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Children and Comparative Fault: Determining the Burden Small Shoulders Should Bear

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Children and Comparative Fault: Determining the Burden Small Shoulders Should Bear

Lester v. Sayles[1]

I. INTRODUCTION

Missouri has long favored a system that treats assessment of a child's contributory fault as a fact issue. This preference was recently reaffirmed by the Missouri Supreme Court in *Lester v. Sayles*.[2] Although the system, referred to as the "modern trend,"[3] has undeniable advantages and provides protection for both children and the adults who negligently injure them, the system has drawbacks when applied to very young children. The negatives of the system should lead us to question whether society is adequately protecting its youngsters or demanding far too much of them.

II. FACTS AND HOLDING

On June 20, 1988, four-year-old Latonya Lester was struck by a one-ton truck driven by Mark Sayles.[4] The accident occurred at the intersection of St. Louis Avenue and Elliott Street in St. Louis, Missouri.[5] Defendant Sayles approached the intersection just as Latonya Lester was crossing the street unattended.[6] At trial, Sayles testified that he never saw the child.[7]

The accident left Latonya quadriplegic with extensive brain damage and led to lawsuits by Latonya and her mother, Wanda Lester.[8] Wanda Lester sought damages from Mr. Sayles and his employer[9] for her daughter's medical expenses as well as for the loss of her services and companionship. Latonya's claim sought relief for the little girl's own extensive damages.[10]

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1. 850 S.W.2d 858 (Mo. 1993).
2. *Id.* at 867.
3. *Id.* at 866.
4. *Id.* at 861.
5. *Id.* at 862.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* Mr. Sayles was working for his employer, McHenry Truck Equipment, Inc. at the time of the accident.
10. *Id.*

Latonya and her mother each prevailed in their negligence actions in the City of St. Louis Circuit Court with jury verdicts of $19,817,000 and $1,674,000 respectively.[11] The defendants' appeal to the Eastern District Court of Appeals and the subsequent reversal after transfer to the Missouri Supreme Court rested largely on an issue that they were not allowed to raise at the trial level—the comparative negligence of Latonya. At trial, the defendants sought and were denied last-minute permission to amend their pleadings to include an allegation of fault on the part of Latonya.[12] In addition, the trial court refused to instruct the jury on the comparative fault issue.[13] However, neither of these alleged errors received notable attention from the Supreme Court.[14] Instead, the underlying issue, not raised by the defendants, of whether comparative fault can even be assessed against such a young child, formed the crux of the Supreme Court opinion.[15]

The Missouri Supreme Court, in an opinion by Judge Limbaugh, reaffirmed and clarified its earlier holdings on comparative fault by a child of tender years. The court held that a child's fault is an issue of fact to be determined according to the standard of care exercised by children of the same age, judgment, and experience, unless a child is so very young or inexperienced that reasonable minds could not differ on the issue of the child's capacity for fault.[16]

III. LEGAL BACKGROUND

Missouri first enunciated its policy regarding the contributory negligence of children around 1900. In four cases with similar fact patterns,[17] the Missouri Supreme Court announced that the determination of contributory negligence by a child would not depend on a fixed age limit,[18] but rather capability of fault was to be a question of fact for the jury.[19]

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11. *Id.* The jury assessed 10% fault to the mother and her award was reduced accordingly. Prejudgment interest was also awarded.

12. *Id.* at 865.

13. *Id.*

14. *Id.* at 867-69.

15. *Id.* at 865-67.

16. *Id.* at 867.

17. Burger v. Missouri Pac. Ry., 20 S.W. 439 (Mo. 1892); Spillane v. Missouri Pac. Ry., 37 S.W. 198 (Mo. 1896); Holmes v. Missouri Pac. Ry., 88 S.W. 623 (Mo. 1905); Berry v. St. Louis M. & S.E. Ry., 114 S.W. 27 (Mo. 1908).

18. *Burger*, 20 S.W. at 441.

19. *Holmes*, 88 S.W. at 626.

In *Burger*, *Spillane*, *Holmes*, and *Berry*, the court examined the contributory negligence of children ages four,[20] eight,[21] and nine,[22] and in each case applied a uniform standard for determination of the issue. Each case involved a young child who had sustained injuries upon crossing or playing around railroad tracks. According to the court, "no arbitrary rule can be established, fixing the age at which a child . . . may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered upon railway tracks."[23]

In conjunction with this belief, the court announced a standard which declined to set an age limit below which a child would be safe from a finding of contributory negligence. Instead, the court adopted the view that the contributory fault of a child is an issue of fact to be determined by a jury, applying a standard based on "whether the child exercised the ordinary care and prudence of a child similarly situated."[24] Characteristics included in the "similarly situated" standard might be age, judgment, intellectual capacity, experience, and knowledge.[25]

However, the court allowed one escape from this determination. In the event a child was exceedingly young and "there is no doubt as to the capacity of the child," the court could decide as a matter of law that the child was incapable of contributory negligence.[26] To make such a finding was to adjudge the child *non sui juris*.[27]

This standard demanded a fact-specific inquiry into each case, which typically unearthed acts of carelessness and made the fault determination a simple decision. For example, in *Spillane*, a nine-year-old boy, "conversant with the running of trains" and "living . . . for years in the immediate vicinity of [the] crossing," was judged contributorily negligent after he stood beside the track while attached to a large block of ice on the opposite side of the

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20. *Berry*, 114 S.W. at 28.

21. *Holmes*, 88 S.W. at 623.

22. *Spillane*, 37 S.W. at 198; *Burger*, 20 S.W. at 439.

23. *Burger*, 20 S.W. at 441.

24. *Holmes*, 88 S.W. at 625.

25. *Id.* at 625; Oscar S. Gray, *The Standard of Care for Children Revisited*, 45 MO. L. REV. 597, 599 (1980).

26. *Holmes*, 88 S.W. at 625 (quoting CHARLES F. BEACH, JR., A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE § 117 at 167-68 (New York, Baker, Voorhis & Co. 3d ed. 1899)).

27. *Id.* at 625. The English translation of "*non sui juris*" is "not of his own right." According to Black's Law Dictionary, a person who is "*sui juris*" possesses "full social and civil rights" and is "not under any legal disability . . . or guardianship." BLACK'S LAW DICTIONARY 1434 (6th ed. 1991).

track via a string tied to his wrist.[28] The train struck the string, threw the boy down, and injured him.[29]

In accordance with the announced standard, the *Spillane* court considered the boy's extensive wisdom and experience in judging his capacity for fault. The court noted:

> When the intelligence of this boy, testified to by his own parents, teachers, and relatives, is considered along with his experience shown to have been acquired by living in the immediate vicinity of those tracks, and the glaring, obvious danger of standing on a railroad track, on which he knew trains were constantly moving, we can discern no reason why he should not be held responsible for the recklessness of his conduct.[30]

A similar evaluation occurred, but with a different result, in *Burger*.[31] In that case, an "unusually bright," nine-year-old boy attempted to cross between the cars of a stationary train and was injured when the train started to move.[32] The jury found the young boy was not contributorily negligent and allowed him to recover—the jury instructions having centered around the standard of care required of a child similarly situated to him.[33] The boy was shown to be "bright, intelligent, active," to "possess unusual capacity," and to have "some knowledge of the movement of trains."[34] However, the court carefully noted that while an adult would almost certainly be negligent in that situation, a child was not to be judged by the adult standard of care.[35] In support of this contention, the court stated that "[a] boy may have all the knowledge of an adult . . . but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid [dangers] which are possessed by the ordinarily prudent adult person."[36]

In this newly announced standard, the court anticipated situations in which a child would be found incapable of negligence as a matter of law.[37] The *Berry* case presented such a situation. In *Berry*, a four-year-old child was injured while playing on a railroad turntable.[38] The court determined that the

28. *Spillane*, 37 S.W. at 200-01.
29. *Id.* at 201.
30. *Id.*
31. Burger v. Missouri Pac. Ry., 20 S.W. 439 (Mo. 1892).
32. *Id.* at 440.
33. *Id.* at 441.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Supra* note 26 and accompanying text.
38. *Berry*, 114 S.W. at 30.

issue of the child's contributory negligence could not be raised and recognized that a child "may be so tender in age and infantile in judgment that the court as a matter of law might rule he could not be guilty of contributory negligence in the circumstances of a given case."[39] Thus, the court in *Berry* found the child non sui juris, but with no explanation of the reasoning behind that determination.[40]

In *Burger*, the court noted that "the rule is believed to be recognized in all the courts of the country that a child is not negligent if he exercise [sic] that degree of care which . . . would reasonably be expected of one of his years and capacity."[41] However, on that issue the court was mistaken, for a very different trend was developing in other states.

Although Missouri refused to fix an age below which a child could not be capable of fault, other states chose to adopt that method. States chose to set a fixed limit at varying ages, usually ranging from age four to seven.[42] One Texas court stated, "This court would be loath to hold in any case that a child six years old should be denied recovery for injuries caused by the negligence of an adult defendant."[43] In subsequent years, fixed age limits became more popular with several states, including Colorado,[44] Michigan,[45] and Washington,[46] adopting a tender years limit.[47]

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39. *Id.* at 29-30.

40. *Id.* at 30.

41. *Burger*, 20 S.W. at 441.

42. Galveston Elec. Co. v. Hansen, 7 S.W.2d 934, 936 (Tex. Ct. App. 1928) (setting the age at six); Temple Lumber Co. v. Lining, 289 S.W. 746, 748 (Tex. Ct. App. 1926) (setting the age at five).

43. *Galveston*, 7 S.W.2d at 936.

44. Benallo v. Bare, 427 P.2d 323, 325 (Colo. 1967) (age seven).

45. Baker v. Alt, 132 N.W.2d 614, 620 (Mich. 1965) (age seven).

46. Cox v. Hugo, 329 P.2d 467, 469 (Wash. 1958) (age six).

47. According to Oscar S. Gray, thirty-two states have specified a fixed age limit or a "conclusive presumption against the capacity for negligence of the very young." Gray, *supra* note 25, at 598. However, Gray also recognizes that authorities disagree as to this number. Gray, *supra* note 25, at 597. In fact, Gray incorrectly includes Missouri in his list of tender years states, Gray, *supra* note 25, at 598 n.7; *Lester*, 850 S.W.2d at 866.

Included in Gray's list are Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Virginia, Washington, Wisconsin. Gray, *supra* note 25, at 598 n.7.

See also generally Donald Paul Duffala, Annotation, *Modern Trends as to Contributory Negligence of Children*, 32 A.L.R.4th 36 (1984); Donald Paul Duffala, Annotation, *Modern Trends as to Tort Liability of Child of Tender Years*, 27 A.L.R.4th

Several states chose age seven as the age below which a child cannot be negligent.[48] Furthermore, many states then adopted a modified version of the tender years doctrine commonly referred to as the Illinois Rule.[49] In addition to setting the fixed age limit at seven, those states declared that children between seven and fourteen were presumed incapable of negligence, and those above fourteen presumed fully capable of negligence.[50] This trend has its roots in the common law standard for criminal responsibility of children, and it also has a biblical basis.[51] In Illinois itself, the rule developed in piecemeal fashion, with a 1902 case setting age seven as the age below which a child could not be negligent,[52] and a later case establishing the presumption for children between seven and fourteen.[53] The exact number of states currently following the Illinois rule is unclear.[54]

Despite clear holdings in *Holmes* and *Spillane*, Missouri courts departed from the modern standard in subsequent cases.[55]
Quirk v. Metropolitan Street Railway,[56] decided in 1919, involved a seven-year-old boy who leapt from a moving train after the motorman discovered him on board.[57] The court, though citing the *Holmes* decision, explicitly

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15 (1984).

48. *See, e.g.*, Chicago City Ry. v. Tuohy, 63 N.E. 997, 1003 (Ill. 1902) (quoting Chicago City Ry. v. Wilcox, 27 N.E. 899 (Ill. 1891)). The court said that "up to the age of seven years a child is incapable of such conduct as will constitute contributory negligence." *Id.*

49. *See, e.g.*, *Lester*, 850 S.W.2d at 865-66. *See infra*, note 54 and accompanying text.

50. *See, e.g.*, Maskaliunas v. Chicago & W.I.R.R., 149 N.E. 23, 26 (Ill. 1925).

51. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 180 (5th ed. 1984).

52. *Chicago City*, 63 N.E. at 1003.

53. *Maskaliunas*, 149 N.E. at 26.

54. Prosser and Keeton estimate that approximately twelve states have the fixed limit at age seven, while "a number" follow the presumption of nonnegligence for those between seven and fourteen. KEETON ET AL., *supra* note 51, § 32, at 180. While there may be others, states following the Illinois rule include: Georgia (Atlanta Gas Light Co. v. Brown, 94 S.E.2d 612, 615 (Ga. Ct. App. 1956)); Idaho (Owen v. Burcham, 599 P.2d 1012, 1018 (Idaho 1979)); Illinois (Riley v. Johnson, 424 N.E.2d 842, 846 (Ill. App. Ct. 1981)); North Carolina (Mitchell v. K.W.D.S., Inc., 216 S.E.2d 408, 412 (S.C. Ct. App. 1975)); Ohio (Howland v. Sears, Roebuck & Co., 438 F.2d 725, 729-30 (6th Cir. 1971) (applying Ohio law)); Pennsylvania (Ross v. Vereb, 392 A.2d 1376, 1379 (Pa. 1978)); and West Virginia (Pino v. Szuch, 408 S.E.2d 55, 58-59 (W.Va. 1991)).

55. *See supra* notes 24, 30 and accompanying text.

56. 210 S.W. 103 (Mo. Ct. App. 1919).

57. *Id.* at 104.

stated that "the tender years of the plaintiff excused him from concurring negligence."[58] In *Volz v. City of St. Louis*,[59] the Missouri Supreme Court announced a rule that a six-year-old boy could not be guilty of contributory fault.[60] That case involved young brothers who ventured onto thin ice, despite warnings of the danger, and a failed rescue attempt by the older brother to save his six-year-old sibling.[61] Similarly, the court in *Schmidt v. Allen*[62] announced, without discussion, that no issue of contributory negligence was presented because the child involved was only four.[63] These cases and others[64] left Missouri law in a state of flux, particularly with regard to children seven years of age and younger.

In 1983 Missouri negligence law changed drastically with the adoption of the comparative fault system.[65] Under the new system, a plaintiff partially at fault would not be completely barred from recovery; instead, the damage award would be reduced according to his percentage of fault. Missouri courts did not address how the change affected child negligence until *Lester v. Sayles*.

IV. INSTANT DECISION[66]

The court began its discussion of the comparative negligence of children by noting that this issue necessarily involves the difficulty of balancing two somewhat conflicting concerns: that children not be held to the same standard

58. *Id.* at 105.

59. 32 S.W.2d 72 (Mo. 1930).

60. *Id.* at 74.

61. *Id.* at 73.

62. 303 S.W.2d 652 (Mo. 1957).

63. *Id.* at 658.

64. *See, e.g.*, Price v. Bangert Bros. Road Builders, Inc., 490 S.W.2d 53, 56 (Mo. 1973) (four-year-old could not be contributorily negligent for failing to wear a seat-belt).

65. After considering it at length, the Missouri Supreme Court adopted the Uniform Comparative Fault Act in *Gustafson v. Benda*. The court found the comparative fault method to be "in the best interest of all litigants" and able to "fulfill the needs of our complex modern society." 661 S.W.2d 11, 15 (Mo. 1983).

66. Judge Limbaugh wrote the opinion in *Lester v. Sayles*. Before addressing the allegations of error raised by defendants regarding denial of permission to amend their pleadings and refusal to permit jury instructions on the issue of comparative fault of Latonya Lester, the court recognized a need to resolve the underlying issues of whether Latonya was capable of fault and how the question of her fault was to be determined. 850 S.W.2d at 865.

of conduct as adults, and that adults not be required to assume "all liability created by the avoidable carelessness of children."[67]

The court described both the fixed age and "Illinois rule" approaches to comparative negligence before ultimately announcing its preference for the so-called "modern trend."[68] After briefly mentioning of the early Missouri cases which first established the "modern trend" in the state,[69] the court hinted of its concern that subsequent cases had eroded those earlier holdings and applied a somewhat different standard.[70] The court unequivocally declared that the "modern trend" is the applicable law in Missouri.[71]

The court noted the modern standard commands that a child's comparative fault be a fact issue determined by the jury.[72] That determination is to be based upon the degree of care exercised by children similarly situated—of similar age, judgment, and experience.[73] An exception is made for children who are exceedingly young or for whom evidence of incapability is "so overwhelming that reasonable minds could not differ on the issue . . . ."[74] In such a situation, the court may rule that the child is incapable of fault as a matter of law.[75]

According to the court, the modern trend is "more sound" and more likely to lead to a fair outcome than the fixed age limit or, particularly, the "Illinois Rule."[76] The court acknowledged that establishment of a fixed age might result in a standard that is easy to apply and produces consistent outcomes, but condemned the standard as "arbitrary," and having "little basis in reason."[77] Criticizing the fixed age standard, the court pointed to the possibility that a child one day short of the required birthday could be incapable of fault, while a child one day past the required birthday might be fully capable of comparative negligence.[78] The modern trend, according to the court, "allows for a degree of flexibility . . . so that a child's negligence or fault is determined in relation to the expectations held for other children in same or similar circumstances."[79]

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67. *Id.*
68. *Id.* at 865-67.
69. *Id.* at 866.
70. *Id.* at 867.
71. *Id.*
72. *Id.* at 866.
73. *Id.* at 867.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

V. COMMENT

The Missouri Supreme Court reaffirmed a standard which enjoys widespread support across the United States. The "modern trend," which makes a child's fault an issue of fact based on a standard of care for children, is a logical way to achieve two important goals: avoiding assessment of full liability to a party involved in an accident caused by a careless child and protecting children by refusing to hold them to the same level of care as an adult.[80] However, since Missouri now follows the comparative fault theory of negligence,[81] these goals could be better achieved, as well as protection and consistency enhanced, with two alterations in Missouri's approach to childhood negligence.

Adoption of a child's standard of care acknowledges several important realities: children have the ability to make certain judgments and decisions, have some experience in safety-related issues, and may possess the same or even a higher level of knowledge than adults on some subjects. At the same time, the standard accounts for the fact that children often do not respond consistently to the same situations, lack experience in many areas, may be influenced by a child's concerns or misunderstandings, and at times act with utter disregard for their own well-being. A fixed age system, particularly one that extends a presumption of incapacity up to age fourteen, simply fails to account for all of these variations.

Burger,[82] *Holmes*[83] and other early Missouri cases applied the doctrine of contributory negligence, which was in effect in Missouri until 1983.[84] Under that system, the "modern trend" for evaluating child negligence had definite benefits. Ideally, only a child who truly should have known better would be denied recovery; and an adult defendant would not bear full liability for an accident predominantly the fault of a careless child. However, neither the "modern trend" nor the fixed age method could counteract the unfairness inherent in the contributory negligence system. Under that system, either method could be wholly unfair to children, even children who acted as recklessly as the boy in *Spillane*.[85] Even though a child's foolishness may

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80. *See id.* at 865.

81. *Supra* note 64 and accompanying text.

82. Burger v. Missouri Pac. Ry., 20 S.W. 439 (Mo. 1892). *See supra* note 18 and accompanying text.

83. Holmes v. Missouri Pac. Ry., 88 S.W. 623 (Mo. 1905). *See supra* note 24 and accompanying text.

84. Gustafson v. Benda, 661 S.W.2d 11, 15 (Mo. 1983). *See also supra* note 64 and accompanying text.

85. Spillane v. Missouri Pac. Ry., 37 S.W. 198, 201 (Mo. 1896). *See supra* note 28 and accompanying text.

have caused an accident, it seems cruel to completely deny recovery to a child severely injured if an adult was partly responsible. Adoption of comparative fault at least partially addressed this problem.

The *Lester v. Sayles* decision, though not directly announced as such, is presumably a discourse on how child fault is to be treated now that contributory negligence is no longer the applicable law. The court decided unanimously that the "modern trend" should continue under the comparative fault doctrine.[86] The "modern trend," in combination with the comparative fault method, protects injured children against complete denial of recovery and protects adults against assessment of full fault for an accident caused in part by a child exercising poor judgment. Furthermore, assessing a percentage of fault seems the ideal way to account for the child's lack of cognitive ability and maturity. However, one area remains where the "modern trend" fails, even in combination with the comparative fault system. It denies adequate protection to one important group—the exceedingly young.

Two alterations in Missouri's law pertaining to child negligence would result in the most effective balance of protecting very young children and protecting adults who accidentally injure them from full liability. The first is to draw a fixed age limit. The second is to abandon the notion that parental negligence can in no way be imputed to the child.

Courts have recognized that children below age five lack the capacity to make judgments and decisions with any consistency and should not be expected to do so. We often see this in the finding of *non sui juris*, which declares the child incapable of fault as a matter of law.[87] Missouri's "modern trend" allows for this finding, with most of the state's *non sui juris* cases involving children under the age of five.[88] In fact there are apparently few, if any, Missouri cases in which a child of four or younger was adjudged comparatively or contributorily negligent.[89] However, while no one would accuse state judges of being arbitrary in their application of the rule, the probability exists that *non sui juris* findings would vary from judge to judge, raising the possibility that a five-year-old would be protected in one county and assessed fault in another.

Although the *non sui juris* finding offers limited protection to youngsters, the fixed age limit, with its consistency in application, is a more appropriate protection. In choosing the fixed age approach, the Ohio Supreme Court noted, "the conclusive presumption approach . . . provides a clear and simple

86. *Lester*, 850 S.W.2d at 867.

87. *See supra* note 27 and accompanying text.

88. Price v. Bangert Bros. Road Builders., Inc., 490 S.W.2d 53, 56 (Mo. 1973); Schmidt v. Allen, 303 S.W.2d 652, 658 (Mo. 1957); Volz v. City of St. Louis, 32 S.W.2d 72, 74 (Mo. 1930).

89. Gray, *supra* note 25, at 612.

rule which we believe will reach just and accurate results while also achieving a desirable judicial economy."[90] Even Prosser, cited by the court in *Lester* as an advocate of the "modern trend,"[91] acknowledged the incapacity of the young when he stated, "As the age decreases, there are fewer possibilities of negligence, until finally, at some indeterminate point, there are none at all." In his opinion that age would be "somewhere in the neighborhood of four years of age."[92] If courts are willing to acknowledge this incapacity in the exceedingly young, the next logical step is to simply draw a line below which no child can be found at fault.

A logical argument against line drawing is it might result in an exceedingly bright child of early years being unjustifiably relieved of fault. However, a bright-line rule merely recognizes that children below a certain age, regardless of their level of intelligence, lack the maturity to make good judgments. In fact, refusing to apply a fixed age penalizes those exceedingly bright children by forcing upon them an expectation that maturity must accompany their knowledge. For society to demand such responsibility from its children is unfair and unwise. A fixed age is the best way to assure needed protection to children below a certain age and, through uniform application, to demonstrate that the protections of the system will be available to all youngsters.

The Missouri Supreme Court criticized the fixed age standard as "arbitrary" and voiced concern that one day's difference in age could be the determining factor in capacity for fault.[93] This was a valid concern under a system of contributory negligence, as a situation could have arisen in which a child one day short of the designated birthday was protected by the fixed rule, while a child one day past that birthday was assessed fault. Under the comparative fault system, the result is not altogether as harsh as the court posits, and the mere fact that the situation could occur does not obviate the need for line drawing. After all, the likely outcome under comparative fault is that while the younger child is still incapable of negligence, the child just beyond the line will be assessed only a small percentage of fault, if any, due to his young age. Some would argue that this is the precise reason why no age need be fixed. Conversely, this author submits that the comparative fault system would operate most effectively if combined with an age limit that protects very young children and provide a much needed starting point for the jury.

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90. Holbrock v. Hamilton Distrib., Inc., 228 N.E.2d 628, 630 (Ohio 1967).

91. *Lester*, 850 S.W.2d at 866.

92. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32 at 159 (3d ed. 1964).

93. *Lester*, 850 S.W.2d at 867.

One significant benefit of a fixed age limit involves the role of the trier of fact. This idea was emphasized in a West Virginia case where the court, in discussing the child's standard of care, said simply, "We find the . . . standard too vague to assist a jury."[94] While it may not be unreasonable to ask a jury to assess the negligence of a twelve-year-old based on a child's standard of care, it is quite a different task to require the same analysis with respect to a three-year-old. With older children there may be recognizable levels of expectation regarding certain tasks or decisions, but the same is not true for the exceedingly young.

The *Holmes* court recognized that the "main question" involved in child negligence cases is whether the child is "of sufficient maturity to be held accountable for his imprudent act . . . ."[95] This author submits that children who are extremely young do not possess the maturity to be held accountable for any act of negligence. More important than whether the child possesses certain knowledge is the reality that toddlers are not mature enough to consistently apply that knowledge in every situation. Since the behavior of very young children is inherently unpredictable, how can we expect a jury to predict what a "similarly situated" young child would do? In other words, there is no ascertainable standard of care for the exceedingly young, and to ask a jury to create such a standard is demanding too much. A fixed age limit would benefit this class of very young children and ease the burden on the jury.

Setting a fixed age limit merely recognizes the point in time when courts can confidently begin evaluating capacity. Society engages in such line drawing in many areas, including drinking, age of consent, capacity to contract, and juvenile court jurisdiction. In the negligence context, the line provides the jury with a starting point at which society begins to expect some degree of responsibility, and at which evaluations of negligence can begin to occur. Children slightly past the age limit are likely to receive more protection under this system than under the "modern trend" because jurors are almost certain to recognize the child's close proximity to the age designation and limit their consideration accordingly.

Perhaps the most persuasive argument against the fixed age limit is the possibility that an innocent adult defendant will have to provide full compensation to the injured child. But the fixed age system need not work a hardship on parties sued for negligence in accidents involving children, providing another necessary change evolves in Missouri case law.

In most accidents involving adults and very young children, another party could appropriately be assessed with fault—the child's parent or guardian. Though parents arguably cannot constantly supervise their older children and

94. Pino v. Szuch, 408 S.E.2d 55, 58 (W.Va. 1991).

95. *Holmes*, 88 S.W. at 624. *See supra* note 24 and accompanying text.

typically give them more freedom to act for themselves as they mature, children under five should not, and generally are not, free to go about their business. Thus, when a very young child is injured, frequently a lack of supervision issue exists.

Several cases have acknowledged the role of parental fault, including *Lester v. Sayles*,[96] and have even reduced the parent's recovery by the parents percentage of fault.[97] However, when the child is the plaintiff, courts refuse to consider parental fault because of the Missouri rule that the parents fault cannot be imputed to the child.[98] That rule, appropriate under the old contributory negligence system, should be abandoned under the modern comparative fault system.

Under the contributory negligence system, imputing the parent's fault to the child produced the grossly unfair result of completely denying recovery to the child. However, the situation is somewhat different under the comparative fault system. Due to the percentage fault values assigned to the responsible parties, a possibility exists that a child might be found 50% responsible in his own cause of action, and the parent 80% responsible in his cause of action for the child's injuries. That adds up to 130% of fault between the parent and the child, and a defendant who is unfairly forced to compensate both parties. However, Missouri courts have set the stage to correct this anomaly.

Under the contributory negligence system, Missouri courts held that a parent whose own negligence was a contributing cause could not sue for the wrongful death of a child.[99] However, if both parents were to join in a claim for wrongful death, the negligence of one of them would not bar the claim.[100] The Missouri Court of Appeals recently applied this concept in the context of comparative fault. The court in *Teeter v. Missouri Highway & Transportation Commission* announced that parents can still join in a claim despite the negligence of one parent.[101] However, once judgment is rendered, the negligent parent's share is to be reduced by that parent's percentage of fault.[102]

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96. *Lester*, 850 S.W.2d at 862.

97. *Id. See also* Wilson v. Lockwood, 711 S.W.2d 545, 555 (Mo. Ct. App. 1986) (allowing a ten percent reduction in damages due to the parent's comparative negligence).

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

99. State *ex rel.* St. Louis-San Francisco Ry. v. Pinnell, 605 S.W.2d 537, 538 (Mo. Ct. App. 1980).

100. Reynolds v. Thompson, 215 S.W.2d 452, 454-55 (Mo. 1948).

101. No. 18771, 1994 WL 80441 at *3 (Mo. Ct. App. March 15, 1994) (Slip Opinion).

102. *Id.*

Following the teachings of *Teeter*, the logical procedure in a case involving child negligence is to merge the claims of the parent and the young child. This allows for a more accurate percentage fault distribution. Furthermore, in those cases where the child is too young to be assessed any fault, it places blame on the appropriately responsible person—the parent. Once a judgment is rendered, the parent's share of the recovery can be reduced by the parent's percentage of fault, and the child's share of the recovery can be reduced by the amount of the child's fault, if any.

VI. CONCLUSION

Missouri's approach to the issue of a child's comparative negligence is a sound and reasonable one. It offers protection to both the adults charged with negligence and the children whose careless acts are involved. However, a significant flaw in the Missouri rule is the lack of complete protection for those children who are too young and immature to be held accountable for their actions. An alteration in the Missouri rule, fixing an age of four or five as the line below which no child could be comparatively negligent, would provide the consistent protection not offered by the *non sui juris* finding. This change, combined with the consideration of parents' fault in a child's negligence action, assures a more logical result without a corresponding detrimental effect on those charged with negligent acts against children.

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