South Carolina Law Review

Volume 18 | Issue 4 Article 7

1966

Contributory Negligence of Children

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CONTRIBUTORY NEGLIGENCE OF CHILDREN

Because a large portion of the United States' population is under twenty-one years of age, the law governing the capacity of this group to be held responsible for their acts is necessarily of great importance. To allow such a large group to be completely immune from responsibility could undermine the entire basis of the law. On the other hand, to impose adult standards on a group that possess neither the maturity nor the judgment to make adult decisions could result in great inequities. In an attempt to find a middle ground between total immunity and total responsibility, a large body of law has developed. In view of the overwhelming extent of this law, this paper will be confined to a discussion of the contributory negligence of children.[1]

The subject involves three primary considerations: (1) the existence of capacity for contributory negligence at any given age; (2) assuming capacity has been established, the standard of care that is to be applied; and (3) whether a child capable of contributory negligence has complied with the particular standard of care demanded by law.

Most jurisdictions have no problem with children three years of age and younger, finding that, as a matter of law, they have *no* capacity to be contributorily negligent. Similarly, infants eighteen years old and over are uniformly found to *have* the capacity to be contributorily negligent as a matter of law. At the early stages of infancy the problem arises in trying to determine when the child acquires capacity to be contributorily negligent; whereas, at the latter stages of infancy, over fourteen, the problem becomes one of determining when the child has the adult capacity to be contributorily negligent.

I. Illinois Rule

Some jurisdictions, including South Carolina, in an attempt to alleviate the problem of deciding when a child has the required capacity, have adopted the "Illinois Rule."[2] In formulating their rule, the Illinois courts looked to the common law capacity of an infant to commit a crime. "The common law rule was that infants under the age of seven were conclusively pre-

1. See Annot., 107 A.L.R. 4 (1937), Annot., 174 A.L.R. 1080 (1948), and Annot., 77 A.L.R.2d 917 (1961).

2. This rule was adopted in Chicago City Ry. v. Tuohy, 196 Ill. 410, 63 N.E. 997 (1902).

sumed incapable of crime; those between seven and fourteen were rebuttably presumed incapable; and those fourteen or over were presumptively capable."[3] Finding "age" to be the sole determining factor of a child's criminal capacity, the courts decided to make age the most important factor in the determination of a child's capacity to be contributorily negligent. As a result, the following presumptions were formulated: a conclusive presumption that a child under seven *lacks* the required capacity to be contributorily negligent; a rebuttable presumption that a child under fourteen *lacks* capacity; and a rebuttable presumption that a child over fourteen *has* capacity to be contributorily negligent.

A. Infants Aged One to Seven: Conclusive Presumption of Incapacity

1. *Development of Illinois Rule.* The Illinois rule or the presumption of incapacity was first recognized in *Chicago City Ry. v. Wilcox.*[4] There a six year old child was waiting to cross a street on which there were two cable tracks. He waited until the train nearest him passed and then ran around the rear of the last car to meet his mother who was waiting on the other side. He was struck by a train coming from the opposite direction. The infant plaintiff was awarded the judgment, and the defendant appealed in part on the ground that the instruction that a six year old cannot be contributorily negligent was erroneous. In overruling the objection the court stated:

> The only negligence charged was in not seeing, and thereby avoiding, the train running north. . . . Doubtless a child as young as the plaintiff was may possess to a very considerable degree what may be termed the instinct of self-preservation, and be . . . capable of exercising care for his own safety. But when moved by that instinct he acts only in view of what he sees or what is actually present to his senses. To guard against unseen danger or one . . . not . . . within the sphere of his observation, requires an exercise of reason

3. 21 AM. JUR. 2d *Criminal Law* § 27 (1965). *But see* 2 HARPER & JAMES, TORTS 926 § 16.8 (1956), which states:

> Even if its counterpart has validity in the criminal law the existence of any significant degree of correlation between the rates of development of a child's sense of right and wrong on the one hand, and his perception of danger and judgement of speeds and distances on the other, seems questionable.

4. 138 Ill. 370, 27 N.E. 899 (1891).

> and reflection of which so young a child is seldom capable, and for which the law, administered on human principles, will scarcely hold him responsible.[5]

Chicago City Ry. v. Tuohy[6] also involved a six year old who was struck by a train, but in this case the child was walking backwards over the track talking to a friend on the curb. The boy reached the far track and tried to cross back over the tracks when he realized that the train was bearing down on him. There was evidence that the trolley was speeding and had failed to sound a warning gong. The plaintiff was awarded judgment, and the defendant objected to the instruction that a child between five and six years old could not be guilty of contributory negligence regardless of his lack of due care.

In *Tuohy* the court was faced with the same basic situation as in *Wilcox*[7] except that in *Wilcox* the plaintiff was looking where he was going, and in *Tuohy* he was not. However, the court in *Tuohy* still found no error in the instruction and held that a child under seven simply does not have the capacity to be contributorily negligent regardless of how patent his carelessness might be.[8]

The court in *Tuohy* ignored the statement in *Wilcox* that "doubtless a child as young as the plaintiff was may possess to a very considerable degree what may be termed the instinct of self-preservation, and be . . . capable of exercising care for his own safety."[9] The court decided to solve the complex question of when a child can be contributorily negligent by allowing one factor—the age of the child—to control. Accordingly, the Illinois rule is divided into three age groups: 0-6 years, 7-13 years, 14-21 years. As a matter of procedure under the rule, the court will first ascertain the age and according to that age will apply the appropriate conclusive or rebuttable presumption of incapacity or if over fourteen the rebuttable presumption of capacity.

2. *Conclusive Presumption in South Carolina.* The conclusive presumption is a complete substitute for evidence, therefore, after a court has adopted a conclusive presumption regarding a factual issue, no amount of evidence can change that presump-

5. *Id.* at 374, 27 N.E. at 903.

6. 196 Ill. 410, 63 N.E. 997 (1902).

7. Chicago City Ry. v. Wilcox, 138 Ill. 370, 27 N.E. 899 (1891).

8. The adoption of the Illinois rule was unnecessary because the only question was whether or not the instruction was prejudicial.

9. Chicago City Ry. v. Wilcox, 138 Ill. 370, 374, 27 N.E. 899, 903 (1891).

tion. If it is established to the satisfaction of the court that a child is under seven years of age, it will refuse to hear any evidence concerning his contributory negligence.

The authority of the conclusive presumption in South Carolina is weakened by the fact that the only case dealing with the capacity of a child under seven to be contributorily negligent cites as its authority cases involving children over seven and discusses the incapacity of a child under seven to commit a crime.[10] The court engaged in no direct discussion as to the child's capacity to be contributorily negligent.

The case which actually states the conclusive presumption rule is *Sexton v. Noll.*[11]

> The rule of common law, that a child under seven years of age is conclusively presumed incapable of committing crime, has been adopted in this state as the test for determining capacity to be guilty of contributory negligence.[12]

Tucker v. Buffalo Mills[13] is cited as authority for this statement. However, because *Tucker* dealt with a child over seven, the court affirmatively stated that they would not rule on the law regarding the capacity of children *under* seven.[14] From the above discussion it can be seen that although the South Carolina courts purport to follow the conclusive presumption rule and have handed down a decision applying the rule,[15] the authority on which the rule is based is weak. Until the courts decide other cases which involve children *under* seven, and which state the presumption against a child's capacity to be contributorily negligent, this weakness will remain.

The question of whether a child under seven is capable of being contributorily negligent has never been realistically considered by the courts in South Carolina. Our courts have refused to recognize any factor other than age as being material to the question of capacity of children under seven to take care of

10. Dodd v. Spartanburg Ry., Gas & Elec. Co., 95 S.C. 9, 78 S.E. 525 (1913).
11. 108 S.C. 516, 95 S.E. 129 (1918).
12. *Id.* at 521, 95 S.E. at 130.
13. 76 S.C. 539, 57 S.E. 626 (1907).
14. We are not concerned in this appeal as to whether the Circuit Court committed error in so far as he charged that there was a conclusive presumption of incapacity of a child under seven years to commit contributory negligence. . . . We are not to be regarded as making any ruling on that particular point.

Id. at 543, 57 S.E. at 627.

15. Dodd v. Spartanburg Ry., Gas & Elec. Co., 95 S.C. 9, 78 S.E. 525 (1913).

themselves. The simplicity of the danger and the obvious intelligence and maturity of the child to avoid the danger are useless arguments once the child has proved that he was under seven at the time of the accident.

B. Age Seven to Fourteen: Rebuttable Presumption of Incapacity

The rebuttable or prima facie presumption against capacity for contributory negligence causes a great deal of confusion in regard to children aged seven to fourteen. The purpose or usefulness of the presumption is nebulous, and it is doubtful that it accomplishes anything which the court could not accomplish more effectively without the aid of any presumption.

The prima facie presumption of incapacity of a child to commit a *crime* serves a useful function by placing the burden of proof on the state to prove that a child has capacity to commit a crime. The capacity to commit a crime must necessarily include, to some extent, the capacity to understand crime. Most criminal laws against crime prohibit an affirmative action that would cause harm to a person or society, and public notice is given as to what action would violate these rules. The presumption is that a child of tender years does not understand the rules and that any act violating the rules would be done innocently.

The capacity to be contributorily negligent does not require the ability to understand any technical rules. The basic requirement is that a person must not put himself in a position that will unnecessarily increase the likelihood of bodily harm. Because procedural ambits place the burden of proof on the defendant to establish the infant plaintiff's contributory negligence,[16] capacity must necessarily be shown; therefore, the rebuttable presumption does not appear to serve any useful function.

The legality of the rebuttable or prima facie presumption was raised in *Tucker v. Buffalo Mills*[17] where the plaintiff was an eight year old child. In charging the jury the trial judge stated that there was a prima facie presumption that a child over seven years of age does not have the capacity to be contributorily negligent. The defendant asserted on appeal that the charge should

16. Butler v. Temples, 227 S.C. 496, 88 S.E.2d 586 (1955); Bolt v. Gibson, 225 S.C. 538, 83 S.E.2d 191 (1954); Crawford v. Charleston-Isle of Palms Traction Co., 126 S.C. 447, 120 S.E. 381 (1923).

17. 76 S.C. 539, 57 S.E. 626 (1907).

have been given to the jury as a factual issue unhampered by any presumption.

The court in *Tucker* by negative reasoning approved the prima facie presumption on the ground that there was no reason to prohibit it. The *Tucker* court also referred to dictum in *Watson v. Southern Ry.*[18] which stated that in the absence of evidence of an infant's capacity to be contributorily negligent there is a prima facie presumption that he is incapable of negligently endangering himself. The court admitted, however, that the prima facie presumption was not essential to a determination of whether the parents' negligence could be imputed to an infant.

The fact remains that the prima facie or rebuttable presumption of incapacity of children seven to fourteen to be contributorily negligent is the law in South Carolina.[19] This presumption can be rebutted by the defendant through a showing of the infant's intelligence, maturity, experience, capacity, prior training and formal education. If the defendant establishes that the child did have the capacity to understand the danger involved, then the child is compared to other children of his age, intelligence, experience, maturity and with his capacity in order to determine whether he acted as they would have acted under the same or similar circumstances.[20] The standard against which the child's action is measured is the reaction of other children with the same qualities in a similar situation. What the mass of children or the reasonable prudent child would have done under the circumstances is of no relevance.[21]

It is important to distinguish between capacity and standard of care.[22] The reason for the distinction is to prevent the unwarranted combination of two entirely different issues, for unless capacity is established there can be no standard for the child to meet.

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18. 66 S.C. 47, 44 S.E. 375 (1903).

19. Hollman v. Atlantic Coast Line R.R., 201 S.C. 308, 22 S.E.2d 892 (1942); Chitwood v. Chitwood, 159 S.C. 109, 156 S.E. 179 (1930).

20. The court stated that the test was "not whether the child acted as an ordinary prudent child of its age would have acted but whether it acted as a child its age and of its capacity, discretion, knowledge and experience would ordinarily have acted under the same or similar circumstances." Chitwood v. Chitwood, 159 S.C. 109, 113, 156 S.E. 179, 180 (1930).

21. *Ibid.*

22. *Id.* at 112, 156 S.E. at 180.

C. Infants Fourteen and Over: Presumption of Capacity

The capacity to be contributorily negligent has been compared to capacity to commit a crime[23] concerning children under seven and children seven to fourteen. Therefore, it seems logical that the analogy would also be applied to children fourteen and over, presuming them to have the adult capacity to be contributorily negligent. This could be rebutted by showing that the required adult faculties to be aware of the danger were lacking.

In *Chitwood v. Chitwood*[24] the contributory negligence of a fifteen year old was in question. The court stated that there was a presumption that children over fourteen had the capacity to be contributorily negligent and that if the child had all the requisite elements necessary to establish adult capacity, then he could be held to the adult or reasonable man standard.[25] The dissenting opinion stated that the presumption was not merely that the infant had capacity but that he had *adult* capacity, and the burden of proof was on the child to prove that he did not have adult capacity and should be judged by the lesser standard.[26]

If the common law analogy to criminal law is uniformly followed, then the dissenting opinion of *Chitwood* is correct. But this would create the harsh rule that a child thirteen years, three hundred and sixty-four days old is prima facie presumed to be incapable of "any" contributory negligence.[27] However, the next day he is presumed to have the adult capacity for self care. This application would be an affirmative benefit to the defendant in that it would allow him to defeat the plaintiff's case by proving contributory negligence, however slight, and it would place the burden of proof on the plaintiff to prove that he did not have adult capacity to be contributorily negligent.

If the court merely states that there is a presumption of capacity of children fourteen and over to be contributorily negligent, many questions are left unanswered. It is apparent that this elim-

23. 21 AM. JUR. 2d *Criminal Law* § 27 (1965). *But see* Annot., 1917F L.R.A. 10, 49, which stated that a child under seven is incapable of contributory negligence, not because of any analogy to criminal law, but because a child under seven lacks the discretion, judgment and appreciation of the probability of danger.

24. 159 S.C. 109, 156 S.E. 179 (1930).

25. *Id.* at 114, 156 S.E. at 180.

26. Chitwood v. Chitwood, 159 S.C. 109, 158 S.E. 179 (1930).

27. The day before his fourteenth birthday a child is presumed not to have the capacity to be contributorily negligent, but the next day he would be presumed to have the same capacity an adult has.

inates the requirement that the defendant must establish the capacity of the plaintiff. However, other issues are left undecided. The presumption does not state when the adult capacity and adult standard of care are to be applied in a particular situation or whether the child should be compared to other children of his age, intelligence, experience, maturity and capacity until he reaches twenty-one. The answers are not as apparent as the questions which are raised by the presumption.

Some of the modern decisions that apply the adult standard to children draw a distinction between "children's activities" and "adult activities."[28] Such adult activities would include the use of vehicles or other instruments that are capable of inflicting grave damage on other individuals or the public. A factor which the courts feel has necessitated the imposition of an adult standard on children is the increasingly large number of automobile accidents involving minors and the existence of the "childish impulse" or a child's disregard for safety which is impossible to anticipate while a minor is commanding a high powered vehicle.

It could be argued that applying the adult standard to children who enter adult activities leads to an illogical conclusion. The purpose of the lesser standards of care for infants is to allow for their immaturity and lack of discretion in foreseeing a dangerous situation and taking steps to avoid the danger.[29] However, to apply the adult standard to a child's adult activities and a lesser standard to his childish activities would be to give

28. Harrelson v. Whitehead, 236 Ark. 325, 365 S.W.2d 868 (1963). The court held that a fifteen year old boy riding a motorcycle on a public street was subject to the adult standard of care for his own safety and that if the defendant had known that the motorcycle was ridden by a minor he would still owe him no higher degree of care than he would an adult. *But see* 38 AM. JUR. *Negligence* § 40 (1941); Dawson v. Hoffman, 43 Ill. App. 2d 17, 192 N.E.2d 695 (1963), held that minors are entitled to be judged by standards commensurate with their age, experience and wisdom when engaged in activities appropriate to their age, experience and wisdom, but stated that the court would not countenance the adoption of a double standard of care for drivers of motor vehicles. In Betzhold v. Erickson, 35 Ill. App. 2d 203, 182 N.E.2d 342 (1962), the court held a thirteen year old unlicensed driver to the adult standard, and in Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961), a twelve year old driving a motorboat was held to the adult standard.

29. The purpose of a distinct standard of care for children is to make allowance for the child's immaturity in judging his contributory negligence. If the Massachusetts standard is used, a child will be judged according to his own intelligence, experience, and mental ability with respect to capacity to perceive the risk. Once given this perception of the risk, the child can be held to exercise the judgment of the standard child having like qualities.

2 HARPER & JAMES, TORTS 924 § 16.8 (1956).

him protection for the simple dangers but to deny it for the more complex ones.[30] Theoretically, the only alternative for the child would be to abstain from any adult activities until age twenty-one and then be at the mercy of the adult world as an inexperienced member of the family of the "reasonable man."

This segment of the law in South Carolina, as in many other jurisdictions, is confusing, and it is conceivable that the scales of justice will weigh in favor of the side which has the more persuasive argument in each individual case.

II. THE MASSACHUSETTS RULE

The jurisdictions that reject the "presumption" method of finding an infant's capacity to be contributorily negligent follow a number of variations of the Massachusetts rule.[31] This rule rejects the idea that age is the major factor in determining a child's capacity. Under the application of this rule each infant, *regardless of his age*, is treated as an "individual."[32] The capacity of the child to be contributorily negligent is determined by comparing his intelligence, experience and discretion with other children of the same age, intelligence, capacity and experience, acting under the same or similar circumstances.

A. Background

One of the earliest indications of adherence to the "Massachusetts Rule" was by dictum in *Collins v. South Boston H. R. Co.*[33] Here the court stated that "it is probable that the more accurate statement of the law for children is . . . that a child is to be held to the exercise of that degree of care which may reasonably be expected of children his age. . . ."[34] A later case established that the issue of whether a child was capable of exercising any care was a question for the jury.[35] That "age" is not the only factor to consider when establishing a child's capacity to be negligent was set forth in *Berdos v. Tremont & Suffolk*

30. The conflicting interest would have to be resolved by public policy; however, very few cases distinguish the capacity requirements in applying them to complex or simple dangers.

31. Annot., 107 A.L.R. 4, 44 (1937).

32. The individual child test is used in the Illinois rule for children seven to fourteen and sometimes for children over fourteen once capacity is established, but age is the controlling factor.

33. 142 Mass. 301, 7 N.E. 856 (1886).

34. *Id.* at 314, 7 N.E. at 859.

35. Sullivan v. Boston Elevated Ry., 192 Mass. 37, 78 N.E. 382 (1906).

Mill.[36] The court indicated that there can be no dispositive rule concerning the particular age at which a minor can be presumed able to comprehend risks or capable of negligence.

B. Rejecting the Presumption View in Favor of the Massachusetts Rule

One of the most cited opinions indicating a preference for the Illinois rule is that of Mr. Justice McAllister in *Tyler v. Weed.*[37] He reasoned that seven was "the age of innocence" and the age when a "human being passed from the realm of imagination and dream to the world of reality and fact."[38] He further pointed out that practical reasons for giving absolute protection to infants under seven were that it would be administratively expedient, it would avoid the danger of a shifting standard and it would eliminate the confusion and inconsistency of jury decisions. This reasoning was rejected by the majority of the court,[39] and the Massachusetts rule was adopted on the ground that jurors were competent to judge whether a child had exercised a degree of care commensurate with his age, capacity and understanding. "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."[40]

Other courts have rejected the Illinois rule on other grounds. For example, in *Johnson's Adm'r v. Rutland R. Co.*[41] the court disapproved of the fact that the Illinois rule is based on the comparison of a child's capacity to be contributorily negligent with his capacity to commit a crime. This court felt that the capacity and discretion to understand the nature and illegality of a particular act which constitutes a crime and the capacity to care for one's safety were essentially dissimilar. The court agreed that the Illinois rule had the merit of simplicity but felt that it was purely arbitrary and lacked the sanction of reason and experience.[42]

36. 209 Mass. 489, 95 N.E. 876 (1911).

37. 285 Mich. 460, 280 N.W. 827 (1938) (dissenting opinion).

38. *Id.* at 474, 280 N.W. at 832.

39. However, in 1965 the majority accepted Justice McAllister's viewpoint in Baker v. Alt, 374 Mich. 492, 132 N.W.2d 614 (1965).

40. Tyler v. Weed, 285 Mich. 460, 493, 280 N.W. 827, 840 (1938).

41. 93 Vt. 132, 106 Atl. 682 (1919).

42. Capacity to commit crime, involving, as it does discretion to understand the nature and illegality of the particular act constituting the crime, is one thing, and capacity to care for one's personal safety is another and

Another basis of the rejection of the Illinois rule has been its "inflexibility." *Hellstern v. Smelowitz*[43] pointed out that a child who is but one day under the age of seven years could be guilty of the most flagrant act of contributory negligence, yet "his exceptional precocity and breadth of judgment and experience cannot be introduced to overcome the illusory presumption of babylike puerility."[44]

Many jurisdictions have expressly rejected the "presumption" method of finding an infant's capacity to be contributorily negligent and have adopted instead the more flexible Massachusetts rule.[45] The South Carolina courts have given no indication as yet that any change from the presumption rule might be considered.

III. CONTRIBUTORY NEGLIGENCE THEORY BORROWED

A few jurisdictions apply the adult standard of care for a child's negligence but a lesser standard for his contributory negligence.[46] The majority of jurisdictions, including South Carolina, apply the lesser standard to both negligence and contributory negligence.[47]

Illustrative of the extensions towards which applications of the Illinois rule may be directed is Michigan, where the question

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> quite a different thing. . . . While the rule has the merit of simplicity, it is purely arbitrary and lacks the sanction of reason and experience. . . . The test of age is not sufficient. Much depends on the circumstances of the particular case, especially the mental development and previous training and experience of the child.

Id. at 135, 106 Atl. at 685.

43. 17 N.J. Super. 366, 86 A.2d 265 (1952).

44. *Id.* at 377, 86 A.2d at 271.

45. Bush v. New Jersey & N.Y. Transit, 30 N.J. 345, 153 A.2d 28 (1959). The court said if no evidence is introduced to prove the infant's capacity then the child was presumed incapable of contributory negligence. In Dillman v. Mitchell, 13 N.J. 412, 99 A.2d 809 (1953), the court in rebuking the statement that the Illinois rule was the overwhelming weight of authority said that six jurisdictions followed the Illinois rule compared to twenty-one that followed the Massachusetts rule. Eckhardt v. Hanson, 196 Minn. 270, 264 N.W. 776 (1936), rejected the conclusive presumption of incapacity for children under seven and held this was a jury question. See Annot., 77 A.L.R.2d 917 (1961), for a list of jurisdictions rejecting the Illinois rule.

46. 27 AM. JUR. *Infants* § 91 (1940); Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

47. In Jorgensen v. Nudelman, 45 Ill. App. 2d 350, 195 N.E.2d 422 (1963), the absurdity of a double standard was pointed out. Imagine a suit between two children under seven who had both been injured. The defendant filed a counterclaim. They both could be guilty of negligence as defendants but neither of contributory negligence as plaintiffs because of the conclusive presumption of incapacity.

of a child's capacity to be contributorily negligent was debated for many years. The most famous case arising in this debate was *Tyler v. Weed*[48] where the majority applied the Massachusetts rule. In 1965, however, Michigan did adopt the Illinois rule in *Baker v. Alt*[49] by holding that a child under seven was conclusively presumed to be incapable of contributory negligence. In *Queens Ins. Co. v. Hammond*[50] Michigan extended this doctrine to apply to negligence and the intentional torts[51] of children under seven.

Similarly, Michigan has invoked application of the rule so as to affect decisions involving the Motor Vehicle Guest Statute. In *Burhaus v. Witbeck*[52] the court held that a five year old was incapable of being a guest because he did not have the capacity to enter into the guest relationship. The infant plaintiff was allowed to recover by showing the ordinary negligence of the defendant rather than gross and willful negligence.

The Illinois court has itself refused to extend the contributory negligence conclusive presumption theory of children under seven to intentional or non-negligent torts on the ground that there is no capacity requirement in these areas.[53] In South Carolina and other jurisdictions following the Illinois rule, it could be logically argued that by applying this contributory negligence theory a child under seven cannot enter into any relationship[54] or be guilty of any act that would require mental capacity.

48. 285 Mich. 460, 280 N.W. 827 (1938).

49. 374 Mich. 492, 132 N.W.2d 614 (1965).

50. 374 Mich. 655, 132 N.W.2d 792 (1965).

51. Huchting v. Engel, 17 Wis. 203, 84 Am. Dec. 741 (1863); 27 AM. JUR. *Infants* § 90 (1940). The general rule is that infants are absolutely liable for their torts.

52. 375 Mich. 253, 134 N.W.2d 225 (1965).

53. Seaburg v. Williams, 16 Ill. App. 2d 295, 148 N.E.2d 49 (1958). The court held that a cause of action for a non-negligent tort could be maintained against a six year old boy who set fire to a garage. However, on remand the trial court charged the boy with negligently setting fire to the garage. The appellate court reversed because negligence was not averred to in the pleadings but stated that in a case properly presented a child under seven would be conclusively presumed to be incapable of negligent conduct. Seaburg v. Williams, 23 Ill. App. 2d 25, 161 N.E.2d 576 (1959).

54. The South Carolina Guest Statute states that:

> No person transported by an owner or operator of a motor vehicle as his *guest* . . . shall have a cause of action for damages against motor vehicle or . . . owner or operator for injury, death or loss . . . unless such accident shall have been intentional . . . or caused by his heedlessness or his reckless disregard of the rights of others. (Emphasis added.)

S.C. CODE ANN. § 46-801 (1962). Query: would the South Carolina Supreme Court follow Burhans v. Whitbeck, 375 Mich. 253, 134 N.W.2d 255 (1965), which held that a child under seven did not have the capacity to enter a guest relationship.

IV. CONCLUSION

The purpose of the lesser standard for children is to allow for their immaturity, indiscretion, inexperience and incapacity, but it is not to excuse childish acts merely on the basis of the amount of time they have or have not lived. Rather than rote application of a simple chronological age test, it seems more logical to consider the elements of intelligence, experience, maturity, capacity and training where they may be pertinent.

It is unrealistic to say that a child seven years old absolutely has no capacity to take care of himself. Recognition of some dangers is so simple that even a very young child is able to understand the hazards after the danger has been properly explained to him. On the other hand, many dangers are so disguised that reasonable men could not differ as to the child's incapacity to understand and appreciate the existence of the danger. In the latter situation the court might rule as a matter of law as to the incapacity of the infant.

The Massachusetts rule is the modern trend, and adoption of it serves to settle many confusing areas without relinquishing any protection already afforded the child. Its application gains for the law a needed flexibility which prevents inequitable results from accruing against the slightly negligent defendant.

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