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Imputation of Negligence Between Husband and Wife--Hale v. Hale

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of an "intent" on the part of the drawer.[21] The *Terrill* case would seem to fall within the second group set out, *i.e.*, where the act of the drawer was the sole cause of the loss.

The fact situation in the main case clearly falls into the "in-between" group. The solution of the problem in such a case depends largely upon the legal effect of the acts of the drawer, payee, and drawee. The court must determine whether there is sufficient evidence to invoke an stoppel. It is submitted that in the *Keck* case, the facts were not sufficient to estop the drawer, and that the loss should have been placed on the paying bank.

ROBERT F STEPHENS

IMPUTATION OF NEGLIGENCE BETWEEN HUSBAND AND WIFE—HALE V HALE

The doctrine of imputed negligence, originated in the English case of *Thorogood* v. *Bryan*,[1] is said to be based upon the idea that such a relationship may exist between an injured person and another that it would be inequitable to permit the injured person to recover where the other party to the relationship was negligent. Can it be said that under this theory the marital relationship, standing alone, is sufficient for the imputation of negligence of one spouse to another? This very question was raised in the recent Kentucky case of *Hale* v. *Hale*.[2]

In that case, a child was killed when, due to the negligent driving of her father, the station wagon in which the family was riding went over an embankment. Suit was brought against the father by the administrator of the child's estate, for the benefit of the mother. Defendant's demurrer was sustained in lower court; the Court of Appeals reversed. There were two grounds of defense. The first, the common law disability of one spouse to sue another. was disposed of by the court with the observation that the Kentucky Constitution[3] expressly provides that the action may be maintained in every case by the administrator of the decedent, and for the benefit of those named in the statute.[4] The second defense, and the one in which we are primarily interested, was that the negligence of the father should be imputed to the mother, so as to bar recovery for the benefit of the mother by the child's administrator. Plaintiff contended that the sounder and more modern rule is that negligence will not be imputed on the basis of the marital relationship alone. The Court of Appeals, in discussing the problem said:

> "The question of imputed negligence is not a new one, the decisions in this state and elsewhere are somewhat in conflict. The better rule is that negligence is not to be imputed by reason of the marital relation alone."[5]

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[21] BRITTON, BILLS AND NOTES 720 (1943).

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[1] 8 C. B. 115, 18 L. C. P. 336 (1849); *See* Keeton, *Imputed Contributory Negligence*, 13 TEX. L. REV. 161 (1935).

[2] 312 Ky. 867, 230 S.W 2d 610 (1950).

[3] KY. CONST. sec. 241.

[4] KY. REV. STAT. sec. 411.130 (1948).

[5] *Supra*, note 2, at 870.

After setting out the above rule, the court then turned its attention to cases taking an apparently opposite view of the matter. It said:

> "In these cases it was held that where a child is killed due to the negligence of a third party and one of its parents is contributorily negligent in permitting the child to be in a place of danger, such contributory negligence will be imputed to the other parent. Such cases rest on a theory of agency as between husband and wife in the control of the child in such a situation; but these holdings are clearly distinguishable from the case at bar. We are not disposed to extend the rule imputing negligence as between husband and wife any further than the bare limits of the situations involved in those cases. Unless there be something more shown than the marital relation or a parent-child relation, negligence should not be imputed by the modern view as followed by most courts, including this court."[6]

In so far as the court says only that it is not disposed to extend the rule imputing negligence as between husband and wife any further than the bare limits of the Kentucky cases brought to its attention, and since it admits the conflict in those cases and fails to differentiate those situations upon sound reasoning, the opinion in the *Hale* case perhaps falls short of what might be desired.

The primary purpose of this note will be to consider the *Hale* case in two aspects. First, how does the result fit in with the general law on imputation of negligence between husband and wife where one of the parents alone has contributed to the death or injury of the child. Second, how does the result fit in with allied Kentucky cases which have raised the problem, a situation which can best be clarified by an analytical discussion of those cases.

In a case almost like the principal case, *O'Connor* v. *Benson Coal Co.*, a child met her death as a result of being run over by a truck driven by her father, who was acting within the scope of his employment as a driver. The suit was brought under a wrongful death statute,[8] by the mother as administrator against the father's employer, upon principles of agency.[9] The question arose as to whether the mother could recover, since the father, as one of the next of kin, would share in the estate. The court decided that the negligence of one beneficiary would not bar innocent beneficiaries from recovery. In effect, an application of the doctrine of imputed negligence was refused, at least upon a mere husband and wife relationship. Had the wife been suing the husband, and not the employer, the result undoubtedly would have been the same, since there is no more basis for imputing negligence when the employee-husband is being sued than when the employer himself is being sued.

The only other cases which could be found were those in which the parent had been only contributorily negligent and the party sued was a third party who had killed or injured the child and the suit by the parent was for loss of services. In these cases, it is said that the theory of the plaintiff's action is that he has an independent right, and is suing for the invasion of his own interest.[10] Most courts apply the same rule in the case of injury to the child as is applied where the child has been killed. If one parent has been guilty of contributory negligence, the

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[6] *Ibid.*
301 Mass. 145, 16 N.E. 2d 636, 637 (1938).
[8] II MASS. GEN. LAWS c. 229, sec. 5 (1932).
[9] RESTATEMENT, AGENCY sec. 217, comment [b] (1933).
[10] PROSSER, TORTS sec. 421 (1941).

other parent is not barred on the basis of the marital relationship alone,[11] except where the community property system prevails.[12]

The conclusion reached by the writer is that the decision in the *Hale* case is not inconsistent with what little case authority could be located in other jurisdictions pertinent to the problem raised by the peculiar facts of the *Hale* case. It seems to be sound in so far as it is said to be based upon the majority rule that the negligence of the husband will not be imputed to the wife, or vice-versa, on the basis of the marital relationship alone.[13] The reason for the contrary rule has long since been rebutted in most jurisdictions.[14]

In summary, the general rule is that where one parent is suing the other parent or his employer for the negligent killing or injuring of the child, or where one parent is suing a third party for the death or injury of a child and the other parent has been contributorily negligent, the doctrine of imputed negligence should not be applied upon the fact alone that the plaintiff and the negligent parent were husband and wife.

The Kentucky cases on imputed negligence which raise the particular problem of the husband and wife relationship fall into three factual categories. The first includes the situation in the *Hale* case, where the suit is brought by one parent against the other parent who killed their child. The second involves a suit by one acting as administrator of his or her child's estate, against a third person who killed the child and who pleads, as a defense, the contributory negligence of the other parent. The third is made up of those cases where one spouse brings suit for personal injuries to himself inflicted by a third party who pleads the contributory negligence of the other spouse as a defense. Although these cases differ in that no children are involved, the imputation of negligence problem is still present.

In all cases of class two described above the court has denied recovery. In the parent-child cases it seems that the marital relation alone had no bearing at all upon the imputation of negligence from one spouse to another. Rather the Court of Appeals has emphasized the legal duty of parents to care for their children.[15] Where the child has been in the actual custody of the parent, it has imputed the contributory negligence of the parent in custody of the child, to the other parent.[16] On the other hand, it has also imputed the contributory negligence

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[11] 39 AM. JUR. 729. *But see* Connelly v. Kaufman & Baer Co., 349 Pa. 261, 37 A. 2d 125 (1944).

[12] Basler v. Sacramento Gas & Electric Co., 158 Cal. 514, 111 Pac. 530, Ann. Cases 1912A; McFadden v. Santa, O. & T. St. Ry. Co., 187 Cal. 464, 25 Pac. 681, 11 L. R. A. 252.

[13] 38 AM. JUR. 925; 16 AM. JUR. 93; 65 C. J. S. 800; PROSSER, TORTS at p. 421 (1941); Keeton, *Imputed Contributory Negligence,* 13 TEX. L. REV. 161 (1934-35); Note, 13 CENT. L. J. 384 (1881); Note, 3 MO. L. REV. 78 (1938); See Note, 23 A. L. R. 691 (1923); See Note, 110 A. L. R. 1099 (1937).

[14] *See* Louisville, N. A. & C. Ry. Co. v. Creek, 130 Ind. 139, 29 N.E. 481, 14 L.R.A. 733 (1892); *Accord* Town of Knightstown v. Musgrove, 116 Ind. 121, 18 N.E. 452.

[15] Louisville & Portland Ry. Co. v. Murphy's Adm'r., 72 Ky. (9 Bush) 522, 531 (1872). "Parents are the legal and natural custodians of their children, and when the children are so young as to not be capable of exercising any discretion their parents must exercise it for them."

[16] Mill's Adm'r. v. Cavannaugh, 29 Ky. Law Rep. 685, 94 S.W 651 (1906) (child drowned in well on premises leased by parents); Toner's Adm'r v. South Covington & Cincinnati St. Ry. Co., 109 Ky. 41, 58 S.W 439 (1900) (child in

of a nurse or sister in custody of the child, to both parents.[17] In both situations it is the custody-agency relation which is stressed, not the husband-wife relation. Using this as a basis, the court has justified its result in each case by saying that under the statute,[18] a recovery would be for the benefit of both parents, one moeity to each.[19] To permit this would be to allow the guilty parent to profit by his or her wrong.

In the third group of cases, involving a suit by one spouse against a third party for personal injuries to himself, the Court of Appeals has refused to impute negligence,[20] with the exception of two cases, in both of which an agency relation of master and servant was found.[21]

The view of the court is best expressed in *Louisville Ry.* v. *McCarthy*.[22] There the plaintiff was riding with her husband in their carriage and the defendant's streetcar struck the carriage, throwing the plaintiff to the ground. The lower court instructed that the plaintiff was responsible only for her own negligence, and not for the contributory negligence of her husband. The upper court said that this presents squarely, the question of whether the negligence of the husband can be imputed to the wife while driving a vehicle in which the wife was passenger, and whether or not the relation of husband and wife is such that the wife cannot recover under such facts if the husband was negligent. In affirming for the plaintiff, the court flatly stated the rule to be that the mere fact of a husband and wife relationship should not render one spouse answerable in the negligence of the other. It said:

> "It seems to us that this rule is in consonance with reason and justice; that the negligence of the husband or the wife, as the case may be, should not be attributable to or charged to the other, unless it should appear that in that particular instance the relation of principal and agent or master and servant existed between them.
>
> The husband has no interest in the recovery, and we see no good reason for denying to a wife the right of a recovery because her husband, into whose car she, for the time being, intrusted herself, was guilty of an act of negligence which contributed to bring about her injury."

It should be noted that the guilty spouse will not benefit from a recovery here and thus the problem of the preceding cases did not hinder the court in reaching a decision in favor of the injured spouse.

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mother's custody, broke away and ran into street); See Brown McClain Transfer Co. v. Major's Adm'r., 251 Ky. 741, 745, 65 S.W. 2d 992, 994 (1933).

[17] Wheat's Adm'r. v. Gray, 309 Ky. 593, 218 S.W. 2d 400, 7 L.R.A. 1336 (1949) (child in sister's care, ran into path of defendant's car).

[18] KY. REV. STAT. sec. 411.130 (2) (d) (1948). "If the deceased leaves no widow, husband or child, then the recovery shall pass to the father and mother, one moiety to each."

[19] Toner's Adm'r v. The South Covington & Cincinnati St. Ry. Co., 109 Ky. 41, 58 S.W. 439 (1900), wherein the court asserted that, "Under the statute, a recovery in this case, if had, would go to the father and mother, one moiety to each."

[20] Creal v. U.S., 84 Fed. Supp. 249 (1949); Sweazy v. King, 248 Ky. 432, 58 S.W. 2d 659 (1933); Cox's Adm'r v. Cin. New Orleans & Texas Pac. Ry. Co., 238 Ky. 312, 37 S.W. 2d 859 (1931); Ray v. Ray, 196 Ky. 579, 245 S.W. 287 (1922); City of Louisville v. Zoeller, 155 Ky. 192, 160 S.W. 500 (1913); Louisville Ry. v. McCathy, 129 Ky. 814, 112 S.W. 925 (1908).

[21] Challinor v. Axton, 246 Ky. 76, 54 S.W. 2d 636 (1932); Standard Oil Co. of Ky. v. Thompson, 189 Ky. 830, 226 S.W. 368 (1920).

[22] 129 Ky. 814, 112 S.W. 925 (1908).

However, in *Challinor* v. *Axton*,[23] it might be asked whether the rule followed in previous decisions is not repudiated. The wife owned a car which was being driven by her husband. A collision occurred as the car was being turned into the driveway of the joint home of the plaintiff and her husband. The lower court's instruction imputed the negligence of the husband to the wife. Since plaintiff counsel had offered an instruction which did the same thing, plaintiff could not complain. But, the upper court further stated that the instruction, in its opinion, was correct. Since the auto was owned by the wife and was being driven by the husband with her consent and acquiescence on a mission as much for her benefit as for his or the children s, the court said it had no trouble in imputing the negligence of the husband to plaintiff, independently of any family purpose doctrine.

The court found further support in the argument that the plaintiff did consent to the husband driving, and selected her husband as a suitable person, not only to operate the car for her own purpose, but also to guard and protect her personal safety while traveling in her car with him as driver. Also, since the negligence of a chauffeur would be imputed to her, the same principles should apply when the selected chauffeur is her husband. In so far as the court based the decision upon a master and servant relation by analogy to the chauffeur relation, the result seems questionable. What seems to have impressed the court most was the ownership of the car by the wife. Other than this, the facts appear no different from those cases already referred to, in which the negligence was not imputable. It is submitted that although the result reached appears to be questionable, the court did not look upon its decision as a repudiation of the rule already set out, but rather as an exception to that rule based upon agency principles which the court has made use of before.

In *Standard Oil Co.* v. *Thompson*,[24] the only difference in the facts, was that the wife was driving the car for her invalid husband. He was injured when the car collided with defendant's truck. Without elaboration upon the facts establishing the agency relationship, the court said at the close of its opinion:

> "Appellee [plaintiff] is chargeable with the negligence of his wife, who was his agent in the operation of his automobile at the time of the collision."[25]

Thus, this is not a modification of the stated rule, but an exception to it based upon an agency relationship.

CONCLUSION

In the final analysis there can be no doubt that if the question in the *Hale* case is considered as being one of the imputation of negligence between the husband and wife based upon the marital relationship alone, the case can be said to be in consonance with allied Kentucky cases. Where one spouse is injured or killed, and the other spouse has been contributorily negligent, recovery by the injured spouse or his administrator will be denied only where an agency relation is established. Where recovery is sought by an administrator for the estate of a deceased child, the court has found an agency relation based upon the custody

[23] 246 Ky. 76, 54 S.W 2d 600 (1932).
[24] 189 Ky. 830, 226 S.W 368 (1920).
[25] *Id.* at 834, S.W at 370.

of the child and has imputed the negligence of one parent to the other, probably because, under the wrongful death statute, both parents will benefit. How does the court logically distinguish the *Hale* case from these parent-child cases upon the custody question? The court does not try to make distinction, and there seems to be no logical one. It merely says that those cases are clearly distinguishable from this case.

It is submitted that in the *Hale* case the Court of Appeals seems to repudiate the custody-agency concept of the parent-child cases by refusing to utilize agency principles for imputing the negligence of the careless father to the plaintiff mother, the court permits the mother to recover the amount to which she is entitled, while at the same time the father can recover nothing.

This case points the way to a reversal of the Kentucky doctrine which in the parent-child-custody situation has been used to bar recovery under our statute.[26] A majority of jurisdictions have applied a less harsh rule in those cases barring recovery only to the extent that it will inure to the benefit of the negligent parent-beneficiary.[27]

CECIL D. WALDEN

TAX SITUS OF RIVER BOATS IN A NON-DOMICILIARY STATE — REEVES V ISLAND CREEK FUEL AND TRANSPORTATION CO.

A case recently decided by the Kentucky Court of Appeals seems to import an extension of the principles now used to determine the tax situs of river boats and barges in a non-domiciliary state. In *Reeves* v. *Island Creek Fuel and Transportation Co.*,[1] the Commonwealth of Kentucky instituted omitted tax assessment proceedings in the courts of certain counties bordering the Ohio River to assess and collect from the appellee ad valorem property taxes on river boats and barges. Appellee obtained a permanent injunction enjoining further prosecution, and this appeal was taken. The Island Creek Co., a Maine corporation, was almost exclusively engaged in shipping coal by barge on the Ohio River between Huntington, West Virginia, and Cincinnati, Ohio, on behalf of its parent company. Although the domiciliary state was Maine, the boats and barges had never been there, nor was there any prospect of their being there in the future. The company had operated its two tugs and fifty-four barges over this route, which is 94.6% in Kentucky,- during the years in question with rela-

[26] Unless this is true the Kentucky court finds itself faced with a curious anomaly. Where a father kills his child, recovery is allowed. Where a third party kills the child and the father is negligent a recovery is denied. It is possible that considerations of "policy" lead the Court of Appeals to such a result. If a suit is brought against a parent for a negligent injury, an insurance company indemnitor is no doubt always in the background, and the burden of payment of the judgment is spread. This might not be true where the defendant is a third party.

[27] See Note, 2 A. L. R. 2d 785, at 799.

[1] 313 Ky. 400, 230 S.W 2d 924 (1950).

This case seems to be decided in terms of route mileage. However, the actual mileage traveled in Kentucky bore the same proportionate relationship to the total mileage traveled as that part of the route in Kentucky bore to the full route. See brief on behalf of Campbell County, Kentucky, as amicus curiae, page 39. Had this not been reasonably true the result might have been unfair, or might well have been different.