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If there were ever valid reasons to justify the immunity rule, they no longer exist. A charity should be required to be just before being generous. It should redress the injuries it inflicts before redressing injuries inflicted by others. A quick survey of the confusing results of the immunity cases based on the various theories, riddled with exceptions and distinctions, will but point up the validity of Pascal's statement, "How ludicrous is reason, blown with a breath in every direction."

PETER P. GRIFFIN

IMPUTED NEGLIGENCE AND JOINT GUARDIAN STATUTES

Some courts have barred the recovery of one parent from a defendant who has negligently harmed his child because of the contributory negligence of the other parent.¹ Due to the relationship between the spouses it was thought that the recovery in such cases would inevitably redound to the benefit of the contributorily negligent spouse and that it would, therefore, be inequitable to allow either spouse to recover.² This concept of imputing negligence³ from one parent to the other has, however, generally been abandoned as the legal obligations between the present day plaintiff-parent and his contributorily negligent spouse have been relaxed, so that they are no longer sufficient to sustain the burden of imputation.⁴

The bare marital relationship has been rejected as an adequate

¹*Darbrinsky v. Pennsylvania Co.*, 248 Pa. 503, 94 Atl. 269 (1915); *Nichols v. Nashville Housing Authority*, 187 Tenn. 683, 216 S.W.2d 694 (1949).

²*Keeton, Imputed Contributory Negligence*, 13 Texas L. Rev. 161 (1935).

³Since the earliest years of the law, the negligence of some persons has been held to be chargeable to others who stood in certain relationships to the negligent parties—e.g., a man and his wife, a master and his servant. In *Thorogood v. Bryan*, 8 C.B. 115, 137 Eng. Rep. 452 (1849), imputed negligence emerged as a distinct tort doctrine. In this case a passenger was charged with the negligence of a driver on the ground that the driver was under the passenger's control. In *Waite v. North Eastern Ry.*, 1 El. Bl. & El. 719, 120 Eng. Rep. 679 (1858), the suit of the injured child was barred on the basis of his grandfather's contributory negligence in caring for him.

The concept was short lived, however, in its native England. The doctrine is generally held to have been overruled by *The Bernina*, 13 App. Cas. 1 (1888). *Oliver v. Birmingham and Midland Motor Omnibus Co.*, [1933] 1 K.B. 35, specifically overruled *Waite v. North Eastern Ry.*, supra, and further declared that the doctrine no longer existed in England.

⁴*Prosser, Torts* § 54 (2d ed. 1955).

basis for the imputation of negligence from one spouse to the other.⁵ The courts have likewise disapproved of the so-called agency theory, under which one spouse is said to be the agent of the other for the purpose of protecting their child.⁶ The theory that the husband and wife are engaged in the joint venture of successfully rearing the child has also been found to be an inadequate legal basis for carrying negligence from one parent to the other.⁷

The rejection of these relationships as a sufficient basis for the imputation of negligence has recently produced a novel argument based upon an unusual application of a reasonably common statute. This type of statute, referred to as a "joint natural guardian" statute, changes the exclusive guardianship of the father, as it existed at common law, into a joint guardianship of both father and mother.⁸ It is not surprising to find that most of the litigation involving these statutes has been concerned with rights pertaining to the custody of the ward and with matters relating to his property;⁹ consequently, it is somewhat startling to note the unusual application of the Florida joint natural guardian statute in the dissent in *Ward v. Baskin*.¹⁰ This case deals with an appeal by a plaintiff-father from a lower court decision which, because of the contributory negligence of his wife, had denied him a recovery from a defendant who had negligently injured his minor child. In reversing the lower court's decision, so as to allow a recovery by the plaintiff, the Florida Supreme Court stated that in Florida there is a "long established rule against the imputation of negligence."¹¹ The dissenting opinion by Justice Parks,¹² who would deny recovery in this case, points out that in Florida the father's common law guardianship has been changed by virtue of the joint natural guardian statute which vests in both parents concurrently

⁵*Illingworth v. Madden*, 135 Me. 159, 192 Atl. 273 (1937); *Herrell v. St. Louis-San Francisco Ry.*, 324 Mo. 38, 23 S.W.2d 102 (1929); 65 C.J.S., Negligence § 159 (1950).

⁶*Darian v. McGrath*, 215 Minn. 389, 10 N.W.2d 403 (1943); *Hessler v. Nelipowitz*, 55 N.Y.2d 692 (Syracuse Munic. Ct. 1945). "The 'agency' of the parent to look after the child is of course the barest fiction. . . ." Prosser, Torts § 54 at 301 (2d ed. 1955).

⁷*Kesler v. Pabst*, 43 Cal. 2d 254, 273 P.2d 257 (1954); *Bailey v. Centerville*, 115 Iowa 271, 88 N.W. 379 (1901); *Danner v. Chandler*, 204 Okla. 693, 233 P.2d 953 (1951).

⁸For example see Ark. Stat. Ann. § 57-646 (1957); Fla. Stat. Ann. § 744.13 (1955); Ind. Stat. Ann. § 8-105 (1953); Tenn. Code Ann. § 34-101 (1956).

⁹*Id.*, see annotations.

¹⁰94 So. 2d 859 (Fla. 1957).

¹¹*Id.* at 860.

¹²*Id.* at 862.

the rights, duties, and responsibilities that had formerly been those of the father alone.¹³ Justice Parks reasons, therefore, that "the custody of the children by either of the natural guardians is also the custody of the other and therefore the negligence of either in the execution of the duties and responsibilities toward the children is the negligence of the other."¹⁴

Although Justice Parks speaks in terms of imputing contributory negligence, his rationale appears to differ from the theory generally used to support imputed negligence in common law jurisdictions. His interpretation of the statute unites the two guardians into a single entity, whose right hand is responsible for the negligent acts of the left. If this view were to be generally accepted, the states having joint natural guardian statutes might find themselves drawn to the same conclusions that are reached under a strict application of the doctrine of imputed negligence; that is, barring the non-negligent spouse's cause of action.¹⁵ It is very doubtful that the legislatures intended by the enactment of joint guardian statutes to accomplish such a result.

The theory propounded by Justice Parks appears to be closely akin to that taken by the courts within the majority of our community property jurisdictions which bar recovery by the non-negligent spouse.¹⁶ These holdings result from the general determination that

¹³Fla. Stat. Ann. § 744.13 (1955).

¹⁴94 So. 2d at 862.

¹⁵Under the rule of *Waite v. North Eastern Ry.* (see note 3 supra) the injured child has been denied recovery because of the contributory negligence of his custodian. Fortunately, this would never occur under the view of the dissent to *Ward v. Baskin*. Justice Parks himself states, "It is hardly necessary to add that the child's right of recovery against such wrongdoer would not be prejudiced." 94 So. 2d at 862. The significance of this point lies in the fact that the right of the child himself to sue for his injuries is not yet certain in all American common law jurisdictions. If the negligence of the parent is imputed to the child, his suit will be barred. "The barbarous rule, which denies to the innocent victim of the negligence of two parties recovery against either, and visits the sins of the father upon the children, was accepted in several American states, but is now overruled everywhere except in Maryland, Maine, and perhaps Delaware." Prosser, *Torts* § 54 at 301 (2d ed. 1955).

¹⁶"At the outset we may state that appellants present the affirmative of this question [that the negligence of one spouse should be charged to the other], fortified by an unanimity of authority in their favor from each of the community property states which have passed upon it, namely: Texas, Louisiana, Washington, California, Idaho and Arizona." *Frederickson & Watson Const. Co. v. Boyd*, 60 Nev. 117, 102 P.2d 627, 628 (1940).

Nevada has held that the cause of action in this type of case is separate property on the theory that it does not fall within the scope of property acquired after marriage and consequently refused to charge one spouse with the negligence of the other. Section 3355 N.C.L., as quoted in *Frederickson & Watson Const. Co. v. Boyd*, supra, provides in part as follows: "All property of the wife owned by her

"the right to recover damages for personal injuries is a chose in action and property; and this right of action having been acquired during the marriage is community property, as is consequently, the damages or compensation recovered for such personal injuries."¹⁷ As a result, the doctrine of contributory negligence will bar the action in behalf of the community, a part of which contributed to the mishap; but even though the negligence of one spouse is said to be "imputed" to the other,¹⁸ the theory would appear to differ from the common law doctrine of imputed negligence. Under the common law viewpoint a non-negligent plaintiff will be barred from recovery by the negligence of another only if the relation between the two is such that the plaintiff would be liable for such negligence if he were a defendant.¹⁹

In the California case of *Dull v. Atchison, Topeka & S.F. Ry.*,²⁰ the non-negligent father was denied a recovery for the death of his wife and children in a grade crossing accident caused primarily by defendant's negligence, because the wife was found to be contributorily negligent in her operation of the vehicle.²¹ In so holding, the court stated, "It is the law that the contributory negligence of the mother is a defence to an action on behalf of the community to recover for death of the children, because in caring for the children she represents and acts for the community . . ."²² This rationale is similar to

before marriage, and that acquired by her afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof, is her separate property." Section 3356 provides: "All other property acquired, after marriage, by either husband or wife, or both, . . . is community property." These Nevada statutes are similar in language to §§ 162 and 164 of the Civil Code of California, which consider a cause of action that arises after marriage to be community property and, therefore, charges the negligence of one spouse to the other.

¹⁷ de Funiak, *Principles of Community Property* § 82 at 223 (1943).

¹⁸ *Takashi Kataoka v. May Department Stores Co.*, 60 Cal. App. 2d 177, 140 P.2d 467 (1943); *Crane v. Smith*, 23 Cal. 2d 288, 144 P.2d 356 (1943).

¹⁹ Prosser, *Torts* § 54 (2d ed. 1955). It is interesting to note the interplay between two different concepts of imputed negligence. The English labeled this practice of charging one individual with the negligence of another, "identification." See note 3 supra. The concept has come into our law as the doctrine of "imputed" negligence, connoting the transfer of the negligence from one party to another, thus the problem at common law of the eventual failure of the various relationships existing between the parties, to sustain the burden of this transfer. The concept of imputation in the view of Judge Parks and of the majority of the community property states would differ in that it is not based on a transfer of the negligence of one party to another, but upon a device by which the negligence of one party actually becomes the negligence of the other.

²⁰ 27 Cal. App. 2d 473, 81 P.2d 158 (1938).

²¹ The contributory negligence of the mother barred the action by the father in spite of the fact that she died in the mishap and could not possibly have enjoyed any damages recovered.

²² 81 P.2d at 162.

the reasoning used by Justice Parks in his novel application of the Florida joint natural guardian statute.²³ The language of the California court—"her negligence, if any, in caring for the children is the negligence of the husband"²⁴—is identical in content with that used by Justice Parks—"the negligence of either in the execution of the duties and responsibilities toward the children is the negligence of the other."²⁵ Thus, in the community property states, as in the view of Justice Parks, the negligence of one parent literally becomes the negligence of the other.

Under the early common law, when the husband controlled his wife and her property, there was a good reason for imputing the negligence of one spouse to the other. The close identity of the spouses provided an adequate theoretical basis for the imputation.²⁶ Since the emancipation of the married woman and the enactment of the Married Women's Acts, however, the ancient concept of the identity of the spouses has been rejected, and, there being no remaining concept sufficient to bind a man and his wife together as a legal entity, as there is in the community property states, the imputation of negligence between spouses has declined.²⁷ To revive the doctrine of imputed negligence in a common law jurisdiction upon the basis of a statute which makes the parents joint natural guardians of their minor children would reverse the modern trend.²⁸ An absence of authority is not alone sufficient to discredit the novel theory propounded by the dissenting opinion in *Ward v. Baskin*, but a careful evaluation of its statutory basis and the overall policy considerations that affect tort litigation raise doubt as to its ultimate value.

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²³94 So. 2d 859 (Fla. 1957).

²⁴81 P.2d at 162.

²⁵94 So. 2d at 862.

²⁶38 Am. Jur., Negligence § 234 (1941).

²⁷*Ibid.*

²⁸Restatement, Torts § 487 (1934).