

# NEGLIGENCE DEFENSES AND AGE OF RISK APPRECIATION IN CHILD SEXUAL ABUSE CLAIMS

IN THE 50 STATES AND DISTRICT OF COLUMBIA

JUNE 2013



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June 2013

Dear Clients:

It is with great pleasure that Eagle International Associates, Inc. presents its ***Negligence Defenses and Age of Risk Appreciation in Child Sexual Abuse Claims In the 50 States and District of Columbia*** booklet. Eagle members from all states contributed to this publication. It is an example of the collective efforts of Eagle providing both service and benefits to clients. We hope that you will find this booklet informative and useful in your respective practices and businesses. We invite you to contact any Eagle member with questions or comments.

With Best Wishes,

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## ALABAMA

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The rule in Alabama is set out in several cases, but most clearly in *King v. South*, 352 So. 2d 1346 (Ala. 1977). “Infants,” defined as children under 7, are incapable of contributory negligence. Children between the ages of 7 and 14 are prima facie incapable of contributory negligence (See *Id.* at 1347, citing *Alabama Power Co. v. Taylor*, 306 So.2d 236 (Ala. 1975), *Birmingham Ry., Light & Power Co v. Landrum*, 45 So. 198 (Ala. 1907)).

A child aged 7-14 can be shown to be capable of contributory negligence, however, “by showing that he possesses that discretion, intelligence, and sensitivity to danger which the ordinary child, who is 14 years of age, possesses.” *Id.* at 1347, citing *McGough Bakery Corp. v. Reynolds*, 35 So.2d 332 (Ala. 1948), *Patrick v. Mitchell*, 6 So. 2d 889 (Ala. 1942).

For individuals over 14 who are still minors, proving contributory negligence requires proof “that the plaintiff had knowledge of the danger and appreciated the danger under the circumstances” and still put himself in harms way. *Jones v. Power Cleaning Contractors*, 551 So. 2d 996, 999 (Ala. 1989). Applying this standard to a child requires the finder of fact to examine 7 elements: “(1) the intelligence of the child; (2) the capacity of the child to understand the potential danger of the hazard; (3) the child’s actual knowledge of the danger; (4) the child’s ability to exercise discretion; (5) the educational level of the child; (6) the maturity of the child; and (7) the age of the child.” *Id.*, citing *Lyle v. Boulder*, 547 So.2d 506 (Ala. 1989).

## ALASKA

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Children under seven years of age are “rebuttably presumed to be incapable of contributory negligence. As to such a child there are two issues to be decided: (1) Whether the child has the capacity to be contributorily negligent, and (2) whether he was in fact contributorily negligent.” *Patterson v. Cushman*, 394 P.2d 657, 660 (Alaska 1964).

*Patterson* is red-flagged in Westlaw, because a portion of its holding not relevant to this issue was not followed in an unrelated case. Its holding with respect to this issue is still good law. See, e.g., *T.P.D. v. A.C.D.*, 981 P.2d 116, 120 n.14 (Alaska 1999).

## ARIZONA

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The general rule is that children are held to the standard of care that is ordinarily exercised by children of the same age, intelligence, knowledge and experience under the existing circumstances. RAJI (Civil) 4<sup>th</sup>, Negligence 5; *Beliak v. Plants*, 84 Ariz 211, 326 P.2d 36 (1958); *First National Bank of Arizona v. DuPree*, 136 Ariz.296, 665 P.2d 1018 (App.1983; *Ruiz v. Faulkner*, 12 Ariz.352, 470 P.2d 500 (1970).

The *Ruiz* case applied the general rule to an 8 ½ year old child. There are at least two older cases that have held that a 4 ½ year old child is incapable “per se” of contributory negligence. *Vigue v. Noyes* 113 Ariz 237, 550 P.2d 234 (1970) (Arizona courts have not addressed whether there is age cutoff where the general rule should not apply.)

An exception to the general rule is where children operate motor vehicles. A child operating a motor vehicle will be held to the same standard as an adult. *Burns v. Wheeler*, 103 Ariz. 525, 446 P.2d 925 (1968).

## ARKANSAS

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Children may be held negligent and, in the same manner as adults, their negligence can bar recovery. The general rule is that minor is not held to the same standard of care as an adult. Rather, “ordinary care” for a minor is that degree of care which a reasonably careful minor of the same age and intelligence would use under the circumstances presented. *Gates v. Plummer*, 173 Ark. 27, 291 S.W. 816 (1927). The general rule does not apply when the minor

is licensed to drive a vehicle (*Harrelson v. Whitehead*, 236 Ark. 325, 365 S.W. 2d 868 (1963)) or when a minor is performing or participating in an activity regulated by a regulation or statute which does not differentiate between the standard of care expected of the participant (i.e., a minor or an adult) (*Newman v. Crawford Const. Co.*, 303 Ark. 641, 7909 S.W.2d 531 (1990)).

Arkansas has not specifically defined an age where one is presumed to appreciate risk.

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As a matter of law, it is possible for children to be negligent and contributory negligent. Under California law, a child must use that degree of care ordinarily exercised by children of like age, intelligence, and experience in a similar situation. (See *Cummings v. County of Los Angeles* (1961) 56 Cal.2d 258, 263.) However, a child is held to an adult standard when engaged in an adult activity such as driving an automobile. (See *Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 731 (motorcycle); see *Schauf v. Southern Cal. Edison Co.* (1966) 243 Cal.App.2d 450, 457 (automobile).) A child younger than 5 years is, as a matter of law, incapable of contributory negligence. (See *Christian v. Goodwin* (1961) 188 Cal.App.2d 650.)

## COLORADO

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Children under the age of seven are incapable of negligence. Colo. Jury Instr., Civil 9:9 (4th ed.); see also *Fletcher v. Porter*, 754 P.2d 788 (Colo. App. 1988) (citing *Benallo v. Bare*, 162 Colo. 22, 26, 427 P.2d 323, 325 (1967)).

A child seven years of age or older at the time of an occurrence is under a duty to use that degree of care which children of similar age, experience and intelligence would ordinarily use under the same or similar circumstances to protect themselves and/or

others from bodily injury, death, and/or property damage. Colo. Jury Instr., Civil 9:9 (4th ed.); see also *Calkins v. Albi*, 163 Colo. 370, 431 P.2d 17 (1967); *Wales v. Howard*, 164 Colo. 167, 171, 433 P.2d 493, 495 (1967). This applies to cases of negligence and contributory negligence. See *LeCoq v. Klemme*, 28 Colo. App. 590, 592, 476 P.2d 280, 281 (1970). However, in cases where a minor operates a motor vehicle, that minor is held to the same duty of care as an adult driver. Colo. Jury Instr., Civil 11:5 (4th ed.); see also *Doran v. Jensen*, 504 P.2d 354, 358 (Colo. App. 1972).

Additionally, C.R.S. § 18-1-801 establishes that children under the age of ten cannot be found guilty of any criminal offense. Therefore, children under the age of ten cannot be found negligent per se for violating a statute. See *Calkins v. Albi*, 163 Colo. 370, 431 P.2d 17 (1967).

## CONNECTICUT

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In Connecticut, the degree of care required of children is such care as may reasonably be expected of children of similar age, judgment and experience. *Neal v. Shiels, Inc.*, 166 Conn. 3, 11, 347 A.2d 102 (1974). In ordinary negligence cases, including the operation of a motor vehicle, the standard of care of a minor is measured by the standard of conduct for the individual which will vary according to the age, judgment and experience of the minor. *Mahon v. Heim*, 165 Conn. 251, 254-55, 332 A.2d 69 (1973). However in statutory negligence cases, where a violation of the statute is negligence per se, such negligence only applies to minors of the age of sixteen or over pursuant to C.G.S. § 52-217. *Id.*

## DELAWARE

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Delaware's statutory framework of comparative negligence is the well-established principle that a child's negligence is to be determined by a standard of care which is based upon an

individualized assessment of the child's age, intelligence, maturity, and other factors relevant to the conduct involved. *Pokoyski v. McDermott*, Del. Supr., 53 Del. 253, 167 A.2d 742 (1961). As such, any attempt to determine whether a particular child is of an "age to appreciate risk", in other words, capacity, is necessarily determined on a case-by-case basis. Below is a good overview of the basic underlying principles that support this case-by-case framework.

While it is generally recognized that the rule of contributory negligence is modified as to children, it is, nevertheless, the duty of children to exercise that degree of care which children of the same age are accustomed to exercise under like circumstances. Courts have found it impossible to lay down a fixed and fast rule for determination in every case as to at what age and under what circumstances the child may be guilty of contributory negligence. The maturity and capacity of the child, her ability to understand and appreciate the danger, her familiarity with the surroundings, together with the circumstances under which the accident occurred, must all be taken into consideration in determining whether or not she was guilty of contributory negligence. *Igle v. People's Ry. Co.*, 28 Del. 374, 5 *Boyce*, Del., 374, 93 A. 666; *Travers v. Hartmann*, 28 Del. 302, 5 *Boyce* 302, 92 A. 855; *Linthicum v. Truitt*, 25 Del. 338, 2 *Boyce* 338, 80 A. 245; *Cecchi v. Lindsay*, 24 Del. 185, 1 *Boyce* 185, 75 A. 376; *Diamond State Iron Co. v. Bell*, 16 Del. 303, 2 *Marv.* 303, 43 A. 161.

The plaintiff in the seminal *Pokoyski* case was a normal child for her age. She was intelligent. She was familiar with the neighborhood. The plaintiff testified that she was looking to the west when she was about to step past the parked car and saw no car coming; that she had traveled in the street a short distance before she was struck in the rear by defendant's car proceeding very slowly. Unquestionably, these circumstances, together with other circumstances of the accident, raise a substantial question as to whether or not she was guilty of contributory negligence. It is only where the facts are undisputed and where reasonable minds can draw but one inference therefrom that the issue of contributory negligence becomes a matter of law.

No case in Delaware has been cited to the *Pokoyski* court, and its own investigation failed to disclose any case, where any court in this Delaware held a minor plaintiff of approximately the same age

as the plaintiff in that case guilty of contributory negligence as a matter of law. A number of other cases have held under somewhat different circumstances that this was a matter for the jury to determine. *Igle v. People's Ry. Co.*, *supra*; *Travers v. Hartmann*, *supra*; *Linthicum v. Truitt*, *supra*; *Cecchi v. Lindsay*, *supra*; *Diamond State Iron Co. v. Bell*, *supra*. As such, the *Pokoyski* court held that under such circumstances it cannot be said plaintiff was guilty of contributory negligence.

## DISTRICT OF COLUMBIA

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Children may be negligent and their contributory negligence may bar recovery. Children are held to the same degree of care that is exercised by an ordinary child of comparable age, education, knowledge, experience, and capacity. *Stevens v. Hall*, 391 A.2d 792, 796 (D.C. 1978); *White v. United States*, 692 A.2d 1365, 1369, n.4 (D.C. 1997); *Cleveland Park Club v. Perry*, 165 A.2d 485, 487-88 (D.C. Nov. 16, 1960). However, minors operating motor vehicles and motorcycles are held to the standard of care applicable to adults. *Herrell v. Pimsler*, 307 F. Supp. 1166, 1172 (D.D.C 1969).

## FLORIDA

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The Courts of Florida have adopted a common law rule for children under the age of six wherein they are conclusively presumed incapable of committing comparative negligence. *Swindell v. Hellkamp*, 242 So. 2d 708 (Fla. 1970).

Florida law provides that children above the age of six can be negligent. The jury instruction for negligence of a child above the age of six provides "reasonable care on the part of a child is the care that a reasonable careful child of the same age, mental capacity, intelligence, training and experience would use under like circumstance." Florida Standard Jury Instruction 401.5.

A minor of age who assumes the responsibilities for the operation of a motor vehicle, is held to an adult standard where the child may be charged with primary or comparative negligence. *Medina v. McAllister*, 202 So. 2d 755 (Fla. 1967).

Florida eliminated contributory negligence many years ago, and instead adopted comparative negligence.

## GEORGIA

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In Georgia, children below the age of 13 are immune from tort liability. O.C.G.A. § 51-11-6; *Horton v. Hinely*, 261 Ga. 863, 864, 413 S.E.2d 199 (1992); *Sorrells v. Miller*, 218 Ga. App. 641, 642, 462 S.E.2d 793 (1995). Additionally, the age of criminal responsibility in Georgia is 13 years at the time of the act, omission, or negligence constituting the crime. O.C.G.A. § 16-3-1; *Sorrells v. Miller*, 218 Ga. App. 641, 642, 462 S.E.2d 793 (1995). Further, children below the age of criminal responsibility – 13 years old – are not capable of negligence *per se* because, under Georgia law, such a child could not be guilty of violating criminal law. *Sorrells v. Miller*, 218 Ga. App. 641, 642, 462 S.E.2d 793 (1995). Nonetheless, children may be negligent, and their contributory negligence may bar recovery. Children are held to a standard of due care. The term "due care," when used in reference to a child of tender years, is such care as the child's mental and physical capacities enable him to exercise in the actual circumstances of the occasion and situation under investigation. O.C.G.A. § 51-1-5.

There is no definition for "tender years," either in statute or in the case law. Despite authority, not yet overruled, holding that children under 4 years of age are conclusively presumed to be incapable of contributory negligence, (see, e.g., *English v. 1st Augusta Ltd.*, 614 F. Supp. 1406 (1985) (holding child of 3 conclusively presumed incapable of contributory negligence); *Valdosta Housing Auth. V. Finessee*, 160 Ga. App. 552, 287 S.E.2d 569 (holding child of four or less conclusively presumed incapable of contributory negligence)), the current trend demonstrates that the court will not mandate a specific age cut-off for contributory negligence. *Clanton v. Gwinnett Co. Sch. Dist.*, 219 Ga. App. 343,

464 S.E.2d 918 (1996) (citing Georgia Supreme Court decision of *Ashbaugh v. Trotter*, 237 Ga. 46, 226 S.E.2d 736 (1976), and holding that the standard set forth in O.C.G.A. § 51-1-5 governs the issue of contributory negligence of children). The reasoning is “that children naturally mature and develop their faculties and capacities at different speeds and ages.” *Clanton v. Gwinnett Co. Sch. Dist.*, 219 Ga. App. 343, 345, 464 S.E.2d 918 (1996). There is no bar to raising the defense of assumption of the risk in cases involving negligence of children. Typically, whether the minor assumed the particular risk is a jury question, except in plain, palpable, and indisputable cases. *Goodman v. City of Smyrna*, 230 Ga. App. 630, 631, 497 S.E.2d 372 (1998). The defendant must prove the plaintiff (1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed herself to the risks. *Goodman v. City of Smyrna*, 230 Ga. App. 630, 631, 497 S.E.2d 372 (1998). In *Goodman*, the Court determined that for children between the ages of 7 and 14, there is no presumption that the child did or did not exercise due care or does or does not have sufficient capacity to recognize danger or to observe due care. Instead, for children within these ages, these issues hinge on the circumstances of the case and the capacity of the particular child, which follows the reasoning set forth above in *Clanton* and *Ashbaugh*.

Generally, however, the dangers of fire, water, and falling from heights are considered to be understood even by young children, absent factors creating additional risks which could not be appreciated by the child. *Goodman v. City of Smyrna*, 230 Ga. App. 630, 632, 497 S.E.2d 372 (1998) (affirming summary judgment to Defendant City on theory of assumption of the risk, where eleven-year-old girl was killed when she roller-skated down a steep incline with sharp curve, lost her balance, and skated over drop-off into rocky creek bed, where child was mature and intelligent for her age; knew of danger having skated many times on same street with hill; and aware of danger of being injured by falling from height).

## HAWAII

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Hawaii's Supreme Court held in *Ellis v. Mutual Telephone Co.*, 29 Haw. 604, 624 (1927), that five-year-olds are incapable of contributory negligence. In *Grace v. Kumalaa*, 47 Haw. 281, 286-87 (1963), the court declined to apply that rule to six-year-olds. It held there that children can be contributorily negligent – “Evidence as to experience and mental capacity is [ ] necessary not only to the application of the standard of care required of a child, but also, preliminarily, to show that the child was capable of some degree of care.” *Grace* 47 Haw. at 286-87.

## IDAHO

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Generally, a child is held to a standard of care which could be expected from an ordinary child of the same age, experience, knowledge, and discretion. *Davis v. Bushnell*, 93 Idaho 528, 530, 465 P.2d 652, 654 (1970); Idaho Civil Jury Instruction 2.02. Idaho courts or statutes have not defined a precise age for children to be capable of negligence as a matter of law. Instead, it is left to juries who are “fully capable of resolving such issues, and the determination thereof may safely be committed to them.” *Mundy v. Johnson*, 84 Idaho 438, 447, 373 P.2d 755, 760 (1962) (holding the capability of a five-year old who dashed into the street was an issue for the jury).

An exception exists in the case of a child operating a motor vehicle on a public highway, where the child is held to an adult standard of care. *Goodfellow v. Coggburn*, 98 Idaho 202, 203, 560 P.2d 873, 874 (1977); see also *Krieger v. Krieger* by *Howell*, 109 Idaho 704, 706, 710 P.2d 614, 616 (Ct. App. 1985).

## ILLINOIS

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A child of “tender years” is defined as a “person of such immature years as to be incapable of exercising the judgment, intelligence, knowledge, experience and prudence demanded by the standard of the reasonable man applicable to adults” and “who, by reason

of his youth, lacks the capacity to know or realize the danger.” See Restatement (Second) of Torts § 283 (1971).

A popular form of the tender years doctrine is the “Illinois Rule.” *Lester v. Sayles*, 850 S.W.2d 858, 865 (Mo. 1993). Courts which adopt the Illinois Rule hold that a child under **seven** years of age is **conclusively presumed** to be incapable of contributory negligence as a matter of law. *Mort v. Walter*, 98 Ill.2d 391, 392, 457 N.E.2d 18, 19-20 (1983). Additionally, children seven to fourteen years of age are **presumed** to be incapable of negligence. *Mort*, 98 Ill.2d at 392. However, this **presumption is rebuttable and weakens as the fourteenth year approaches**. *Id.* Furthermore, under the Illinois Rule, children over the age of fourteen are presumptively capable of negligence and the burden shifts to the minor to prove *lack* of capacity. *Id.*

The Illinois Supreme Court judicially adopted the Illinois Rule in *Chicago City Railway Co. v. Tuohy* in the early twentieth century. 196 Ill. 410, 412, 63 N.E. 997, 998 (1902). In formulating this rule, the Illinois Supreme Court utilized the state common law rules exempting infants under the age of seven from responsibility for criminal acts. *Toney v. Mazariegos*, 166 Ill.App.3d 399, 404, 519 N.E.2d 1035, 1038 (1st Dist. 1988) (citing *Tuohy*, 196 Ill. at 412). In adopting the Illinois rule our supreme court stated that it was utilizing the analogy of the common law rule exempting infants under the age of seven from criminal responsibility. *Tuohy*, 196 Ill. at 412. Although the age for criminal capacity has been increased to 13 (see Ill. Ann. Stat., ch. 38, par. 6 -- 1 and Committee Comments thereto), Illinois courts continue to follow the Illinois rule even though its criminal antecedent has been modified and even though comparative negligence has been substituted for contributory negligence. *Mort*, 98 Ill.2d at 393. Although *Mort* did not expressly consider the effect of comparative negligence on the Illinois rule, the First District Appellate Court in *Toney* stated that it would not disturb a rule that the Supreme Court of Illinois had recently reaffirmed. 66 Ill. App. 3d at 404.

For additional case citations, see *Duffy v. Cortesi*, 2 Ill.2d 511, 516-17, 119 N.E.2d 241, 246 (1954); *Maskaliunas v. Chicago & Western Indiana R.R. Co.*, 318 Ill. 142, 149-50, 149 N.E. 23, 26-27 (1925); *Wallace v. Weinrich*, 87 Ill.App.3d 868, 872, 409 N.E.2d 336, 339-340 (5th Dist. 1980).

The same rule is applied at trial through Illinois Pattern Jury Instruction 11.03, which states in full:

You must not consider the question of whether there was contributory negligence [on the part of [name]], because, under the law, a child of the age of [the plaintiff] [name] is incapable of contributory negligence.

## INDIANA

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Children over the age of fourteen can be negligent, whereas children under the age of seven are incapable of negligence or contributory negligence. Children over the age of fourteen are held to the same standard of care as adults. For children between the ages of seven and fourteen a rebuttable presumption exists that they can be contributory negligent and are held to the standard of care of children of like age, knowledge, judgment, and experience. *Bailey v. Martz*, 488 N.E.2d 716, 721 (Ind. 1986); *Creasy v. Rusk*, 730 N.E. 2d 659, 663 (Ind. 200).

## IOWA

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In Iowa, a child of two years does not have the capacity to be negligent. Otherwise, the standard of conduct to which the child must conform to avoid being negligent is that of a reasonable person of like age, intelligence and experience under like circumstances. The jury's first inquiry is a subjective one: what was the capacity of this particular child – given what the evidence shows about the child's age, intelligence and experience – to perceive and avoid the particular risk involved in the case. Once this has been determined, the focus becomes objective: How would a reasonable child of like capacity have acted under similar circumstances? The particular child in question can be found negligent only if his actions fall short of what may reasonably be expected of children of similar capacity.

## KANSAS

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Children may be negligent and their comparative negligence may bar recovery. K.S.A. 60-258a. Children are held to the same degree of care that is ordinarily exercised by children of the same age, capacity, discretion and experience under similar circumstances. *Honeycutt By and Through Phillips v. City of Wichita*, 247 Kan. 250, 796 P.2d 549 (1990).

## KENTUCKY

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Children under the age of seven cannot be negligent or contributory negligent. *Ward v. Music*, 257 S.W.2d 516, 518 (Ky. 1953). Children between the ages of seven and fourteen are presumed incapable of contributory negligence. *Id.*; *Sutton Cons. Co. v. Lemaster's Adm'r*, 233 S.W.2d 613, 615 (Ky. 1928). If a child has sufficient mental capacity, the duty of care imposed is the duty to exercise a degree of care reasonably to be expected from the ordinary child of like age, intelligence, and experience under like or similar circumstances. *Williamson v. Garland*, 402 S.W.2d 80, 82 (Ky. 1966).

## LOUISIANA

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One of the “basic precepts” of the attractive nuisance doctrine “is that the injured person must be a child of tender years, too young and immature to appreciate and avoid the danger of the injury-causing condition or instrumentality.” *Adams v. State*, 525 So.2d 55, 58 (La. App. 3 Cir. 1988). “In order to apply the doctrine there must be evidence concerning the child’s age and understanding.” *Batiste v. Boh Bros. Const. Co., Inc.*, 404 So.2d 1348, 1350 (La. App. 4 Cir. 1981). There is no bright-line rule. See, e.g., *Walker v. Union Oil Mill, Inc.*, 369 So.2d 1043 (La. 1979) (15 year-old who died when he became trapped in a soybean storage tank

“had the appearance of a grown man tall and stout,” but was otherwise a normal fifteen-year-old who attended school, “was old enough to be aware of and to appreciate the limited dangers” of a soybean storage operation.”)

## MAINE

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In testing the conduct of a minor child, it is for the jury to determine whether the child has exercised care that the ordinarily prudent child of his age, intelligence, training, experience, judgment, and capacity are accustomed to exercise under like circumstances. *Fowles v. Dakin*, 160 Me. 392, 205 A.2d 169 (1964)(contributory negligence case).

## MARYLAND

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Children may be negligent and their contributory negligence may bar recovery. Children are held to the same degree of care that is ordinarily exercised by children of the same age, capacity, discretion and experience under similar circumstances. *Pratt v. Md. Farms Condo., Phase 1, Inc.*, 42 Md. App. 632, 636, 402 A.2d 105, 107 (1979).

Contributory negligence may be found for children ages 5 and older. *State ex rel. Taylor v. Barlly*, 216 Md. 94, 102, 140 A.2d 173, 177 (1958).

## MASSACHUSETTS

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The negligence of a child is “judged by the standard of behavior expected from a child of like age, intelligence, and experience.” *Mathis v. Massachusetts Elec. Co.*, 409 Mass. 256, 263, 565

N.E.2d 1180, 1184 (1991). While this is almost always a question for the jury, *Brown v. Daley*, 273 Mass. 432, 436, 173 N.E. 545 (1930), in practice, it has resulted in rulings that children of 2 ½ and 3 ½ years of age are incapable, as a matter of law, of appreciating a particular danger, *Tucker v. Ryan*, 298 Mass. 282, 10 N.E.2d 73 (1937); *McDonough v. Vozzela*, 247 Mass. 552, 556-57, 142 N.E. 831, 832 (1924), but that a child of 4 years of age is “not incapable” of exercising due care. *Coldiron v. Worcester Consolidated Street Ry. Co.*, 253 Mass. 462, 463, 149 N.E. 141, 141-42 (1925). These rules apply with respect to the defense of comparative negligence as well. *Mathis, supra*.

## MICHIGAN

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In Michigan children under the age of seven are presumptively incapable of committing negligent or criminal or intentional torts. *Queens Ins. Co, v Hammond*, 374 Mich. 655, 657-658, 132 N.W.2d 792 (1965). In negligence actions, a child over the age of seven is required only to act as “a minor of similar age, mental capacity and experience would conduct himself,” unless engaging in an adult activity. *Stevens v Veenstra*, 226 Mich. App. 441, 443, 573 N.W.2d 341 (1997).

### M Civ JI 10.07

The law recognizes that children act upon childish instincts and impulses. If you find the defendant knew or should have known that a child or children were or were likely to be in the vicinity, then the defendant is required to exercise greater vigilance and this is a circumstance to be considered by you in determining whether reasonable care was used by the defendant.

### M Civ JI 10.06

A minor is not held to the same standard of conduct as an adult. When I use the words “ordinary care” with respect to [the minor / <name of minor>], I mean that degree of care which a reasonably careful minor of the age, mental capacity and experience of [the minor / <name of minor>] would use under the circumstances which you find existed in this case. It is for you to decide what a reasonably careful minor would do or would not do under such circumstances.

## MINNESOTA

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Reasonable care for a child is the care which a reasonable child of the same age, intelligence, training and experience would have used under like circumstances. *Toetschinger v. Ihnot*, 250 N.W.2d 204, 208-209, 208, 211 (Minn. 1977); *Aldes v. St. Paul Ball Club, Inc.*, 88 N.W.2d 94, 97 (Minn. 1958).

One court observed, “there may be a difference between the standard of care that is required of a child in protecting himself against hazards and the standard that may be applicable when those activities expose others to hazards.” *Dellwo v. Pearson*, 107 N.W.2d 859, 863 (Minn. 1961) (citing *Roberts v. Ring*, 173 N.W. 437, 438 (Minn. 1919)); see also 34 Minn. Dunnell Digest § 3.00. This principal has only been applied in cases in which children participate in certain adult activities. “[I]n the operation of an automobile, airplane, or powerboat, a minor is to be held to the same standard of care as an adult.” *Dellwo v. Pearson*, 107 N.W.2d 859, 863 (Minn. 1961); *Miller v. State*, 306 N.W.2d 554, 555 (Minn. 1981). “The adult standard of care applies to teenagers handling guns.” *Huebner v. Koelfgren*, 519 N.W.2d 488, 490 (Minn. Ct. App. 1994).

## MISSISSIPPI

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Children under the age of seven are not capable of contributory negligence. For children between the ages of seven and 14, a child is presumed to be incapable of contributory negligence in failing to exercise due care for his or her own safety. This presumption is based on the assumption of the child's lack of capacity to perceive danger. However, the presumption against contributory negligence for children between the ages of seven and 14 may be rebutted upon demonstrating that the child has exceptional capacity and possesses a degree of judgment that removes him or her from the class of children presumptively incapable of exercising discretion. In considering whether the defendant has demonstrated such exceptional capacity, the Mississippi Supreme

Court has held that testimony that the child rendered ordinary services for the child's age to his or her parents is insufficient as a matter of law to rebut the presumption of incapacity. In a case involving the drowning death of a 13 year-old child, the court found that the child's swimming ability and experience was not substantial and that the defendant failed to rebut the presumption against the child's contributory negligence. In general, the cases indicate that contributory negligence by a child under the age of 14 is rarely found.

## MISSOURI

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Missouri does not recognize a predetermined age at which a child can be found to be negligent. Instead, the courts prefer a rule that allows for a degree of flexibility in the handling of each case so that a child's negligence or fault is determined in relation to the expectations held for other children in same or similar circumstances. The fault of a child should be determined by the fact-finder in each case, based upon that degree of care exercised by children of the same or similar age, judgment, and experience. *Lester v. Sayles*, 850 S.W.2d 858, 867 (Mo. 1993). Only if the child is so young or the evidence of incapacity so overwhelming that reasonable minds could not differ on the issue, should trial courts rule as a matter of law, usually pursuant to a motion for directed verdict, that the child cannot be capable of fault. *Id.*

The applicable jury instruction is:

MAI [1996 Revision] 11.04 Definition — Negligence of Minor

The term "negligent" or "negligence" as used in this [these] instruction[s] with respect to (here describe minor such as plaintiff or decedent) means the failure to use that degree of care which an ordinarily careful [boy][girl] of the same age, capacity and experience would use under the same or similar circumstances.

## MONTANA

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Montana uses the reasonable care for children of similar age and experience standard without any pre-determined age at which a child becomes capable of negligence. A child can be comparatively negligent and the issue is generally one to be determined by the jury (*Graham v Rolandson*, 150 Mont 270, 435 P2d 263, 268-269 [1967]). The standard of care for contributory negligence is measured by the capacity of the particular child to appreciate danger either to themselves or others, of the act alleged to be negligent. Capacity is determined by the child's age, experience, intelligence, and capabilities (*Ranard v O'Neil*, 166 Mont 177, 531 P2d 1000, 1001-1002 [1975]). In addition, the violation of a statute, such as a jaywalking statute, can be excused based upon the infant's lack of capacity to comply with the statute (*Id.*).

## NEBRASKA

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In Nebraska, a minor is held to exercise that degree of care used by an ordinarily prudent child of the same capacity to appreciate and avoid danger. Whether or not negligence may be attributable to a minor of the age of plaintiff is usually a matter for a jury under the circumstances of each case. It is only in an extreme situation, where the facts show plainly knowledge and appreciation of the danger that may occur, if a certain action is taken, that a court may rule as a matter of law that a minor of such age was guilty of negligence, or that his act or omission was the proximate cause of the event in question.

## NEVADA

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Nevada has refused to adopt a rigid rule as to a specific age at which a child is incapable of contributory negligence. *Quillian v. Mathews*, 86 Nev. 200, 467 P.2d 111 (1970); *Galloway v. McDonald's Restaurants of Nevada, Inc.*, 102 Nev. 534, 538, 728 P.2d 826, 828-829 (1986). The Court stated:

In our opinion it is not advisable to establish a fixed and arbitrary rule, and we reject the view espoused by the Ohio court in *Holborck v. Hamilton Distributing, Inc.*, supra. We prefer to treat the issue of contributory negligence of a child as a fact issue for the jury upon proper instructions unless reasonable minds could come to but one conclusion from the evidence. This allows for a degree of flexibility in the handling of each case as it comes before the trial court. That court may decide initially whether reasonable minds could believe that the particular child has the capacity to exercise that degree of care expected of children of the same age, experience and intelligence in similar circumstances. Should the court determine that the child has such capacity, the jury then is to decide whether such care was exercised in the particular case. Should the court rule otherwise, then, of course, the issue of contributory fault would not be submitted for jury resolution....

*Id.* at 102 Nev. 534, 538, 728 P.2d 826, 829. Although, the dissenting opinion suggested that “[a] jury should not be permitted to speculate on an issue that reason and experience place outside the realm of speculation... ,” one law review commentator noted:

This argument, however, is \*1405 unpersuasive because permitting a jury to decide whether a child has been negligent can produce no more confusion and inconsistency than that which exists in any trial involving older children. Members of juries are familiar with the propensities of children. [FN345] The question of whether a child has been contributorily negligent is therefore well within the capacity of jurors to determine.

24 Pac. L.J. 1323, 1404 -1405 (April1993)

## **NEW HAMPSHIRE**

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Minors are entitled to be judged by standards commensurate with their age, experience, and wisdom when they are engaged in activities appropriate to their age, experience, and wisdom. This rule applies in cases involving the negligence of a minor and

in cases where a minor plaintiff's contributory fault is at issue. *Charbonneau v. MacRury*, 84 N.H. 501, 507, 153 A. 457, 464 (1931). However, when a minor is engaged in an activity normally undertaken by an adult (e.g., driving an automobile), he should assume responsibility for such an activity in accordance with the standards of negligence that would be applied to an adult. *Daniels v. Evans*, 107 N.H. 407, 224 A.2d 63 (1966).

## **NEW JERSEY**

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Under New Jersey law, a child of less than seven years of age is rebuttably presumed to be incapable of negligence and hence the issue may not be submitted to the jury in the absence of evidence of training and experience from which the jury could infer that the child was capable of understanding and avoiding the danger of injury involved in the circumstances of the case. If evidence of capacity is introduced, then the trial judge must determine if such evidence is sufficient so that reasonable men might disagree concerning the question of whether the child had the capacity to perceive the risk and avoid the danger to himself. If the answer is in the affirmative and if there is further evidence that the child did not act in a manner which would be expected of a child of similar age, judgment and experience, then the question of contributory negligence must be submitted to the jury. *Bush v. N.J. & N.Y. Transit Co.*, 30 N.J. 345 (1958).

## **NEW MEXICO**

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"The correct test in determining the contributory negligence of a child is whether he exercised that degree of care ordinarily exercised by children of like age, capacity, discretion, knowledge, and experience under the same or similar circumstances." *Hernandez v. Brooks*, 95 N.M. 670, 672 (1980).

## NEW YORK

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New York applies the reasonable care for children of similar age and experience standard. A child can be comparatively negligent and is held to that standard care which a reasonably prudent child of (his/her) age, experience, intelligence and degree of development would use under the circumstances (*McDonald v Central School Dist*, 289 NY 800 [1943]).

A child under four years old is, as a matter of law, incapable of being negligent (*Verni v Johnson*, 295 NY 436 [1946]; *Smith v Kinsey*, 50 AD3d 1456, 1457 [4<sup>th</sup> Dep't 2008]; *Smith v Sapienza*, 115 AD2d 723 [2d Dep't 1985]). Beyond that, "no rule of law affixes an arbitrary age at which a particular degree of care may be expected, or furnishes a true presumption which takes the place of evidence, that a child is not chargeable with contributory negligence" (*Camardo v New York State Railways*, 247 NY 111, 118 [4 year, 10 month old chargeable with negligence] [1928]; see also, *Redmond v City of New York*, 55 NY2d 796 [1981]).

## NORTH CAROLINA

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Under North Carolina law, an infant under 7 years of age is conclusively presumed to be incapable of contributory negligence. An infant between the ages of 7 and 14 is presumed to be incapable of contributory negligence, but this presumption may be rebutted by evidence showing capacity. The test in determining whether the child is contributorily negligent is whether he acted as a child of his age, capacity, discretion, knowledge and experience would ordinarily have acted under similar circumstances.

See *Duvall v. U.S.*, 312 F.Supp. 625, 633 (E.D.N.C. 1970) (applying North Carolina law).

## NORTH DAKOTA

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North Dakota applies the reasonable child of like age and background standard. The pattern jury instruction for “Measure of Duty of Minor to Exercise Care” C 2.20 provides as follows:

The duty to exercise ordinary care imposed upon a minor child is properly measured by what an individual of ordinary prudence of the child’s age, capacity, intelligence, and experience would have done under the same or similar circumstances. Negligence, as applied to a minor child, is the doing of that which an individual of ordinary prudence of the age, capacity, intelligence, and experience of the child would not have done under the same or similar circumstances, or the failure to do that which such an individual would have done under the same circumstances.

(<http://www.sband.org/PatternJuryInstruction/Details.aspx?InstructionId=455&CivilCriminal=False>; see also, *Dimond v Kling*, 221 NW2d 86, 91 [ND 1974]; *Kleinjan v Knutson*, 207 NW2d 247, 251-252 [ND 1973]).

While the duty of care issue is generally for the jury (*Schweitzer v Anderson*, 83 NW2d d 416 [ND 1957], a three and one-half year old is incapable of negligence as a matter of law (*Ruehl v Lidgerwood Rural Tel Co.*, 135 NW 793 [ND 1912])).

## OHIO

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Generally, children over the age of fourteen can be negligent, while children under the age of seven are incapable of negligence and contributory negligence. *Holbrock v. Hamilton Distributing, Inc.*, 11 Ohio St. 2d 185, 190 (Ohio 1967). For children between the ages of seven and fourteen, a rebuttable presumption exists that the child is incapable of contributory negligence. *Howland v. Sears, Roebuck & Co.*, 438 F.2d 725, 729(6th Cir. 1971). The presumption can be rebutted by a showing that the child has the mental capacity to make intelligent judgments and avoid danger with respect to the particular activity in which the child is engaged.  
*Id.*

## OKLAHOMA

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Oklahoma children less than 7 years old are conclusively presumed incapable of negligence as a matter of law. *Thomas v. Gilliam*, 1989 OK 3,774 P.2d 462, 466. Children between the ages of 7 and 14 are presumed to be incapable of negligence, but may be shown to be capable of negligence. See OUJI 9.4. If a jury determines that a child between the ages of 7 and 14 had the capacity for negligence, it must then decide if the child was negligent under the specific circumstances of the case. See OUJI 9.4, comment 1. Children 14 and older are presumed to be capable of negligence, but may be shown to be incapable of negligence. Id. In determining negligence or contributory negligence, children are held to the standard of care which children of like age, experience, and intelligence are accustomed to use under similar circumstances. See OUJI 9.4A. An exception is when the child is conducting an adult activity, such as driving a motor vehicle, in which case the child is held to the same standard of care as an adult. See *Baxter v. Fugett*, 1967 OK 72, 425 P.2d 462, 464 (Okla. 1967); See also OUJI 10.6.

## OREGON

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In Oregon, a child may be found negligent if his or her actions fall below the standards of a “reasonable person of like age, intelligence, and experience under similar circumstances.” If, however, a child engages in inherently adult activities, the child will be held to an adult standard. If a child allegedly acted intentionally, the court will take into consideration whether the child had the “ability to form the necessary intent to do the act.”

The acts of children are usually not judged by the same standards as the acts of adults; instead, “a minor is held to the standard of a reasonable person of like age, intelligence, and experience under similar circumstances.” *Thomas v. Inman*, 282 Or 279, 285, 578 P2d 399 (1978). If, however, a child engages in what is normally

an adult activity, the minor is held to the standard of an adult. See e.g., *Nielsen v. Brown*, 232 Or 426, 451, 374 P2d 896 (1962), overruled in part on other grounds, 296 Or 174, 182, 674 P2d 587 (1983) (holding that a child is held to an adult standard when operating a motor vehicle on public highways because driving a motor vehicle is an adult activity requiring adult qualifications); compare with *Hudson-Connor v. Putney*, 192 Or App 488, 497, 86 P33d 106 (2004) (holding that minor's driving of motorized golf cart on private premises was not adult activity because golf carts are not normally only operated by adults).

If a child acted intentionally and not merely negligently, his or her conduct is judged by whether the child acted reasonably given his or her "age, intelligence and experience" and "ability to form the necessary intent to do the act." *Gymnastics USA v. McDougal*, 92 Or App 453, 458, n 4, 758 P2d 881, 885 (1988).

## PENNSYLVANIA

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One under 7 is conclusively presumed incapable of negligence; one between 7 and 14 is rebuttably presumed incapable.

By analogy to the common-law rule for crimes committed, children under seven years of age have many times been conclusively presumed to be incapable of appreciating and guarding against danger. 19 months – *Kay v. Pennsylvania R. Co.*, 65 Pa. 269 (1870); Two years – *Jones v. United Traction Co.*, 201 Pa. 344, 50 A. 826 (1902); *Satinsky v. Mutual Brewing Co.*, 187 Pa. 57, 40 A. 821 (1898); Three years – *Gift v. Palmer*, 392 Pa. 628, 141 A.2d 408 (1958); Four years – *Nolder v. McKeesport, W. & D. R. Co.*, 201 Pa. 169, 50 A. 948 (1902); Five years – *Hogan v. Etna Concrete Block Co.*, 325 Pa. 49, 188 A. 763 (1937); Six years – *Idzotic v. Catalucci*, 222 Pa. Super. 47, 292 A.2d 464 (1972) It has also been held that if such a child unwittingly exposes himself or herself to danger the court should declare his or her freedom from negligence or contributory negligence as a matter of law. *Sullenberger v. Chester Traction Co.*, 33 Pa. Super. 12 (1907). During this period the parent owes the highest degree of care.

*Sullenberger v. Chester Traction Co.*, 33 Pa. Super. 12 (1907) However, in one case, the negligence of a child of six years was held to be a question for the jury, depending upon the degree of intelligence of the child and whether it was aware of its danger. *Rummele v. Allegheny Heating Co.*, 16 A. 78 (Pa. 1888).

This presumption of freedom from negligence or contributory negligence for children under age seven has been recognized by Pennsylvania courts after the change from the common law to the Comparative Negligence Act and still exists under the new comparative negligence regime. See *Young v. Washington Hosp.*, 2000 PA Super 277, 761 A.2d 559, 2000 Pa. Super. LEXIS 2594 (2000).

After age seven, the presumption of incapacity is rebuttable, *Braden v. Pittsburgh*, 143 Pa. Super. 427, 18 A.2d 99 (1941) (The presumption that a minor under 14 is incapable of negligence may be rebutted as a matter of law on an uncontradicted showing of unusual capacity, where no reasonable doubt can be drawn from facts); *Rasmus v. Pennsylvania R. Co.*, 164 Pa. Super. 635, 67 A.2d 660 (1949) (A 13-year-old boy cannot be conclusively presumed to be incapable of appreciating and guarding against danger) and grows weaker with each year of age, *Dunn v. Teti*, 280 Pa. Super. 399, 421 A.2d 782 (1980), until age 14, *Braden v. Pittsburgh*, 143 Pa. Super. 427, 18 A.2d 99 (1941), when a presumption of capacity arises, *Rachmel v. Clark*, 205 Pa. 314, 54 A. 1027 (1903), and puts upon the minor the burden of showing of his or her personal want of intelligence, prudence, foresight or strength usual to minor of his or her age. *Rachmel v. Clark*, 205 Pa. 314, 54 A. 1027 (1903).

The same standards have been applied since passage of the Comparative Negligence Act. "Reasonable care" required of a minor is measured by a different legal yardstick than that used for adults: it is that measure of care which other minors of like age, experience, capacity, and development would ordinarily exercise under similar circumstances. Courts sort minors into three categories based on their ages: minors under the age of seven years are conclusively presumed incapable of negligence; minor over the age of fourteen years are presumptively capable of negligence, the burden being placed on such minors to prove their incapacity; minors between the ages of seven and fourteen years

are presumed incapable of negligence, but such presumption is rebuttable and grows weaker with each year until the fourteenth year is reached. *Cureton v. Phila. Sch. Dist.*, 798 A.2d 279, 2002 Pa. Commw. LEXIS 241 (Pa. Commw. Ct. 2002); *Philadelphia v. Duda*, 141 Pa. Commw. 88, 595 A.2d 206, 1991 Pa. Commw. LEXIS 378 (1991).

## **RHODE ISLAND**

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Rhode Island does not recognize conclusive or rebuttable presumptions in determining whether a child was negligent or contributorily negligent. In Rhode Island, ordinary care as applied to children, even children of tender years, is that degree of care which children of the same age, education and experience would be expected to exercise in similar circumstances. Whether a child failed to exercise due care according to that standard is a question of fact for the jury.

## **SOUTH CAROLINA**

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A minor is capable of negligence. When analyzing the negligence of a minor under the age of fourteen, the minor's conduct is judged by the standard of behavior to be expected from a child of like age, intelligence, and experience, under like circumstances. *Standard v. Shine*, 278 S.C. 337, 295 S.E.2d 786 (1982). When analyzing the negligence of a minor fourteen years of age and above, the minor's conduct is judged by the adult standard of care. *McCormick v. Campbell*, 285 S.C. 272, 329 S.E.2d 752 (1985).

## **SOUTH DAKOTA**

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South Dakota uses the reasonable child of like age and experience standard. An infant, at least until the later years of infancy, is not bound to exercise the care required of an adult. The question of contributory negligence of a child is generally for a jury to

determine considering the child's age, intelligence, experience, and capacity to comprehend the situation and realize the risks to himself or others (*Finch v Christensen*, 84 SD 420, 426, 172 NW2d 571, 574 [SD 1969]). There is no fixed age at which an infant plaintiff becomes capable of negligence (see, *Doyen v Lamb*, 74 SD 126, 49 NW2d 382 [SD 1953] [holding it was error to assume, as a matter of law, that a 5 year old is incapable of contributory negligence]).

## TENNESSEE

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As to negligence of a child, the cases hold that where a child is 6 years old or under, *Wells v. McNutt*, 136 Tenn. 274, 189 S.W. 365, and *Taylor v. Robertson*, 12 Tenn.App. 320, or where he is 7 to 14 years old, *West v. Southern Ry. Co.*, 20 Tenn.App. 491, 100 S.W.2d 1004, there is a prima facie presumption he is not capable of negligence, but that the evidence may show him to be capable of negligence and if there be any material evidence of capacity, it is for the jury to decide; whereas if a child is over 14 years old there is a prima facie presumption that he is capable of negligence the same as a grown person, but if there be any material evidence he is incapable, it is a jury question.

*Hadley v. Morris*, 35 Tenn.App. 534, 249 S.W.2d 295(1951).

## TEXAS

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In Texas, a child is not bound to exercise for his own safety the care required of an adult, but the standard by which to measure the child's conduct is that degree of care ordinarily exercised by children of the same age, intelligence, experience and capacity under same or similar circumstances. *Dallas R. & T. Co. v. Rogers*, 218 S.W.2d 456, 458 (Tex. 1949).

## UTAH

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Question of whether a child under fourteen years of age can be contributorily negligence “hinges on a number of factors, such as age, intelligence, experience, and education of the child, which cannot be determined in a vacuum, but must be related to the child itself.” *Carr v. Bradshaw Chevrolet Co.*, 23 Utah 2d 415, 417 (1970). See also *Kawaguchi v. Bennett*, 112 Utah 442, 449 (1948) (jury was permitted to determine, after considering the evidence, whether an 8-year-old was contributorily negligent).

## VERMONT

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A child is not required to exercise the same amount of care that is expected of an adult, but must exercise a care reasonable to be expected of children of like age, capacity, education, and experience. A time when a child is capable of negligence is not a mere matter of age, but depends on the circumstances, especially the child’s mental development, previous training and experience. *Mitchell v. Amadon*, 128 Vt. 169, 260 A.2d 213 (1969)(contributory negligence case).

## VIRGINIA

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Children under the age of seven are conclusively presumed to be incapable of contributory negligence. *Grant v. Mays*, 204 Va. 41, 44, 129 S.E.2d 10, 12 (1963). Children between the ages of seven and fourteen are presumed to be incapable of exercising care and caution for their own safety, and this presumption prevails unless rebutted by sufficient proof that a reasonable person of like age, intelligence, and experience would understand the danger of his conduct under the same or similar circumstances. *Id.*; see also *Doe v. Dewhirst*, 240 Va. 266, 268, 396 S.E.2d 840, 842 (1990). Children over the age of fourteen are presumed to have sufficient

capacity to be capable of and chargeable with contributory negligence, and are held to the standard of care expected of a child of like age, intelligence, and experience under the same or similar circumstances. *Carson by Meredith v. LeBlanc*, 245 Va. 135, 140, 427 S.E.2d 189, 192 (1993).

Minors operating motor vehicles are held to the standard of care applicable to adults; i.e., the degree of care that a reasonably prudent person would exercise under the same or similar circumstances. *Thomas v. Settle*, 247 Va. 15, 21, 439 S.E.2d 360, 364 (1994).

## WASHINGTON

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In Washington, a child under the age of six is deemed to lack the capacity to be liable for negligent or reckless conduct, but may be liable for intentional, wrongful conduct. A child older than six may be found negligent if he or she lacks the care “ordinarily exercised by children of the same age, capacity, discretion, knowledge, and experience, under the same or similar circumstances.”

A child under the age of six cannot be liable for negligent or reckless conduct because the child lacks the “mental capacity to comprehend a duty to exercise a standard of care.” *Price v. Kitsap Transit*, 125 Wn2d 456, 462, 886 P2d 556 (1994). A child under the age of six is likewise incapable of fault as that term is used in RCW 4.22.070(1) (comparative fault statute), and is not an “entity” under which fault can be apportioned under the statute. *Id.* at 464.

A child under the age of six may, however, be held liable for intentional, wrongful conduct such as assault or battery. *Garratt v. Dailey*, 46 Wn2d 197, 202-203, 279 P2d 1091 (1955). A court will still take into account whether the child’s “age is of any consequence in determining what [the child] knew” – and therefore the child’s experience, capacity, and understanding are material. *Id.* at 203.

A child over the age of six is not bound to exercise the care required of an adult; instead the child's conduct is measured by the conduct "ordinarily exercised by children of the same age, capacity, discretion, knowledge, and experience, under the same or similar circumstances." *Hinckel v. Steigers*, 30 Wn2d 171, 174, 191 P2d 279 (1948), citing 101 A.L.R. 1, 7. In these circumstances, a child's capacity is a question of fact and not law, and a jury must agree that the child had the ability to comprehend the entire situation and the dangers involved before the child can be found liable for contributory negligence. *Id.* at 176.

## WEST VIRGINIA

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In West Virginia, a child under the age of seven is conclusively presumed incapable of negligence or contributory negligence. Children between the ages of seven and fourteen are rebuttably presumed incapable of negligence or contributory negligence. To overcome the presumption, the burden is upon the party alleging negligence to come forward with evidence of the child's intelligence, maturity, experience and judgmental capacity. Merely showing a child is bright, or does well in school, does not rebut the presumption. At the age of fourteen and older, a child is presumed to possess sufficient mental capacity to comprehend and avoid danger. If a child fourteen or older relies on a lack of such capacity, the burden of proof is on the child.

## WISCONSIN

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Wis. Stat. § 891.44 provides, "[i]t shall be conclusively presumed that an infant minor who has not reached the age of 7 shall be incapable of being guilty of contributory negligence or of any negligence whatsoever." A jury should not be instructed pursuant to section 891.44. Even though a child under seven cannot be guilty of negligence as a matter of law, the child can be negligent as a fact for purposes of apportionment of fault by the jury. *Gremban v. Burke*, 33 Wis. 2d 1, 9-10 (Wis. 1966).

Whether a child has “exercised due care under all the facts and circumstances disclosed by the evidence must be determined in the light of the care which is ordinarily exercised by children of the same age, capacity, discretion, knowledge, and experience under the same or similar circumstances.” *Goldberg v. Berkowitz*, 173 Wis. 603, 605-606 (Wis. 1921); *Secard v. Rhineland Lighting Co.*, 147 Wis. 614, 620 (Wis. 1911).

When a child engages in an activity which is typically engaged in only by adults—such as driving an automobile or flying an airplane—that child will be held to the same standard as an adult. *Strait v. Crary*, 173 Wis. 2d 377, 382-383 (Wis. Ct. App. 1992); *Frayser by Edenhofer v. Lovell*, 190 Wis. 2d 794 (Wis. Ct. App. 1995).

## WYOMING

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A minor is not held to the same standard of conduct as an adult. The minor is only required to exercise the degree of care that ordinarily is exercised by minors of like age and experience under similar circumstances. *Blakeman v. Gopp*, 364 P.2d 986 (Wyo. 1961); *Afton Electric Co. v. Harrison*, 54 P.2d 540 (Wyo. 1936).

The above rule does not apply in situations in which a licensed minor is operating a motor vehicle. *Krahn v. LaMeres*, 483 P.2d 522 (Wyo. 1971).

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