
104.25 CONTRIBUTORY NEGLIGENCE OF MINOR BETWEEN SEVEN AND 14 YEARS OF AGE.[1]

The (*state number*) issue reads:

"Did the minor plaintiff, by *his* own negligence, contribute to *his* [injury] [damage]?"

You will answer this issue only if you have answered the (*state number*) issue as to the defendant's negligence "Yes" in favor of the minor plaintiff.[2]

On this (*state number*) issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, three things:

First, that the minor plaintiff was capable of negligence. The law presumes that a child who is between seven and fourteen years of age is not capable of negligence. However, this presumption may be overcome by evidence that a child of the minor plaintiff's age ordinarily would have the discretion, judgment and mental capacity to discern and appreciate circumstances of danger.[3] It is your duty to consider all of the evidence in the case and determine whether the defendant has proven, by the greater weight of the evidence, that a child of the minor plaintiff's age ordinarily would have the discretion, judgment and mental capacity to understand and avoid danger.[4]

Second, that the minor plaintiff was negligent. The test of what is negligence, as I have already defined and explained it, is not the same for the minor plaintiff as it is for the defendant. Even if a child who is between seven and fourteen years of age is capable of negligence, the child is not required to exercise the same degree of care for the safety of others that is required of an adult[5]. The law imposes a duty upon a child to exercise only that degree of

care for the safety of others that a reasonably careful child of the same age, discretion, knowledge, experience and capacity ordinarily would exercise under the same or similar circumstances.[6] A child's failure to exercise the required degree of care would be negligence.

And Third, that the minor plaintiff's negligence was a proximate cause of the minor plaintiff's [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and one which a reasonable and prudent child of the same age, discretion, knowledge, experience and capacity could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the defendant need not prove that the minor plaintiff's negligence was the sole proximate cause of the [injury] [damage]. The defendant must prove, by the greater weight of the evidence, only that the minor plaintiff's negligence was a proximate cause. If the minor plaintiff's negligence joins with the negligence of the defendant in proximately causing the minor plaintiff's own [injury] [damage], it is called contributory negligence, and the minor plaintiff cannot recover.[7]

In this case, the defendant contends, and the minor plaintiff denies, that the minor plaintiff was capable of negligence and was negligent in one or more of the following respects:

Read all contentions of negligence supported by the evidence.

The defendant further contends, and the minor plaintiff denies, that the minor plaintiff's negligence was a proximate cause of *his* own [injury] [damage].

I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].

Give law as to each contention of negligence included above.

Finally, as to this (*state number*) issue on which the defendant has the burden of proof, if you find, by the greater weight of the evidence, that the minor plaintiff was capable of negligence, was negligent (in any one or more of the ways contended by the defendant) and that such negligence was a proximate cause of the minor plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the defendant.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the minor plaintiff.

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1 A child under seven is conclusively presumed to be incapable of contributory negligence. *Walston v. Greene*, 247 N.C. 693, 696, 102 S.E.2d 124, 126 (1958). A child who has reached his fourteenth birthday is "presumed to have sufficient capacity to be sensible of danger and to have power to avoid it," *Welch v. Jenkins*, 271 N.C. 138, 142, 155 S.E.2d 763, 767 (1967), "and he is chargeable with contributory negligence as a matter of law if he fails to do so," *Burgess v. Mattox*, 260 N.C. 305, 307, 132 S.E.2d 577, 578 (1963).

There is a rebuttable presumption that a child between the ages of seven and fourteen is incapable of contributory negligence. *Hoots v. Beeson*, 272 N.C. 644, 650, 159 S.E.2d 16, 21 (1968); *see also Caudle v. Seaboard Air Line R.R.*, 202 N.C. 404, 407, 163 S.E. 122, 124 (1932) (citations omitted) ("Prima facie presumption exists that infant between ages of seven and fourteen is incapable of contributory negligence, but presumption may be overcome. Test in determining whether child is contributorily negligent is whether it acted as child of its age, capacity, discretion, knowledge, and experience would ordinarily have acted under similar circumstances.").

2 This sentence will be accurate only when there is a single defendant and there is no issue as to the negligence of an agent of the defendant. In more complex situations, the judge must instruct the jury precisely as to what answers to what prior issues will call for an answer to this issue.

3 *See Walston*, 247 N.C. at 696, 102 S.E.2d at 126. Failure to instruct on the rebuttable presumption is prejudicial error. *Hoots v. Beeson*, 272 N.C. at 650, 159 S.E.2d at 21.

4 *Blue v. Canela*, 139 N.C. App. 191, 193-194, 532 S.E.2d 830, 832 (2000).

5 *Morris v. Sprott*, 207 N.C. 358, 359, 177 S.E. 13, 14 (1934).

6 *Boykin v. Atlantic Coast Line R.R.*, 211 N.C. 113, 115, 189 S.E. 177, 178 (1937).

7 Omit the phrase, "and the minor plaintiff cannot recover," if an issue of last clear chance is being submitted. For an instruction on last clear chance, refer to N.C.P.I.–MV 105.15.