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Henry C. Kessler Jr.

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NOTES

THE EFFECT OF CONTRIBUTORY NEGLIGENCE
BY ONE OF SEVERAL CO-BENEFICIARIES

It is the law of Pennsylvania that contributory negligence is a complete bar to recovery in personal actions. The application of this doctrine is widespread in this State. But nowhere more drastically than in situations where the cause of action is for death negligently caused does it rise to confront the plaintiff-beneficiary and provide the tortfeasor an unimpeachable avenue to escape the payment of damages.

In certain respects the application of the contributory negligence rule in Pennsylvania extends beyond that of most of our sister states.

In the type of action above referred to, the contributory negligence of the
deceased is a complete defense to an action by the beneficiaries named in the wrongful death statutes.1

Again, any release or settlement by the deceased prior to death operates to deprive the beneficiaries of a cause of action.2 An examination of cases wherein the beneficiary has been held to be within the scope of the rule will reveal its far-reaching effects. For example, the Pennsylvania courts have consistently refused recovery to both parents of a deceased child where one only was negligent, basing the decisions on the doctrine of imputed negligence.3

In Darbrinsky v. The Pennsylvania Company,4 the action was brought by the mother to recover damages for the loss of the child who met his death through the contributory negligence of the father. In affirming a compulsory nonsuit, the Pennsylvania Supreme Court stated that "... where a joint right exists each party is bound by the acts of the other, on the theory of implied authority, to such an extent that one cannot rid himself of the consequences of the other's acts within the scope of the implied authority; hence, where there is a joint right which begets joint obligations, a failure to perform these obligations by either party will affect the other even though the suit to enforce the right may be brought by one alone. ... The true doctrine ... is that, while the family relation exists, 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, and this implied authority does not rest upon the legal fiction of the unity of husband and wife but is founded upon the family relation."

The doctrine of implied authority is rejected in most jurisdictions which allow recovery to a surviving parent who in no wise contributed to the death of the child through negligence.5

In Louisville Railway Co. v. Creek6 the Court said: "A husband and wife may undoubtedly sustain such relations to each other, in a given case, that the negligence of one will be imputed to the other. The mere existence of the marital relation, however, will not have that effect."

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6Supra, note 5.
It is conceded, by the Pennsylvania Supreme Court, that the decision reached by it in the Darbrinsky case is not in harmony with the cases from the majority of other jurisdictions. The broad scope of the doctrine readily is seen from the decision of the Supreme Court in Gress v. Philadelphia & R. Ry. Co., where the parents were denied recovery for the death of their child who at the time of the accident was in the custody of an older sister. It was held that the sister was an agent of the parents and her contributory negligence barred recovery by them.

In the majority of American States, the rule laid down seems to be that "the contributory negligence of a parent, even though it may bar recovery for his benefit, or to the extent of his interest in an action . . . for the death of a child will not altogether defeat recovery, if there are other beneficiaries who were not negligent. . . . In accord with the above rule that the contributory negligence of a parent will defeat recovery for the death of a child . . . only to the extent of such parent's interest is the rule which is supported by the majority of the cases . . . that the contributory negligence of one parent will not be imputed to the other so as to bar recovery, merely on that ground for the death of a child, by or for the benefit of the latter." The negligence of one parent is not imputable to the other so as to preclude recovery merely for that reason by or on behalf of the parent who is not negligent, for the death of a child," is the rule which has been called "the better view."

But there is another aspect of these wrongful death situations which is an 'open question' in this State.

In cases involving beneficiaries other than the situation where the parents are suing for the death of a minor child, what is the effect of contributory negligence on the part of either the sole beneficiary, or one of several beneficiaries?

As to the sole beneficiary, the prevailing rule supported by the weight of authority is that his contributory negligence (or that of all the beneficiaries) is a bar to recovery. The rule is based on public policy and the principle that no one should be permitted to profit by his own wrong.

The real issue arises in those situations where some of the beneficiaries were negligent, but others were not. This is a situation which has never come before the courts of Pennsylvania. The weight of authority supports the rule that the contributory negligence is a defense against the negligent beneficiaries but not against those who were not negligent, unless the contributory negligence of one

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7a248 Pa. 482, 77 Atl. 810 (1910).
823 A.L.R. 690, 691.
9Supra, note 8.
or some of the beneficiaries is imputable to all under the peculiar circumstances and the particular law of the jurisdiction.\textsuperscript{13}

Most of the cases on the question of the effect of a beneficiary's negligence have involved actions for the death of a child, the subject discussed above. There is a dearth of decisions where the negligent beneficiary has been some next of kin, named as a beneficiary under the various death statutes.\textsuperscript{14} However, there are sufficient cases to establish a prevailing rule. As stated above, the rule in the majority of the jurisdictions supports the general proposition that the contributory negligence of one beneficiary will not bar recovery for the benefit of other beneficiaries who were not negligent. Recovery will be defeated, at most, only to the extent of the negligent beneficiary's interest.\textsuperscript{15}

There are quite a number of decided cases involving the negligence of a personal representative which, however, are not indicative of any conclusion regarding the status of the law in Pennsylvania, because these cases arise in jurisdictions where the action brought by the personal representative is founded on a survival statute, that is, the suit is based on decedent's own cause of action, and not, as in Pennsylvania, on a new right arising in a named group of beneficiaries.\textsuperscript{16}

It should also be observed in passing that in some states a distinction is made by the courts where a statutory administrator brings the action, and where provision is made for a single assessment of damages in a gross amount. In such situations it has been held that the negligence of one or some of the beneficiaries is a bar to recovery by the statutory administrator.\textsuperscript{17}

There is one Pennsylvania case,\textsuperscript{18} which, while not directly on the point, may lend some assistance in arriving at an inference as to what the decision may be if a case directly raising the question is presented for consideration.

In McFadden v. May,\textsuperscript{19} the question was whether the mother of decedent could bring the suit when decedent's husband, who had deserted her some years before, was living. It was held that inasmuch as the husband had forfeited his right to share in the sum recovered,\textsuperscript{20} the mother could bring the action in his name, for he was merely, under the statute, the required legal plaintiff. The court said, "Since the suit in the present case will, under such procedure, be in

\textsuperscript{13}16 Am. Jur., p. 90, Sec. 133.
\textsuperscript{14}23 A.L.R. 648.
\textsuperscript{15}Kokesh v. Price, 136 Minn. 305, 161 N.W. 713 (1917); Phillips v. Denver City Tramway Co., 53 Colo. 438, 128 Pac. 460 (1912); Restatement, Torts, § 495; 23 A.L.R. 648; 16 Am. Jur., p. 90, §133.
\textsuperscript{16}See Nashville Lumber Co. v. Busbee, 100 Ark. 76, 139 S.W. 301, 38 L.R.A. (N.S.) 754 (1911).
\textsuperscript{17}Hazel v. Hoopston-Danville Motor Bus Co., 310 Ill. 38, 141 N.E. 392, 30 A.L.R. 491 (1923); 16 Am. Jur. p. 90, §133.
\textsuperscript{18}McFadden v. May, 325 Pa. 145, 189 Atl. 483 (1937).
\textsuperscript{19}Supra, note 18.
\textsuperscript{20}Act of April 5, 1851, P.L. 699; April 26, 1855, P.L. 309; June 7, 1911, P.L. 678, Sec. 1; Kaczorewski v. Kalkorinski, 321 Pa. 438, 184 Atl. 663 (1936); Gaydos v. Domably, 301 Pa. 523, 529, 152 Atl. 549, 551 (1930).
the name of the decedent’s husband, the defendant may interpose any defense which he would have as against the husband as plaintiff.” The court states as an example of a defense which could be interposed, settlement with the husband if such were the case. Suppose the husband had in some way been responsible through his negligence for the wife’s death. Would that have barred the mother’s right to recover? It will be noted that the language used in the dictum is broad. How far it may indicate an answer to the question under discussion is a matter of speculation, for the defense of contributory negligence was not under consideration in the McFadden case.

Summarizing we have the following situations:

1. Death of a minor child through contributory negligence of one parent bars recovery by the other.\(^ {21}\)

2. Contributory negligence of the sole beneficiary is a complete defense to an action.\(^ {22}\)

3. Contributory negligence of one or some of the beneficiaries will not bar recovery by the beneficiaries who were not negligent, and recovery will be defeated at most only to the extent of the interest of the negligent beneficiary or beneficiaries.\(^ {23}\)

What conclusions, if any, may be drawn justifiably from the McFadden case concerning the question under consideration? It is true that there is very little in the case on which to base any deductions aside from the facts peculiar to it. The dictum cited above may, however, indicate to some extent the viewpoint of the court on the question of the contributory negligence of beneficiaries. To state a situation not impossible of existence: suppose A, a widower, is killed through the negligence of his son X, and leaves to survive him in addition to X, sons Y and Z, all three of whom would be eligible to recover under the statutes. Or, suppose, for example, under the facts of the McFadden case, that the husband had negligently contributed to his estranged spouse’s death. If he were suing, that would, it seems, be a defense to the action despite the fact that another beneficiary would benefit by a recovery. This case may or may not tend to indicate an answer to these suppositious problems, depending entirely on the extent to which the dictum throws light on the point of view of the State’s highest tribunal.

In connection with the McFadden case, it is to be noted that the procedural difficulty therein involved has been obviated by the new Rules of Procedure adopted and promulgated by the Supreme Court, effective September 4, 1939. These rules provide that the personal representative shall bring suit for wrongful

\(^ {21}\)Darbrinsky v. The Penna Co., 248 Pa. 503, 94 Atl. 269 (1915).


death for the benefit of the group of beneficiaries named in the statutes. The rule provides that if the personal representative fails to bring suit within six months from the time the right accrues, then the named beneficiary or beneficiaries may do so.

Since the new rules are intended merely to correct procedural difficulties they do not effect the substantive law. Contributory negligence of the sole beneficiary is still a defense. Whether the contributory negligence of one of several beneficiaries will defeat the executor or administrator's representative suit is still unanswered.

YORK, PA. HENRY C. KESSLER, JR.*

LIABILITY OF GRATUITOUS BAILORS FOR INJURIES TO THIRD PERSONS DUE TO UNKNOWN DEFECTS

The duty owed by gratuitous bailors to third persons, who are not involved in the bailment and who, therefore, are not subject to defenses available against the bailee, is difficult to ascertain. Increasingly widespread use of the automobile, resulting in more frequent gratuitous bailment, has led to a number of adjudications bearing on this duty of gratuitous bailors, which warrant consideration. Though their significance may be qualified by recognition that they concern bailments of a particular type of chattel, it is worthy of notice that the basis of most is a concept common to bailment of chattels in general.

It is generally agreed that gratuitous bailors are liable for injuries caused to third persons by defects known to the bailor at the time of bailment and not disclosed to the bailee, but there is very little authority on the question of liability for injuries caused by unknown defects in the bailed article, which defects could have been ascertained by the exercise of ordinary or reasonable diligence. This note is concerned with the latter question.

The basis of liability to third persons is considered to be "the obligation which the law imposes upon every man to refrain from acts of omission or commission which he may reasonably expect would result in injury to third persons."

* A.B. 1935, LL.B. 1937, Catholic University of America; Librarian York County Law Library.

1 Restatement, Torts, (1934) §§ 405 & 388; Jenkins v. Spitler, (W. Va.) 199 S. E. 368 (1938); McCallister v. Farra, 117 Ore. 286, 243 Pac. 785 (1926); Tannahill v. Dep. Oil and Gas Co., 110 Kan. 254, 203 Pac. 909 (1922); 61 A. L. R. 1340.