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THE STANDARD OF CARE FOR CHILDREN REVISITED

Oscar S. Gray*†

One of the least controversial features of American tort doctrine is the allowance made for the immaturity of a child charged with contributory (or comparative) negligence.¹ Yet a few basic questions surprisingly have survived the attention which has been devoted to this familiar area of negligence law.

The first is a statistical curiosity. It is well known that a number of states have specified a minimum age below which a child is conclusively presumed to be incapable of negligence. The leading authorities, however, are not clear as to how many states have done so. Similar confusion exists about the cutoff ages which have been picked by such states.

According to Harper and James, for instance, "[t]he great majority of states have established three as the age below which they will not allow consideration of contributory negligence."² This statement is correct if it is understood to mean that virtually all courts would consider a two-year-old incapable of negligence. It would be erroneous, however, to infer that a three-year-old would be considered capable of negligence in most states. A review of the precedents in the fifty states and the District of Columbia³ suggests different conclusions.

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1. Most of what follows is equally applicable to child defendants. There is, however, less agreement that child plaintiffs and defendants should enjoy the same allowance for their immaturity than there is concerning the allowance for child plaintiffs. Considerable support exists for the view that defendants should be held to stricter standards than plaintiffs. See, e.g., 2 F. Harper & F. James, The Law of Torts §§ 16.2, 8 (1956); Shulman, The Standard of Care Required of Children, 37 Yale L.J. 618, 619 (1928). Cf. James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549, 554-56 (1948) (advocating an adult standard for defendants in insured activities). Most commentators and courts have hesitated to accept such a distinction. See, e.g., W. Prosser, Handbook of the Law of Torts 156-57 (4th ed. 1971); Restatement (Second) of Torts §§ 283A, 464 (1965). Yet its influence is reflected in the mainstream of modern doctrine. See, e.g., Restatement (Second) of Torts § 464, Comment f (1965) ("Although the rules . . . are essentially the same [for child plaintiffs and defendants], the application of the standard to particular facts may lead to different conclusions as to whether the same conduct constitutes negligence or contributory negligence."). The special rules, now widely accepted, for applying adult standards in the care of "adult" activities find their principal justification in the position of Professor James that the standard of care should not be relaxed for insured defendants, typically motorists. From his point of view, however, it is perverse to apply the "adult" standard to children, victims of the negligence of others. See 2 F. Harper & F. James, supra, § 16.8, at nn.11 & 12 (Supp. 1968).
3. See Appendix infra.
Prosper thought the "great majority of the courts have rejected any . . . fixed and arbitrary rules of delimitation," such as a cutoff at the age of seven, but that, where minimum age limits have been set, the seventh birthday is the age most commonly chosen. As the summary below and the résumé in the Appendix show, he was correct that the seventh birthday has been specified in more jurisdictions than any other cutoff date. He was also correct in concluding that this cutoff age at seven is distinctly a minority position; it is the law in only a dozen or so states. But it would be incorrect to infer that most states do not specify a conclusive presumption against the capacity for negligence of the very young; at least thirty-two do.

A state-by-state analysis shows that a majority of states treat three-year-olds as incapable of contributory negligence. As to five-year-olds, the states which have ruled on the point are more evenly divided, but here also most which have ruled would exclude consideration of a plaintiff's negligence. Beginning with six-year-olds

4. W. Prosser, supra note 1, at 155-56.
5. See text accompanying notes 8-15 infra. See also Appendix infra.
6. Alabama, Colorado, Illinois, Kentucky, Michigan, Montana, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, and Wisconsin; also possibly some or all of the following: Arkansas, Iowa, Louisiana, and Missouri. Alaska has a rebuttable presumption against the capacity for negligence of children under seven. See Appendix infra.
10. At least 20 states treat five-year-olds as incapable of contributory negligence: Alabama, Colorado, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, Washington, and Wisconsin. In another four there are inconclusive indications to the same effect: Arkansas, Kansas, Louisiana, and Montana. On the other hand, 19 jurisdictions have held that a five-year-old can be contributorily negligent: California, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, and West Virginia. In at least two other states, Alaska and Maine, there are similar indications. See generally Appendix infra.
there is more authority permitting consideration of contributory negligence than prohibiting it. A few states, however, have adopted formulas based on rules of the criminal law for determining the ages at which children could be guilty of criminal intent. In these states, children under seven are conclusively presumed to be incapable of contributory negligence. As to those between seven and fourteen, there is a rebuttable presumption in their favor that they have been careful or that they are incapable of care; children over fourteen are treated like adults, or are rebuttably presumed capable of care. Such fixed rules based on multiples of seven are in general disrepute for purposes of determining civil liability, except for the small number of jurisdictions in which they obtain, whatever validity they may be thought to have in the criminal law.

11. In at least 26 jurisdictions the negligence of a six-year-old plaintiff may be considered: Alaska, Arizona, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and West Virginia; also, probably but less definitely, Maine. In 15 states it is reasonably clear that six-year-olds may not be considered contributorily negligent: Alabama, Colorado, Illinois, Iowa, Kentucky, Michigan, Mississippi, Montana, Nebraska, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, and Wisconsin. In at least another three, Kansas, Louisiana, and Montana, there are also indications that six-year-olds are deemed incapable of contributory negligence. See generally Appendix infra.


13. The conduct of children between ages seven and fourteen is judged by a subjective standard in these jurisdictions. See text accompanying notes 16-23 infra.

14. See, e.g., 2 E. HARPER & F. JAMES, supra note 2, § 16.8, at 926; W. PROSSER, supra note 1, at 155-56; RESTATEMENT (SECOND) OF TORTS § 283A, Comment b (1965).

15. It is beyond the scope of this paper to attempt to relate the findings of modern developmental psychology to the views which have been expressed by courts concerning the capabilities of children at various stages of maturity. Those who regard moral culpability as decisively important in the imposition and limitation of tort liability, which I do not, may be interested in examples from the vast scientific literature on the subject. See generally J. FLAVELL, THE DEVELOPMENTAL PSYCHOLOGY OF JEAN PIAGET (1963); J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1948); P. RICHMOND, AN INTRODUCTION TO PIAGET (1971). It is interesting to note that developmental psychologists appear to recognize fundamental changes in the nature of a child's thinking, some of which normally occur at about the age of seven, and others at about fourteen, which might be considered relevant to issues of moral responsibility for negligence and crime. But a definitive correspondence between these developmental and legal concepts is not easy to establish and is by no means undertaken here.
If a child is old enough to be considered capable of contributory negligence, the standard of care applicable to him is generally thought to be well-established. Typically it is said that the child is to be held "to the exercise of the degree of care which ordinary children of his age, intelligence, and experience ordinarily exercise under similar circumstances,"16 or to some similar-sounding test,17 except perhaps in the conduct of "adult" activities.18 But the precise meaning of this standard is not easy to glean from the opinions. There are two principal reasons for the existence of a greater degree of obscurity than is generally recognized.

The first has to do with the catalog of factors which are to be considered, for example, "age, experience, and mental capacity;" "age and intelligence;" "age, intelligence, and discretion;" "age, intelligence, and capacity;" "age and maturity;" "years and experience;" "age" alone; "age, judgment, and experience;" "age" plus "maturity and capacity;" "age, capacity, intelligence, training, and experience;" "age, intelligence, experience, and training;" "age, experience, knowledge, and discretion;" "age, knowledge, judgment, and experience;" or "age, experience, intelligence, and educational level."19 These formulas are treated by the courts as substantially interchangeable. There is very little suggestion that any of these groups of words means anything different from the meaning of any other group. This should seem remarkable to lawyers, or to anyone who thinks that words have meaning. Yet it appears that the courts use these phrases more as an atmospheric spray to denote a shared general idea than in a definitional sense.

The complexities of that general idea also are reflected in the second type of variation which runs through the formulations of the standard of care, further obscuring its precise meaning. This variation concerns the relationship between the individual factors specified above20 and an objective requirement for the exercise of prudence, for example, whether the standard is expressed in terms of the conduct of an "ordinary" child of a certain age, etc., or of an "ordinarily prudent" or "reasonably prudent child" of that age, etc. Because of both types of variations, it would be difficult for a close reader to infer from appellate opinions and approved jury instructions whether the young actor is held to the standard of the ordinary conduct of children of the actor's age, etc.; or the ordinary con-

16. 2 F. HARPER & F. JAMES, supra note 2, § 16.8, at 926 n.2. See also Shulman, supra note 1, at 622.
17. See, e.g., W. PROSSER, supra note 1, at 155 ("what it is reasonable to expect of children of like age, intelligence and experience"); RESTATEMENT (SECOND) OF TORTS § 464 (1965) (the standard "of a reasonable person of like age, intelligence, and experience under like circumstances"). Cf. RESTATEMENT (SECOND) OF TORTS § 464, Comment f (1965) (same definition for defendants, although not necessarily same conduct). See also notes 19-28 and accompanying text infra.
18. See, e.g., RESTATEMENT (SECOND) OF TORTS § 283A, Comment c (1965). See also Appendix infra.
19. See generally Appendix infra.
20. See text accompanying note 19 supra.
duct of such of those children who are reasonably prudent; or the conduct of such children when they are prudent.

The formulas recited in most opinions are particularly unclear about the extent to which the child’s personal tendency toward heedlessness or impulsiveness should be viewed as an aspect of his “maturity” or “mental capacity,” as distinguished from imprudence. A well-respected,21 traditional academic view would have it that the child would be judged according to his own intelligence, experience, and mental capacity in terms of ability to perceive or avoid the risk. Given the capacity to perceive and avoid the risk, as determined by this test, the child would be held to exercise the prudence of the standard child having the other qualities, such as “age, intelligence, and experience,” of the actor.23

This, it is submitted, is a good deal easier to formulate than to apply. Indeed, it is questionable whether the distinction between cognitive functions and “prudence” is at all realistic. Behavioral characteristics of children are complex and interrelated; impulsiveness and capacity for control vary among individuals of the same age, intelligence, and general experience.24 The capacity for sound judgment also varies among individual children.25 The child who has been injured by the negligence of another should not suffer from comparison with a hypothetical standard child with respect to prudential capacities which he does not personally possess, for the same reasons that he is not held up to such a comparison with respect to cognitive capacities. Of course, if sufficient information about any given child is available, it is possible in principle to evaluate the child’s conduct in terms of what can reasonably be expected from it, all factors considered. Shulman was certainly right that a pattern of bad behavior by an individual does not itself establish the standard by which the child’s conduct is to be

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21. See, e.g., 2 F. HARPER & F. JAMES, supra note 2, § 16.8, at 926 n.3.
22. Shulman, supra note 1, at 625.
23. See authorities cited notes 21 & 22 supra.
24. See, e.g., M. RUTTER, J. TIZARD & K. WHITMORE, EDUCATION, HEALTH AND DEVELOPMENT: PSYCHOLOGICAL AND MEDICAL STUDY OF CHILDHOOD DEVELOPMENT (1970). This is a detailed report on surveys of the behavior, intellectual and educational retardation, psychiatric disorders, and physical handicaps of all the nine- to twelve-year-old children living on the Isle of Wight in 1964 and 1965. It concludes, inter alia, that “in a population of children which is somewhat above the average in intelligence and in its standard of living, one child in six has a chronic handicap of moderate or severe intensity.” Id. at 6. Deviant behavior was found to be associated with a variety of identifiable factors other than those contained in the standard judicial formulas which purport to define the standard of care for children, e.g., certain specific family characteristics, or the existence of physical or psychiatric disorders.
25. The Restatement (Second) of Torts is misguided in rejecting allowance for variability in the capacity of children for judgment, as an aspect of “intelligence,” on the spurious contention that “judgment . . . is an exercise of capacity rather than capacity itself.” See RESTATEMENT (SECOND) OF TORTS § 283A, Comment b (1965) ("once . . . account [of intelligence] is taken, the child is still required to exercise the judgment of a reasonable person of that intelligence"). It is surely a common experience among lawyers that intelligence, in terms of school brightness, is one thing, and the capacity for sound judgment quite another.
judged.26 But this is not to say that the child's personal capacity or incapacity for prudent conduct is to be ignored. The conduct of other children of similar age, experience, and intelligence may furnish a guide to the particular child's capacity. But, it is suggested, the conduct of others is not the proper standard. It is relevant only as evidence of the probable capacity of the child in question. Similarly relevant to the question of the child's own capacity may be information about the individual other than the child's "age, intelligence, and experience," which may well be based in part on information concerning the child's past conduct. Ultimately it is this child's capacity, however it may have been limited, which is the standard by which the child should be judged, not the conduct or capacity of others.

For those who feel the need for some mixture of objective standards along with the subjective, there is indeed in all of this an objective benchmark, but it is not the conduct of other children. It is the conduct of the reasonable adult. This is the norm in negligence. Allowance is made for the incapacity, if any, of a child to meet this norm because of immaturity. But there is no need, in making this allowance, for a bifurcated examination of capacities for purposes of distinguishing between cognitive and prudential functions, the former to be evaluated in accordance with the child's actual ability, and the latter, supposedly, by reference to a hypothetical standard child who shares some but not necessarily all of the actor's characteristics.

Notwithstanding the acceptance by scholars of the conventional academic view, I would suggest that such a bifurcated examination is not what goes on in litigation. It may well be that courts have lived comfortably with their disparate formulas precisely because judges and juries have on the whole understood each other along the lines proposed in the foregoing discussion. The lack of concern about the differences in these formulas can perhaps be understood in this light: that, whatever the literal terms of the formula, the courts have been trying in a more general sense to determine what is fair to expect from a particular child, taking into consideration any recognizable incapacity, without much fuss as to its classification.

They have naturally looked to their experience with other apparently similar children as a principal guide. In the ordinary case this is likely to be as sound a guide as any. But the extraordinary case may arise. For instance, expert testimony may be proffered to establish that a clinically hyperactive child is constitutionally more impulsive than other children of the same age, intelligence, and experience. The admissibility of such testimony should not turn on whether the applicable formula includes words other than "age," "intelligence," and "experience," such as "matur-

26. Shulman, supra note 1, at 622-23.
ity," "discretion," or "capacity." It should not turn on whether the child's condition is to be classified as a "physical disability" rather than something else for purposes of distinguishing between those personal characteristics which may be considered as among the circumstances in which a standard "reasonable" actor functions, and those which may not be so considered.

Such distinctions bespeak unnecessary complications in a test that can, should be, and usually is viewed in simpler terms. Any information relevant to the child's own capacity either to perceive dangers or to avoid them should be admissible. The common sense and general experience of the trier of fact will determine the weight to be given the testimony, but the trier's judgment should not be fettered by an excessively refined formulation of the child's "standard of care."

27. The Connecticut court is clearer than most that in allowing for a child's individual capacity it will consider the child's "discretion to heed and his power of self-control." Marfyak v. New England Transp. Co., 120 Conn. 46, 51, 179 A. 9, 11 (1935); Lederer v. Connecticut Co., 95 Conn. 520, 526, 111 A. 785, 787 (1920).

28. Compare Restatement (Second) of Torts § 283C (1965) with Restatement (Second) of Torts §§ 283B, Comment a and 283A, Comment b (1965) ("physical" infirmities and illness are ordinarily considered among the circumstances; "mental" deficiency ordinarily is not; although an exception is stated as to children, for whom it is said that mental deficiency is taken into account, this seems intended to refer to characteristics like "retardation," as an aspect of "intelligence," and not to an incapacity "to exercise the judgment of a reasonable person of that intelligence").
Résumé, by jurisdiction, of typical decisions

**Alabama**

Jones v. Strickland, 201 Ala. 138, 77 So. 562 (1917) (conclusive presumption that child under seven is incapable of contributory negligence); King v. South, 352 So. 2d 1346, 1347 (Ala. 1977) (child between seven and fourteen—or perhaps seven and thirteen inclusive—presumed incapable of contributory negligence; presumption may be overcome by showing that child possessed “discretion, intelligence, and sensitivity to danger” of ordinary 14-year-old; otherwise, evidence that child under 14 is “normal” or “average” or “bright, smart, and industrious” is insufficient to overcome presumption). It is not clear whether a 14-year-old is presumed not to have the normal capacity of a 14-year-old, or whether the rebuttable presumption applies only to those under 14. The adult standard applies to “adult” activities. See Gunnels v. Dethrage, 366 So. 2d 1104 (Ala. 1979) (child defendant).

**Alaska**

Patterson v. Cushman, 394 P.2d 657 (Alaska 1964) (child less than seven years old rebuttably presumed incapable of contributory negligence; six-year-old who knew danger of automobiles, and had been warned by parents to watch out for cars and not to play in streets, capable as a matter of law of contributory negligence, subject to jury determination whether he was in fact contributorily negligent, in terms of conduct of “ordinary” or “ordinarily prudent” child “of like age, intelligence, and experience”).

**Arizona**


**Arkansas**


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*Editor’s Note: Professor Gray’s Appendix reviews the law of the individual states regarding the liability exposure of children and the standard of care to which they are held. Within each state designation, Professor Gray first discusses the controlling cutoff ages beyond which a child cannot be held contributorily negligent or negligent. He then turns to the state’s formulation of a standard of care for children, citing case authority which has dealt with the issue of a child’s negligence and enunciated standards governing the conduct of children. Finally, Professor Gray considers the standard of care to be applied to children when they are performing “adult” activities. The progression of analysis within each state may vary occasionally from the schema set forth above, due in large part to a lack of case authority regarding one of the elements of Professor Gray’s analysis.*
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CHILD'S STANDARD OF CARE

Gray: Standard of Care for Children Revisited


California

A child under age five is conclusively presumed to be incapable of contributory negligence. Casas v. Maulhardt Buick, Inc., 258 Cal. App. 2d 692, 66 Cal. Rptr. 44 (1968); Christian v. Goodwin, 188 Cal. App. 2d 650, 10 Cal. Rptr. 507 (1961). See also Cal. Book Approved Jury Instr. No. 3.61 (6th ed. 1977). There is no such conclusive presumption in the case of a child of five years of age or older. Courtell v. McEachen, 51 Cal. 2d 448, 334 P.2d 870 (1959); Cal. Book Approved Jury Instr. No. 3.60 (6th ed. 1977). See also Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970). Contributory negligence of children five years old or older “is determined by a bifurcated test which requires a finding that the particular child had the capacity to act negligently and then tests the child’s conduct by the standards of children of like age and maturity.” Brown v. Connolly, 62 Cal. 2d 591, 395, 398 P.2d 596, 598, 42 Cal. Rptr. 324, 326 (1965). The subjective test has been said to be applied to those under 21, and was applied to an 18-year-old boy in Lehmann v. Long Beach Unified School Dist., 55 Cal. 2d 544, 348 P.2d 887, 2 Cal. Rptr. 279 (1960), and to a 19-year-old girl (at a time when the legal age of majority for girls was 18) in Geyer v. Sterling Laundry Co., 171 Cal. 761, 765, 154 P. 1057, 1058 (1916) (“care and prudence due from one of her years and experience”). The adult standard applies to activities “normally undertaken only by adults.” Prichard v. Veterans Cab Co., 63 Cal. 2d 727, 408 P.2d 360, 47 Cal. Rptr. 904 (1965) (plaintiff motorcyclist).

Colorado

Child under seven conclusively presumed incapable of contributory negligence or of assumption of the risk. Benallo v. Bare, 162 Colo. 22, 427 P.2d 323 (1967); Bennett v. Gitzen, 29 Colo. App. 271, 484 P.2d 8 11 (1971). An older child “prima facie not sui juris is only required to exercise a degree of care as may reasonably be expected of children of that age.” Benallo v. Bare, 162 Colo. at 25, 427 P.2d at 324-25. The violation of a statute is not negligence per se for a child under 10. Instead, it is a jury question “whether . . . having in mind his age, intelligence, and experience,” the child had “sufficient mental and physical capacity to be capable of common law contributory negligence.” Calkins v. Albi, 163 Colo. 370, 382, 431 P.2d 17, 22-23 (1967) (but court also seems to approve an instruction referring to “such care for his safety as may be fairly and reasonably expected from a reasonably prudent child of like age, intelligence, and experience”). Minors operating motor vehicles are apparently held to the adult standard. See Doran v. Jensen, 504 P.2d 354 (Colo. Ct. App. 1972).

Connecticut

It is not clear whether there is any age below which there is always a conclusive presumption of inability to be careful, but there may be such a presumption at age two or three. A conclusive presumption was denied for five-year-old children in Marfyak v. New England Transp. Co., 120 Conn. 46, 179 A. 9 (1935). See also Altieri v. D'Onofrio, 21 Conn. Supp. 1, 140 A.2d 887 (Super. Ct. 1958). A plaintiff of four years, four months was required to prove due care when he so pleaded (before enactment of a statute shifting the burden to plead and prove contributory negligence to the defendant) in Colligan v. Reilly, 129 Conn. 26, 26 A.2d 231 (1942). This case may turn, however, on Connecticut's rule that a party who pleads a fact must prove it, whether or not he was required to plead it. Cf. Press v. Connecticut Co., 95 Conn. 45, 47, 109 A. 295, 295 (1920) (jury verdict for plaintiff of four years, nineteen days upheld, the court noting that
"[t]he tender age of the injured girl . . . rendered it impossible for the trial court to say that the verdict was unwarranted for the reason that freedom of contributory negligence on the part of the child was not shown"). The capacity of the child to be charged with contributory negligence is said to turn on whether he is "of sufficient age, intelligence, and experience to perceive a risk and to realize its unreasonable character." Lutteman v. Martin, 20 Conn. Supp. 371, 374-75, 135 A.2d 600, 602-03 (C.P. 1957) (nine-year-old capable of exercising judgment).

In Milledge v. Standard Mattress Co., 27 Conn. Supp. 358, 288 A.2d 602 (Super. Ct. 1968), plaintiff's demurrer to a contributory negligence defense (on the ground that a plaintiff of three years, ten months could not as a matter of law be held negligent) was overruled on the ground that plaintiff's age was not conceded in the pleadings, and therefore its legal effect could not be tested by demurrer. In the course of its discussion, the court stated that the trial judge "will have to determine whether to charge on the issue, as a matter of law, or leave it to the jury as an issue of fact." Id. at 359, 288 A.2d at 603. The court in Milledge assumed that there is no fixed cutoff age in Connecticut above the age of two, citing Simon v. Nelson, 118 Conn. 154, 170 A. 796 (1934), for the proposition that there is no duty of care on a two-year-old. Query whether Simon so held as a matter of Connecticut law or only of Massachusetts law, as Massachusetts law was held to apply to the accident. See also Daley v. Norwich & W.R.R., 26 Conn. 590 (1858), where the contributory negligence of a child under age three was submitted to the jury under the judge's charge that "considering the very tender age of the plaintiff, I think the presumptions are strongly in favor of regarding her as free from fault or blame." Id. at 592. The verdict for plaintiff was upheld, with the court noting that "the plaintiff, as the jury have found, (and it might almost have been assumed as matter of law) was guilty of no neglect or culpability whatever." Id. at 597 (emphasis added).


Delaware

Rebuttable presumption that child under seven is incapable of negligence. Audet v. Convery, 187 A.2d 412 (Del. Super. Ct. 1963) (child of six years, eleven months), cited with approval in Beggs v. Wilson, 272 A.2d 713, 714 (Del. 1970) (child of four and one-half). It is assumed that at some age under seven the presumption could become conclusive, but that age has not yet been specified. 272 A.2d at 714. The presumption is "not easily rebutted," and the fact that plaintiff is a typical child merely "buttresses" the presumption, which may be overcome only by showing that the child possessed "perceptions, abilities, development, and judgment far greater than most children her age." Id. at 715. Generally, it has been said, it is the "duty of children to exercise that degree of care which children of the same age are accustomed to exercise under like circumstances," but it is at the same time said that the "maturity and capacity" of the child and "ability to understand and appreciate the danger" are to be taken into consideration. Pokosky v. McDermott, 53 Del. 253, 258, 167 A.2d 742, 744-45 (1961).

There is old authority for the proposition that an infant of 14 or over is rebuttably presumed to have "sufficient discretion and understanding to be responsible for his wrongs, to be sensible of danger and have power to avoid it." Travers v. Hartman, 28 Del. (5 Boyce) 302, 306, 92 A. 855, 857 (1914). The test in Travers was stated by reference to "that degree of care and caution which a
reasonably prudent person of his age, general development, and maturity would exercise under like circumstances," with, again, consideration of the child's "maturity and capacity . . ., his ability to understand and appreciate the danger." *Id.* at 307, 92 A. at 897. The adult standard applies to minor motor vehicle drivers. Wagner v. Shanks, 56 Del. 555, 194 A.2d 701 (1963) (minor defendant).

**District of Columbia**

There is no fixed cutoff age, and the contributory negligence of children at least as young as five-year-olds has been considered a jury question. See, e.g., *Washington & G.R.R. v. Gladmon*, 82 U.S. (15 Wall.) 401, 408 (1872) (seven-year-old) ("Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than one of seven; and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."); *D.C. Transit Sys. v. Bates*, 262 F.2d 697 (D.C. Cir. 1958) (six-year-old); *Capital Transit Co. v. Gamble*, 160 F.2d 283 (D.C. Cir. 1947) (dictum); *Ballard v. Polly*, 387 F. Supp. 895 (D.D.C. 1975); *National City Dev. Co. v. McFerran*, 55 A.2d 342 (D.C. 1947). The determination of whether reasonable care was exercised by a minor should be made by the jury "on the basis of the minor's age, education, training, and experience," even where the violation of a statute would be negligence per se for an adult, at least where the minor engages in an activity "where no license is required by the state." *Herrell v. Pimsler*, 307 F. Supp. 1166, 1171 (D.D.C. 1969).

**Florida**

Standard for children is described in *Fla. Standard Jury Instr. No. 4.4* (1976) as "that degree of care which a reasonably careful child of the same age, mental capacity, intelligence, training, and experience would use under like circumstances." In *Larnel Builders, Inc. v. Martin*, 110 So. 2d 649, 650 (Fla. 1959), the standard was described as that "to be expected from one of like age, intelligence, and experience." See also *McGregor v. Marini*, 256 So. 2d 542, 543 (Fla. Dist. Ct. App. 1972) (that "which could reasonably be expected from a child of like age, intelligence, experience, and training"). There is a conclusive presumption of incapacity to be negligent below the age of six. *Swindell v. Hellkamp*, 242 So. 2d 708 (Fla. 1970); *Harris v. Moriconi*, 311 So. 2d 353 (Fla. Dist. Ct. App. 1976). An adult standard applies to operators of motor vehicles if the operator is old enough to be licensed. *Medina v. McAllister*, 202 So. 2d 755 (Fla. 1967) (plaintiff motor scooter operator).

**Georgia**

"Due care in a child of tender years" is statutorily defined as "such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation under investigation." *Ga. Code Ann.* § 105-204 (1968). The statute specifies no cutoff age. Nevertheless a number of cases have held that a child of four or younger is conclusively presumed incapable of contributory negligence. See, e.g., *Harris v. Hardman*, 153 Ga. App. 941, 212 S.E.2d 883 (1975). There was a line of authority applying such a conclusive presumption to children of six (or even seven), which has now been overruled by the Georgia Supreme Court on the ground of inconsistency with the "plain language" of the statute, presumably because of the lack of a statutory cutoff age. *Ashbaugh v. Trotter*, 227 Ga. 46, 47, 226 S.E.2d 786, 787 (1976). The same, of course, could be said of presumptions at younger ages. "Tender years" seems to refer broadly to children under 14. See, e.g., *Anderson v. Happ*, 136 Ga. App. 839, 222 S.E.2d 607 (1975).

An older minor is treated as "a young person," whose mental and physical immaturity may be taken into consideration, but who is "presumptively chargeable with diligence for his own safety," and is chargeable with "such diligence as under the circumstances might fairly be expected of the class and condition to which he belongs." *Central R.R. & Banking Co. v. Phillips*, 91 Ga. 526, 528, 17 S.E. 952, 953 (1893) (plaintiff acting "under the pressure of intimidation"). See also *Bourn v. Herring*, 225 Ga. 67, 166 S.E.2d 89 (1969); *Witke v. Horne's Enter

Hawaii

The Hawaii Supreme Court has apparently endorsed an early decision, Ellis v. Mutual Tel. Co., 29 Hawaii 604 (1927), which held that a five-year-old is incapable of contributory negligence, but has refused to extend it to a six-year-old. Grace v. Kumalaa, 47 Hawaii 281, 386 P.2d 872 (1963). As a general rule, a minor "is only required to use that degree of care appropriate to her age, experience, and mental capacity." Viveiros v. State, 54 Hawaii 611, 613, 513 P.2d 487, 488 (1973) (15-year-old). See also Sherry v. Asing, 56 Hawaii 135, 551 P.2d 648 (1975) (mentally deficient 17-year-old).

Idaho

Submission to jury of contributory negligence of five-year-old was upheld in Mundy v. Johnson, 84 Idaho 438, 373 P.2d 755 (1962). Cf. Asumendi v. Ferguson, 57 Idaho 450, 463, 65 P.2d 713, 718-19 (1937) (instruction that child "of two or three years" is incapable of negligence or contributory negligence upheld, although child's negligence was not at issue); Anderson v. Great Northern Ry., 15 Idaho 513, 527, 99 P. 91, 95 (1908) (jury instruction that four-year-old "presumed to be incapable of undertaking ordinarily the dangers and perils incident to walking upon the railroad track").


Illinois

There is a conclusive presumption of incapacity below seven. Turner v. Seyfert, 44 Ill. App. 2d 281, 194 N.E.2d 529 (1963) (six-year-old). See generally Maskalunas v. Chicago & W. Ind. R.R., 318 Ill. 142, 149 N.E. 23 (1925). There is a rebuttable presumption (which must be left to the jury to determine, taking into consideration a child's age, capacity, intelligence, and experience) that a child between seven and fourteen is incapable of contributory negligence. Sramek v. Logan, 36 Ill. App. 3d 471, 344 N.E.2d 47 (1976); Strasma v. Lemke, 111 Ill. App. 2d 377, 250 N.E.2d 305 (1969). The presumption adheres unless the child is engaged in adult activity, such as operating a motor vehicle. See Perricone v. DiBartolo, 141 Ill. App. 3d 514, 302 N.E.2d 637 (1973) (13-year-old operating minibike on sidewalk). The jury is not, however, to be told of this rebuttable presumption "once evidence opposing the presumption comes into the case," in which event "the presumption ceases to operate, and the issue is determined on the basis of the evidence . . . as if no presumption had ever existed." Diederich v. Walters, 65 Ill. 2d 95, 101-02, 357 N.E.2d 1128, 1130-31 (1976). A 13-year-old can be contributorily negligent as a matter of law. Hardy v. Smith, 61 Ill. App. 3d 441, 378 N.E.2d 604 (1978). A child of 14 or over is treated like an adult in the sense that a directed verdict may be entered against him, but he is not held to the same standard of care as an adult in that his "intelligence and experience" are to be considered. Dickson v. Baltimore & Ohio Chi. Terminal R.R., 42 Ill. 2d 103, 245 N.E.2d 762 (1969). This latter rule does not apply if the child is engaged in an adult activity. See Fishel v. Givens, 47 Ill. App. 3d 512, 352 N.E.2d 97 (1977) (14-year-old minibiker).

Child "of immature years . . . cannot be held guilty of contributory negligence." Paschka v. Carsten, 231 Iowa 1185, 1193, 3 N.W.2d 542, 546 (1942) (six-year-old). Otherwise, the standard is described as that of "reasonable behavior in children of similar age, intelligence, and experience," and the violation of a statute will not be negligence per se for a child not engaged in an adult activity, even if it would be negligence per se for an adult. Rosenau v. City of Estherville, 199 N.W.2d 125, 129 (Iowa 1972). See also Ruby v. Easton, 207 N.W.2d 10 (Iowa 1973).

It is accepted in general that children are not held to "the same strict accountability . . . as persons of full age," and that "a child may be presumed conclusively incapable of contributory negligence." Gerchberg v. Loney, 223 Kan. 446, 449, 576 P.2d 593, 596-97 (1978). The case law, however, is thin on doctrine. There is recent dictum stating that "children nine years of age and younger are generally presumed conclusively incapable of contributory negligence" in Talley v. J. & L. Oil Co., 224 Kan. 214, 219, 579 P.2d 706, 710 (1978). There is also an inconclusive, subtle hint that children below nine may be considered incapable of contributory negligence in Weber v. Wilson, 187 Kan. 214, 229, 356 P.2d 659, 664 (1960) ("courts cannot say that children between nine and thirteen years of age are . . . relieved from . . . the doctrine of contributory negligence"). Kansas authority is scant for the application of the doctrine to younger children, except for a 19th century case in which no argument was made, apparently, in favor of a conclusive presumption. Atchison, T. & S.F. Ry. v. Potter, 60 Kan. 808, 810, 58 P. 471, 471 (1899) (jury question for infant "less than seven"). Cf. Garcia v. Slater-Breitag Yeamans Motor Co., 128 Kan. 365, 370, 278 P. 23, 26 (1929) (dictum concerning six-year-old plaintiff "being too young to have . . . contributory negligence attributable to herself").

At least two cases discuss seven-year-old plaintiffs, but not clearly: Williams v. Davis, 188 Kan. 385, 390, 362 P.2d 641, 645 (1961) (supreme court states that district court "recognized that . . . plaintiff was . . . seven," and "correctly concluded" that plaintiff "was not guilty of contributory negligence," but is not quite explicit as to whether plaintiff wins on this issue solely because of his age); Bellamy v. Kansas City Rys., 108 Kan. 708, 712, 196 P. 1104, 1106 (1921) (jury verdict for plaintiffs upheld on wrongful death claim concerning seven-year-old decedent against contention that decedent should have been ruled negligent as a
matter of law; court was not clear whether decision against plaintiff's negligence was merely permissible or whether it was mandatory, i.e., whether there was a rebuttable or conclusive presumption against negligence, when it said: "[I]nfan
ts of such tender years are not presumed to have discretion, and are not, as a matter of law, held amenable to the disabling effects of contributory negligence.'"). Cf. Farran v. Peterson, 185 Kan. 154, 160, 342 P.2d 180, 185 (1959) ("[Appellees ... seem to admit that the seven year old girl could not be charged with contributory negligence, which we agree would be exceedingly difficult to do ... ."]). In Kansas Pac. Ky. v. Whipple, 39 Kan. 581, 18 P. 750 (1888), plaintiff's contributory negligence was treated as an issue in the case of a plaintiff variously described as "in his ninth year" (in the opinion), and as "a little boy nine years of age" (in the "Syllabus by the Court") (issue of questionable importance as plaintiff alleged that defendant "recklessly and wantonly" injured him, in which event the court held that plaintiff's contributory negligence would not affect his claim). For nine-year-olds (at least) and older, the standard is stated as "the degree of care and caution which a ... [child] of like age, capacity, discretion, knowledge, and experience is ordinarily expected to exercise under like circumstances." Riley v. Holcomb, 187 Kan. 711, 718, 359 P.2d 849, 855 (1961). Adult standard applies to minor operators of motor vehicles, whether plaintiffs or defendants. Williams v. Esaw, 214 Kan. 658, 522 P.2d 950 (1974).

**Kentucky**

A child below the age of seven is treated as incapable of contributory negligence. Johnson v. Brey, 438 S.W.2d 535 (Ky. 1969). A child past his seventh birthday is not. Goff v. Horsley, 439 S.W.2d 937 (Ky. 1969). Former rule of rebuttable presumption against capacity for contributory negligence in the case of children from seven through fourteen has been abandoned in favor of standard of degree of care "reasonably to be expected from the ordinary child ... ." or "usually exercised by ordinarily prudent children of the same age, intelligence, and experience under like or similar circumstances." Williamson v. Garland, 402 S.W.2d 80, 82 (Ky. 1966). See Meyer v. Smith, 428 S.W.2d 612 (Ky. 1968). Cf. Croghan v. Hart County Bd. of Educ., 549 S.W.2d 306, 308 (Ky. Ct. App. 1977) ("age, experience, maturity, and intelligence"). Minor plaintiffs can be contributorily negligent as a matter of law. See, e.g., Shelanie v. National Fireworks Ass'n, 487 S.W.2d 921 (Ky. 1972) (14-year-old who attempted to burn what he correctly suspected was an aerial fireworks bomb); Allgeier v. Grimes, 449 S.W.2d 911 (Ky. 1970) (15-year-old passenger who knew driver had been drinking, and how much, consented to drag race).

**Louisiana**

The general standard for minor plaintiffs is "the self-care expected of a child of his age, intelligence, and experience under the particular circumstances." Dufrène v. Dixie Auto Ins. Co., 373 So. 2d 162, 165 n.4 (La. 1979). See also Brantley v. Brown, 277 So. 2d 141 (La. 1973). It is also said that "a child's caution must be judged by his maturity and capacity to evaluate circumstances in each particular case." Plauche v. Consolidated Cos., 225 La. 691, 706, 105 So. 2d 269, 274 (1958). Another formulation reported is whether the child "[c]onsidering his age, background, and inherent intelligence, indulged in the gross disregard of his own safety in the face of known, understood, and perceived danger." Simmons v. Beauiregard Parish School Bd., 315 So. 2d 883, 888 (La. Ct. App. 1975). See also Capo v. Louisiana Farm Bureau Mut. Ins. Co., 347 So. 2d 1189 (La. Ct. App. 1977). As to the cutoff age, it appears that "[n]o Louisiana court has ever found a seven-year-old child to be contributorily negligent." White v. Nicosia, 351 So. 2d 234, 236 (La. Ct. App. 1977). The White court rejected an "absolute rule setting minimum ... ages for being capable of negligence," id. at 237, but ruled that a plaintiff 17 days short of his eighth birthday was as a matter of law not contributorily negligent on the facts of the case. Cf. Jackson v. Jones, 224 La. 403, 415, 69 So. 2d 729, 733 (1953) (child of seven "is to be considered as being incapable of contributory negligence in the absence of a showing of extraordinary conditions," such as "marked intelligence").

Maine

The general standard for children is described as “what might be expected of ordinarily careful children of like age, capacity, and experience, as they would tend, naturally and necessarily, to act under similar circumstances.” Orr v. First Nat’l Stores, Inc., 280 A.2d 785, 796 (Me. 1971). There is a minimum cutoff age, at least for those under two. See Morgan v. Aroostook Valley R.R., 115 Me. 171, 98 A. 628 (1916). The precise cutoff age of two, however, is not clear. Cf. Tenney v. Taylor, 392 A.2d 1092, 1093 (Me. 1978) (award to plaintiff, “nearly six,” reduced under comparative negligence statute); Harrison v. Wells, 151 Me. 75, 116 A.2d 134 (1955) (contributory negligence discussed as a possible issue in the case of a three-year-old plaintiff).

Maryland

A child five or over may be guilty of contributory negligence. Taylor v. Armiger, 277 Md. 638, 358 A.2d 883 (1976). The standard of care is based on that of ordinarily prudent children of the same age and intelligence. Id. at 651-52, 358 A.2d at 889. Children of four were held to be incapable of contributory negligence because of their age in Farley v. Yerman, 231 Md. 444, 190 A.2d 773 (1963), and Miller v. Graff, 196 Md. 609, 78 A.2d 220 (1951).

Massachusetts

The standard is “the care of an ordinary child of his age,” the burden as to contributory (now comparative) negligence is on the defendant, and the negligence of four-year-old plaintiffs is regularly treated as a jury question. See Dennehy v. Jordan Marsh Co., 321 Mass. 78, 81, 71 N.E.2d 758, 760 (1947), and cases cited there. Presumably somewhere below age four “there is an age where the court can say as a matter of law that a child cannot exercise any care under any circumstances.” Sullivan v. Boston Elevated Ry., 192 Mass. 37, 39, 78 N.E. 382, 383 (1906). Where that age may be, however, is not clear. Apparently cases are tried on the assumption that three-year-olds are incapable of contributory negligence, at least in certain contexts, but appellate courts have not been definite that such children are incapable in all contexts. See, e.g., Minsk v. Pitaro, 284 Mass. 109, 187 N.E. 224 (1933). Cf. Sughrue v. Bay State St. Ry., 230 Mass. 363, 365, 119 N.E. 660, 661 (1918) (two- and one-half-year-old plaintiff “admittedly being too young to be capable of caring for herself”).

Michigan

Minnesota

There is no automatic cutoff age, at least down through ages of six and five. Toetscher v. Ihnot, 312 Minn. 59, 250 N.W.2d 204 (1977). Standard is stated as "that care which a reasonable child of the same age, intelligence, training, and experience . . . would have used under like circumstances." Id. at 94, 250 N.W.2d at 207. Adult standard applies to defendants, but not to plaintiffs, operating automobiles, airplanes, and powerboats. See Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961).

Mississippi

Mississippi cases presume that plaintiffs as old as eight are incapable of negligence. Some earlier cases speak in terms of "prima facie" presumptions which are expressly rebuttable by a showing of exceptional capacity or precocity. See, e.g., Hines v. Moore, 124 Miss. 500, 87 So. 1 (1921) (eight-year-old); Westbrook v. Mobile & Ohio R.R., 66 Miss. 560, 567, 6 So. 321, 322 (1889) (plaintiff "four or five years of age"). Other cases, mostly more recent, seem to treat the incapacity of children of these ages as unqualified. See, e.g., Agregaard v. Duncan, 252 Miss. 454, 173 So. 2d 416 (1965) (dictum) (six- and one-half-year-old plaintiff, but defendant held not negligent); Morris v. Boleware, 228 Miss. 139, 87 So. 2d 246 (1956) (eight-year-old plaintiff, but defendant found not negligent); City of Pass Christian v. Fernandez, 100 Miss. 76, 56 So. 329 (1911) (four-year-old). This unqualified treatment has apparently been accepted in the Mississippi federal courts. See, e.g., Gault v. Tableda, 400 F. Supp. 136 (S.D. Miss. 1975) (same rule applied as in Kopera), aff'd, 526 F.2d 1405 (5th Cir. 1976); Kopera v. Moschella, 400 F. Supp. 131, 135 (S.D. Miss. 1975) (six-year-old; "minor under the age of seven years is conclusively presumed incapable of possessing the necessary discretion to . . . [be charged] with negligence"), aff'd, 526 F.2d 1405 (5th Cir. 1976); Tidwell v. Ray, 208 F. Supp. 952 (N.D. Miss. 1962) (seven-year-old cannot be charged with contributory negligence). An older child below 14 is presumed incapable of contributory negligence, but the presumption can be overcome upon consideration of his or her age, intelligence, knowledge, and experience. If the presumption is overcome, the child is held to "only such care as it is capable of exercising, taking into consideration its age, experience, knowledge, and intelligence." Potera v. City of Brookhaven, 95 Miss. 774, 783, 49 So. 617, 618 (1909) (child "10 or 12 years old"). Cf. Cochran v. Peeler, 209 Miss. 394, 47 So. 2d 806 (1950) (no presumption against capacity for 14-year-old).

Missouri

It seems fairly well established that a child of four will be deemed incapable of contributory negligence. See, e.g., Schmidt v. Allen, 303 S.W.2d 652 (Mo. 1957). Cf. Price v. Bangert Bros. Road Builders, 490 S.W.2d 53, 56 (Mo. 1973) (rule slightly qualified: "in the circumstances here," i.e., failure to wear seat belt). There is dictum that it is "the general rule" that a child of six cannot be contributorily negligent in Volz v. City of St. Louis, 326 Mo. 362, 32 S.W.2d 72 (1930). The ordinary test for children who are capable of contributory negligence is the standard of care "ordinarily possessed by one of the age, intelligence, discretion, knowledge, and experience of the particular plaintiff under the same or similar circumstances." "Knowledge and experience" apparently including a requirement that the child had the capacity to appreciate the danger and did in fact appreciate it. Carter v. Boy's Club, 552 S.W.2d 327, 332 (Mo. App., K.C. 1977). See also Bridges v. Arkansas-Missouri Power Co., 410 S.W.2d 106, 111 (Mo. App., Spr. 1966) ("the care and caution . . . ordinarily exercised by others of the same age, experience, and capacity under the same or similar circumstances"); applied to plaintiff sixteen years, eleven months old at time of accident, in ninth grade for second year at time of accident, for third year at time of trial).
Montana

A child under seven is probably conclusively presumed to be incapable of contributory negligence. See Graham v. Rolandson, 150 Mont. 270, 435 P.2d 263 (1967) (dictum; case involved eight- and one-half-year-old); Lesage v. Largey Lumber Co., 99 Mont. 372, 43 P.2d 896 (1935) (dictum; case involved eight-year-old); Burns v. Emingher, 81 Mont. 79, 261 P. 613 (1927) (six-year-old). As to a child seven or older there is no presumption either way. Instead, there is a dual inquiry: whether the child had the capacity to be contributorily negligent, in terms of an ability to appreciate the danger of the act alleged to be negligent, and if so, then whether the child actually exercised "the degree of care that can ordinarily be expected of children of the same age, taking into consideration their experience, intelligence, and capabilities." Lesage v. Largey Lumber Co., 99 Mont. at 383, 43 P.2d at 900. The child's violation of a statute is not negligence per se if he lacked the capacity for compliance. Ranard v. O'Neil, 166 Mont. 177, 531 P.2d 1000 (1975).

Nebraska


Nevada

No fixed cutoff age; initial question for trial court is whether particular child has the capacity expected of children of the same age, experience, and intelligence, and then a jury question arises as to whether child exercised that capacity, "unless reasonable minds could come to but one conclusion from the evidence." Quillian v. Mathews, 86 Nev. 200, 203, 467 P.2d 111, 113 (1970) (jury question concerning contributory negligence of six-year-old plaintiff). Cf. Clark v. Circus-Circus, Inc., 525 P.2d 1328, 1331 (9th Cir. 1975) (wherein a federal district judge in Nevada who submitted to jury the issue of the contributory negligence of a four- and one-half-year-old was reversed on the ground that he "should have taken judicial notice that a 41/2 year old child running to his mother could not be held responsible for his acts when he ran into the chain"). One judge, concurring "with misgivings," states that this result, which he considers "just and proper," is not foreclosed by any reported Nevada decision, but that "I suspect . . . if and when the Nevada court gets around to deciding the precise question . . . it will decide it differently." Id. at 1331-33 (Hill, J., concurring). The standard is "that degree of care which ordinarily would be exercised by children of the same age, intelligence, and experience," and the violation of a statute by a child is not negligence per se. Quillian v. Mathews, 86 Nev. 200, 203, 467 P.2d 111, 113 (1970). Certain behavior, however, can be considered negligent as a matter of law. See, e.g., Hamilton v. Southern Nev. Power Co., 70 Nev. 472, 273 P.2d 760 (1954) (youth, nearly seventeen, stood on metal roof and raised pipe in direction of electric wire, the presence of which he well knew).

New Hampshire

A six-year-old is capable of contributory negligence. Hamel v. Crosietier, 109 N.H. 505, 256 A.2d 145 (1969). A five-year-old is not. Dorr v. Atlantic Shore Line Ry., 76 N.H. 160, 80 A. 536 (1911). Cf. Bellotte v. Zayre Corp., 116 N.H. 52, 352 A.2d 723 (1976) (dictum). The standard of care for a child has been variously expressed as "the rule of reasonable conduct in view of all the circumstances, but allowance must be made for his state of mental development, lack of experience, and age," and as "the care which an average prudent . . . [child of the same age] would have used under the same or similar circumstances." Corbeil v. Rouslin,
112 N.H. 295, 296, 293 A.2d 760, 761 (1970). This standard applies only to activities "appropriate" for children (said to include being a pedestrian, or riding a bicycle or horse), but not to "adult" activities (such as riding a motorcycle). See Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1966). Furthermore, even for activities appropriate to children, "[o]nce a youth's intelligence, experience, and judgment mature to the point where his capacity to perceive, appreciate, and avoid situations involving an unreasonable risk of harm to himself or others approximates the capacity of an adult, the youth will be held to the adult standard of care." Dorais v. Paquin, 113 N.H. 187, 190, 304 A.2d 369, 372 (1973) (17-year-old pedestrian who walked on wrong side of slippery highway at night wearing dark clothing and without a light held to adult standard).

New Jersey

No fixed, conclusive cutoff age for capacity to be negligent, although a particular child may be too young as a matter of law depending on its own development. See Dillman v. Mitchell, 13 N.J. 412, 99 A.2d 809 (1953); Hellstern v. Smelovitz, 17 N.J. Super. 366, 86 A.2d 265 (App. Div. 1952). If a child is less than seven, however, there is a rebuttable presumption of incapacity, and the issue of his contributory negligence may not be submitted to jury without evidence of training and experience from which capacity to understand and avoid the danger could be inferred. Bush v. New Jersey & N.Y. Transit Co., 30 N.J. 345, 153 A.2d 28 (1959). This evidence is, of course, likely to be relatively inaccessible to the opposing party. For children who are old enough the standard is that of "a reasonable person of like age, intelligence, and experience under like circumstances," is the same for plaintiffs and defendants, and applies until the age of 18; this standard does not apply to "adult" activities (e.g., operating motor vehicle or motor boat, or hunting). Goss v. Allen, 70 N.J. 442, 447-48, 360 A.2d 388, 391 (1976) (skiing ordinarily not "adult" activity; defendant, novice 17-year-old skier, entitled to charge on standard applicable to minors, which permitted consideration of his inexperience).

New Mexico

The standard is "that degree of care which a reasonably careful child of the age, mental capacity, and experience" of the actor "would use under [similar] circumstances." LaBarge v. Stewart, 84 N.M. 222, 225, 501 P.2d 666, 669 (Ct. App. 1972). This standard applies until "the stage at which physical and mental maturity is reached." The age at which such maturity is reached varies among individuals, is certainly not thirteen, and is not necessarily after child has passed the age of fourteen. Thompson v. Anderman, 59 N.M. 400, 414, 285 P.2d 507, 516 (1955). A two-year-old cannot be contributorily negligent. Sanchez v. J. Barron Rice, Inc., 77 N.M. 717, 427 P.2d 240 (1967) (citing an earlier case involving a five-year-old plaintiff, Frei v. Brownlee, 56 N.M. 677, 248 P.2d 671 (1952)). The Frei court held that there was no issue of contributory negligence in that case; the use of Frei by the Sanchez court suggests that the reason was the youth of the plaintiff, but this is not clear from Frei itself. A nine-year-old was held to be contributorily negligent as a matter of law in Mellas v. Lowdermilk, 58 N.M. 369, 271 P.2d 399 (1954). The adult standard applies to motorists, but not to the use of firearms. See Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965) (plaintiff motor scooter operator); LaBarge v. Stewart, 84 N.M. 222, 501 P.2d 666 (Ct. App. 1972) (minor defendant playing Russian roulette with revolver).

New York


**North Carolina**

A child under seven is conclusively presumed incapable of contributory negligence. Mitchell v. K.W.D.S., Inc., 26 N.C. App. 409, 216 S.E.2d 408 (1975). There is a rebuttable presumption that a child between seven and fourteen is incapable of contributory negligence, the burden of which is on the defendant. The applicable standard is whether the plaintiff acted "as [a] child of its age, capacity, discretion, knowledge, and experience would ordinarily have acted under similar circumstances." Caudle v. Seaboard Air Line Ry., 202 N.C. 404, 407, 163 S.E. 122, 124 (1932). See also Hoots v. Beeson, 272 N.C. 644, 159 S.E.2d 16 (1968). An "infant" of fourteen or over is presumed to possess the capacity of an adult to protect himself, and the adult standard of care applies unless the presumption is rebutted "by clear proof" of the absence of the "ability, capacity, or intelligence of the ordinary 14-year-old." Welch v. Jenkins, 271 N.C. 158, 149, 155 S.E.2d 763, 768 (1967). The 14-year-old may be held contributorily negligent as a matter of law. See Van Brooks v. Boucher, 22 N.C. App. 676, 207 S.E.2d 282 (1974).

**North Dakota**

It has been held that a three- and one-half-year-old cannot be capable of contributory negligence. Ruehl v. Lidgerwood Rural Tel. Co., 25 N.D. 6, 135 N.W. 793 (1912). At least some six-year-olds and seven-year-olds in general, however, may be capable of contributory negligence. See Schweitzer v. Anderson, 85 N.W.2d 416 (N.D. 1957) (plaintiff nine days less than seven); Enget v. Neff, 77 N.D. 355, 43 N.W.2d 644 (1950). The standard of conduct is "that which an ordinarily prudent person of the age, intelligence, experience, and capacity of such child [would or] would not do under . . . similar circumstances." Kirchoffner v. Quam, 264 N.W.2d 203, 205 (N.D. 1978) (avoiding decision whether different standard applies for "adult" activities). Cf. Sheets v. Pendergast, 106 N.W.2d 1, 4 (N.D. 1960) ("that degree of care which ordinarily is exercised by minors of like age, mental capacity, and experience"; applied to 17-year-old "not far from eighteen").

**Ohio**

A child under seven is conclusively presumed to be incapable of contributory negligence. Hunter v. City of Cleveland, 46 Ohio St. 2d 91, 346 N.E.2d 303 (1976); Holbrook v. Hamilton Distrib., Inc., 11 Ohio St. 2d 185, 228 N.E.2d 628 (1967). A defendant under seven is apparently also considered incapable of negligence. See DeLuca v. Bowden, 42 Ohio St. 2d 392, 329 N.E.2d 109 (1975). A child of seven or older may be contributorily negligent. See Smith v. Flesher, 12 Ohio St. 2d 107, 233 N.E.2d 137 (1967). If the child is between seven and fourteen, he may be entitled to a charge that there is a rebuttable presumption against his capacity to commit negligence. See Howland v. Sears, Roebuck & Co., 488 F.2d 725 (6th Cir. 1971) (reviewing conflicting Ohio cases). The traditional standard is "such care as is reasonably to be expected from children of his own age and capacity." Lake Erie & W.R.R. v. Mackey, 53 Ohio St. 370, 383, 41 N.E. 980, 981 (1895). The adult standard applies to defendants operating motor vehicles. Carano v. Cardina, 115 Ohio App. 30, 184 N.E.2d 430 (1961).
Oklahoma

The submission to a jury of whether a four- and one-half-year-old pedestrian may be negligent per se in failing to yield the right of way was upheld in Boyett v. Airline Lumber Co., 277 P.2d 676, 681 (Okla. 1954) (i.e., whether he had "the mental capacity to appreciate his duty to observe the city ordinances, such as a child of his years, capacity, experience, knowledge, and judgment may . . . fairly be presumed to possess"). There is no change in presumptions at age 14. See, e.g., Texas-O. & E. Ry. v. McCarroll, 80 Okla. 282, 195 P. 139 (1920) (jury question whether 15-year-old plaintiff had capacity to understand danger and the ability to take care of himself). The adult standard of care applies to operators of motor vehicles. See Tipton v. Mullinix, 508 P.2d 1072 (Okla. 1973) (plaintiff motorbike driver); Baxter v. Fugett, 425 P.2d 462 (Okla. 1967) (defendant automobile driver).

Oregon

The contributory negligence of at least some five-year-olds should be submitted to a jury according to Taylor v. Bergeron, 252 Or. 247, 449 P.2d 147 (1969) (plaintiff five years, nine months, ten days old), which declined to specify any firm cutoff age, and explicitly refused to re-examine an earlier line of authority which had been understood to create a conclusive presumption against contributory negligence for all those under five. See, e.g., Oviatt v. Camarra, 210 Or. 445, 311 P.2d 746 (1957). A child may be barred by contributory negligence as a matter of law, particularly if he admits that he knew his course of conduct was dangerous, as was the case in Nikkila v. Niemi, 248 Or. 594, 433 P.2d 825 (1967) (15-year-old passenger knew that his driver would participate in a race, and that this would be dangerous). See also Grant v. Lake Oswego School Dist., 15 Or. App. 325, 515 P.2d 947 (1975) (dictum). The normal standard for a child is that "to be expected from a child of like age, intelligence and experience," at least for contributory negligence; this standard does not apply to "adult" activities, such as driving a car. Nielsen v. Brown, 232 Or. 426, 445, 374 P.2d 896, 905 (1962) (15-year-old defendant). This standard seems to be understood as equivalent to "the same care that a reasonably prudent person of the same age, intelligence and experience would use under the same or similar circumstances." Or. UNIFORM JURY INSTR. No. 12.04 (1976), approved in Thomas v. Inman, 282 Or. 279, 284, 578 P.2d 399, 402 (1978) (applying same standard to minor defendants and plaintiffs, and refusing to extend the "adult" activity exception to the handling of guns).

Pennsylvania

Apparently the position in recent years has been that a child under seven is conclusively presumed to be incapable of contributory negligence. See Geiger v. Schneyer, 398 Pa. 69, 157 A.2d 56 (1959). Children between the ages of seven and fourteen are rebuttably presumed incapable of contributory negligence. See Ross v. Vereb, 481 Pa. 446, 392 A.2d 1376 (1978); Masters v. Alexander, 424 Pa. 65, 225 A.2d 905 (1967); Patterson v. Palley Mfg. Co., 360 Pa. 259, 267, 61 A.2d 861, 865 (1948) (presumption may reach a point close to age 14 "when it becomes almost a negligible quantity," but "care and caution required of a child is measured by his capacity to see and appreciate danger, and he is held only to such measure of discretion as is usual in those of his age and experience"). Older cases seem to apply a conclusive presumption against the capacity of seven-year-olds and even eight-year-olds. See, e.g., Horen v. Davis, 274 Pa. 244, 118 A. 22 (1922) (dictum); Thomas v. Southern Pa. Traction Co., 270 Pa. 146, 112 A. 918 (1921); Counizzarri v. Philadelphia & R. Ry., 248 Pa. 474, 94 A. 134 (1915).

Rhode Island

The contributory negligence of a three- and one-half-year-old was submitted to a jury, but without an instruction on negligence per se for violation of a statute requiring pedestrians to yield the right of way in Fontaine v. Devonis, 114 R.I. 541, 336 A.2d 847 (1975). The majority stated that the standard is "only that degree of care which children of the same age, education, and experience would be expected to exercise in similar circumstances. . . . [A] prudent child of 3½ years old cannot be expected to be cognizant of the provisions of [R.I. GEN. LAWS]
§ 31-18-5 [1968] and to control and conform his conduct accordingly.". Id. at 547, 336 A.2d at 852. The court went on to say that the "consequences which follow violation of statutes in the case of adults" may apply to "infants," if "evidence demonstrates that a minor, in view of . . . [his age, experience, and intelligence] could be held to the standard of reasonable care applicable to adults." Id. at 547, 336 A.2d at 852-53. The test of "the standard of behavior expected of a child of defendant's age and experience" has been applied to a defendant. Nelson v. Petrone, 118 R.I. 1018, 371 A.2d 585 (1977) (11-year-old girl who kicked 8-year-old in the testicles in course of argument with plaintiff's older brother).

South Carolina
A child under seven is conclusively presumed incapable of contributory negligence. Barton v. Griffith, 253 F. Supp. 774 (D.S.C. 1966) (dictum ostensibly applying South Carolina law); Sexton v. Noll Constr. Co., 108 S.C. 516, 95 S.E. 129 (1918). Between seven and fourteen a child is rebuttably presumed incapable of contributory negligence. See Mahaffey v. Ahd, 264 S.C. 241, 214 S.E.2d 119 (1975); Rowe v. Frick, 250 S.C. 499, 159 S.E.2d 47 (1968). The test is "not whether the child acted as an ordinarily prudent child of its age would have acted, but whether it acted as a child of its age, and of its capacity, discretion, knowledge, and experience would ordinarily have acted under the same or similar circumstances." Hollman v. Atlantic Coast Line R.R., 201 S.C. 308, 313, 22 S.E.2d 892, 894 (1942) (citing Chitwood v. Chitwood, 159 S.C. 109, 111, 156 S.E. 179, 180 (1930)) (plaintiff "about fifteen"); court distinguishes capacity for care, which is presumed beginning at age 14, from standard of care, emphasizing that the standard for children applies to minors over 14).

South Dakota
Any fixed cutoff age has been rejected, and the contributory negligence of five-year-olds has been submitted to juries under instruction that the standard is "such care as an ordinarily prudent child of similar age, maturity, experience, and capacity would ordinarily use under like circumstances." Doyen v. Lamb, 75 S.D. 77, 79, 59 N.W.2d 550, 551 (1953). Accord, Stone v. Hinsvark, 74 S.D. 625, 57 N.W.2d 669 (1953). The standard is that "conduct which it is reasonable to expect from children of like age, intelligence, and experience." Chernotik v. Schrank, 76 S.D. 374, 379, 79 N.W.2d 4, 7 (1956) (applied to 16-year-old driver). Violation of a statute will not automatically constitute negligence per se for a minor not engaged in an "adult" activity, even if it would for an adult, "but may be considered in determining whether the minor met the special standard of conduct which would ordinarily be exercised by a minor of like age, intelligence, experience, and capacity under similar circumstances." Alley v. Siepman, 87 S.D. 670, 676, 214 N.W.2d 7, 11 (1974). With such consideration, the trial judge may find the minor negligent or contributorily negligent as a matter of law if he finds the minor's conduct sufficiently unreasonable. Id.

Tennessee
There is a rebuttable presumption against the capacity for contributory negligence of children under 14. The rebuttable presumption applies to children of six, or perhaps less. See Wells v. McNutt, 136 Tenn. 274, 189 S.W. 365 (1916). The presumption "might not" be rebuttable in the case of a child of "three or four." Id. at 278, 189 S.W. at 366. Cf. Clegborn v. Thomas, 58 Tenn. App. 481, 490, 432 S.W.2d 507, 511 (1968) (three-year-old "much too young to be chargeable with contributory negligence"); Garis v. Eberling, 18 Tenn. App. 1, 20, 71 S.W.2d 215, 227 (1954) (presumption theoretically rebuttable as to five and one-half-year-old, but apparently conclusive instruction upheld where "no facts were developed to overcome the prima facie case"). The rebuttable presumption against capacity is said to continue until the age of 14 when it is replaced by a rebuttable presumption in favor of capacity. Both presumptions can be "nullified by evidence relating to . . . mental development, experience, and other circumstances," which may include "the child's familiarity, or lack of same, with the scene of his injury." Hadley v. Morris, 35 Tenn. App. 534, 542, 249 S.W.2d 295, 299 (1951). See also

Texas

A child under five is considered incapable of negligence. Yarborough v. Berner, 467 S.W.2d 188 (Tex. 1971). Over five and below fourteen the standard of “an ordinarily prudent child” of the “same age, experience, and intelligence” is applied, except for the conduct of “adult” activities. At fourteen and over there is a “prima facie” presumption of adult capacity, and the adult standard applies during “the later years of minority,” unless it is shown that the child “is wanting in discretion.” City of Austin v. Hoffman, 879 S.W.2d 103, 107 (Tex. Civ. App. 1964) (child standard applicable to 13-year-old operator of “small motor scooter”). See also Dallas Ry. & Terminal Co. v. Rogers, 147 Tex. 617, 218 S.W.2d 456 (1949).

Utah

A child under six is not necessarily incapable of contributory negligence. See Mann v. Fairbourn, 12 Utah 2d 342, 266 P.2d 603 (1961) (five- and one-half-year-old). Cf. Herald v. Smith, 56 Utah 304, 190 P. 932 (1920) (child of four years, ten months held incapable, as a matter of law, of appreciating danger of crossing street, but opinion inconclusive whether child that age could be capable of other negligence). The standard for children is “that degree of care which ordinarily would be observed by children of the same age, intelligence, and experience under similar circumstances.” Rivas v. Pacific Fin. Co., 16 Utah 2d 183, 185, 397 P.2d 990, 991 (1964) (plaintiff “just under six”). The defendant has the burden of rebutting a presumption that plaintiffs under 14 are incapable of negligence, a jury question which should not be decided by the court against a plaintiff because the question “hinges on a number of factors such as age, intelligence, experience, and education.” Carr v. Bradshaw Chevrolet Co., 23 Utah 2d 415, 417, 464 P.2d 580, 581 (1970). The adult standard probably applies to operators of motor vehicles. See Stevens v. Salt Lake County, 25 Utah 2d 168, 478 P.2d 496 (1970); Nelson v. Arrowhead Freight Lines, Ltd., 99 Utah 129, 104 P.2d 225 (1940).

Vermont

There is no fixed cutoff age for child plaintiffs. See Mitchell v. Amadon, 128 Vt. 169, 176, 260 A.2d 213, 217 (1969) (jury question as to negligence of five-year-old; standard is the “care reasonably to be expected of children of like age, capacity, education, and experience”). The negligence of a child three years, nine months old was treated as a jury question in an early case. Robinson v. Cone, 22 Vt. 213 (1850) (it was apparently not contended by plaintiff that there should be a conclusive presumption of incapacity; the discussion instead related to the standard of care, rather than the existence of some requirement of care). A child of two years, seven months has, on the other hand, been described as “of such tender years ... as to be incapable of exercising care.” Howe v. Central Vt. Ry., 91 Vt. 485, 493, 101 A. 45, 48 (1917) (but unclear whether statement limited to the particular facts—the child was an automobile passenger in a grade crossing accident—or intended to apply to all children that age in all circumstances).

Virginia

Conclusive presumption of incapability of contributory negligence “under 7 years of age”; rebuttable presumption of incapability “between the ages of 7 and 14”; after a child “reaches the age of [fourteen] he loses the benefit of all presumptions in his favor.” Grant v. Mays, 294 Va. 41, 44, 129 S.E.2d 10, 12 (1963). Presumption of capacity “will stand until overcome by clear
proof of the absence of such discretion as is usual with infants of that age," but standard of care is not that of adults. Instead, standard is "that degree of care which children of the same age, experience, discretion, and knowledge would exercise under the same or similar circumstances." Id. at 45, 129 S.E.2d at 12-13.

Washington


West Virginia

A child 14 or over is rebuttably presumed capable of care, and one under 14 is rebuttably presumed to lack capacity. French v. Sinkford, 132 W. Va. 66, 54 S.E.2d 38 (1948). It is sometimes said that the rebuttable presumption of incapacity applies to children "between the ages of seven and fourteen." Pitzer v. M.D. Tomkies & Sons, 136 W. Va. 268, 274, 67 S.E.2d 437, 442 (1951) (dictum). See Buckley v. Valley Camp Coal Co., 324 F.2d 244 (4th Cir. 1963). In other cases, it has been assumed that a plaintiff under seven might be negligent. See Pierson v. Liming, 113 W. Va. 145, 167 S.E. 151 (1932) (contributory negligence of plaintiff six years, three months old should have been submitted to jury). Cf. Prunty v. Tyler Traction Co., 90 W. Va. 194, 200, 110 S.E. 570, 572 (1922) (on particular facts of "the nature of the danger encountered and to be avoided," a plaintiff of three years, three months, twenty-six days was deemed incapable of care as a matter of law, but "there may be cases in which an infant even of the tender years of the plaintiff might possibly be guilty of contributory negligence if the jury should so find"). The factors to be considered in judging the conduct of a minor plaintiff include the child's age, intelligence, experience, alertness and previous training, the existence (where applicable) of a warning, and the nature of the danger encountered. See Buckley v. Valley Camp Coal Co., 324 F.2d 244 (4th Cir. 1963), and cases cited therein. The "care and caution required of a child is according to its maturity and capacity, wholly [to be measured by] the degree of care which children of the same age, experience, discretion, and knowledge would exercise under the same or similar circumstances." Jordan v. Bero, 210 S.E.2d 618, 626 (W. Va. 1974).

Wisconsin

There is a statutory conclusive presumption that an "infant minor" below the age of seven is incapable of "contributory negligence or any negligence whatsoever." Wis. Stat. Ann. § 891.44 (West 1966). See also Wagner v. American Family Mut. Ins. Co., 65 Wis. 2d 243, 222 N.W.2d 652 (1974). Before the statute was enacted, the Wisconsin Supreme Court had drawn the line for a conclusive presumption at five- and one-half-years of age. See Kohler v. Dumke, 13 Wis. 2d 211, 108 N.W.2d 581 (1961); Shaske v. Hron, 266 Wis. 384, 63 N.W.2d 706 (1954). The degree of care required of a child "depends upon ... age, capacity, discretion, knowledge, and experience." Rossow v. Lathrop, 20 Wis. 2d 656, 663, 123 N.W.2d 525, 525 (1963) (13- and one-half-year-old). See also Hargrove v. Peterson, 65 Wis. 2d 118, 221 N.W.2d 875 (1974).
Wyoming

The standard of care for a child is expressed as "that care that may fairly and reasonably be expected from children of his age." Ramirez v. City of Cheyenne, 34 Wyo. 67, 72, 241 P. 710, 711 (1925) (plaintiff between seven and eight). See also Smith v. United States, 546 F.2d 872 (10th Cir. 1975) (14-year-old). A minor operating a motor vehicle is held to an adult standard. Krahn v. LaMeres, 483 P.2d 522 (Wyo. 1971). No cases have been found discussing the existence of a cutoff age.