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Suggested: An Objective Standard of Care for Minors in Nebraska

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Comments

RECOMMENDED: AN OBJECTIVE STANDARD OF CARE FOR MINORS IN NEBRASKA

I. INTRODUCTION

Tort law is not static. Existing as it does to provide a means of recompense for those injured by "conduct which is socially unreasonable,"[1] it follows that as society changes so too may social development recharacterize people and their conduct so that what was once realistic is now undesirable. This comment will be concerned with the changes that are occurring in the standard of care which is required of minors[2] participating in certain adult activities. In all of the cases adjudicated by the Nebraska Supreme Court in which a minor has been charged with negligence, contributory rather than primary negligence has been alleged against him.[3] With perhaps one exception,[4] the court has applied a subjective standard of care to the minor accused of contributory negli-

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[1] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 6 (3d ed. 1964).

[2] "Minor" for the purposes of this article means any person under 21 years of age. An interesting article, which concludes that 21 became fixed as the age of transfer from infancy to adulthood in the common law because that was the age at which the son became eligible for judicial combat and knight service, is James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22, 30 (1960).

[3] A minor may be charged with *primary* negligence when he is sued as a defendant. When the minor is a plaintiff in a negligence suit the defense of *contributory* negligence may be raised against him. A few courts hold that the plaintiff must plead and prove his freedom from contributory negligence. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 64, at 426 (3d ed. 1964).

[4] Johnston v. New Omaha Thomson-Houston Elec. Light Co., 78 Neb. 24, 110 N.W. 711 (1907), *aff'd on rehearing*, 78 Neb. 27, 113 N.W. 526 (1907), *aff'd on rehearing*, 86 Neb. 165, 125 N.W. 153 (1910). The *Johnston* case involved an unusual situation where the plaintiff's son, a boy age 12, persisted in attempting to touch the defendant's electric wires extending from the edge of a viaduct in spite of repeated warnings from his friends. In its second opinion on the case, the Nebraska Supreme Court said that irrespective of the defendant's negligence, the plaintiff could not recover because his son had been guilty of contributory negligence as a matter of law. 78 Neb. at 32, 113 N.W. at 527-28. The court did not mention applying a "subjective" standard of care to the boy. The *Johnston* case has since apparently been limited to its facts by the Nebraska Supreme Court. See Bear v. Auguy, 164 Neb. 756, 769, 83 N.W.2d 559, 567-68 (1957); Armer v. Omaha & C.B. St. Ry., 151 Neb. 431, 438-39, 37 N.W.2d 607, 611 (1949); Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 7, 165 N.W. 883, 884 (1917).

gence.[5] It is submitted that it is proper for the court to apply a subjective standard of care in cases where the minor is charged with contributory negligence; however, it ought to apply an objective or "reasonable man" standard of care when the minor is alleged to have committed acts constituting primary negligence and is found to have engaged in an adult activity potentially dangerous to the public.

II. APPLICATION OF THE OBJECTIVE STANDARD TO MINORS

A. Subjective and Objective Standards of Care

With but minor variation the rule in most jurisdictions as to the standard of care required of minors to defeat an allegation of negligence—be the negligence primary or contributory—is "that of a reasonable person of like age, intelligence, and experience under like circumstances."[6] Often called the "subjective" standard of care, it allows the trier of fact (usually a jury) to take into account the immaturity of the minor accused of negligence in terms of his particular mental capacity and his individual lack of knowledge and experience.[7] After making allowance for any unripened capacity and any gaps in experience and knowledge, the trier of fact—theoretically at least—then compares the minor's behavior at the time of the accident with how the prudent child of like capacity, experience and knowledge would have acted in the same situation.

This is different from the "objective" standard of care which adults must meet in order to escape being found either primarily or contributorily negligent. An adult has to act as a reasonable man of ordinary or average prudence would in the same or similar circumstances.[8] The reasonable *man* standard implies that a grown-up serves as bench mark for the objective standard of care. Exceptions are seldom made in negligence cases for the adult whose

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[5] Vacanti v. Montes, 180 Neb. 232, 237, 142 N.W.2d 318, 322 (1966); Bear v. Auguy, 164 Neb. 756, 768, 83 N.W.2d 559, 567 (1957); Armer v. Omaha & C.B. St. Ry. Co., 151 Neb. 431, 438, 37 N.W.2d 607, 611 (1949); Kauffman v. Fundaburg, 123 Neb. 340, 344, 242 N.W. 658, 660 (1932); Chicago, B. & Q. R.R. v. Grablin, 38 Neb. 90, 100, 56 N.W. 796, 798 (1893); Huff v. Ames, 16 Neb. 139, 141-42, 19 N.W. 623, 624 (1884).

[6] Restatement (Second) of Torts §§ 283A, 464(2) (1965).

[7] Shulman, *The Standard of Care Required of Children*, 37 Yale L.J. 618, 625 (1928); 1 F. Harper & F. James, The Law of Torts § 8.13, at 658 (1956).

[8] Reed v. Metropolitan Util. Dist., 173 Neb. 854, 857-58, 115 N.W.2d 453, 456 (1962); W. Prosser, Handbook of the Law of Torts § 32, at 153-54 (3d ed. 1964).

mental capacity falls below that of the "reasonable man,"[9] and the adult with a physical disability of which he is aware must proceed in public as would a reasonable man with such a handicap.[10]

B. Modification of the Subjective Standard of Care

While the majority of courts apply a subjective standard of care to minors charged with negligence regardless of the situation in which the accident took place,[11] a significant number have moved to a "reasonable man" or objective standard of care for the minor when he engages in certain "adult" activities. The objective standard of care has been imposed on minors driving automobiles,[12] motor scooters and motorcycles,[13] power boats[14] and airplanes.[15]

A number of rationales have been used by these courts to arrive at their holdings. Some have found that the legislature has impliedly demanded an objective standard for minors driving vehicles on public streets and highways by stipulating, via statute, that all drivers must meet the same licensing requisites[16] or obey the same safety rules.[17] *Allen v. Ellis*[18] is a good example of this approach. In this case plaintiff's young son was walking across a wide, well-lighted street at night when he was struck by the defendant motorist. Although only sixteen years old, the defendant

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9 Restatement (Second) of Torts § 283B (1965).

10 Restatement (Second) of Torts § 283C (1965).

11 W. Prosser, Handbook of the Law of Torts § 32, at 158-59 (3d ed. 1964).

12 Hill v. Transp. Co. v. Everett, 145 F.2d 746 (1st Cir. 1944); Wagner v. Shanks, 194 A.2d 701 (Del. 1963); Dawson v. Hoffmann, 43 Ill. App. 2d 17, 192 N.E.2d 695 (1963); Betzold v. Erickson, 35 Ill. App. 2d 203, 182 N.E.2d 342 (1962); Allen v. Ellis, 191 Kan. 311, 380 P.2d 408 (1963); Wilson v. Shumate, 296 S.W.2d 72 (Mo. 1956); Carano v. Cardina, 115 Ohio App. 30, 184 N.E.2d 430 (1961); Nielsen v. Brown, 232 Ore. 426, 374 P.2d 896 (1962).

13 Harrelson v. Whitehead, 236 Ark. 325, 365 S.W.2d 868 (1963); Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965); Powell v. Hartford Accident & Indem. Co., 398 S.W.2d 727 (Tenn. 1966).

14 Dellwo v. Pearson, 259 Minn. 452, 458, 107 N.W.2d 859, 863 (1961).

15 *Id.*

16 Wagner v. Shanks, 194 A.2d 701, 708 (Del. 1963); Betzold v. Erickson, 35 Ill. App. 2d 203, 209, 182 N.E.2d 342, 345 (1962); Allen v. Ellis, 191 Kan. 311, 317, 380 P.2d 408, 412-13 (1963); Nielsen v. Brown, 232 Ore. 426, 451-52, 374 P.2d 896, 908 (1962).

17 Harrelson v. Whitehead, 236 Ark. 325, 327, 365 S.W.2d 868, 869 (1963); Wilson v. Shumate, 296 S.W.2d 72, 77 (Mo. 1956); Daniels v. Evans, 224 A.2d 63, 65-66, (N.H. 1966).

18 191 Kan. 311, 380 P.2d 408 (1963).

reversing a judgment for the defendant, the Kansas Supreme Court held that the state licensing law demanded that he observe an objective standard when at the wheel:

> There is nothing in the Uniform Operators' and Chauffer's License Act (G.S. 1961 Supp., Ch. 8, Art. 2) that makes any exception to the standard of care and caution required as between minors and adults. The act was passed for the protection of the general public and users of the streets and highways and not for the protection of immature, inexperienced and negligent drivers.[19]

Other courts, in concluding that an objective standard is required of the minor when he participates in activities adult in nature, have anchored their holdings to a common law "rule of reason" rather than to any particular statute.[20] The leading case adopting the "rule of reason" theory is *Dellwo v. Pearson*.[21] The plaintiffs, husband and wife, were fishing on a lake and had lines trailing behind their boat. The defendant, a boy age twelve, was operating a boat with an outboard motor. He crossed behind the plaintiffs' boat and apparently caught the line being held by the plaintiff wife. Her line was suddenly pulled out to the end and her rod was forced downward, causing the reel to hit the side of the boat. The reel came apart and a piece of it penetrated the lens of the plaintiff wife's glasses and injured her eye. The plaintiffs sued in negligence and the case went to the jury with an instruction that the defendant was required to exercise only that degree of care which a child of like age, capacity and experience would use under the same or similar circumstances. Reversing a lower court judgment held a state driver's license. Over the plaintiff's objection, the trial court had instructed the jury that mere possession by the defendant of a valid and unrestricted driver's license did not in and of itself require him to exercise a grown-up standard of care. In

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[19] *Id.* at 317, 380 P.2d at 412-13.

[20] Dawson v. Hoffman, 43 Ill. App. 2d 17, 20, 192 N.E.2d 695, 696 (1963); Dellwo v. Pearson, 259 Minn. 452, 458, 107 N.W.2d 859, 863 (1961); Adams v. Lopez, 75 N.M. 503, 507, 407 P.2d 50, 52 (1965); Carano v. Cardina, 115 Ohio App. 30, 33, 184 N.E.2d 430, 432 (1961); Powell v. Hartford Accident & Indem. Co., 398 S.W.2d 727, 732 (Tenn. 1966).

The recent New Hampshire case of Daniels v. Evans, 224 A.2d 63 (N.H. 1966) seems to have been partially decided on a "rule of reason" basis. *Id.* at 64-66. Although *Daniels* did not explicitly overrule Charbonneau v. MacRury, 84 N.H. 501, 153 A. 457 (1931), it appears to necessarily have done so. *Charbonneau* was formerly the leading case holding that minors need observe only a subjective standard of care when driving automobiles. The rule of the *Daniels* case is that "a minor operating a motor vehicle, whether an automobile or a motorcycle, must be judged by the same standard of care as an adult . . . ." 224 A.2d at 66.

[21] 259 Minn. 452, 107 N.W.2d 859 (1961).

for the defendant, the Minnesota Supreme Court held that a minor was obligated to observe an objective standard of care when operating an automobile, airplane or power boat.[22] The court cited no licensing or safety statutes, articulating instead the following policy reasons for its decision:

> To give legal sanction to the operation of automobiles by teenagers with less than ordinary care for the safety of others is impractical today, to say the least. We may take judicial notice of the hazards of automobile traffic, the frequency of accidents, the often catastrophic results of accidents, and the fact that immature individuals are no less prone to accidents than adults. While minors are entitled to be judged by standards commensurate with age, experience, and wisdom when engaged in activities appropriate to their age, experience, and wisdom, it 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 . . . engaged in . . . childhood activities 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, airplane, or powerboat is a minor or an adult, and usually cannot protect himself against youthful imprudence even if warned.[23]

The *Restatement of Torts, 2d* appears to be in accord with the *Dellwo* case and others[24] in suggesting that, essentially on a common law basis, minors should be held to a "reasonable man" criterion of behavior when taking part in an adult pursuit.[25]

C. Policy Reasons for Holding Minors to an Objective Standard of Care

The arguments in favor of extending an objective standard of care to minors participating in certain adult activities are impressive and are as valid in Nebraska as in other states. Today large numbers of minor participate in activities of an adult nature. Considering motor vehicle operation as an example, it is estimated by the Nebraska Department of Motor Vehicles that out of about 917,000 total licensed drivers in Nebraska in 1966, 115,000 to 118,000 were in the age group from sixteen to twenty-one. In addition, approximately 4,000 restricted licenses were held by drivers from ages fourteen to sixteen,[26] and there were about 32,000 learner's

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22 *Id.* at 458, 107 N.W.2d at 863.

23 *Id.*

24 Dawson v. Hoffmann, 43 Ill. App. 2d 17, 192 N.E.2d 695 (1963); Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965); Carano v. Cardina, 115 Ohio App. 30, 184 N.E.2d 430 (1961); Powell v. Hartford Accident & Indem. Co., 398 S.W.2d 727 (Tenn. 1966).

25 Restatement (Second) of Torts § 283A, comment c (1965).

26 Neb. Rev. Stat. § 60-407 (3) (Supp. 1965), provides that a minor over

permits issued for drivers of age fourteen and over.[27]

Minors are usually involved in a considerable number of the accidents which arise out of the adult activity in which they engage. Again using motor vehicle operation as an example, in Nebraska during 1965 out of a total of 48,728 drivers involved in motor vehicle accidents, 9,461 were drivers age nineteen or under and 17,786 were drivers age twenty-four or under. Of the 457 drivers involved in fatal accidents in the state in 1965, 68 were age nineteen or under and 143 were age twenty-four or under.[28]

As was pointed out by the Minnesota court in the *Dellwo* case, the rest of the public often does not know that a minor is the one engaging in the adult activity and—even if the minor is recognized as such—time is not always available for those meeting him to take extra precautions against any mistakes he may make.[29]

The insurance factor cannot be overlooked as a policy reason for demanding an objective standard of care from minors participating in various adult pursuits. Most motor vehicles operated on the streets and highways by minors are covered by liability policies, ordinarily carried by their parents.[30] Hence the financial consequences of minors' negligent driving does not commonly fall upon them as individuals—rather it is being borne by and is distributed among their insured parents.[31]

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the age of 14 who lives outside metropolitan, primary and first-class cities may obtain a limited permit to drive to and from school if he lives at least 1½ miles from school. However, the minor must pass a driver's examination to obtain this permit.

27 NEB. REV. STAT. § 60-407(3) and (5) (Supp. 1965), authorizes certain minors who are over 14 and all minors who have reached age 15 to obtain a learner's permit which allows them to drive on the highway if accompanied by a licensed driver 21 years of age or older.

28 ACCIDENT RECORD BUREAU, NEB. DEP'T. OF RDS., STANDARD SUMMARY OF NEBRASKA MOTOR VEHICLE TRAFFIC ACCIDENTS FOR JANUARY—DECEMBER (1965). These figures exclude the drivers of vehicles involved in accidents while in proper parking positions.

29 Adams v. Lopez, 75 N.M. 503, 507, 407 P.2d 50, 52 (1965).

30 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 13.4 at 769 (1956); Notes, *Torts: Application of Adult Standard of Care to Minor Motor Vehicle Operators*, 1962 DUKE L.J. 138, 141-42; 24 OHIO ST. L.J. 401, 404 (1963). The Nebraska Motor Vehicle Safety Act provides that after a driver has had an accident in which any person is killed or injured or in which damage is in apparent excess of $100, the driver or the owner, in order to prevent suspension of their driver's license, must give security of not less than $500 to satisfy any judgment which may arise against them from the accident, or else show that the motor vehicle involved was insured for certain amounts. NEB. REV. STAT. §§ 60-505, 60-507, 60-508 (Supp. 1965) and 60-509 (Reissue 1960).

31 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 13.4 at 770 (1956).

Imposing an objective standard of care on minor drivers might increase the cost of their parents' insurance because jurors would more frequently find that the minor was negligent. But it seems more reasonable for the insured parents to bear this extra burden as a class rather than to leave the individual plaintiff having to pay the entire cost of his injury by permitting the minor to wear the protective mantle of a child's standard of care.[32] Also to be considered is that the minor usually has the sanction of his parents when operating a motor vehicle.

D. Should the Nebraska Supreme Court Adopt the "Statutory" or the "Common Law" Approach?

If the Nebraska Supreme Court does see fit to apply an objective standard of care to minors when they participate in certain adult activities, the question then becomes: which would be the best approach for the court to take—statutory or common law?

Should it take the statutory approach, the court would have little difficulty finding solid ground to stand on in the various Nebraska licensing and safety statutes. Considering statutes pertaining to motor vehicles as an example, the court might conclude from a reading of these statutes that the legislature has impliedly demanded application of an objective standard to the minor when he is driving a motor vehicle on the public roads. Nebraska's main licensing statute provides that "no person" may operate a motor vehicle on streets, alleys or public highways in the state without first obtaining a license.[33] Other statutes stipulate that no "appli-

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[32] Neb. Rev. Stat. § 60-509.01 (Supp. 1965) provides that every liability policy issued on a motor vehicle "registered or principally garaged" in Nebraska must contain a provision insuring the owner and user thereof against legally recoverable damages caused them by owners or operators of uninsured or hit-and-run motor vehicles. This "uninsured and hit-and-run" coverage goes into every liability policy unless the insured rejects it. In view of the statute's wording, the chances of a plaintiff who has been injured by an uninsured minor recovering from his own insurance company would be much improved if the minor were held to an objective standard of care. The statute stipulates that the policy must insure the plaintiff (within certain dollar limits) for damages he is "legally entitled" to recover from the defendant. By holding the minor defendant to an objective standard of care the plaintiff could more easily show that the defendant is legally liable.

[33] Neb. Rev. Stat. § 60-403 (Supp. 1965). There are certain exceptions to the licensing requirement, for example where the party possesses a learner's permit. It may be noted that the definition of "motor vehicle" in Neb. Rev. Stat. § 60-401 (Supp. 1965) encompasses "all vehicles propelled by any power other than muscular power, except self-propelled invalid chairs, farm tractors used occasionally outside of general farm usage, road rollers, and any vehicle which run only on

cant" may secure a driver's license until he passes certain physical and driving skill tests.[34] Nebraska safety statutes are so written to make "any person" who drives a motor vehicle in indifferent, wanton or willful disregard for the safety of persons or property guilty or reckless, or willful reckless, driving.[35]

All of these statutes refer to "person" or "applicant" in general and make no distinctions or allowances for age.[36] On the basis of the licensing statutes it could be maintained that after a minor is old enough to qualify for a driver's license he must, in addition to possessing adequate physical capabilities, meet an adult standard of operating skill in order to get the license. If, even without securing a license, the minor proceeds to operate a motor vehicle on the public streets and highways, he ostensibly must observe the common standard of care implicit in the safety and speed limit statutes.[37]

Nevertheless the Nebraska Supreme Court would do well to base its decision on a common law "rule of reason" theory if it

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rails or tracks . . . ." This definition would include motorcycles, motor scooters and motor bicycles. NEB. REV. STAT. § 60-403 (Supp. 1965) requires all persons operating such motor vehicles to have a license for that purpose. Hence it would seem that all operators of two-wheeled motor-powered vehicles must have driver's licenses to operate them on streets and highways in Nebraska. Undoubtedly most of the drivers of these two-wheeled vehicles are minors. Whether or not these minors all hold driver's licenses is another question.

34 NEB. REV. STAT. §§ 60-407, 60-408 (Supp. 1965).

35 NEB. REV. STAT. §§ 39-7,107, 39-7,107.02 (Reissue 1960). See also §§ 39-7,108 and 39-723 (Supp. 1965) (speed).

36 See NEB. REV. STAT. § 81-815.10(1) (Supp. 1965) which provides that "no person shall operate any motorboat or vessel, or manipulate any water skis, surfboard, or similar device in a reckless or negligent manner so as to endanger the life, limb, or property of any person." NEB. REV. STAT. § 3-129 (Reissue 1962) states in part that "it shall be unlawful for any person to engage in aeronautics as an airman in this state unless he has . . . an effective certificate of registration of an appropriate airman's license, certificate or permit . . . ." Excluded from the requisites of § 3-129 are certain airmen traveling interstate, airmen from other states if properly licensed in their home state, and persons learning to fly if with an instructor.

37 The situation may arise where a minor accidentally sets a motor vehicle into motion on a public road. For example, the young 4 year-old, momentarily left alone in the car while his parent goes into a store, may release the emergency brake and cause the car to roll out into the street where it collides with another vehicle. Here, an objective standard of care should not be required of the minor because he is not really driving the car. Moreover the owner of the other vehicle would in all likelihood sue the parent for his negligence in leaving the young minor unattended in the car.

decides to apply an objective standard of care to minors pursuing adult activities which involve danger to the public. The most obvious limitation to the statutory approach is that it would restrict the courts to imposing an objective standard on the minor only when he participates in an adult activity governed by statute. Certain types of adult activities in which minors engage are not regulated by statute. Nonetheless such activities seem appropriate for imposition of a "reasonable man" standard of care on the minor who pursues them. Hunting with a gun, setting traps and shooting arrows are three examples.[38]

The same policy reasons for applying an objective standard of care to the minor when he is driving an automobile are present in the situations represented by these examples. Often other members of the public are unaware that it is a minor who is involved in the activity, therefore, they cannot take additional measures to avoid an accident. Also the minor may, while engaging in such an activity, be covered under a comprehensive personal liability policy carried by his parents. The personal liability provisions in many homeowners' package policies, an increasingly popular type of insurance protection, appear broad enough to cover, for example, damages from hunting accidents caused by an insured.

E. A Problem in Applying the Objective Standard of Care to Minors

One question left unanswered by courts which have applied the objective standard of care to minors is: what are all of the adult activities in which minors' participation should subject them to a grown-up standard?

In all of the cases cited above in which an objective standard was imposed on the minor, the minor was operating a motor-powered vehicle or boat. One could argue that these courts intend the driving of motor-powered transportation devices to be the only area in which minors should be held to an adult standard, and that when the courts use the term "adult activity" to characterize the minor's pursuit, they use it only in this narrow sense. It is indeed possible that the underlying rationale of these courts is that when a minor operates a self-propelled vehicle, boat or airplane he is obliged to follow a higher standard of care than the subjective standard to which he is ordinarily held—which higher standard is for him the objective standard—because he is operating a *machine* which is potentially dangerous to others.

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[38] There are of course state statutes regulating the taking of fish and game. See Neb. Rev. Stat. §§ 37-101 through 37-614 (Reissue 1960 and Supp. 1965).

But regardless of the fact that in all of the precedent cases cited in which the courts have held minors to an objective standard the minor was operating a motor-driven transportation device, it is contended that the objective standard should not be reserved for application only to those minors involved in such activities. This would unnecessarily limit the rule. Examples of other situations where an objective standard might reasonably be applied to the minor are, as previously mentioned, when he is hunting with a gun, setting traps, or shooting arrows. Although the minor is not operating a motor-driven machine in any of these instances, he is still carrying on a pursuit which involves considerable danger to others.

"Adult activity" may not seem a proper term for all of the activities in which, if the minor engages, the courts have applied or will apply to him a "reasonable man" standard of care. For example, most motor scooters and motor bicycles are probably not operated by adults.[39] But whatever the name given to the area in which these activities are grouped, the area should purposely be left broad so that courts may add activities to it as they determine that minors participating therein must observe an objective standard of care.

Some may insist that it is against logic to say that a minor should in any instance be held to an objective or "reasonable man" standard of care for the simple reason that a minor is not an adult and so cannot act like one. Without belaboring the obvious counterargument that drawing a rigid dividing line between mi-

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[39] Three years after the Arkansas Supreme Court had decided, primarily on the basis of the state's safety statutes pertaining to motor vehicles, that a 15 year old motorcycle operator was required to observe an objective standard of care, Harrelson v. Whitehead, 236 Ark. 325, 365 S.W.2d 868 (1963), it was urged upon the court that a 7 year old bicyclist should be held to an objective standard of care because the motor vehicle statutes also applied to persons riding bicycles. The court (with one dissent) refused to accept this argument, first pointing out that motor vehicle operators had to hold driver's licenses whereas bicycle drivers did not. The court continued: "There can be no serious comparison of a sixteen-year-old youth driving an automobile with a seven-year-old child riding a bicycle—as much a plaything as a means of transportation. The automobile poses all the threats to human life that led to our decision in the Harrelson case, but the bicycle poses no threat of serious injury to anyone except the child himself." Williams v. Gilbert, 395 S.W.2d 333, 335 (Ark. 1965). The Nebraska Supreme Court has recently held that a bicycle is a vehicle within the meaning of the state's rules of the road statutes, and that a minor bicycle operator must observe these rules. Sacca v. Marshall, 180 Neb. 855, 146 N.W.2d 375 (1966). However, the decision did not impose a new standard of care on a minor bicycle operator.

nority and majority at age twenty-one does not itself admit of irrefutable logic, it is well to look at what the courts which have applied an objective standard to the minor are trying to accomplish. In essence, these courts are making provision for an instruction to the jury that a minor must observe a higher standard of care than he normally does when he engages in certain activities dangerous to the rest of the public which the courts have for convenience labeled "adult." The "reasonable man" standard of care has been seized upon by these courts as an effective means of impressing on the jury that when a minor participates in such activities he must behave with much more care than he customarily does.

F. A Subjective Standard is Proper for Minors When Contributory Negligence[40] Is Alleged

Where the minor is the plaintiff and contributory negligence is raised as a defense against him, policy reasons which support applying an objective standard of care vis-a-vis primary negligence no longer obtain, albeit the minor has engaged in the identical activity in both instances. "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm."[41] It involves conduct by the plaintiff harmful to himself rather than to others[42] and becomes necessary as a defense only after the defendant has been shown to have been negligent in causing injury to the plaintiff.

Requiring the minor accused of contributory negligence to meet a "reasonable man" standard of care would diminish his prospects of recovering from a negligent defendant. It would hamper the desirable social policy of distributing the plaintiff's loss among the numerous members of the class of insureds to which the defendant would in most instances belong. At the same time it would increase the possibility of the plaintiff having to shoulder the entire cost of his injury.[43]

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[40] Admittedly, some courts have applied an objective standard of care to minors charged with contributory negligence. See Harrelson v. Whitehead, 236 Ark. 325, 365 S.W.2d 868 (1963); Wilson v. Shumate, 296 S.W.2d 72 (Mo. 1956); Daniels v. Evans, 224 A.2d 63 (N.H. 1966); Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965); Powell v. Hartford Accident & Indem. Co., 398 S.W.2d 727 (Tenn. 1966).

[41] Restatement (Second) of Torts § 463 (1965).

[42] James, *Contributory Negligence*, 62 Yale L.J. 691, 723 (1953).

[43] James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 Yale L.J. 549, 550 (1948); Notes, *Torts: Application of Adult*

Another reason for imposing an objective standard of care on the minor charged with primary negligence—that the rest of the public is not able to look out for the immaturity of the minor—also loses validity when contributory negligence is alleged. If the defendant was negligent towards the minor plaintiff—which must be the situation before the defense of contributory negligence may be activated—he should not be able to complain that he might not have proceeded negligently had the plaintiff been observing a grown-up standard of care.

In most jurisdictions, if a negligent defendant can show negligence by the plaintiff which contributed to the plaintiff's injury, the latter is entirely cut off from recovery unless the defendant had the last clear chance to avoid the accident.[44] The harshness of this rule has been mitigated somewhat in Nebraska by a comparative negligence statute which provides that if the plaintiff's contributory negligence is slight and the defendant's primary negligence is gross in comparison, the plaintiff's negligence will only go to lessen his damages and not bar them completely.[45] Contributory negligence as a defense has also met with increasing disfavor by the courts.[46] It should not be given sustenance by holding that a minor must observe a "reasonable man" standard of care to defeat it.[47]

III. CONCLUSION

The Nebraska Supreme Court should require application of an objective or "reasonable man" standard of care to minors charged with primary negligence in suits arising out of their participation in those adult activities which are potentially dangerous to the rest of the public. Where minors engage in such activities in any ap-

Standard of Care to Minor Motor Vehicle Operators, 1962 DUKE L.J. 138, 142; 24 OHIO ST. L.J. 401, 404 (1963).

44 RESTATEMENT (SECOND) OF TORTS § 467 (1965).

45 NEB. REV. STAT. § 25-1151 (Reissue 1964).

46 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 64, at 428 (3d ed. 1964).

47 The situation may arise where both the defendant and the plaintiff in the negligence suit are minors of about the same age, and both were involved in the same kind of activity, for example, driving a car. It would seem incongrous to the jury, some might contend, to have the judge charge them that the minor defendant must be found to have obeyed an adult standard of care to defeat the allegation of primary negligence against him, while the minor plaintiff need be found to have followed only a subjective standard of care to defeat the allegation of contributory negligence against him—when both minors were driving cars at the time of the accident. The judge could help remove this apparent incongruity by giving to the jury a short instruction on the theory of contributory negligence.

preciable number they are usually involved in many of the accidents which arise therefrom. Often the rest of the public receives no advance notice that it is a minor who is pursuing the adult activity and they have no opportunity to watch out for any display of immaturity on his part. Although application of an objective standard of care to minor defendants would probably increase the incidence of recovery by plaintiffs, the resulting financial burden would be distributed mostly over a large class of insured parents. Such seems a better consequence than the individual plaintiff bearing the entire cost of his injury because the jury was instructed that the minor only had to meet a subjective standard of care.

However, the subjective standard of care should be retained for the minor charged with contributory negligence. Imposing a "reasonable man" standard of care on the minor plaintiff against whom contributory negligence is alleged would lessen the liklihood of the cost of the plaintiff's injury being distributed among the large class of insureds to which the defendant in most instances would belong and, at the same time, increase the probability of the plaintiff assuming the entire cost of his injury himself.

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