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## THE CONTRIBUTORY NEGLIGENCE OF CHILDREN: *RANARD V. O'NEIL*

Mary B. Troland

### I. INTRODUCTION

To what extent is a child responsible for his conduct? On what basis is his fault in negligence actions to be measured? Is he to be held to an adult standard of care, or is his youth and inexperience to be considered in determining his liability? Questions concerning a child's capacity to be negligent or contributorily negligent have received extensive judicial discussion and legal commentary.<sup>1</sup> Although there is general agreement that a child is to be treated more leniently by the law than an adult, the methods for measuring his responsibility and fault vary considerably from state to state.<sup>2</sup> In the recent case of *Ranard v. O'Neil*,<sup>3</sup> the Montana supreme court synthesized prior Montana decisions on the contributory negligence of children and formulated the test by which a child's standard of care and capacity for negligence are to be measured in this jurisdiction. The principles of *Ranard*, although articulated in the context of contributory negligence, nevertheless provide useful guidelines for the determination of the relative fault of children in comparative negligence cases.

### II. THE ISSUES RAISED BY *RANARD*

In the *Ranard* case, the child plaintiff, whose eighth birthday was the day following the accident, was struck by the defendant's car in the street in front of his home. His older brother had just crossed the street, and the plaintiff followed him immediately, not noticing the defendant's car until he was in the middle of the street. In depositions the plaintiff admitted that he had not looked before running into the street, although he had been instructed on pedestrian safety and knew he should check for traffic. The defendant was granted summary judgment on the finding that the plaintiff was guilty of contributory negligence as a matter of law.

The issues presented on appeal, according to the supreme court, were whether the plaintiff had the capacity to be contributorily negligent, and if so, whether he was in fact contributorily negligent.<sup>4</sup> The first issue therefore requires the ascertainment of the

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1. Annot., 107 A.L.R. 4 (1937); Annot., 174 A.L.R. 1080 (1948).

2. Annot., 77 A.L.R.2d 917 (1961).

3. *Ranard v. O'Neil*, \_\_\_ Mont. \_\_\_, 531 P.2d 1000 (1975).

4. *Id.* at 1001.

particular child's capacity, that is, ". . . his ability to appreciate the danger . . . of the act alleged to be negligent."<sup>5</sup> The second issue requires the measurement of the child's actual conduct against the applicable standard of care.<sup>6</sup>

### III. CAPACITY AND STANDARD OF CARE IN MONTANA

#### A. Children under Seven

It has long been the rule in Montana that a child under the age of seven cannot, as a matter of law, be held contributorily negligent.<sup>7</sup> The reason given in Montana for the rule is that such children are *non sui juris*, that is, lacking in the capacity to manage their own affairs.<sup>8</sup> Other courts have used similar reasoning for presuming children under seven incapable of contributory negligence,<sup>9</sup> although the rule has been sternly criticized<sup>10</sup> and has been abandoned in most jurisdictions.<sup>11</sup> Regardless of the criticism of the presumption, ". . . it has been the law in Montana for forty years."<sup>12</sup>

#### B. Children over Seven

In *Ranard* and two earlier Montana cases, *Lesage v. Largey Lumber Co.*<sup>13</sup> and *Graham v. Rolandson*,<sup>14</sup> the court was dealing with the issue of contributory negligence in children over seven and could not avail itself of the presumption relating to younger children. The question in these cases, therefore, was how to determine the capacity and standard of care for children over seven.

In *Lesage*, an eight-year old boy, who was playing football in the street, was injured when he was struck by the defendant's car. The court, in refusing to rule that the plaintiff was guilty of contri-

5. *Id.* at 1002.

6. Discussion of judicial uses of the terms "capacity" and "standard of care" appears in: Keet, *Contributory Negligence of Children*, 12 CLEV.-MAR. L. REV. 404 (1963); Note, *Contributory Negligence of Children in Indiana: Capacity and Standard of Care*, 34 IND. L. J. 511 (1959).

7. *Gilligan v. City of Butte*, 118 Mont. 350, 166 P.2d 797, 805 (1946); *Johnson v. Herring*, 89 Mont. 420, 300 P. 535, 538 (1931); *Burns v. Eminger*, 81 Mont. 79, 261 P. 613, 615 (1927); *Conway v. Monidah Trust et al.*, 47 Mont. 269, 132 P. 26, 27 (1913).

8. *Burns v. Eminger*, *supra* note 7 at 615.

9. *Walston v. Greene*, 247 N.C. 693, 102 S.E.2d 124, 126 (1958); *Tyler v. Weed*, 285 Mich. 460, 280 N.W. 832 (1938).

10. "A rule that age, not sense; years, not intelligence; length of life, not experience, should govern responsibility for human action is unsound and should be discarded." *Tyler*, *supra* note 9 at 840 (dissenting opinion).

11. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, 156 (4th ed. 1971); Annot., 77 A.L.R.2d 917 (1961).

12. *Graham v. Rolandson*, 150 Mont. 270, 435 P.2d 263, 267 (1967).

13. *Lesage v. Largey Lumber Co.*, 99 Mont. 372, 43 P.2d 896 (1935).

14. *Graham v. Rolandson*, *supra* note 12.

butory negligence as a matter of law, proposed the following test for determining the standard of care for children over seven:

Did he or did he not exercise the degree of care that can ordinarily be expected of children of the same age, taking into consideration their experience, intelligence, and capabilities?<sup>15</sup>

Under this test, the particular child is compared to other children of "his own age and understanding,"<sup>16</sup> and his conduct is judged by what they might reasonably be expected to do in a given situation. Similar standards of care, with slight variations in terminology, are imposed on children in most other jurisdictions<sup>17</sup> and are espoused by legal theoreticians as generally accepted criteria.<sup>18</sup>

In the *Lesage* case, the court focused on the standard of care to be applied to the child's conduct. In the later *Graham* case, the court directed its attention to the child's capacity to be contributorily negligent and articulated the "dual inquiry"<sup>19</sup> later used by the court in *Ranard*. In *Graham* an eight-year old boy, while riding his bicycle, was struck and killed by the defendant's car. The court stated that the determination of contributory negligence in children over seven required the following two findings:

(1) The *capacity* of a particular child in a given case to be contributorily negligent; and (2) The *establishment in fact* of the particular child's contributory negligence under the circumstances of a given case.<sup>20</sup>

The court went on to hold that in Montana there is no presumption as to the capacity or incapacity of an eight-and-a-half year old to be contributorily negligent and that the issue of capacity is a question of fact to be determined on the basis of the individual child in the individual case.<sup>21</sup>

### C. *Ranard v. O'Neil*

With the *Lesage* and *Graham* tests before it, the Montana su-

15. *Lesage v. Largey Lumber Co.*, *supra* note 13 at 900.

16. *Id.* at 901.

17. *Patterson v. Cushman*, 394 P.2d 657, 660 (Alaska 1964) (using the terms "age, intelligence, and experience"); *Hartnett v. Boston Store of Chicago*, 265 Ill. 331, 106 N.E. 837, 839 (1914) (using the terms "age, intelligence, capacity, discretion and experience"); *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489, 95 N.E. 876, 878 (1911) (using the words "age, intelligence, and experience"); *Lehmuth v. Long Beach Unified School District*, 53 C.2d 544, 348 P.2d 887, 894, 2 Cal. Rptr. 279 (1960) (using the terms "age, capacity and experience").

18. RESTATEMENT (SECOND) OF TORTS § 464 (1965); PROSSER, *supra* note 11 at 155.

19. *Graham v. Rolandson*, *supra* note 12 at 267.

20. *Id.*

21. *Id.* at 268.

preme court in *Ranard* sought to combine the notions of capacity and standard of care as applicable to children over seven who are charged with negligence or contributory negligence. Other courts, too, have attempted to deal with these notions with a combined capacity and standard of care approach and have reached varying conclusions. One court has dealt with capacity as a matter of law, while finding the applicable standard of care to be a question of fact.<sup>22</sup> Others have treated capacity as a subjective determination and standard of care as an objective determination.<sup>23</sup> The Montana court in *Ranard* has articulated what appears to be a novel solution to the problems raised in determining a child's negligence. The issues of *both* capacity and standard of care are determined by subjective criteria relating only to the particular child, and are decided as questions of fact, generally by the jury.<sup>24</sup>

### 1. Capacity

In the test set forth in *Ranard*, the determination of the particular child's capacity to be contributorily negligent is the dominant and controlling element. The capacity of a child is ". . . his ability to appreciate the danger, either to himself or others, of the act alleged to be negligent."<sup>25</sup> The factors to be considered are the child's ". . . age, experience, intelligence and capabilities."<sup>26</sup> The only indication in *Graham* of the type of information necessary for determining a child's capacity was that such information must go beyond age and grade in school.<sup>27</sup> In *Ranard*, however, the court furnishes more detailed guidelines as to the evidence required for establishing capacity. Evidence of intelligence, for instance, must be specific; inferences of intelligence may not be drawn merely from the child's responses to depositions, as they were by the trial court in granting summary judgment.<sup>28</sup> A showing of experience in the type of conduct alleged to be negligent is also necessary and must go beyond comparisons with other children of the same age as well as beyond evidence of instruction in the general activity.<sup>29</sup> Finally, the child's capabilities must be established, providing the court and the jury with a means of judging the child's personality, his

22. *Patterson v. Cushman*, *supra* note 17 at 660.

23. *Brown v. Connolly*, 62 C.2d 391, 398 P.2d 596, 598, 42 Cal. Rptr. 324, 11 A.L.R.3d 1348 (1965); *Berdos v. Tremont & Suffolk Mills*, *supra* note 17.

24. *Ranard v. O'Neil*, *supra* note 3 at 1002.

25. *Id.*

26. *Id.*

27. *Graham v. Rolandson*, *supra* note 12 at 268.

28. *Ranard v. O'Neil*, *supra* note 3 at 1002.

29. *Id.*

attention-span, his independence, or his forgetfulness.<sup>30</sup>

From the court's discussion, it is obvious that detailed evidence is required to establish a given child's capacity for negligence. Grades from school, testimony from teachers, evidence of the extent and nature of the particular child's former participation in the conduct complained of, and information on his personality traits would all be relevant in ascertaining his ability to appreciate the danger involved in a given situation. The production of such evidence is vital to both the plaintiff's and the defendant's cases in persuading the jury of the child's capacity or incapacity. In certain cases, the evidence presented may even be sufficient for the court to rule on the issue of capacity as a matter of law.<sup>31</sup>

## 2. *Standard of Care*

The novelty of the Montana approach to the question of a child's contributory negligence is the standard of care to which the child is held. In *Lesage* the standard of care was phrased in terms of ordinary children of the same age and understanding.<sup>32</sup> This standard, widely accepted by the courts and authorities, sets up a fictional counterpart or group of counterparts to the particular child and measures the child's conduct against the ordinary conduct of his imaginary peers.<sup>33</sup> In *Ranard*, however, the Montana supreme court appears to be discarding the fictional counterpart or peer group standard in favor of a personal standard for the particular child involved in the lawsuit. As stated by the court:

His [the child's] negligence in fact can only be determined by finding a failure to conform his conduct to a standard of care which *he* can reasonably observe, given the limitations of his capacity.<sup>34</sup> (emphasis added)

No longer is there any reference to other children of the same or similar capacity, maturity, or intelligence, as there was in *Lesage*. Instead, a highly personal and subjective standard of care is applied to each child on an individual basis.

According to the principles voiced in *Ranard*, the child's standard of care cannot be determined until his capacity is established.<sup>35</sup> The limits of that capacity, determined from evidence as to his age, intelligence, experience, and capabilities, govern and prescribe the

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30. *Id.*

31. *Id.*

32. *Lesage v. Largety Lumber Co.*, *supra* note 13 at 900.

33. *See cases, supra* note 17.

34. *Ranard v. O'Neil*, *supra* note 3 at 1002.

35. *Id.* at 1003.

standard of care applicable to the child. He must conform his conduct to this personal and subjective standard of care; he must, in essence, live up to his personal capacity or be found guilty of negligence.

Although the formulation of subjective tests for both capacity and standard of care tends to obfuscate the distinction between the two concepts, the same criticism has also been leveled at the use of a subjective determination of capacity and objective application of standard of care.<sup>36</sup> Varying individual factors of background, capability, intelligence, and maturity must necessarily be considered in judging the conduct of children. Attempting first to find a child's capacity for negligence by looking to his personal characteristics and then to fashion an objective standard for his conduct from the conduct of hypothetical children of similar capacity is, at best, a confusing process for judge or jury. In Montana, this intermingling of the subjective with the objective is no longer required. Once a child is found to have the capacity for negligence, there is no need to back away from his individuality in judging his particular conduct. Instead, his personality and individuality form the basis not only for his capacity but also for the standard of care to which he is held. When a child's conduct is judged in Montana, the question posed is whether this particular child in these particular circumstances performed as *he* personally could be expected to perform. The emphasis remains on subjective factors throughout the process of determining negligence. Such an emphasis seems both more workable and more realistic in the light of the special status accorded to children by the law.

#### D. *Children over Fourteen*

Although the court in *Ranard* was dealing with cases specifically concerning children between the ages of eight and nine, the language used in the summarizing of the general rule is not limited by age group.<sup>37</sup> It should be remembered, however, that children under seven are incapable of contributory negligence as a matter of law.<sup>38</sup> Likewise, in *Sherris v. Northern Pacific Ry. Co.*,<sup>39</sup> the court stated that children fourteen or over are presumed, as a matter of law, to be capable of contributory negligence. It would seem likely that the same types of evidence necessary to establish capacity or incapacity of children under fourteen will be necessary to overcome this presumption.

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36. Keet, *supra* note 6 at 403.

37. *Ranard v. O'Neil*, *supra* note 3 at 1002.

38. See cases, *supra* note 7.

39. *Sherris v. Northern Pacific Ry. Co.*, 55 Mont. 189, 175 P. 269, 270 (1918).

## IV. CONCLUSION

The Montana case of *Ranard v. O'Neil* represents the culmination of the Montana supreme court's efforts to establish criteria for determining the negligence and contributory negligence of children over seven. The first step in the determination is to ascertain the capacity of the particular child to be contributorily negligent, from evidence presented as to his age, experience, intelligence, and capabilities. It is only after the child's capacity is determined that a standard of care for his conduct may be established. According to *Ranard*, this standard of care is personal and individual to each particular child. It is not a standard derived from the conduct of hypothetical children of the same age and understanding; instead, it is a standard set by the child for himself, bounded by the limits of his own capacity to realize the dangers of a given situation. A child's capacity to be contributorily negligent defines his standard, and his conduct must conform to his particular standard.

Although contributory negligence is no longer a complete defense in Montana, the *Ranard* case and the principles it sets forth on children and negligence law will form important bases for determining relative fault in comparative negligence cases. A child must still be found capable of negligence, and the extent of that negligence can only be found by measuring his conduct against the degree of care required of him by the law. Because the *Ranard* case establishes the criteria for determining both capacity and standard of care for children, its general principles should remain valid in controversies involving comparative negligence.



