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NEGLIGENCE AND THE ELDERLY: A PROPOSAL FOR A RELAXED STANDARD OF CARE

INTRODUCTION

Son, support the old age of thy father, and grieve him not in his life; and if his understanding fail, have patience with him, and despise him not when thou art in thy strength, for the relieving of thy father shall not be forgotten. . . . And in justice thou shalt be built up, and in the day of affliction thou shalt be remembered. . . . Of what an evil fame is he that forsaketh his father! 1

The infirmities caused by aging have long been recognized as requiring societal understanding and accommodation. 2 The American system of jurisprudence, however, has not made concessions for the infirmities of old age when adjudging the negligence of the elderly defendant. 3 Although a number of jurisdictions do consider the infirmities of old age in determining the negligence of elderly plaintiffs, 4 no jurisdiction has made

1. Ecclesiasticus 3:14-18 (Douay). This Old Testament book is not to be confused with Ecclesiastes.
2. See supra note 1 and accompanying text. The reference to sons and fathers in the passage quoted is construed as referring to the different generations of society and not specifically to the family. Throughout the Old Testament familial terms are used in a much larger sense than they are used today and generally refer to the elements of society as in this verse. Interview with Rev. Charles Durkin and Rev. Frank Kane, Associate Pastors of Our Lady of Mount Carmel Church, in Chicago, Illinois (July 30, 1983).
3. E.g., Demeyer v. Maxwell, 103 Idaho 327, 647 P.2d 783 (1982) (elderly defendant held to same standard of care as a younger adult); Richie v. Elquist, 283 Minn. 375, 168 N.W.2d 332 (1969) (same); Roberts v. Ring, 143 Minn. 151, 173 N.W. 437 (1919) (same). Except for cases involving elderly plaintiffs, (see infra note 4 and accompanying text) all adults must conform to the same standard of care for their own protection and for the protection of others. The standard is that of a “reasonably careful person” under like circumstances. See generally RESTATEMENT (SECOND) OF TORTS §§ 283, 464 (1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 149-66 (4th ed. 1971).
4. Kitsap County Transp. Co. v. Harvey, 15 F.2d 166 (9th Cir. 1926) (old age excused plaintiff’s forgetfulness); Rosenthal v. Chicago & A.R. Co., 255 Ill. 552, 99 N.E. 672 (1912) (old age considered in adjudging plaintiff’s alleged contributory negligence for failure to observe an oncoming train); O’Connor & Raque Co. v. Bill, 474 S.W.2d 344 (Ky. Ct. App. 1971) (infirmities of plaintiff’s old age considered when adjudging his alleged contributory negligence in tripping over a step he should have been familiar with); Garner v. Crawford, 288 So.2d 886 (La. Ct. App. 1973) (old age considered in adjudging plaintiff’s alleged contributory negligence for failure to avoid an obviously slippery sidewalk); LaCava v. City of New Orleans, 159 So.2d 362 (La. Ct. App. 1964) (infirmities of old age considered in adjudging plaintiff’s alleged contributory negligence in failing to observe a dangerous break in a side-
similar concessions for elderly defendants.\textsuperscript{5}

To date, only one case has raised the question of a different standard of care for elderly defendants.\textsuperscript{6} In \textit{Roberts v. Ring},\textsuperscript{7} a six year old plaintiff brought a negligence suit against a seventy-seven year old defendant.\textsuperscript{8} In evaluating his contributory negligence, the jury was instructed to consider the young plaintiff's incapacity resulting from his age. The jury was also instructed to consider the defendant's age and concomitant infirmities in evaluating his negligence, thereby taking into account his poor sight, poor hearing, and slow reflexes.\textsuperscript{9} On appeal, the Minnesota Supreme Court reversed the trial court's finding that the elderly defendant's conduct was not negligent.\textsuperscript{10}

The court held that the jury was correctly charged to consider the young age and incapacity of the boy, but that the elderly defendant must be judged as an ordinary, reasonably careful

\textsuperscript{5} See supra note 3 and accompanying text.

\textsuperscript{6} Roberts v. Ring, 143 Minn. 151, 173 N.W. 437 (1919). In fact, almost nothing is written on the subject elsewhere. William Prosser noted this lack of cases and commentary concerning a different standard of care for the elderly defendant in his handbook. \textit{W. PROSSER, HANDBOOK OF THE LAW OF TORTS} 157 (4th ed. 1971). Extensive research for this comment has uncovered only one writer who summarily suggested a different standard for the elderly as follows: "Advanced age, like youth, has its shortcomings though they are different ones. Where these involve any impairment of faculties, that fact ought to be considered in judging conduct." James, \textit{The Qualities of the Reasonable Man in Negligence Cases}, 16 Mo. L. REV. 1, 25 (1951).\textsuperscript{7} 143 Minn. 151, 173 N.W. 437 (1919).

\textsuperscript{8} The defendant was driving an automobile at a rate of five miles per hour when the plaintiff suddenly ran into the street in front of the defendant's car. Roberts v. Ring, 143 Minn. 151, 173 N.W. 437 (1919).\textsuperscript{9} \textit{Id.} at 152-53, 173 N.W. at 437-38.\textsuperscript{10} \textit{Id.} at 154, 173 N.W. at 438.
As illustrated in Roberts, an elderly defendant is held to the same standard of care as a mentally and physically agile young adult, even though the infirmities of old age may have been the cause of his alleged negligence. In determining whether an elderly defendant is negligent, courts have not considered the infirmities brought on by aging that may render the elderly defendant incapable of comprehending a risk otherwise foreseeable to a younger adult, or that may render the elderly defendant incapable of reacting to a dangerous situation as quickly as a younger adult.

This comment will discuss the practical and legal considerations that point to the need for a change in the standard of care as applied to the elderly. First, the comment will look at the growing population of elderly Americans and the inevitable, natural infirmities of old age. The comment will explore the comparatively high rate of accidents involving the large population of elderly in order to demonstrate the reduced capacity of the elderly to protect themselves and others from risk of harm. Next, the comment will address the unfairness of imposing liability on the elderly merely because of their natural debilities; in essence, the current standard imposes liability in the absence of fault. Third, an analogy will be drawn between the relaxed standard of care presently applied to children and the proposed relaxed standard of care for the elderly. Fourth, some states allow a relaxed standard of care for elderly plaintiffs only. The comment will argue that there is no rational basis for this distinction. Fifth, public opinion concerning the plight of the elderly in America will be explored as well as the impact of that opinion may have on encouraging the creation of a new standard of care for elderly defendants. The comment concludes with a proposed standard of care for the elderly that incorporates the inevitable, natural infirmities of old age.

The Elderly in America

The population of Americans of advanced age is at a record high, with 26,253,000 Americans, or 11.4% of the total population,

11. Id. at 153-54, 173 N.W. at 438. The Minnesota Supreme Court stated that the defendant's infirmities of old age should be considered, but only to the extent necessary to determine whether the elderly defendant should have refrained from operating a motor vehicle in the first place. Id. The supreme court, however, refused to make concessions for the defendant's age, holding this elderly defendant to the same standard of care as an ordinary "reasonably careful person." Id.

12. See supra note 3 and accompanying text.
sixty-five years of age or older.13 Since 1961, the population of the United States has increased 27%14 and the population of Americans aged less than sixty-five has increased 24%.15 During the same time period, the population of Americans ages sixty-five and over has increased by 57%.16 Between now and the year 2025 the population of Americans ages sixty-five and over will increase by another 123%,17 compared to a projected increase in the total population of only 34%.18 By the year 2025, the population of Americans ages sixty-five and over will comprise 20% of the total population.19 The law cannot continue to impose a standard of care that such a large, growing portion of the population finds impossible to meet because of the unavoidable infirmities of old age.

Generally these infirmities are memory loss,20 loss of...
strength,\textsuperscript{21} impairment of hearing,\textsuperscript{22} impairment of vision,\textsuperscript{23} as well as diminution of perception\textsuperscript{24} and reflexes.\textsuperscript{25} The attributes

\begin{itemize}
  \item Let's Learn About Aging 77 (J. Barry & C. Wingrove ed. 1977). See also B. Silverstone & H. Hyman, You and Your Aging Parents 94-95 (1976) (the distinctive features of old age include “disturbances and impairment of memory, intellectual function or comprehension.”)
  
  For additional studies demonstrating the detrimental effect of aging on memory, see Bowles & Poon, An Analysis of the Effect of Aging on Recognition Memory, 37 J. Gerontology 212 (1982); Bruce, Coyne & Botwinick, Adult Age Differences in Metamemory, 37 J. Gerontology 354 (1982) Chairness, Visual Short-Term Memory and Aging in Chess Players, 36 J. Gerontology 615 (1981); Malone & Szoke, Neurochemical Studies in Aging Brains, 37 J. Gerontology 262 (1982).
  
  21. Loss of strength begins in the middle years and continues until death. Moss, Normal Aging, in Let's Learn About Aging 77 (J. Barry & C. Wingrove ed. 1977). The bones begin to become brittle, the calcium content begins to diminish, and the muscles diminish in size, dehydrate, and become fibrous. \textit{Id}. The “reasonably careful person” is expected to know if he is physically weak and act accordingly. See W. Prosser, Handbook of the Law of Torts 151-52 (4th ed. 1971).
  
  22. Impaired hearing and impaired vision are injected into the standard of a “reasonably careful person.” But the standard is not, thereby, relaxed. Rather, the “reasonably careful person” who is deaf or blind must take reasonable precautions to compensate for his deafness or blindness. W. Prosser, Handbook of the Law of Torts 152 (4th ed. 1971). However, hearing and vision capabilities inevitably diminish with age. Moss, Normal Aging, in Let's Learn About Aging 75-88 (J. Barry & C. Wingrove ed. 1977). The elderly need more light than younger people: “[W]hen such light is unavailable, they may face anything from annoyance to severe harm.” S. Cohen & G. Gans, The Other Generation Gap 62 (1978). A loss of hearing is universal, beginning in most people at age twenty-five and occurring so gradually that the loss usually cannot be noticed. \textit{Id}. The loss of these physical attributes when coupled with all other infirmities of old age may render the elderly person incapable of taking the precautions for those physical infirmities expected of the “reasonably careful person.” If the process of degeneration is gradual, then it is possible that the elderly person is unaware of the extent of his relative impairment, also rendering that person incapable of taking the precautions required of him by law.
  
  23. See supra note 22.
  
  24. Reduced perception is the effect of the combination of memory loss, hearing and vision impairment, and the loss of additional mental capacity, such as diminished problem solving ability, diminished creative imagination, restlessness, sleep disturbances, and a degree of diminished intellect, all the direct consequence of old age. Moss, Normal Aging, in Let's Learn About Aging 75-88 (J. Barry & C. Wingrove ed. 1977). A diminution of the above-mentioned sensory capabilities necessarily diminishes the capacity of the elderly to perceive risk of harm to themselves as well as others. This resulting diminished perception may render an elderly person incapable of meeting the standard of care of the ordinary “reasonably careful person.”
  
  25. Reflexes and the ability to react quickly to avoid dangerous situations inevitably decline with age. One commentator summarized it as follows: “As part of their overall physical decline, aging people begin to lose their sharp reflexes and coordination they once had. This often means that they cannot react as quickly to avoid accidents.” S. Cohen & B. Gans, The Other Generation Gap 87 (1978). Between the ages of thirty and seventy-five there is a gradual replacement of nerve tissue by fibrous cells causing a 90% slow down in the rate of nerve impulses resulting in slower reflexes and reactions. Moss, Normal Aging, in Let's Learn About Aging 76-77 (J.
of old age are inevitable, occurring in all human beings to some degree as they grow old. The natural outgrowth of these attributes is a reduced capacity of the elderly to protect themselves as well as others from risk of harm. Notwithstanding this reduced capacity, society gives the elderly no desirable alternative other than to continue functioning within the community.

The consequences of the elderly's continued interaction within society is best illustrated by the statistics. Persons sixty-five years of age and older have the highest accidental death rate in the United States. Accidents are the fifth leading cause of mortality in the sixty-five through seventy-four year old group and the sixth leading cause of death for those seventy-five years of age and older. Additionally, an estimated three million elderly individuals suffer non-fatal accidental injuries annually. Approximately one million of those suffering non-fatal accidents end up bedridden or hospitalized. Of the persons hospitalized due to accidents, the number of elderly victims is five times greater than accident victims in the younger groups. The causes of these accidents are directly linked to the various characteristics of aging.

Automobile accident statistics also show a direct correlation between the diminished capacity of drivers due to aging and the frequency of accidents. In 1981, 15% of all drivers ages sixty-five

Barry & C. Wingrove ed. 1977). See also Sabbahi & Sedgwick, Age-Related Changes in Monosynaptic Reflex Excitability, 37 J. Gerontology 24 (1982) (reflexes and reactions inevitably diminished with age). But even so, the same standard of care applies to the reasonably careful thirty year old as applies to the reasonably careful seventy-five year old. See supra note 3 and accompanying text.

26. See generally S. Cohen & B. Gans, The Other Generation Gap 5-48 (1978) (the characteristics of old age are inevitable). The infirmities of old age are also predictable and capable of generalization about their presence in the large population of elderly Americans. Moss, Normal Aging, in Let’s Learn About Aging 75-79 (J. Barry & C. Wingrove ed. 1977).

27. See supra notes 24-25.

28. An elderly person thrives most easily if he or she is able to live independently. S. Cohen & B. Gans, The Other Generation Gap 32 (1978). Gerontologists recommend that society attempt to prolong the independent functioning of the elderly in order to avoid the psychological harm involved with making these once productive members of society feel as though they have become a burden to themselves, their loved ones, and to society. See, e.g., id. at 268.


30. Id.

31. Id.

32. Id.

33. Id. A total of sixty-two out of every one thousand elderly persons admitted to hospitals are there because of accidents. Id.

34. The large rate of accidents for the elderly is attributable to their diminished sensory capabilities, perception, and reflexes. Id.
through sixty-nine were involved in automobile accidents, while those drivers ages fifty through fifty-four had only a 10% accident rate. Even more demonstrative of the effects of aging on risk are the statistics for those seventy-five years of age and older. In that group, twenty out of every one hundred drivers were involved in automobile accidents in 1981. This incremental rate of accidents involving persons of advanced age is not attributable to increased conscious carelessness. Rather, it is attributable to the diminished capacity of the elderly to both perceive danger and respond to it as quickly as younger adults.

The elderly person, therefore, has a capacity that naturally falls short of that of a younger adult. In spite of this diminished capacity, empirically demonstrated by the accident statistics, the elderly are still held to the same standard of care as younger adults, without any accommodation for the infirmities of old age. The law can no longer impose a standard of care that such a large portion of the population will find impossible to meet because of the unavoidable, natural infirmities of their age.

**LiABILITY BASED UPON FAULT**

The commentators and the courts agree that no liability is to be imposed upon any alleged tortfeasor, absent a strong public policy concern, without the presence of legal fault. The law determines liability based on blameworthiness; W. Prosser, Handbook of the Law of Torts 17-18 (4th ed. 1971) ("there should be no liability without 'fault,' involving a large element of personal blame"); Isaacs, Fault and Liability, 31 Harv. L. Rev. 954 (1918) (there should be no liability without fault).

Except for cases involving temporary delusionary insanity, the law generally holds those defendants who are insane or mentally slow to the same standard of care as an ordinary reasonably careful person regardless of legal fault. See generally W. Prosser, Handbook of the Law of Torts 132-53 (4th ed. 1971). Although beyond the scope of this comment, the application of the standard of a "reasonably careful person" regardless of fault to the insane or retarded has not gone without criticism. E.g., Curran, Tort Liability and the Mentally Ill and Mentally Deficient, 21 Ohio St. L.J. 52 (1960). The reason for holding the retarded or insane person to the same standard of care as an ordinary reasonably careful person is that their condition is not common or usual, it is often difficult to determine, and respect for the general welfare of society requires that they pay for their own negligence. See O.W. Holmes, The Common Law 108 (1881); W. Prosser, Handbook of the Law of Torts 132-53 (4th ed. 1971).

The situation of the elderly with their infirmities of old age is distinguishable from the situation of the retarded and insane. Insanity and

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36. Id.
38. See supra note 3 and accompanying text.
is not synonymous with moral fault or moral turpitude, but has come to mean a departure from that conduct required of persons by society for the protection of others. Oliver Wendell Holmes described the concept as follows: "[E]very man is presumed to possess ordinary capacity to avoid harm to his neighbors." This "ordinary capacity" has been personified into the "reasonably careful person" which presumes some uniform standard of behavior on the part of all of us for protecting ourselves and others from unreasonable risk of harm.

The courts have, however, modified this standard for children. They have done so because they have considered the general shortcomings of an entire class of persons, such as the lack of maturity, mental capacity, and experience and have recognized that these shortcomings may render members of that class incapable of meeting the standard of a "reasonably careful person" and, therefore, incapable of fault as judged by that standard. One commentator summarized as follows: "so long as it is an accepted general principle that liability for injuries to certain interests are to be imposed only upon those guilty of fault in mental retardation are derangements; they are not conditions expected of normal human beings during their lives and these conditions occur relatively infrequently. See BLAKISTON'S MEDICAL DICTIONARY 412, 495 (4th ed. 1979). Unlike the insane or retarded, but analogous to children who are held to a relaxed standard of care for their normal incapacity, the incapacity brought about by old age is normal and inevitable, occurring in all human beings as they grow old. See supra notes 20-26 and accompanying text. Also, unlike the insane or retarded but like children, the elderly comprise a very large portion of our population. See supra notes 13-19 and accompanying text. Therefore, the policy behind the law as it treats the retarded and insane is inapplicable to the elderly. The law should consider the policy behind allowing the relaxed standard of care for children as applicable to the situation of the elderly and make no exception in the case of the elderly to the general rule that liability is to be imposed only when legal fault is involved. See infra notes 42-54 and accompanying text.

Tort liability has also been developed around the theory of prevention and punishment. When the court decisions become known and people realize the threat of liability, there is a strong incentive to prevent the occurrence of harm. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 23 (4th ed. 1971). However, when an elderly person is incapable of perceiving a risk or reacting quickly enough to prevent the injury, because of the infirmities of old age, the idea of prevention and punishment becomes meaningless.

42. See generally James, The Qualities of the Reasonable Man in Negligence Cases, 16 MO. L. REV. 1 (1951).
44. See supra note 43.
causing them, it should be applied consistently and no liability should be imposed upon those for any reason incapable of fault.45

Children have received special treatment in the form of a relaxed standard of care that accounts for the existence of shortcomings inherent in this entire class of children. Because the natural infirmities of old age may similarly render elderly defendants incapable of meeting the standard of a "reasonably careful person," they, too, should receive special treatment.46 The elderly should be held to a relaxed standard that accounts for their natural infirmities so that liability is not imposed in the absence of legal fault.

The era of liability without fault ended in 1616 with Weaver v. Ward.47 Since then, the Anglo-American courts have recognized that liability without fault "penalized unduly those activities which were essential to an advancing developing society and ran counter to the typical Anglo desire for unrestricted freedom of self assertion."48 This concept was pivotal in allowing considerations of age and the characteristics of age into the standard applied to children. The children's standard of care was allowed in part to enable children to associate with their elders and society in order to promote their growth and maturity without unnecessary fears of liability.49 The same idea holds true for the elderly; unless we are to deny them free unre-

46. It is interesting to note here that state motor vehicle drivers' licensing statutes have tacitly recognized the inevitable infirmities of old age and the effect these infirmities have upon the elderly driver. These statutes generally require of the elderly license applicant and not younger applicants a mandatory practical driving examination in order to determine whether the elderly driver has the ability to exercise ordinary and reasonable control of a motor vehicle. E.g., Ill. Rev. Stat. ch. 95-1/2, § 6-109(c) (1981).
47. 80 Eng. Rep. 284 (1616) (no man should be liable for a trespass without fault).
48. Bohlen, Liability in Torts of Infants and Insane Persons, 23 Mich. L. Rev. 9, 32 (1924-25). See also James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549 (1948) (the concept of liability only with fault developed in order to promote the common good).
49. Unless infants are to be denied the environment and association of their elders until they have acquired maturity, there must be a living relationship between them on terms which permit the child to act as a child in his stage of development. As well expect a boy to learn to swim without experience in the water as to expect him to learn to function as an adult without contact with his superiors. For the law to hold children to the exercise of the care of adults would be to shut its eyes ostrich-like to the facts of life and burden unduly the child's growth to majority.

strained association with their families and the whole of society, thus discouraging long productive lives, we must establish a system of laws that permits them to behave as elderly persons without exposing them to unavoidable liability.

If we are to adhere to the premise that liability is to be based upon fault only, then the current "across the board" adult standard of care is inconsistent with any valid interpretation of this premise, and is arbitrary. The current standard determines legal fault by use of a standard that the elderly person cannot meet, it imposes liability not because of the existence of fault, but rather, because the elderly person has merely grown old. If the law as written is not changed to determine fault in light of the infirmities of old age, it is a signal that society wishes to subject a large portion of us to a life of court-induced isolation and dependency upon others in the later years of our lives. Society should absorb the cost of fostering independence and active conduct on the part of the elderly rather than forcing them to absorb it entirely themselves.

**THE CHILDREN'S STANDARD OF CARE**

The standard of care required of a child judges a child by what is reasonably to be expected of a child of like age, intelligence, and experience. A similar concession should be made for the elderly because the situation of the elderly parallels that of children, not only from the standpoint of legal fault, but also in other aspects which the court were concerned with in adopting a different standard of care for children. Both the young and the old represent large segments of our population that have predictable qualities characteristic of their ages which may lessen the capacity of members of the groups rendering them incapable of fault. In the case of children, these qualities, including immaturity and lack of experience, have been legally...

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50. See supra notes 20-38 and accompanying text.

51. The standard of care applied to a child generally considers the child's age, mental capacity, and experience using these factors to determine how a child with similar capacity would have acted under similar circumstances. E.g., § 10.05 ILL. PATTERN JURY INSTRUCTIONS—CIVIL (2d ed. 1969). See also RESTATEMENT (SECOND) OF TORTS § 283A (1965). This relaxed standard is applied in a number of ways in different jurisdictions. For a complete analysis of the law of negligence as it applies to children, see Gray, The Standard of Care for Children Revisited, 45 Mo. L. REV. 597 (1980).

52. See supra notes 39-50 and accompanying text.

53. In 1981 those sixty-five years of age and over totaled 11.4% of the nation's population and those seventeen years of age and younger totaled 27% of the nation's population. Calculated using data from U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 25 (103d ed. 1982).
recognized. The result has been a different standard of care required of children.\textsuperscript{54} In the case of persons of advanced age, diminished sensory capabilities, strength, perception, and reflexes should be legally recognized as inevitable and predictable,\textsuperscript{55} similarly requiring a standard of care different from that of the ordinary "reasonably careful person."

These qualities of the very young and the elderly, although capable of generalization, necessarily vary greatly, not only by age within the groups but also between individuals of the same age.\textsuperscript{56} This disparity lends an element of subjectivity to any standard that considers the infirmities of age.\textsuperscript{57} When a child is being tried, a jury no longer examines the child's conduct by a comparison to the objective "reasonably careful person."\textsuperscript{58} Rather, the jury examines the conduct of this child based upon reasonable expectations of a child of the same age, the same intellect, and the same level of experience as this child.\textsuperscript{59} Therefore, the result of the children's standard of care, when applied to the wide range of capabilities of children, was to inject an element of subjectivity where the courts had previously preferred objectivity.\textsuperscript{60} The same subjective element would be present in a standard that considers age and capacity of the elderly because of a similar range of variables.

The purpose underlying the objective standard is to judge legal fault by applying a standard of care to all persons typical of the general community, thus alleviating subjective considerations. Moreover, the objective standard helps to assure that the

\textsuperscript{54} See supra note 51 and accompanying text.
\textsuperscript{55} See supra notes 20-25 and accompanying text.
\textsuperscript{56} "[T]he capacities of children vary greatly, not only with age, but also with individuals of the same age." W. PROSSER, HANDBOOK OF THE LAW OF TORTS §55 (4th ed. 1971). The same holds true for the elderly. The process of aging, although inevitable, occurs at different rates in different people. See generally J. BARRY & C. WINGROVE, LET'S LEARN ABOUT AGING 75-80 (1977) (the infirmities of old age inevitably occur but at different rates in different people).

\textsuperscript{57} See supra note 51 and accompanying text.
\textsuperscript{58} See supra note 51 and accompanying text.
\textsuperscript{59} "The mental capacity, the knowledge, and experience of the particular child, are to be taken into consideration in each case. These qualities are individualized—subjective." Shulman, The Standard of Care Required of Children, 37 YALE LJ. 618, 625 (1928). See also W. PROSSER, HANDBOOK OF THE LAW OF TORTS 155 (4th ed. 1971) ("there is something of an individual standard: the capacity of the particular child . . . must be taken into account").

\textsuperscript{60} See, e.g., W. PROSSER, HANDBOOK OF THE LAW OF TORTS 150 (4th ed. 1971) (the standard is an external and objective one and must be the same for all, so far as possible, because the law can have no favorites); James, The Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1, 2 (1951) (a relaxed subjective standard places the burden of loss resulting from substandard behavior upon the innocent victim).
The burden of loss resulting from substandard behavior does not unjustly fall upon the innocent victim. The injection of subjectivity into such a standard by allowing consideration of an array of personal variables may undermine such a basic premise.

This problem is overcome in adopting the children's standard of care. Commentators have explained that the standard is not completely subjective; the standard is subjective only for the purpose of determining whether the child had the capacity to perceive the risk of injury, and beyond that, the test is purely objective. In other words, after subjectively determining a child's capacity, that child is objectively judged as a "reasonably careful person" of like capacity. Further, the law recognized that the state of a child's progress toward maturity is reasonably capable of determination because all of us have been children at one time and have dealt with many children personally.

Similarly, the problems with subjectivity can be overcome in adopting a relaxed standard of care for the elderly. The characteristics of old age are predictable and capable of diagnosis. Although most jurors have not experienced old age nor the attributes of old age, ample scientific and medical authority is available to aid the jury in establishing the capacity of the person of advanced age. After that capacity is established, the elderly actor should be adjudged objectively based upon the standard of a "reasonably careful person" of like capacity, similar to the test applied to children.

61. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 155 (4th ed. 1971) ("the standard is not entirely subjective, and if the conclusion is that the conduct of the child was unreasonable in view of his estimated capacity he may still be found negligent."); Shulman, The Standard of Care Required of Children, 37 YALE L.J. 618, 625 (1928) (the standard is subjective only for the purpose of determining a child's capacity and beyond that it is objective).

62. The special standard to be applied in the case of children arises out of the public interest in their welfare and protection, together with the fact that there is wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them.

63. See supra note 19. The infirmities of old age are capable of prediction and reliable diagnosis and explanation by medical experts. See generally F. CAIRD & T. JUDGE, ASSESSMENT OF THE ELDERLY PATIENT (2d ed. 1979).

64. See supra note 63.

65. See supra notes 61-62 and accompanying text.

66. An "adult activity" is an inherently dangerous activity normally undertaken only by adults such as driving a car or flying an airplane. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 156-57 (4th ed. 1971). The law does not allow the relaxed standard of care to a child who is involved in an accident
The elderly should not be totally exempt from the application of the ordinary "reasonably careful person" standard. Concerns for public safety warrant consideration of an exception to the application of a relaxed standard of care to the elderly similar to the "adult activities" exception to the children's standard. An elderly person should be judged as a normal "reasonably careful person" for accidents occurring when the elderly person is engaged in an inherently dangerous activity such as driving a car. Because of a personal and economic situation peculiar to the elderly in general, however, the ordinary standard of care should be applied only when the inherently dangerous activity is undertaken by the elderly person unnecessarily.

For children, the general rule is that whenever a child plaintiff or defendant is engaged in an inherently dangerous "adult activity," public interest and public safety require that he be held to the adult standard regardless of his incapacity. The underlying rationale is that such a policy will discourage children from engaging in inherently dangerous activities while still allowing the child to enjoy traditional childhood activities without being held to the adult standard of care. Another suggested reason for this rule is that a child may be treated as an

while engaged in an "adult activity." Rather, the courts will hold such a child to the standard of the ordinary "reasonably careful person." *E.g., Robinson v. Lindsay,* 92 Wash. 2d 410, 598 P.2d 392 (1979). *See also Restatement (Second) of Torts § 283A comment c (1965).*

An exception to the rule stated in this Section may arise where the child engages in an activity which is normally undertaken only by adults, and for which adult qualifications are required. As in the case of one entering upon a professional activity which requires special skill, he may be held to the standard of adult skill, knowledge, and competence, and no allowance may be made for his immaturity. Thus, for example, if a boy of fourteen were to attempt to fly an airplane, his age and inexperience would not excuse him from liability for flying it in a negligent manner. The same may be true where the child drives an automobile.

*Restatement (Second) of Torts § 283A comment c (1965).*

7. See infra notes 68-71 and accompanying text.
68. See infra note 100.
69. See supra note 66. See, e.g., *Dellwo v. Pearson,* 259 Minn. 452, 107 N.W.2d 859 (1960) (a minor is to be held to the adult standard of care when operating an automobile, airplane, or powerboat); *Robinson v. Lindsay,* 92 Wash. 2d 410, 598 P.2d 392 (1979) (a minor driving a snowmobile is held to the adult standard of care).
70. *Robinson v. Lindsay,* 92 Wash. 2d 410, 413, 598 P.2d 392, 394 (1979). "Such a rule protects the need of children to be children but at the same time discourages immature individuals from engaging in inherently dangerous activities. Children will still be free to enjoy traditional childhood activities without being held to an adult standard of care." *Id.*
adult because he is either judgment proof or is covered by some form of liability insurance, generally paid for by a parent, which shelters the child from significant, detrimental pecuniary harm.\textsuperscript{71} The situation of the elderly, however, is significantly different in these respects and requires additional consideration.

Traditional childhood activities do not generally include providing the necessities of life. A child generally knows nothing other than dependency upon a parent or guardian for providing transportation, food, and all other basic necessities. Unlike children, the elderly have been providing all of their own needs and must continue to do so if they are to continue living their lives independently. Therefore, the person of advanced age may have to engage in an inherently dangerous activity out of complete necessity in order to provide the basic needs for survival if he is to remain independent.

The best example of this is driving an automobile. Affordable public transportation to a desired destination is often not available to the elderly.\textsuperscript{72} Younger relatives or friends are not always conveniently available to aid in transporting the elderly.\textsuperscript{73} Also, in urban areas especially, the danger of the elderly being robbed or attacked while walking to public transportation or some other destination is significant.\textsuperscript{74} It is easy, therefore, to imagine situations where no other practical means of transportation is available to the elderly person other than driving an automobile himself. Therefore, unlike children in general, the

\textsuperscript{71} It has been suggested that children should be held to the adult standard of care in spite of their normal incapacity, because in reality they do not pay for their own negligence. W. Prosser, Handbook of the Law of Torts 156 (4th ed. 1971). See also C. Morris, Morris On Torts 57 (1953) (children are usually judgment proof); James, Accident Liability Reconsidered, The Impact of Liability Insurance, 57 Yale L.J. 549, 555 (1948) (minor drivers are generally covered by insurance of which a negligible amount is paid by the minor). At common law, parents were not held liable for damages caused by the negligence of their children, when the parents themselves were in no way culpable. This situation has been changed by statute to allow recovery from a parent, but generally only to a maximum amount of approximately $250 to $500. See generally Annot., 8 A.L.R. 3d 612 (1966 & Supp. 1982) (common law and statutory parental liability discussed).

\textsuperscript{72} A study conducted by the National Council on the Aging, Inc. concluded that 15\% of the elderly have no affordable public transportation available to take them where they need to go. National Council on the Aging, Inc., The Myth and Reality of Aging in American 33-34 (4th printing 1977).

\textsuperscript{73} The National Council on Aging, Inc. found that of those elderly surveyed, 14\% complained about not having means of transportation other than a car available to them. Id.

\textsuperscript{74} 24\% of the elderly surveyed by the National Council on Aging, said that the "danger of being robbed or attacked on the streets was a serious problem for them." Id.
elderly may have to engage in inherently dangerous activities in order to survive, unless they are to be subjected to an undesirable life of dependency upon others for basic human necessities.\textsuperscript{75}

Unlike children, the elderly are not judgment proof; nor do others pay for their liability insurance. Elderly Americans generally own their own home, an asset of considerable value that is available to satisfy judgment debts.\textsuperscript{76} Their disposable cash income, however, is likely to be significantly lower than persons in younger age groups. Indeed, an estimated 40\% of all Americans ages sixty-five and over are just at or below the nation's poverty level.\textsuperscript{77} At the poverty level, an elderly couple would have approximately fifty dollars per month, per person, for food, clothing, taxes, transportation, utilities, and insurance.\textsuperscript{78} Unlike children, therefore, the elderly are not sheltered from pecuniary harm. Rather, their peculiar economic situation generally renders them subject to more harm than younger Americans\textsuperscript{79} through the potential loss of an irreplaceable home or increased insurance premiums they cannot afford to pay.\textsuperscript{80}

\textsuperscript{75} Gerontologists recommend that society promote prolonged independence of the elderly. \textit{See supra} note 28.

\textsuperscript{76} Approximately 80\% of all couples and 57\% of all singles ages sixty-five and older live in a home they own. \textsc{W. Browne \& L. Olson}, \textit{Aging and Public Policy: The Politics of Growing Old} 25 (1983). The amount of mortgage debt if any on those homes is generally low. \textit{Id.} Approximately 80\% of all elderly homeowners own their homes free of debt. \textit{Id.}

\textsuperscript{77} \textit{Id.} at 27 (based on the United States Bureau of Census data for 1979).

\textsuperscript{78} \textit{Id.} at 29 (based on a 1977 Congressional Budget Office analysis).

\textsuperscript{79} American heads of households sixty-five years of age and older have average cash incomes equal to only about one-half of the average cash incomes for American heads of households aged less than sixty-five based on 1979 data. \textit{Id.} at 25.

\textsuperscript{80} Senior citizens generally receive a 5 to 10\% discount on automobile insurance premiums. This discount is given because of lower comprehensive claims by the elderly as compared to younger drivers resulting from the facts that the elderly drive cars that are less likely to be stolen and are more likely to keep their cars in garages. However, in spite of reduced miles driven by the elderly, according to State Farm Insurance Company 1982 claim experience records, "at fault" liability claims for policy holders over sixty-five were 6.27 claims per 1000 policies, where for the younger policy holders ages twenty-five through sixty-four the "at fault" liability claim rate was 5.8 claims per 1000 policies. The discount is given because the savings from the lower comprehensive claims more than offset the increased cost of the older group's liability losses. Letter from J. Robert Sasser, Superintendent-Public Relations, State Farm Insurance Cos., to Charles V. Barrett (June 24, 1983) (discussing the effect of aging on insurance rates). If the standard of care required of the elderly were changed to make allowances for the infirmities of age, perhaps additional savings to the insurance companies would result from fewer "at fault" claims that could also be passed on to the elderly driver. Lower premiums could also make insurance available to those elderly who, because of a poor cash income, cannot afford liability insurance.
The situation of the elderly is, therefore, different than that of children. This difference should serve as a basis for developing an exception to a standard of conduct for the elderly that would serve both concerns for public safety and the predicament of the elderly. Creating a different standard of care for the elderly with an exception only for unnecessary, inherently dangerous activities satisfies these competing societal concerns. Concerns for the public safety would allow for the finding of negligence on the part of an elderly person as judged by the standard of the "reasonably careful person" only in situations where the elderly engage in inherently dangerous activities unnecessarily. Such an exception would deter the elderly from needlessly engaging in such activity.

Uniting the application of the "reasonably careful person" standard to the elderly with the proposed relaxed standard of care, satisfies the dual concerns of public safety and independence for the elderly. The elderly could engage in necessary, inherently dangerous activities without fear of liability without fault being imposed. A different standard of care for the elderly could also potentially aid in lowering liability insurance rates, partially abating a poor cash flow problem, and lessen the possibility of the elderly homeowner losing the home he has worked all of his life for to a judgment creditor.

INCONSISTENCY OF STANDARDS

A number of courts have recognized a different standard of care required of elderly plaintiffs. These courts inject into the standard of care considerations of the infirmities of old age. Courts that apply this different standard for plaintiffs have

81. See infra note 100.
82. See supra notes 76-80 and accompanying text.

A person whose senses are blunted and mental faculties impaired by old age is not guilty of contributory negligence where his failure to use that degree of care which an ordinarily prudent person would use under the same or similar circumstances is due to such disability. In any event, the failure of an elderly person to take certain precautions does not constitute contributory negligence, so as to preclude recovery, where such failure was not the proximate cause of the injury suffered. Id.

84. E.g., Kitsap County Transp. Co. v. Harvey, 15 F.2d 166 (9th Cir. 1926). The seventy-three year old plaintiff in Kitsap, while a passenger on defendant's vessel, forgot about an unmarked elevation upon which her chair was situated upon and, while leaving her seat, she stepped out as she would upon an unbroken floor, lost her balance, and fell, fracturing her thigh bone and wrist. The circuit court held plaintiff was not contributorily negligent, reasoning as follows: "[I]f we apply to her the standard of what ordinarily careful women of her age and experience would do under like circum-
treated its application only summarily. The justification these courts give for the different standard is that the law has made such allowances for the youth and incapacity of child plaintiffs. Because of this, the courts reason, the same allowances should be made for elderly plaintiffs. For example, the Court of Appeals of Louisiana, in Garner v. Crawford,\(^{85}\) stated: "Generally a relaxed standard of care is required in the contributory negligence situation by persons who are subject to the infirmities of old age. The rationale appears to be essentially the same as that employed to exculpate young children from contributory negligence."\(^{86}\) Unaccountably, the same type of analogy has not been used by the courts to allow a new standard of care for the elderly defendant.\(^{87}\)

If courts recognize the age of the elderly plaintiff in assessing his negligence, the next logical step is to extend the standard to the elderly defendant. This same progression of events occurred with the adoption of the relaxed standard of conduct for children. First the courts recognized such a standard by applying it to child plaintiffs, and then the same standard was extended to child defendants.\(^{88}\) In extending the children's standard to child defendants, the courts concluded that it was inconsistent to apply one standard of care to the plaintiff and a different standard to the defendant.\(^{89}\) In Charbonneau v. MacRury,\(^{90}\) the Supreme Court of New Hampshire adopted the children's standard of care for child defendants.\(^{91}\) The court determined that if the law relieves a child plaintiff from the penalty that a lack of reasonable care would impose upon him because of his incapacity, it is inconsistent and arbitrary to penalize a child for the same lack of care simply because the child

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\(^{86}\) Id. at 888. See also Johnson v. St. Paul City Ry. Co., 67 Minn. 260, 262, 69 N.W. 900, 901 (1897).

The age of plaintiff is also to be kept in mind. All that the law requires of an infant is a degree of care commensurate with its age and discretion. We think the same rule should apply to old people, whose senses are blunted and mental facilities impaired by age.

\(^{87}\) See supra notes 5-12 and accompanying text.

\(^{88}\) See, e.g., Charbonneau v. MacRury, 84 N.H. 501, 153 A. 457 (1931). See infra notes 90-92 and accompanying text.

\(^{89}\) See infra notes 90-92 and accompanying text.

\(^{90}\) 84 N.H. 501, 153 A. 457 (1931).

\(^{91}\) Id. at 512-13, 153 A. at 464.
is a defendant.\footnote{If our law recognizes infants as incapable of exercising that care for their own protection which is required of normal persons as a condition to their right to redress for injuries caused by the wrongful acts of others and relieves them from the penalty which such lack of care would, but for their incapacity, impose, it would be inconsistent and arbitrary to penalize them to compensate others whom they injure by conduct, which though guilty in others, is, by reason of their incapacity, innocent in them. \textit{Id.} at 504, 153 A. at 460.}

The inconsistency of two different standards of care applied to children, which was recognized and corrected by the courts, is analogous to the inconsistency of allowing considerations of old age and the infirmities of old age with an elderly plaintiff, but not with an elderly defendant. Such a legally recognized inconsistency should be corrected by implementing a standard of care for both the elderly plaintiff and the elderly defendant that consistently recognizes and considers the infirmities of old age.

### Public Opinion

Implementation of a relaxed standard of care for the elderly is in accord with public opinion. A recent Harris Poll found that 81% of Americans aged eighteen through sixty-four felt a need to work together towards improving the conditions and social status of people over sixty-five.\footnote{NATIONAL COUNCIL ON THE AGING, INC., \textit{THE MYTH AND REALITY OF AGING IN AMERICA} 230 (4th printing 1977). This study was made for the National Council on the Aging, in 1975 by Louis Harris and Associates, Inc. The study is extensive, covering all aspects of the condition of the elderly in America and of the public's attitude toward old age in America. The study demonstrates an overwhelming concern and empathy that younger Americans have for the elderly. It also demonstrates a desire of younger Americans to pay more than mere lip service to the problems of elderly Americans by a willingness "to rally around efforts to improve the older people's status and conditions." \textit{Id.} at 231.} This poll concluded that the American public has a deep concern about the plight of the elderly in this country and would be willing to support efforts to improve their situation.\footnote{See supra note 93.} Additionally, commentators have argued that it is unlikely that any juror applies a strictly objective standard in adjudging the negligence of any elderly defendant.\footnote{See, e.g., C. MORRIS, \textit{MORRIS ON TORTS} 56 (1953) ("a jury charged to take circumstances into account \textit{seldom} thinks of a reasonably prudent man with none of the attributes of the defendant"); James, \textit{The Qualities of the Reasonable Man in Negligence Cases}, 16 Mo. L. Rev. 1, 3 (1951) ("\[H\]owever objective the test laid down in the charge, the trial of an accident case always furnishes a host of indications as to the subjective factors . . . and it is hard indeed to believe that these do not weigh heavily with the jury").} In view of this reticence and the concern the general public has for the elderly, it is understandable that a jury decision
favorable to an elderly defendant would be subsequently reversed on appeal because the appellate court found that the jury made its decisions under the influence of passion and prejudice stemming from sympathy for the elderly defendant.96

The standard of care, applied to the elderly defendant without consideration of the infirmities of old age, is inconsistent with public opinion and is probably being ignored by juries. The current standard, therefore, tends to undermine respect for the law. Consequently, the law should be changed in order to reflect changing social needs and realities.

PROPOSAL: A RELAXED STANDARD

Courts desiring to develop a relaxed standard of care for the elderly defendant will have ample justification for doing so. As a suggestion, the following standard is proposed.

First, a minimum age of sixty-five years will be the threshold that must be crossed to raise any issue about application of such a standard. The age of sixty-five has been selected because it is most often associated by our society with the commencement of old age.97 There is nothing magic about sixty-five and certainly many sixty-five year olds would resent being considered elderly. Some age, however, must be developed as establishing a point when the infirmities of old age may fairly be considered. In light of the accident statistics that increase with persons over sixty-five,98 the sixty-fifth year appears to be a reasonable threshold.

Second, it must not be age alone, but the infirmities caused

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96. Cf. Demeyer v. Maxwell, 103 Idaho 327, 647 P.2d 783 (1982). In Demeyer, the elderly husband of the decedent brought a wrongful death action against an elderly driver. Id. The jury found that 50% of the negligence causing the death was attributable to the decedent and 50% was attributable to the defendant. Id. at 328, 647 P.2d at 784. The trial judge granted a motion for a new trial because there was no evidence to support the jury’s finding that the decedent had been negligent and the trial judge concluded that the “jury’s verdict was given under the influence of passion and prejudice.” Id. The Court of Appeals of Idaho also held that the evidence did not support the jury verdict, insofar as it found negligence on the part of the decedent. Id. at 331, 647 P.2d at 787.


98. See supra notes 29-37 and accompanying text.
by aging, that should be considered in the standard.\footnote{99. This has been the rule in those jurisdictions that allow considerations of old age in determining contributory negligence of elderly plaintiffs. \textit{E.g.}, \textit{LaCava v. City of New Orleans}, 159 So.2d 362, 364 (La. Ct. App. 1964) ("[I]t is not advanced age alone but rather disability resulting from advanced age . . . which affects the test of care required.").} This assures that the burden of loss does not needlessly fall upon the innocent plaintiff. Therefore, the elderly defendant would have the burden of proving he was infirm, that his infirmities caused the injury, and that those infirmities were the result of and generally associated with advanced age.

Third, if the alleged negligence of the elderly person occurred while he was engaged in an inherently dangerous activity, such as driving an automobile, he would have the burden of proving that he engaged in that activity out of necessity.\footnote{100. It is beyond the scope of this comment to discuss completely the issue of what constitutes engaging in an inherently dangerous activity out of necessity. As discussed earlier in this comment, an elderly person may have to drive an automobile in order to obtain food and other tangible necessities. See \textit{supra} notes 74-77 and accompanying text. However, as humans, the elderly have other needs as well. Some of these needs are less tangible than food but nonetheless important, such as companionship and love. The extent to which all of these needs give rise to situations that constitute undertaking inherently dangerous activities out of necessity is for the courts to decide. In resolving this issue, the courts must weigh on a case-by-case basis public safety concerns against concerns for the situation of the elderly in general. The courts must also address the problems involved with determining the necessity out of which the inherently dangerous activity was undertaken, such as the subjectivity involved with determining the alleged urgency of fulfilling the need and with determining the availability of a reasonable alternative to the activity undertaken.} If that burden was met, his conduct would be adjudged by the proposed standard. This exception will account for public safety concerns while allowing the person of advanced age to still function independently as a part of society.

Fourth, if the elderly person has satisfied these requirements, the jury would be allowed to subjectively determine the capacity of the defendant considering all of his relevant infirmities with the aid of expert testimony. After establishing this capacity, the jury would objectively determine whether the defendant acted as a reasonably careful person of like age and similar infirmities.

\section*{Conclusion}

All indicators—statistical, legal, practical—demonstrate the need to reform the standard of the ordinary "reasonably careful person" in adjudging the negligence of an elderly defendant. Such a reformed standard must take into account the inevitable infirmities of old age because these infirmities may render an
elderly person incapable of conforming to the standard of the ordinary "reasonably careful person." Such a reformed standard of care for the elderly, by analogy, would find precedent in the same legal reasoning used by the courts in adopting the relaxed standard of care required of children. Unlike the current adult standard that holds members of the large population of the elderly liable without fault merely because they have grown old, the reformed standard of care for the elderly must determine liability based only upon fault. If a reformed standard of care for the elderly such as the one proposed in this comment is adopted by the courts, it would be a sign that the law and society wish the elderly to continue to be independent, to continue to share the environment, and to continue to associate with their successors together in the mainstream of society.

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