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Wrongful Death and Contributory Negligence

Robert H. Wettach

WRONGFUL DEATH AND CONTRIBUTORY NEGLIGENCE

ROBERT H. WETTACH*

I. CONTRIBUTORY NEGLIGENCE OF DECEASED

In view of the confusion which abounds in wrongful death cases, especially when combined with such doctrines as contributory negligence or imputed negligence, there may be some justification for repeating the obvious. It is well understood that the contributory negligence of the deceased will constitute a bar to recovery in actions for wrongful death.[1] The explanation of this rule is not to be found in the doctrine of imputed negligence,[2] which in this situation would amount to imputing the negligence of the deceased to his personal representative or named beneficiary, designated as plaintiff in the wrongful death statute. It is rather a matter of restatement of a definite provision of the wrongful death statute or a matter of statutory construction, when the wrongful death statute is not definite.

The progenitor of all the American wrongful death statutes is Lord Campbell's Act,[3] which provided,

". . . That whensoever the Death of a Person shall be caused by wrongful Act, Neglect or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured. . . every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased. . . ."

In *Senior v. Ward*,[4] Lord Campbell, as Chief Justice, interpreted the act which bears his name, as follows:

"We conceive that the Legislature, in passing the statute on which the action is brought, intended to give an action to the representatives of

* Professor of Law, University of North Carolina.

[1] RESTATEMENT, TORTS (1934) §494. The section is as follows: "The plaintiff is barred from recovery for an invasion to his legally protected interest in the health or life of a third person which results from the harm or death of such third person, if such third person was guilty of contributory negligence which would have barred his own recovery." HARPER, LAW OF TORTS (1933) §280; TIFFANY, DEATH BY WRONGFUL ACT (2d ed. 1913) §66.

[2] For a general discussion, see Gilmore, *Imputed Negligence* (1921) 1 WIS. L. REV. 193, 257; HARPER, LAW OF TORTS (1933) §§146-149.

[3] 9 & 10 Vict. c. 93 (1846).

[4] 1 El. & El. 385, 393 (Q. B. 1859).

the person killed by negligence only where, had he survived, he himself, at the common law, could have maintained an action against the person guilty of the alleged negligence."

In that case, the contributory negligence of the deceased was held to be a bar to recovery. The great majority of American courts, while recognizing that the statute creates a new right of action, have followed the English view that contributory negligence of the deceased is a bar—largely because of the express language of the wrongful death statutes that the deceased must have had a right of action[5] or because of a similar construction of those statutes where no specific provision is found.[6]

In passing on an Idaho wrongful death statute which was silent on this point, Brewer, J. said:

"The two terms, therefore, wrongful act and neglect, imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It can not be that, if the death was caused by a rightful act, or an unintentional act with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured."[7]

[5] Stringfellow v. Atlantic C. L. R. R., 64 F. (2d) 173 (C. C. A. 5th, 1933); Weatherly v. Nashville, C. & St. L. Ry., 166 Ala. 575, 51 So. 959 (1909); Scoggins v. Atl. & Gulf Portland Cement Co., 179 Ala. 213, 60 So. 175 (1912); Chicago & A. Ry. v. Stone, 109 Ill. App. 517 (1903); Dee v. City of Peru, 343 Ill. 36, 174 N. E. 901 (1931); Chicago & E. I. Ry. v. Hedges, 118 Ind. 5, 20 N. E. 530 (1889); State v. Longeley, 161 Md. 563, 158 Atl. 6 (1932); Holwerson v. St. Louis & S. Ry., 157 Mo. 216, 57 S. W. 770 (1900); Williams v. East St. Louis Ry., 100 S. W. (2d) 51 (Mo. 1936); McDonald v. Wright, 125 Neb. 871, 252 N. W. 411 (1934); Canning v. Buffalo R. & P. Ry., 28 App. Div. 621, 50 N. Y. Supp. 506 (1898); Flaherty v. Meade Transfer Co., 157 App. Div. 416, 142 N. Y. Supp. 357 (1913); Scott v. Telegraph Co., 198 N. C. 795, 153 S. E. 413 (1930); Cameron v. Great Northern Ry., 8 N. D. 618, 80 N. W. 885 (1899); Pennsylvania R. R. v. Moses, 42 Ohio App. 220, 182 N. E. 40 (1931); City of Shawnee v. Cheek, 41 Okla. 227, 137 Pac. 724 (1913); Kalify v. Udine, 52 R. I. 191, 159 Atl. 644 (1932); Walkup v. Covington, 18 Tenn. App. 117, 73 S. W. (2d) 718 (1933); Dallas & T. Ry. v. Moore, 52 S. W. (2d) 104 (Tex. Civ. App. 1932); Norfolk & W. Ry. v. Carper, 88 Va. 556, 14 S. E. 328 (1892); Gunn v. Ohio River R. R., 42 W. Va. 676, 26 S. E. 546 (1896).

For statutes containing provision that deceased must have had right of action, see note 15, *infra*.

[6] Hunt v. Los Angeles Ry., 110 Cal. App. 456, 294 Pac. 745 (1930); De Nardi v. Palanca, 120 Cal. App. 371, 8 P. (2d) 220 (1932); Goldstein v. People's Ry., 21 Del. 306, 60 Atl. 975 (1905); Engle v. Nelson, 220 Iowa 771, 263 N. W. 505 (1935); Clark's Adm'x v. Louisville and N. Ry., 101 Ky. 341, 39 S. W. 840 (1897); Vitale v. Checker Cab Co., 166 La. 527, 117 So. 579 (1928); Murphy v. Boston & M. R. R., 216 Mass. 178, 103 N. E. 291 (1913); Melville v. Butte-Balaklava Copper Co., 47 Mont. 1, 130 Pac. 441 (1913); Hughes v. Delaware & H. Canal Co., 176 Pa. 254, 35 Atl. 190 (1896); Ostheller v. Spokane & I. E. R. R., 107 Wash. 678, 182 Pac. 630 (1919).

For statutes containing no reference to a right of action by deceased, see note 16, *infra*.

[7] Northern Pac. Ry. v. Adams, 192 U. S. 440, 450, 24 Sup. Ct. 408, 409, 48 L. ed. 513, 517 (1903).

The Kentucky court, in discussing the wrongful death provision of the Kentucky Constitution, which says nothing about the matter, put it clearly, as follows:

"It was not the design of the convention to deprive a defendant of the right, as then existed, to plead and prove contributory negligence."[8]

The time at which the wrongful death action accrues is not material when the defense is the contributory negligence of the deceased. But when the defense is settlement for the deceased's injuries before he died, whether by satisfaction or release or recovery in an action for damages, the time of accrual is essential. Courts differ as to this. In *Michigan Central R. R. v. Vreeland,*[9] Lurton, J. said,

"But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent *immediately before his death* to have maintained an action for his wrongful injury." (italics ours.)

If this view is taken, that the deceased must have had a right of action up to the moment of his death, then satisfaction, release or recovery by the deceased would bar the wrongful death action.[10] On the other hand, if all that is required is the existence of a right of action at the time of the injury, then the courts might permit recovery for wrongful death, notwithstanding release or satisfaction or prior recovery by the deceased.[11] But contributory negligence constitutes a valid defense under either view. If it is only necessary to show that a right of action accrued to the deceased at the time of the injury, contributory negli-

[8] Passamaneck v. Louisville Ry., 98 Ky. 195, 202, 32 S. W. 620, 622 (1895).

[9] 227 U. S. 59, 70, 33 Sup. Ct. 192, 196, 57 L. ed. 417, 421 (1913). In Ostheller v. Spokane & I. E. R. R., 107 Wash. 678, 182 Pac. 630, 632 (1919), the court said, ". . . it nevertheless gives a right of action to the heirs of the deceased which is dependent upon the right the deceased would have had to recover for such injuries up to the instant of his death."

[10] Crockett v. Missouri Pac. R. R., 179 Ark. 527, 16 S. W. (2d) 989 (1929); (release and satisfaction); So. Bell Tel. & Tel. Co. v. Cassin, 111 Ga. 575, 36 S. E. 881 (1900) (release); Harris v. Ill. Cent. R. R., 111 Miss. 623, 71 So. 878 (1916) (recovery by deceased); Edwards v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635 (1916) (recovery by deceased and satisfaction); Rish v. Seaboard A. L. Ry., 106 S. C. 143, 90 S. E. 704 (1916) (release by deceased); Brodie v. Washington Power Co., 92 Wash. 574, 159 Pac. 791 (1916) (release and satisfaction); Note (1936) 85 U. of Pa. L. Rev. 124.

Delaware and Pennsylvania provide that an action brought by deceased during his lifetime will bar the wrongful death action. See note 16, *infra.*

[11] Release for personal injuries before death not a bar to wrongful death action: Early v. Pac. Elect. Ry., 176 Cal. 79, 167 Pac. 513 (1917); Stokes v. Collum Commerce Co., 120 Okla. 133, 252 Pac. 390 (1926); Rowe v. Richards, 32 S. D. 201, 151 N. W. 1001 (1915). See Cobb, J. dissenting in So. Bell Tel. & Tel. Co. v. Cassin, 111 Ga. 575, 36 S. E. 881 (1900).

Recovery by deceased for personal injuries held not a bar to wrongful death action in Blackwell v. Am. Film Co., 189 Cal. 689, 209 Pac. 999 (1922).

gence would be a defense. If the deceased's right of action must have continued in existence until his death, contributory negligence is likewise a defense. Contributory negligence prevents any right of action ever arising, as there is no wrongful act or neglect which would have entitled the deceased to recover, if he had lived.

We might also begin our inquiry by asking whether the wrongful death statute gives the beneficiary a new and independent right of action, thus recognizing the interest of the relatives in the life of the deceased, or whether it merely does away with the common law rule that tort actions die with the injured party.[12] Lord Campbell's Act changes two common law rules, the first, that personal actions die with the party injured, and the second that the relatives of a deceased person have no legally protected interest in his continued existence. The first of these has been emphasized at the expense of the second, largely because of the provision in Lord Campbell's Act that the deceased must have had a right of action. The North Carolina Court stated this viewpoint, as follows:

"While we have repeatedly held, and the position is in accord with the authoritative cases on the subject elsewhere, that this law, commonly designated as Lord Campbell's Act, has the effect of creating a new cause of action in the sense that such a suit could not be maintained at common law, it will appear from the better-considered decisions construing the statute, both in England and in this country, that its purpose was to withdraw claims of this kind from the effect and operation of the maxim, 'Actio personalis moritur cum persona', and that the action did not thereby lose its identity, but that the basis of such a claim continued to be the wrongful injury to the person resulting in death."[13]

However, it would seem apparent that the legislature was really addressing itself to the second of these common law defects, because it was creating an action for the benefit of certain next of kin to recover from a wrongdoer damages for the injury caused. This injury was to the surviving relatives for the wrongful death, not to the deceased for his injury. "This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles.

[12] Schumacher, *Rights of Action under Death and Survival Statutes* (1924) 23 MICH. L. REV. 114; Note (1932) 80 U. OF PA. L. REV. 993; Note (1915) 28 HARV. L. REV. 802.

[13] Mitchell v. Talley, 182 N. C. 683, 686, 109 S. E. 882, 884 (1921). In Read v. Great Eastern Ry., L. R. 3 Q. B. 555, 558 (1868), Lush, J. said, "The intention of the statute is, not to make the wrongdoer pay damages twice for the same wrongful act but to enable the representatives of the person injured to recover in a case where the maxim actio personalis moritur cum personâ would have applied . . . that does not give a fresh cause of action."

It is a liability for the loss and damage sustained by relatives dependent upon the decedent."[14]

If Lord Campbell's Act had not contained the provision restricting recovery to those cases where the deceased might have recovered had he survived, it is conceivable that even contributory negligence of the deceased would not have been considered a defense as against the wrongdoer. The courts might have taken the view that there were two negligent parties, the defendant and the deceased. Just because the deceased was negligent should not be sufficient reason to bar the surviving relatives for the injury which the defendant had caused to their interest in the continued existence of the deceased. Needless to say, this reasoning did not prevail. It was not even considered because of the express provision on the point in Lord Campbell's Act and in the wrongful death statutes of thirty-four states,[15] and because of a similar judicial construction of the statutes in the remaining states.[16]

[14] Michigan Cent. R. R. v. Vreeland, 227 U. S. 59, 68, 33 Sup. Ct. 192, 195, 57 L. ed. 417, 421 (1913). For an excellent discussion, see opinion of Whiting, J., in Rowe v. Richards, 32 S. D. 201, 151 N. W. 1001 (1915).

[15] Statutes containing provisions that deceased must have had right of action: ALA. CODE ANN. (Michie, 1928) §5696; ARIZ. REV. CODE ANN. (Struckmeyer. 1928) §944; ARK. DIG. STAT. (Crawford and Moses, 1919) §1074; COLO. STAT. ANN. (Michie, 1935) c. 97, §§96, 97; FLA. COMP. GEN. LAWS ANN. (Skillman 1927) §7047; ILL. REV. STAT. (Cahill, 1933) c. 70, §1; IND. STAT. ANN. (Burns, 1933) Vol. 2, §404; KAN. GEN. STAT. ANN. (Corrick, 1935) c. 60, §3203; ME. REV. STAT. (1930) c. 101, §9; MD. CODE ANN. (Flack, 1935) art. 67, §1; MICH. COMP. LAWS (1929) §14,061; MINN. STAT. (Mason, Supp. 1936) §9657; MISS. CODE ANN. (1930) §510; MO. REV. STAT. (1929) §3263; NEB. COMP. STAT. (1929) c. 30, art. 8, §809; NEV. COMP. LAWS (Hillyer, 1929) §9194; N. J. COMP. STAT. (1911) Vol. 2, pp. 1907, 1908; N. M. STAT. ANN. (Courtright, 1929) c. 36, §102; N. Y. CONSOL. LAWS (Cahill, 1930) c. 13, §130; N. C. CODE ANN. (Michie, 1935) §160; N. D. COMP. LAWS ANN. (1913) §8321; OHIO CODE ANN. (Throckmorton, 1929) §10770; OKLA. STAT. ANN. (1937) tit. 12, §§1053, 1054; ORE. CODE ANN. (1930) Vol. 1, tit. 5, §703; R. I. GEN. LAWS (1923) §4862; S. C. CODE ANN. (Michie, 1932) §411; S. D. COMP. LAWS (1929) §2929; TENN. CODE ANN. (Williams, 1934) §8236; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 4672; VA. CODE ANN. (Michie, 1936) §5786; VT. PUB. LAWS (1933) §2859; WIS. STAT. (1931) c. 331, §.03; WYO. REV. STAT. (1931) c. 89, §403; W. VA. CODE (1931) p. 1346, §5.

[16] Statutes containing no reference to the necessity of a right of action by deceased: ALA. CODE ANN. (Michie, 1928) §5695 (dealing only with suits for injury causing death to minor child); CAL. CODE CIV. PROC. (Deering, 1935) §§376, 377; CONN. GEN. STAT. (1930) §5987; DEL. REV. CODE (1935) §4638; GA. CODE (1933) c. 105-13; IDAHO CODE ANN. (1932) tit. 5, §311; IOWA CODE (1935) §§10986, 11920; KY. STAT. ANN. (Carroll, 1936) §6; LA. CIV. CODE ANN. (Dart, 1932) art. 2315; MASS. ANN. LAWS (1933) Vol. 7, c. 229, §5; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §§9075, 9076; N. H. PUB. LAWS (1926) c. 302(7) (survival statute which covers actions for wrongful death); PA. STAT. (Purdon, 1936) §§1601-1604; UTAH REV. STAT. ANN. (1933) tit. 13, c. 3, §§10, 11; WASH. REV. STAT. ANN. (Remington, 1932) Vol. 2, §§183, 183 (i).

In the statutes of Delaware and Pennsylvania, cited above, there is a provision that an action brought by deceased during his lifetime will bar the wrongful death action.

See note 6 *supra* for cases construing these statutes and holding that contributory negligence of the deceased bars recovery on the theory that deceased must have had a right of action had death not ensued.

That the courts construe the wrongful death statutes to protect the relational interest[16a] of the surviving relative is found in those cases mentioned above where recovery was permitted in spite of a prior settlement of the deceased's claim for injuries.[17] A similar protection is found in a recent Pennsylvania case[18] which permitted a recovery by a father against the estate of a deceased daughter's husband for the daughter's death due to the husband's negligence. In Pennsylvania, a woman may not maintain a suit for a personal tort against her husband. However, this disability did not prevent recovery for the loss of pecuniary benefits which the father would have received from the deceased daughter had death not intervened. Clearly, this is not a recovery for the injuries received by the deceased. It is a construction of the Pennsylvania wrongful death statute to effect a protection of the interest of a father in the continued life of a daughter who contributed to his support. Such a construction comports more closely to the purpose of the wrongful death statutes and affords a much-needed protection to a person's interest in the life of a deceased relative.[19]

We also find in the wrongful death cases the usual exceptions to the contributory negligence doctrine. Where the defendant's conduct is wilful or wanton, the negligence of the deceased is not a defense,[20] as in a Virginia case where the defendant's conduct in shooting deceased was regarded as voluntary manslaughter or even second degree murder.[21] In Georgia, it is held that mere negligence on the part of the deceased does not bar recovery for tortious "homicide."[22] It must be borne in mind that the Georgia wrongful death statute is punitive in character and is based altogether on the dependency of the plaintiff.[23] The explanation may be that the defendant's conduct is a

[16a] See Green, *Relational Interests* (1934) 29 ILL. L. REV. 460, 471-3, 481-2.

[17] See note 11, *supra*.

[18] Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936), (1936) 85 U. OF PA. L. REV. 124.

[19] In Nelson v. Galveston, H. & S. A. Ry., 78 Tex. 621, 14 S. W. 1021 (1890), a pregnant woman was injured in a railroad accident, resulting in a miscarriage and the birth of twins, one dying nineteen days later as a result of pre-natal injuries. The parents recovered an item of damages for loss of the child, although the Texas wrongful death statute limits recovery to cases where the deceased might have recovered. Prior to this time, there was no Texas case permitting recovery for pre-natal injuries, so the decision protects the interest of an unborn child in his physical person, as well as recognizing the relational interest of the parents in the life of the infant.

[20] Louisville & N. R. R. v. Orr, 121 Ala. 489, 26 So. 35 (1899); see Scoggins v. Atl. & Portland Cement Co., 179 Ala. 213, 218, 60 So. 175, 177 (1912); Chicago & Alton Ry. v. Stone, 109 Ill. App. 517, 519 (1903); Murphy v. Boston and Me. R. R., 216 Mass. 178, 180, 103 N. E. 291, 292 (1913); Gunn v. Ohio River R. R., 42 W. Va. 676, 686, 26 S. E. 546, 549, 36 L. R. A. 575 (1896).

[21] Matthews v. Warner's Adm'r, 29 Grat. 570, 26 Am. Rep. 396 (Va. 1877); *cf.* Gray v. McDonald, 104 Mo. 303, 16 S. W. 398 (1891).

[22] Hudson v. Devlin, 28 Ga. App. 458, 111 S. E. 693 (1922).

[23] (1922) 11 N. C. L. REV. 98.

wrong different from negligence and so contributory negligence should not constitute a bar. Or it may be that the Georgia court feels that an action created for the benefit of dependents should not be barred, as against a wrongdoer, by the mere contributory negligence of the deceased, and that the wrongful death action does not really depend on the deceased's right of action. Where the statute gives a right of action to named beneficiaries who must show dependency it would seem that the Georgia result should be followed.

Where the case is one for the application of the doctrine of last clear chance, we find that the contributory negligence of the deceased is not a bar, the court applying its customary rules of contributory negligence, including last clear chance, to the wrongful death cases.[24] The doctrine of comparative negligence is dealt with in like fashion. If the law of the state provides for the mitigation of damages where there is contributory negligence, whether that results from a statute or by judicial decision, the doctrine of diminution of damages applies to the contributory negligence of a decedent.[25] In Florida, the state courts have adopted the rule of diminution of damages for contributory negligence,[26] but since that is a matter of general law which the federal courts need not follow under the doctrine of *Swift v. Tyson*,[27] we find a federal court in Florida barring the action of a widow because of the contributory negligence of her deceased husband.[28]

The wrongful death cases also follow the rules of the jurisdiction as to burden of proof of contributory negligence.[29] A few states still retain the common law rule that the burden is on the plaintiff to show that he had acted with due care, and, in those jurisdictions, the burden of showing that the deceased was not negligent is on the plaintiff.[30]

[24] Alabama G. S. R. R. v. Burgess, 116 Ala. 509, 22 So. 913 (1897); see Weatherly v. Nashville, C. & St. L. Ry., 166 Ala. 575, 581, 51 So. 959, 961 (1909); Holwerson v. St. L. & Suburban Ry., 157 Mo. 216, 57 S. W. 770, 771 (1900) (humanitarian doctrine); Kalify v. Udin, 52 R. I. 191, 159 Atl. 644 (1932) (dissenting opinion).

[25] Florida Cent. & P. R. R. v. Foxworth, 41 Fla. 1, 25 So. 338 (1899); Chicago & A. R. R. v. Fietsam, 123 Ill. 518, 15 N. E. 169 (1888); Artenberry v. Southern Ry., 103 Tenn. 266, 52 S. W. 878 (1899). In Caine v. St. Louis-S. F. Ry., 209 Ala. 181, 95 So. 876 (1923), the comparative negligence doctrine of Oklahoma was applied in an Alabama action for a wrongful death in Oklahoma.

[26] Florida Cent. & P. R. R. v. Foxworth, 41 Fla. 1, 25 So. 338 (1899).

[27] 16 Pet. 1, 10 L. ed. 865 (1842). See Waterman, *The Nationalism of Swift v. Tyson* (1933) 11 N. C. L. REV. 125; Black and White Taxicab and Trans. Co. v. Brown and Yellow Taxicab Co., 276 U. S. 518, 48 Sup. Ct. 404, 72 L. ed. 681 (1928), (1928) 7 N. C. L. REV. 48.

[28] Stringfellow v. Atlantic C. L. R. R., 64 F. (2d) 173 (C. C. A. 5th, 1933), Hutcheson, J., dissenting on ground that the federal courts should follow the state rule, especially in this case as the Florida statute provides for diminution of damages for contributory negligence of injured or deceased person.

[29] For collection of cases see (1911) 33 L. R. A. (N.S.) 1085 *et seq.*

[30] Kotler v. Lalley, 112 Conn. 86, 151 Atl. 433 (1930), (1931) 44 HARV. L. REV. 292.

But in most states, contributory negligence is a matter of defense, and this applies to wrongful death actions.[31] To assist the plaintiff, some courts indulge in the presumption, in the absence of witnesses, that the deceased was exercising care for his own safety.[32]

Imputed Negligence in Wrongful Death Cases.

It is apparent from the discussion thus far that the rules governing contributory negligence in any particular jurisdiction, with such exceptions or extensions as are found, may be applied to the decedent in wrongful death cases. Thus the doctrine of imputed negligence may be used, in a proper case, to hold the deceased guilty of contributory negligence barring recovery for wrongful death.

While the general rule is that the negligence of a driver of a vehicle is not imputed to a guest or passenger, there are two exceptions: (1) cases in which the driver is the servant or agent of the guest or passenger and (2) the "joint enterprise" cases.[33] If the guest or passenger is killed in an accident resulting from the concurring negligence of the defendant and of the driver of the vehicle in which the deceased is riding, the action for wrongful death cannot be maintained in cases falling within these two exceptions, because the passenger or guest could not have recovered for personal injuries, if death had not occurred.

In cases involving children too young to exercise care for their own safety, the general rule is that the negligence of a parent or custodian will not be imputed to the child to prevent recovery by the child for injuries received from the defendant's negligent conduct.[34] Courts, in repudiating the doctrine of imputed negligence in these cases of children of tender years, talk of visiting the sins of the parents upon innocent children, and recognize that there are two negligent parties responsible for the child's injury. Theoretically, the child could sue either negligent party, and the defendant cannot complain if he is held for his wrongful act or neglect proximately causing the child's injury. However, there are a few jurisdictions where the identification doctrine of *Hartfield v. Roper*[35] still prevails to prevent a child of tender years from recovering from a negligent defendant if the parent or custodian of the child has been negligent in the care of the child.

[31] Washington & G. R. R. v. Gladmon, 15 Wall. 401, 21 L. ed. 114 (1872); Williams v. East St. L. Ry., 100 S. W. (2d) 51 (Mo. 1936).

[32] Adams v. Bunker Hill & Sullivan Min. Co., 12 Idaho 637, 89 Pac. 624 (1906), 11 L. R. A. (N.S.) 844 (1908); Brown v. West Riverside Coal Co., 143 Iowa 662, 120 N. W. 732 (1909).

[33] For general discussion see Note, *Liability of Passenger in Automobile for Negligence of Driver* (1934) 12 N. C. L. REV. 385; HARPER, LAW OF TORTS, §148.

[34] For collection of authorities see Note (1921) 15 A. L. R. 414.

[35] 21 Wend. 615, 34 Am. Dec. 273 (N. Y. 1839).

Thus the negligence of the parent or custodian has the same effect as the child's own want of due care would have had if he were an adult. But the doctrine of *Hartfield v. Roper* has no application at the present time to a case where the child is capable of exercising care and is actually free from personal negligence. To the above extent, the doctrine of imputed negligence is applied in wrongful death cases where children are killed.[36]

These cases, involving a restricted application of imputed negligence, must be distinguished from the cases to be discussed in the next part, where a negligent parent is denied recovery for the death of a child on other grounds.

II. CONTRIBUTORY NEGLIGENCE OF BENEFICIARIES[36a]

If the deceased was not guilty of any personal negligence so that he might have maintained an action for his injuries had he survived, and if the doctrine of imputed negligence is limited according to the discussion in the above section so that the negligence of a surviving spouse, parent or custodian is not imputed to the deceased, there still remains a troublesome question. Is the right of action created by the wrongful death statute barred by the contributory negligence of one or all of the beneficiaries? In *Hazel v. Hoopeston-Danville Motor Bus Company*,[37] a husband sued as administrator of his deceased wife's estate under the Illinois wrongful death statute. While riding in an automobile driven by the husband, the deceased was fatally injured as a result of the concurring negligence of the husband and of the defendant. Besides her husband, the deceased was survived by five children. The husband's contributory negligence being admitted, the court had to decide upon the extent to which recovery under the wrongful death statute should be affected, reaching the conclusion that there should be no recovery.

The courts, in dealing with the above problem of contributory negligence of beneficiaries in wrongful death cases, have had a number of different and competing solutions to choose from. These may be grouped for convenience, as follows:

1. The contributory negligence of beneficiaries is immaterial.
2. The contributory negligence of one beneficiary bars all recovery.

[36] Slattery v. O'Connell, 153 Mass. 94, 26 N. E. 430 (1891); Grant v. Fitchburg, 160 Mass. 16, 35 N. E. 84 (1893); Huerzeler v. Central Cross Town R. R., 139 N. Y. 490, 34 N. E. 1101 (1893); Kieley v. New York C. R. R., 86 Misc. 490, 149 N. Y. Supp. 299 (1914). In Feldman v. Detroit United R. R., 162 Mich. 486, 127 N. W. 687 (1910), the court, although it denies the application of the doctrine of imputed negligence to cases where the child's injury does not result in death, approves the imputing of the parent's contributory negligence to a deceased child in a wrongful death case.

[36a] For general discussion see TIFFANY, DEATH BY WRONGFUL ACT (2d ed. 1913) §§69-72; Notes (1923) 23 A. L. R. 648, 655, 670.

[37] 310 Ill. 38, 141 N. E. 392 (1923).

3. Where the sole beneficiary is negligent, there can be no recovery, whether the action is brought in his own name or by the personal representative of the deceased's estate.

4. Where one of several beneficiaries is negligent, recovery is barred to the extent of his interest.

1. *The contributory negligence of beneficiaries is immaterial.*

To sustain this conclusion, it has been argued that the wrongful death statute prescribes the terms upon which an action may be brought, that the principal condition—discussed above in Part I—is the right of the decedent to have recovered damages for his injury, if death had not occurred, that since this is a statutory action, the court should not impose conditions which are not made specific by the words of the statute, and that, consequently, the contributory negligence of a beneficiary, even if the sole beneficiary, has no effect on the cause of action.[38]

The New York court develops this argument. "There can be no doubt that the plaintiff's negligence would not have defeated a recovery by the wife if she had lived. Her cause of action abated upon her death, but the legislature has substituted a new action and has specified the condition upon which it may be maintained, *i.e.*, the right of the injured person to maintain an action if death had not ensued. While the measure of damages is different . . . the right of the personal representative to recover depends solely on the right of the injured person to recover, if living, unless we are to read something into the statute."[39]

"The statute incorporates one limitation. . . . The evident meaning of this phrase is to prevent recovery where the decedent himself was guilty of causing his own death or where there had been no breach of duty on the part of the defendant."[40]

Another argument advanced for this result is that the action seeks to recover damages in the right of the deceased and not in the right of the parents or surviving spouse, who are statutory beneficiaries. Their right is by inheritance from the estate of the deceased, the recovery being assets of the deceased's estate. Consequently, if the deceased could have recovered, had he survived, his administrator may recover the full amount of damages which the estate sustained, regardless of the contributory negligence of beneficiaries.[41] This argument

[38] Hines v. McCullers, 121 Miss. 666, 83 So. 734 (1920); McKay v. Syracuse Rapid Transit Co., 208 N. Y. 359, 101 N. E. 885 (1913); Emery v. Rochester Telephone Co., 271 N. Y. 306, 3 N. E. (2d) 434 (1936).

[39] McKay v. Syracuse Rapid Transit Co., 208 N. Y. 359, 363, 101 N. E. 885, 886 (1913).

[40] Emery v. Rochester Telephone Co., 271 N. Y. 306, 3 N. E. (2d) 434, 436 (1936).

[41] Wymore v. Mahaska County, 78 Iowa 396, 43 N. W. 264 (1889).

has been developed in those states where the statute designates the executor or administrator as party plaintiff and provides that the amount of the judgment shall form part of the estate of the decedent and be distributed as assets thereof.[42] In the leading case of *Warren v. Manchester Street R. R.*, the New Hampshire court stated this proposition in the following terms:

"This action, brought by the administrator of the child's estate, is for the benefit of the estate and not, as the defendants claim, for the

[42] I. Statutes providing for distribution of recovery as assets of the deceased's estate:

ALA. CODE ANN. (Michie, 1928) §5696 (dealing with actions by executor or administrator for death of an adult); ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §§944-946; ARK. DIG. STAT. (Crawford & Moses, 1919) §§1073-1075; CAL. CODE CIV. PROC. (Deering, 1931) §377 (providing for suit by heirs or personal representative for death of adult); COLO. STAT. ANN. (Michie, 1935) c. 97, §§96, 97 (if action is brought by husband or wife of deceased the judgment shall be distributed under the statute of distributions); CONN. GEN. STAT. (Rev. 1930) §5987; GA. CODE (1933) cc. 105-13; IDAHO CODE ANN. (1932) tit. 5, §311 (providing for suit by heirs or personal representative in an action for death of an adult); ILL. REV. STAT. (Cahill, 1933) c. 70, §§1, 2; IND. STAT. ANN. (Burns, 1933) Vol. 2, §404; IOWA CODE (1935) §11,920; KAN. GEN. STAT. ANN. (Corrick, 1935) c. 60, §3203; MICH. COMP. LAWS (1929) §§14,061, 14,062; MINN. STAT. (Mason, Supp. 1936) §9657; NEB. COMP. STAT. (1929) c. 30, art. 8, §§809, 810; N. C. CODE ANN. (Michie, 1935) §160; N. D. COMP. LAWS ANN. (1913) §§8321-8324; OKLA. STAT. ANN. (1937) tit. 12, §§1053, 1054; ORE. CODE ANN. (1930) Vol. 1, tit. 5, §703; PA. STAT. ANN. (Purdon, 1936) §§1601-1604; UTAH REV. STAT. ANN. (1933) tit. 13, c. 3, §§10, 11; VT. PUB. LAWS (1933) §§2859, 2860; W. VA. CODE (1931) p. 1346, §§5, 6; WYO. REV. STAT. (1931) c. 89, §§403, 404.

II. Statutes providing for: (A) Suit by named beneficiary who receives proceeds of judgment, or (B) Suit by administrator or executor who maintains the action for the benefit of certain named beneficiaries who receive proceeds of judgment:

ALA. CODE ANN. (Michie, 1928) §5695 (providing for suit by father or mother in case of death of minor child); CAL. CODE CIV. PROC. (Deering, 1931) §376 (providing for suit by father or mother for death of minor child, or suit by guardian for death of ward); COLO. STAT. ANN. (Courtwright Mills, 1930) §§2178-2180 (where father or mother sues for death of minor child the parents shall share equally in the judgment); IDAHO CODE ANN. (1932) tit. 5, §310 (providing for suit by father or mother in an action for death of minor child or by guardian for death of ward); DEL. REV. CODE (1935) §4638; FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) §§7047-7049; KY. STAT. ANN. (Carroll, 1936) §6; LA. CIV. CODE ANN. (Dort, 1932) art. 2315; ME. REV. STAT. (1930) c. 101, §§9, 10; MD. CODE ANN. (Flack, 1935) art. 67, §1; MASS. LAWS ANN. (1933) Vol. 7, c. 229, §5; MISS. CODE ANN. (1930) §§510, 511; MO. REV. STAT. (1929) §§3263, 3264; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §§9075, 9076; NEV. COMP. LAWS (Hillyer, 1929) §§9194, 9195; N. J. COMP. STAT. (1911) Vol. 2, pp. 1907, 1908; N. M. STAT. ANN. (Courtright, 1929) c. 36, §§102-104; N. Y. CONSOL. LAWS (Cahill, 1930) c. 13, §§130-134; OHIO CODE ANN. (Throckmorton, 1929) §§10,770, 10,772; R. I. GEN. LAWS (1923) §4862; S. C. CODE ANN. (Michie, 1932) §§411-414; S. D. COMP. LAWS (1929) §§2929, 2931; TENN. CODE ANN. (Williams, 1934) §8236; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) arts. 4671-4673, 4675; VA. CODE ANN. (Michie, 1936) §§5786-5788; WASH. REV. STAT. ANN. (Remington, 1932) Vol. 2, §§183, 183(i); WIS. STAT. (1931) c. 331, §§.03, .04, .045.

Of the above statutes, those of Colorado, Kentucky, Maine, Nevada and New Mexico contain a general provision for distribution according to the statutes of descent or distribution in cases where none of the named beneficiaries is in existence.

benefit of the father. The fact that the father will be indirectly benefitted is only an incident of the suit. Had the child survived, the action would have been brought in his own name. The father's cause of action would have been what it is now,—case for the loss of the child's service. The child's cause of action survived by reason of the statute, and the money recovered in it will be assets in the hands of its administrator, to be distributed in accordance with the special provisions of the statute. If the father's negligence barred his right to recover in this action, there would seem to be no reason why it would not bar him from recovering any property of the child which he might inherit under the general provisions relating to descent and distribution; but this is not claimed to be and is not the law. The evidence of the father's negligence was properly excluded. . . ."[43]

It should be pointed out that the New Hampshire statute, under which the above case was decided, is a survival statute, but, in the absence of a Lord Campbell's Act in that state, it serves a dual purpose and covers wrongful death actions.

Even the time-worn proximate cause formula is called upon to support the view that the negligence of a beneficiary is immaterial. In an early Virginia case, we find the following:

"But that [parent's contributory negligence] is a wholly immaterial question in this action. When the suit is by a parent for the loss of service caused by an injury to the child, the contributory negligence of the plaintiff is a good defense; but such negligence is not imputable to the child, and is consequently not to be considered when the suit is by the child or its personal representative. . . . Hence, when the facts are such that the child could have recovered had his injuries not been fatal, his administrator may recover, without regard to the negligence or presence of the parents at the time the injuries were received, and although the estate is inherited by the parents. Of course, it is essential to a recovery in any case that negligence on the part of the defendant be shown. But, when that is proven in a suit by the child, the parents' negligence is no defense, because it is regarded, not as a proximate, but as a remote, cause of the injury."[44]

A later Virginia case,[45] however, refuses to adhere to this conclusion and points out that the broad language quoted above was not necessary, because the court had already decided that the charge of contributory negligence against the parent was not sustained by the evidence.

In Alabama, there are two lines of cases decided under different sections of the Alabama wrongful death statute. Where the action is

[43] 70 N. H. 352, 47 Atl. 735, 738 (1900).
[44] Norfolk & W. R. R. v. Groseclose's Adm'r, 88 Va. 267, 270, 13 S. E. 454, 455 (1891).
[45] Richmond, F. & P. Ry. v. Martin's Adm'r, 102 Va. 201, 45 S. E. 894 (1903).

brought by the administrator or executor of the deceased's estate, the contributory negligence of beneficiaries is held to be immaterial,[46] but where suit is brought by a named beneficiary, his contributory negligence will bar recovery.[47] However, in a Missouri case, the contributory negligence of a father was held to be immaterial although the action was brought by the father and mother jointly.[48] In most jurisdictions which treat the beneficiary's negligence as immaterial,[49] the action is given to the executor or administrator.[50] It may be worth noting that the cases discussed above are not limited to actions where parents have been negligent in caring for young children, but extend to cases of negligence by a surviving spouse, who is nevertheless permitted to participate in a recovery of damages.[51]

In our previous discussion of the purpose of Lord Campbell's Act, it was shown that the legislature was seeking to protect the interests of relatives of a deceased person in his continued existence, as well as providing for the survival of personal actions. In the cases discussed, the courts have recognized the distinction between the two purposes. If Lord Campbell's Act merely gave protection to the personality of the deceased, all defenses against the deceased would logically be valid against his administrator, and the negligence of beneficiaries, unless chargeable to the deceased, would logically not affect the wrongful death action. On the other hand, if the statute merely gave protection to the interests of surviving relatives—and if courts were strictly logical—the negligence of the deceased would be immaterial, and the negligence of beneficiaries might bar recovery. Thus the solution that the negligence of a beneficiary is immaterial, while based on a strict and literal construction of the wrongful death statute, is, paradoxically, liberal in its effect, by giving the fullest protection to the interests of surviving relatives.

[46] Southern Ry. v. Shipp, 169 Ala. 327, 53 So. 150 (1910); City of Birmingham v. Crane, 175 Ala. 90, 56 So. 723 (1911).

[47] Alabama Power Co. v. Stogner, 208 Ala. 666, 95 So. 151 (1923); Alabama Utilities Service Co. v. Hammond, 225 Ala. 657, 144 So. 822 (1932).

[48] Herrell v. St. Louis-San Francisco Ry., 324 Mo. 38, 23 S. W. (2d) 102 (1929).

[49] Nashville Lumber Co. v. Busbee, 100 Ark. 76, 139 S. W. 301 (1911); Danforth v. Emmons, 124 Me. 156, 126 Atl. 821 (1924); Love v. Detroit, J. & C. Ry., 170 Mich. 1, 135 N. W. 963 (1912); Consolidated Traction Co. v. Hone, 59 N. J. Law 275, 35 Atl. 899 (1896); Van Clik v. Hackensack Water Co., 2 N. J. Misc. 1140, 126 Atl. 634 (1924); Bastedo v. Frailey, 109 N. J. Law 390, 162 Atl. 621 (1932); Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350 (1887); Bloomquist v. City of Le Grande, 120 Ore. 19, 251 Pac. 252 (1926); Watson v. Southern Ry., 60 S. C. 47, 44 S. E. 375 (1903).

[50] For wrongful death statutes see note 42, *supra*.

[51] Van Clik v. Hackensack Water Co., 2 N. J. Misc. 1140, 126 Atl. 634 (1924); Bastedo v. Frailey, 109 N. J. Law 390, 162 Atl. 621 (1932); McKay v. Syracuse Rapid Transit Co., 208 N. Y. 359, 101 N. E. 885 (1913); Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350 (1887).

2. Contributory negligence of one beneficiary bars all recovery.

In the Illinois case of *Hazel v. Hoopeston-Danville Motor Bus Company*,[52] mentioned above, the deceased wife was guilty of no personal negligence, which would have barred her recovery. Neither was the husband's negligence imputed to her for that purpose. The question was whether the action created by the statute in favor of the deceased wife's personal representative is barred by the contributory negligence of her surviving husband. The Illinois court adopted the second of the four solutions and decided that the action was not maintainable, although there were five children surviving, all innocent beneficiaries.

In discussing the analogous situation where the negligence of parents contributes to the death of a child, the court states that the negligence of the parents bars the action, (1) not because it is a failure of duty to the child, (2) not because of imputed negligence and (3) not because of the reason often advanced that no man may profit by his own wrong.

"The reason that the negligence of the parent of an infant decedent, or of any beneficiary, is a bar to the action of the administrator, is that, the action being for damages caused to the beneficiary by the negligence of the defendant, it has been the theory of the common law in every such case that the contributory negligence of the person suffering the damages is a complete defense to the person negligently causing the injury . . . no man may recover damages for an injury to himself or his property which he himself was a material instrument in causing. The principle applies, not only to suits for damages for the death of minor children caused by negligence where the parent has himself been negligent, but to every case under the act authorizing the recovery of damages for death caused by a wrongful act, whether the relation of the deceased and the next of kin was that of parent and child, husband and wife, brother and sister, or other relation, whether the deceased was in the care of the next of kin or not, and whether the deceased was an adult or minor."[53]

This argument must be viewed in the light of the court's further point that a wrongful death action is a single cause of action. The jury finds a single gross amount in an inseparable cause of action, and therefore the contributory negligence of one beneficiary entitled to share in the amount recovered, is a defense to the action. This reasoning would apply to the typical wrongful death statute which, as in Illinois, provides for a single assessment of damages in a gross amount.[54]

[52] See note 37, *supra*. [53] *Id.* at 45, 141 N. E. at 395.

[54] In Ohio, the jury is authorized to give damages to the persons, respectively, for whose benefit the action is brought, proportioned to the pecuniary injury suffered by each as a result of the death. OHIO CODE ANN. (Throckmorton, 1929) §10772. In Virginia, the jury may award such damages as to it may seem fair and just, not exceeding $10,000, and may direct in what proportion they shall be distributed to those entitled under the statute. VA. CODE ANN. (Michie, 1936)

In Pennsylvania, which likewise prevents any recovery where there is a negligent parent-beneficiary, the court uses the doctrine of imputed negligence, basing its argument on the existence of the family relation by which each parent at all times impliedly authorizes the other to act for him or her in the common care and control of their children, so that each becomes responsible for the acts of the other in that respect. Mestrezat, J., in a strong dissent in the leading Pennsylvania case[55] in point, criticizes in general this doctrine of imputable negligence, as erroneous where no agency relation existed, and as unwarranted in a wrongful death action by a surviving mother for the death of a child to which the deceased husband's negligence contributed. He distinguishes those Pennsylvania cases where—both parents surviving—the right of action for the death of a child is in both parents jointly, and therefore the negligence of both or of either will defeat the joint action.

The doctrine of imputed negligence is so generally repudiated today that the Pennsylvania decision is subject to criticism for retaining it even in wrongful death cases where parents have been negligent in the care of minor children. The Illinois explanation of a single cause of action as a basis for barring recovery where a beneficiary is negligent, is much to be preferred to imputed negligence. If a court in construing a wrongful death statute reaches the conclusion that there should be no recovery, it is better to put the conclusion on an interpretation of the statute and not on a repudiated doctrine. That there can be no recovery is a conclusion which prevails in only a few jurisdictions[56] and is out of line with the beneficial purposes of the wrongful death acts.

3. *Negligence of sole beneficiary bars recovery.*

While there are a few jurisdictions which hold that the contributory negligence of beneficiaries is not material and will not bar recovery (discussed in (1) above), the great majority of cases and authorities agree that a sole beneficiary, who negligently contributes to the injury,

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§5787. No other statutes were found which authorized the jury to apportion damages among beneficiaries.

[55] Darbrinsky v. Pennsylvania Co., 248 Pa. 503, 94 Atl. 269 (1915).

[56] Ohnesorge v. Chicago City Ry., 259 Ill. 424, 102 N. E. 819 (1913); Edwards v. Negley, 193 Ill. App. 426 (1914); Hazel v. Hoopeston-Danville Motor Bus Co., 310 Ill. 38, 141 N. E. 392 (1926); Garnhart v. Reeves, 288 Ill. App. 159, 5 N. E. (2d) 855 (1937); Darbrinsky v. Pennsylvania Co., 248 Pa. 503, 94 Atl. 269 (1915); Morningstar v. North East Penn. R. R., 290 Pa. 14, 137 Atl. 800 (1927). *Cf.* Garabedian v. Worcester Consol. St. Ry., 225 Mass. 65, 113 N. E. 780 (1916) (Administrator must show due care of custodian of deceased child. At the time the case was decided, this was necessary to avoid a directed verdict, but today the custodian's lack of due care is a matter of defense.); Hendricks v. Monongahela West Penn. Pub. Serv. Co., 111 W. Va. 576, 163 S. E. 411 (1932) (negligence of father or custodian will prevent recovery by father as administrator).

cannot recover, whether the action is brought in his own name[57] or by the deceased's personal representative.[58] According to cases holding this view, if suit is brought by a parent in his own name, and if the rule of imputed negligence is not employed,[59] it is necessary that the parent, in order to recover damages for the death of a child from the wrongful act of the defendant, should be free from negligence contributing to the child's injury. The parent's negligence which constitutes a good defense is simply the contributory negligence of the plaintiff in the case.[60] "The true rule, which no amount of amplification can simplify, is that whenever the negligence of the plaintiff contributes proximately to cause the injury of which he complains, the defendant is not liable unless the defendant discovered the peril in time to have avoided injury by the use of ordinary care."[61] In this quotation, we also find the last clear chance exception[62] to the common law doctrine of contributory negligence.

In a number of decisions, there is an attempt to explain the result in wrongful death cases by the analogy of actions for loss of services where injury does not result in death. A father suing for loss of services cannot recover if his negligence contributes to the injury, for the reason that recovery should not be allowed in favor of a wrongdoer—that the policy of the law forbids that one shall reap a benefit from his own misconduct. When suit is brought by an adminis-

[57] Baker v. Dallas Hotel, 73 F. (2d) 825 (C. C. A. 5th, 1934); Ala. Power Co. v. Stogner, 208 Ala. 666, 95 So. 151 (1923); Ala. Utilities Co. v. Hammond, 225 Ala. 657, 144 So. 822 (1932); St. Louis & S. Ry. v. Cochran, 77 Ark. 398, 91 S. W. 747 (1906); Indianapolis St. Ry. v. Antrobus, 33 Ind. 663, 71 N. E. 971 (1904); Wise v. Eubanks, 159 So. 161 (La. 1935); Tucker v. Draper, 62 Neb. 66, 86 N. W. 917 (1901); Missouri K. & T. Ry. v. Perimo, 89 Okla. 136, 214 Pac. 907 (1923); Vinnette v. Northern Pac. Ry., 47 Wash. 320, 91 Pac. 975 (1907); Potter v. Potter, 272 N. W. 34 (Wis. 1937). See Brown McClain Co. v. Major's Adm'r, 251 Ky. 741, 65 S. W. (2d) 992, 994 (1933).

[58] Kenna v. United Railroads, 57 Cal. App. 124, 207 Pac. 35 (1922); Mills Adm'r v. Cavanaugh, 29 Ky. L. Rep. 685, 94 S. W. 651 (1906); Feldman v. Detroit United Ry., 162 Mich. 486, 127 N. W. 687 (1910); Jenson v. Glemaker, 195 Minn. 556, 263 N. W. 624 (1935); Scherer v. Schlaberg, 18 N. D. 421, 122 N. W. 1000 (1909); O'Shea v. Lehigh Valley R. R., 79 N. Y. Supp. 890 (1903); Wolf v. Lake Erie & W. Ry., 55 Ohio St. 517, 45 N. E. 708 (1896); Richmond, F. & P. Ry. v. Martin's Adm'r, 102 Va. 201, 45 S. E. 894 (1903); Reid v. Medley's Adm'r, 118 Va. 462, 87 S. E. 616 (1916); Ratcliff v. McDonald's Adm'r, 123 Va. 781, 97 S. E. 307 (1918); Erikson v. Wisconsin Hydro-Electric Co., 214 Wis. 614, 254 N. E. 106 (1934); see Sandel v. State, 115 S. C. 168, 174, 104 S. E. 567, 568 (1920); Crawford v. Simons-Mayrant Co., 141 S. C. 334, 346, 139 S. E. 788, 792 (1927).

[59] If an agency relationship may be found to exist between parents and a child's custodian, negligence of the custodian may be imputed to the parents to bar recovery. Kuchler v. Milwaukee Elec. Ry., 157 Wis. 107, 146 N. W. 1133 (1914). *Contra:* Reynolds v. Kinyon, 222 S. W. 476 (Mo. 1920); Carnev v. Chicago, R. I. & P. Ry., 323 Mo. 470, 23 S. W. (2d) 993 (1929); Clinchfield Coal Corp. v. Webber, 165 Va. 49, 181 S. E. 357 (1935).

[60] Indianapolis St. Ry. v. Antrobus, 33 Ind. 663, 71 N. E. 971 (1904).

[61] St. Louis & S. Ry. v. Cochran, 77 Ark. 398, 401, 91 S. W. 747, 748 (1906).

[62] Czezewzka v. Benton-Belle Fontaine Ry., 121 Mo. 201, 25 S. W. 911 (1894).

trator,[63] instead of by the negligent beneficiary in person, the majority of cases treats the administrator as a trustee or mere nominal party, and the conduct which matters is that of the substantial plaintiff or beneficiary. In a leading Ohio case, this rather simple problem was adequately analyzed, as follows:

"As the parent cannot recover for loss of services when he himself contributed to the injury which caused the loss, can the intervention of the personal representative, who is a mere trustee, having no interest, either for himself or the estate he represents, shield him from the usual consequences of such negligence? I should say not. The damages for loss of services and those arising from the wrongful death are the same in principle, and should be governed by the same rules as to defenses. The damages for wrongful death are such as are proportioned to the pecuniary injury resulting to the parent from the injury to the child. If the parent, by his negligence, contributes towards the injury which causes the death of the child, he is equally guilty with the other party who, by his negligence, caused the injury; and when both parties by their combined negligent acts, bring about an injury, neither party can sustain an action for damages against the other. To award damages to a parent guilty of contributory negligence in such cases would permit him to profit by his own wrong, and besides it would be in direct conflict with the universal rule as to contributory negligence."[64]

Where the community system of property prevails, the courts also reach the result that the contributory negligence of the sole beneficiaries bars recovery. A California case[65] held that a father's action, brought as administrator for the death of a child, would be defeated by the contributory negligence of the mother, because, in caring for the child, the mother represented and acted for the community and for the husband as the head of the community. Therefore her negligence became the negligence of the husband barring recovery. Adopting another line of reasoning, the Washington court[66] argued that the sum recovered by a parent for death of a child belongs to the community, that damages recovered for the benefit of one spouse would belong half to the other spouse, who, if guilty of contributory negligence, would thus be allowed to profit by his own wrong.[67]

4. *Negligence of one of several beneficiaries bars recovery to the extent of his interest.*

If any proposal can be said to represent the prevailing view in these wrongful death cases, the above statement may be so designated. In 1908, when Mr. Wigmore urged the desirability of apportioning damages for the benefit of those beneficiaries who were not negligent, he

[63] See note 58, *supra.*
[64] Wolf v. Lake Erie & W. Ry., 55 Ohio St. 517, 45 N. E. 708, 710 (1895).
[65] Kenna v. United Railroads, 57 Cal. App. 124, 207 Pac. 35 (1922).
[66] Crevelli v. Chicago, M. & St. P. R. R., 98 Wash. 42, 167 Pac. 66 (1917).
[67] Vinnette v. Northern Pac. Ry., 47 Wash. 320, 91 Pac. 975 (1907).

found little support in the decisions.[68] Today Mr. Wigmore's argument finds growing favor and cases in many jurisdictions enable innocent beneficiaries to participate in the damages, while excluding negligent beneficiaries.[69]

The courts which adhere to this solution agree that the negligence of parents or other beneficiaries cannot be imputed to the deceased to support the plea of contributory negligence, but that when the action is for the benefit of the parent or other beneficiary, whether brought in the beneficiary's name[70] or brought by the personal representative[71] of the deceased in behalf of named beneficiaries, the contributory negligence of the parent or other beneficiary can be shown as a bar to the extent of his own recovery. A named beneficiary may be regarded as having an independent right of action, which is not subject to impairment, except by his own wrongful conduct. When there are innocent beneficiaries, the argument that the negligent beneficiary should not profit by his own wrong, that it would be wrong to permit him to put money into his pocket for damages caused by his own negligence, is a convincing one to the extent of precluding recovery by him. But this should not affect the innocent beneficiaries, and they should be permitted to recover to the extent of their interests. This conclusion

[68] Wigmore, *Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death* (1908) 2 ILL. L. REV. 487 (relying on Wolf v. Lake Erie & W. Ry., 55 Ohio St. 517, 45 N. E. 708 (1896)).

[69] Southern Pac. Co. v. Day, 38 F. (2d) 958 (C. C. A. 9th, 1930); Bowen v. Kizirian, 105 Cal. App. 286, 287 Pac. 570 (1930); Phillips v. Denver City Tramway Co., 53 Colo. 458, 128 Pac. 460 (1912); Atlanta & C. A. L. Ry. v. Gravitt, 93 Ga. 369, 20 S. E. 550 (1894); Donk Bros. Coal & Coke Co. v. Leavitt, 109 Ill. App. 385 (1903); Chicago City Ry. v. McKeon, Adm'r, 143 Ill. App. 598 (1908); Cleveland, C. C. & St. L. Ry. v. Bossert, 44 Ind. App. 245, 87 N. E. 158 (1909); Kokesh v. Price, 136 Minn. 304, 161 N. W. 715 (1917); White v. National Lead Co., 99 S. W. (2d) 535 (Mo. App. 1936); Davis v. Seaboard A. L. Ry., 136 N. C. 115, 48 S. E. 591 (1904); Cleveland, C. C. & St. L. Ry. v. Grambo, 107 Ohio St. 471, 134 N. E. 648 (1921); Wilson v. Clarendon County, 139 S. C. 333, 138 S. E. 33 (1927); Horne v. Atlantic C. L. Ry., 177 S. C. 461, 181 S. E. 642 (1935); Fisher v. J. H. Sheridan Co., 182 S. C. 316, 189 S. E. 356 (1936); Anderson v. Memphis St. Ry., 143 Tenn. 216, 227 S. W. 39 (1921); City of Danville v. Howard, 156 Va. 32, 157 S. E. 733 (1931); see Town of Flagstaff v. Gomez, 23 Ariz. 184, 202 Pac. 401, 406 (1921); Harton v. Forest City Tel. Co., 141 N. C. 455, 466, 54 S. E. 299, 303 (1906); Wolf v. Lake Erie & W. Ry., 55 Ohio St. 517, 45 N. E. 708, 711 (1896).

[70] Bowen v. Kizirian, 105 Cal. App. 286, 287 Pac. 570 (1930); Atlanta & C. A. L. Ry. v. Gravitt, 93 Ga. 369, 20 S. E. 550 (1894); Donk Bros. Coal and Coke Co. v. Leavitt, 109 Ill. App. 385 (1903); White v. National Lead Co., 99 S. W. (2d) 535 (Mo. App. 1936).

[71] Southern Pac. Co. v. Day, 38 F. (2d) 958 (C. C. A. 9th, 1930); Phillips v. Denver City Tramway Co., 53 Colo. 458, 128 Pac. 460 (1912); Chicago City Ry. v. McKeon, 143 Ill. App. 598 (1908); Cleveland, C. C. & St. L. Ry. v. Bossert, 44 Ind. App. 245, 87 N. E. 158 (1909); Kokesh v. Price, 136 Minn. 304, 161 N. W. 715 (1917); Davis v. Seaboard A. L. Ry., 136 N. C. 115, 48 S. E. 591 (1904); Cleveland, C. C. & St. L. Ry. v. Grambo, 107 Ohio St. 471, 134 N. E. 648 (1921); Horne v. Atlantic C. L. Ry., 177 S. C. 461, 181 S. E. 642 (1935); Anderson v. Memphis St. Ry., 143 Tenn. 216, 227 S. W. 39 (1921); City of Danville v. Howard, 156 Va. 32, 157 S. E. 733 (1931).

follows from a consideration of the purpose of the wrongful death statutes, which are remedial in character and impose liability on wrongdoers for injury to surviving relatives. If a child is killed as a result of the concurring negligence of the father and the defendant, the latter should not be able to escape liability to the mother for the loss which she has suffered at the hands of joint wrongdoers.[72] She should be able to sue either her husband or the defendant, unless considerations of policy prevent.

This proposal for apportionment of damages does not substantially increase the difficulty of the jury's task. They usually consider the pecuniary losses suffered by the beneficiaries in any wrongful death case. Under this proposal, they would consider only the losses suffered by those beneficiaries not found guilty of contributory fault. Their verdict would have to be for a gross sum to be distributed among the innocent beneficiaries, and no damages would be awarded on account of negligent beneficiaries.[73] This will usually result in a diminution of damages to the extent of the negligent beneficiary's interest. However, in *Kokesh v. Price*,[74] the Minnesota court held that where the defendant failed to request a reduction in damages for the negligence of one beneficiary, a full recovery would be allowed. In that case, a husband sued as administrator of his deceased wife's estate. His contributory negligence would have acted as a bar to his own share of the judgment, but would not have barred recovery to his children. Because of the defendant's failure to make a proper request, the children thus received more than they would ordinarily have been entitled to. Likewise, a Missouri court refused to diminish damages in a suit by a father and mother, as joint plaintiffs, for the death of a son, the father's negligence contributing thereto. The court held that the contributory negligence of the father was not a defense to the action or any part thereof, on the ground that the father had no separable interest in the cause of action prior to judgment.[75]

[72] Atlanta & C. A. L. Ry. v. Gravitt, 93 Ga. 369, 20 S. E. 550 (1894); Davis v. Seaboard A. L. Ry., 136 N. C. 115, 48 S. E. 591 (1904); Horne v. Atlantic C. L. Ry., 177 S. C. 461, 181 S. E. 642 (1935); City of Danville v. Howard, 156 Va. 32, 157 S. E. 733 (1931).

[73] Phillips v. Denver City Tramway Co., 53 Colo. 458, 128 Pac. 460 (1912) (Action by father and mother for death of child. Held, mother has a one-half interest in the judgment which would be easy for jury to determine, if father found guilty of contributory negligence.); Cleveland, C. C. & St. L. Ry. v. Bossert, 44 Ind. App. 245, 87 N. E. 158 (1909) (jury instructed to reduce damages by amount equal to share of negligent son); Anderson v. Memphis St. Ry., 143 Tenn. 216. 227 S. W. 39 (1921) ($8,000 judgment in favor of mother and daughters reduced to $4,000 for benefit of daughters because of mother's contributory negligence); City of Danville v. Howard, 156 Va. 32, 157 S. E. 733 (1931) (Administrator recovered $5,000 judgment. Reduced to $2,500 for benefit of mother, the father having negligently contributed to son's death.).

[74] 136 Minn. 304, 161 N. W. 715 (1917).

[75] Herrell v. St. Louis-S. F. Ry., 324 Mo. 38, 23 S. W. (2d) 102 (1929)

Effect of parent's consent to illegal employment of minor child.

A kindred doctrine to contributory negligence is found in cases where minors are employed in violation of law but with the consent of their parents. The problem is not important today unless the accident is one that does not come within the scope of workmen's compensation. There are a number of cases denying recovery to a parent who had put a child to work in violation of laws prohibiting the employment of children in dangerous occupations, such as around machinery or in mines. The denial of recovery has been placed on the ground of the contributory negligence of the parent,[76] but the better explanation is the parent's consent to the ordinary risks of the illegal employment. "The father, when he consents, waives the unlawful employment and is estopped from recovery for death from the natural, probable and anticipated consequences of the employment."[77] By these decisions, there can be no recovery to the consenting parent who is the sole beneficiary,[78] and, in a West Virginia case, recovery was denied to a consenting father suing as administrator, although there were other beneficiaries.[79]

The Minnesota court, however, has construed its statute prohibiting the employment of minors in certain dangerous employments as taking from the employer all defenses except the defense provided in the statute of obtaining and keeping on file an affidavit of the parent or guardian to the effect that the child is not less than sixteen. This is the only way that an employer can relieve himself of the charge of violating the statute, and, since the statute definitely expresses the state's policy against children working in dangerous occupations, the defenses of contributory negligence or assumption of risk by the child are not available and neither is the fact that the boy and his parents misrepresented his age to the employer, although the parents are the beneficiaries of the action.[80]

[76] Dickinson v. Stuart Colliery Co., 71 W. Va. 325, 76 S. E. 654 (1912).

[77] Wills v. Montfair Gas Coal Co., 97 W. Va. 476, 480, 125 S. E. 367, 368 (1924).

[78] Lee v. New River & P. C. Coal Co., 203 Fed. 644 (C. C. A. 4th, 1913) (father permitted minor son to work in coal mine for 26 hours without rest or sleep); Missouri, K. & T. Ry. v. Evans, 16 Tex. Civ. App. 68, 41 S. W. 80 (1897); Dickinson v. Stuart Colliery Co., 71 W. Va. 325, 76 S. E. 654 (1912); Daniels v. Thacker Fuel Co., 79 W. Va. 255, 90 S. E. 840 (1916); Wills v. Montfair Gas Coal Co., 97 W. Va. 476, 125 S. E. 367 (1924). Under the Georgia wrongful homicide statute, which gives a right of action to the father or mother personally, there can be no recovery where the parent, entitled to sue, knowingly permitted the child to work in defendant's mill, an employment in violation of statute. Hodges v. Savannah Kaolin Co., 155 Ga. 143, 116 S. E. 303 (1923).

[79] Swope v. Keystone Coal and Coke Co., 78 W. Va. 517, 89 S. E. 284 (1916).

[80] Dusha v. Virginia and R. L. Co., 145 Minn. 171, 176 N. W. 482 (1920), (1923) 23 A. L. R. 635. Accord: Smith v. Jar and Bottle Co., 84 Kan. 551, 114 Pac. 845 (1911).

Conclusion

Section 493 of the Torts Restatement provides, "The effect of the contributing negligence of a beneficiary under a death statute depends upon the provisions of the statute." As the Restatement goes, this section is crystal clear. But it helps little—a futile gesture in the right direction. Perhaps, it was not intended that the section should solve anything. Nevertheless, it points to the process by which a solution may be reached—the process of statutory construction. So the Restatement leaves off at the beginning of the difficulties presented by actual cases. Whether the courts should treat the contributory negligence of beneficiaries as immaterial, or as barring all recovery, or whether the contributory negligence of a sole beneficiary should prevent all recovery, or whether, when one of several beneficiaries is negligent, recovery should be barred only to the extent of his interest, is left to statutory construction. The comment to Section 493 of the Torts Restatement suggests a classification of wrongful death statutes, somewhat like that made in footnote 42 *supra,* between statutes where the amount recovered is treated as an asset of the decedent's estate and statutes purporting to compensate survivors for benefits which they would have derived from the earning power of the decedent had he lived. But these classifications are not strictly exclusive, as has been pointed out, and cases are decided on other grounds. Much more important is the attitude of a court toward giving full protection to the interests of surviving relatives.

With the funds and facilities at its disposal, the American Law Institute might have contributed something of great value to legal development in this country by presenting a clarifying statute to take the place of the present batch of wrongful death acts with all their diversities and with all the judicial glosses which have been made. The present discussion has attempted to deal with only part of the confusion in wrongful death litigation, *i.e.,* those cases involving contributory negligence.