Torts—A Child's Contributory Negligence Bars a Parent's Recovery For Medical Expenses in Texas. *Dartez v. Gadbois*, 541 S.W.2d 502 (Tex. Civ. App.—Houston [1st. Dist.] 1976, no writ).

On May 17, 1972, Richard Dartez was swimming in the Southside Place Park Association pool.[1] A casual acquaintance of Richard's, Glen Gadbois, was standing near the lifeguard throwing berries toward Richard. Richard in turn would retrieve the berries and throw them back at Glen. During this activity, as Richard swam toward one of the berries, Glen threw another that struck Richard in one eye. Because of the injuries received to that eye, blindness ensued, and surgery was required to remove the injured eye.[2] As a result of this injury, Mr. Dartez sued, as next friend, Southside Place Park Association (defendant) for negligently causing his son's injuries. Mr. Dartez also sued in his own behalf to recover medical expenses incurred in treating Richard's injury.[3] The defendant answered with allegations that Richard was contributorily negligent. In addition, the defendant impleaded Glen Gadbois alleging that Glen's negligence was the proximate cause of Richard's injury.[4] At the conclusion of the trial, the court submitted an issue to the jury asking them to determine whose negligence was the proximate cause of Richard's injury.[5] The jury responded that Richard, Glen and the defendant were all guilty of negligence contributing to Richard's injury. Based on this finding of Richard's contributory negligence,[6]

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1. Dartez v. Gadbois, 541 S.W.2d 502, 507 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

2. *Id*.

3. *Id.* at 505. Mr. Dartez alleged that certain acts of negligence on the part of the defendant were the proximate cause of the injuries suffered by Richard. Mr. Dartez alleged further, that by reason of the injuries suffered by his son he was required to pay certain medical expenses. *Id.*

4. *Id.*

5. *Id.* The question was submitted in the following form:

> Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the accident in question?
>
> (a) The Defendant, Southside Place Park Association, Inc.
>
> (b) The Plaintiff, Richard Dartez.
>
> (c) The Third-Party Defendant, Glen Gadbois.
>
> (d) A combination of the above. (State the combination). *Id.*

6. It should be noted that the accident giving rise to the *Dartez* action occurred prior to the adoption of comparative negligence in Texas. However, even under the comparative negligence statute, the problems addressed in this article will exist. If the injured child is found contributorily negligent and such negligence is used to prevent or decrease the amount of his recovery, the question still remains as to whether such negligence should be imputed to the parent to decrease the parent's recovery for medical expenses.

the trial court thereafter ordered a take nothing judgment against Richard's father, both on his suit for Richard's injuries and his own action for medical expenses. On appeal, the take nothing judgment was affirmed by the Court of Civil Appeals.[7]

Two primary issues faced the court in *Dartez v. Gadbois*.[8] The first issue concerned the trial court's submission to the jury of the negligence-proximate cause issue.[9] The second issue, and the one addressed by this article, revolves around the trial court's refusal to enter judgment for Mr. Dartez in his action for medical expenses. Mr. Dartez argued that his son's contributory negligence should not operate as a bar to his recovery as a parent for medical expenses paid. The Court however, rejected Mr. Dartez' argument and stated that although this case was one of first impression in Texas, it would follow the rule found in most jurisdictions.[10] This general rule states that a child's contributory negligence will bar the parent's recovery for medical expenses incurred in treating the child's injuries.[11] Notwithstanding its decision to follow the general rule, the *Dartez* court did recognize that the rule is subject to substantial criticism.[12]

The criticism directed against the general rule recognized by the *Dartez* court was considered by the Iowa Supreme Court to be so persuasive that Iowa became the first American jurisdiction to

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7. *Id.* at 510.

8. *Id.* at 506-510. The court also treated the plaintiff - appellant's contention that there was no evidence supporting the finding that the acts by Richard Dartez were a proximate cause of his injury. *Id.* at 507. The appeals court found that there was sufficient evidence to support the finding. *Id.* The apppeals court also found that the trial court's failure to submit special issues relating to the defendant's negligence was not reversable error. *Id.* at 508. The court of appeals also rejected the plaintiff's argument that he should have received judgment as a matter of law, based on the doctrine of assumption of risk, by finding that the judgment was not based on assumption of risk. *Id.* The plaintiff also argued that there was no evidence to support the jury's finding on the questions of discovered peril and that the trial court erred in not submitting the plaintiff's special issue on discovered peril. *Id.* The appeals court found ample evidence to support the jury's finding, and the court further stated that the plaintiff's special issue was not in proper form. *Id.* The court of appeals also held that the trial court's failure to submit explanatory instructions on circumstantial evidence was not error. *Id.* Finally, the court of appeals found that the plaintiff's contention with respect to the jury's findings on damages was without merit. *Id.* at 509-510.

9. The court of appeals did not reach the substantive questions of law relating to this point of error. The court held that the plaintiff waived any potential error by failing to make a proper objection at trial. *Id.* at 506.

10. *Id.* at 509.

11. *Id.*

12. *Id.* The court offered no reason for adopting the general rule other than that the rule was followed in most other jurisdictions.

reject the rule outright.[13] In *Handeland v. Brown,*[14] the Iowa court based its rejection of the general rule on the belief that the four theories used by various courts to support the rule are illogical and archaic. According to the *Brown* court, these theories served "to perpetuate an erroneous doctrine simply to avoid a departure from the past."[15]

Of the four theories found by the *Brown* court to support the general rule, the first is that of imputed negligence.[16] According to this theory, the contributory negligence of the child is imputed to the parent because the parent-child relationship imposes a responsibility on the non-negligent parent for the conduct of the child.[17] The second theory states that the parent's action is derived from the child's action.[18] A cause of action separate from that of the injured child's arises in favor of the parent, but the parent takes the action subject to the same defenses available against the child.[19] The third theory is based on the argument that the parent's cause of action arises by operation of law because a portion of the child's action is assigned to the parent.[20] This argument characterizes the parent's cause of action as an award, by law, for accepting the legal duty to care for and support the child.[21] Because the parent receives a portion of the child's action by operation of law, the parent must take the action under the same liabilities as the child.[22] The final theory supporting the general rule is based on precedent.[23] That is, the rule is so well settled that there is no reason to disturb it, and that to disturb the rule would not be in the best interests of justice.[24]

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13. Handeland v. Brown, 216 N.W.2d 574 (Iowa 1974). An early Canadian court took this position in Wasney v. Jurazsky, [1933] 1 D.L.R. 616 (Can.).

14. 216 N.W.2d 574 (Iowa 1974).

15. *Id.* This position is supported by a dissent in an earlier case found at Ross v. Cuthbert, 239 Ore. 429, 397 P.2d 529, 533 (1964) (dissenting opinion).

16. Chicago, B. & Q. R.R. v. Honey, 63 F. 39 (8th Cir. 1894). This is a federal case construing Iowa law. Although the U.S. Court of Appeals for the Eighth Circuit has never overruled this case, it would appear that its viability as precedent has been significantly undermined by Handeland v. Brown, 216 N.W.2d 574 (Iowa 1974).

17. Chicago, B. & Q. R.R. v. Honey, 63 F. 39, 41 (8th Cir. 1894).

18. Dudley v. Phillips, 218 Tenn. 648, 405 S.W.2d 468 (1966). *See* cases at Annot., 21 A.L.R.3d 469, 471 (1968).

19. *Id.* at 469-471.

20. Callies v. Reliance Laundry Co., 188 Wis. 376, 206 N.W. 198 (1925); *See* Annot., 21 A.L.R.3d 469, 473 (1968).

21. Callies v. Reliance Laundry Co., 188 Wis. 376, 206 N.W. 198, 200 (1925).

22. *Id.*

23. Ross v. Cuthbert, 239 Ore. 429, 397 P.2d 529, 530-31 (1964).

24. *Id. See* dissent in Handeland v. Brown, 216 N.W.2d 574, 579 (Iowa 1974), and cases accumulated there.

Because Texas courts have not previously applied the general rule barring a parent's recovery on the basis of his child's contributory negligence, there is no Texas law directly in point. It is valuable to note, however, that Texas courts have considered the general question of imputed negligence in several contexts concerning the family relationship. A parent's contributory negligence has generally been held not to bar a child's recovery for his own injuries.[25] This position was first adopted in Texas in *G., H & H. Railway v. Moore.*[26] In support of its position, the court recognized that the basis of any obligation to compensate a party for injuries arises from the breach of some duty.[27] The court also recognized a parent's duty to protect, provide for and maintain the child, stating that this duty was of an affirmative nature.[28] In addition, the court stated that all others in society have a duty, of a negative nature, not to subject the child to injury.[29] Therefore, if the parent's negligence was imputed to the child, the third party was entirely excused from the consequences of a negligent breach of duty. According to the *Moore* court, this result was unjust.[30] The child had no control over the parent's conduct and therefore the innocent child should not be denied redress because of the parent's conduct.[31]

Another related area of law in which Texas has established precedent is known as the family purpose doctrine.[32] The family purpose doctrine exists in two forms.[33] In one form the doctrine is based on a true agency relationship, for example where the parent directs the child to perform an errand relating to the parent's business.[34] This resulting relationship makes the parent liable for negli-

25. Thacker v. J.C. Penney Co., 254 F.2d 672, 679 (5th Cir. 1950); Gulf Prod. Co. v. Quisenberry, 128 Tex. 347, 97 S.W.2d 166, 168 (1936); Western Union Tel. Co. v. Hoffman, 80 Tex. 202, 15 S.W. 1048, 1048-49 (1891); G., H. & H. R.R. v. Moore, 59 Tex. 64 (1883); Kuemmel v. Vradenburg, 239 S.W.2d 869, 873 (Tex. Civ. App.—San Antonio 1951, writ ref'd n.r.e.); Sullivan v. Trammell, 130 S.W.2d 310, 315 (Tex. Civ. App.—Waco 1939, writ dism'd jdgmt cor.).

26. 59 Tex. 64 (1883).

27. *Id.* at 68.

28. *Id. See* TEX. FAMILY CODE ANN. § 4.02 (1975).

29. G., H. & H. R.R. v. Moore, 59 Tex. 64, 68 (1883).

30. *Id.* at 68-69.

31. *Id.*

32. Trice v. Bridgewater, 125 Tex. 75, 81 S.W.2d 63 (1935); Seinsheimer v. Burkhart, 132 Tex. 336, 122 S.W.2d 1063, 1066 (1939); Cotterly v. Muirhead, 244 S.W.2d 920, 922 (Tex. Civ. App.—Ft. Worth 1951, writ ref'd n.r.e.); HARPER & JAMES, THE LAW OF TORTS, § 26.15, at 1419 (1956). *See generally* Annot., 132 A.L.R. 981 (1941).

33. Trice v. Bridgewater, 129 Tex. 75, 81 S.W.2d 63, 63-64 (1935).

34. *Id.*

gent conduct by the child while doing the parent's business. This result is reached purely under the law of agency, and reference to this type of circumstance as an example of the family purpose doctrine is, in some respects, a misnomer.[35] The Texas courts have accepted such results based on straightforward applications of agency principles.[36]The true example of the family purpose doctrine arises when the child uses a family car, purchased for the family by the parent, in pursuing his own purposes.[37] According to the doctrine, the parent is responsible in this situation for any injuries or damages caused by the child's negligence.[38] This theory originated when the automobile was considered a dangerous instrument, and a parent was negligent in permitting a child to operate the auto.[39] Modern perpetuations of the rule appear to be based either on the weight of precedent or the fact of the ownership of the car. Those courts using the latter reason have stated that the mere purchase of an automobile for family pleasure was a sufficient basis for sustaining the parent's liability.[40] Apparently these courts implied some type of agency relation between the parent and child with the business involved being some general concept of family pleasure. Texas courts have chosen not to adopt this appliation of the family purpose doctrine and have stated that the single fact of ownership of the auto was insufficient as a basis for liability.[41]

Two other relevant areas of law concerning imputed negligence among family members have been discussed by Texas courts. In general, a parent is not liable for the torts of a child.[42] There are some exceptions to this rule,[43] but on the whole Texas courts have been unwilling to hold the parent liable for conduct by the child over which the parent had no control.[44] In addition, Texas has estab-

35. *Id.*

36. *Id.* at 67.

37. *Id.* at 64, *quoting* Norton v. Hall, 149 Ark. 428, 232 S.W. 934, 935 (1921).

38. *Id.*

39. Trice v. Bridgewater, 125 Tex. 75, 81 S.W.2d 63, 64-65 (1935).

40. *Id.* at 65. *See* Fridman, *The Doctrine of the "Family Car:" A Study in Contrasts*, 8 TEX. TECH L. REV. 323, 330-31 (1976).

41. Trice v. Bridgewater, 125 Tex. 75, 81 S.W.2d 63, 65 (1935).

42. Chandler v. Deaton, 37 Tex. 406, 407 (Term of 1872-3); Aetna Ins. Co. v. Richardelle, 528 S.W.2d 280, 285 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); Lessoff v. Gordon, 124 S.W. 182, 183 (Tex. Civ. App. 1909, no writ); Ritter v. Thibodeaux, 41 S.W. 492, 493 (Tex. Civ. App. 1897, no writ).

43. Moody v. Clark, 266 S.W.2d 907, 912 (Tex. Civ. App.—Texarkana 1954, writ ref'd n.r.e.).

44. Note 41, *supra.*

lished precedent with respect to imputing negligence between spouses. Originally it was held that the negligence of one spouse will, in most instances, operate to bar recovery by the non-negligent spouse.[45]The theory behind this holding, as ennunciated in *Missouri Pacific Railway v. White*[46] and as followed thereafter,[47] was based primarily on community property concepts. That is, because the proceeds of a recovery by a non-negligent spouse become part of the community estate, the negligent spouse is also benefited.[48] Consequently, the courts impute the negligence of one spouse to the other to prevent the unjust benefit from accruing to the negligent spouse.[49]

In a landmark case, *Graham v. Franco,*[50] the Texas Supreme Court modified the community property defense to spousal recovery by reclassifying personal injury recoveries as separate property.[51] When the proceeds of a recovery by a non-negligent spouse are classified as separate property, then the rationale supporting the old community property defense disappears because no legal benefit accrues to the negligent party.[52] The *Franco* court held that because the negligent spouse could not legally benefit from the non-negligent spouse's separate property recovery, the contributory negliegence of one spouse should not bar recovery by the other.[53] However, the court limited this holding to recoveries for personal injuries (separate property), emphasizing that a recovery for medical expenses or loss of earnings remains property of the community.[54] One should note, therefore, that the old concepts of the community property defense remain intact where it would be unjust to allow a negligent party to benefit from his own wrong.[55]

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45. Missouri-Kan. Tex. R.R. v. Hamilton, 314 S.W.2d 114, 117 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.). *But see* Graham v. Franco, 488 S.W.2d 390, 397 (Tex. 1972).

46. 80 Tex. 202, 15 S.W. 808 (1891).

47. Dallas Ry. & Terminal Co. v. High, 129 Tex. 219, 103 S.W.2d 735 (1937); Northern Tex. Traction Co. v. Hill, 297 S.W. 778 (Tex. Civ. App.—El Paso 1927, writ ref'd).

48. Missouri P. Ry. v. White, 80 Tex. 202, 15 S.W. 808 (1891). *See* Comment, *Reclassification of Tort Recoveries*, 4 TEX. TECH L. REV. 359, 360-61 (1973).

49. Missouri P. Ry. v. White, 80 Tex. 202, 15 S.W. 808 (1891). *See also* Graham v. Franco, 488 S.W.2d 390, 391-96 (Tex. 1972).

50. Graham v. Franco, 488 S.W.2d 390 (Tex. 1972).

51. *Id.* at 397. Technically, the *Franco* court merely found that § 5.01 of the Texas Family Code was consistent with Texas community property law and therefore constitutional. This section classified personal injury recoveries as separate property. TEX. FAMILY CODE ANN. § 5.01 (1975).

52. Graham v. Franco, 488 S.W.2d 390, 397 (Tex. 1972). *See* Rucker v. Garner, 489 S.W.2d 683 (Tex. Civ. App.—Eastland 1973, no writ).

53. Graham v. Franco, 488 S.W.2d 390, 397 (Tex. 1972).

54. *Id.* at 396.

55. *Id.*

Despite the availability of the preceeding Texas cases concerning imputed negligence in the family context, the court in *Dartez v. Gadbois*[56] simply chose to characterize the fact situation before it as one of first impression. Further, based on that characterization, the *Dartez* court decided to apply the so-called general rule obtaining in other jurisdictions that have faced similar fact situations without any analysis of the logic supporting the rule. An analysis of existing Texas case law in connection with the *Dartez* fact situation indicates the court incorrectly concluded that the contributory neglience of a minor child bars a parent's recovery for medical expenses in Texas.

The cases in which a parent's contributory negligence is not imputed to the child[57] are remarkably similar to the *Dartez* case. The relationship, that of parent and child, is the same in both instances, the only distinction being that in *Dartez* the negligence was imputed from the child to the parent rather than vice versa. Applying the logic used by the courts in refusing to impute negligence from parent to child,[58] it appears that there is no justification for imputing a child's negligence to the parent. It is obvious that imputing a child's negligence to the parent would effectively shield a negligent third party from liability for damage caused to the innocent parent. The damage to the parent in this case is financial, *i.e.*, medical expenses incurred in treating his child. It seems that this result is equally as undesirable in the circumstances of *Dartez* as in circumstances where the child is not held responsible for the parent's negligence.

Another analogy can be made between the *Dartez* circumstances and the facts giving rise to the family purpose doctrine.[59] Here again, the family relationship is identical in both *Dartez* and family purpose cases. In addition the negligence is imputed from the child to the parent in both *Dartez* and family purpose cases. Clearly there is no agency relationship in *Dartez,* as is required by Texas courts before applying the family purpose doctrine. An agency cannot exist in *Dartez* because the child was pursuing his own personal purposes.[60] The only basis for imputing negligence in *Dartez* is the fact

56. 541 S.W.2d 502 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

57. *See* notes 24-30 *supra* and accompanying text.

58. *See* notes 24-30 *supra* and accompanying text.

59. *See* notes 31-40 *supra* and accompanying text.

60. Dartez v. Gadbois, 541 S.W.2d 502, 507 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

of the relationship of parent and child. As that fact is insufficient as a basis for liability in Texas under the family purpose doctrine,[61] it should not be made the basis of liability in circumstances such as *Dartez*.

Texas courts have also refused to impose liability on the parent for injuries caused by the negligent conduct of the child in other contexts.[62] There appears to be no logical distinction, in light of this rule, for imputing the contributory negligence of the child to the parent, as was done in *Dartez*.

Finally, the rule adopted by the Texas Supreme Court in *Graham v. Franco*[63] is important in analyzing *Dartez*. *Franco* appears to dispell any remaining doubts as to the justice of the result if the child's contributory negligence is not imputed to the parent. Although the relationships in *Dartez* and *Franco* are not identical, they are both of a close familial nature. In addition, the community estate is involved in both circumstances. In *Franco* the recovery was of separate property, personal to the non-negligent spouse.[64] In *Dartez*, the recovery was personal to the parent, and the child had no legal right or ownership interest in the recovery.[65] The personal nature of the recovery is a result of the parent's legal duty to provide adequate support and health care for the child.[66] If *Franco* is read as generally permitting recovery in family circumstances where the negligent family member will not be legally benefited, then the child's negligence should not bar the parent's recovery for medical expenses.

Additionally, one could attack the court's application of the general rule in this case by a critical analysis of the four theories used to support it. The theory that a child's negligence should be imputed to the parent, based on the fact of the relationship or on the parent's duty to control the child, is illogical and impractical.[67]

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61. Trice v. Bridgewater, 125 Tex. 75, 81 S.W.2d 63 (1935).

62. *See* notes 40-43 *supra* and accompanying text.

63. 488 S.W.2d 390 (Tex. 1972).

64. *Id.* at 397.

65. Hernandez v. United States, 313 F. Supp. 349, 362 n.16 (M.D. Tex. 1969); Rishworth v. Moss, 222 S.W. 225 (Tex. Comm'n App. 1920, holding approved); Kennedy v. Kennedy, 505 S.W.2d 393, 397 (Tex. Civ. App.—Austin 1974, no writ); Walsh v. Hershey, 472 S.W.2d 954, 957-58 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.); Coates v. Moore, 325 S.W.2d 401, 403 (Tex. Civ. App.—Waco 1959, writ ref'd n.r.e.); TEX. FAMILY CODE ANN. § 4.02 (1975).

66. *Id.*

67. Handeland v. Brown, 216 N.W.2d 574, 576 (Iowa 1974); Callies v. Reliance Laundry Co., 188 Wis. 376, 206 N.W. 198, 199-200 (1925). It is a practical impossibility for a parent to

Neither the family relationship nor the duty discussed above are so extensive as to justify barring a parent's recovery by imputing the child's negligence.[68] The limited scope of the relationship and the duty is demonstrated by the facts that a parent is generally not liable for a child's torts[69] and is obligated to control the child only to the best of his ability.[70] In addition, both the derivative action theory[71] and the assignment theory[72] are inconsistent with the idea that the parent's action for medical expenses is separate and independent, and available only to the parent.[73] Operation of law cannot serve to assign a cause of action to the parent when the parent is already in possession of the claim. Finally, any legal rule that is adopted or perpetuated solely on the basis of precedent is, on its face, subject to serious question.

The adoption of the rule imputing a child's contributory negligence to the parent, in *Dartez v. Gadbois*,[74] is an unjustified perpetuation of an illogical but widely accepted rule of law. Any workable legal system must be based on a consistent and logical application of fundamental principles. The position taken by the *Dartez* court is inconsistent with accepted rules of law currently existing in Texas. An innocent party suffered financial loss and was denied redress in *Dartez v. Gadbois*,[75] a result that would not have occurred

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control a child's every action. Consequently, absent a finding of negligence by the parent, the parent should not be held responsible for the child's misconduct.

68. Callies v. Reliance Laundry Co., 188 Wis. 376, 206 N.W. 198, 199-200 (1925). A further inconsistency is that a child's negligence will not affect a parent's claim for damages to borrowed clothes or other personalty, even if the child's negligence contributed to the damage to the parent's property. See James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340, 354-55 (1954).

69. Moody v. Clark, 266 S.W.2d 907, 912 (Tex. Civ. App.—Texarkana 1954, writ ref'd n.r.e.). *See generally Torts: Whether a Child's Concurrent Contributory Negligence Bars a Parent's Recovery for Loss of the Child's Services*, 14 WASHBURN L.J. 691, 694-95 (1975).

70. Du Pre v. Du Pre, 271 S.W.2d 829, 831 (Tex. Civ. App.—Dallas 1954, no writ). *See also* Annot., 12 A.L.R.2d 1042 (1950).

71. See notes 17-18 *supra* and accompanying text.

72. See notes 19-21 *supra* and accompanying text.

73. Handeland v. Brown, 216 N.W.2d 574, 576 (Iowa 1974); James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340, 354-55 (1954); *See also* PROSSER, LAW OF TORTS, § 125 (4th Ed. 1971); 1 HARPER AND JAMES, THE LAW OF TORTS, § 8.8 at 629-35 (1956); Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services*, 2 U. CHI. L. REV. 173, 180-193 (1935). A truly derivative action is illustrated by the situation in which a relative brings a wrongful death action to redress a wrong done to the deceased party. James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340, 354-55 (1954).

74. 541 S.W.2d 502 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

75. *Id.*

under a careful and consistent application of accepted principles of Texas law.

D. Woody Glenn