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PARENT AND CHILD-ACTION BY PARENT FOR LOSS OF SERVICES OF CHILD-CONTRIBUTORY NEGLIGENCE OF CHILD AS A DEFENSE

PARENT AND CHILD—ACTION BY PARENT FOR LOSS OF SERVICES OF CHILD—CONTRIBUTORY NEGLIGENCE OF CHILD AS A DEFENSE.—It appears to be axiomatic with the courts that a parent cannot recover damages for the loss of services of a child, because of an injury negligently inflicted by a third person, if the child was guilty of contributory negligence. Nearly all of the decisions on this point have been reached without any reason being given for the result. Typical opinions, in which any explanation of the rule is conspicuously avoided, may be found in *Chicago & G. E. Ry. Co. v. Harney,* 28 Ind. 28; *Dietrich v. Baltimore, etc. Ry. Co.* 58 Md. 347; *Cleveland C. & C. R. Co. v. Terry,* 8 Ohio St. 570.

Upon considering the consistent silence in the great majority of cases on this point, one might be led to believe that there is no debatable question involved; that the courts have not spoken because the reason has been self evident. But when an attempt is made to find the reason, one may well ask if the silence of the courts has not been due either to a blind adherence to old theories, now obsolete, or to a refusal to discuss a difficult problem. What are the possible reasons for barring a parent's recovery on the ground of the child's contributory negligence?

The plaintiff, in an action for damages, should be charged with the negligence of some third person only in case such negligence is imputed to him, or where his cause of action is derived from the third person. BEACH ON CONTRIBUTORY NEGLIGENCE, p. 132. Following this generalization a parent is to be charged with the child's negligence only when negligence is to be imputed to him, or where he has derived his cause of action from the child.

Under modern statutes which change the common law relationship of husband and wife, and parent and child, the doctrine of imputed negligence has been narrowed. SHEARMAN & REDFIELD ON NEGLIGENCE, 6th ed. pp. 170-205. In many states the negligence of a husband driving a vehicle, in which the wife is riding, is not imputable to the wife. *Southern Ry. Co. v. King,* 128 Ga. 383, 57 S. E. 687. Although many states have been slow to break away from the doctrine of imputed negligence in the husband and wife relation, there is no excuse for any hesitation in the case of parent and child. There was no common law conception of unity in the relation of parent and child, or of responsibility of the parent for the torts of the child. *Hagerty v. Powers,* 66 Cal.

368, 5 Pac. 622. In *Chicago, B. & Q. Ry. Co. v. Honey,* 63 Fed. 39, where an action was brought by a husband for a loss of the services of his wife, the husband was charged with the wife's negligence. The court gave as the reason that the husband exercised such a control over his wife as to impute her negligence to him. It would be much more difficult to justify an extension of such a doctrine to the parent and child relation for reasons given above. A recent case, *Callies v. Reliance Laundry Co.* (Wis. 1925) 206 N. W. 198, is outstanding because it carefully considers the reasons for barring the parent's recovery when the child was contributorily negligent. In commenting on imputed negligence as a reason the court said: "Practically neither a husband nor a parent can effectively control the conduct of a wife or child as respects contributory negligence. * * * The bar of the child's contributory negligence is not due to the application of the doctrine of imputed negligence." It appears that in our search for an explanation of the tenacious holdings of the courts on this point we get but little satisfaction from the doctrine of imputed negligence.

Is the parent's cause of action derived from the child? If it is, then the parent stands as an assignee and is subject to the defenses available against the child. In *Honey v. Chicago, B. & Q. Ry. Co.* 59 Fed. 423, a husband was allowed to recover for a loss of the services of his wife in spite of the contributory negligence of the wife. The court justified its holding in these words: "It cannot be successfully maintained that the right of action in behalf of the husband is derived from the wife." Although this decision was reversed in *Chicago, B. & Q. Ry. Co. v. Honey, supra,* the argument against a derived cause of action was not answered by the reversing court. But the Wisconsin court in the *Callies* case, *supra,* did charge the parent with the child's negligence on the theory of a derived cause of action. "The parent is by law required to support and care for the child. In return for the performance of such an obligation, the law gives to the parent the right to a part of the child's cause of action in case he is negligently injured by another. * * * This splitting up of the cause of action is due solely to the parental relations existing between the parties." The Wisconsin court evidently reasoned that the right to the services of the child was due to a parent and child relation; that the cause of action was given to the parent as a reward for the support of the child. This would appear to make the parent an assignee of the child, as to its share of the cause of action, by force of the law.

However, authority does not bear out the reasoning that the parent's right to the services of the child is based upon a parent and child relation. To the contrary, it seems to be well settled that the parent's right arises from a master and servant relation. 7 LABATT'S MASTER AND SERVANT, p. 8100. "It is commonly declared that the parent's right of action is founded on the relation of master and servant." *Callaghan v. Lake Hopatcong Ice Co.* 69 N. J. L. 100, 54 Atl. 223; *Trow v. Thomas,* 70 Vt. 580, 41 Atl. 652; *Rooney v. Milwaukee Chair Co.* 65 Wis. 397, 27 N. W. 24. In the much cited case of *Dennis v. Clark,* 2 Cush. (Mass.) 347, it was said: "When such actions are brought for the loss of service the right of action is founded upon the relation of master and servant and not upon the relation of parent and child." In *Matz v. Chicago & A. R. Co.* 85 Fed. 180, the father was found to have a property in the services of his son during minority. The upshot of these opinions is that the parent's right to the services of the child is not given by the law on the theory

of a parent and child relation. It is not given in exchange for an expenditure by the parent, but exists as an independent property right, the same as the master's right to the services of his servant.

That the courts looked upon the parent's action in this light is indicated in the actions for injuries to a child of tender years. The English view has been that a parent cannot recover even for medical expenses, if the child is of such tender years that it is incapable of rendering services. *Hall v. Hollander,* 7 Dowl. & R. 133. Early cases in this country followed this view. *Allen v. Atlanta St. R. Co.* 54 Ga. 503. These opinions pointed out that the parent's right of action was based upon the loss of services and not upon expenses incurred by reason of medical attention. If these courts had looked upon the parent as an assignee of the child because of money paid for the support of the child, they would surely have allowed a recovery for medical expenses. Later cases in this country have permitted the parent to recover for medical expenses, but on the ground that this action is based upon the relation of parent and child, while the action for loss of services is based upon a relation of master and servant. Where a parent pays out money for medical attention to the child, and seeks to recover, he should stand in no better position than the child. But the very fact that a distinction is drawn between an action to recover for medical expenses and the action to recover for loss of services seems to show an unconscious attitude, on the part of the courts, toward considering the latter as an action independent of the child's cause of action.

If the parent is to be considered as an assignee he is to be subjected to all of the defenses available against the child. Have the courts consistently subjected the parent to other defenses than contributory negligence? There are two distinct types of cases in which the parent has been allowed to recover in spite of defenses which would have been available against the child or an assignee of the child. Where the death of a child, caused by wrongful act, is not instantaneous, the father may recover for the loss of services up to the time of death, without the aid of any statute. If the derived cause of action theory were followed, such a recovery would be barred at common law by the death of the child. It is rather peculiar that although the courts have not been prone to discuss the reason for charging a parent with the contributory negligence of the child, they have not hesitated to explain their decisions allowing a recovery after the death of the child. In *Hyatt v. Adams,* 16 Mich. 180, it was said: "Where an action is brought by a master for loss of service of his servant or by a husband for his wife, the cause of action could never have vested in the servant or the wife." In *Trow v. Thomas, supra,* the court said: "The right of action is founded on the relation of master and servant, and not that of parent and child. It is difficult to perceive why, upon principle, the parent cannot recover the damages resulting from the death, the expenses of burial and the loss of services until the child would have reached majority." It is obvious that the parent, in such an action, is not considered as an assignee, or as one having a derived cause of action. It is true that a recovery is limited to the loss of services up to the time of death of the child. But this much is permitted, and the courts admit that a logical application would give a recovery for loss of services up to the time of majority of the child.

Another type of case where recovery is allowed over a defense, good against the child, is where the child has accepted the provisions of the Work-

men's Compensation Act, and has been injured. It is generally held that the parent's common law action is not waived by the child. In *King v. Viscoloid Co.* 219 Mass. 420, 106 N. E. 988, the court said: "The parent's right of action was not in any just sense consequential upon that of the son. It was independent of his right and was based on her personal loss. He had waived his right of action but he had not waived his parent's independent right." Mr. Gilmore, in 1 WIS. L. REV. 206-211, has discussed these and several other instances where the courts have not subjected the parent to defenses good against the child.

Although authority is unanimously to the contrary, there is a strong temptation to venture an opinion that a jurisdiction, which has no decision directly in point, may on principle break away from the fold, and refuse to charge the parent with the contributory negligence of the child. And those jurisdictions, which have decisions in point, might reasonably indulge in some judicial legislation, and allow a recovery for the loss of services of the child. Such an indulgence could be justified on principle, and also on the ground of the narrowing of the doctrine of imputed negligence and the growing freedom in domestic relations. R. G. J.