Maryland Law Review

Volume 15 | Issue 3 Article 5

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Recommended Citation

S. D. Hill, *Imputing Parental Negligence to Bar Recovery by an Infant*, 15 Md. L. Rev. 248 (1955)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol15/iss3/5

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Comment and Casenotes

IMPUTING PARENTAL NEGLIGENCE TO BAR RECOVERY BY AN INFANT

By SAMUEL D. HILL*

Before the courts today are numerous cases involving injury to infants of tender years alleged to have been caused by the negligence of another in the maintenance of his property or the operation of his vehicle. In each case of this nature before courts in Maryland a doctrine of law, which has been called "barbaric",[1] stands menacing the right of the infant to recover. It has been approved as late as 1951 by the Court of Appeals of Maryland.[2] The doctrine involves the imputing of negligence of the parent or custodian to one who is too young to be guilty of negligence himself and thus barring recovery by the infant for his injuries.

In 1839 the Court of Appeals of New York first rationalized this theory.[3] However, the doctrine had hardly been initiated before most courts found it undesirable and refused to apply it. In other courts its popularity was short lived and its applicability was soon overruled.[4] Two states, including New York, where it got its start, have precluded the applicability of the doctrine by statute.[5] An investigation of authorities, both decisions and text, reveals that thirty-nine states have now rejected or overruled the doctrine of imputing parental negligence to a child of tender years.[6] The Restatement of Torts expressly rejects the

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[1] Caraveo v. Pickwick Stages System, 113 Cal. App. 443, 298 P. 516, 517 (1931). See also quote from PROSSER ON TORTS (1941), 420, *infra*, n. 10, characterizing the doctrine as "barbarous".

[2] Graham v. Western Md. Dairy, 198 Md. 210, 214, 81 A. 2d 457 (1951).

[3] Hartfield v. Roper, 21 Wend. (N. Y.) 615 (1839).

[4] PROSSER, *op. cit.*, *supra*, n. 1, 419-420.

[5] Ann. Laws Mass. C. 231, Sec. 85D (1954 Cum. Supp.); New York Cons. Laws Service, Domestic Relations Law, Sec. 73.

[6] 15 A. L. R. 414 lists 34 jurisdictions where the doctrine is inapplicable. In addition to those states cases were found in Oregon, Arizona and New Mexico rejecting the doctrine and the statutes mentioned, *supra*, n. 5, preclude its application in New York and Massachusetts.

doctrine.[7] Three states have recently upheld its validity,[8] and one state has hinted that it might apply.[9]

Prosser says of the doctrine that:

> "It is a barbarous rule which denies the innocent victim of the negligence of two persons redress against either, and visits the sins of the fathers upon their children, and the overruling weight of authority now rejects it."[10]

American Jurisprudence clearly states the reasoning of those states which now refuse to apply the doctrine to be:

> ". . .; that he (the infant) is entitled to the protection of the law equally with persons who have attained their majority, and to refuse him relief on the ground of his parents' indifference or negligence would be to deny it to him; and that to impute to him negligence of others is harsh in the extreme, whether the negligence so imputed is that of his parents, their servants, or his guardian."[11]

Yet among those three states which still recognize the imputation of the custodian's negligence to bar recovery by an infant of tender years is Maryland. The doctrine was first recognized by the Maryland Court of Appeals in 1866 in the case of *Bannon v. B. & O. R.R. Co.*[12] Since that time a number of decisions of the Maryland Court of Appeals have reiterated the applicability of the doctrine under the proper factual circumstances,[13] the most recent being *Graham v. Western Maryland Dairy.*[14]

The doctrine arises out of an attempt to balance the rights and duties of the infant and the person with whose property he comes into contact. The concept of negligence cases embraces reciprocal rights and duties of the persons involved. The courts recognized, however, that an infant

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[7] Sec. 488.

[8] Maryland: Graham v. Western Md. Dairy, *supra*, n. 2; Maine: Wood v. Balzano, 137 Me. 87, 15 A. 2d 188 (1948); Delaware: Messick v. Delaware Electric Power Co., 175 A. 772 (Del. 1934).

[9] Milliken v. Weybosset Pure Food Market, 71 R. I. 312, 44 A. 2d 723 (1945).

[10] PROSSER, *loc. cit.*, *supra*, n. 1.

[11] 38 Am. Jur. 928, Negligence, Sec. 240. Parenthetical material added.

[12] 24 Md. 108, 125 (1866), by a reference to Hartfield v. Roper, *supra*, n. 3.

[13] McMahon v. N. C. R.R. Co., 39 Md. 438 (1874); Balt. City Pass. Co. v. McDonnell, 43 Md. 534 (1876); Cumberland v. Lottig, 95 Md. 42, 51 A. 841 (1902); United Rys. Co. v. Carneal, 110 Md. 211, 72 A. 771 (1909); Caroline County v. Beulah, 153 Md. 221, 138 A. 25 (1927); York Ice Machinery Co. v. Sachs, 167 Md. 113, 173 A. 240 (1934).

[14] 198 Md. 210, 81 A. 457 (1951).

of tender years could not be expected to exercise such, if any, care for his own safety as was required to keep the rights and duties in balance. Therefore, the courts attempted to cast the negligence aspect, where a young infant was injured, in proper balance by imputing to the infant the duty of the parent or custodian to use reasonable care in his custodial undertaking.[15]

This attempt to analyze the reasoning behind the application of this doctrine brings into focus the factual requirements which must be presented by the evidence and found by the trier of fact before the theory can apply to preclude recovery. Because of the numerous personal injury cases on our dockets involving infants of tender years and also because of the possible misuse of this doctrine, it seems appropriate to consider in more detail these factual requirements.

As a matter of caution it should be noted that the doctrine applies only to cases where an infant through his next friend is seeking to recover for personal injuries suffered by the infant as distinguished from cases where a parent or guardian is seeking recovery for injuries to the infant. In the latter case any custodial negligence contributing to the infant's injuries would directly bar recovery by the parent or guardian.[16]

Perhaps an examination of the rule as restated by a later New York case,[17] will serve to best expose the elements of proof necessary to the use of the doctrine under consideration:

> "We understand the rule to be that, in an action for an injury founded on negligence, contributory personal negligence cannot be attributed to a child of very tender years, who from his age cannot be supposed capable of exercising judgment or discretion, although the injury would not have happened without his concurring act, and although that act, if committed by an adult would be a negligent one. In such a case, a defendant whose negligence was a constitutent element of the transaction, and without which the injury

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[15] I SHEARMAN AND REDFIELD, NEGLIGENCE (1914), Sec. 89; Bannon v. B. & O. R.R. Co., *supra*, n. 12, 125.

[16] For cases where the action was brought by the parent and his custodial negligence was considered as a bar to recovery see: B. & O. R.R. Co. v. State, use of Fryer, 30 Md. 47 (1869); Coughlan v. B. & O. R.R. Co., 24 Md. 84 (1866); Zipus v. United Rys. & El. Co., 135 Md. 297, 108 A. 884 (1919); Wash. B. & A. Elec. R. Co. v. State, use of Kolish, 153 Md. 119, 137 A. 484 (1927).

[17] Kunz v. City of Troy, 104 N. Y. 344, 10 N. E. 442, 444 (1887).

> would not have happened, is legally responsible, notwithstanding the negligence of the infant, unless it appears that the parents or guardians were negligent in permitting the child to be brought into the situation which subjected it to the hazard and resulting injury."

This theory is more succinctly presented in the statement of the minority view in the annotation in A. L. R. concerning the doctrine:

> "In several jurisdictions the view is taken that the negligence of the parent or custodian contributing to the injury of a child should be imputed to it as to bar a recovery by or in behalf of the child, if the child itself is not capable of exercising the ordinary care of an adult and its conduct does not conform to the standard of care which an adult would be bound to exercise."[18]

In these statements of the doctrine the factual requirements for its application clearly appear. The infant must be of such tender years as not to be able to exercise ordinary care for his own safety. His action which placed him in the place of danger must have contributed to his injury and must have been an act which would have been negligent if performed by an adult. And there must have been negligence on the part of the parent or custodian in performing the custodial duty which contributed to the happening of the contact causing injury to the infant. These factual requirements are interrelated and must all appear before this doctrine can be applied.

It is axiomatic that a young child cannot be held to the same degree of care as should be exercised by an adult but only to that degree of care that an infant of like age and intelligence would use under similar circumstances.[19] Imputed parental negligence can apply only when the child is of such tender years as to be unable to exercise care or discretion to avoid injury. Whether a child is of such a tender age is generally a question for the jury.[20] However, the Court of Appeals of Maryland has recently reiterated that a child of four or less cannot be guilty of contributory negligence under any circumstances.[21] If the trier of fact finds the child of such a young age as to be incapable of

[18] 15 A. L. R. 414, 423.

[19] Zulver v. Roberts, 162 Md. 636, 641, 161 A. 9 (1932); Miller v. Graff, 196 Md. 609, 619-20, 78 A. 2d 220 (1951).

[20] Zulver v. Roberts, *ibid.*

[21] Miller v. Graff, *supra*, n. 19, 620.

contributory negligence or the child is four years old or younger, the first requirement in applying the doctrine has been met.

Even though the infant be found too young to exercise discretion for his safety, his action in getting himself into a dangerous situation resulting in his injury must have contributed to the happening of the injury and must have been such an act as would constitute negligence on the part of an adult.[22] This is so regardless of the custodial negligence of the parent. For example; the doctrine could not apply though a parent be found negligent in allowing a very young child to cross a main thoroughfare alone, if the child crossed at a pedestrian's crosswalk with a green light in a manner which would not be negligent for an adult and the child was struck by a vehicle unlawfully crossing the intersection on a red light.

In one case the Maryland Court of Appeals has ignored this requirement and perhaps made bad law.[23] There the infant was a six month old baby lying on its mother's lap in an automobile driven by the father which struck a tree which had fallen across the road. The Court found error in the trial court's refusal to grant an instruction that the negligence of the father could be imputed to the child.[24] The child was too young to act in any way, and especially in a way which would be negligent for an adult. Her father's negligence, however, was held to bar her recovery. And yet the negligence of a driver ordinarily cannot be imputed to another riding in his car, even if that other be the driver's wife.[25]

By the decision in the *Beulah* case the rationale of the doctrine is subverted in cases where the infant is riding in a car with its parent. The doctrine in such a case does not balance the duties of the defendant and the plaintiff. Even though an adult guest in an automobile can recover, regardless of the negligence of the driver, where another's negligence is found to have contributed to the injury, a child too young to care for itself cannot recover, if the parent driving the automobile is found negligent. The Massachusetts Court, before the doctrine was overruled in that state by statute, made a rather inept observation in a decision similar to the *Beulah* decision that the child, since in actual

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[22] See the statement of the doctrine in the quote from Kunz v. City of Troy, *supra*, n. 17, and from 15 A. L. R. 414, *supra*, n. 18.

[23] Caroline County v. Beulah, 153 Md. 221, 138 A. 25 (1927).

[24] *Ibid*, 227.

[25] Sklar v. Southcomb, 194 Md. 626, 630, 72 A. 2d 11 (1950); Pennsylvania R.R. Co. v. State, 188 Md. 646, 655, 53 A. 2d 526 (1947).

physical custody of the father, was identified with him as far as negligence was concerned.[26]

The final interrelated requirement necessary for the application of imputed parental negligence is the negligence of the parent or guardian which contributed to the happening of the injury to the child. It is this custodial negligence which is imputed to the child to bar recovery. It takes the place of the contributory negligence of the child, which cannot be found because of the child's age. Since this negligence becomes by the doctrine the contributory negligence of the infant, it must have contributed causally to the injury. Also the doctrine can apply only when the person in actual custody of the child at the time was negligent.[27]

The custodial negligence of the parent is generally a question for the jury.[28] In determining whether there was any custodial negligence contributing to the child's injury, the trier of fact should consider all the circumstances.[29] Certain parents have far greater means of protecting their young children from danger than do others. The financial means, the available play areas, the proximity to places of danger, and many other factors should be considered.

The classic example is in the *Kolish* case,[30] where the family lived in a crowded in-town block fronting on a street along which ran the defendant's trolley. The street was the playground. The mother was sitting on the front steps with the little boy when her baby cried in the house. She went to check on the baby and, upon returning to the steps within a very short time, found that her little boy had gotten into the street and had been killed by one of the defendant's trolleys. Judge Sloan for the Court of Appeals found proper the refusal to grant a directed verdict on the negligence of the mother and also the refusal to grant a prayer which in effect directed the jury to find a verdict for the Defendant, if they found the mother negligent in allowing the child to go into the roadway.[31] This prayer according to the Court "is faulty in that it assumes failure on the part of the mother to protect her child without taking into account all the circumstances shown by the

[26] Gallagher v. Johnson, 237 Mass. 455, 130 N. E. 174 (1921).

[27] This does not mean in physical control but merely having the actual custodial responsibility at the time. The person in such custody might be the parent, an older sister or brother or, perhaps, a maid.

[28] Wash. B. & A. R. Co. v. State, use of Kolish, 153 Md. 119, 125, 137 A. 484 (1927).

[29] *Ibid*, 127.

[30] *Ibid*.

[31] *Ibid*, 123-127.

evidence".[32] The *Kolish* case actually was brought by the parents to recover for the child's death but the same considerations for determining the parent's negligence would apply in a case brought by the infant to recover for his injuries.

Upon findings of these interrelated requirements the doctrine of imputed parental negligence can be applied to bar recovery by the injured infant. It should be remembered that even though these factual requirements are found, recovery by the infant cannot be barred if the defendant could have avoided the consequences of the imputable parental negligence by the exercise of reasonable care.[33] "Last clear chance" if found will remove the bar of the parent's imputed contributory negligence just as it will where contributory negligence of the plaintiff is found.

The determination of whether these requirements have been met is generally for the trier of fact.[34] In only one case has the Court of Appeals of Maryland declared the doctrine applicable as a matter of law.[35] In that case the mother took her child of six onto a roof near wires which she knew were dangerous and he was injured in touching one of those wires. The Court found as a matter of law that, if the son was old enough to know better, he was contributorily negligent in touching the wires and, if he was too young to exercise discretion, his mother's negligence in taking him into such a dangerous place would be imputed to him.[36]

This decision later was distinguished by the Court of Appeals from those cases where the injury occurred at a place where the injured person had a right to be.[37] By this distinction it would appear that the doctrine can be applicable as a matter of law only when the injury occurred in a place where the injured child was taken by the custodian when they had no right to go or be there. In all other cases the Court hints that the application of the doctrine under proper instructions is one for the trier of fact. And the burden of proof of these factual requirements is on the defendant.

Even so imputed parental negligence is a doctrine which is regarded by the great weight of authority as being unfair

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[32] *Ibid*, 127.
[33] Balto. City Pass. Co. v. McDonnell, 43 Md. 534, 551 (1876); United Rys. Co. v. Carneal, 110 Md. 211, 230, 72 A. 771 (1909).
[34] Wash. B. & A. Elec. R. Co. v. State, use of Kolish, *supra*, n. 28, 125.
[35] Cumberland v. Lottig, 95 Md. 42, 51 A. 841 (1902).
[36] *Ibid*, 48.
[37] Wash. B. & A. Elec. R. Co. v. State, use of Kolish, *supra*, n. 28, 123.

to an injured child and one which can easily be misapplied, unless it is fully understood. If our Court will not overrule its applicability, it might be well for the Legislature to consider a bar to its use, as has been done in two states which are among those recognized as foremost in legal authority.[38]

[38] See *supra*, n. 5.