reversible error for trial court to instruct jury that plaintiff cannot recover if plaintiff crossed the street against the light).

475. *See, e.g.*, Congini *ex rel.* Congini v. Portersville Valve Co., 470 A.2d 515, 518 & n.5 (Pa. 1983) (18-year-old presumed capable of negligence); Pannell v. Taylor, 403 A.2d 101, 107 (Pa. Super. Ct. 1979) (15-year, 3-month-old; trial court properly refused to instruct jury on the subjective standard of care where "the evidence disclosed that [plaintiff] was cooperative, industrious, engaged in gainful employment, intelligent, helpful at home, excellent in cooking, ambitious, and skilled at sewing. Nothing in [plaintiff's] case indicated any incapacity . . . .").

476. *See* Caparco v. Lambert, 402 A.2d 1180, 1182 (R.I. 1979) (4½-year-old); Fontaine v. Devonis, 336 A.2d 847, 851-53 (R.I. 1975) (3½-year-old); Haddad v. First Nat'l Stores, Inc., 280 A.2d 93, 96 (R.I. 1971) (5-year-old); Milliken v. Weybosset Pure Food Mkt., 44 A.2d 723, 725 (R.I. 1945) (2 year, 4 month old).

age. Therefore, no very definite statement can be made as to just what standard is applied to them."[477]

SOUTH DAKOTA

No arbitrary age limit should determine whether or not a child has the capacity for negligence.[478] Any rule which relies on chronological age alone to set the standard of care required of children "lead[s] to the absurd conclusion that one day's difference in age determines whether a child is capable of negligence or not."[479]

TENNESSEE

There is a rebuttable presumption that children under the age of fourteen are incapable of negligence.[480] In *Garis v. Eberling*,[481]

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477. T.Z. Standard v. Shine, 295 S.E.2d 786, 787 (S.C. 1982) (6-year-old); *accord* McCormick v. Campbell, 329 S.E.2d 752, 752-53 (S.C. 1985) (14-year-old plaintiff and 16-year-old defendant); Inman v. Thompson, 375 S.E.2d 358, 350-60 (S.C. Ct. App. 1988) (8-year-old).

478. Doyen v. Lamb, 59 N.W.2d 550, 551 (S.D. 1953) (5 year, 10 month old); *accord* Finch v. Christensen, 172 N.W.2d 571, 573-74 (S.D. 1969) (11-year-old).

479. *Doyen*, 59 N.W.2d at 551.

480. *See* Keenan v. United States, 217 F. Supp. 603, 604 (E.D. Tenn. 1963) (4-year-old who received injuries after being hit by truck while riding on the handlebars of a bicycle not chargeable with contributory negligence); Wells v. McNutt, 189 S.W. 365, 365-66 (Tenn. 1916) (6-year-old); Wolfe v. Hart, 679 S.W.2d 455, 457 (Tenn. Ct. App. 1984); Wilburn v. Vernon, 447 S.W.2d 382, 388 (Tenn. Ct. App. 1969); Bailey v. Williams, 346 S.W.2d 285, 287-88 (Tenn. Ct. App. 1960) (8-year-old plaintiff, 7-year-old defendant); West v. Southern Ry. Co., 100 S.W.2d 1004, 1008 (Tenn. Ct. App. 1937) (11-year-old). The standard of care required of a minor is not confined to chronological age alone. *See* Prater v. Burns, 525 S.W.2d 846, 852-53 (Tenn. Ct. App. 1975) (reversible error for trial judge to mention only age in standard of care instruction regarding the negligence of a 14-year-old plaintiff and 13-year-old defendant). The Tennessee Supreme Court in *Wells* based its holding on the view that:

> There should not be fixed arbitrarily an age when an infant is presumed, as a matter of law, to be capable of exercising discretion and care. Some children mature earlier than others; some have natural capacity or better training in habits of thought than others who are older. Moreover, care or lack of care is a thing related to the particular surroundings, simple or complex, of the accident under investigation. It is also easily conceivable that a child nearly seven years of age by reason of living near the scene of the injuries may be better acquainted with and appreciative of the dangers incident to it than some other child of fifteen unacquainted with it.

Wells, 189 S.W. at 365-66; *see also* Cleghorn v. Thomas, 432 S.W.2d 507, 511 (Tenn. Ct. App. 1968) (3-year-old who, "exhibiting the normal curiosity and interest of a child of his age, opened the

a five-and-a-half year old boy was killed after the hand brake of the car on which he was sitting malfunctioned and began rolling down the driveway, thereby knocking him off and crushing him.[482] Citing *Wells v. McNutt*,[483] the *Garis* court held that these facts coupled with evidence that the child had the mental capacity of a seven to eight year old were insufficient to rebut the presumption that the child was incapable of negligence.[484] Conversely, in *Hadley v. Morris*,[485] a seven-year-old boy was killed when he ran into a highway and was hit by a car.[486] The evidence showed that the plaintiff's parents had warned him to refrain from crossing the highway but that the plaintiff had done so anyway; the child ignored warnings against using his bicycle on the highway; and the child had ridden his pony for about one year along the highway and observed the daily traffic.[487] The *Hadley* court held that this evidence was sufficient to rebut the presumption of incapacity.[488]

TEXAS

Children below the age of five are conclusively presumed incapable of negligence.[489] Children above the age of five are charged with that standard of care required of a child of like age, knowledge,

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unsecured valve on the 'tar kettle', allowing molten tar to run out of [the] valve or faucet upon the feet and legs of plaintiff," was too young to be contributorily negligent).

481. 71 S.W.2d 215 (Tenn. Ct. App. 1934).

482. *Id.* at 219.

483. 189 S.W. 365 (Tenn. 1916).

484. *Id.* at 227.

485. 249 S.W.2d 295 (Tenn. Ct. App. 1952).

486. *Id.* at 298-99.

487. *Id.* at 299.

488. *Id.*; *see also* Williams v. Williams, 470 S.W.2d 368, 373-74 (Tenn. Ct. App. 1971) (7½-year-old plaintiff was burned while trying to stomp out fire; court held that it was a question for jury whether child's "impulsive act" was negligent).

489. *See* Chambers v. United States, 656 F. Supp. 1447, 1456 (S.D. Tex. 1987) (5-year-old held to come within scope of rule announced in *Yarborough*); Yarborough v. Berner, 467 So. 2d 188, 190 (Tex. 1971) (4 years, 10 months old; trial court properly refused to instruct jury on the subjective standard of care); Molina v. Payless Foods, Inc., 615 S.W.2d 944, 946 (Tex. Ct. App. 1981) (2-year-old incapable of negligence; no evidence the child was contributorily negligent).

and experience behaving under the same or similar circumstances.[490]

UTAH

Whether a child should be charged with contributory negligence is to be determined by a bifurcated test.[491] In *Kilpack v. Wignall*,[492] the supreme court cited language from *Nelson v. Arrowhead Freight Lines*[493], which stated that children under the age of seven are conclusively presumed incapable of negligence.[494] That language, however, was dicta because the children in *Nelson* were sixteen and twenty years of age.[495]

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490. *See* Guzman v. Guajardo, 761 S.W.2d 506, 510 (Tex. Ct. App. 1988) (7-year-old; rejected defendant's contention that plaintiff was contributorily negligent as a matter of law on the ground that "the jury's 'failure to find' negligence could have been based on the fact that [plaintiff], a seven-year-old, was following the lead of his older companions [about ages 8 and 9] and yet was unable to react as quickly as they did when [defendant's] truck began to approach"); MacConnell v. Hill, 569 S.W.2d 524, 526-28 (Tex. Ct. App. 1978) (6-year-old; jury's apportionment of 60% fault to minor plaintiff was "against the overwhelming preponderance of the evidence"; reversed judgment in favor of defendant and commented that "an additional instruction should be given which again apprises the jury that a different standard should be applied in determining the negligence of a child when compared to the negligence of an adult").

491. Mann v. Fairbourn, 366 P.2d 603, 606 (Utah 1961) (5½-year-old). The bifurcated test operates as follows:

> If the trial judge, after a consideration of the age, experience and capacity of the child to understand and avoid the risks and dangers to which it was exposed in the actual circumstances and situation of the case, determines that fair-minded men might honestly differ as to whether the child failed to exercise that degree of care that is usually exercised by persons of similar age, experience and intelligence, the question of the child's contributory negligence should be submitted to the jury, but if the trial judge determines that fair-minded men could not conclude that the child had the capacity to be negligent, then he should decide the question of incapacity.

Id.; *accord* Donohue v. Rolando, 400 P.2d 12, 14 (Utah 1965) (6½-year-old); Rivas v. Pacific Finance Co., 397 P.2d 990, 991 & n.2 (Utah 1964) (child under 6).

492. 604 P.2d 462 (Utah 1979).

493. 104 P.2d 225 (Utah 1940).

494. *Kilpack* 604 P.2d at 465-66.

495. *Nelson*, 104 P.2d at 227-28. The supreme court in *Mann* recognized this fact and declined to apply *Nelson* to cases involving children under the age of seven. *Mann*, 366 P.2d at 606. In any event, the language from *Nelson* was inconsequential to the outcome in *Kilpack* because the *Kilpack* court concluded the evidence of the plaintiff's contributory negligence was insufficient to support the charge. *Kilpack*, 604 P.2d at 464-66.

VERMONT

There is no precise age below which a child can be deemed incapable of negligence as a matter of law.[496] "The test of age alone is not sufficient. Much depends upon the circumstances of the particular case, especially the mental development and previous training and experience of the child."[497]

VIRGINIA

Minors below the age of seven are conclusively presumed incapable of negligence.[498] Between the ages of seven and fourteen, there is a rebuttable presumption of incapacity.[499] While

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496. *See* Mitchell v. Amadon, 260 A.2d 213, 217-18 (Vt. 1969) (trial court properly submitted question of contributory negligence of 5-year-old to jury where plaintiff "was of average intelligence, had been repeatedly warned not to cross the travelled highway where the accident happened, but had darted out from behind one motor vehicle into the path of another").

497. Johnson's Adm'r v. Rutland R. Co., 106 A. 682, 685 (Vt. 1919) (6 year, 9 month old). "[I]n the case of a child the question of capacity in its comprehensive sense is preliminary to the usual inquiry respecting contributory negligence; for, unless such capacity is found, negligence will not be imputed." *Id.* at 686; *accord* Beaucage v. Russell, 238 A.2d 631, 635-36 (Vt. 1968) (8-year-old; "the capacity of the plaintiff to comprehend the dangers of entering the highway at a substantial speed, without proper control of his bicycle, knowing the defendant was not looking in his direction was an issue of fact for the jury to resolve"); Vitale v. Smith Auto Sales Co., 144 A. 380, 381-82 (Vt. 1929) (9-year-old with the mentality of a 5 year, 2 month old); Parker v. Gunther, 164 A.2d 152, 155-56 (Vt. 1960) (6-year-old; "[n]o evidence appears in the case that [plaintiff] was aware of the approach of the defendant's tractor-trailer, nor is the[re] evidence that he was trying to cross the road when he was struck").

498. *See* Grant v. Mays, 129 S.E.2d 10, 13 (Va. 1963) (dicta); Birtcherd Dairy v. Edwards, 91 S.E.2d 421, 424 (Va. 1956) (3-year-old; no defense of contributory negligence); Sheckler v. Anderson, 29 S.E.2d 867, 869 (Va. 1944) (4-year-old; defense of contributory negligence not raised).

499. *See* Doe v. Dewhirst, 396 S.E.2d 840, 842-43 (Va. 1990) (10½-year-old; reversible error for trial court to refuse to submit question of contributory negligence to the jury; plaintiff "knew the importance of looking for oncoming traffic before alighting from a vehicle"; on this record, the court should have allowed the jury to determine whether plaintiff "had the capacity and knowledge to understand the danger of stepping into the travel lane of the street without looking for approaching traffic"); Endicott v. Rich, 348 S.E.2d 275, 277-79 (Va. 1986) (13 years, 9 months old; reversible error for court to hold plaintiff contributorily negligent as a matter of law; distinguished *Barker* on the ground "[t]here is no proof in [plaintiff's] case that he was capable of understanding that the choice he made to avoid the accident was a dangerous one. On the contrary, the choice [plaintiff] made goes far to show why the presumption [of incapacity] exists."); Norfolk & Portsmouth Belt Line R. v. Barker, 275 S.E.2d 613, 616-17 (Va. 1981) (10-year-old; reversed jury verdict in favor of the plaintiff and held minor contributorily negligent as a matter of law on ground "[plaintiff] had the capacity to know and, in fact, did know that his conduct was dangerous"; plaintiff testified that

children above the age of fourteen are not protected by any presumption of incapacity, they are not held to the same standard of care as adults.[500]

WASHINGTON

Children under the age of six are conclusively presumed incapable of negligence.[501] Children above the age of six are not protected by any presumptions and the question of whether a minor has been negligent is for jury determination.[502]

WEST VIRGINIA

Minors below the age of seven are presumed incapable of negligence.[503] There is a rebuttable presumption that minors between the ages of seven and fourteen are incapable of

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"he had been jumping on trains since he was 'around eight or nine years old,' that his father and school friends had warned him about the practice, and that he knew it was dangerous and 'you could get hurt by riding a train,' but that he was 'willing to take that chance.'"); Norfolk S. Ry. Co. v. Fincham, 189 S.E.2d 380, 384 (Va. 1972) (9-year-old; rejected defendant's contention that plaintiff's awareness of the danger precluded his recovery as a matter of law).

500. *Grant*, 129 S.E.2d at 13; Meade v. Meade, 147 S.E.2d 171, 176 (Va. 1966). A Virginia court has ruled: "[T]he standard by which his conduct is to be measured is that degree of care which children of the same age, experience, discretion and knowledge would exercise under the same or similar circumstances." *Grant*, 129 S.E.2d at 13.

501. *See* Cox v. Hugo, 329 P.2d 467, 469 (Wash. 1958) (5-year-old; trial court did not err in granting plaintiff a new trial on the ground that even though the trial court did not instruct the jury on contributory negligence, evidence of the child's contributory negligence "'definitely influenced the jury in reaching [a] decision" for defendants); *accord* Arnold v. Laird, 621 P.2d 138, 140 n.2 (Wash. 1980) (4-year-old); *cf.* Brannon v. Harmon, 355 P.2d 792, 794 (Wash. 1960) ("The inherent danger of fire cannot be doubted"; court held: "we do not believe that a young child of the age of three and one-half years . . . is to be charged, as a matter of law, with the knowledge of [a concealed fire].").

502. *See* Seholm v. Hamilton, 419 P.2d 328, 330-31 (Wash. 1966) (*Cox* does not apply to child between 6 and 7); Graving v. Dorn, 386 P.2d 621, 622-24 (Wash. 1963) (13-year-old; affirmed jury verdict for defendant and held minor not entitled to jury instruction that establishes a rebuttable presumption of incapacity for minors between the ages of 6 and 14).

503. *See* Pino v. Szuch, 408 S.E.2d 55, 57 (W. Va. 1991) (dicta); Miller v. Warren, 390 S.E.2d 207, 209 (W. Va. 1990) (2-year-old; no citation to authority and defense of contributory negligence not raised; court erroneously instructed jury in a manner that would have allowed the jury to impute the negligence of the parents to the child).

negligence, with the presumption growing weaker as the child approaches fourteen.[504]

In *Pino v. Szuch*,[505] the West Virginia Supreme Court established a three-tiered system of presumptions that reflects the "considerable favoritism" West Virginia shows to children charged with negligence.[506] In *Pino*, an eight-year-old boy rode his bicycle into a neighbor's yard and collided with a lawn mower, thereby severely injuring his leg and foot. Plaintiff sued the driver of the lawn mover alleging that the driver negligently operated the vehicle. The defendant raised a defense of comparative negligence. The jury found the plaintiff forty-five percent at fault for his injuries. The trial court denied plaintiff's motion for new trial and the plaintiff appealed, arguing that the trial court committed reversible error for failing to instruct the jury that children between the ages of seven and fourteen are rebuttably presumed incapable of negligence. The supreme court agreed and reversed, holding "[f]or children between the ages of seven and fourteen, the conclusive presumption disappears, and a rebuttable presumption applies. However, the burden is upon the party attempting to overcome the presumption to prove that the child has the capacity to be contributorily negligent." [507]

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504. *See* Jordan v. Bero, 210 S.E.2d 618, 625-26 (W. Va. 1974) (10-year-old; jury was correctly instructed that child between 7 and 14 is rebuttably presumed incapable of negligence). *Compare* French v. Sinkford, 54 S.E.2d 38, 29 (W. Va. 1948) (there was "no testimony tending to rebut the presumption that [the 11-year-old plaintiff] was incapable of contributory negligence") *with* Shaw v. Perfetti, 125 S.E.2d 778, 780-85 (W. Va. 1962) (presumption rebutted and judgment for defendant affirmed where child between 7 and 8 years of age "had been repeatedly warned by both his father and mother to be careful in crossing [the] heavily traveled national road. In fact, [the plaintiff] had been warned on the day of the accident by his father, and only a few minutes before the accident by his mother. The evidence indicates that [the plaintiff] . . . had the capacity to understand the danger of crossing the highway, and did understand such danger. [The plaintiff] knew that the highway . . . he crossed was used by many automobiles traveling in both directions.").

505. 408 S.E.2d 55 (W. Va. 1991).

506. *Id.* at 57-59.

507. *Id.* at 57-58. The court stated that "[t]he rationale for the rebuttable presumption . . . is that these children usually lack the intelligence, maturity, and judgmental capacity to be held accountable for their actions." *Id.* at 58. Applying this rule to the facts before them, the *Pino* court concluded that "this case involved a child who was at the opposite end of the presumption spectrum. In this situation, the presumption is strong, and the defendant must show that the child's maturity, intelligence, experience, and judgmental capacity is significantly beyond that of the average eight-year-old to overcome it." *Id.* at 59. The court provided broad guidelines for determining the *type* of

Children above the age of fourteen are presumed to be capable of negligence and the party asserting incapacity has the burden of proving it.[508]

WISCONSIN

Children under the age of seven are presumed incapable of negligence by statute.[509]

WYOMING

The standard of care required of children is that care which may reasonably be expected from children of similar age, knowledge, capacity, and experience.[510]

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evidence which can be introduced to rebut the presumption of incapacity as well as the way in which juries should evaluate such information:

> Merely showing that the child is a bright eight-year-old or does well in school does not rebut the presumption, and to hold otherwise would undercut its very foundation. . . . It is . . . permissible to show that the child had been recently warned of the dangers associated with the activity that gave rise to his injury. Moreover, the jury should be instructed about the rebuttable presumption and that it should consider the foregoing factors along with the entire chain of events leading up to the accident to determine whether the presumption has been rebutted.

Id. The court rejected the defendant's contention that West Virginia should adopt the standard reflected in section 283A of the Restatement of Torts on the ground the Restatement standard was "too vague to assist a jury." *Id.* at 58 & n.1. Finally, the court noted that the three-tiered system of presumptions applied with equal force under the doctrine of comparative negligence. *Id.* at 60 n.3.

508. *See Pino*, 408 S.E.2d at 58 (dicta); *French*, 54 S.E.2d at 39 (dicta).

509. *See* WIS. STAT. ANN. § 891.44 (West 1966); *see also* Bair v. Staats, 102 N.W.2d 267, 271-72 (Wis. 1960) (6 year, 1 month old; trial court properly granted plaintiff new trial where jury instruction compared conduct of plaintiff to that of an eighteen-year-old).

510. Ramirez v. City of Cheyenne, 241 P. 710, 711 (Wyo. 1925) (between 7 and 8 years of age); *see* Smith v. United States, 546 F.2d 872, 878-79 (10th Cir. 1976) (question whether 14-year-old was contributorily negligent is for jury determination); Stilwell v. Nation, 363 P.2d 916, 918 (Wyo. 1961) (9-year-old; "A child old enough to ride a bicycle knows the danger of riding against fences or other objects. Not seeing such an object is a matter not related to age.").