Contributory Negligence of Young Children—Minnesota Adheres to the Massachusetts Rule [Toetsching v. Ihnot, Minn. 250 N.W.2d 204 (1977)]
COMMENTS

CONTRIBUTORY NEGLIGENCE OF YOUNG CHILDREN—MINNESOTA ADHERES TO THE MASSACHUSETTS RULE

[Toetschinger v. Ihnot, __ Minn. __, 250 N.W.2d 204 (1977)].

I. INTRODUCTION

Whether a child of "tender years" can be held contributorily negligent is a question that has produced disagreement among the courts. The majority position, followed in Minnesota, holds that a child of tender years is capable of contributory negligence, whereas the minority position conclusively presumes such a child to be incapable of contributing to its own injury. In Toetschinger v. Ihnot the Minnesota Supreme Court affirmed its view that a child of tender years may be capable of contributory negligence. The decision in Toetschinger, however, did not

1. This terminology is used consistently by the courts in describing young children, but it has been defined infrequently. The Supreme Court of Washington in Hanson v. Freigang, 55 Wash. 2d 70, 345 P.2d 1109 (1959) gave the following definition: "A child of tender years is one who, because of insufficient age, knowledge, experience, intelligence, judgment and discretion, is incapable of deliberating and acting upon his own experience and judgment." Id. at 74, 345 P.2d at 1111.

2. The question of the standard of care applicable to a child defendant who commits a tort or other wrong against another is beyond the scope of this note. The Minnesota court has indicated that "minors are entitled to be judged by standards commensurate with age, experience, and wisdom when engaged in activities appropriate to their age . . . ." Dellwo v. Pearson, 259 Minn. 452, 458, 107 N.W.2d 859, 862 (1961). The court has also indicated that a child operating an automobile, boat, or airplane will be held to the standard of an adult regardless of the child's age. See id. at 458, 107 N.W.2d at 863-64. For a general discussion of the standard of care applicable to torts committed by children, see Bahr, Tort Law and the Games Kids Play, 23 S.D. L. Rev. 275 (1978).

3. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32 (4th ed. 1971). Prosser believes that no minimum age should be set in advance below which a child is to be declared to be incapable of contributory negligence, but rather that this should be left to a judgment based on the capacity of the individual child. Id. Not all courts agree with this position. See, e.g., Walker v. Fresno Distrib. Co., 233 Cal. App. 2d 840, 847, 44 Cal. Rptr. 68, 73 (1965) (under California law a child under four is incapable of contributory negligence).

4. See W. PROSSER, supra note 3, at 155. This rule has also been imposed by statute. See Wis. Stat. Ann. § 891.44 (West 1966) (children under the age of seven incapable of contributory negligence).

5. __ Minn. __, 250 N.W.2d 204 (1977).

6. Id. at __, 250 N.W.2d at 208. Another significant issue raised by the decision in Toetschinger was the proper application of the emergency doctrine. This issue was presented because the plaintiff in Toetschinger had run out in front of the defendant's car. The defendant was aware of the presence of children some 100 feet ahead of her on the side of the road. The court held that this was a proper case for the application of the emergency doctrine. See id. at __, 250 N.W.2d at 211. The emergency doctrine operates as follows: "[A]n emergency rule is but a special application of the general standard of reasonable care and that, when given, it requires a jury to consider the fact of sudden peril
receive the support of the full court. A strong dissent was filed, in which three justices concurred, advocating the adoption of a conclusive presumption that a child of tender years cannot be contributorily negligent. In addition to raising the relative merits of the majority and minority rules, Toetschinger raises a question as to the manner in which the majority rule is to be applied under Minnesota law.

In Toetschinger the plaintiff, a five-year-old child, was standing with his two sisters by the side of a four-lane through street just beyond an intersection. The street did not have a crosswalk at this point. The defendant was driving her car on the through street at a speed within the posted forty-five mile-an-hour limit. Approximately one hundred feet before the point at which the child was standing, the defendant realized that children were standing by the side of the road and took her foot off the accelerator. As the defendant proceeded into the intersection, the child left his place of safety at the shoulder of the road and dashed into the path of the car. The defendant applied her brakes but was unable to avoid striking the child, causing injuries to his mouth and one of his legs. In an action by the child to collect damages, the defendant asserted that the child was contributorily negligent. The jury returned a verdict finding the child eighty-percent negligent and the defendant twenty-percent negligent. Thus, under Minnesota’s comparative negligence statute, the plaintiff’s recovery was barred because the plaintiff was found to be more negligent than the defendant. 7

On appeal, the question of the plaintiff’s capacity to be contributorily negligent was raised. This caused the court to examine its long standing adherence to the Massachusetts rule,8 which submits the question of as a circumstance in determining the reasonableness of a person’s response thereto. Urban v. Minneapolis St. Ry., 256 Minn. 1, 4-5, 96 N.W.2d 698, 700 (1959). The court in Toetschinger distinguished Kachman v. Blosberg, 251 Minn. 224, 232-33, 87 N.W.2d 687, 693-94 (1958) in which the emergency doctrine was held inapplicable to a defendant who was aware of the presence of children some 300 feet ahead in the road. See Toetschinger v. Ihnot, Minn. at ____, 250 N.W.2d at 211. Apparently the court found the difference of 200 feet, which distinguishes the circumstances of Toetschinger from those of Kachman, to be decisive.

7. At the time of the plaintiff’s injury Minnesota’s comparative negligence statute barred recovery when the negligence of the plaintiff was as great or greater than that of the defendant. See Minn. Stat. § 604.01 (1976) (current version at Act of Apr. 5, 1978, ch. 738, § 6, 1978 Minn. Laws 839). The statute was amended in 1978 to allow recovery by a plaintiff whose negligence is equal to or less than that of the defendant. See Act of Apr. 5, 1978, ch. 738, § 6, 1978 Minn. Laws 839 (to be codified as Minn. Stat. § 604.01 (1)).

8. This terminology was first utilized by the Minnesota court in Eckhardt v. Hanson, 196 Minn. 270, 272, 264 N.W. 776, 777 (1936) to denominate the rule which holds that the question of the child’s contributorly negligence is for the jury under proper instructions. Compare Twist v. Winona & St. P.R.R., 39 Minn. 164, 169, 39 N.W. 402, 405 (1888) and Decker v. Itasca Paper Co., 111 Minn. 439, 444-45, 127 N.W. 183, 184 (1910) with Eckhardt v. Hanson, 196 Minn. at 272, 264 N.W. at 777. The Massachusetts rule has been the longstanding rule in the State of Minnesota. See, e.g., Rosvold v. Johnson, 284 Minn. 162,
whether such a child was contributorily negligent to the jury. In upholding the application of the Massachusetts rule in Minnesota the majority found that the rule was grounded in sound considerations of public policy.\(^9\) In a lengthy dissent, however, a minority of justices urged the adoption of the Illinois rule,\(^10\) which conclusively presumes that a child under the age of seven years is incapable of contributory negligence.

Because the Massachusetts rule was seriously questioned by four of the nine justices on the court, the rule's continued application in this state may be in doubt. Therefore, the Massachusetts and Illinois rules will be compared, analyzing the policy sought to be served by each rule and examining whether each rule, in fact, serves that policy. Further, this Comment examines the application of both rules in an effort to recommend a future course for the Minnesota court.

II. THE MASSACHUSETTS RULE

The merits of the Massachusetts rule are a function of both its procedural application and its rationale. Two questions must be answered to resolve the issue of whether a young child was contributorily negligent.\(^11\) The first is whether the child is capable of negligence; that is, whether the child has the ability to recognize and cope with the particular danger which resulted in its injury. Under Minnesota law this question is for the trial court, not the jury. Once the question of the child's capacity for contributory negligence is answered, the second question—whether

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\(^9\) See Toetschinger v. Ihnot, ___ Minn. at ____, 250 N.W.2d at 210.

\(^10\) This terminology was first utilized by the Minnesota court in Eckhardt v. Hanson, 196 Minn. 270, 264 N.W. 776 (1936) to denominate the rule which holds that a child under the age of seven is conclusively presumed to be incapable of contributory negligence. See note 8 supra.

\(^11\) No decision in Minnesota clearly sets out the two-step decision-making process. As a result, a good deal of ambiguity arises as to the exact procedure which must be followed in Minnesota. The following language, however, makes clear the trial court's role in the initial determination of the child's capacity for contributory negligence.

The trial judge, who has the opportunity of observing the situation firsthand, can direct that the child involved, because of tender years, inexperience, or the subtleties of the danger to be apprehended, cannot be held to be contributorily negligent under the circumstances of the given case.

Toetschinger v. Ihnot, ___ Minn. at ____, 250 N.W.2d at 210. In a footnote following this language the court cited several cases to support this power of the trial court. Id. at ____, 250 N.W.2d at 210 n.2. These cases discuss, generally, the power of the trial court to decide whether the issue of the child's contributory negligence should be submitted to the jury. They do not, however, make the procedure by which a child is to be judged contributorily negligent clearer than does the above quotation from Toetschinger. See Capriotti v. Beck, 264 Minn. 39, 41, 117 N.W.2d 563, 565-66 (1962); Watts v. Erickson, 244 Minn. 264, 267-68, 69 N.W.2d 626, 629 (1955); Thomsen v. Reibel, 212 Minn. 83, 85, 2 N.W.2d 567, 568 (1942); Decker v. Itasca Paper Co., 111 Minn. 439, 444, 127 N.W. 183, 184 (1910).
the child acted in a negligent manner—arises. In Minnesota this question is for the jury as the trier of fact. The standard of care to be applied by the jury is the care that would be exercised by a "reasonable child of the same age, intelligence, training and experience" as the child in question. Under this standard the jury apparently applies the evidence introduced on the issue of capacity in its determination of the degree of care required of the child.

In Watts v. Erickson the Minnesota court held that because of the failure to introduce evidence of the particular child's capacity for contributory negligence, a new trial was required so that the jury could be "more completely informed as to the experience, training and intelligence of . . . [the child] before . . . [the jury] attempts to pass on the question of his contributory negligence." The court in Watts indicated that evidence sufficient to establish the capacity of the child would fall into categories of general intelligence, general maturity and ability, and instructions and warnings from parents or schools as to the particular mode of conduct in question. However, if this evidence is not sufficient to establish the capacity of the child for contributory negligence when confronted with the particular danger or if the child is too young, the Minnesota Supreme Court indicated in Toetschinger that the trial court may instruct the jury that the child is incapable of negligence.

The manner in which the Massachusetts rule is applied in Minnesota

12. See Toetschinger v. Ihnot, — Minn. at —, 250 N.W.2d at 210.

13. The Minnesota jury instructions provide: "In the case of a child, reasonable care is that care which a reasonable child of the same age, intelligence, training and experience as (name of child) at the time of the (accident) (occurrence) (collision) would have used under like circumstances." A MINNESOTA PRACTICE JIG II, 104 G-S (2d ed. 1974). This instruction was quoted with approval in Toetschinger. See — Minn. at —, 250 N.W.2d at 210. Although this instruction states the general standard of care, it does not clarify the exact procedure by which the court and jury must apply the standard.


15. 244 Minn. 264, 69 N.W.2d 626 (1955).

16. Id. at 269, 69 N.W.2d at 630. Watts involved a child who was hit by a bus while crossing the street. Noting that the only evidence of the child's capacity was age, the court stated that "there was no showing of the qualifications of this particular child, such as experience in crossing the streets, the amount of traffic instructions he had received in his home, and his general intelligence, knowledge, or experience." Id. at 269, 69 N.W.2d at 629. For this reason the court granted a new trial so that the jury could be more fully informed.

17. Id.; accord, Rosvold v. Johnson, 284 Minn. 162, 169 N.W.2d 598 (1969). In Rosvold the plaintiff appealed on the ground that no evidence of the child's capacity had been introduced at trial. The court rejected this contention stating that testimony of the child's father as to the child's obedience, personality, intelligence, maturity, and ability was sufficient evidence of the child's capacity. Id. at 165, 169 N.W.2d at 599-600. See Van Asch v. Rutili, 286 Minn. 9, 12, 174 N.W.2d 101, 103 (1970) (evidence of reprimands for failure to exercise care, familiarity with city streets, and intelligence sufficient).

18. See — Minn. at —, 250 N.W.2d at 210.
appears to transform the rule into a rebuttable presumption that a child under the age of seven years is incapable of contributory negligence. As applied in Watts, the rule shifts the burden of proving the child’s capacity for negligence to the defendant who asserts the contributory negligence of a young child. If the defendant fails to meet this burden, the trial court is empowered to instruct the jury to find in favor of the child on the issue of his contributory negligence. If the defendant introduces evidence sufficient to satisfy the trial court that the child has the capacity to be contributorily negligent, however, the case goes to the jury under the special standard of care used for children of tender years.

Although the manner in which the Massachusetts rule is applied in Minnesota appears to be that of a rebuttable presumption of the child’s incapacity for contributory negligence, the Minnesota court has not explicitly categorized the rule as creating such a presumption. The court, however, is aware of and has acknowledged the roles of both the trial court and the jury in the application of the Massachusetts rule. Under the present application of the Massachusetts rule, if the trial judge does not explicitly rule that the child is incapable of contributory negligence, the case is submitted to the jury without mention of the child’s capacity for contributory negligence. This procedure is consist-

19. New Jersey case law offers assistance in determining the operation of the Massachusetts rule in Minnesota. New Jersey’s variation of the Massachusetts rule holds a child of tender years to be rebuttably presumed to be incapable of contributory negligence. See, e.g., Dillman v. Mitchell, 13 N.J. 412, 416, 99 A.2d 809, 811 (1953). Under the New Jersey variation of the Massachusetts rule, if reasonable persons cannot differ as to the child’s incapacity for contributory negligence the trial court may decide the issue. See, e.g., Bush v. New Jersey & N.Y. Transit Co., 30 N.J. 345, 358, 153 A.2d 28, 33 (1959). If reasonable persons can differ as to the capacity of the child for contributory negligence, the case is submitted to the jury as if presumption never existed.)

20. See Watts v. Erickson, 244 Minn. at 268-69, 69 N.W.2d at 629-30. Under Minnesota law presumptions cease to operate as soon as evidence which can support a contrary finding is introduced. See, e.g., Firkus v. Murphy, Minn., 246 N.W.2d 864, 866 (1976); cf. Suske v. Straka, 229 Minn. 408, 413, 39 N.W.2d 745, 749 (1949) (once rebutting evidence is introduced case is decided as if presumption never existed); State v. Northwestern Nat’l Bank, 219 Minn. 471, 492, 18 N.W.2d 569, 580 (1945) (absent rebutting evidence presumption dictates outcome). See also MINN. R. EVID. 301.


22. See id. at 210, 250 N.W.2d at 210.

23. Under the Minnesota Rules of Evidence a rebuttable presumption is not mentioned to the jury if sufficient evidence has been introduced to rebut it. See MINN. R. EVID. 301. If the presumption remains unrebutted it dictates the outcome of the issue to which it is applicable. See id. Thus, the Massachusetts rule appears to operate as a rebuttable presumption. See id. See generally Thompson, Presumptions and the New Rules of Evidence in Minnesota, 2 WM. MITCHELL L. REV. 167, 168-69 (1976).


25. See notes 15-18 supra and accompanying text.
ent with the application of a rebuttable presumption under the Minnesota Rules of Evidence, which provide that once a presumption is rebutted, the presumption is not mentioned to the jury.\textsuperscript{26} When the defendant fails to establish the capacity of the child for contributory negligence, however, the trial judge may direct that the child is incapable of contributory negligence.\textsuperscript{27} This result is also consistent with the Minnesota Rules of Evidence for rebuttable presumptions.\textsuperscript{28} The failure of the Minnesota court to recognize explicitly the nature of the Massachusetts rule as a rebuttable presumption of the child’s incapacity for contributory negligence detracts, however, from the certainty with which the rule is applied. By acknowledging the nature of the Massachusetts rule as that of a rebuttable presumption, the court would facilitate a streamlined application of the rule. Explicit recognition of the rule as a rebuttable presumption also might eliminate the belief of the dissenting justices in \textit{Toetschinger} that the results presently obtained under the Massachusetts rule, as applied in Minnesota, are uncertain.\textsuperscript{29}

The rationale for the Massachusetts rule apparently originated as dictum in the case of \textit{Collins v. South Boston Railroad}.\textsuperscript{30} Holding that children were to be judged by the standard of whether the child exercised “that degree of care which might reasonably be expected of a child of his age; or which is ordinarily shown by children of the same age,”\textsuperscript{31} the Massachusetts court reasoned:

\begin{quote}
It would seem that if children unreasonably, intelligently, and intentionally run into danger, they should use the prudence and discretion which persons of their years ordinarily have, and that they cannot be permitted with impunity to indulge in conduct which they know, or ought to know to be careless, because children are often mischievous.\textsuperscript{32}
\end{quote}

This rationale is quite similar to that given for the Massachusetts rule by the Minnesota court in \textit{Toetschinger},\textsuperscript{33} in which the court stated that young children are permitted by society to assume some degree of responsibility for their actions and should be held to a degree of care commensurate with their experience.\textsuperscript{34} The majority in \textit{Toetschinger} indicated that this treatment was in line with the common practice of

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\footnote{26. See \textit{Minn. R. Evid.} 301. See generally Thompson, \textit{supra} note 23, at 168-69.}
\footnote{27. See notes 15-18 \textit{supra} and accompanying text.}
\footnote{28. See \textit{Minn. R. Evid.} 301 (presumption imposes the burden of going forward with evidence on party against whom it operates). See generally Thompson, \textit{supra} note 23, at 168 (unrebutted presumption necessitates a directed verdict).}
\footnote{29. See \textit{Toetschinger v. Ihnot}, \textit{Minn. at ____}, 250 N.W.2d at 220 (Yetka, J., dissenting).}
\footnote{30. 142 Mass. 301, 7 N.E. 856 (1886).}
\footnote{31. \textit{Id.} at 315, 7 N.E. at 860.}
\footnote{32. \textit{Id.}}
\footnote{33. \textit{Id.} at ____ \textit{Minn. at ____}, 250 N.W.2d at 210.}
\footnote{34. \textit{Id.}}
\end{footnotes}
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parents of young children who, according to the court, are best able to assess the capacity of their children. The court went on to point out that more responsibility has been placed on young children since the rule was first utilized in Minnesota, thus solidifying the basis of the Massachusetts rule in contemporary considerations of public policy.

III. THE ILLINOIS RULE

While the value of the Massachusetts rule lies in its flexible approach, allowing a determination to be made on the basis of both the specific fact situation and the individual characteristics of the child, the Illinois rule has merit in so far as its application dictates the same result in every case, thus achieving certainty. The rule is quite simple to apply—all children under the age of seven are conclusively presumed to be incapable of contributory negligence. The rationale for the Illinois rule is more troublesome, however, because the rule depends on the variable of the child's age for its operation. The use of this single variable gives the Illinois rule the appearance of being arbitrary and possibly unconstitutional.

The dissenting opinion in Toetschinger, written by Justice Yetka and joined in by three other members of the court, raised strong objection to the continued application of the Massachusetts rule in Minnesota. Arguing for the adoption of the Illinois rule, the dissent contended that the Massachusetts rule leaves too much to circumstance and therefore does not afford young children enough protection. Relying on the "common law and the civil law as well as jurisprudence generally," the dissent contended that the Illinois rule is not arbitrary and that the collective judgment of many years of analysis represented by the Illinois rule should be respected.

35. Id. at __, 250 N.W.2d at 210-11.
36. Id. at __, 250 N.W.2d at 210. The public policy considerations mentioned in support of the Massachusetts rule were first considered by the Minnesota court in Eckhardt v. Hanson, 196 Minn. 270, 274, 264 N.W. 776, 778 (1936).
37. See, e.g., __ Minn. at __, 250 N.W.2d at 211 (outcome of litigation should not be dictated by such a fortuity as age); Eckhardt v. Hanson, 196 Minn. at 272, 264 N.W. at 777 (Illinois rule referred to as arbitrary).
38. See notes 52-72 infra and accompanying text.
39. __ Minn. at __, 250 N.W.2d at 219 (Yetka, J., dissenting).
40. Id. at __, 250 N.W.2d at 220 (Yetka, J., dissenting). Before Minnesota had firmly adopted either the Massachusetts or Illinois rules, the merits of the rules were discussed, but no decision was reached. See Decker v. Itasca Paper Co., 111 Minn. 439, 444-45, 127 N.W. 183, 184 (1910). In Twist v. Winona & St. P.R.R., 39 Minn. 164, 39 N.W. 402 (1888) the court also discussed both rules, but came to the conclusion that the authority was all one way in support of the Massachusetts rule. Id. at 169, 39 N.W. at 405. Finally, in Eckhardt v. Hanson, 196 Minn. 270, 264 N.W. 776 (1936), the court resolved the apparent inconsistency between Decker and Twist by adopting the Massachusetts rule. See id. at 272-74, 264 N.W. at 777-78.
41. __ Minn. at __, 250 N.W.2d at 221-22 (Yetka, J., dissenting) (footnotes omitted).
Refusing to accept the majority's premise that contemporary children are more advanced in their abilities to perceive and understand danger than the children around whom the Illinois rule was formulated, the dissent contended that the rapid technological developments of society furnish a strong basis for the application of the Illinois rule because the rule protects children against their inability to comprehend the complex dangers created by these advances. In support of this position, the dissent discussed psychological literature and findings pointing to the conclusion that the seven-year cutoff point of the Illinois rule is related to changes that take place in the physical and mental capacities of young children. Among the changes contended by the dissent to take place at the age of seven are "the inception of thought and reason, the commencement of exchange of ideas, the beginning of concepts of justice . . . [and the beginning of] social thought and cooperation."

The Illinois rule found its origin in the common law presumption that a child under the age of seven years was incapable of formulating the necessary *mens rea* to commit a crime. While this rationale for the Illinois rule apparently remains unchanged in the Illinois courts, the Supreme Court of Washington has attempted to develop a more convincing rationale for the application of the rule. In *Von Saxe v. Barnett* the Washington court based its rationale for adherence to the Illinois rule on the interplay between the public policy decision represented by the contributory negligence doctrine, which at that time barred recovery even though the child was only slightly negligent, and the tenderness with which society regards young children. The court stated that the contributory negligence doctrine was the result of a public policy decision against allowing persons partially at fault for their own injury to

42. See id. at —, 250 N.W.2d at 222-23 (Yetka, J., dissenting).
43. See id. at —, 250 N.W.2d at 223 (Yetka, J., dissenting).
44. Id. at —, 250 N.W.2d at 222-23 (Yetka, J., dissenting). Reliance on psychology in this area may be unfounded. It has been argued that much of what passes for incapacity in children is, in reality, a limitation on the development of the child imposed by society. See Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 Law & Contemp. Prob. 38, 75-77 (1975).
45. __ Minn. at —, 250 N.W.2d at 222 (Yetka, J., dissenting) (quoting Tyler v. Weed, 285 Mich. 460, 473, 280 N.W. 827, 832 (1938) (McAllister, J., dissenting in part)).
48. 125 Wash. 639, 217 P. 62 (1923), noted in 8 Minn. L. Rev. 73 (1923).
49. 125 Wash. at 645-46, 217 P. at 64. The *Von Saxe* court rendered its decision prior to the advent of comparative fault systems, therefore even the slightest contributory negligence on the part of a plaintiff at that time barred recovery. See generally W. Prosser, *supra* note 3, § 65, at 421.
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thrust that responsibility on another. Then, assuming that children under the age of seven do not have the capacity for contributory negligence, the Washington court reasoned that because the contributory negligence doctrine requires people to take responsibility for their own fault, the doctrine should have no application to a child of tender years who is not capable of taking responsibility for its own acts. This rationale, grounded in considerations of public policy and not in a common law criminal rule, furnishes some justification for modern application of the Illinois rule.

The nature of the Illinois rule, of course, is that of an irrebuttable presumption based on the age of the child. Once the basic fact of the child's age is established, the presumed fact—the incapacity of the child for contributory negligence—arises. Because of the rule's nature as an irrebuttable presumption and because the presumption uses age in its formulation, the rule might present constitutional problems.

One possible basis for an attack on the Illinois rule arises from its use as an irrebuttable presumption. Such a presumption may be held to violate the due process clause of the fourteenth amendment if the subject of the presumption is determined to have been denied the opportunity to establish a basis for his exclusion from the class created by the presumption. The rule developed by the United States Supreme Court to test the constitutionality of an irrebuttable presumption is whether "it is necessarily or universally true in fact" that the presumed fact follows the initial fact. If an irrebuttable presumption does not meet this test, however, the rule it represents is not completely abrogated. Rather, the individual subject of the presumption must be afforded a hearing to determine whether he or she is a member of the class created by the presumption. In effect, the presumption is changed from an

50. 125 Wash. at 645-46, 217 P. at 64.
52. See C. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 342, at 804 (2d ed. E. Cleary 1972). An irrebuttable presumption is defined as a substantive rule of law not related to the fact finding process. See also Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 HARV. L. REV. 59, 62 (1933) (no evidence to the contrary can overthrow a conclusive presumption).
Whether the irrebuttable presumption doctrine would be applicable to the Illinois rule must be questioned. The class created by the Illinois rule is made up of all children under seven years of age. Because these children derive benefit from inclusion in the class, an attack by a member of the class on the presumption giving the child such a significant advantage is nearly impossible to imagine. Further, in cases in which the Supreme Court has applied the irrebuttable presumption doctrine, the person challenging the presumption has suffered some harm because of inclusion in the class created by the presumption. Therefore, to establish that the irrebuttable presumption doctrine should be applied to the Illinois rule, a defendant in a negligence action would be required to claim that the Illinois rule also created a class of defendants who must defend such actions. But the mere inclusion in such a defendant class does not result in harm. Thus, while a defendant might argue that the Illinois rule creates a class of persons required to defend a negligence action against a child under seven years of age, the possibility of a court recognizing such a class is remote because under the Illinois rule liability may not be imposed on a defendant until he is found to be at fault. The irrebuttable presumption doctrine, therefore, would seem inapplicable to the Illinois rule.

Even if a defendant were able to convince a court to apply the irrebuttable presumption doctrine to the Illinois rule, the rule might well be declared constitutional. Although the incapacity of a child under the age of seven for contributory negligence is not "necessarily or universally true in fact," the Supreme Court appears to have modified the irrebuttable presumption doctrine as it is applied to social welfare legislation by applying a standard of "reasonableness" to such legislation.

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57. Tribe suggests that the irrebuttable presumption doctrine is but one of many tests which may be utilized by the United States Supreme Court to deal with a rule which seems too harsh, but is not so radical as to be totally unconstitutional. Instead of completely destroying the rule, the Court simply alters its administration to include an individualized hearing. See L. Tribe, American Constitutional Law § 16-32 (1978).


59. See, e.g., Binsfeld v. Curran, 22 Wis. 2d 610, 614, 126 N.W.2d 509, 512 (1964). This result is mandated by Wis. Stat. Ann. § 891.44 (West 1966), which establishes a conclusive presumption of incapacity in children under the age of seven.

60. Vlandis v. Kline, 412 U.S. at 452.

Under the reasonableness standard the courts of a state may conclude that the irrebuttable presumption of incapacity for contributory negligence of a child under the age of seven is a reasonable rule, especially if that state has not shifted to a comparative fault analysis. Thus, it is unlikely that the Illinois rule would be held unconstitutional on this basis.

Another possible basis for a constitutional attack on the Illinois rule may be the rule’s use of age in its formulation, presenting a possible violation of the equal protection clause. Recent constitutional attacks on mandatory retirement programs, however, indicate that the Illinois rule is unlikely to be held violative of equal protection. These attacks have failed thus far because the Supreme Court has refused to declare age a suspect classification. Thus, the Court has applied a “rational

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63. Under the Supreme Court’s equal protection analysis, if a classification is declared to be “suspect,” a close relationship must be shown between such a classification and the end sought to be achieved. See, e.g., McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (applying strict scrutiny to racial classification). Although a question may arise as to whether common law rules can violate the equal protection clause, the Court has made it clear that judicial decisions constitute state action which can be held to violate the fourteenth amendment. See, e.g., Shelly v. Kraemer, 334 U.S. 1, 16 (1948); Watson v. Kenlick Coal Co., 498 F.2d 1183, 1193 (6th Cir.), cert. denied, 422 U.S. 1012 (1974).

64. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-16 (1976) (per curiam) (mandatory retirement at age 50 for state patrol has a rational basis). However, it has been argued by at least one commentator that age is an inherently unreasonable classification. See generally Comment, Mandatory Retirement: Discrimination Against the Aged Minority, 23 S.D. L. Rev. 358, 371 (1978).

65. See, e.g., Larkin, Constitutional Attacks on Mandatory Retirement: A Reconsideration, 25 U.C.L.A. L. Rev. 549, 556 (1978). Larkin indicates that a major flaw in attacks on mandatory retirement is that much legislation regarding the elderly uses age as a basis to favor the class. Presumably this argument can be applied by analogy to the Illinois rule which favors young children. But see Tribe, Childhood, Suspect Classification, and Conclusive Presumptions: Three Linked Riddles, 39 Law & Contemp. Prob. 8, 34-37 (1975) (suggesting that age should be a “semi-suspect” classification). For a more general discussion of age classifications and their constitutional implications, see L. Tribe, supra note 57, at § 16-29 (1978).
basis” standard rather than the “strict scrutiny” test that is required when considering suspect classifications. For example, in *Massachusetts Board of Retirement v. Murgia* the Court upheld a statute that required state police officers to retire at age fifty, regardless of physical ability, on the ground that the statute was rationally related to the state’s purpose of assuring that all police officers were physically fit. The Court in *Murgia* reiterated that the rational basis test did not require legislation to be perfectly tailored to its purpose; the fact that some fifty-year-old police officers were physically fit did not make the Massachusetts statute irrational. Because the Illinois rule apparently would be judged under the rational basis test, the fact that not all children under the age of seven are incapable of contributory negligence in every situation probably would be insufficient to support a finding that the Illinois rule is irrational and thus unconstitutional.

IV. A COMPARISON OF THE MASSACHUSETTS AND ILLINOIS RULES

Both the Massachusetts and Illinois rules have considerable followings among the various courts. Perhaps the ultimate test of each of these rules should be whether either serves the public policy that created it. Thus, the advantages and disadvantages of each rule are best analyzed through an examination of the rationales stated for the rules.

Courts that apply the Massachusetts rule appear to do so on the premise that even young children are capable of comprehending some danger and exercising some degree of care. To safeguard the viability of this assumption, these courts have created what amounts to a rebuttable presumption that the child in question is incapable of contributory negligence. A rebuttable presumption of the child’s incapacity for negligence gives the litigant representing the interest of the child a significant procedural advantage. A failure to introduce evidence of the

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69. Id. at 316.
70. Id. (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).
71. Id. at 314-17.
74. See notes 19-22 supra and accompanying text.
75. A rebuttable presumption may shift either the burden of proof or the burden of
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child’s capacity by the party asserting the contributory negligence of the child entitles the litigant representing the interests of the child to a directed verdict on that issue. If the trial judge is of the opinion that the party asserting the contributory negligence of the child has met the burden of rebutting the presumption of the child’s incapacity, however, the issue of the child’s contributory negligence is submitted to the jury without mention of the presumption. This procedure is reasonable because the Massachusetts rule, in effect, presumes that the contributory negligence of the child is unlikely but not impossible. Thus, the person asserting the less likely event is required to prove that it was at least possible. The jury then is allowed to decide the factual issues presented by the specific occurrence.

In effect, this presumption serves as a threshold question of whether the child had the capacity to appreciate the specific danger that resulted in the child’s injury. In this manner the Massachusetts rule, with its fundamental assumption that a child of tender years is capable of exercising some degree of care, can be administered without fear that a child who is unable to comprehend a danger causing its injury will be declared contributorily negligent.

As judge-made law the Massachusetts rule is an excellent method for weighing the facts necessary for a finding that a young child is contributorily negligent. First, the rule is justifiable in light of changes in society that have resulted in placing increased responsibility on young children. Second, the application of a multi-variable test—age, intelligence, training, and experience—helps to ensure that the rule is applied with fairness. Finally, the Massachusetts rule is able to bridge the persuasion to the party not normally required to come forward with evidence on that issue. See generally Note, Constitutionality of Rebuttable Statutory Presumptions, 55 COLUM. L. REV. 527, 528-29 (1955).

66. See, e.g., Toetschinger v. Ihnot, __ Minn. ___, 250 N.W.2d 204, 210 (1977); Watts v. Erickson, 244 Minn. 264, 268-69, 69 N.W.2d 626, 629 (1955) (before issue of child’s contributory negligence goes to jury sufficient evidence of capacity must be introduced); Note, supra note 75, at 529 (failure to introduce rebutting evidence requires directed verdict for party in whose favor the presumption operates).

67. See, e.g., Toetschinger v. Ihnot, __ Minn. ___, 250 N.W.2d 204, 210 (1977). See also MINN. R. EVID. 301.

68. See generally Gausewitz, Presumptions in a One-Rule World, 5 VAND. L. REV. 324, 329 (1952) (reason for creation of presumption is to promote decisions in accord with probabilities); Morgan, supra note 52, at 930 (party against whom presumption operates is relying on the unusual and is required to prove it).

69. See generally Morgan, supra note 52, at 930.


71. See id.; cf. Stumbo, Presumptions—A View at Chaos, 3 WASHBURN L.J. 182, 183 (1964) (principal reason for creation of presumptions is implementation of social policy).


73. See notes 14, 17-18 supra and accompanying text. The utilization of these factors in assessing the capacity of a child for contributory negligence helps to insure that a child
obvious gap between the harsh results sometimes achieved under contributory negligence rules and the tenderness with which society treats young children.

While the Massachusetts rule views children under the age of seven as capable of exercising some care for their own safety, the basic premise of the Illinois rule appears to rest on the conviction that a child of tender years is "immature" and thus incapable of exercising care for its own safety. This premise appears to be equally applicable whether the courts choose to view the Illinois rule as derived from the common law criminal rule or as a public policy exception to the doctrine of contributory negligence.

Further, because of its nature as a conclusive presumption, the Illinois rule appears arbitrary. That all children under the age of seven are incapable of perceiving and understanding every danger that causes them harm cannot be contended seriously. Further, as a conclusive presumption, the Illinois rule constitutes a substantive rule of law and thus is inflexible. As a result of this inflexibility, the rule is incapable of adjusting to changes in the manner society treats young children who are increasingly exposed to sophisticated ideas at an early age. While the dangers created by society may become more complex and incomprehensible, many common dangers will not change, whereas the ability of young children to understand these dangers, such as crossing the street, is likely to increase as information and education are received at an earlier age. Because the Illinois rule does not provide for recognition of these changes, the rule may serve to impede rather than facilitate social progress.

who is incapable of negligence in a particular situation will not be found contributorily negligent. Thus, the multi-variable test facilitates a fair application of the Massachusetts rule.

84. See, e.g., Chicago City Ry. v. Tuohy, 196 Ill. 410, 420-21, 63 N.E. 997, 1001 (1902). The court in Tuohy stated:

Up to a certain age, the precise limit of which is not and perhaps cannot be well defined, a child is incapable of such conduct as will constitute contributory negligence . . . . The rule thus contended for is sometimes said to be analogous to the rule of common law which exempts children under seven years of age from criminal responsibility.

Id. The court then proceeded to declare a child of six incapable of contributory negligence.


86. See, e.g., E. Morgan, Basic Problems of Evidence 31 (1962); Stumbo, supra note 81 at 88.

87. See Stumbo, supra note 81, at 188 (procedural effect of a conclusive presumption is always the same).

88. See notes 42-43 supra and accompanying text.

89. See generally O.W. Holmes, The Common Law 126 (1881) ("precedents should be overruled when they become inconsistent with present conditions").
Although the Illinois rule has merit when the alternative is to hold that a slight degree of negligence on the part of a young child is a complete bar to recovery, the rule's appeal is diminished considerably when its application in a state that compares the fault of the victim with that of the defendant is considered. In a state that has a comparative fault system, as does Minnesota,90 a conclusive presumption of a young child's incapacity for negligence seems to defeat the whole purpose of comparative fault—apportionment of liability for injury.91 An application of the Illinois rule in Minnesota would abrogate comparative fault for all plaintiffs under the age of seven because if such children cannot be held negligent as a matter of law there is no fault to compare with the fault of the defendant. Assuming that some fault on the part of the defendant could be proved, the child would be entitled to a full recovery even though the injury was caused in part by acts or omissions of the child. This result is not in accord with the comparative fault system adopted by the Minnesota Legislature.92

Thus, the Massachusetts rule, which holds that a child capable of

90. See Minn. Stat. § 604.01 (1976), as amended by Act of Apr. 5, 1978, ch. 738, § 6, 1978 Minn. Laws 839. That section reads in part as follows:

Contributory fault shall not bar recovery in an action by any person or his legal representative to recover damages for fault resulting in death or injury to person or property, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person recovering.

Id.

91. Cf. Thomas v. Tesch, 268 Wis. 338, 67 N.W.2d 367 (1955) (because child of five is incapable of contributory negligence, submission of contributory negligence question to jury was error). Because what is really compared under the comparative fault act is the contribution made to the accident by each party's negligence, see Winge v. Minnesota Transfer Ry., 294 Minn. 399, 403, 201 N.W.2d 259, 263 (1972), the policy behind the statute would be defeated.

92. Cf. Price v. Amdal, ___ Minn. ___, ___, 256 N.W.2d 461, 464 (1977) (purpose behind statutory presumption of decedent's due care reexamined in light of comparative negligence statute), noted in 4 WM. MITCHELL L. REV. 245 (1978). However, a contrary argument is possible. Because Minnesota's comparative fault statute was originally adapted from Wisconsin's statute, Olson v. Hartwig, 288 Minn. 375, 377, 180 N.W.2d 870, 872 (1970); Note, Contributory Negligence and Assumption of Risk—The Case for Their Merger, 56 MINN. L. REV. 47, 65 (1971); see Act of June 15, 1931, ch. 242, § 1, 1931 Wis. Laws 375, as amended by Act of July 26, 1949, ch. 548, § 2, 1949 Wis. Laws 498, as amended by Act of May 20, 1965, ch. 66, § 4, 1965 Wis. Laws 95 (current version at Wis. STAT. ANN. § 895.045 (West Cum. Supp. 1978)), and because Wisconsin also has a statute that implements a conclusive presumption of incapacity for negligence of a child under seven, see Wis. STAT. ANN. § 891.44 (West 1966), an argument can be made that Minnesota's comparative fault law and the Illinois rule are not really in conflict. The other side of the argument is that the Minnesota Legislature was aware of Wisconsin's conclusive presumption but did not adopt it. Therefore, the Minnesota court should not adopt the Illinois rule by judicial decision but should defer to the Legislature.
understanding the particular danger with which he is confronted may be contributorily negligent, clearly is more in line with Minnesota policy than is the Illinois rule, which sets an arbitrary age below which a child is conclusively presumed to be incapable of contributory negligence. The application of the Massachusetts rule in Minnesota would be improved, however, by the court’s explicit recognition of the rule as a rebuttable presumption. The suggestion that the Minnesota court implement the Massachusetts rule as a rebuttable presumption is aimed simply at a clarification of the application of the rule and at the creation of a compromise position to reunify the court behind the Massachusetts rule. Because the principal criticism leveled against the Massachusetts rule by the dissent in Toetschinger was that the rule does not afford young children enough protection, the institution of an explicit rebuttable presumption of the child’s incapacity for contributory negligence would afford a stronger safeguard. A rebuttable presumption of the child’s incapacity for contributory negligence would make it clear that the burden is on the defendant to prove the child’s capacity for negligence in the particular situation in question. Regardless of whether the Minnesota court explicitly recognizes the Massachusetts rule as a rebuttable presumption, however, application of the rule will continue to yield results which are consistent with the manner in which society treats young children.