

Negligence--When Imputable to a Child Non Sui Juris (Kupchinsky, Adm'r v. Vacuum Oil Co., 238 App. Div. 457 (2nd Dept. 1933))

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NEGLIGENCE—WHEN IMPUTABLE TO A CHILD NON SUI JURIS.

—In an action brought for the injuries resulting in the death of a child *non sui juris*, from a collision of trucks owned by the respective defendants, the drivers of which were concededly negligent, the contention of the appellant that the negligence of the defendant uncle is imputable to the *deceased* child, *held*, untenable, the doctrine of imputable negligence not being applicable. *Kupchinsky, Adm'r v. Vacuum Oil Co.*, 238 App. Div. 457, 265 N. Y. Supp. 186 (2d Dept. 1933).

The general rule, well settled by authority is that the negligence of a custodian, whether parents or persons to whose care the child has been entrusted, is imputable to a child, *non sui juris*.¹ This rule is not universally accepted² and has been repudiated in some jurisdictions wherein it was formerly allowed.³ However, the infant must

¹ *Hartfield v. Roper*, 21 Wend. 615 (N. Y. 1839); *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 456 (1868); *Canavan v. Stuyvesant*, 154 N. Y. 84, 47 N. E. 967 (1895); *Metcalf v. Rochester R. R. Co.*, 12 App. Div. 147, 42 N. Y. Supp. 661 (4th Dept. 1896); *Levine v. Metropolitan St. R. Co.*, 78 App. Div. 426, 80 N. Y. Supp. 48 (1st Dept. 1903); *Paige v. N. Y. C. & H. R. R.*, 111 App. Div. 828, 98 N. Y. Supp. 183 (3rd Dept. 1906); *Wallace v. John A. Casey Co.*, 132 App. Div. 359, 116 N. Y. Supp. 394 (2d Dept. 1909); *Pastore v. Livingston*, 72 Misc. 555, 131 N. Y. Supp. 971 (1911).

² *Berry v. Lake Erie & W. R. Co.*, 70 Fed. 679 (C. C. D. I. 1895); *St. Louis & S. F. R. Co. v. Underwood*, 194 Fed. 363 (C. C. A. 5th, 1912); *Gov't St. R. Co. v. Hanlon*, 53 Ala. 70 (1875); *Southern R. Co. v. Shipp*, 169 Ala. 327, 53 So. 150 (1910); *Jones v. Strickland*, 201 Ala. 138, 77 So. 562 (1917); *St. Louis, Southwestern R. Co. v. Cockran*, 77 Ark. 398, 91 S. W. 747 (1905); *Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 139 S. W. 301 (1911); *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 179 Pac. 203 (1919); *Denver City Tramway Co. v. Brown*, 57 Colo. 484, 143 Pac. 364 (1914); *Bronson v. Southberry*, 37 Conn. 199 (1870); *Atlantic Coast R. Co. v. Crosby*, 53 Fla. 400, 43 So. 318 (1907); *Herrington v. Macon*, 125 Ga. 58, 54 S. E. 71 (1906); *Perryman v. Chicago City R. Co.*, 242 Ill. 269, 89 N. E. 980 (1909); *J. F. Darmody v. Reed*, 60 Ind. App. 662, 111 N. E. 317 (1916); *Fink v. Des Moines*, 115 Iowa 641, 89 N. W. 28 (1902); *Burzio v. Joplin & P. R. Co.*, 102 Kan. 287, 171 Pac. 351 (1918); *Louisville & N. R. Co. v. Wilkins*, 143 Ky. 572, 136 S. W. 1023 (1911); *Dana v. Monroe*, 129 La. 138, 55 So. 741 (1911); *Love v. Detroit, J. & C. R. Co.*, 170 Mich. 1, 135 N. W. 963 (1912); *Brennan v. Minnesota D. & W. R. Co.*, 130 Minn. 314, 153 N. W. 611 (1915); *Westbrook v. Mobile & A. R. Co.*, 66 Miss. 560, 6 So. 321 (1889); *Neff v. Cameron*, 213 Mo. 350, 111 S. W. 1139 (1908); *Flaherty v. Butte Electric R. Co.*, 40 Mont. 454, 107 Pac. 416 (1910); *Huff v. Ames*, 16 Neb. 139, 19 N. W. 623 (1884); *Warren v. Manchester St. R. Co.*, 70 N. H. 352, 47 Atl. 735 (1900); *Markey v. Consolidated Traction Co.*, 65 N. J. L. 682, 48 Atl. 1117 (1901); *Mullinax v. Hord*, 174 N. C. 607, 94 S. E. 426 (1917); *St. Clare St. R. Co. v. Eadie*, 43 Ohio St. 91, 1 N. E. 519 (1885); *Atchison, T. & S. F. R. Co. v. Calhoun*, 18 Okla. 75, 89 Pac. 207 (1907); *Erie City Pass. R. Co. v. Schuster*, 113 Pa. 412, 6 Atl. 269 (1886); *Watson v. Southern R. Co.*, 66 S. C. 47, 44 S. E. 375 (1903); *Nashville R. Co. v. Howard*, 112 Tenn. 107, 78 S. W. 1098 (1903); *Northern Texas Traction Co. v. Roye*, 38 Tex. Civ. App. 601, 86 S. W. 621 (1905); *Ploof v. Burlington Traction Co.*, 70 Vt. 509, 41 Atl. 1017 (1895); *Roanoke v. Shull*, 97 Va. 419, 34 S. E. 34 (1899); *Gregg v. King County*, 80 Wash. 196, 141 Pac. 340 (1914).

³ *Zarzana v. Neve Drug Co.*, *supra* note 2; *City of Evansville v. Lenhen*, 151 Ind. 42, 47 N. E. 634 (1897).

have committed or omitted to do something which in the case of an adult would have constituted negligence.⁴ The negligence of a custodian when not acting in that capacity is not chargeable to the child even though it tends to expose the child to injury from other persons.⁵ A child being in a lawful place, and exercising what would be regarded as ordinary care in an adult is entitled to recover for an injury occasioned by a wrongful act of another irrespective of the conduct of the parents.⁶ Negligence of a guardian is not imputable to an infant *non sui juris* who did nothing which would constitute negligence.⁷

In the present case, if the court applied the rule, it would be placed in an anomalous position of barring recovery to the administratrix of the deceased child, while the other who was injured might recover under the same circumstances. The court distinguishes the act of custody from that of driving, in stating that custody ceased at that moment the uncle placed the child in a safe position. As no negligent act of commission or omission on the part of the child contributed to the accident,⁸ the court rightly held that the doctrine of imputable negligence is not applicable in this case.

A. R. L.

OFFER AND ACCEPTANCE—REVOCATION—QUALIFIED ACCEPTANCE—SPECIFIC PERFORMANCE.—After negotiations, plaintiff and defendant met at the office of the attorney for the defendant where an instrument for the sale of land was drawn up and signed by the defendant. Plaintiff refused to sign at that time, saying: “* * * everything is O.K. in the contract but will there be any objection there to have one of his contracts looked over by an attorney?” No objection was made and it was attempted to leave

⁴ *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317 (1872); *Cumming v. Brooklyn R. R. Co.*, 104 N. Y. 669, 10 N. E. 853 (1887); *Lamb v. Ferrell*, 125 Misc. 148, 209 N. Y. Supp. 365 (1925); *Sullivan v. Chadwick*, 236 Mass. 130, 127 N. E. 632 (1920).

⁵ *McMahon v. New York*, 33 N. Y. 642 (1865); *Huerzeler v. Central Crosstown R. Co.*, 1 Misc. 136, 20 N. Y. Supp. 676 (1892), *aff'd*, 139 N. Y. 490, 34 N. E. 1101 (1893); *Hennessey v. Brooklyn R. R. Co.*, 6 App. Div. 207, 39 N. Y. Supp. 805 (2d Dept. 1896); *Smith v. City Realty Co.*, 79 App. Div. 441, 79 N. Y. Supp. 1116 (4th Dept. 1903); *Regan v. International R. R. Co.*, 205 App. Div. 425, 199 N. Y. Supp. 601 (4th Dept. 1923).

⁶ *Lannen v. Albany Gas Light Co.*, 44 N. Y. 459 (1871); *McGarry v. Loomis*, 63 N. Y. 104 (1875); *Serano v. New York C. & H. R. R. Co.*, 188 N. Y. 156, 80 N. E. 1025 (1907); *McNiel v. Boston Ice Co.*, 173 Mass. 570, 54 N. E. 257 (1899).

⁷ *Cavaliere v. Brooklyn City R. R. Co.*, 216 App. Div. 764, 214 N. Y. Supp. 763 (2d Dept. 1926).

⁸ Instant case.