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Article 12

Torts - Wife Entitled to Sue Spouse for Personal Injury

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cent years in North Carolina and other States outlawing the practice of optical kickbacks,[24] but this did not affect its decision, since it was concerned with public policy as it existed in 1943 and 1944, when the kickbacks were made.

Since the Supreme Court's decision in the *Lilly* case, the Tax Court has had occasion to pass upon the deductibility of secret payments in the nature of bribes or graft made by one company to the purchasing agent of another company in order to procure a contract.[25] In deciding that the payments were not deductible, the court avoided the question of public policy and made a factual finding that the payments were not to be regarded as normal, usual, nor customary in the business world, or "such as were allowable in *Lilly v. Commissioner*."[26]

The Tax Court apparently was on safe ground in this instance, since the Supreme Court has previously said that the question of whether an expense is directly related to a business and whether it is ordinary and necessary are doubtless pure questions of fact in most instances, and that a decision of the Board of Tax Appeals[27] on these issues should not be reversed by the federal appellate courts, except where a question of law is unmistakably involved.[28]

On the related question of fee-splitting by surgeons, which the Commissioner had been inclined to treat in the same manner as the kickbacks in the *Lilly* case, a new position was assumed which gave recognition to the policy enunciated by the Supreme Court. This new position was set forth in a Bureau ruling[29] to the effect that payments by surgeons under split-fee arrangements would be deductible where they complied substantially with the tests laid down in the *Lilly* case.

TORTS—WIFE ENTITLED TO SUE SPOUSE FOR PERSONAL INJURY

The plaintiff alleged that while she was riding as a guest in the car of the defendant, her husband, he wilfully and wantonly collided with another car, causing injuries to her. The parties were subsequently divorced. The wife brought this tort action which was dismissed in the Superior Court. The Appellate Court affirmed that decision.[1] The Illinois Supreme

[24] N.C. Laws (1951) c. 1089, §§ 21, 23; Remington's Wash. Rev. Stat. (1949) §§ 10185–14; Deering's Cal. Business and Professions Code (1951) §§ 650, 652.

[25] Estate of Lashells, 11 T.C.M. 274 (1952), 52, 086 P-H MEMO T.C. (1952).

[26] Estate of Lashells, 11 T.C.M. 274 (1952), 52, 086 P-H MEMO T.C. (1952).

[27] The Board of Tax Appeals was redesignated the Tax Court of the United States by Act October 21, 1942, ch. 619, title V., § 504, 56 Stat. 957.

[28] Commissioner v. Heininger, 320 U.S. 467, 475 (1943).

[29] I.T. 4096, 1952 Int. Rev. Bull. No. 18, at 3 (1952).

[1] Brandt v. Keller, 347 Ill. App. 18, 105 N.E. 2d 796 (1952).

Court, two judges dissenting, reversed the Appellate Court and held that under the Married Women's Act of 1874[2] the plaintiff was authorized to bring such an action. *Brandt v. Keller*, 413 Ill. 503, 109 N.E. 2d 729 (1952).

This case represents the first time that the Illinois courts have been called upon to decide whether the 1874 Married Women's Act confers upon the wife the right to sue her husband for a personal tort.

At common law a married woman could not sue anyone. She was completely dependent upon her husband to enforce her rights. It was held that husband and wife could not sue each other because they were considered one person, and one cannot sue himself.[3] Gradually the rights of a married woman were extended by courts of equity and statutory enactments. An Illinois act of 1861[4] allowed a wife to acquire and convey her own property. This statute was held to include the right to bring suits in her own name without joining her husband for unlawful interference with her property, even against her husband.[5]

The decision in the present case is based on an interpretation of Section 1 of the Married Women's Act of 1874:

> That a married woman, may in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment in such action may be enforced by or against her as if she were a single woman.[6]

The court held that the phrase "in all cases" was to be construed literally, and that the legislative intent was to remove all of the married woman's common law disabilities with regard to suing and being sued.

The court followed the reasoning of *Welch v. Davis*,[7] stating that the common law obstacles in suits by married women no longer exist because by statute a wife may own property independently of her husband and may bring suit in her own name; it would no longer be a circuitous action in which the property would return to her husband.

The court also stated that the public policy reason for denying a tort action between spouses was without merit. It noted that when one spouse assails another with a suit there is not much domestic tranquility left to disrupt, and the conjugal peace is just as seriously jarred by other allowable actions, i.e., property and contract actions.[8]

In answer to the Appellate Court's interpretation of the 1874 Statute

[2] Ill. Rev. Stat. (1951) c. 68, § 1.

[3] Chestnut v. Chestnut, 77 Ill. 346 (1875).

[4] Ill. Pub. Law (1861) p. 143.

[5] Emerson v. Clayton, 32 Ill. 493 (1863).

[6] Ill. Rev. Stat. (1951) c. 68, § 1.

[7] 410 Ill. 130, 101 N.E. 2d 547 (1951).

[8] Thomas v. Mueller, 106 Ill. 36 (1883); Martin v. Robson, 65 Ill. 129 (1872).

that the emphasis should be placed on the phrase "without joining her husband," the court here said that acts of 1861 and 1869 already were interpreted to permit a married woman to sue her husband, as well as third parties, without joining him in property actions.[9] Thus the court assumed that the legislature intended to extend her rights by the 1874 Act.

The Illinois court further reasoned that since the court had already authorized a wife to sue her husband in contract[10] without any express authority other than the general words relied upon in this case (a married woman may, in all cases, sue and be sued),[11] she should also be able to sue her husband in tort. The statute could not be construed to remove the common law immunity for contract purposes and preserve it for another purpose, i.e., tort.

The principal Appellate Court reasons are worthy of note. The court said: 1. that the words "without joining her husband" emphasize the joinder of the husband as the major legislative concern; 2. that statutes in derogation of the common law are to be strictly construed; 3. that the primary rule in statutory interpretation is to give effect to the legislative intent, considering the conditions, evils, and injustices sought to be corrected; 4. that the whole act is concerned with the disabilities of wives as distinguished from spouses to effect the object of equality and not to remove the common law immunities between them; 5. that since in seventy-seven years following the passage of the act no similar suit had been brought, it was fair to conclude from this fact that the consensus of opinion of all who had to deal with the matter, lawyers, judges, and others, was that interspousal suits in personal tort were not allowed by the statute.[12]

Thus there are good arguments on both sides of the issue. However, in view of the language of the statute and the steady development in women's rights from property to contracts, the advance from contracts to torts is a fair extension, and the logic of the Illinois Supreme Court cannot be denied.

It is interesting to note two decisions that are not in accord with this decision. In *Thompson v. Thompson*[13] the United States Supreme Court held for purely public policy reasons that a District of Columbia Statute authorizing women "to sue separately in tort as fully as if unmarried" did not authorize a tort suit against a spouse. In *Buckeye v. Buckeye*[14] the Wisconsin Supreme Court applied Illinois law in a tort action and

[9] Martin v. Robson, 65 Ill. 129 (1872).

[10] Thomas v. Mueller, 106 Ill. 36 (1883).

[11] Ill. Rev. Stat. (1951) c. 68, § 1.

[12] Brandt v. Keller, 347 Ill. App. 18, 105 N.E. 2d 796 (1952).

[13] 218 U.S. 611 (1910).

[14] 203 Wis. 248, 234 N.W. 342 (1931).

held that the common law immunity remained in spite of the 1874 Statute. That court relied mainly on the case of *Merrill v. Marshall*[15] in which the Illinois Appellate Court said that the common law unity of husband and wife was not changed by the statute to make them subject to a civil conspiracy charge.

The present court recognized that the majority of courts are contrary to the holding in this case. However, Illinois now sides with a growing minority and a possible modern trend.[16] It is important to remember that the question is essentially one of statutory construction.

Of much importance are the implications involved in the present case. Will the rule be confined to wilful and wanton torts as are involved in the reported case? Apparently not from the liberal language of the court giving literal interpretation to the phrase "in all cases." It is interesting to note that the court made no further references to the words "wilful and wanton" other than in the statement of the facts of the case. Other concurring jurisdictions have not limited such an action to wilful and wanton torts.[17]

A serious sociological problem is also involved. There is certainly a much greater threat to domestic tranquility by allowing tort actions than other actions. Seldom do spouses have occasion to instigate criminal prosecutions, contract and property actions in comparison to the opportunities they have to sue each other in tort.

A question arises as to whether a husband may sue his wife for tort under the Married Women's Act of 1874.[18] Other courts with similar statutes have held that such a suit is not allowed unless by express statute.[19] It is also interesting to note that for public policy reasons sister states may refuse to entertain any such domestic actions.[20]

In the most common type of cases involving automobile accidents, the insurance companies representing the defendant will be faced with the problem of collusion between husband and wife.

[15] 113 Ill. App. 447 (1904).

[16] Singer v. Singer, 245 Wis. 191, 14 N.W. 2d 43 (1944); Coster v. Coster, 289 N.Y. 438, 46 N.E. 2d 509 (1943); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); Ginsberg v. Ginsberg, 126 Conn. 146, 9 A. 2d 812 (1939); Courtney v. Courtney, 184 Okla. 395, 87 P. 2d 660 (1938); Rains v. Rains, 97 Colo. 19, 46 P. 2d 740 (1935); Gray v. Gray, 87 N.H. 82, 174 A. 508 (1934); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W. 2d 696 (1931); Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920); Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917).

[17] Singer v. Singer, 245 Wis. 191, 14 N.W. 2d 43 (1944); Courtney v. Courtney, 184 Okla. 395, 87 P. 2d 660 (1938); Rains v. Rains, 97 Colo. 19, 46 P. 2d 740 (1935).

[18] Ill. Rev. Stat. (1951) c. 68, § 1.

[19] Scholtens v. Scholtens, 230 N.C. 149, 52 S.E. 2d 350 (1949); Singer v. Singer, 245 Wis. 191, 14 N.W. 2d 43 (1944).

[20] Poling v. Poling, 116 W.Va. 187, 179 S.E. 604 (1935).

It appears likely that the Illinois courts will soon be called upon to decide whether or not a wife may sue her estranged husband in the tort action of rape.[21] The action is being brought on the authority of our present decision. It seems inconceivable that the Illinois courts will sustain any such action. Our present decision cannot be cited as a precedent authorizing the courts to completely disregard all marital privileges.

However, it must be concluded that our present decision has opened the way in Illinois to a new body of tort law which will certainly bring many more interspousal disputes into the courts, especially where the parties are divorced at the time of bringing suit as in the present case.

LABOR LAW–RIGHT TO COMPEL REDELIVERY OF UNION SHOP CARD

Plaintiff, a local barbers' union, sought to compel the redelivery of a union shop card which had been supplied to the defendant, a barber shop proprietor. The shop card identified defendant's place of business as a "union shop" and it had been accepted by the defendant as union property subject to recall for violation of union rules. Defendant was not only an employer of other barbers, but he also worked as a barber in his own shop. The union brought this suit to recover the shop card on the grounds that the defendant refused to join the union and pay dues as a "non-active member," such refusal being in violation of union rules.[1] The Supreme Judicial Court of Massachusetts dismissed the suit and refused to compel return of the card. *Di Leo v. Daneault*, 109 N.E. 2d 824 (Mass., 1953).

The *Di Leo* case represents the latest interpretation of a provision recently added to the constitution of the International Barbers' Union.[2] The constitutional provision requires that proprietors working "with the tools of the trade," join the union as "non-active" or "proprietor" members. Such a "non-active" membership would require the proprietor

[21] Chicago Daily Sun-Times § 1, p. 3, col. 3 (Feb. 11, 1953).

[1] For decisions holding that an attempt to unionize employers is a lawful and proper labor objective see: Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943); Saveall v. Demers, 322 Mass. 70, 76 N.E. 2d 12 (1947); Coons v. Journeymen Barbers, Etc., 222 Minn. 100, 23 N.W. 2d 345 (1946); Naprawa v. Chicago Flat Janitors' Union, 315 Ill. App. 328, 43 N.E. 2d 198 (1942); Swing v. A.F. of L., 298 Ill. App. 63, 18 N.E. 2d 258 (1938).

Contra: Dinoffria v. International Brotherhood of Teamsters and Chauffeurs, 331 Ill. App. 129, 72 N.E. 2d 635 (1947); Ellingsen v. Milk Wagon Drivers' Union, 377 Ill. 76, 35 N.E. 2d 349 (1941); Meadowmoor Dairies v. Milk Wagon Drivers' Union, 371 Ill. 377, 21 N.E. 2d 308 (1939); Carlson v. Carpenter Contractors' Ass'n., 305 Ill. 331, 137 N.E. 222 (1922); Doremus v. Hennessy, 176 Ill. 608, 52 N.E. 924 (1898); Rest., Torts § 814 (1939).

[2] The Journeymen Barbers, Hairdressers and Cosmetologists' International Union of America. This constitutional provision became effective Jan. 1, 1948.