# An Overview of the Age of a Child Contributory/Comparative Negligence and Assumption of Risk Defenses

## in the 50 States and District of Columbia

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Prepared By:
Eagle International Associates, Inc.

# BOARD OF DIRECTORS

# EAGLE INTERNATIONAL ASSOCIATES, INC.

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Dear Clients:

It is with great pleasure that Eagle International Associates, Inc. presents ***AN OVERVIEW OF THE AGE OF A CHILD CONTRIBUTORY/ COMPARATIVE NEGLIGENCE AND ASSUMPTION OF RISK DEFENSES 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,

The Members of Eagle International Associates, Inc.

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### IN THE 50 STATES AND DISTRICT OF COLUMBIA

## ALABAMA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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. Bouler,* 547 So.2d 506 (Ala. 1989).

#### Alabama Contributory Negligence Charges for Minor

**APJI 30A.04 Child under 7 years old**
If you are reasonably satisfied that *(name of child)* was under 7 years old at the time of the event, you cannot find that *[his/her]* conduct was contributory negligence.

**APJI 30.07 Child Between 7 and 14 Years of Age**
A child between the ages of 7 and 14 years is presumed to be wanting in that degree of care, judgment, discretion and sensitiveness to danger which belong to the average child who is 14 years of age, and therefore presumed to be incapable of committing contributory negligence. This presumption is rebuttable and if you are reasonably satisfied from the evidence that the plaintiff was between the ages of 7 and 14 years and did, at the time of the occasion complained of, possess that degree of care, judgment, discretion and sensitiveness to danger belonging to the average child 14 years of age, then you would consider and determine whether or not he *(she)* was guilty of contributory negligence.

**APJI 30.08 Child 14 Years of Age and Over**
Normal children 14 years of age and above are presumed by the law to possess that maturity of discretion which belongs to adults of ordinary prudence; therefore, the general rules of law applicable to adults also apply to minors who are at least 14 years of age.

If you are reasonably satisfied from the evidence that the plaintiff at the time of the occasion complained of was a normal child 14 years of age or older, then you would consider and determine whether or not he *(she)* was guilty of contributory negligence.

**ASSUMPTION OF RISK**

Alabama Courts have held that whether a child plaintiff is capable of assumption of the risk is ordinarily a question for the factfinder. However, there is an even higher burden on the defendant in regard to assumption of the risk than in the case of contributory negligence, because the defendant attempting to show assumption of the risk must show that the child subjectively appreciated the danger and voluntarily undertook it. Where the defendants have not made such a showing, the trial court properly would not submit the question to the jury. *Superskate, Inc. v. Nolen by Miller*, 641 So.2d 231 (Ala. 1994).

**Alabama Assumption of the Risk Jury Charges**

**APJI 30.05 Assumption of Risk--Elements**
The three elements essential to assumption of risk *(or contributory negligence)* in cases of this kind are that the party charged with assumption of risk *(or contributory negligence)* (1) had knowledge of the existence of the dangerous condition and (2) with appreciation of such danger (3) failed to exercise care for his *(her)*own safety by putting himself *(herself)*in the way of such known danger.

## ALASKA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

Children under seven years of age are "rebuttably presumed to be incapable of contributory negligence". There are two issues: (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.

### ASSUMPTION OF RISK

There is not any apparent minimum age for a child to be able to assume the risk. Its application turns on whether the claimant recognizes and accepts the risks the defendant's conduct poses. It normally requires evidence that the claimant appreciates the risks arising from the defendant's conduct. *Joseph v. State,* 26 P.3d 459, 471 (Alaska 2001). Ordinarily, the plaintiff cannot assume any risk of conditions or activities of which he is ignorant. He must not only know of the facts which create the danger, but he must comprehend and appreciate the danger. *Hay v. Nance*, 119 F. Supp. 763, 771 (D. Alaska 1954).

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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) 4th, 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). Likewise, there is no minimum age or age requirements for assumption of the risk. Most likely the courts will provide the same analysis used for contributory negligence.

**ASSUMPTION OF RISK**

There is no minimum age or age requirements for assumption of the risk. Most likely the courts will provide the same analysis used for contributory negligence above.

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**CONTRIBUTORY/COMPARATIVE NEGLIGENCE**

Children may be held negligent and, in the same manner as adults, their negligence can bar recovery. The general rule is that a 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)).

Somewhere between the age of 4 and 8 a child can be capable of contributory negligence. ""A child of tender years cannot be guilty of negligence." *Sherman v. Mountaire Poultry Co.*, 243 Ark. 301, 419 S.W.2d 619 (1967) "A child under four is incapable of negligence or contributory negligence." *Clay v. Garrett*, 228 Ark. 953, 955, 311 S.W.2d 522, 524 (1958) "Eight-year-old boy, who, as he was crossing street alone from a point in middle of block, was struck by a pickup truck driven by defendant, was not of

such tender age that he was wholly incapable of negligence, as a matter of law, as are much younger children." *Blythe v. Byrd*, 251 Ark. 363, 472 S.W.2d 717 (1971).

### ASSUMPTION OF RISK

The Arkansas Supreme Court determined in *Dawson v. Fulton*, 745 S.W.2d 617 (Ark. 1988), that following adoption of comparative negligence, assumption of the risk is no longer applicable in Arkansas as a separate theory; see also *Ouachita Wilderness Inst., Inc. v. Mergen*, 947 S.W.2d 780 (Ark. 1997).

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

As a matter of law, it is possible for children to be negligent and contributorily 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); s*ee Schauf v. Southern Cal. Edison Co.* (1966) 243 Cal.App.2d 450, 457 (automobile).)

### ASSUMPTION OF RISK

While 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, 653-55.), the doctrine of assumption of risk applies regardless of age. (*See Peart v. Ferro* (2004) 119 Cal. App.4th 60, 75.) Therefore, there is not a minimum age threshold for a child to have the capacity to assume the risk.

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

Children under the age of seven are incapable of negligence. Colo. Jury Instr., Civil 9:9 (4th ed.); s*ee 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).

### ASSUMPTION OF RISK

The same rule as contributory negligence above applies for assumption of risk of by a child.

## CONNECTICUT

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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. For statutory negligence cases involving a minor under the age of 16, a question of fact arises as to whether the minor was exercising due care commensurate with what is reasonably expected of a

minor of similar age, judgment and experience. C.G.S. § 52-217. In determining the comparative negligence of a minor, the conduct of the minor is "to be measured by that which may be reasonably expected of children of similar age, judgment and experience." *Greene v. DiFazio*, 148 Conn. 419, 425, 171 A.2d 411 (1961). This standard is applicable to all minors regardless of age.

### ASSUMPTION OF RISK

The doctrine of assumption of the risk was abolished with the enactment of C.G.S. § 52-572h(l), but factors relevant to the doctrine of assumption of the risk may be considered by the trier of fact in determining whether a minor was comparatively negligent.

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

Delaware recognized a rebuttable presumption that a child under seven years of age is incapable of negligence. *Pokoyski v McDermott*, 53 A.2d 253, 258 (Del. 1961); *Audet v. Convery*, 187 A.2d 412, 413 (Del. Super. 1963), approved, *Beggs v. Wilson*, 272 A.2d 713, 714 (Del. 1970).

### ASSUMPTION OF RISK

A child can assume the risk at age 7. *Mosher v. Evans*, 1998 Del. Super. LEXIS 183, *n8 (quoting *Croom v. Pressley*, 1994 Del. Super. LEXIS 385, *15) (holding that "Delaware recognizes both primary and secondary assumption of the risk…[p]rimary assumption of the risk is generally found where the plaintiff expressly accepts the risk…[c]onversely, secondary assumption of the risk is found where 'the plaintiff's conduct in encountering a known risk may in itself be unreasonable, because the danger is out of proportion to the advantage which he is seeking to obtain'").

## DISTRICT OF COLUMBIA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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).

**ASSUMPTION OF RISK**

There are no age requirements for a child to assume the risk.

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**CONTRIBUTORY/COMPARATIVE NEGLIGENCE**

Children under the age of six are conclusively presumed incapable of comparative negligence. *Swindell v. Hellkamp*, 242 So. 2d 708 (Fla. 1970). 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).

**ASSUMPTION OF RISK**

The Courts have abolished the assumption of risk. *Blackburn v. Dorta, 348 So. 2d 287* (Fla. 1977).

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**CONTRIBUTORY/COMPARATIVE NEGLIGENCE**

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. O.C.G.A. § 16-3-1; *Sorrells v. Miller,* 218 Ga. App. 641, 642, 462 S.E.2d 793 (1995). 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 the danger from skating many times on same street with hill; and was aware of danger of being injured by falling from height).

**ASSUMPTION OF RISK**

Georgia has not mandated a specific age for a child to have assumed the risk. Recent case law states that "[w]ith respect to children between the ages of seven and fourteen...there is no legal bar to applying [the doctrine of] assumption of the risk, as a matter of law ... when the evidence shows that the danger was obvious, that the child knew of the danger and was able to appreciate the risks associated with it, and the child voluntarily chose to run the risk." *Kensington Place Owners Ass'n, Inc. v. Thomas*, 318 Ga. App. 609, 611-12, 734 S.E.2d 445, 448 (2012). Courts "apply a subjective standard and look to what [the child] knew, understood, and appreciated." Id.

Based on the above-quoted language, it is unclear whether children that are less than seven years old could be considered to have "assumed the risk." However, Georgia Jurisprudence on Personal Injury and Torts cites to a case where an assumption of the risk was presented as a jury question for a 4 year-old child.14 Ga. Jur. Personal Injury and Torts § 21:45; *Pearson v. Small World Day Care Center, Inc.*, 234 Ga. App. 843, 845–46, 508 S.E.2d 200 (1998) (child aged four years, seven months; jury question presented on assumption of risk).

## HAWAII

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

Five-year-olds are incapable of contributory negligence. *Ellis v. Mutual Telephone Co.,* 29 Haw. 604, 624 (1927). The court declined to apply that absolute rule to six-year-olds. It held that children as young as six 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 v. Kumalaa*, 47 Haw. 281, 286-87 (1963)

### ASSUMPTION OF RISK

There is no age minimum for assumption of risk.

## IDAHO

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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). Submission of issue of "contributory negligence" of five-year-old child who dashed into street and was struck and killed by automobile was not error. *Mundy v. Johnson*, 84 Idaho 438, 373 P.2d 755 (1962).

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* by *Krieger v. Howell*, 109 Idaho 704, 706, 710 P.2d 614, 616 (Ct. App. 1985).

**ASSUMPTION OF RISK**

Idaho has no cases touching upon minimum age requirements for a child to assume the risk.

## ILLINOIS

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**CONTRIBUTORY/COMPARATIVE NEGLIGENCE**

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. An exception exists in the case of a child engaging in adult activities, such as operating a motorcycle, where the child is held to an adult standard of care. *See* e.g. *Betzold v. Erickson*, 35 Ill. App. 2d 203, 209, 182 N.E.2d 342, 345 (3rd Dist. 1962). It is doubtful, however, that a child involved in a sexual abuse claim would be deemed to have engaged in an adult activity for purposes of applying this exception.

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. Likewise, an Illinois appellate court decision described the tender year doctrine as "antiquidated" and "arbitrary" but nevertheless found that it could not overturn the rule under the doctrine of *stare decisis* . *See* Appelhans v. McFall, 325 Ill. App. 3d 232, 757 N.E.2d 987 (2001)

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.

**ASSUMPTION OF RISK**

Whether a child assumes a risk in Illinois depends on the age and experience of the child. It is a case-by-case question of fact to be decided by juries. A child with certain experiences might assume the risk of an activity, whereas another child of the same age and intelligence, but without those experiences, might not. The difference is whether each child is able to appreciate the danger and risks connected with the activity. "The plaintiff must not only have actual knowledge of the danger, he must also *appreciate* the danger and the risks connected with it." *Fox v. Beall*, 314 Ill.App. 144, 147; 41 N.E.2d 126, 128 (2d Dist.1942).

The test is a subjective one. Not what plaintiff should have known, but what he/she *in fact* did know and appreciate. *Russo v. The*

*Range, Inc.*, 76 Ill.App.3d 236, 238-239; 395 N.E.2d 10, 13-14; 32 Ill.Dec. 63, 66-67 (1st Dist.1979); *Maytnier v. Rush*, 80 Ill.App.2d 336, 349; 225 N.E.2d 83, 90 (1st Dist.1967). However, a plaintiff cannot elude application of the doctrine with "protestations of ignorance in the face of obvious danger." *Russo v. The Range, Inc.*, 76 Ill.App.3d 236, 238-239; 395 N.E.2d 10, 13-14; 32 Ill. Dec. 63, 66-67 (1st Dist.1979). "A person of sufficient age and experience is chargeable with knowledge of the ordinary risks and hazards of his employment, and will be presumed to have notice of and to have assumed such risks which, to a person of his age and experience, are, or ought to be, obvious." *Mack v. Davis*, 76 Ill.App.2d 88, 98; 221 N.E.2d 121, 126 (2d Dist.1966).

Ordinarily, this is a fact issue for the jury unless the facts are so clear that reasonable persons could not differ as to whether the plaintiff appreciated the danger. *Fox v. Beall*, 314 Ill.App. 144, 147;, 41 N.E.2d 126, 128 (2d Dist.1942); *Hinrichs v. Gummow*, 41 Ill.App.2d 428, 434-435; 190 N.E.2d 610, 612-613 (2d Dist.1963). Overall, the question of whether a child assumes the risk of an activity or situation will likely depend on circumstances (age, experience, intelligence) unique to that particular child.

## INDIANA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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. 2000).

### ASSUMPTION OF RISK

The minimum age for a child to assume the risk is 7 years old. "[C}hildren seven or older may be found to have incurred the risk of a particular activity." *Smith v. ALMI Realty Co.,* 614 N.E.2d 618, 621 (Ind. Ct. App. 1993) citing *Baller v. Corle*, 490 N.E.2d 382 (Ind. Ct. App. 1986).

## IOWA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

A child's capacity for negligence is a fact question based on the child's age, intelligence, and experience. *Peterson v. Taylor*, 316 N.W.2d 869, 873 (Iowa 1982).

### ASSUMPTION OF RISK

Assumption of risk is form of comparative negligence. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 148 (Iowa 1992). A child's capacity for negligence is a fact question based on the child's age, intelligence, and experience. *Peterson v. Taylor*, 316 N.W.2d 869, 873 (Iowa 1982).

## KANSAS

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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).

### ASSUMPTION OF RISK

The implied assumption of risk doctrine as a complete defense is limited to cases involving an employer – employee relationship. *Smith v. Massey – Ferguson, Inc.*, 256 Kan. 90 (1994). Assumption of risk is likely not applicable in a situation involving a minor.

## KENTUCKY

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

Children under the age of seven cannot be negligent or

contributory negligent. *Ward v. Music*, 257 S.W.2d 516, 518 (Ky. 1053). 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).

**ASSUMPTION OF RISK**

The assumption of the risk is not a defense in Kentucky since the adoption of pure comparative negligence. See Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984); Parker v. Redden, 421 S.W.2d 586 (Ky. 1967). Now, that portion of assumption of risk that had been used as part of contributory negligence can be proven as part of comparative negligence.

## LOUISIANA

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**CONTRIBUTORY/COMPARATIVE NEGLIGENCE**

There is not a set age requirement minimum for comparative/ contributory negligence. 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.")

**ASSUMPTION OF RISK**

There is not a set age requirement for assumption of the risk.

## MAINE

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

There is not a set age minimum for comparative/contributory negligence. 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 and intelligence (training, experience, judgment, capacity) is accustomed to exercise under the circumstances. Fowles v. Dakin, 160 Me. 392, 205 A.2d 169 (1964).

### ASSUMPTION OF RISK

The legislature's enactment of a comparative negligence statute, 14 M.R.S. §156, is considered to have effectively abolished the doctrine of implied assumption of risk. Wilson v. Gordon, 354 A.2d 398 (Me. 1976).

## MARYLAND

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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). 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).

### ASSUMPTION OF RISK

Assumption of the risk principles apply to children as well as adults. *See Bliss v. Wiatrowski,* 125 Md.App. 258, 273, 724 A.2d 1264, *cert. denied,* 354 Md. 571, 731 A.2d 970 (1999); *McQuiggan,* 73 Md.App. at 710–12, 536 A.2d 137. Like adults, children are held to an objective standard, albeit one reflecting the child's age, mental capacity, experiences, and circumstances. *Kelly v. McCarrick*, 155 Md. App. 82, 95, 841 A.2d 869, 876 (2004)

## MASSACHUSETTS

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

Although there is no bright line determining at what age a child is incapable of exercising due care as a matter of law, as a practical matter it is probably somewhere around four years of age. Compare *Coldiron v. Worcester Consolidated Street Railway Co.*, 253 Mass. 462, 149 N.E. 141 (1925) (3½ year old boy incapable of exercising due care) and *McDonough v. Vozzela*, 247 Mass. 552, 142 N.E. 831 (1924) (4 year old boy not incapable of exercising due care). The negligence of a child is judged by the standards of behavior expected from a child of like age, intelligence, and experience under all of the prevailing circumstances. *Mann v. Cook*, 346 Mass. 174, 190 N.E.2d 676 (1963). These principles apply with equal force to claims of comparative negligence of a child. *Mathis v. Massachusetts Elec. Co.*, 409 Mass. 256, 565 N.E.2d 1180 (1991).

### ASSUMPTION OF RISK

Assumption of the risk as a defense to an action in tort was abolished by the legislature in 1974 upon the adoption of the comparative negligence statute. Mass. Gen. Laws, ch. 231, §85.

## MICHIGAN

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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.

**ASSUMPTION OF RISK**

This common law doctrine is generally not applicable in Michigan. Since *Felgner v Anderson*, 375 Mich 23, 133 NW2d 136 (1965), the doctrine of assumption of risk has only been applied to cases (1) between employee and employer for injuries incurred in the course of employment where the statutory bar of the Workers Disability Compensation Act is not applicable, and (2) in cases where it is claimed there has been an express contractual assumption of risk.

However, the doctrine has been revived to a limited extent in the context of voluntary recreational activities in which a "reckless misconduct" minimum standard of care applies to co-participants in voluntary recreational activities – depending on the circumstances. *Ritchie-Gamester v Berkley*, 461 Mich 73, 597 NW2d 517 (1999). The Michigan Supreme Court reasoned that voluntary participants in recreational activities necessarily consent to subject themselves to the risks inherent in that activity. An ordinary negligence standard of care would apply to such things as play and roughhousing. Presumably, even under the *Ritchie-Gamester* standard of care, a child under age 7 will be found to be incapable of negligence because of his/her age. There is no case law which directly addresses this issue.

## MINNESOTA

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**CONTRIBUTORY/COMPARATIVE NEGLIGENCE**

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).

**ASSUMPTION OF RISK**

Minnesota has allowed primary assumption of the risk to be used as a defense to some actions involving minors. *See Greaves v. Galchutt,* 289 Minn. 335, 184 N.W.2d 26 (1971) (barring recovery in accidental shooting death of 11-year-old child). The defense of primary assumption of the risk, however, is unavailable as a matter of law in cases concerning the sexual abuse of a child, as the courts look to minors' inability to consent to such acts in criminal law. *See* Minn. Stat. § 609.342, subd. 1 (2006); Minn. Stat. § 609.343, subd. 1 (2006); Minn. Stat. § 609.344, subd. 1 (2006) (stating that "consent to the act by the complainant shall [not] be a defense" to criminal sexual conduct involving a minor).

*Bjerke v. Johnson,* 742 N.W.2d 660, 669-71 (Minn. 2007).

## MISSISSIPPI

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**CONTRIBUTORY/COMPARATIVE NEGLIGENCE**

Children under the age of seven are not capable of contributory negligence. Children between the ages of seven and 14, are 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.

Unless engaged in an adult activity, Mississippi recognizes three (3) age groups:

- 0-7 years: In Mississippi, a child under the age of seven is legally incapable of negligence, *Kopera v. Moschella*, 400 F. Supp. 131 (S.D. Miss. 1975);
- 7-14 years: A child between the ages of seven and fourteen is presumed to be incapable of negligence, but the presumption may be rebutted by showing that the child in question had exceptional capacity. *Steele v. Holiday Inns, Inc.*, 626 So. 2d 593 (Miss. 1993);
- Above age 14: Children over the age of fourteen are presumed to be capable of negligence, and within this class, the duty is to do what a person of like age, intelligence, and experience would do under similar circumstances. *Steele v. Holiday Inns, Inc.*, 626 So. 2d 593 (Miss. 1993).

## ASSUMPTION OF RISK

Mississippi is a pure comparative fault state and assumption of risk has been abolished.

# MISSOURI

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## CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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.

## ASSUMPTION OF RISK

Missouri does not recognize a predetermined age at which a child can assume the risk. The basis of the doctrine is that recovery for injuries should not be allowed where one voluntarily exposes oneself to a danger that is known and appreciated. *Gamble v. Bost*, 901 S.W.2d 182, 187 (Mo. Ct. App. 1995). In practice, the concepts of duty, assumption of risk, and consent must be analyzed on a case-by-case basis. According to Prosser and Keeton on Torts, § 68, 486–87 (5th ed.1984), the defense of assumption of risk is very narrow. The authors outline the required elements:[F]irst, the plaintiff must know that the risk is present, and he must further understand its nature; and second, his choice to incur it must be free and voluntary....Under ordinary circumstances the plaintiff will not be taken to assume any risk of either activities or conditions of which he has no knowledge. Moreover he must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger he confronts. *Gamble v. Bost*, 901 S.W.2d 182, 187 (Mo. Ct. App. 1995).

## MONTANA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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. 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]).

### ASSUMPTION OF RISK

The doctrine of assumption of risk has been largely subsumed into comparative negligence. Montana has statutory assumption of risk defenses applicable in product liability, ATV, snowmobile, and skiing cases (MCA §§ 23-2-654, 23-2-822, 27-1-727, 27-1-719). There is no stated minimum age for assumption of risk. The awareness of risk analysis is a subjective standard. "If by reason of age, or lack of information, experience, intelligence, or judgment, the plaintiff does not understand the risk involved in a known situation, he will not be taken to assume the risk, although it may be found that his conduct is contributory [comparative] negligence because it does not conform to the community standard of the reasonable" (*Krueger v General Motors Corp*., 240 Mont 266, 276, 783 P2d 1340, 1347 [1989]).

## NEBRASKA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

The negligence of a minor is normally a question for the jury; that, however, is not always the case. *Humphrey v. Burlington N. R.R. Co.*, 251 Neb. 736, 748, 559 N.W.2d 749, 756 (1997). (See N.J.I2d §3.05). In *Camerlinck,* the child was 6 years and 1 month old. *Camberlinck v. Thomas,* 209 Neb. 843, 312 N.W.2d 260 (1981). While sliding down a playground slide, he struck a

4 ½ year-old-boy in the eye with a stick. The trial court directed a verdict for defendant and dismissed the Petition, holding that, because of his age, the 6-year-old was not capable of actionable negligence. *Camerlinck,* 209 Neb. at 844-45, 312 N.W.2d at 26. The Supreme Court reversed and remanded, holding that the case presents a jury question on the issue of the 6-year-old's capacity for negligence. *Camerlinck*, 209 Neb. at 860-61, 312 N.W.2d at 269. "The more recent cases . . . appear to uphold the rule that there is no arbitrary . . . time at which a [minor] . . . may be wholly capable or incapable of understanding and avoiding dangers to be encountered, and that whether or not negligence may be attributed to a minor is usually a matter for the jury." *Camerlinck,* 209 Neb. at 856, 312 N.W.2d at 267.

> "A child of tender years is not required to conform to the standard of behavior which it is reasonable to expect of an adult. His conduct is to be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience. A child may be so young as to be manifestly and utterly incapable of exercising any of those qualities of attention, perception, knowledge, experience, intelligence, and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character. On the other hand, it is obvious that a minor . . . may be quite as capable as an adult of exercising such qualities . . .
>
> "Between the two extremes [--the younger, while not able to be fixed definitely for all cases, probably being somewhere in the vicinity of four years--] there are children whose capacities are infinitely varied. The standard of conduct required of the child is that which it is reasonable to expect of children of like age, intelligence, and experience."

*Camerlinck*, 209 Neb. at 868-59, 312 N.W.2d at 268 (quoting Restatement (Second) of Torts § 283A, comment (1965)).

" 'If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.' " Center State Bank v. Dana, Larson, Roubal & Assoc., 226 Neb. 408, 414, 411 N.W.2d 635, 639 (1987) (quoting *Camerlinck*, 209 Neb. at 858, 312 N.W.2d at 268). This means that, among other things, relevant evidence might include " 'the circumstances under which the child has lived,' " the experience of the child in

" 'encountering particular hazards, or the education' " the child has received concerning these hazards. *Center State Bank,* 226 Neb. at 414, 411 N.W.2d at 639(quoting *Camerlinck*, 209 Neb. at 859, 312 N.W.2d at 268).

**ASSUMPTION OF RISK**

There is no minimum age/or age requirement for a child to assume the risk. Case law in Nebraska does not specifically discuss assumption of risk with respect to children. However, the Standard of Conduct is that there is no arbitrary time at which a minor may be wholly capable or incapable of understanding and avoiding dangers to be encountered. The law primarily deals with the negligence of children, but the standard for assumption of risk, presumably would be the same. Assumption of risk would be a matter for the jury. *Camberlinck v. Thomas,* 209 Neb. 843, 312 N.W.2d 260 (1981).

## NEVADA

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**CONTRIBUTORY/COMPARATIVE NEGLIGENCE**

In Nevada, there is no minimum age at which a child can be held liable for contributory/comparative negligence. *Galloway v. McDonald's Restaurants of Nevada, Inc.*, 102 Nev. 534, 538, 728 P.2d 826, 828-29 (1986)

> ("In *Quillian v. Mathews*, 86 Nev. 200, 467 P.2d 111 (1970), however, we specifically refused to adopt a rigid rule of this nature. In *Quillian*, we determined that the issue of a child's contributory negligence is one of fact 'for the jury upon proper instructions unless reasonable minds could come **829 to but one conclusion from the evidence.' 86 Nev. at 203, 467 P.2d at 113. In so doing, we 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. In sum, we have expressly repudiated any Procrustean rule that, merely because a child has not reached some specified age, he or she is incapable of contributory negligence no matter what the situation, and no matter what the experience or capabilities of the child. Hence, the trial court could not give an instruction announcing to the jury that such is the state of the law in Nevada. [T]he 'requested instruction must be consistent with existing law.' *Beattie v. Thomas*, 99 Nev. 579, 583, 668 P.2d 268, 271 (1983) (citation omitted).")

**ASSUMPTION OF RISK**

There is no Neveda law addressing the minimum age/or age requirements for a child to assume the risk.

## NEW HAMPSHIRE

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**CONTRIBUTORY/COMPARATIVE NEGLIGENCE**

The infancy of a person is of material importance in determining whether he can be found to be contributorily negligent. Charbonneau v. MacRury, 84 N.H. 501, 153 A. 457 ( 1931). Minors are entitled to be judged by standards commensurate with their age, experience, and wisdom when engaged in activities appropriate to their age, experience, and wisdom. Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1966). However, a minor operating a motor vehicle must be judged by the same standard of care as an adult, whether he is charged with primary or contributory negligence. Id.

**ASSUMPTION OF RISK**

In determining whether a defendant has created an unreasonably increased risk of harm, such that a plaintiff can be said not to have assumed a risk of injury, the court inquires as to the nature and type of the activity involved, the ages, physical characteristics and skills of those engaged in the activity, and the typical risks involved in being engaged in such activity. *Allen v. Dover Co-Recreational Softball League*, 148 N.H. 407, 807 A.2d 1274 (2002).

## NEW JERSEY

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**CONTRIBUTORY/COMPARATIVE NEGLIGENCE**

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).

**ASSUMPTION OF RISK**

New Jersey does not recognize assumption of risk as a valid defense in the ordinary negligence action. As per the model jury charge, "there are fact scenarios, however, in which the concept of risk assumption has been recognized by statute…" Three such statutes relate to skiing (NJSA 5:13-1), roller skating (NJSA 5:14-1, and equestrian activities (NJSA 5:15-1). With regards to sports injuries, New Jersey has adopted a recklessness standard of care in determining the duty a recreational player owes to another. Where assumption of risk might be considered in a statutory case, while we have found no case specifically addressing the age at which a child might be capable of assuming the risk, the analysis undertaken by the court would likely be the same as for

assessing contributory/comparative fault of a child. That is, there must be evidence of training and experience of a child over the age of seven to assess the child's capability of understanding and avoiding the danger in order for the issue of assumption of risk under the applicable statute to be submitted to the jury.

## NEW MEXICO

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

Contributory negligence does not apply to children younger than 6 years old. "The correct test in determining the contributory negligence of a child (over 6) 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); *Saul v. Roman Catholic Church of Archdiocese of Santa Fe*, 75 N.M. 160, 402 P.2d 48 (1965). However, while, New Mexico decisions have held that a seven year old child may be negligent. *Marrujo v. Martinez*, 65 N.M. 166, 334 P.2d 548 (1959). Frei v. Brownlee, 56 N.M. 677, 248 P.2d 671 (1952) (ALTHOUGH RED FLAGGED FOR OTHER REASONS) indicates a five year old child cannot be contributorily negligent and *Latimer v. City of Clovis*, 1972-NMCA-040, 83 N.M. 610, 617, 495 P.2d 788, 795 also found a five year old could not be contributorily negligent as a matter of law.

### ASSUMPTION OF RISK

Assumption of risk is subsumed by the defense of comparative negligence. Assumption of risk is no longer a separate defense in New Mexico. "If pleaded and warranted by the evidence, the ground formerly occupied by the doctrine of assumption of risk will be covered by the law pertaining to negligence and contributory negligence." *Williamson v. Smith*, 491 P.2d 1147, 1152 (Sup Ct. NM 1971).

## NEW YORK

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

New York applies the standard of a reasonable child 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 [4th 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]).

**ASSUMPTION OF RISK**

There is no stated minimum age for assumption of risk. However, a child under four years old is incapable of being negligent (*Verni v Johnson,* 295 NY 436 [1946]). The complete defense of primary implied assumption of risk defense only applies to sporting activities (*Custodi v Amherst,* 20 NY3d 83 [2012]; *Morgan v State,* 90 NY2d 471, 486 [1997]; *Turcotte v Fell,* 68 NY2d 432 [1986]). In other contexts, assumption of risk does not bar recovery, but instead is an element of plaintiff's culpable conduct (*Trupia ex rel Trupia v Lake George Central School Dist.,* 14 NY3d 392, 396 [2010] [11 year old did not assume risk of sliding down banister at school]). Age is a consideration in determining if a particular plaintiff was aware of the risk (*Kroll v Watt,* 309 AD2d 1265 [4th Dep't 2003]). Generally, the younger the child, the more difficult it is to prove that plaintiff was aware of the inherent risk of the particular activity. Children as young as 13, have been found to have assumed the risk of sporting injuries and the issue of awareness of a 10 year old boy presented a jury question (*Braun v Davos Resort,* 241 AD2d 533 [2nd Dep't 1997] [13 year old assumed risk]; *Kroll v Watt,* 309 AD2d 1265 [4th Dep't 2003] [10 year old's awareness of risk to be determined by jury]).

## NORTH CAROLINA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

"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 it acted as a child of its age, capacity, discretion, knowledge and experience would ordinarily have acted under similar circumstances.'" *Allen v. Equity & Investors Mgmt. Corp.*, 56 N.C. App. 706, 709, 289 S.E.2d 623, 625 (1982) (quoting *Welch v. Jenkins*, 271 N.C. 138, 142, 155 S.E.2d 763, 766 (1967)).

### ASSUMPTION OF RISK

North Carolina law does not recognize assumption of risk as a defense absent a contractual relationship between the parties. *Clark v. Pilot Freight Carriers, Inc.*, 247 N.C. 705, 709, 102 S.E.2d 252, 255 (1958). The contract may be express or implied. *See Allred v. Capital Area Soccer League, Inc.*, 194 N.C. App. 280, 288, 669 S.E.2d 777, 781 (2008). Contracts with minors are voidable, with the exception of contracts for necessaries and contracts authorized by statute. G*illis v. Whitley's Disc. Auto Sales, Inc.*, 70 N.C. App. 270, 277, 319 S.E.2d 661, 666 (1984). North Carolina case law has not directly addressed whether and under what circumstances a minor may assume the risk of negligence by contract.

## NORTH DAKOTA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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]).

### ASSUMPTION OF RISK

North Dakota abolished the assumption of risk doctrine (*Wentz v Deseth,* 221 NW2d 101 [ND 1974]).

## OHIO

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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 (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, Roebuk & 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.*

**ASSUMPTION OF RISK**

In Ohio, the doctrine of secondary (implied) assumption of risk has merged with the doctrine of contributory negligence. Ohio courts have suggested that a child may be guilty of primary assumption of risk, including the participation in recreational activities, regardless of age. *See Gentry v. Craycraft,* 101 Ohio St.3d 141, 2004-Ohio-379; *Kelly v. Roscoe,* 185 Ohio App.3d 780, 2009-Ohio-4279 (7th Dist.).

## OKLAHOMA

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**CONTRIBUTORY/COMPARATIVE NEGLIGENCE**

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.

**ASSUMPTION OF RISK**

For assumption of risk, the same standards apply. See the leading case on the matter, *Ramage Mining Co. v. Thomas*, 44 P.2d 19 (1935), which provides in its pertinent part:

'The doctrine may be invoked in a case where the child injured by reason of an attractive nuisance is an invitee, a licensee, or trespasser; a child under seven years of age, or, in the absence of evidence of capacity, between seven and fourteen years of age, being presumed to be incapable of guilt of more than technical trespass.'

Whether the child was of an age and capacity to understand and avoid danger is usually a question for the jury, but it may be stated as a settled rule in this state that after the age of fourteen all minors are prima facie presumed to be capable of the exercise of judgment and discretion. Plaintiff being over the age of fourteen, and there being no evidence of lack of capacity, but, on the contrary, there being evidence that plaintiff was of advanced intelligence, the trial court should have held as a matter of law that the rule of attractive nuisance could not be invoked.

*Keck v. Woodring*, 1948 OK 174, 201 Okla. 665, 667, 208 P.2d 1133, 1135-6.

## OREGON

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

In Oregon, a minor has the duty to "use the same care that a reasonably prudent person of the same age, intelligence, and experience would use under the same or similar circumstances." *See* UCJI 22.04. 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).

### ASSUMPTION OF RISK

The doctrine of implied assumption of risk is abolished under Oregon Law. ORS 31.620.

## PENNSYLVANIA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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

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. Nineteen 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 – *Idzojtic 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)

**ASSUMPTION OF RISK**

One under the age of 7 is incapable of assuming the risk. One between the ages of 7 and 14 is rebuttably presumed incapable of assuming the risk. This is analyzed under the same principles for negligence and comparative negligence.

## RHODE ISLAND

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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. *Fontaine v. Devonis*, 336 A.2d 847 (R.I. 1975) (contributory negligence of three and one-half year old question of fact for the jury).

### ASSUMPTION OF RISK

No Rhode Island decision addresses assumption of the risk. However, because assumption of the risk requires an appreciation of the "unreasonable character" of the risk, the defense would likely be held a jury question as to a child of any age. *Ferguson v. Marsall Contractors, Inc.,* 644 A.2d 310 (R.I. 1994).

## SOUTH CAROLINA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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). A minor's conduct is to be judged by a standard of behavior to be expected of one of like age, intelligence, and experience under similar circumstances. In essence, every case is different and the conduct of every minor to be determined based on many factors.

See also Estate of Haley, ex. Rel. Haley vs. Brown, 370 S.C.240, 634 S.E.2d 62 (Ct. App. 2006).

### ASSUMPTION OF RISK

There is no minimum age requirement for a child in South Carolina to assume the risk.

## SOUTH DAKOTA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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 him 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 that a 5 year old is incapable of contributory negligence]).

### ASSUMPTION OF RISK

The assumption of risk doctrine is still viable in South Dakota and there is no minimum age for a child to assume the risk (Dodson v South Dakota Dept. of Human Services, 703 NW2d 353, 355 [SD 2005]). To prove assumption of risk, a defendant must show: 1) that the plaintiff had actual or constructive knowledge of the existence of the specific risk involved; 2) that the plaintiff appreciated the risk's character; and 3) that the plaintiff voluntarily accepted the risk, having had the time, knowledge, and experience to make an intelligent choice (Goepfert v Filler, 563 NW 2d 140, 142 [SD 1997]). This is similar to the like age and experience standard applicable to contributory negligence. For example, an eleven year old is capable of assuming the risk of being struck by another skier on intersecting ski-slopes (see, *Rantapaa v Black Hills Chair Lift Co.*, 633 NW2d 196 (S.D. 2001]).

# TENNESSEE

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## CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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 prmia 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).

## ASSUMPTION OF RISK

Historically this defense could be applied to a minor. *Walker v. Hamby*, 503 S.W.2d 118, 123 (Tenn.1973). But, it is a question of fact to be decided by the trier of fact, *Hood v. Waldrum*, 58 Tenn.App. 512, 520, 434 S.W.2d 94, 98 (1968), or it is at least a mixed question of law and fact to be decided according to the circumstances of each case. *Cleveland Wrecking Co. v. Butler*, 57 Tenn.App. 570, 576, 421 S.W.2d 380, 383 (1967). However, the Tennessee Supreme Court's decision in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn.1992), imported the principles of comparative fault into the common law and heralded the demise of both the doctrine of contributory negligence and the doctrine of implied assumption of the risk. In McIntyre, the Court abandoned the common-law "all-or-nothing" doctrine of contributory negligence. *McIntyre v. Balentine*, 833 S.W.2d at 56-57. Two years after deciding *McIntyre v. Balentine*, the Tennessee Supreme Court abandoned the doctrine of implied assumption of the risk, noting that: "[i]t would be ironic indeed if, after abolishing the all-or-nothing proposition of contributory negligence in *McIntyre*, we were to reinstate it here using the vehicle of assumption of risk." *Perez v. McConkey*, 872 S.W.2d 897, 905 (Tenn.1994). Thus, instead of retaining the doctrine of implied assumption of the risk as a separate defense, the Court decreed that "the reasonableness of a party's conduct in confronting a risk should be determined

under the principles of comparative fault." *Perez v. McConkey*, 872 S.W.2d at 905; see also *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 91 (Tenn.2000).

However, the law takes into account that minors generally do not have the same degree of experience, maturity and education as an adult and, therefore, lack the same capacity as an adult to understand or appreciate the consequences of their conduct. See *Cardwell v. Bechtol*, 724 S.W.2d 739 (Tenn.1987). Therefore, in assessing a minor's negligence, the minor is generally not held to the same standard of care imposed on adults. *Cardwell*, 724 S.W.2d at 748; *Arnold v. Hayslett*, 655 S.W.2d 941, 947 (Tenn.1983). Instead, the minor is charged with such care as a reasonably prudent person of like age, capacity, knowledge and experience would be expected to exercise under the same circumstances. See *Cardwell*, supra.

## TEXAS

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

The minimum age at which a child can be held liable for contributory/comparative negligence in Texas is five (5). A child under the age of five (5) cannot be held to any standard or degree of care because a child under five(5) is incapable of negligence as a matter of law. *Yarborough v. Berner*, 467 S.W.2d 188, 190 (Tex. 1971). In general, a child between the ages of five(5) and fourteen (14) can be held negligent, but would be held to a child's standard of care – defined as what an ordinarily prudent child of the same age, experience, intelligence, and capacity would or would not have done under the same or similar circumstances. See *Guzman v. Guajardo*, 761 S.W.2d 506, 510 (Tex. App.—Corpus Christi 1988, writ denied); *City of Austin v. Hoffman*, 379 S.W.2d 103, 107 (Tex. App.—Austin 1964, writ dism'd). A child over the age of fourteen (14) will be held to an adult's standard of care, unless it can be shown that the child lacks discretion or is under the handicap of some mental disability. *Hoffman*, 379 S.W.2d at 107.

### ASSUMPTION OF RISK

The assumption-of-risk doctrine has been abolished in Texas as an affirmative defense to negligence actions. See *Farley v. MM*

*Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975) (in minor's negligence suit against employer, holding assumption-of-risk doctrine (which acts as a complete bar to recovery) could no longer be asserted as affirmative defense due to Legislature's adoption of comparative negligence).

## UTAH

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

Question of whether a child under fourteen years of age can be contributorily negligent "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).

### ASSUMPTION OF RISK

Assumption of risk is subsumed by the comparative negligence defense. Assumption-of-risk language is not appropriate under comparative negligence statutes. Assumption of the risk in its secondary sense, as used in the requested instruction, is to be treated as comparative negligence. *Stephens v. Henderson*, 741 P.2d 952, 955 (Utah 1987).

In adopting this approach, the legislature has necessarily disavowed any tort theory of recovery inconsistent with comparative fault apportionment principles. Thus, the doctrine of "assumption of risk," whereby a defendant is not liable for his negligence toward a plaintiff who has "voluntarily assume[d] a risk of harm arising from [the defendant's] negligent ... conduct," is no longer recognized in Utah as a total bar to recovery. *Hale v. Beckstead*, 2005 UT 24, ¶ 21, 116 P.3d 263, 268

Secondary assumption of risk is treated in the same manner as comparative negligence for the purpose of apportioning fault under the comparative negligence statute. *Rigtrup v. Strawberry Water User's Ass'n, Utah*, 563 P.2d 1247 (1977).

## VERMONT

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

There is no specific age threshold. In some cases, a child may be so young that she or he is conclusively presumed incapable of judgment and discretion. In other cases, a child may be so mature in age and intelligence that the court should say as a matter of law that he is capable of exercising some degree of care for his own safety under the circumstances. However, lying between those limits, necessarily undefined by age, are the cases where the contributory and comparative negligence of a minor is a question of fact that depends upon the circumstances of the particular case, especially the mental development and previous training and experience of the child. *Johnson's Administrator v. Rutland Railroad*, 93 Vt. 132, 106 A. 682 (1919); *Northern Security Ins. Co. v. Perron*, 172 Vt. 204, 777 A.2d 151 (2001).

### ASSUMPTION OF RISK

There is no specific age threshold. The doctrine of assumption of the risk involves a sufficiently exact appreciation of the nature and extent of the danger to have enabled the injured plaintiff to estimate the possibilities of his surroundings so far as they affect his safety. While a comprehension of the risk is usually inferable from a knowledge of the conditions, in the case of minors it is not always so. The test is whether the dangers are so apparent that a person of his age, experience and capacity would in the circumstances, and by the exercise of due care, know and appreciate them and how to avoid them. *Wiggins v. E.Z. Waist Co*., 83 Vt. 365, 76 A. 36 (1910).

## VIRGINIA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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). *Virginia Elec. & Power Co. v. Dungee*, 258 Va. 235, 250, 520 S.E.2d 164, 173 (1999) (applying presumption to an assumption of the risk defense). 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).

### ASSUMPTION OF RISK

The same principles would apply for assumption of risk as contributory negligence above.

## WASHINGTON

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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. Applying this same standard, the issue of a child's contributory negligence is generally a question for the trier of fact. *Bauman v. Crawford,* 104 Wn2d 241, 244, 704 P2d 1181 (1985).

### ASSUMPTION OF RISK

Washington Courts also apply the assumption of risk doctrine in analyzing the claims of children. *Scott v. Pac. W. Mountain Resort,* 119 Wn2d 484, 501-03, 834 P2d 6 (1992) (analyzing assumption of risk in the context of a 12-year old skier); *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn2d 121, 875 P2d 621 (1994).

## WEST VIRGINIA

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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

### ASSUMPTION OF RISK

West Virginia has not ruled on age limitations on assumption of the risk.

## WISCONSIN

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### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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. Rhinelander 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); *Frayer by Edenhofer v. Lovell,* 190 Wis. 2d 794 (Wis. Ct. App. 1995).

### ASSUMPTION OF RISK

Wisconsin does not have assumption of risk as a complete defense, but rather, it is an element of contributory negligence. If a minor is guilty of contributory negligence, neither minor nor parent can recover, for their rights spring out of the same transaction—the same cause of action. *Callies v. Reliance Laundry Co.,* 188 Wis. 376, 206 N.W. 198, 200 (1925)

# WYOMING

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## CONTRIBUTORY/COMPARATIVE NEGLIGENCE

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). If the minor acts outside of that standard of care then the minor can be liable for comparative negligence.

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). Under these circumstances Wyoming joins the majority of jurisdictions in holding licensed minors to the same standard of care as an adult.

## ASSUMPTION OF RISK

There is no minimum age requirement for the assumption of risk. Wyoming adopted the Wyoming Recreational Safety Act (RSA), Wyo. Stat. Ann §1-1-121 et seq., The statute was amended in March of 2011:

> "The assumption of risk provisions in subsections (a) through (c) of this section apply irrespective of the age of the person assuming the risk." Wyo. Stat. 1-1-123(d).


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