Capacity of Minors to Be Chargeable with Negligence and Their Standard of Care

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Comment

Capacity of Minors to be Chargeable with Negligence And Their Standard of Care

The infant is favored by the law not so much on his lack of knowledge as because of indiscretion, imprudence, lack of judgment, and impulsiveness.¹

I. INTRODUCTION

Nebraska law, like that of other American jurisdictions, bestows considerable favoritism upon children. Although a minor, like an adult, may sue² or be sued,³ the minor is the subject of legal favoritism predicated on the disability of infancy which has long been recognized at common law.⁴ This favoritism is obvious in the special treatment accorded youthful criminal offenders;⁵ in contract law, under which the contracts of minors are in some cases voidable;⁶ in the law of intentional tort;⁷ and in the law of negligent tort.⁸

It is the last of these examples of favoritism—the special consideration given minors in the law of negligence—which is the topic of this comment. This special consideration has taken the form of an ushering out from any jury room, when a child's negligence is considered, of the venerable "reasonable man"

2. Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959); NEB. REV. STAT. § 25-307 (Reissue 1975). Actually, minors are favored even in the statutes pertaining to the right to sue. Statutes of limitation generally do not run against a minor until the disability of infancy is removed. Id. § 25-213.
5. See, e.g., NEB. REV. STAT. §§ 43-201, 205 (Reissue 1974) (allowing a county attorney to deal with an offender under 18 years of age in juvenile court); id. § 43-212.01 to .03 (providing special protections for a minor fingerprinted in the investigation of an unlawful act).
7. Connors v. Pantano, 165 Neb. 515, 86 N.W.2d 367 (1957) (child, four years and seven months of age, held incapable of intentional tort).
8. Armer v. Omaha & Council Bluffs St. Ry., 151 Neb. 431, 37 N.W.2d 607 (1949) (whether a minor is capable of negligence is a fact question for jury; adult standard of care not applied to child).
against whom the acts of adult parties are objectively measured.\textsuperscript{9} Instead, minors' acts and omissions are scrutinized by a subjective standard, which may be stated as a pair of fact issues—capacity and standard of care—which in Nebraska have been formulated thus: "Whether or not negligence may be attributed to a minor of the age of the plaintiff [or defendant] is usually a matter for a jury under the circumstances of each case"\textsuperscript{10} and "[t]he plaintiff [or defendant] is required to exercise that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation."\textsuperscript{11} By operation of these factual inquiries, a child's capacity to be chargeable with negligence, as well as the child's standard of care, is, unlike that of an adult, subjective and somewhat nebulous.

Springing from these general statements are several issues: what are the exceptions to the general rule; are there conflicts with other tort doctrines; and are there inconsistencies or gaps in the case law? While cases from other jurisdictions will be cited in discussing these issues, there will be no attempt to detail the law of any state except that of Nebraska. With regard to Nebraska law on minors and negligence, this comment will venture into its historical development, the current status of the law, problem areas, and comments on the problem areas.

II. MINORS AND NEGLIGENCE

The common law grants no tort immunity on account of the minority status of children; they may be liable to others for their negligence\textsuperscript{12} and may be prevented from recovery by their contributory negligence.\textsuperscript{13} It is in fact contributory negligence of minors which is considered in the majority of the cases, but there appears to be no different treatment of a minor defendant's primary negligence than of a minor plaintiff's contributory negligence.\textsuperscript{14}

\textsuperscript{10} Bear v. Auguy, 164 Neb. 756, 768, 83 N.W.2d 559, 567 (1957).
\textsuperscript{11} Gadeken v. Langhorst, 193 Neb. 299, 301-02, 226 N.W.2d 632, 634 (1975).
\textsuperscript{12} Midkiff v. Midkiff, 201 Va. 829, 113 S.E.2d 875 (1960).
\textsuperscript{13} Once capacity for the negligence which contributes to the child's injury is established, the process of measuring a child's acts by the subjective standard of care is the same as the process of measuring an adult's acts by the reasonable man standard. See, e.g., Gadeken v. Langhorst, 193 Neb. 299, 226 N.W.2d 632 (1975).
\textsuperscript{14} W. PROSSER, TORTS § 32 (4th ed. 1971). Prosser noted in passing that it was urged, some 30 years ago, that there should be a distinction between a child plaintiff and a child defendant. The argument was that an adult standard
Notwithstanding the absence of explicit immunity, the position of a minor who is claimed to be negligent is very unlike that of an adult in a similar predicament. Whether a minor is to be deemed negligent in a particular case requires an inquiry quite different from that applied to an adult. As the subsequent discussion indicates, the precise nature of the inquiry for children varies among the jurisdictions.

A. Minors' Capacity to be Chargeable with Negligence

A type of pseudo-immunity for children accused of negligence has been developed by the American courts in the form of judicial declarations that some minors, notably the very young ones, have no "capacity" for negligence; that is, they are legally incapable of negligent acts and omissions. This judicial accommodation to the human experience that "kids will be kids" cannot be said to be predicated on the physical characteristics of childhood because in negligence law generally, including cases involving adults, physical disabilities have already been taken into account in formulating the reasonable man against whom the parties are measured. Rather, the accommodation is in the area of mental deficiency, and represents a substantial departure from the law of negligence as applied to adults. For adults, mental deficiency, short of idiocy, is not a factor considered in the reasonable man formulation. For children, however, varying mental capabilities are considered and some minors are eligible for characterization as devoid of any capacity for negligence.

There appears to be no single statement of law which captures the essence of children's capacity for negligence. In fact,
in many of the cases there is no specific statement on capacity at all; the issue is commonly submerged into the standard of care against which a minor's acts are to be gauged in determining the ultimate issue of negligence. Typical of the combined inquiry into capacity and standard of care is this language:

No arbitrary rule can be established fixing the age at which a child . . . may be declared wholly capable or incapable of understanding and avoiding the dangers to be encountered upon railway tracks. It is a question of capacity in each case. . . . [T]he rule is believed to be recognized in all the courts of the country that a child is not negligent if he exercises the degree of care which, under like circumstances, would reasonably be expected of one of his years and capacity. 18

The aspect of capacity, as distinguished from the application of the standard of care, typically surfaces and is treated in its own right only when a court considers a claim of negligence against a very young child. 19 Where, in such a case, the capacity for negligence is found to exist as a first step of analysis, the next steps are to determine the standard of care by which to judge the minor's acts and to decide whether the minor met that standard. 20

Jurisdictions vary in their approaches for determining capacity of minors for negligence. One approach has been to establish gross age groupings and attach certain presumptions to members of these groups. For example, it has been held that a child under seven years of age is conclusively presumed incapable of negligence, 21 that a child from seven to about fourteen years of age is rebuttably presumed incapable of negligence, 22 and that a minor in the teenage years is presumed capable of negligence. 23 Somewhat similar to this triad of presumptions is a doctrine in which a certain minimum age for capacity to be negligent is fixed. This doctrine, applied by a majority of the courts, is actually an exception to the general rule of infant liability for torts and is available only to children of "tender years." 24 Just how "tender" a child must be to qualify for the status of incapacity to be negligent has varied in the courts'
case-by-case applications of the doctrine; generally the "tender years" are those below the age of seven. Once a child is beyond the "tender years," the inquiry into capacity tends to blend into determining the minor's standard of care. In short, no arbitrary rule of presumption applies once the "tender years" are passed.

Judicial movement away from arbitrary rules on capacity of minors to be negligent has been manifested in holdings that capacity, like standard of care, is an issue of fact, not law:

> The capacity or incapacity of a child is a factual inquiry and the test to be applied is that applicable to any other question of fact. If the trial judge, after a consideration of the age, experience and capacity of the child to understand and avoid the risks and dangers to which it was exposed in the actual circumstances and situation of the case, determines that fair-minded men might honestly differ as to whether the child failed to exercise that degree of care that is usually exercised by persons of similar age, experience and intelligence, the question of the child's contributory negligence should be submitted to the jury. . . .

It is clear, however, that while such an inquiry into capacity is satisfactory for children of most ages, the influence of the cases which created the triad of presumptions is not completely unfelt, at least in regard to very young and very old children. So, where fair-minded men could not differ, capacity may yet be determined by the court, not as a conclusive or rebuttable presumption, but apparently as a matter of law where the minor is "so young and immature as to require the court to judicially know that it could not contribute to its own injury or be responsible for its acts, or so old and mature that the court must know that, though an infant, yet it is responsible."

B. Minor's Standard of Care

Assuming, as the preceding discussion suggests, that capacity for negligence is a viable and separate issue from the standard of care owed by minors, logic urges a three-step analytical framework for determining whether a particular minor was negligent: (1) is a minor of this particular child's age, intelligence and experience capable of negligence; (2) if so, what is the appropriate standard of care; and (3) did this particular child meet this standard? But, few courts have bothered with this

25. Id. (under age five); Thomas v. Tesch, 268 Wis. 338, 67 N.W. 2d 367 (1954), rehearing denied, 268 Wis. 341a, 68 N.W.2d 457 (1955) (almost five-and-a-half).
26. See note 18 and accompanying text supra.
27. W. Prosser, supra note 14, at § 32.
29. Id.
30. See note 20 supra.
approach. For example, in *Mann v. Fairbourn* the Utah Supreme Court merged the first and third steps into a single question of fact. Such an approach, if not perfectly logical, is certainly understandable; when arbitrary rules are no longer used to determine capacity, the subjective inquiry into capacity is practically subsumed in the application of the subjective standard of care. Both the inquiry and the application focus on what society expects in the behavior of youngsters of a certain age, mentality and experience.

However, complete merger of the inquiry into capacity and the application of the standard of care is to invite reversible error, according to at least one court. In *Grant v. Mays*, in contrast to *Mann* in which the Utah court's language subsumed the capacity inquiry into the application of the standard of care, a Virginia trial court used the standard of care to determine capacity. The trial judge granted a plaintiff's jury instruction which read in part:

> [I]f the infant plaintiff exercised such care and caution as might reasonably have been expected from a child of his age, discretion and intelligence under the circumstances of this case, and he was injured in consequence of the negligence of the defendant, *then the defendant is liable, although the infant plaintiff may have contributed to the injury*.  

In finding this instruction reversible error, the Virginia Supreme Court explained:

> This [emphasized] language erroneously took away from the jury the question of contributory negligence of the plaintiff and in effect told them that he was not capable of being contributorily negligent as a matter of law, which is the rule applicable to a child under 7 years of age. [The plaintiff was 14.] The instruction was also in conflict with other instructions . . . and confused the issues of capacity and standard of care.

Short of such misapplication of the standard of care, it is obvious that the central determinant of capacity and the ultimate issue of a minor's negligence is the widely-recognized subjective standard of care. While the language varies among jurisdictions, the thrust of the standard is reflected in this formulation: "By the weight of authority, the standard by which [a child's] conduct is to be measured is that degree of care, which children of the same age, experience, discretion and knowledge would exercise under the same or similar circumstances."

32. See text accompanying note 28 *supra*.
34. Id. at 43, 129 S.E.2d at 12 (emphasis in original).
35. Id. at 45, 129 S.E.2d at 13 (emphasis in original).
36. Id. at 45, 129 S.E.2d at 13. Note the similar formulations in the text accompanying notes 11 and 18 *supra*. Cf. *Restatement (Second) of Torts* § 464(2) (1965) (child "of like age, intelligence, and experience").
Other statements of the standard strike the same theme: "A child is held to that standard of care which could be expected from an ordinary child of the same age, experience, knowledge, and discretion."\(^{37}\) and "that [care] which is usually exercised by persons of the same age, experience and intelligence under like or similar circumstances."\(^{38}\)

Normally, whether a minor has met this subjective standard of care,\(^{39}\) like his capacity for negligence and the standard itself,\(^{40}\) is for the jury to decide. Normally, but not always. On occasion, the subjective test's application has been wrested from the jury and vested in the judge. Findings of contributory negligence of minors as matters of law typically have occurred in older cases in which the child's acts were extremely careless.\(^{41}\) But, as the general child's standard of care indicates, this approach has been severely limited.\(^{42}\)

C. Adult Activities

The tort doctrine under which "negligent" minors have avoided the adult, reasonable man standard of care is not, of course, absolute. Well into the development of the child's special status in negligence law, courts were confronted with demands which conflicted with human sympathy for children and children's inherent failings of prudence.

Some courts have perceived one such conflict in cases in which minors were engaged in adult activities—for example, driving automobiles. Resolution of this conflict by holding children engaged in adult activities to the adult standard is said to

41. Studer v. Southern Pac. Co., 121 Cal. 400, 53 P. 942 (1898) (12-year-old's attempt to pass between railroad cars stalled on the street bordered on recklessness); Colomb v. Portland & Brunswick St. Ry., 100 Me. 418, 61 A. 898 (1905) (10-year-old plaintiff did not meet burden of showing no contributory negligence; her act of crossing track in front of moving car was either unthinking impulse or reckless daring); Johnston v. New Omaha-Thomson-Houston Elec. Light Co., 78 Neb. 24, 110 N.W. 711, aff'd on rehearing, 78 Neb. 27, 113 N.W. 526 (1907) (12-year-old knew he would be injured by touching power line).
42. Johnston v. New Omaha-Houston Elec. Light Co., 78 Neb. 24, 110 N.W. 711, aff'd on rehearing, 78 Neb. 27, 113 N.W. 526 (1907), has been described as a case involving an extreme situation, and its law limited to the facts of that case. Armer v. Omaha & Council Bluffs St. Ry., 151 Neb. 431, 37 N.W.2d 607 (1949); Rule v. Claar Transfer & Storage Co. 102 Neb. 4, 165 N.W. 883 (1917).
be gaining approval among American jurisdictions.\textsuperscript{43} An example of the cases applying this adult-activities exception to the general rule requiring a subjective standard for children was a personal injury suit by a twelve-year-old bicyclist who was struck by a sixteen-year-old motorist.\textsuperscript{44} The Oklahoma Supreme Court reviewed its prior "child's standard of care" cases, noted that each involved a child engaged "in activities commensurate with his age," and stated:

> The [child's standard] instruction complained of permits a minor to engage in adult activities which expose others to hazards, while imposing only a child's standard of care on the minor so engaged. This legal sanction is impractical and contrary to the circumstances of modern life. We hold that a minor, when operating an automobile, must exercise the same standard of care as an adult.\textsuperscript{45}

Operating a motorcycle has similarly been held to be an adult activity which subjects a minor to the objective adult standard when his contributory negligence is considered.\textsuperscript{46}

One rationale for the "adult activities" exception is the idea that children so engaged are no less likely to cause accidents with catastrophic consequences than are adults:

> [I]t would be unfair to the public to permit a minor in the operation of a motor vehicle to observe any other standards of care and conduct than those expected of all others. A person observing children at play... may anticipate conduct that does not reach an adult standard of care or prudence. However, one cannot know whether the operator of an approaching automobile... is a minor or an adult... \textsuperscript{47}

At least two questions are suggested by such language. Is the subjective standard of care limited to minors engaged only in play? If not, how does a child know whether he is indulging in the activities of an adult? It has been said that "activities appropriate" to childhood include walking, running, playing, and bicycling.\textsuperscript{48} But, taking the last of these as the more extreme example, is it logical that a sixteen-year-old is judged by the subjective child's standard when he runs down and injures another with a bicycle and yet is judged by the adult standard when he causes the same damage with a motorcycle? The same question may be asked in regard to a minor's negligence contributing to his own injury. Concern for the catastrophes that may be caused by such adult activities as driving automobiles hints that the true distinction is not between what adults and children normally do, but between activities more or

\textsuperscript{43} W. Prosser, supra note 14, at § 32.
\textsuperscript{44} Baxter v. Fugett, 425 P.2d 462 (Okla. 1967).
\textsuperscript{45} Id. at 464.
\textsuperscript{47} Dellwo v. Pearson, 259 Minn. 452, 458, 107 N.W.2d 859, 863 (1961) (footnote omitted).
less prone to result in significant injury. It might even be reasonable to speculate that an adult standard is applied to activities more prone to serious injury, notably driving, because these are also activities which are more typically accompanied by liability insurance coverage.

Another rationale for the adult activities exception in cases in which minors were driving motor vehicles has been the absence of a dualistic standard of care in state rules-of-the-road statutes.\textsuperscript{49} While it is certainly correct that separate standards for children and adults do not exist, the opinions employing this argument lack clarity as to the relevance of their absence to court-made negligence law.\textsuperscript{50} Indeed, the law generally is replete with special standards for children.\textsuperscript{51}

Until a court which accepts the adult activities exception better articulates its rationale, it would seem that, except in such extreme cases as driving cars and playing hide-and-go-seek, the exception is susceptible of case-by-case application and the uncertainty attendant thereto.

D. Interface with Other Tort Doctrines.

The subjective child's standard of care has implications for other established doctrines of negligence law. Chief among these doctrines are risk assumption and negligence per se.

As to risk assumption, it appears the courts which created a subjective standard for minors accused of contributory negligence are spared the trouble of doing the same for minors accused of risk assumption. Generally, assumption of risk bars from recovery a plaintiff who assumes a risk of negligent injury.\textsuperscript{52} But, unless the risk is assumed by an express agreement which is not invalid as contrary to public policy,\textsuperscript{53} a plaintiff does not assume the risk of the defendant's conduct unless he \textit{knows} of that risk's existence and appreciates its unreasonable character.\textsuperscript{54} Even for adults, then, subjective elements of knowl-

\textsuperscript{49} Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1966); Baxter v. Fugett, 425 P.2d 462 (Okla. 1967). The rules-of-the-road statutes are those statutes which govern the operation of motor vehicles upon the streets and highways within each state. \textit{See} \textit{NEB. REV. STAT.} §§ 39-601 to 6,195 (Reissue 1974).

\textsuperscript{50} \textit{Id.} For example, the New Hampshire Court cited a statute making it a misdemeanor for "any person" to do something forbidden in that state's rules of the road as "some indication" of legislative intent that the court-made adult standard of care should apply to every person, including minors. Daniels v. Evans, 107 N.H. 407, 409-10, 224 A.2d 63, 65 (1966).

\textsuperscript{51} \textit{See, e.g.,} notes 4-8 and accompanying text \textit{supra}.

\textsuperscript{52} \textit{RESTATEMENT (SECOND) OF TORTS} § 496A (1965).

\textsuperscript{53} \textit{Id.} § 496B.

\textsuperscript{54} \textit{Id.} § 496D.
edge and appreciation (not present in the objective adult test for contributory negligence) are necessary to find that a plaintiff assumed the risk of harm. Since a child's standard of care for contributory negligence is typically a subjective inquiry, there appears little distinction between the two defenses when alleged against a minor. Enlightening in this regard is the parallel language to be found in a New York case which considered whether a minor decedent was contributorily negligent or assumed the risk of harm and thus barred his parent from recovering, under a dram-shop law, from the tavern owner who sold the youth liquor:

[A]n infant [in regard to contributory negligence] must exercise the care which an ordinary prudent person of his age, capacity and experience would have exercised under similar circumstances . . . . An infant may assume the risk of injury . . . and, under the circumstances of this case, considering the decedent's age of nearly eighteen years, his intellectual capacity and experience, the court holds that he assumed the risks inherent in voluntarily exposing himself to the dangers in the consumption of alcoholic beverages . . . .

In a case involving a minor of tender years, in a jurisdiction where such children are incapable of negligence, a court noted the close kinship of the doctrines of contributory negligence and risk assumption and held a child of tender years incapable of "knowingly and voluntarily assuming a risk of harm."

In jurisdictions where there exists the tort doctrine that violation of a statute constitutes negligence per se when the violator injures another as a result of the violation, there is an obvious tension with the special subjective standard of care applied to minors accused of negligence. When a minor violates a statute in such a jurisdiction, one or the other of the doctrines must yield; a child can hardly be negligent per se and yet required to meet only a child's subjective standard of care. This tension would arise in fewer cases, since many statutory violations (notably of motor vehicle laws) would arise only when
conflict has been resolved in some jurisdictions by holding that a child cannot be negligent per se even though an adult in the same situation would have been. The conflict, however, has also been resolved otherwise. And of course, the conflict need not be resolved at all—because it does not exist—in jurisdictions in which violation of a statute is merely some evidence of negligence and not negligence per se.

No survey of tort law's special consideration for children would be complete without some mention of the legal favoritism embodied in the doctrine of attractive nuisance. Although the rule is variously stated and in some jurisdictions flatly rejected, its focus is obviously the protection of children, even though they are trespassers on the property of others. In most cases in which the rule has been applied, the minors were of relatively tender age, although the Restatement of Torts pred-

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Where a minor not engaged in a primarily adult activity violates a statute or ordinance, that violation does not in and of itself constitute negligence per se, 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.


62. Tittle v. McCombs, 129 Ga. App. 148, 199 S.E.2d 363 (1973) (minority of motorcyclist not considered in affirming trial court's instruction that jury could find the youth violated the statute and was, therefore, negligent per se).


64. One formulation is found in Restatement (Second) of Torts § 339 (1965):
A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

66. Restatement (Second) of Torts § 339, Comment c (1965).
icates a property possessor's liability on injuries to any child "too young to appreciate the danger."^67

III. NEBRASKA LAW

A. Standard of Care of Minors

Nebraska's adoption of the subjective standard of care for children who are faced with charges of primary or contributory negligence is of early vintage. In Huff v. Ames^68 the Nebraska Supreme Court upheld a district court's refusal to apply an adult standard of care to an eleven-year-old plaintiff who lost two fingers while feeding sugar cane into a crushing mill. The plaintiff alleged that his employer, the owner of the mill, was negligent. The court in Huff approved language which instructed the jury that "the rule as to contributive negligence of a child is, that it is required to exercise only that degree of care which a person of the age of this plaintiff would naturally and ordinarily use in the same situation and under the same circumstances."^70 By its selection of authority for this holding, it appears the court in Huff was not interested in adopting any presumptions of capacity of relatively young or old minors. In passing, it should be noted that in other early cases involving claims of negligence against infants' employers the negligence allegation itself, as well as the minor plaintiffs' standard, provided special treatment for children. In these cases, defendant employers were sued for negligently failing to advise minors of risks in employment, although no such warnings were due adult employees.^[72]

^67. Id.
^68. 16 Neb. 139, 19 N.W. 623 (1884).
^69. Id. at 141, 19 N.W. at 624.
^70. Id. (emphasis added).
^71. Id. at 142, 19 N.W. at 624:

In Wait's Actions and Defenses, vol. 4, 720 it is said: "The rule of law in regard to the negligence of an adult and in regard to that of an infant ten years of age is materially different. . . . 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 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."


^73. Cases in this area focus on the issue of risk assumption. See notes 162-68 infra.
The child's standard of care formulated in *Huff* was carried forward and fleshed out in *Chicago, Burlington & Quincy Railroad v. Grablin*,
which adopted as the "correct rule" a headnote from *Huff* which went beyond the criterion of age as stated in *Huff*: "[I]n determining whether or not the plaintiff was guilty of negligence [the jury] should take into consideration his age and discretion in determining that fact . . . ." *Grablin* went on to add "prudence" to age and discretion in articulating the child's standard of care.

Subsequent expressions of the standard applicable to minors have added to the elements of age, discretion, and prudence these considerations: intelligence and experience, 
knowledge and appreciation of danger, and physical and mental development. These elements have sustained substantial intermingling and alternative use over the course of time. The essence of these various verbalizations of the child's standard of care has been captured in a short-hand phraseology which has had fairly consistent usage since articulated in 1949. The standard is "that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation." This language has enjoyed considerable currency in Nebraska child negligence cases.

The Nebraska Supreme Court, in the recent case of *Caradori v. Fitch*, once again approved this short-hand language when it upheld a jury instruction which "recited that a minor is held to the exercise of that degree of care which an ordinarily prudent

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74. 38 Neb. 90, 56 N.W. 796 (1893).
75. See text accompanying note 70 supra.
76. 38 Neb. at 100, 56 N.W. at 798.
77. "All that the law requires of such an infant is that he exercise that care, discretion, and prudence which may reasonably be expected from children of like age." *Id.* at 100, 56 N.W. at 798.
83. *Id.* at 438, 37 N.W.2d at 611.
child of the same capacity to appreciate [sic] and avoid danger would use.” The court said that this instruction, given in a case in which an eleven-year-old girl was struck and killed by a motorist while the girl was riding a bicycle on an unlighted street after dark, was consistent with Nebraska law.  

In *Armer v. Omaha & Council Bluffs Street Railway*, more than in subsequent cases, the court gave meaning to its standard and discussed the underlying considerations. In *Armer* the supreme court reversed a trial court’s finding as a matter of law that an eleven-year-old girl whose bicycle collided with a bus was contributorily negligent. In rather eloquent language, Justice Boslaugh stated the significance of the minor’s subjective standard of care: mere knowledge of danger is not the relevant issue; rather it is appreciation of the “necessity for keeping away from, or not doing” certain things.

Ordinarily, as in any ultimate fact issue in negligence cases, whether a child met the standard of care is a question for the jury. The exceptional cases are those in which a very young child is said to have no capacity for negligence as a matter of law, and those in which a child’s actions are so extreme as to

86. *Id.* at 189, 263 N.W.2d at 652.
87. *Id.*
88. 151 Neb. 431, 37 N.W.2d 607 (1949).
89. *Id.* at 437-38, 37 N.W.2d at 610-11:

The conduct of appellant as shown by this record should not, her age considered, conclusively bar her right of recovery, conceding that she was a bright, intelligent girl; had lived in Omaha and had on occasions ridden bicycles on the streets for two years; and was as familiar with the operations of vehicles and bicycles on the street as any girl of her age and discretion would usually be.

90. *Id.* at 438, 37 N.W.2d at 611:

She doubtless knew that there was danger of injury in traveling in the street and in turning to the left to cross the street. Nearly any child of her age would answer, if asked, that if it fell in the river it might be drowned; if it fell in the fire it would be burned; or if it got in the way of a street or a motor vehicle it would be injured and possibly killed; but mere childish knowledge of everyday things does not necessarily establish that they appreciate or understand the necessity for keeping away from, or not doing these things. They act on impulse, and often the greater the danger, the greater the challenge. They do dangerous things without thought of the consequences that may follow what they do, and to conclude as a matter of law that a child of such an age as the appellant should be held to the high standards demanded of adults in looking after their own and the safety of others is opposed to good judgment and sound law. The infant is favored by the law not so much on his lack of knowledge as because of indiscretion, imprudence, lack of judgment, and impulsiveness.

91. *Id.*
92. *Id.* at 437, 37 N.W.2d at 610.
93. See § III-B of text infra.
make the child negligent as a matter of law. It appears this latter extreme-situation exception has been applied only once in Nebraska. In *Johnston v. New Omaha Thomson-Houston Electric Light Co.*, the supreme court found a twelve-year-old boy contributorily negligent as a matter of law, reversing a jury verdict for the boy. He was injured when he touched an electric wire and the court said the evidence showed that the boy anticipated and deliberately sought a shock, although he may not have appreciated the extent of the injury he was to incur. However, subsequent courts have declined opportunities to apply *Johnston* and, while not overturning the case, have consistently expressed the need to severely restrict the extreme-situation exception. With seventy years now passed since *Johnston*, and twenty years since the court’s last discussion of the exception, there is room for speculation that a situation sufficiently extreme will never again be found. Instead, it would appear, the cases in which minor plaintiffs’ behavior is outrageous are analyzed by inquiring (1) whether it was the minors’ acts, and not those of the defendants, which proximately caused the accident, or (2) whether the defendants simply were not negligent.

**B. Capacity of Children to be Chargeable with Negligence**

It is not at all clear from the Nebraska cases whether inquiry into the capacity of children is analytically separate from inquiry into whether a particular child met his standard of care. Here “capacity” for negligence is used in the sense of “capability” of being held responsible for acts, and not in the sense of a child’s mental abilities, as was apparently the meaning of the standard of care articulated in *Armer v. Omaha & Council Bluffs Street Railway*. While related, these meanings are distinguishable; the first meaning refers to childrens’ *legal* capacity to be chargeable with negligence, while the second refers to the degree of *mental* capacity a child may have to appreciate and avoid danger. In a sense, it could be said, findings of legal

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95. *Id.*
96. *Id.* at 31, 110 N.W. at 712.
101. *See* text accompanying notes 30-35 *supra*.
102. 151 Neb. 431, 37 N.W.2d 607 (1949). *See* text accompanying note 83 *supra*. 
incapacity for negligence are judicial recognition that mental capacity can be so weak (in very young children) that it would be ludicrous to apply a standard of care at all.103

Apparently responsible for the lack of clarity in the Nebraska Supreme Court’s analytical framework is its holdings that the determination of whether children of a certain age are chargeable with negligence, like the determination of whether a particular child met his standard of care, is normally a question of fact for the jury.104 The problem is that capacity for negligence and the issue of whether a particular child met the standard of care are not the same fact question, as may have been recognized by the court in *Vacanti v. Montes*.105 There, the court approved a jury instruction which appeared to distinguish the two fact questions.106 But if this was a conscious distinction, it is apparently not one about which the Nebraska court is very concerned; in *Gadeken v. Langhorst*107 the court did not bat a judicial eye as it merged the two inquiries.108 And, in its most

103. Legal capacity and incapacity are distinguishable from determinations of negligence or no negligence as matters of law. The former is applied to a group of children who are similar in age and mentality; the latter is applied to a particular child in a given case.


105. *180 Neb. 232, 142 N.W.2d 318 (1966).*

106. *Id.* at 238, 142 N.W.2d at 322. The jury instruction was quoted by the court as follows:

> The evidence is uncontroversial in this case that at the time of the accident in question the plaintiff was a minor of the age of 9 years and 3 months.

> You are instructed that a minor of the age of the plaintiff at the time of the accident cannot be charged with the same degree of caution required of an adult in guarding against possible accidents while traveling upon and crossing a street in a city. There is no arbitrary rule fixing the time at which a child during his minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered while engaged in such activity. **Whether or not negligence may be attributed to a minor of the age of the plaintiff is a matter for the jury to determine** under all the circumstances of the case.

> The degree of care required of a minor is that which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. **Whether or not the plaintiff at the time of the accident in question was of sufficient knowledge, discretion and appreciation of danger that she may be subject to the defense of contributory negligence is a question of fact for the jury to determine.** (emphasis added).

107. *193 Neb. 299, 226 N.W.2d 632 (1975).*

108. *Id.* at 301-02, 226 N.W.2d at 634:

The plaintiff was 11 years of age at the time of the accident.
recent negligence case involving a minor, the supreme court did not mention as an issue the legal capacity to be chargeable with negligence of the plaintiffs' eleven-year-old decedent.\textsuperscript{109}

The appropriate question concerning this silent merger would seem to be, not whether it was for better or for worse, but whether it really matters. Instructing a jury to make two factual determinations which are for practical purposes the same\textsuperscript{110} would be pointless. Thus, the merger may be a practical way of avoiding arbitrary rules on the capacity of minors to be chargeable with negligence.\textsuperscript{111} Besides, in the cases in which capacity to be chargeable with negligence is of substantial significance, that is, when the minors are very young, capacity does receive separate attention.\textsuperscript{112}

Implicit in the merger of the capacity inquiry into the subjective standard of care inquiry is the idea that there is no age below which a minor is not chargeable with negligence and above which he is so chargeable.\textsuperscript{113} When this idea is applied to real cases, the result is that "[w]hether or not negligence may be attributed to a minor of the age of the plaintiff is usually a matter for a jury under the circumstances of each case."\textsuperscript{114}

But the pronouncement that there is no arbitrary age below which a minor is not chargeable with negligence is misleading in its generality. While the adoption of this subjective consideration of capacity appears to place Nebraska squarely in the camp of jurisdictions which reject arbitrary rules and assumptions,\textsuperscript{115} there is a substantial line of cases, beginning with \textit{Sacca v. Omaha & Council Bluffs Street Railway},\textsuperscript{116} which hold that a child of tender years is not chargeable with negligence.

"Tender years" is, to say the least, a vague concept. On the

\begin{itemize}
\item Whether negligence may be attributed to a minor 11 years of age is usually a question of fact for the jury . . . The plaintiff was required to exercise that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.
\item See text accompanying notes 112-14 infra.
\item Bear v. Auguy, 164 Neb. 756, 768, 83 N.W.2d 559, 567 (1957): "There is no arbitrary rule fixing the time at which a child during his minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered while engaged in such an activity." Accord, Vacanti v. Montes, 180 Neb. 232, 238, 142 N.W.2d 318, 322 (1966).
\item See note 27 supra.
\item Bear v. Auguy, 164 Neb. 756, 768, 83 N.W.2d 559, 567 (1957).
\item See note 27 supra.
\item 98 Neb. 73, 152 N.W. 315 (1915).
\end{itemize}
one hand, it has been said that any person in his minority is of
tender years and, therefore, entitled to the protection of the
law.\textsuperscript{117} In line with this definition and the general pronounce-
ment against arbitrary rules, in pre-\textit{Sacca} cases the minor par-
ties' tenderness entitled them only to a jury's scrutiny under the
subjective child's standard of care;\textsuperscript{118} incapacity to be charge-
able with negligence was not considered. But, starting with \textit{Sac-
ca}, "tender years" took on a second meaning, and children of
\textit{very} tender years began to receive more favorable con-
sideration. It is not clear whether the \textit{Sacca} court held the six-
year-old plaintiff not contributorily negligent as a matter of
law\textsuperscript{119} or not chargeable with negligence because he was of
"such tender years."\textsuperscript{1120} The result, of course, was the same: the
issue of the minor's negligence was said to have been correctly
withheld from the jury by the trial judge.\textsuperscript{121} In dissent, it was
argued that the boy's possible contributory negligence in run-
ning into a street car was not the real issue, rather the issue was
the defense that the defendant conductor was not negligent at
all and the boy's actions were the sole proximate cause.\textsuperscript{122} This
conceptualization of the accident's cause has been carried forth
in later cases as a caveat to the "tender years" exception to the
general rule that there is no particular age at which capacity for
negligence arises.\textsuperscript{123}

\textit{De Griselles v. Gans},\textsuperscript{124} in which the defendant truck driver
was found to have been in no way negligent in colliding with a
boy of about nine,\textsuperscript{125} signaled explicit recognition of the in-
capacity of young children to be chargeable with negligence.\textsuperscript{126}

\begin{enumerate}
\item Collins v. Weise, 110 Neb. 552, 559, 194 N.W. 450, 453 (1923) (youth, 16, was of
tender years).
\item Crabtree v. Missouri Pac. Ry., 86 Neb. 33, 124 N.W. 932 (1910) (nine-year-
old); Chicago, Burlington & Quincy R.R. v. Grabin, 38 Neb. 90, 56 N.W. 796
(1893) (nine-year-old); Huff v. Ames, 16 Neb. 139, 19 N.W. 623 (1884) (11-year-
old).
\item 98 Neb. at 76, 152 N.W. at 316:
Without attempting to fix the exact age at which a child may be said
to be responsible for his acts, and capable of being guilty of negli-
gence, we believe that this child, who was under six years of age,
cannot, under all the circumstances of the case, be charged with
negligence . . .
\item 120. \textit{Id.} "The child was of such tender years that it cannot be deemed in law
possessed of sufficient discretion to make it guilty of negligence for its
failure to exercise due care for its safety."
\item 121. \textit{Id.}
\item 122. \textit{Id.} at 78-79, 152 N.W. at 317.
\item 123. \textit{See} § III-C of text infra.
\item 124. 116 Neb. 835, 219 N.W. 235 (1928).
\item 125. \textit{Id.} at 845, 219 N.W. at 239.
\item 126. \textit{Id.} at 843, 219 N.W. at 238: "The plaintiff's decedent, on account of his
tender age, is not chargeable with contributory negligence . . . ."
\end{enumerate}
Although this recognition was apparently dictum (the defendant’s lack of negligence decided the case), non-dictum statements of the incapacity of very young minors followed. In *McKinney v. Wintersteen*, the court held that the defendant automobile driver was not prejudiced by an instruction submitting to the jury an issue of the six-year-old plaintiff’s contributory negligence in running into the car. The reason given by the court was that the youngster was incapable of negligence anyway. In *Siedlik v. Schneider*, the court reversed and remanded a small verdict from which a seven-year-old plaintiff appealed because the trial court’s instructions may have caused the jury to consider contributory negligence of the boy. “A child of tender years—and it must be conceded that the plaintiff was a child of tender years—is not chargeable with negligence or with contributory negligence.”

A later case, *Tews v. Bamrick*, provided perhaps the clearest distinction between capacity to be chargeable with negligence and negligence or no negligence as a matter of law. In *Tews* a five-year-old boy was struck by a truck. Affirming a verdict for the boy, the court said: “It can be here said that the conduct of the boy was undoubtedly negligent, but we have often said a child of tender years is not chargeable with contributory negligence.” Subsequent Nebraska courts have recognized the “tender years” exception to the general rule that there is no arbitrary age for determining capacity to be chargeable with negligence.

The more recent cases discussing capacity have involved children less tender in years; the general rule expressed in *Bear v. Auguy* and not the exception for “tender years,” has been applied. Since nearly twenty years have elapsed since the last

129. *Id.* at 682, 241 N.W. at 114.
130. *Id.*
132. *Id.* at 765, 241 N.W. at 536.
133. *Id.*
134. 148 Neb. 59, 26 N.W.2d 499 (1947).
135. *Id.* at 66, 26 N.W.2d at 504.
136. Adams v. Welliver, 155 Neb. 331, 51 N.W.2d 739 (1952) (tender years cases involved minors under seven; exception not to be applied to nine-year-old); Connors v. Pantano, 165 Neb. 515, 86 N.W.2d 367 (1957) (incapacity of four-year-old to commit intentional tort); Eden v. Klaas, 166 Neb. 384, 89 N.W.2d 74 (1958) (five-year-old); Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959) (under two years of age).
138. Caradori v. Fitch, 200 Neb. 186, 263 N.W.2d 649 (1978); Vacanti v. Montes,
which applied the "tender years" exception, it seems appropriate to question the exception's continued vitality.

Two 1975 cases considered the capacity of minor plaintiffs to be contributorily negligent. Gadeken v. Langhorst,\textsuperscript{140} involved a plaintiff who, at the age of eleven, was injured when her bicycle collided with the defendant's automobile at an intersection. In reversing the trial court's dismissal of the girl's action and remanding the case, the court held that the evidence, when considered in the light most favorable to the plaintiff, created a jury question as to the defendant's negligence.\textsuperscript{141} The court in Gadeken said the issue of whether negligence could be attributed to an eleven-year-old is also a jury question, thus applying the general rule as articulated in Bear.\textsuperscript{142} The court's failure in Gadeken to discuss "tender years" is not necessarily inconsistent with the exception's continued viability, in light of the age of the child involved. The same may be said of the supreme court's nondiscussion of "tender years" in the 1978 case of Caradori v. Fitch,\textsuperscript{143} which also involved an eleven-year-old plaintiff.

More revealing is Korbelik v. Johnson,\textsuperscript{144} in which a five-year-old plaintiff was struck by the defendant's automobile in a school crosswalk. The court affirmed a verdict for the defendant, explaining that the jury could deny recovery by finding the child's actions were the sole proximate cause of her injury.\textsuperscript{145} The court in Korbelik dismissed an objection raised by the plaintiff that jury instructions on sole proximate cause conflicted with the trial judge's determination "as a matter of law that Jamie L. Korbelik, because of her age at the time of the accident, cannot be charged with negligence or contributory negligence."\textsuperscript{146} The supreme court appeared to make a back-handed affirmation of the "tender years" exception when it wrote: "There is no merit to plaintiff's first contention. \textit{Even if a child

\textsuperscript{139} Pullen v. Novak, 169 Neb. 211, 222, 99 N.W.2d 16, 24 (1959) (arguably dictum). An instruction mentioning the incapacity of very young children to be chargeable with negligence before stating the general child's standard of care was approved in Sacca v. Marshall, 180 Neb. 855, 867, 146 N.W.2d 375, 383 (1966). However, the minor in the case was fourteen and the court only discussed the general standard of care.

\textsuperscript{140} 193 Neb. 299, 226 N.W.2d 632 (1975).

\textsuperscript{141} \textit{Id.} at 301, 226 N.W.2d at 634.

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} 200 Neb. 186, 263 N.W.2d 649 (1978).

\textsuperscript{144} 193 Neb. 356, 227 N.W.2d 21 (1975).

\textsuperscript{145} \textit{See} § III-C of text \textit{infra}.

\textsuperscript{146} 193 Neb. at 360, 227 N.W.2d at 24.
is not capable of contributory negligence, if such child's conduct can be considered the sole proximate cause of his injury, there can be no recovery."\textsuperscript{147}

C. Sole Proximate Cause and the Adult Standard

Despite the special consideration granted children in the negligence law of Nebraska and other jurisdictions, all is not gloom for the adult who has the greater misfortune to injure a child one day before, rather than one day after, the child's majority. Nor will the adult inevitably lose when the child with whom he has an accident is of tender years. As \textit{Korbelik} demonstrates,\textsuperscript{148} even a child too young to be chargeable with contributory negligence may not recover when it is the child's act which is the sole proximate cause of his injury. Or, as it is sometimes expressed, the defendant must have been negligent to be liable.\textsuperscript{149}

In Nebraska, this fundamental concept of a proximate cause requirement in child negligence cases pre-dates the preferential subjective standard of care for children which originated in the 1884 case of \textit{Huff v. Ames}.\textsuperscript{150} In \textit{Meyer v. Midland Pacific Railroad},\textsuperscript{151} a train struck a brother and sister, killing the boy (two years old) and so injuring the girl (over three) that her leg was amputated; a jury awarded the girl $10,000.\textsuperscript{152} In reversing and remanding for a new trial, the court in \textit{Meyer} said that, while the engineer had a duty to exercise great care, there was no evidence "tending even to show the child was seen . . . or that she was in a position where she could have been seen by the engineer one moment sooner than she was."\textsuperscript{153} Finding no negligence by the defendant, the court apparently saw no need to discuss possible contributory negligence by the girl.

Express comment on proximate cause in negligence cases involving minors was made in \textit{De Griselles v. Gans},\textsuperscript{154} in which the court reversed a verdict for the deceased minor's father:

\textsuperscript{147} \textit{Id.} at 361, 227 N.W.2d at 24 (emphasis added).
\textsuperscript{148} See text accompanying notes 144-45 \textit{supra}.
\textsuperscript{149} Siedlik v. Schneider, 122 Neb. 763, 765, 241 N.W. 535, 536 (1932):
[That a child of tender years cannot be negligent] does not mean . . . that the defendant was the insurer of plaintiff's safety or that the defendant would be responsible for injuries received by the plaintiff which were caused by the recklessness or carelessness of the plaintiff alone with which there was no negligence on the part of the defendant.
\textsuperscript{150} 16 Neb. 139, 19 N.W. 623 (1884). See text accompanying notes 68-71 \textit{supra}.
\textsuperscript{151} 2 Neb. 319 (1872).
\textsuperscript{152} \textit{Id.} at 320.
\textsuperscript{153} \textit{Id.} at 338.
\textsuperscript{154} 116 Neb. 835, 219 N.W. 235 (1928). See text accompanying note 125 \textit{supra}.
The plaintiff's decedent, on account of his tender age, is not chargeable with contributory negligence, but in determining the existence of negligence upon the part of the defendant, having no notice of the presence of children, the same rules apply [as where an adult is struck] . . . and while the boy is not chargeable with negligence, if his act, whether negligent or not, was the proximate cause of his death, there can be no recovery.155

Clearly, a minor plaintiff must, like his adult counterpart, establish a prima facie case of negligence.

While the adult defendant is entitled to put his minor plaintiff to the proof of the adult's negligence, the law will sometimes help the child with his burden. In the typical child-darting-in-front-of-a-car case, the Nebraska Supreme Court has made relevant to the inquiry of whether the defendant met his standard of care the defendant's knowledge of children in the vicinity of the accident. This adjustment to the adult standard of care was perhaps foreshadowed in the court's interest in Meyer in whether the train engineer saw or could have seen the youngsters near the track.156

Initially, this adjustment to the defendant's standard was rather inartfully stated in Kauffman v. Fundaburg:157 "The driver . . . must exercise more care toward a child of tender years crossing the street between blocks than toward an adult in the same circumstances."158 The problem with this assertion, which received no additional embellishment when transcribed as a headnote to the case, was that it did not account for an important fact in the case—the driver had knowledge of the presence of children in the immediate vicinity.159 Without this element, it would otherwise appear that a driver who strikes a child, even where there is no warning of the presence of youngsters, is held to a higher standard of care than a driver who strikes an adult.

It is clear, however, that the unqualified proposition in Kauffman was an aberrational use of language that ought not be depended upon by a minor plaintiff's lawyer.160 The more


156. See text accompanying note 153 supra.


158. Id. at 344, 242 N.W. at 660.

159. Id. at 342-43, 242 N.W. at 659.

160. See, e.g., De Griselles v. Gans, 116 Neb. 835, 843, 219 N.W. 235, 238 (1928): A driver "is not bound to anticipate that conduct of children, of whose presence he has no knowledge, will be different from that of an ordinarily
artful approach, explicitly approved by the supreme court, is to describe presence of children as one circumstance in determining the care due from a driver: "A motorist who observes or should reasonably anticipate the presence of children in the highway is obliged to use reasonable care in view of all the circumstances."\textsuperscript{161}

D. Assumption of Risk and Negligence Per Se

The tort doctrine of risk assumption poses no significant issue in Nebraska's law of negligence involving minors.\textsuperscript{162} The cases discussing risk assumption by minors arose in another era, when child labor and the advent of industrialization made the doctrine a livelier one than it now appears to be in regard to minor plaintiffs. Within the context of the master-servant relationship, an early case on risk assumption, \textit{Omaha Bottling Company v. Theiler},\textsuperscript{163} stated:

The general rule is that infants, like adults, assume the ordinary risks of the service in which they engage. They are entitled, however, to warning of dangers which, on account of their youth and inexperience, they do not fully comprehend. . . . But whether the plaintiff in this case, by reason of his youth or lack of experience, was ignorant of the dangers . . . was for the jury to determine from the evidence . . . .\textsuperscript{164}

The court in \textit{Theiler} also noted that the defendant employer's duty to warn is not absolute, but only that of a "prudent master."\textsuperscript{165} Subsequent master-minor servant cases have followed the court's lead as set out in \textit{Theiler}.\textsuperscript{166}

The lack of discussion on risk assumption in the more recent cases may be attributable to the fact that the subjective inquiry into knowledge and appreciation of the risk assumed\textsuperscript{167} is largely implicit in the subjective inquiry into a minor plaintiff's contributory negligence.\textsuperscript{168}
Similarly, since in Nebraska violation of a statute is not negligence per se but only evidence of negligence,\(^{169}\) that doctrine creates no conflict with the minor’s subjective standard of care.\(^{170}\) It is established, however, that violation of a statute is to be considered as evidence of negligence against a minor. In *Sacca v. Marshall*\(^{171}\) it was held reversible error not to instruct the jury that violation of a statute by a minor is some evidence of negligence when such an instruction would be given against an adult.\(^{172}\) More recently, in *Caradori v. Fitch*,\(^{173}\) the court appeared to indicate that the jury could have concluded that the plaintiff’s minor decedent had been contributory negligent in riding her bicycle beside the bicycle of a companion in violation of a Nebraska statute.\(^{174}\)

### E. The Guest Statute

Whether all minors are subject to Nebraska’s automobile guest statute\(^{175}\) is not yet settled, although it appears likely the supreme court would hold that they are.\(^{176}\) Under the guest statute a passenger in a motor vehicle who is a guest, that is, not a passenger for hire, may not recover from the vehicle’s owner or operator for his negligence unless the driver was intoxicated or grossly negligent. In the first case to expressly consider whether a minor may be barred from recovery as a guest passenger, it appeared the court went out of its way to allow the child to recover. The supreme court, in *Snelling v. Pieper*,\(^{177}\) determined that a twelve-year-old passenger of an adult defend-

which should consider his age and experience in determining both). See text accompanying notes 55-56 supra.


170. See note 63 and accompanying text supra.


172. Id. at 866, 146 N.W.2d at 382.


174. Id. at 188, 263 N.W.2d at 652. This fact appeared to have no particular significance in the court’s decision and was, therefore, dictum.

175. NEB. REV. STAT. § 39-6,191 (Reissue 1974):

The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, but shall not be construed to apply or to include any such passenger in a motor vehicle being demonstrated to such passenger as a prospective purchaser.


ant, who was paid fifteen dollars a week to look after the child, was not a guest under the statute as a matter of law.\textsuperscript{178} The youngster was, therefore, able to recover for injuries suffered when the defendant allowed his unlicensed son to drive and the car crashed; the recovery was based on ordinary, not gross, negligence.\textsuperscript{179}

While the court in \textit{Snelling} appeared to strain to favor the injured child,\textsuperscript{180} the apparent favoritism of minor plaintiffs in such cases was soon curtailed. In \textit{Kolar v. Divis},\textsuperscript{181} the court refused to exclude from the operation of the guest statute a thirteen-year-old girl who was drowned after the car in which she was a passenger was hit by flood waters. Her administrator, the court said, had to show gross negligence by the defendant driver to recover. A gratuitous passenger, the decedent, who the court described as a "bright" and "dependable" girl, could not be favored for her minority.\textsuperscript{182} Although the court's holding was restricted to a thirteen-year-old under the factual circumstances, its discussion appeared to leave open little possibility that a minor of even very tender years would be treated differently.\textsuperscript{183}

F. Attractive Nuisance

While it is not within the scope of this comment to discuss in full the legal favoritism shown minors through the doctrine of attractive nuisance in Nebraska, it is relevant to note that the doctrine does exist in and is applied in Nebraska. In the recent case of \textit{Davis v. Cunningham},\textsuperscript{184} the supreme court had occasion to discuss the doctrine of attractive nuisance in regard to a three-year-old boy who was injured when he pulled a piece of ditching equipment down on himself. Although the court ruled that the owner of the land on which the child was injured could not have reasonably foreseen the danger to children, and therefore dismissed the boy's action,\textsuperscript{185} the opinion described the nature of the attractive nuisance doctrine as it is applied in Nebraska. A minor plaintiff, even though he be a trespasser upon the property of his defendant, may invoke the doctrine if the nuisance presents an unreasonable risk and it is foreseeable that a child might be attracted to it.\textsuperscript{186} However, a property

\textsuperscript{178} Id. at 824, 135 N.W.2d at 711.
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 825, 135 N.W.2d at 712 (dissenting opinion).
\textsuperscript{181} 179 Neb. 756, 140 N.W.2d 658 (1966).
\textsuperscript{182} Id. at 763, 140 N.W.2d at 663.
\textsuperscript{183} Id. at 762-63, 140 N.W.2d at 663.
\textsuperscript{184} 196 Neb. 8, 241 N.W.2d 343 (1976).
\textsuperscript{185} Id. at 12-13, 241 N.W.2d at 346.
\textsuperscript{186} Id. at 10-11, 241 N.W.2d at 345.
owner is not an insurer of the child's safety and has no duty to make his property childproof. Finally, the court in *Davis* indicated that the doctrine itself is not favored and its principles are not to be extended.

G. Adult Activities

In *Caradori v. Fitch*, the supreme court was asked by an adult defendant whose automobile had struck and killed an eleven-year-old bicyclist to apply an adult standard of care to the activities of the plaintiff's deceased child. The defendant had argued that riding a bicycle on a city street is an adult activity and that a child engaging in such activity should be held to the adult standard. The court in *Caradori* rejected this invitation to engraft upon the Nebraska law of minor negligence an adult-activities exception to the subjective standard of care to which children are held.

*Caradori* was the first case, insofar as the decisions reflect, in which the Nebraska Supreme Court considered the adult-activities exception. And in this 1978 case, the court's consideration was indeed brief. The court cited for the adult-activities rule the Minnesota case of *Dellwo v. Pearson*, in which the relevant activity was operation of a power boat. Rather than treating the adult-activities rule on its merits, the court quite understandably stated: "We are not prepared, even assuming the wisdom of the Minnesota rule, to place the activity of bicycling in the same category as power boating."

As a result of the court's disposition of the defendant's urging of the adult-activities rule, there now appears to be authority that, although the adult-activities rule is not law in Nebraska, it is not an adult activity for a child to ride a bicycle in Nebraska. It is also apparent that consideration of the adult-activities rule on its merits by the Nebraska Supreme Court must await a case in which a minor plaintiff or defendant is involved in some activity more "adult-like" than bicycling.

IV. CONCLUSION AND COMMENTARY

The Nebraska Supreme Court has long accepted a subjective

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187. *Id.* at 11-12, 241 N.W.2d at 346.
188. *Id.* at 12, 241 N.W.2d at 346.
190. *Id.* at 189, 263 N.W.2d at 652. For a discussion of the adult-activities doctrine, see notes 43-51 and accompanying text supra.
191. 200 Neb. at 186, 263 N.W.2d at 652.
192. 259 Minn. 452, 107 N.W.2d 859 (1961).
193. 200 Neb. at 189, 263 N.W.2d at 652.
standard of care for children charged with primary or contribu-
tory negligence. In its most succinct form, the standard of a
child is the degree of care "which an ordinarily prudent child of
the same capacity to appreciate and avoid danger would use in
the same situation." Determining whether a particular child has
met the standard, as well as what the child's standard is, is a fact
question for the jury. While there is authority that in an extreme
situation the minor's negligence may be determined as a matter
of law, it is clear that this approach has been so severely restrict-
ed as to cast doubt upon its continued viability.

It is unclear whether, in a case involving a child beyond the
most tender years, capacity of the child to be chargeable with
negligence is a separate analytical inquiry from the ultimate
fact question of whether the child met his subjective standard of
care. However, in cases involving very young children this ca-
pacity inquiry is separate and typically has prevented the reach-
ing of the ultimate fact question; that is, a child of tender years
has no capacity for negligence.

Even in the case of a child of tender years, it is necessary that
an adult defendant have been negligent, or that the minor plain-
tiff's acts not have been the sole proximate cause of his injury.
However, in the not uncommon case of a child plaintiff injured
by an adult defendant's motor vehicle, the actual or imputed
knowledge by the driver of the presence of children in the vicini-
ty heightens the driver's duty of care.

In regard to use of the defense of risk assumption against a
minor plaintiff, it appears that the subjective nature of a child's
standard of care for avoiding contributing to his own injury
makes contributory negligence and risk assumption practically
indistinguishable defenses.

Finally, Nebraska law's favoritism of minors involved in neg-
ligence cases extends to acceptance of the attractive nuisance
doctrine (although application of the doctrine is presently being
limited by the supreme court), but does not extend to any special
treatment of minors under the state's automobile guest statute.

Satisfaction with this state of Nebraska law may largely de-
pend on the side of a lawsuit on which the person contemplating
the law finds himself. To the objective observer, however, there
are strong considerations both for and against the favoritism
extended children in negligence law.

On the one hand, there is a natural compassion for children,
especially very young ones, and where a child is injured or
thoughtlessly injures another this compassion is understand-
ably stronger. It is also common knowledge that children, since
they are not adults, will not and probably cannot conduct their activities with the same prudence expected of adults. Even if the law were to expect of children the same prudence it demands of adults, it seems unlikely that juries would follow suit.

On the other hand, adults who are suing or being sued by minors find themselves in a position which, at least to them, smacks of injustice. At best, the adult parties find their minor opponents' acts gauged by a subjective standard of care; at worst, when the children are of tender years, they find that the minors are held incapable of negligent acts. Even more unjust would seem the position of a nine-year-old party, whose acts are judged by the subjective standard, who is suing or being sued by a seven-year-old party, who is by law incapable of negligence.

Some jurisdictions have sought to alleviate such injustices by applying an adult's objective standard of care to minors engaged in adult activities. While this adjustment to the law's favoritism of minors may serve a useful purpose in the most extreme cases, the courts' lack of candor in formulating their rationales limits the adult-activities doctrine's usefulness.

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

This approach, focusing on compensation, would be of lesser significance where the child is the plaintiff and his defendant accuses him of contributory negligence. Here the potential injustice to the adult is already prevented to some degree by the Nebraska Supreme Court's holdings that, even though a child may be incapable of contributory negligence, if the child's injuries resulted from his own acts and not those of the defendant, there can be no recovery. Even in this type of case, however, a compensation focus could result in fairer treatment of an adult defendant. If the child is included in a family health insurance policy, there is some argument that his insurer ought not be able to use the child's limited or complete incapacity to be
contributorily negligent to recover from the defendant on a subrogated claim.

In both of the above instances, whether the child is a defendant or plaintiff, the risk is thus placed on the primary insurer. With the primary insurer so liable, not only is the risk of loss capable of being effectively spread, but the necessity of litigation is minimized. Thereby, at least in cases in which insurance is present, the adult defendant or plaintiff is spared the harsher applications of the law's favoritism for the child charged with primary or contributory negligence.

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