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COMMENTS

INFANTS — NEGLIGENCE — IMPUTING PARENT'S CONTRIBUTORY NEGLIGENCE TO A CHILD NON SUI JURIS

The doctrine of imputing the parents¹ contributory negligence to a child non sui juris to bar recovery in an action brought by the child² for injuries sustained, is receding farther back into the dusty pages of time. Notwithstanding its almost total repudiation,³ four states have dogmatically perpetuated its memory: Delaware, Maine, Maryland and Massachusetts.

In a 1951 Maryland decision,^{3a} the plaintiff child was injured in an alley adjoining his home by the defendant's truck, driven by one of its agents. The mother knew that the child was playing in the alley and that trucks were being driven through it. The question of the mother's contributory negligence in allowing her three year old child to play unattended was properly held to be submitted to the jury to deny the child's recovery. "If the child be so young as not to be able to take care of itself, then parental neglect resulting in injury may be imputed to the child."⁴

Thus, the Maryland court remains as the chief proponent of a doctrine that had the "dubious distinction of originating wholly in dictum"⁵ in the case of *Hartfield v. Roper*.⁶ An implied agency was found to exist so that the maxim *qui facit per alium facit per se*, directly applied. However, this fictitious use of the law of agency was just a remnant of the old Roman law doctrine of "identification," introduced in England by the case of *Thorogood v. Bryan*⁷ and brought to bear on children non sui juris through the decision rendered in *Waite v. N. E. Ry. Co.*⁸ The English court there held that the negligence of the grandmother in charge of the plaintiff child at the time of injury would preclude the

¹ The doctrine applies with equal vigor to custodians, but only 'parents' will be referred to in the comment.

² The comment is confined only to actions brought by the child in his own name or on his behalf.

³ Note, 15 A.L.R. 414 (1921); RESTATEMENT, TORTS, § 488; PROSSER ON TORTS, 419, 420 (1941); 65 C.J.S. 801; 38 Am. Jur. 926.

^{3a} *Graham v. Western Maryland Dairy, Inc.*, 81 A. 2d 457 (Md., 1951).

⁴ *York Ice Machinery Corp. v. Sachs*, 167 Md. 123, 124, 173 A. 240, 245 (1934); *Graham v. Western Maryland Dairy Inc., et al.*, *supra*, note 3a, at 459.

⁵ *Imputation of Parents or Custodians Contributory Negligence to an Infant Plaintiff*, STATE OF NEW YORK LAW REVISION COMMISSION (1935).

⁶ *Wend.* (N.Y.) 615, 34 Am. Dec. 273 (1839).

⁷ 8 C.B. 115, 18 L.S.C.P. 336 (1849); overruled in *Mills v. Armstrong* (the *Bernina*), 13 App. Cas. 1, 58 L.S. 423 (House of Lords, 1888).

⁸ *E.B. & E.* 728, 28 L.S.Q.B. 258 (1858); overruled in *Oliver v. Birmingham and Midland Motor Co.*, 48 J.L.R. 540, 1 K.B. 35 (1933). For an able discussion on Imputed Negligence with emphasis on Parent and Child see *Imputed Contributory Negligence*, 13 TEXAS L. REV. 161, 170 (1935).

child from recovering against a third person. The court's theory was founded on the principle that the child was "identified" with his custodian, and the negligence of the latter is then the negligence of the former.⁹

I. ELEMENTS OF THE DOCTRINE

The doctrine itself has two component elements that are necessary before it will be invoked. The one is that the child must be found to be non sui juris and the other, that the parent must be contributorily negligent. The general rule, of universal acceptance, holds a child non sui juris to be one so young as to be incapable of taking care of itself or a child not held to any degree of care.¹⁰ The precise age at which a child is non sui juris is the subject of a great diversity of opinion, both as to whether a court should set an age as a matter of law, and whether that presumption is conclusive or rebuttable.¹¹ A leading Wisconsin case held:

"It is our considerate judgment that the better and more just rule is that which permits a child of the age of about 6 years to be found guilty of contributory negligence if from the facts and circumstances it is apparent from his age, capacity, discretion, knowledge and experience he knows or ought to have known of the dangers involved in a certain act and in the exercise of such ordinary care as he should have exercised he could have avoided the injury."¹²

The question of parental negligence presents another broad field of divergence, because it does not lend itself to the formulation of any substantive rule of law. Each case, of necessity, rests on its own peculiar facts and circumstances¹³ so that in most cases it is a proper jury question. Wisconsin is in accord with the general test or standard of conduct necessary, viz., whether the conduct of the parent measured up to the care that an ordinary careful prudent parent exercises under the same or similar circumstances.¹⁴ The particular negligence of which

⁹ Cf. *Gallagher v. Johnson*, 237 Mass. 455, 130 N.E. 174 (1921). "Being in the actual physical custody of his father, the child was identified with him so far as concerns due care and negligence."

¹⁰ *Jacobs v. H. J. Koehler Sporting Goods Co.*, 208 N.Y. 416, 102 N.E. 519 (1913). "An infant may be of such tender years as to be incapable of personal negligence. At such age the infant is termed non sui juris. . . ."

¹¹ Note, 174 A.L.R. 1080 (1948).

¹² *De Groot v. Van Akkeren*, 225 Wis. 105, 118, 273 N.W. 725 (1937).

¹³ *Schmidt v. The Milwaukee and St. Paul Railway Company*, 23 Wis. 186, 188 (1868). Cf. *De Nardi v. Palanca*, 120 Cal. App. 371, 8 P. 2d 220 (1932). "I instruct you that the amount of care to be exercised by a parent for the safety of a child is dependent upon the age and sex of the child, and upon the question whether dangers exist in the vicinity where the child is accustomed to play, and that such parent should exercise such a degree of care for the safety of his child as may be reasonably necessary to save from such danger. If he fails to exercise such care he is guilty of negligence." Cf. *Monrean v. Eastern Wis. R. & L. Co.*, 152 Wis. 618, 624, 140 N.W. 309 (1913).

¹⁴ Note, 51 A.L.R. 209 (1927).

the parent stands accused lies in his placing the infant in a position of possible danger with which the child will be unable to cope.¹⁵

II. MINORITY RULE

The minority states have perverted the law of agency to substantiate their position. The underlying basis or assumption of the doctrine is, that since the child is incapable of caring for itself and is held to no degree of care, the parent who has the care or custody of the child is deemed the child's keeper or agent. Therefore the act of negligence of the parent is the act of the child and the principle that the acts of an agent are the acts of the principal is applied. The Massachusetts court typified this reasoning when it sanctioned a charge to the jury:

" . . . the boy has no independent standing from his father so far as the matter of liability is concerned. In other words his case must stand or fall with his father's, because the relationship between them is that of father and son. The boy was not old enough nor was he in the condition to exercise any independent due care on his own part, and so he is to have the benefit of the due care of his father in so far as his father exercised due care; and he is also charged with the negligence of the father in case the father is negligent. And so the case stands or falls upon the due care or negligence of the father."¹⁶

The Wisconsin court championed the agency theory in *Prideaux v. City of Mineral Point*,¹⁷ but this fallacious application of the law of agency was laid to rest when a later court decided that a third party could not hold the occupant of a vehicle as principal of the negligent driver.¹⁸ It is interesting to note, however, that Wisconsin had previously held the *Prideaux* case, involving the imputation of a husband driver's negligence to his wife, a passenger, as one of agency, inapplicable in a decision in which it would not impute a mother's contributory negligence to her infant child.¹⁹

III. MAJORITY RULE

Where the Wisconsin decision quietly repudiated the doctrine, it was not so in other jurisdictions where it underwent scathing criticism on

¹⁵ *Supra*, note 5, at p. 69.

¹⁶ *Supra*, note 9, at p. 174.

¹⁷ 43 Wis. 513, 528 (1878); *cf.* *Kuchler v. Milwaukee E. R. & L. Co.*, 157 Wis. 107, 146 N.W. 1133 (1914). *Corrigan, Walter D., Imputed Negligence As Applied Against A Guest In a Private Conveyance (A criticism of the Wisconsin Rule)*, 3 MARQ. L. REV. 169 (1918).

¹⁸ *Reiter v. Grober*, 173 Wis. 493, 181 N.W. 739, 18 A.L.R. 362 (1921). An excellent study treating the *Reiter* case by Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193 (1921).

¹⁹ *Gulessarian v. Madison Railway Company*, 172 Wis. 400, 406, 179 N.W. 573, 15 A.L.R. 406 (1920). "It is considered that the doctrine approved in the foregoing citations and authors holding that the contributory negligence of the parent or custodian of the child will not preclude recovery by the child for negligent injury, is a just rule and should be adopted in the jurisprudence of this state." *Noted, Boardman, Parents' Negligence Not Imputed to Infant*, 1 WIS. L. REV. 191 (1921).

logical, legal and social grounds.²⁰ In a most forceful opinion, the Minnesota court, in a decision cited extensively for its legal import, laid the foundation on which the majority decisions stand.

"The right of an infant to damages for injuries to his person caused by the wrongful act of others is a property right, and entitled to the same protection in the courts as is accorded other property held or owned by him. He is entitled to the protection of the law equally with persons who have attained their majority and to refuse them relief on the ground of his parent's indifference or negligence would be to deny it to him. To impute to him negligence of others is harsh in the extreme, whether the negligence so imputed be that of his parents, their servants, or his guardian. He is a citizen within the meaning of the law of the land, and entitled to such rights and privileges as are appropriate to his class, and to the equal protection of law."²¹

IV. MINORITY RULE CRITICIZED

The author would like to bring attention to several more basic errors and inconsistencies in the doctrine itself. They also form the hard core of legal and social opposition to the minority rule. The first of these concerns the minority position as to the ultimate disposition of the funds recovered by the child.

The minority take the stand that the negligent parent through his control over the child in effect would profit by his own wrong if his negligence were not imputable. This is the underlying policy in denying a negligent parent relief under the survival and death statutes. It can be stated in rebuttal that to deny relief on the ground that the money in reality goes to the negligent parents is to overlook the fact that such disposition of funds as recovered by the child can be governed by the court and expended for the child's benefit.²²

A further basic inconsistency in the minority doctrine, lies in its apparent conflict with the general rules governing imputed negligence on the whole. As a rule the negligence of another will not be imputed to one without personal fault, ". . . if he neither authorized such conduct nor participated therein nor had control of the conduct of such other."²³ That a child of tender years is incapable of controlling the conduct of his custodian who is alleged to be contributorily negligent, is of such common understanding that it need not be labored upon. Nor are parent

²⁰ *Zarzana v. Neve Drug Co. et al.*, 180 Cal. 32, 171 P. 2d 203, 204, 15 A.L.R. 401 (1919); cf. *Atchison, T. & S. F. Ry. Co. v. Calhoun*, 18 Okla. 75, 89 P. 207, 209, 11 Ann. Cas. 681 (1907). Overruled on appeal, but not affecting Oklahoma's majority stand. 213 U.S. 1, 29 S.Ct. 321, 53 L.Ed. 671 (1909).

²¹ *Mattson v. Minn. & N.W.R. Co.*, 95 Minn. 477, 107 N.W. 443, 70 L.R.A. 503 (1905).

²² *Negligence of Custodian as Imputed to a Child*, 47 HARV. L. REV. 874 (1934). For a more thorough treatment of death and survival statutes, Gilmore, *Imputed Negligence (Concluded)*, 1 Wis. L. REV. 257 (1921).

²³ 65 C.J.S. 797; 38 Am. Jur. 445.

and child in such privity as to be engaged in a joint enterprise merely because they bear to each other that relationship.²⁴

Furthermore, the doctrine as propounded by the minority courts presents the anomolous situation of imputing negligence to a child of tender years who is incapable by common definition, of personal negligence in the first instance.²⁵

V. MINORITY RULE MODIFIED

Some courts following the minority view have attempted to modify it. The courts of Delaware set forth two situations where negligence of the parent may or may not be imputed to the child. Where the parent is merely negligent in leaving a child of tender years unattended, and the child is confronted by a dangerous situation, the court will not invoke the rule. However, in a case where the parent is actively negligent, as in driving an automobile with the child as the only passenger, because the parent's actual conduct produced the dangerous situation, the court will then impute the negligence of the parent to the child.²⁶

The New York courts have also secured changes in the rule and though the State has repudiated the doctrine,²⁷ their modifications²⁸ are of historical interest. They held the negligence of a parent or guardian when acting in a custodial capacity distinguishable from active creation by that parent of a situation whereby the child might be exposed to an injury from a third party. Negligence was imputed in the first instance, but not in the latter situation.²⁹

The most pronounced and significant modification took place in the states of Massachusetts and New York where the courts would not apply the doctrine if the child's conduct at the time of the accident measured up to that of an adult. By way of further clarification the New York court stated the rule in this manner:

"If a child, though non sui juris, has not committed or omitted an act which would constitute contributory negligence in a person of years of discretion, an injury by the negligence of another

²⁴ *Louisville & N.R. Co. v. Calvert*, 170 Ala. 565, 54 So. 184 (1910); *cf. Klas v. Fenske*, 248 Wis. 534, 22 N.W. 2d 596 (1945); *Reiter v. Grober*, *supra*, note 18.

²⁵ *Supra*, note 10.

²⁶ *Messick v. Delaware Electric Power Co.*, 36 Del. (6 N.W. Harr.) 354, 175 A. 772 (1934); noted Loeb, Edna, *Imputaion of Parent's Contributory Negligence to Child*, 4 DUKE B.A.J. 95 (1935).

²⁷ N.Y. Dom. Rel. Law § 73. Negligence of Parent or other Custodian not imputed to infant. In an action brought by an infant to recover damages for personal injury the contributory negligence of the infant's parent or other custodian shall not be imputed to the infant.

²⁸ *Hennessey v. Brooklyn City R. Co.*, 6 App. Div. 206, 39 N.Y.S. 805 (1896); *Spaulding v. Mineah*, 239 App. Div. 460, 268 N.Y.S. 772 (1933). *Contra: Caroline County Com'rs. v. Beulah*, 153 Md. 221, 183 A. 25 (1927).

²⁹ "Under the logic of these authorities Mrs. Spaulding's negligence in her connection with the operation of the car would not be imputable to the infant while the improper exposure of the child to danger would amount to negligence in custodianship and would be imputable." *Spaulding v. Mineah*, *supra*, note 28.

cannot be defended upon the alleged negligence of the parent."³⁰ The modification certainly brought sorely needed relief, but to a rule already fraught with legal confusion, it also imposed a standard of care on children of tender years that the courts required of adults. May it be noted in mitigation of this position, however, despite the fact that the courts had further clouded the doctrine with uncertainty, it was the only standard of care capable of application in view of the principle that a child non sui juris is not held to any standard of care. The child being deemed incapable of caring for itself, the court was faced with the dilemma of applying the rules setting forth the standard of conduct required of children sui juris or the standard of care required of adults. It can readily be perceived that application of the first standard to infants non sui juris would be difficult and illogical. However, in view of the fact that an infant's conduct is usually negative in these cases, inaction, rather than any affirmative cause on his part, being the prime factor producing the dangerous situation, application of the adult standard is more just and equitable.

VI. NEW YORK STATUTE

Though the doctrine was discredited by the overwhelming majority of the courts, both in this country and in England, the New York courts would not rise up to the occasion and abrogate the rule.³¹ The problem was brought to the forefront by the *New York Revision Commission*,³² and by legislative fiat³³ its courts were unshackled from the doctrine they lethargically promulgated for a span of 96 years. It is interesting to note that once again on firm legal footing, New York in an early case refused to permit an inquiry into the infant's standard of conduct and maintained the principle that a child non sui juris is not held to any standard of care.³⁴

VII. CONCLUSION

The minority states should follow the example set by the New York legislature and repudiate the doctrine by statute. The rule denies infant children a cause of action, a valuable property right, and its continuation works a hardship that finds no sanction on legal or moral grounds in the annals of American jurisprudence.

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³⁰ *McGarry v. Loomis*, 63 N.Y. 104, 107, 20 Am. Rep. 510 (1875); *accord*: *Kupchinsky v. Vacuum Oil Co. et al.*, 263 N.Y. 128, 188 N.E. 278 (1933); *Ihl v. Forty-Second Street R.R. Co.*, 47 N.Y. 317 (1872); *Friedman v. Berthiaume*, 303 Mass. 159, 21 N.E. 2d 261, 264 (1939); *Cadmon v. White*, 296 Mass. 117, 5 N.E. 2d 19, 20 (1936).

³¹ The Minnesota court did not wait for legislative action, *supra*, note 21, at 448. "Though the Fitzgerald case has remained undisturbed many years as the law of the state, the rule there laid down is not a rule of property, no rights will be affected by a departure from it, for no one has a vested right to negligently cause injury to another. . . ." But Wisconsin held: "were it a rule of property we should certainly apply to it the rule of stare decisis. But it is not a rule of property." *Supra*, note 18, at 496.

³² *Supra*, note 5.

³³ *Supra*, note 27.

³⁴ *Meyer v. Inguaggiato et al.*, 258 App. Div. 331, 16 N.Y.S. 2d 672 (1940).