



**DIGITALLY MATURE: RE-EXAMINING
INFANT CAPACITY TO ENTER ONLINE
CONTRACT IN TECHNOLOGICALLY SAVVY
WORLD**

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ABSTRACT

Every sane person is presumed to have the capacity to enter into a legal contract. However, the law places the risk of contracting with an infant on the adult by establishing an age rule under which the infant is irrefutably presumed incompetent to contract, but only if the minor raises the issue at the point of performance of the contract. The lack of minor accountability regarding contractual obligations must be reconsidered to advance electronic commerce.

Utilizing the doctrinal research methodology, this paper seeks to examine the principles relating to infant capacity to contract in light of the sophisticated nature of commercial transactions in which minors are regularly engaged in in today's society.

1.0 INTRODUCTION

The traditional principles of contract law specify who is incapacitated from entering into a contract. These include a minor and a person of unsound mind or in a drunken state of mind.¹ The power of an infant to enter into a contract is governed by rules of common law as limited by statute. At common law, an infant is a person who has not attained the age of maturity, 21 years according to the Infants Relief Act of 1874. With the enactment of the Child's Right Act 2003,² the contractual age has been reduced to 18 years in Nigeria. Section 18 of the Child's Right Act 2003 codifies the common law thus: 'any contract, except a contract for necessities, entered into by a child for repayment of money lent or for payment of goods supplied to the child, shall be void'.³

The continued application of the principle is based on the presumption that minors generally are easily exploitable and less capable of fully comprehending the nature of legal obligations associated with a contract.⁴ For ease of administration and clarity in the application of the rule, the rule was settled as a firm age line without regard to whether an individual is mature or not.

In contemporary times scholars have argued that the blanket protection given to the infant should be checked.⁵ One of the strong

¹ I. E. Sagay, *Nigeria Law of Contract* (3rd Ed., Spectrum Books Limited, 2018) 537.

² CRA 2003, Section 277 while some States Child's Right Law fix it at below 18 years.

³ *Ibid*, Section 18.

⁴ J. L. Daniel, 'Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope' (2008) (43) (2) *GLR* 239.

⁵ I. M. Mehler, 'Infant Contractual Responsibility: A Time for Reappraisal and Realistic Adjustment?' (1963) 11 *UKLR* 361.

arguments against the rule is that the contractual age for infants is largely dependent on whatever the legislature says it is, not whether the person is competent or not.⁶ The statutory age of majority has nothing to do with whether a person is capable of giving consent to the transaction. This is illustrated by the lack of inquiry into whether the minor understood the nature and consequences of his actions. The fact that a 20-year-old person could be generally regarded as incapable of contracting on one day and legally capable of contracting the next day due to a legislative enactment highlights the lack of consideration given to a person's actual cognitive abilities under the extant laws. It is also surprising to grasp the concept that in the blink of an eye, a person sheds infancy and attains adulthood the moment the person's eighteenth birthday is realised based on the Child's Right Act 2003.

The harshness of the infancy doctrine has led courts to limit the doctrine with some exceptions. The commonest exception to the infancy doctrine is that a minor is not permitted to disaffirm a contract for necessities.⁷ The law wants to allow minors to obtain items necessary for their survival by assuring merchants that minors' contracts for necessities will be binding. However, whether the subject matter of the contract constitutes a 'necessity' is not so clear-cut as this is a question of fact depending on the minor's station in life.⁸ Section 2 of the Sale of the Goods Act 1893 defines necessary goods as 'goods suitable to the condition in life of such an infant or minor or another person, and to his actual requirement at the time

⁶ Daniel (n 4).

⁷ CRA 2003, Section 18(2); Infants Relief Act 1874, Section 1.

⁸ *Peters v Fleming* (1840) 6 M & W 42.

of sale and delivery'⁹ According to Alderson B in *Chappel v Cooper*¹⁰ 'things necessary are those without which an individual cannot reasonably exist.... Thus, articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed'. What is necessary for an infant from a rich and well-to-do family will not be for an infant from a poor family. Note however, that Goods supplied to an infant for trading, are not necessities. The infant is not bound to pay for them,¹¹ so also agreement for work or labour.¹² A married infant is liable for a contract made by his wife when she had the authority to pledge for his credit e.g. food or essential household goods.

Another common exception involves contract situations where the minor misrepresented his age in entering into the contract. The law is that a minor is stripped of his ability to disaffirm a contract he induced by misrepresenting his age, irrespective of how the misrepresentation was made but it requires more than a mere statement of inaccurate age.¹³ The adult has a duty to reasonably investigate age, notwithstanding the representation. Other exceptions are where the infant receives benefit from the contract and where he is emancipated.¹⁴

The advancement of technology has made it almost impossible for a minor not to enter into an online contract without the assistance of

⁹ SOGA 1893, Section 2.

¹⁰ (1844) 13 MdW 253.

¹¹ *Labinjo v Abake* 5 NLR 33.

¹² *Merchantile Union Guarantee Corp Ltd. V. Ball* (1937) KB 498.

¹³ *Gillis v. Whitley's Discount Auto Sales, Inc.*, 70 N.C. App. 270 (N.C. App. 1984) (holding that minor's misrepresenting his age does not bar him from disaffirming a contract).

¹⁴ Daniel (n 4).

his parent or guardian.¹⁵ The complex nature of online contracts makes it impossible for the person entering into a contract to know if the other contracting party is competent or not and this has continued to challenge the application of the infancy doctrine to electronic contracts.

This paper examines minors' capacity to enter electronic contract in today's technologically savvy society. The paper concludes by proposing a new approach to infant capacity to contract.

2.0 INFANTS AND ELECTRONIC TRANSACTION

In light of the proliferation of information technology and minors' use thereof, it is time to revisit the outdated notion that minors need to be protected from unscrupulous merchants seeking to take advantage of them at all times. It is suggested that the infant be bound by the online contract where he benefits from the contract and where he misrepresents his age to the online merchant who does not have the means of knowing the capacity of the online consumer.

2.1 BENEFIT PRINCIPLE

According to this principle, a minor would incur liability if he received a benefit from or was enriched by an agreement that he entered into without the assistance of his parent or guardian¹⁶ provided the terms of the contract are not onerous. Williston states the rule thus: 'If an infant enters into any contract subject to

¹⁵ Raghavendra S. Srivatsa and Sukruta R., 'Online Contracts' in S.K. Verma and Raman Mittal (eds), *Legal Dimensional on Cyberspace* (Indian Law Institute, 2004) 67.

¹⁶ *Clements v London and North Western Railway Company* [1894] 2 QB 482; *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71.

conditions or stipulations, the minor cannot take the benefit of the contract without the burden of the conditions or stipulations.’¹⁷ Thus in the case of electronic transactions, a child who entered an online contract and benefited from the contract should not be allowed to refrain from such contract. The court seems to favour this position in the United State case of *A.V. v iParadigms*¹⁸ The plaintiffs in the *AV v iParadigms*¹⁹ were four high school students who sued iParadigm for copyright infringement of their papers, turned in through iParadigm’s anti-plagiarism software, Turnitin. Each of the students belonged to schools that required students to submit their papers through Turnitin, which then produced plagiarism reports for the teachers. In addition, the schools had authorized Turnitin to archive the student submissions to be part of an ever-growing database against which to check future papers for plagiarism. Each of the students “read and clicked ‘I agree’ to the terms of the Clickwrap Agreement,” but did so with a written disclaimer on the copy of their submitted works that indicated they did not consent to the archiving of their works by Turnitin. Turnitin continued to archive the students’ works and the students subsequently sued for copyright infringement, after the students were disciplined by their schools for plagiarism offenses. In addition to claiming that the disclaimer changed the terms of the clickwrap agreement, the students argued that they could void the terms of the agreement under the infancy doctrine, thus they argued

¹⁷ RA. Lord, *Williston on Contracts* (4th ed. West 2007) 9:14.

¹⁸ 544 F. Supp. 2d 473(E.D. Va. 2008).

¹⁹ *Ibid.*

that they were not bound by the terms of the clickwrap agreement even if they had assented to it.

The Court had no trouble rejecting that argument. The court held that the minors cannot accept the benefits of the contract without also bearing its burdens: ‘Plaintiffs cannot use the Infancy defence to void their contractual obligations while retaining the benefits of the contract.’²⁰ Because plaintiffs had benefitted from their use of the defendant’s product. (they had, after all, satisfied their school paper requirements), they must accept any burdens imposed by the clickwrap agreement. The law is to be used ‘as a shield to protect the infant from injustice and wrong,’ and not as ‘a sword to be used to the injury of others.’²¹

It must be noted that a contract that is more onerous than beneficial to the minor will impose no liability.²² The benefit principle does not apply to ordinary trading contracts.²³

2.2 FRAUDULENT MISREPRESENTATION OF AGE

If a minor induces another person to enter into a contract with him, by fraudulently representing himself to have the capacity to contract, such a contract can still be enforced. It is argued that contracts concluded by fraudulent minors will be binding on them because in deliberately misrepresenting themselves to be of full age to contract, they induced the other party to believe this. In other words, neither

²⁰ Ibid at 481

²¹ Ibid.

²² *De Francesco v Barnum* (1890) 45 Ch D 430; Section 127 of the Federal Competition and Consumer Protection Act 2018.

²³ *Labinjo v. Abake* 5 NLR 33; *Anson’s Law of Contract* (29th ed, Oxford University Press Inc. 2010) 236.

party should be allowed to object at a later stage that the contract is unenforceable for want of competence on the part of one of the parties.²⁴ A minor who is old enough to convince another that he is an adult would also be old enough to bear liability arising from his fraud. The South African Consumer Protection Act 2008 in Section 39(2) provides a legislative framework in the case of a fraudulent minor. According to the subsection, the protection accorded infants:

does not apply to an agreement if the consumer or any person acting on behalf of the consumer, directly or indirectly, by act or omission (a) induced the supplier to believe that the consumer had an unfettered legal capacity to contract; or (b) attempted to obscure or suppress the fact that the consumer did not have an unfettered legal capacity to contract.

The doctrine of *uberrimae fidei* will have to be strictly adhered to in the case of an online contract and a party acting to his detriment on the representation of the other that he is competent to enter into a contract should not be put to any prejudice.²⁵ It must be noted that it is not in all cases where an infant misrepresents his age that he will be liable. This is because under the Nigerian criminal law ‘a person under the age of 7 is not criminally responsible for any act or omission’,²⁶ while ‘a person under the age of 12 years is not criminally responsible for an act or omission. Unless it is proved that

²⁴ R. S. Srivatsa and R. Sukruta, “Online Contracts” in S.K. Verma and Raman Mittal (eds), *Legal Dimensional on Cyberspace* (Indian Law Institute, 2004) 67.

²⁵ *Ibid.*

²⁶ Section 30 of the Criminal Code Act, Cap 38 LFN 2004.

at the time of doing the act or making the omission, he could know that he ought not to do the act or make the omission’.

We therefore suggest that the best way to overcome this difficulty is for the online retailer or service provider to require the users to use a valid credit card or any other age verification mechanism to access their content. This mechanism will go a long way in eradicating this menace. Such age verification mechanisms should be prescribed for all types of contracts or the law should raise a presumption as to the competence of both the parties. Alternatively, the parties should be allowed to make a provision in the contract itself that parties shall be estopped from repudiating the contract for want of competence on the part of one of the parties.²⁷ The age verification mechanism is however the best.

3.0 CONCLUSION

The right of a minor to disaffirm a contract no doubt plays an important role in protecting minors participating in commercial transactions, however, the voidability of minors’ contracts creates a risk for adults seeking to contract with minors. We suggest that instead of the sweeping treatment for all minors regardless of maturity level, it is worthwhile to consider adopting laws that reflect the demonstrated legal capacities of adolescents in the digital age. The law and the court should look at the issue of minor contracting online from their ability to navigate the internet in concluding the contract. There should be questions put to the minor to test his competence just as it is done under the law of evidence. Where it

²⁷ Raghavendra and Sukruta (n 25).

appears that the minor understood the consequence of his action, he should be bound by the electronic contract.