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TORTS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE OF ONE PARENT IS IMPUTED TO THE OTHER TO DIMINISH THE LATTER'S RECOVERY FOR THE DEATH OF A MINOR CHILD. *Stull v. Ragsdale*, 273 Ark. 277, 620 S.W.2d 264 (1981).

The appellants, Donald and Youvanna Stull, were parents of the decedent, four year old Windy Stull. While Donald was away at work, Youvanna put Windy down for a nap and later fell asleep herself. Without awakening her mother, Windy left the house and crossed the adjacent highway where she was struck and killed by a truck driven by the appellee, James Ragsdale.

Youvanna Stull instituted a wrongful death and survival¹ action against Ragsdale. On interrogatories, the jury apportioned 25% of the negligence to Ragsdale and 75% to Youvanna Stull, awarded each parent damages for mental anguish,² and awarded funeral expenses to the estate. The trial court entered judgment only for the funeral expenses in favor of the estate, determining that Youvanna Stull was barred from recovery by her own negligence³ and that her negligence should be imputed to Donald Stull, barring his recovery as well. The Arkansas Supreme Court upheld the imputation of the mother's negligence to the father, but allowed him to recover the original jury award reduced by the percentage of negligence attributed to his wife. *Stull v. Ragsdale*, 273 Ark. 278, 620 S.W.2d 264 (1981).⁴

Because the present system of liability based on fault is grounded in a philosophy of individualism, an individual is gener-

1. The Arkansas wrongful death and survival statutes are codified at ARK. STAT. ANN. §§ 27-901 to -906 (1979).

2. *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark. 1960), interpreted the Arkansas wrongful death statute to provide that any recovery by the administratrix for the wrongful death of the deceased would be for the benefit of the deceased's next of kin. *Peugh v. Oliger*, 233 Ark. 281, 345 S.W.2d 610 (1961), further interpreted the statute to allow recovery for mental anguish.

3. ARK. STAT. ANN. § 27-1765 (1979) provides in pertinent part: "If the fault chargeable to a party claiming damages is equal to or greater in degree than any fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is not entitled to recover such damages."

4. The holding in *Stull* raises two issues. The first concerns the use of the doctrine of imputed contributory negligence to bar the recovery of an innocent parent for the wrongful death of a child because of the other parent's negligent supervision of the child. The second relates to the proper application of the Arkansas comparative fault statute, set out *supra* note 3.

ally made accountable only for his own misconduct.⁵ However, there are many situations in which the negligence of one party is imputed to a totally innocent individual merely because of some relation between them.⁶ Such imputed conduct may be used in two distinct contexts. First, it may be used to make an innocent party vicariously liable for the blameworthy conduct of another based on the existence of an agency relationship between the two.⁷ Thus, a master may be held liable for the negligent acts of his servant⁸ or an innocent individual may be responsible for the negligence of another with whom he is engaged in a joint enterprise.⁹ Various reasons have been given for imposing vicarious liability in such situations, including (1) that the innocent party has an actual or potential right to control the conduct of the negligent party, (2) that it is necessary to allow an injured plaintiff to reach a financially responsible defendant, and (3) that it constitutes a rule of policy, a deliberate allocation of risk.¹⁰ In contrast to this use of the fiction of imputed conduct to facilitate the plaintiff's recovery, it may also be used to defeat an innocent plaintiff's claim against a negligent defendant because of the concurring negligence of a third party who stands in some relation to the plaintiff.¹¹

During the early stages of its development, the doctrine of imputed contributory negligence was commonly applied to a variety of

5. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 23.1 (1956).

6. *Id.* at § 26.1.

7. "Agency is a familiar and conspicuous branch of the law where the liability of the principal for the acts of his agent may be and often is expressed in terms of the fiction of imputed conduct." Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193, 194 (1921).

8. "Under the doctrine of *respondeat superior*, an employer will be liable for the negligence of an employee committed while the employee is within the scope of his employment." *Lundberg v. State*, 25 N.Y.2d 467, 470, 306 N.Y.S.2d 947, 950, 255 N.E.2d 177, 179 (1969) (citing *Sauter v. New York Tribune, Inc.*, 305 N.Y. 442, 113 N.E.2d 790 (1953)). The Arkansas court has long recognized the doctrine. *E.g.*, *Gray v. McLaughlin*, 207 Ark. 191, 179 S.W.2d 686 (1944); *Hunter v. First State Bank*, 181 Ark. 907, 28 S.W.2d 712 (1930); *Robinson v. St. Louis, I.M. & S. Ry.*, 111 Ark. 208, 163 S.W. 500 (1914); *Ward v. Young*, 42 Ark. 542 (1884).

9. The imputation of negligence between members of a joint enterprise is based on principles of partnership and agency. Although it is most often used to bar a plaintiff's recovery by imputing contributory negligence, it is also available to impute vicarious liability to one member of a joint enterprise for the negligent acts of another member. 2 F. HARPER & F. JAMES, *supra* note 5, at § 26.13; *Black & White, Inc. v. Love*, 236 Ark. 529, 367 S.W.2d 427 (1963).

10. 2 F. HARPER & F. JAMES, *supra* note 5, at §§ 26.1—26.5; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 69 (4th ed. 1971); Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916).

11. *E.g.*, W. PROSSER, *supra* note 10, at § 74. It is with the use of the fiction in this second context, often called imputed contributory negligence, that *Stull* is concerned.

relationships outside the traditional agency and employment categories which define the limits of vicarious liability.¹² In these cases the courts often imposed a fictitious agency relationship as an expedient means to bar recovery.¹³ The origin of the doctrine is generally traced to the 1849 English case of *Thorogood v. Bryan*,¹⁴ in which the court held that an injured omnibus passenger had so identified himself with the driver by selecting that mode of conveyance that his recovery against a negligent third party would be defeated by the concurring negligence of his driver.¹⁵ Among the reasons given for the decision was that the plaintiff exercised a degree of control over the driver.¹⁶ Although *Thorogood* was overruled in England thirty-nine years later,¹⁷ it was adopted by several American jurisdictions during the interim.¹⁸ However, its rule that contributory negligence may be imputed based solely on the driver-passenger relationship has since been rejected everywhere,¹⁹ largely because it is recognized that passengers generally have no actual or potential control in those cases and because it is "against all legal rules" to impute contributory negligence on the basis of a relation which would not support the imposition of vicarious liability.²⁰ The Arkansas Supreme Court never recognized *Thorogood*²¹ and in *Railway Co. v. Harrell*²² expressly rejected the imputation of contributory negligence in a factual situation similar to that in *Thorogood*.²³

Similarly, contributory negligence has been imputed to third

12. W. PROSSER, *supra* note 10, at § 74. *E.g.*, *Thorogood v. Bryan*, 8 C.B. 115, 137 Eng. Rep. 452 (1849) (driver's negligence imputed to passenger to bar the latter's recovery); *Hartfield v. Roper*, 21 Wend. 615 (N.Y. 1829) (father's negligence imputed to minor child); *Texas & Pac. R. Co. v. Tankersley*, 63 Tex. 57 (1885) (bailee's negligence imputed to bailor).

13. Gilmore, *supra* note 7, at 195.

14. 8 C.B. 115, 137 Eng. Rep. 452 (1849).

15. *Id.* at 132, 137 Eng. Rep. at 458.

16. *Id.*

17. *Mills v. Armstrong*, The Bernia, 13 App. Cas. 1 (1888).

18. The doctrine of imputed contributory negligence based on the theory of identification was first adopted in the United States in *Brown v. New York, Central R.R.*, 31 Barb. 385 (N.Y. 1860), and was followed by only a minority of jurisdictions at any time. Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 FORDHAM L. REV. 156, 159 (1951).

19. W. PROSSER, *supra* note 10, at § 74.

20. *Little v. Hackett*, 116 U.S. 366 (1886).

21. Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1, 10 (1946).

22. 58 Ark. 454, 25 S.W. 117 (1894).

23. Other Arkansas cases have refused to apply the *Thorogood* rule in passenger-carrier situations. *E.g.*, *Hass v. Kessell*, 245 Ark. 361, 432 S.W.2d 842 (1968); *Crossett Lumber Co. v. Cater*, 201 Ark. 432, 144 S.W.2d 1074 (1940); *Missouri Pac. R.R. v. Henderson*, 194 Ark. 884, 110 S.W.2d 516 (1937); *Itzkowitz v. P.H. Ruebel & Co.*, 158 Ark. 454, 250 S.W. 535

parties based on other special relationships. At one time, courts generally imputed the contributory negligence of a bailee to his bailor to bar the latter's recovery for damage to the bailed property caused partly by a third party's negligence.²⁴ Although the Arkansas court once followed this rule,²⁵ it has since joined the overwhelming majority²⁶ of jurisdictions in refusing to impute negligence solely on this basis.²⁷ Courts have generally analogized the relationship arising out of a bailment situation to one arising out of a passenger-carrier situation and have refused to impute contributory negligence for the same reasons.²⁸

The existence of certain domestic relationships such as parent and child and husband and wife has also served as a basis for imputing contributory negligence to members of these relationships.²⁹ For instance, in *Hartfield v. Roper*³⁰ a New York court barred a minor child's recovery for injuries he sustained when struck by the defendant's sleigh because of his father's negligent supervision. The court determined that there was an agency relationship whereby the father was the child's "keeper and agent" for purposes of providing supervision.³¹ The court also noted that the father would benefit from the action and would "profit from his own wrong if recovery were allowed."³² Although the rule in *Hartfield* was widely accepted at one time,³³ it is now almost universally rejected.³⁴ Arkansas has allowed recovery when the award was for the benefit of

(1923); *Pine Bluff Co. v. Whitlaw*, 147 Ark. 152, 227 S.W. 13 (1921); *Hot Springs St. R.R. v. Hildreth*, 72 Ark. 572, 82 S.W. 245 (1904).

24. *E.g.*, *Welty v. Indianapolis & V.R. Co.*, 105 Ind. 55, 4 N.E. 410 (1886); *Illinois Cent. R. v. Sims*, 77 Miss. 325, 27 So. 527 (1899); *Forks Township v. King*, 84 Pa. 230 (1877).

25. *Duggins v. Watson*, 15 Ark. 118 (1854).

26. Texas was apparently the last state to discard the rule, following it until its rejection in *Rollins Leasing Corp. v. Barkley*, 531 S.W.2d 603 (Tex. 1976).

27. *E.g.*, *Bill C. Harris Constr. Co. v. Powers*, 262 Ark. 96, 554 S.W.2d 332 (1977); *Featherston v. Jackson*, 183 Ark. 373, 36 S.W.2d 405 (1931); *Missouri Pac. R.R. v. Boyce*, 168 Ark. 440, 270 S.W. 519 (1925). The majority view is expressed in *RESTATEMENT (SECOND) OF TORTS* § 489 (1965).

28. 2 F. HARPER & F. JAMES, *supra* note 5, at § 23.6.

29. Leading cases involving imputation based on the parent-child relationship include *Hartfield v. Roper*, 21 Wend. 615 (N.Y. 1829), and *Waite v. North Eastern Ry. Co.*, 120 Eng. Rep. 679 (1858). A case involving imputation based on the marital relationship is *Pennsylvania R.R. v. Goodenough*, 55 N.J.L. 577, 28 A. 3 (1893).

30. 21 Wend. 615 (N.Y. 1829).

31. *Id.* at 619.

32. *Id.* at 620.

33. W. PROSSER, *supra* note 10, at § 74. *E.g.*, *Gallagher v. Johnson*, 237 Mass. 455, 130 N.E. 174 (1921).

34. W. PROSSER, *supra* note 10, at § 74. The modern rule is expressed in the *RESTATEMENT (SECOND) OF TORTS* § 488(1) (1965): "A child who suffers physical harm is not barred

the child or his estate,³⁵ even in situations in which the negligent parent was the sole heir of the child's estate and would be the ultimate beneficiary.³⁶

The imputation of contributory negligence based on the marital relationship alone was generally predicated on the fact that at common law the wife shared her husband's legal identity,³⁷ but some courts also based the rule on the premise that the marital relationship itself created an agency between spouses.³⁸ However, the passage of the Married Women's Acts³⁹ in all states has eliminated the common-law identity concept, and, presently, only a few community property states impute contributory negligence on this basis alone.⁴⁰ Arkansas is apparently in accord with the majority and will not impute negligence between spouses unless other factors are present.⁴¹

The practice of creating these fictitious agencies to impute contributory negligence outside agency and employment situations was widely criticized because the results were often harsh.⁴² The major-

from recovery by the negligence of his parent, either in the parent's custody of the child or otherwise."

35. *E.g.*, *Willingham v. Southern Rendering Co.*, 239 Ark. 858, 394 S.W.2d 726 (1965); *Southern Helicopter Serv., Inc. v. Jones*, 238 Ark. 133, 379 S.W.2d 10 (1964); *Missouri Pac. R.R. v. Moore*, 209 Ark. 1037, 193 S.W.2d 657 (1946); *Railway Co. v. Rexroad*, 59 Ark. 180, 26 S.W. 1037 (1894).

36. *E.g.*, *Stockton v. Baker*, 213 Ark. 918, 213 S.W.2d 896 (1948); *Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 139 S.W. 301 (1911).

37. W. PROSSER, *supra* note 10, at § 74.

38. Lessler, *supra* note 18, at 167.

39. *E.g.*, ARK. STAT. ANN. § 55-401 (1971). A collection of these statutes may be found at 3 VERNIER, *AMERICAN FAMILY LAWS* §§ 167, 179-180 (1935).

40. W. PROSSER, *supra* note 10, at § 74. The RESTATEMENT (SECOND) OF TORTS § 487 (1965) takes the position that the negligence of one spouse does not bar recovery by the other for his or her own physical harm. A few states have statutes providing that any recovery for personal injuries by either spouse will be considered community property. In order to prevent the negligent spouse from benefitting from his own wrong, these states bar the injured spouse's recovery. *DeLozier v. Smith*, 22 Ariz. App. 136, 524 P.2d 970 (1974); *Clark v. Foster*, 87 Id. 134, 391 P.2d 853 (1964); *Ostheller v. Spokane & I.E.R. Co.*, 107 Wash. 678, 182 P. 630 (1919).

41. *E.g.*, *Willingham v. Southern Rendering Co.*, 239 Ark. 858, 394 S.W.2d 726 (1965); *Ford v. Markham*, 235 Ark. 1025, 363 S.W.2d 926 (1963); *Wymer v. Dedman*, 233 Ark. 854, 350 S.W.2d 169 (1961); *Holmes v. Lee*, 208 Ark. 114, 184 S.W.2d 957 (1945). *But see* *Wisconsin & Arkansas Lumber Co. v. Brady*, 157 Ark. 449, 248 S.W. 278, 280 (1923), in which the court held that the wife's negligence in driving a car was imputable to the husband. However, the court may have hinted at the existence of a joint enterprise by weighing heavily the fact that the husband had "control" over the vehicle's operation.

42. *See* *Gilmore, supra* note 7, at 193; *Gregory, Vicarious Responsibility and Contributory Negligence*, 41 YALE L.J. 831 (1932); *Keeton, Imputed Contributory Negligence*, 13 TEX. L. REV. 161 (1935); *Lessler, supra* note 18, at 156.

ity rule today is that the contributory negligence of a third party will not be imputed to bar an innocent plaintiff's recovery except in situations in which the plaintiff could be held vicariously liable for the third party's conduct.⁴³ Accordingly, Arkansas cases have imputed contributory negligence when there is a master-servant relationship⁴⁴ or a joint enterprise.⁴⁵

Aside from its general application, the doctrine of imputed contributory negligence has frequently been a factor in determining whether recovery will be allowed in wrongful death cases in which one or more of the beneficiaries have been contributorily negligent.⁴⁶ At common law no recovery was allowed for the death of a human killed by the negligence or wrongful act of another.⁴⁷ In addition, death terminated the decedent's cause of action for personal torts.⁴⁸ In order to remedy the inequities created by these common-law rules, every American state has enacted a statutory remedy for wrongful death.⁴⁹ The two prevalent types of statutes enacted for this purpose are wrongful death acts and survival acts.⁵⁰

43. *E.g.*, *Hurley v. Peebles*, 238 Ark. 739, 384 S.W.2d 261 (1964); *Smalich v. Westfall*, 440 Pa. 409, 269 A.2d 476 (1970). The RESTATEMENT (SECOND) OF TORTS § 485 (1965) rejects the application of the doctrine of imputed contributory negligence in the absence of the master-servant relationship (§ 486), a joint enterprise (§ 491), or in an action for wrongful death or loss of services when the negligence of the person who was injured bars recovery by the person who has been deprived by the relation (§ 494). This rule has been appropriately named the "both ways test." Gregory, *supra* note 42, at 831.

44. *E.g.*, *Schubach v. Traicoff*, 214 Ark. 375, 216 S.W.2d 395 (1949); *Watts v. Safeway Cab & Storage Co.*, 193 Ark. 413, 100 S.W.2d 965 (1937); *Pine Bluff Water & Light Co. v. Schneider*, 62 Ark. 109, 34 S.W. 547 (1896).

45. *E.g.*, *Hurley v. Peebles*, 238 Ark. 739, 384 S.W.2d 261 (1964); *Wilson v. Holloway*, 212 Ark. 878, 208 S.W.2d 178 (1948) (overruled on other grounds in *Riley v. Johnson*, 239 Ark. 37, 386 S.W.2d 942 (1965)).

46. A related situation develops when the decedent was himself contributorily negligent. Generally, a claim arising in such cases will be barred or diminished regardless of whether it was brought under a wrongful death act or a survival act. This rule is based entirely on the courts' interpretation of the applicable statute, and imputed contributory negligence is not a factor. Imputed contributory negligence may be used, however, to bar recovery in cases in which the decedent is personally innocent but a party with whom he stands in some recognized relationship is contributorily negligent. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* §§ 13.1, 13.3 (1974); I S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 5.9 (2d ed. 1975); H. WOODS, *COMPARATIVE FAULT* § 9.3 (1978). See also RESTATEMENT (SECOND) OF TORTS § 494 (1965).

47. W. PROSSER, *supra* note 10, at § 126; I S. SPEISER, *supra* note 46, at § 1.2. This rule apparently evolved from dicta in Lord Ellenborough's opinion in *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

48. W. PROSSER, *supra* note 10, at § 126.

49. *Id.* All state and federal wrongful death and survival statutes, as well as the original Lord Campbell's Act, 1846, 9 & 10 Vict., ch. 93, are compiled at 2 S. SPEISER, *supra* note 46, at App. A (2d ed. 1975 & Cum. Supp. 1981).

50. An initial distinction must be made between actions based on wrongful death stat-

Arkansas has both a wrongful death and a supplemental survival act.⁵¹

When an action is brought under a survival statute, recovery is generally deemed to be for the benefit of the estate, and any ultimate benefit to the beneficiaries is viewed as incidental.⁵² Therefore, under survival acts the negligence of an ultimate beneficiary or heir of the estate will generally not bar recovery by the estate.⁵³ A long line of Arkansas cases is in accord with this rule.⁵⁴

In contrast, when an action is brought under a wrongful death act, recovery is sought directly for a designated group of beneficiaries rather than for the decedent's estate.⁵⁵ Since the beneficiaries themselves are given the right of action, if either the sole beneficiary or *all* of the beneficiaries were guilty of negligence contributing to the decedent's death, recovery will generally be barred or diminished.⁵⁶ However, in cases in which only one of several beneficiaries is negligent, a majority of courts have held that recovery by the innocent beneficiaries is not barred.⁵⁷ Thus, if the contributory negli-

utes, on one hand, and actions brought under survival statutes, on the other. In situations involving wrongful death it is generally recognized that two distinct interests are invaded. One is the interest of the family and dependents in the continued existence of the deceased. Wrongful death acts redress this injury. Most of these acts are patterned after the original Lord Campbell's Act, 1846, 9 & 10 Vict., ch. 93, and are construed as creating a new right of action on behalf of designated beneficiaries to compensate them for injuries resulting from the loss of the decedent. Survival statutes, when enacted, protect a second interest, by preserving any right of action in the estate which accrued to the decedent before his death. 2 F. HARPER & F. JAMES, *supra* note 5, at § 23.8.

51. ARK. STAT. ANN. §§ 27-901 to -906 (1979).

52. 1 S. SPEISER, *supra* note 46, at § 5.6; H. WOODS, *supra* note 46, at § 9.4.

53. 1 S. SPEISER, *supra* note 46, at § 5.6. *E.g.*, *Wilmot v. McPadden*, 78 Conn. 276, 61 A. 1069 (1905); *Danforth v. Emmons*, 124 Me. 156, 126 A. 821 (1924); *Potter v. Potter*, 224 Wis. 251, 272 N.W. 34 (1937). A discussion of this issue may be found at Annot., 2 A.L.R.2d 785 (1948).

54. *E.g.*, *Stockton v. Baker*, 213 Ark. 918, 213 S.W.2d 896 (1948); *Ashcraft v. Jerome Hardwood Lumber Co.*, 173 Ark. 135, 292 S.W. 386 (1927); *Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 139 S.W. 301 (1911); *Miles v. St. Louis, I.M. & S. Ry.*, 90 Ark. 485, 119 S.W. 837 (1909).

55. 1 S. SPEISER, *supra* note 46, at § 5.7. *E.g.*, *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark.), *appeal dismissed*, 285 F.2d 427 (8th Cir. 1960); *Davis v. St. Louis, I.M. & S. Ry.*, 53 Ark. 117, 13 S.W. 801 (1890).

56. 1 S. SPEISER, *supra* note 46, at § 5.7; H. WOODS, *supra* note 46, at § 9.5. *E.g.*, *Peoples v. Seamon*, 249 Ala. 284, 31 So. 2d 88 (1947); *St. Louis Southwestern Ry. v. Cochran*, 77 Ark. 398, 91 S.W. 747 (1906); *St. Louis, I.M. & S. Ry. v. Dawson*, 68 Ark. 1, 56 S.W. 46 (1900); *Nichols v. United States Fidelity & Guar. Co.*, 13 Wis. 2d 491, 109 N.W.2d 131 (1961).

57. "The general rule in such cases is that, although the action or right of action will not be barred, the amount of recovery will be reduced . . . to the extent of the contributorily negligent beneficiary's share in the recovery." 1 S. SPEISER, *supra* note 46, at § 5.8. The RESTATEMENT (SECOND) OF TORTS § 493(1) (1965) adopts this position. *E.g.*, *Hines v. Mc-*

gence of one beneficiary is to be imputed to innocent beneficiaries, the imputation must be made on the basis of some relationship between the beneficiaries which would have given rise to it under general tort principles.⁵⁸

In cases in which a child is killed or injured as a result of the concurrent negligence of one parent and a third party, courts are divided on the issue whether the fault of the negligent parent will be imputed to the innocent parent.⁵⁹ The majority rule is that the innocent parent is not to be barred from recovery on the ground of imputed contributory negligence.⁶⁰ In reaching this result, courts have reasoned that the mere existence of the marital relationship is not a sufficient basis for making the imputation⁶¹ and that the independence granted wives under the Married Women's Acts precludes the contention that the wife was the husband's agent for the purpose of caring for minor children.⁶²

However, some courts have reached different results. In a few community property jurisdictions where both spouses are entitled to a share of any recovery made by either, courts have barred the innocent parent's recovery to prevent accrual of any benefits to the negligent spouse.⁶³ In addition, a minority of non-community property jurisdictions refuse to allow the innocent spouse to recover.⁶⁴ In

Cullers, 121 Miss. 666, 83 So. 734 (1920); *Anderson v. Memphis Street Ry.*, 143 Tenn. 216, 227 S.W. 39 (1921). A discussion of this issue may be found at Annot., 2 A.L.R.2d 785 (1948).

58. 1 S. SPEISER, *supra* note 46, at § 5.9.

59. Examples of cases holding that contributory negligence will not be imputed in such circumstances include *Wright v. Standard Oil Co.*, 470 F.2d 1280 (5th Cir. 1972), *cert. denied*, 412 U.S. 938 (1973); *Ward v. Baskin*, 94 So. 2d 859 (Fla. 1957); *Baca v. Baca*, 71 N.M. 468, 379 P.2d 765 (1963); *MacDonald v. O'Reilly*, 45 Ore. 589, 78 P. 753 (1904); and *Tufty v. Sioux Transit Co.*, 70 S.D. 352, 17 N.W.2d 700 (1945).

Cases in which recovery by the innocent parent has been barred include *Crane v. Smith*, 23 Cal. 2d 288, 144 P.2d 356 (1944); *Wheat's Adm'r v. Gray*, 309 Ky. 593, 218 S.W.2d 400 (1949); *Darbrinsky v. Pennsylvania Co.*, 248 Pa. 503, 94 A. 269 (1915); and *Nichols v. Nashville Hous. Auth.*, 187 Tenn. 683, 216 S.W.2d 694 (1949).

60. 1 S. SPEISER, *supra* note 46, at § 5.9. This is the position taken in RESTATEMENT (SECOND) OF TORTS § 494A (1965), which states that "[t]he negligence of one parent does not bar recovery by the other parent for loss of the services of their child, or for medical expenses incurred in caring for him."

61. *E.g.*, *Ward v. Baskin*, 94 So. 2d 859, 860 (Fla. 1957) (recovery was allowed for injury to a minor child).

62. *E.g.*, *Illingworth v. Madden*, 135 Me. 159, 192 A. 273 (1937); *Herrell v. St. Louis-San Francisco Ry. Co.*, 324 Mo. 38, 23 S.W.2d 102 (1929).

63. W. PROSSER, *supra* note 10, at § 74. *E.g.*, *Dull v. Atchison, T & S.F. Ry.*, 27 Cal. App. 473, 81 P.2d 158 (1938).

64. *E.g.*, *Darbrinsky v. Pennsylvania Co.*, 248 Pa. 503, 94 A. 269 (1915); *Nichols v. Nashville Hous. Auth.*, 187 Tenn. 683, 216 S.W.2d 694 (1949).

these cases the courts generally have based their decisions on two factors. First, these courts have reasoned that any award to the innocent parent will, in reality, be for the mutual benefit of both parents, thereby allowing the negligent parent to profit from his own wrong.⁶⁵ In addition, these courts have based the imputation of negligence on holdings that an implied agency existed between the parents in the care and supervision of minor children.⁶⁶ Other courts have apparently merely assumed that such an agency existed and barred recovery by either parent without further discussion of the rationale behind the imputation.⁶⁷ An 1880 decision, *St. Louis I.M. & S. Ry. v. Freeman*,⁶⁸ indicates that the Arkansas court may be included in this latter group.

Apart from the issue concerning the imputation of contributory negligence, the holding in *Stull v. Ragsdale*⁶⁹ presents questions regarding the proper application of the Arkansas comparative fault statute.⁷⁰ At common law any negligence on the part of a plaintiff which contributed to the injury entirely barred any recovery from a negligent defendant.⁷¹ Despite subsequent limitations,⁷² the use of contributory negligence as an absolute defense proved to be unduly harsh and led to much dissatisfaction.⁷³ In order to alleviate this harshness, many jurisdictions adopted the concept of comparative negligence, whereby the damages are divided between a defendant

65. *E.g.*, *Wheat's Adm'r v. Gray*, 309 Ky. 593, 218 S.W.2d 400 (1949).

66. *E.g.*, *Darbrinsky v. Pennsylvania Co.*, 248 Pa. 503, 94 A. 269 (1915).

67. *Gilmore, supra* note 7, at 272. *E.g.*, *Vinette v. Northern Pac. Ry.*, 47 Wash. 320, 91 P. 975 (1907).

68. 36 Ark. 41 (1880). In *Freeman* the Arkansas Supreme Court considered a case which was factually similar to *Stull*. A minor child was left in her mother's care while her father was away at work. The child was struck and killed by a train after the mother negligently left her unattended. The court in *Freeman*, without expressly imputing the mother's negligence to the father, barred the father's suit for the child's wrongful death.

69. 273 Ark. 277, 620 S.W.2d 264 (1981).

70. ARK. STAT. ANN. § 27-1765 (1979), set out *supra* note 3.

71. The doctrine of contributory negligence originated in dicta contained in Lord Ellenborough's opinion in *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (1809), and was given "full and broad application" by courts subsequently applying the doctrine. V. SCHWARTZ, *supra* note 46, at § 1.2.

72. Many courts placed significant limitations on the use of the defense. The doctrine of last clear chance prevents the use of contributory negligence as a defense when the defendant had the last clear chance to avoid the accident. *E.g.*, *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (1842). Also, the defense was generally not available in cases of intentional torts. 2 F. HARPER & F. JAMES, *supra* note 5, at § 22.5. Additionally, if the defendant's conduct was regarded as reckless or was in violation of a statute intended to protect the plaintiff, the plaintiff's contributory negligence would not bar his recovery. V. SCHWARTZ, *supra* note 46, at § 1.2.

73. V. SCHWARTZ, *supra* note 46, at § 3.1.

and a contributorily negligent plaintiff.⁷⁴ Several types of comparative negligence systems exist in the United States today.⁷⁵ Under pure comparative negligence systems, the damages awarded to a contributorily negligent plaintiff are simply reduced by the proportionate share of the negligence attributed to him.⁷⁶ Thus, the plaintiff is entitled to some recovery unless his negligence is found to be the sole cause of his injury.⁷⁷ Other states have adopted modified systems, under which the plaintiff is entirely barred from recovery when his negligence is equal to or greater than that of the defendant.⁷⁸ A third system of comparative negligence, the slight-gross system, requires that the quality of each party's negligence be examined and allows a reduced recovery when the plaintiff's negligence was only "slight" when compared to that of the defendant.⁷⁹

In 1955, the Arkansas legislature enacted a pure comparative negligence statute.⁸⁰ However, the pure system was criticized by both insurance companies and the "plaintiff's bar," who contended

74. *Id.*

75. *Id.*

76. *Id.* at § 3.2. See LA. CIV. CODE ANN. art. 2323 (West Supp. 1981); MISS. CODE ANN. § 11-7-15 (1972); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); R.I. GEN. LAWS § 9-20-4 (Supp. 1981); WASH. REV. CODE ANN. § 4.22.005 (Supp. 1981).

In addition, several states have judicially adopted pure comparative negligence. See *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Alvis v. Ribar*, 85 Ill. 2d 1, 521 Ill. App. 23, 421 N.E.2d 886 (1981); *Kirby v. Larson*, 400 Mich. 585, 256 N.W.2d 400 (1977); *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

77. V. SCHWARTZ, *supra* note 46, at § 3.2.

78. See ARK. STAT. ANN. § 27-1765 (1979); COLO. REV. STAT., § 13-21-111 (Supp. 1981); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258a (1976); ME. REV. STAT. ANN. tit. 14, § 156 (1964); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1981); MINN. STAT. ANN. § 604.01 (West Supp. 1982); N.D. CENT. CODE § 9-10-07 (1975); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1981); UTAH CODE ANN. § 78-27-37 (1977); WIS. STAT. ANN. § 895.045 (West Supp. 1981); WYO. STAT. § 1-1-109 (1977). In addition, West Virginia judicially adopted this system in *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979). For a discussion of the evolution of comparative negligence in Georgia, see V. SCHWARTZ, *supra* note 46, at § 1.4.

Other states have adopted a slightly different form of the modified system and will allow recovery by an equally negligent plaintiff. See CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1981); HAWAII REV. STAT. § 663-31 (1976); MONT. CODE ANN. § 27-1-702 (1981); NEV. REV. STAT. § 41.141 (1979); N.H. REV. STAT. ANN. § 507:7-a (1974); N.J. STAT. ANN. 2A:15-5.1 (West Supp. 1981); OHIO REV. CODE ANN. § 2315.19 (Page Supp. 1981); OR. REV. STAT. § 18.470 (1979); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1981); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1981).

79. See NEB. REV. STAT. § 25-1151 (1979); S.D. COMP. LAWS ANN. § 20-9-2 (1979).

80. 1955 Ark. Acts 191 stated in part that "the contributory negligence of the person injured . . . shall not bar a recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributed to the injured person."

that it was too confusing to juries.⁸¹ Thus, two years later the legislature adopted a modified form of comparative negligence under which the defendant's negligence had to be greater than the plaintiff's before any recovery was allowed.⁸² This modified system was incorporated into the present Arkansas Comparative Fault Act, which was enacted in 1973 and amended in 1975.⁸³

The Arkansas court in *Stull v. Ragsdale*⁸⁴ imputed the mother's negligence to the father on the basis of two major considerations. First, the court determined that there is a "community of interest" between the husband and wife concerning the care of their minor children.⁸⁵ In addition, the court recognized that if the innocent husband were allowed to recover, the negligent mother would in reality receive some benefit from the recovery, thus allowing her to profit from her own wrong.⁸⁶ Holding that the purpose of the Arkansas comparative negligence statute is to "distribute the total damages among those who caused them,"⁸⁷ the court refused to deny the father's recovery altogether but, rather, reduced his damages by the proportionate share of the mother's negligence.⁸⁸ In his dissent, Justice Purtle pointed out that Arkansas cases had refused to impute contributory negligence in similar situations and argued that the majority had deviated from this "progressive and enlightened path."⁸⁹ In addition, Justice Purtle contended that the husband should either recover his entire award or nothing at all, since if the wife's negligence were imputed to him he would be 75% negligent.⁹⁰

The court's decision in *Stull* involves the application of two distinct legal principles—the doctrines of imputed contributory negligence and comparative fault. Neither application in this case can be defended on logical grounds, although practical reasons for reaching the result may exist.

81. H. WOODS, *supra* note 46, at § 4.2.

82. 1957 Ark. Acts 296 provided that "contributory negligence shall not prevent a recovery where any negligence of the person so injured . . . is of less degree than any negligence of the person . . . causing such damage"

83. The present act is compiled at ARK. STAT. ANN. §§ 27-1763 to -1765 (1979).

84. 273 Ark. 277, 620 S.W.2d 264 (1981).

85. *Id.* at 280, 620 S.W.2d at 267.

86. *Id.* at 281, 620 S.W.2d at 267.

87. *Id.*

88. *Id.*

89. *Id.* at 286, 620 S.W.2d at 270 (Purtle, J., dissenting).

90. *Id.* at 289, 620 S.W.2d at 271. Although Justice Purtle did not specifically refer to the Arkansas comparative negligence statute, his objection was apparently based on the premise that the statute forbids recovery by a plaintiff who is 50% or more negligent.

Prior to *Stull*, Arkansas courts had not expressly used the doctrine of imputed contributory negligence to bar an innocent plaintiff's recovery when no actual agency relationship existed.⁹¹ Given the equality of husband and wife before the law in Arkansas,⁹² it would appear that each should have a common and equal duty to exercise care in supervising minor children. Therefore, absent an express agreement between them that one should act as the other's agent for such purposes, no fictitious agency should be imposed for the purpose of imputing contributory negligence.⁹³

In addition, in Arkansas each spouse is entitled to sue⁹⁴ and to own and control personal property independently from the other.⁹⁵ This would seem to reduce the weight of the court's argument that the recovery would be for the mutual benefit of both spouses. However, as a practical matter, the court was probably correct in its contention, since in reality one spouse would probably have access to any recovery made by the other.

Stull undoubtedly represents a clear deviation from the well-established trend in Arkansas law concerning the application of imputed contributory negligence outside established agency relationships. However, in light of the court's long-standing previous refusal to impute contributory negligence on the basis of fictitious agencies, it is doubtful that the decision was intended to signal a future policy of disregard for the widely recognized both ways test.⁹⁶

Of perhaps greater concern is the court's rather unique application of the Arkansas comparative fault statute.⁹⁷ The statute, both on its face and as judicially interpreted, allows a contributorily negligent plaintiff to recover apportioned damages only when his fault is less than that of the defendant.⁹⁸ As the dissent in *Stull* pointed out, the imputation of the mother's negligence to the father made the father 75% negligent.⁹⁹ Therefore, he should have been unable to recover under the Arkansas modified comparative fault system.

91. See Leflar, *supra* note 21, at 10-15.

92. See Married Women's Emancipation Act, ARK. STAT. ANN. § 55-401 (1971).

93. Gilmore, *supra* note 7, at 272-73.

94. ARK. STAT. ANN. § 55-401 (1971).

95. *Id.* §§ 55-402, 55-404 (Supp. 1981).

96. See *supra* note 43.

97. ARK. STAT. ANN. § 27-1765 (1979).

98. The statute states in part that damages will be diminished in proportion to fault "[i]f the fault chargeable to a party claiming damages is of less degree than the fault chargeable to the party or parties from whom the claiming party seeks to recover damages." *Id.* *E.g.*, Riddell v. Little, 253 Ark. 686, 488 S.W.2d 34 (1972).

99. 273 Ark. at 289, 620 S.W.2d at 270 (Purtle, J., dissenting).

The court, however, allowed him to recover the jury award reduced by the 75% negligence attributed to him.¹⁰⁰ In effect, the court treated the issue as if it were applying a pure comparative negligence standard, which allows apportioned recovery whenever the plaintiff's negligence is not the sole proximate cause of his injury. The question thus presented by the holding in *Stull* is whether the court, either through inadvertence or by design, has judicially adopted a pure comparative negligence system.¹⁰¹

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100. *Id.* at 281, 620 S.W.2d at 267.

101. The Arkansas Supreme Court stated in *Stull*: "Therefore, in a wrongful death action in which one parent is found negligent, as here, we believe the better result would be to permit recovery of damages by reducing the award of damages to the non-negligent parent by that amount of negligence attributed to the other parent." *Id.* This specificity would seem to indicate that the court intended to restrict the application of pure comparative negligence to the particular facts of *Stull*. However, in reaching its decision the majority relied on what it apparently considered to be the purpose of the comparative negligence statute, *i.e.*, to "distribute the total damages among those who caused them." *Id.* Whether this suggests judicial dissatisfaction with the legislatively enacted modified comparative fault system which allows such a distribution only up to a point remains to be determined.

