TORTS I

During the survey period, the Nebraska Supreme Court decided two significant cases of first impression. In *Lave v. Neumann*,[1] the court held that a police officer, injured in an attempt to prevent damage to another's personal property, was able to recover damages under the rescue doctrine.[2] In *Camerlinck v. Thomas*,[3] the court held for the first time that a child as young as six years old could be charged with negligence upon a fact determination by the jury.[4]

LAVE v. NEUMANN: THE FIREMAN'S RULE AND THE RESCUE DOCTRINE

INTRODUCTION

The rescue doctrine and the "fireman's rule," although both apparently applicable in certain fact situations, have led to different conclusions.[5] The rescue doctrine allows a rescuer to recover damages for injuries sustained in the rescue.[6] As an exception to the rescue doctrine, the fireman's rule denies recovery to a person paid to rescue.[7]

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1. 211 Neb. 97, 317 N.W.2d 779 (1982).
2. *Id.* at 101, 317 N.W.2d at 782.
3. 209 Neb. 843, 312 N.W.2d 260 (1981).
4. *Id.* at 860-61, 312 N.W.2d at 269.
5. *See* Comment, *The New Minnesota Fireman's Rule*, 64 MINN. L. REV. 878, 886 (1980) (discussing and comparing the fireman's rule and rescue doctrine) [hereinafter cited as Comment, *Minnesota Fireman's Rule*].
6. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 44 at 277 (4th ed. 1971) states "[T]here is thus an independent duty of care owed to the rescuer himself, which arises when the defendant endangers no one's safety but his own." *Id.*
7. HENDERSON AND PEARSON, THE TORT PROCESS, 545 (2nd ed. 1981) distinguishes the fireman's rule from the rescue doctrine, as outlined in Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921), in the following manner:

> One exception to the *Wagner* rule worthy of note is that professional rescuers may not recover for injuries flowing from risks inherent in the act of rescue. Often referred to as the 'fireman's rule,' it reflects the judgment that firemen and other professional rescuers of persons and property have already been compensated, ahead of time, for assuming the risks inherent in their work.

See, e.g., Walters v. Sloan, 20 Cal. 3d 609, 571 P.2d 609, 142 Cal. Rptr. 152 (1977) (holding a police officer, injured when he attempted to arrest a drunk minor on private premises, unable to recover damages because of the fireman's rule); Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979) (holding a fireman, injured while fighting a fire at a liquified petroleum gas storage facility, unable to recover damages because of the fireman's rule).

The Nebraska Supreme Court in Buchanon v. Prickett & Sons, Inc., 203 Neb. 684, 688, 279 N.W.2d 855, 858 (1979) stated the fireman's rule as:

> [I]n the absence of any statute or ordinance prescribing a duty on the part

In *Lave v. Neumann*,[8] the Nebraska Supreme Court held that a police officer, injured while on duty and in an attempt to prevent damage to personal property of another, could recover damages under the rescue doctrine.[9] The court's decision was a reversal from its former trend, which had applied the fireman's rule in similar circumstances.[10]

FACTS AND HOLDING

The plaintiff, a Bellevue, Nebraska police officer, while on duty and investigating an unrelated matter, noticed the defendant's unattended truck rolling down a residential street.[11] The plaintiff ran after the truck in an effort to stop it.[12] After reaching the truck and stepping on the running board with his right foot, the door of the cab came open and he fell to the ground.[13] He was injured when the left rear wheels of the truck either ran over his legs or pinched them against the curb.[14] The plaintiff brought an action for damages against the truck's owner for negligent maintenance.[15] The Nebraska Supreme Court held that, under the rescue doctrine, the police officer could recover for injuries proximately caused by the defendant's negligence.[16]

BACKGROUND AND ANALYSIS

The Nebraska Supreme Court has previously ruled on similar facts. In *Buchanon v. Prickett & Sons, Inc.*,[17] the court denied recovery to a volunteer fire fighter injured while extinguishing a fire

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> of the owner of premises to members of a public fire department, the owner is not liable for injuries to such a fireman except those proximately resulting from willful or wanton negligence or a designed injury . . . .

Both doctrines have previously been examined by the court in situations where they have inevitably clashed. *See Buchanon*, 203 Neb. at 693, 279 N.W.2d at 860 (holding a volunteer fire fighter, injured on personal property, barred from recovery by the fireman's rule); *cf.* Nared v. School District of Omaha, 191 Neb. 376, 379-81, 215 N.W.2d 115, 117-18 (1974) (holding a police officer injured on real property barred from recovery for the reasons set forth in RESTATEMENT (SECOND) OF TORTS § 345 at 228 (1965), which is essentially the fireman's rule); Wax v. Co-Operative Refinery Assoc., 154 Neb. 805, 807-10, 49 N.W.2d 707, 708-10 (1951) (holding a fire fighter, injured on personal property, barred from recovery as a licensee assuming risk of premises).

8. 211 Neb. 97, 317 N.W.2d 779 (1982).
9. *Id.* at 101, 317 N.W.2d at 782.
10. *See* note 7 *supra*.
11. 211 Neb. at 98, 317 N.W.2d at 781.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 99, 317 N.W.2d at 781.
16. *Id.* at 101, 317 N.W.2d at 782.
17. 203 Neb. 684, 279 N.W.2d 855 (1979).

on a gasoline truck, due to the fireman's rule.[18] Although recognizing the fire fighter as a rescuer, the court stated: "the rescue doctrine contemplates a voluntary act by one who, in an emergency and prompted by spontaneous human motives to save human life, attempts a rescue which he had *no duty to attempt* by virtue of a legal obligation or duty fastened on him by his employment."[19] Therefore, the court held the rescue doctrine inapplicable since the fire fighter had a duty to attempt a rescue by virtue of his employment.[20]

In *Nared v. School District of Omaha*,[21] the court denied recovery to a police officer injured on real property when he lost his footing in an unlighted attic.[22] The court held that an equivalent of the fireman's rule applied to a police officer injured in the scope of employment.[23] Therefore, the Nebraska Supreme Court has held the fireman's rule applicable to a fire fighter injured by personal property and an equivalent thereof to a police officer injured on real property.

Another rationale in denying application of the rescue doctrine to fire fighters was announced in *Wax v. Co-Operative Refinery Association*.[24] The court determined that fire fighters assume the risks of their employment and therefore can not recover for injuries sustained in fighting a fire.[25] Other courts have also determined that the assumption of risk doctrine is the underlying rationale of the fireman's rule.[26]

Under this rationale, plaintiffs are denied recovery if they

18. *Id.* at 692-93, 279 N.W.2d at 860.

19. *Id.* at 688, 279 N.W.2d at 858 (emphasis added). The rescue doctrine is also applicable to situations involving the rescue of property. *Cf.* RESTATEMENT (SECOND) OF TORTS, § 445 (1965), which states: "[i]f the actor's negligent conduct threatens harm to another's person, land, or chattels, the normal efforts of the other or a third person to avert the threatened harm are not a superceding cause of harm resulting from such efforts." *See, e.g.*, Schmartz v. Harger, 22 Conn. Supp. 308, —, 171 A.2d 89, 91 (1961) (protection of defendant's house); Green v. Britton, 22 Conn. Supp. 71, —, 160 A.2d 497, 498 (1960) (protection of defendant's car and other cars in a parking lot); Rushton v. Howle, 79 Ga. App. 360, —, 53 S.E.2d 768, 769 (1949) (protection of defendant's car); Henjum v. Bok, 261 Minn. 74, —, 110 N.W.2d 461, 463 (1961) (protection of defendant's gasoline truck).

20. 203 Neb. at 692-93, 279 N.W.2d at 860.

21. 191 Neb. 376, 215 N.W.2d 115 (1974).

22. *Id.* at 377, 215 N.W.2d at 116-17.

23. *Id.* at 378-79, 215 N.W.2d at 117-18. *See also* 211 Neb. at 99-100, 317 N.W.2d at 781.

24. 154 Neb. 805, 808-09, 49 N.W.2d 707, 710 (1951).

25. *Id.*

26. *Walters*, 20 Cal. 3d at 204, 571 P.2d at 612, 142 Cal. Rptr. at 155; *Wax*, 154 Neb. at 808-09, 49 N.W.2d at 710; Cameron v. Abatiell, 127 Vt. 111, —, 241 A.2d 310, 316 (1968) (holding that a police officer did not recognize the danger and therefore did not assume the risk).

know of the danger and voluntarily undertake the hazard by virtue of their duty.[27] If the plaintiff in *Lave* was acting within the scope of his duty, then arguably he should have been denied recovery under the assumption of risk analysis inherent in the fireman's rule. Although the court found that the police officer had acted within the scope of his duties,[28] it held that the rescue doctrine, rather than the fireman's rule, was applicable.[29]

A police officer's duties consist of protecting the lives and properties of citizens and acting in emergencies.[30] Therefore, if the officer's acts in *Lave* were part of his duties to protect society, then arguably he would have assumed the risk and the fireman's rule would have been a bar to recovery.

It has been claimed that the choice between the rescue doctrine and the fireman's rule should rest on considerations of fairness and social policy.[31] In *Lave*, if it had been found that the police officer's actions were part of his duties,[32] then his exclusive remedy has been provided by statute.[33] On the other hand, if the police officer acted outside his scope of employment, then fairness would dictate that the officer be allowed to recover damages under the rescue doctrine.

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27. *Walters*, 20 Cal. 3d at 204-05, 571 P.2d at 612, 142 Cal. Rptr. at 155.

28. 211 Neb. at 101, 317 N.W.2d at 782.

29. *Id.*

30. Lee v. State, 490 P.2d 1206, 1209 (Alaska 1971) (rescuing a child whose arm was caught in the mouth of a lion); Wilson v. Florida Processing Co., 368 So. 2d 609, 610-11 (Fla. Dist. Ct. App. 1979) (evacuating a town after chlorine gas had escaped); Briley v. Mitchell, 238 La. 551, —, 115 So. 2d 851, 855 (1959) (capturing a wild deer); Muhs v. Fire Ins. Salvage Corps., 89 A.D. 389, —, 85 N.Y.S. 911, 912 (1903) (pushing a woman and child out of the way of a rushing fire truck); Dillon v. Allegheny County Light Co., 179 Pa. 482, 483-84, 36 A. 164, 164 (1897) (removing a fallen wire charged with electricity).

31. Comment, *Minnesota Fireman's Rule*, *supra* note 5, at 886-87. *See, e.g.*, Krauth v. Geller, 31 N.J. 270, —, 157 A.2d 129, 132-33 (1960). A fire fighter was allowed to recover damages for injuries sustained while extinguishing an overheated salamander. The court stated: "[t]he question is ultimately one of public policy, and the answer must be distilled from the relevant factors involved upon an inquiry into what is fair and just." *Id.* at —, 157 A.2d at 130. The court in Giorgi v. Pacific Gas and Elec. Co., 266 Cal. App. 2d 355, 72 Cal. Rptr. 119, 122 (1968) cites *Krauth* in holding a federal employee barred from recovery for injuries sustained fighting a forest fire because he had assumed the risk. 266 Cal. App. 2d at —, 72 Cal. Rptr. at 122.

32. *See* note 28 and accompanying text *supra*.

33. NEB. REV. STAT. § 16-335 (Reissue 1977) provides in pertinent part:

> In case of temporary total disability of a policeman received while in line of duty, he shall receive his salary during the continuance of such disability for a period not to exceed twelve months . . . .

See also Walters v. Sloan, 20 Cal. 3d at —, 571 P.2d at 612-14, 142 Cal. Rptr. at 155-56, wherein the court's discussion centers on the fact that public safety officers are justly compensated for injuries in the State of California. Therefore, the court held that as a matter of social policy, the police officer was unable to and had no need to invoke the rescue doctrine. *Id.*

The court in *Lave* based its decision on the rationale that a police officer injured by the negligence of another should not have less of a right to recovery in tort than anyone else.[34] This holding effectively overrules the court's prior decision in *Nared*, which held that the fireman's rule applied to a police officer injured in the scope of employment.

CONCLUSION

It is difficult to determine the basis for the abandonment of *Nared* in *Lave*.[35] The court previously had held that the fireman's rule applied to police officers. The assumption of risk doctrine, as a rationale supporting the fireman's rule, has also been accepted by the Nebraska Supreme Court. Since the court in *Lave* held that a police officer could recover damages for injuries sustained in the scope of his duties, its prior rulings appear to be overruled.[36]

CAMERLINCK v. THOMAS: THE NEGLIGENCE OF A CHILD OF TENDER YEARS

INTRODUCTION

In the law of torts, children are held to a lower standard of care than are adults, not because they do not perceive the risks in their actions, but because they lack the experience, and therefore the capacity, to understand the consequences of such acts.[37] Prior to *Camerlinck v. Thomas*,[38] the Nebraska Supreme Court had never held a child under nine years of age capable of negligence or contributory negligence.[39] However, this recent decision held that any child over the age of four is chargeable with negligence as a matter of law.[40] The court in *Camerlinck* adopted Restatement (Second) of Torts section 283A as the rule to follow in a child negligence ac-

34. 211 Neb. at 101, 317 N.W.2d at 782.
35. 211 Neb. at 102, 317 N.W.2d at 782 (Caporale, J., dissenting) ("The majority does not undertake to tell us why such an analogy [to earlier Nebraska cases, *see* note 7 *supra*] cannot be made.").
36. *Id.* at 103, 317 N.W.2d at 783 (Caporale, J., dissenting) ("The result reached by the majority is not logically consistent with our prior pronouncements.").
37. Armer v. Omaha & C.B. Street R. Co., 151 Neb. 431, 438, 37 N.W.2d 607, 611 (1949) (holding an 11 year old bicyclist, who was hit by a bus on a city street, chargeable with contributory negligence).
38. 209 Neb. 843, 312 N.W.2d 260 (1981).
39. Adams v. Welliver, 155 Neb. 331, 51 N.W.2d 739 (1952) (holding a child pedestrian of nine years chargeable with contributory negligence). The child in *Adams* appears to be the youngest held chargeable with negligence or contributory negligence.
40. 209 Neb. at 857, 312 N.W.2d at 268.

tion.[41] Section 283A and *Camerlinck* reject the arbitrary rule that children under age seven can not be held liable for negligence, stating that this is an ancient and out-moded rule, and state instead that an examination of all relevant factors such as the age and experience of each child under the circumstances is a factual matter for the jury's determination.[42]

FACTS AND HOLDING

Robert Camerlinck, father of four year old Bobby, brought an action against Ann Thomas, mother of six year old Jay, to recover damages for an eye injury sustained by Bobby.[43] Jay and Bobby were playing at a playground when Jay proceeded down a slide carrying a stick. As Jay neared the bottom, he called out to Bobby who was standing next to the slide. Bobby turned in response to the call and was struck in the left eye by the stick. The blow resulted in a permanent loss of vision. The trial court held, as a matter of law, that the defendant's son, due to his tender age, was incapable of negligence.[44]

The Nebraska Supreme Court reversed the trial court and held that the issue of a six year old's negligence presents a question for the trier of fact.[45] The court conducted an exhaustive examination of case law on the subject dating back nearly 100 years,[46] and concluded that the modern law discourages a fixed, arbitrary age limit under which a child is incapable of negligence as a matter of law.[47] However, the court stated in dictum that any child younger than four years will probably lack the capacity to be held liable for negligence.[48] The court held that imposition of liability for negligence should be a question of fact for the jury to determine on the basis of the circumstances of the case, including the age, experience and intelligence of the child, under a "reasonable child" standard of care.[49]

41. *Id.* at 858, 312 N.W.2d at 268.

42. *Compare* RESTATEMENT (SECOND) OF TORTS § 283A (1965) *with* Brahatcek v. Millard School District, 202 Neb. 86, 98-99, 273 N.W.2d 680, 687-88 (1979) (holding that it was a question of fact for the jury as to whether a 14 year old assumed the risk of playing golf) *and* Gadeken v. Langhorst, 193 Neb. 299, 301, 226 N.W.2d 632, 635 (1975) (holding that is was a question of fact for the jury as to whether an 11 year old bicyclist was contributorily negligent while riding through an intersection).

43. 209 Neb. at 844, 312 N.W.2d at 261.

44. *Id.*

45. *Id.* at 860-61, 312 N.W.2d at 269.

46. *Id.* at 845-57, 312 N.W.2d at 262-67. *See* notes 50-51 *infra* for a discussion of the cases.

47. *Id.* at 856, 312 N.W.2d at 267.

48. *Id.* at 857, 312 N.W.2d at 267.

49. *Id.* at 860-61, 312 N.W.2d at 268-69.

BACKGROUND AND ANALYSIS

Although the Nebraska Supreme Court has repeatedly examined whether a child may be charged with contributory negligence,[50] prior to *Camerlinck*, it had not made a determination on a child's liability for negligence.[51] Nevertheless, the court in *Bear v. Auguy*[52] and *Connors v. Pantano*[53] suggested in dicta that there should be no distinction between charging a child with either negligence or contributory negligence.[54] This rule generally prevails in other jurisdictions.[55]

An early Nebraska case discussing the issue of a child's negligence was *Huff v. Ames*,[56] wherein the court declared that a child's

50. Caradori v. Fitch, 200 Neb. 186, 263 N.W.2d 649 (1978) (holding an eleven year old capable of contributory negligence); Gadeken v. Langhorst, 193 Neb. 299, 226 N.W.2d 632 (1975) (holding an eleven year old capable of contributory negligence); Vacanti v. Montes, 180 Neb. 232, 142 N.W.2d 318 (1966) (holding a nine year old capable of contributory negligence); Eden v. Klaas, 166 Neb. 354, 89 N.W.2d 74 (1958) (holding a child of five incapable of contributory negligence); Bear v. Auguy, 164 Neb. 756, 83 N.W.2d 559 (1957) (holding a fourteen year old capable of contributory negligence); Adams v. Welliver, 155 Neb. 331, 51 N.W.2d 739 (1952) (holding a child of nine chargeable); Armer v. Omaha & C.B. Street R. Co., 151 Neb. 431, 37 N.W.2d 607 (1949) (holding a child of eleven contributorily negligent); Tews v. Bamrick, 148 Neb. 59, 26 N.W.2d 499 (1947) (holding a child of five incapable of contributory negligence); Siedlik v. Schneider, 122 Neb. 763, 241 N.W. 535 (1932) (holding a seven year old incapable of contributory negligence); McKinney v. Wintersteen, 122 Neb. 679, 241 N.W. 112 (1932) (holding a child of six incapable of contributory negligence); DeGriselles v. Gans, 116 Neb. 835, 219 N.W. 235 (1928) (holding an eight year old incapable of contributory negligence); Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N.W. 883 (1917) (holding an eleven year old capable of contributory negligence); Sacca v. Omaha & C.B. Street R. Co., 98 Neb. 73, 152 N.W. 315 (1915) (holding a child under the age of six incapable of contributory negligence); Huff v. Ames, 16 Neb. 139, 19 N.W. 623 (1884) (holding an eleven year old capable of contributory negligence).

51. 209 Neb. at 845-57, 312 N.W.2d at 262-67 (1981). A discussion by the court of the sixteen most pertinent cases is void of any dealing with primary negligence. Also cited was Connors v. Pantano, 165 Neb. 515, 86 N.W.2d 367 (1957), which dealt with a four year old's willful misconduct in setting a garage on fire. *See generally* Note, 26 MERCER L. REV. 367 (1974) (few cases deal with primary negligence); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 156 (4th ed. 1971) (great bulk of decisions have involved the contributory negligence of a child).

52. 164 Neb. 756, 768, 83 N.W.2d 559, 567 (1957).

53. 165 Neb. 515, 518-19, 86 N.W.2d 367, 369 (1957).

54. In *Auguy* the court did not specifically state there should be no distinction, but considered the negligence of a child generally while holding a fourteen year old chargeable with contributory negligence. 164 Neb. at 768, 83 N.W.2d at 567. However, in *Pantano*, the court specifically addressed the issue. 165 Neb. at 518-19, 86 N.W.2d at 369.

55. *See, e.g.*, Ellis v. D'Angelo, 116 Cal. App. 2d 310, —, 253 P.2d 675, 678 (1953); Bixenman v. Hall, 251 Ind. 527, —, 242 N.E.2d 837, 840 (1968); Van Brunt v. Meyer, 422 S.W.2d 364, 371 (Mo. Ct. App. 1967). *Contra*, Neumann v. Shlansky, 58 Misc. 2d 128, —, 294 N.Y.S.2d 628, 632-33 (1968). See also Note, 26 MERCER L. REV. 367 at 368 (1974).

56. 16 Neb. at 140-43, 19 N.W. at 624-25 (1884).

maturity and the circumstances of each case are to be taken into consideration.[57] In addition to maturity, Nebraska cases have decided that various factors such as age,[58] intelligence,[59] knowledge and appreciation of the danger,[60] general experience,[61] specific experience,[62] and familiarity with the surroundings[63] could all be taken into consideration in order to determine a child's capacity for negligence.[64]

The youngest child previously held capable of contributory negligence by a Nebraska court was nine years of age.[65] Since 1947, Nebraska has generally discarded the fixed age rule set at eight years in *DeGriselles v. Gans*.[66]

The result of *Camerlinck* is to hold a child to that degree of care and capacity which a child of like age and experience would utilize under the same circumstances.[67] Section 283A of the Second Restatement closely parallels this rule,[68] delineating the following as important factors to consider: the child's judgment, the circumstances under which the child has lived, the child's experi-

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57. *Id.* at 140-41, 19 N.W. at 624 (holding an eleven year old boy, who crushed his fingers while employed in a sugar mill, could be found capable of contributory negligence upon a consideration of the boy's capacity for understanding the danger).

58. Sacca v. Marshall, 180 Neb. 855, 867, 146 N.W.2d 375, 383 (1966); *Auguy*, 164 Neb. at 768, 83 N.W.2d at 567; *Rule*, 102 Neb. at 7, 165 N.W. at 883; *Huff*, 16 Neb. at 141, 19 N.W. at 624.

59. *Pantano*, 165 Neb. at 518, 86 N.W.2d at 369; *Adams*, 155 Neb. at 342, 51 N.W.2d at 744; *Armer*, 151 Neb. at 437, 37 N.W.2d at 611.

60. *Brahatcek*, 202 Neb. at 99, 273 N.W.2d at 688 (an understanding of the inherent dangers in the game of golf); *Caradori*, 200 Neb. at 189, 263 N.W.2d at 652 (danger of bicycle riding); *Auguy*, 164 Neb. at 768, 83 N.W.2d at 567 (danger of motorcycle riding); *Adams*, 155 Neb. at 340, 51 N.W.2d at 745 (danger of crossing a street); *Armer*, 151 Neb. at 437, 37 N.W.2d at 610 (danger of riding a bicycle on a street).

61. *Auguy*, 164 Neb. at 768, 83 N.W.2d at 567 (experience with motorcycles); *Sacca*, 98 Neb. at 74, 152 N.W. at 316 (experience with street car tracks).

62. *Brahatcek*, 202 Neb. at 99, 273 N.W.2d at 688. The court found the deceased lacked appreciation of the danger "considering the fact that he was not familiar with the game of golf and had never before had a golf club in his hands." *Id.*

63. *Auguy*, 164 Neb. at 768, 83 N.W.2d at 567; *Armer*, 151 Neb. at 438, 37 N.W.2d at 611.

64. For a discussion of the various factors which a jury should consider in order to determine a child's capacity for negligence, *see generally* Note, 39 TENN. L. REV. 747, 748-49 (1972).

65. *See* note 39 *supra*.

66. 116 Neb. at 843, 219 N.W. at 238 (1928) (holding an eight year old incapable of contributory negligence). Since the case of Armer v. Omaha & C.B. Street R. Co., 151 Neb. 431, 37 N.W.2d 607 (1949), the Nebraska Supreme Court has utilized the rationale of focusing on the circumstances of each case. Only one case dealt with the contributory negligence of a child under nine, and this child was five years old. Eden v. Klaas, 166 Neb. 354, 89 N.W.2d 74 (1958).

67. *Caradori*, 200 Neb. at 189, 263 N.W.2d at 652; *Gadeken*, 193 Neb. at 301-02, 226 N.W.2d at 334; *Vacanti*, 180 Neb. at 238, 142 N.W.2d at 322.

68. RESTATEMENT (SECOND) OF TORTS § 283A (1965).

ence in encountering particular hazards, and the education the child has received concerning such hazards.[69] The Restatement also states that there is probably a minimum age under which negligence can never be found, somewhere in the vicinity of age four.[70] Although most jurisdictions follow the Restatement and reject an arbitrary age limit,[71] at least three states, Ohio,[72] Pennsylvania,[73] and Mississippi[74] have clung to the biblical notion that a child under the age of seven is incapable of negligence as a matter of law.[75]

Camerlinck was the culmination of the recent trend of Nebraska case law on the subject,[76] holding that a child's capacity for negligence is a question of fact.[77] The court found Jay Thomas' intelligence, general experience and maturity outside the home, specific experience of being warned not to throw objects in other children's faces, and familiarity with the playground as factors to be taken into consideration by the jury in determining whether *this* six year old was negligent.[78]

The court in *Camerlinck* did not specifically address the appropriate standard of care where a child, as plaintiff, is charged with contributory negligence.[79] However, given the fact that *Camerlinck* relied on precedent involving children charged with contributory negligence, it would appear that the standard of care announced in *Camerlinck* would apply equally in both contexts.[80] This result would be in line with other jurisdictions.[81]

CONCLUSION

The Nebraska Supreme Court's decision in *Camerlinck* is significant because it places the issue of a child's negligence as a

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69. *Id.*
70. *Id.*
71. *See generally*, Note, 9 AKRON L. REV. 368, 370 (1975). A distinct minority of states follow the arbitrary rule.
72. DeLuca v. Bowden, 42 Ohio St. 392, 329 N.E.2d 109 (1975) (holding a six year old was not chargeable with negligence for shooting a friend with a B.B. gun).
73. Dunn v. Teti, 421 A.2d 782 (Pa. Super. Ct. 1980) (holding a five year old not capable of negligence when he inflicted injuries on a friend with a wooden stick).
74. Kopera v. Moschella, 400 F. Supp. 131 (S.D. Miss. 1975) (holding a six year old child, who drowned in a swimming pool at an apartment complex, was incapable of contributory negligence as a matter of law).
75. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32 at 155-56 (4th ed. 1971).
76. *See* note 67 and accompanying text *supra*.
77. 209 Neb. at 860, 312 N.W.2d at 269.
78. *Id.*
79. *Id.* at 845-57, 312 N.W.2d at 262-67. No distinction need be made between primary and contributory negligence.
80. *See* note 54 *supra*.
81. *See* note 55 *supra*.

question of fact rather than as a question of law.[82] In addition, fixed, arbitrary age limits established for a child's liability for negligence have been explicitly rejected.[83] The court now directs that all relevant factors concerning the child and the circumstances surrounding the injury be examined in order to determine whether liability should be imposed upon the child for negligence. Of course, children will not be charged with the standard of care required of adults;[84] however, they will be required to act as children of like age, intelligence, and experience.[85]

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82. 209 Neb. at 860, 312 N.W.2d at 269 (1981).
83. 122 Neb. at 765, 241 N.W. at 536 (1932). The court had set the age at seven, under which contributory negligence could never be found.
84. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32 at 154-55 (4th ed. 1971).
85. *Id.* at 155.