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Agency--Respondeat Superior--Contribution--Indemnity--Employer's Liability Toward the Wife of His Employee

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AGENCY—RESPONDEAT SUPERIOR—CONTRIBUTION—INDEMNITY—EMPLOYER'S LIABILITY TOWARD THE WIFE OF HIS EMPLOYEE.—For purposes of appeal from a summary judgment granted to defendant, the Court assumed the following facts from the allegations and viewed them in the light most favorable to the plaintiff: the plaintiff, a passenger, was injured by her husband's negligent operation of an automobile owned by defendant corporation of which the husband was an employee and shareholder. The accident occurred while plaintiff was assisting her husband in preparing for an impending sales trip for defendant's benefit and while her husband was acting within the scope of his employment. *Held*: Reversed. The immunity extending to the husband for a tortious act toward his wife does not offer a defense to the vicarious liability of his employer. *Fields v. Synthetic Ropes, Inc.*, 215 A.2d 427 (Del. 1965).

The Delaware court agreed with the defendant that a wife may not sue her husband in an action at law, but disagreed with the argument that permitting an employee's wife to sue her husband's employer would be allowing her to do indirectly that which she cannot do directly. This "argument of indirection"[1] arises from the possibility that the employer could recover idemnification[2] from the employee, which would not only negate the wife's recovery, but would also reduce the family funds by the costs of the litigation.

The defendant supported his argument of indirection with two cases, one of which[3] held that the Contribution Among Tortfeasors Act[4] had no application unless there was a "common liability" to the plaintiff between the defendant and the proposed contributor. In that case, the driver of an automobile and his guest passengers brought suit against the adverse driver, who sought contribution[5] from the plaintiff driver. The defendant was not permitted to recover contribution because the Guest Statute[6] precluded the host's liability to the

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[1] 215 A.2d at 429.

[2] 42 C.J.S. *Indemnity* § 1 (1944) states, "As relating to a contract of indemnity the word 'indemnity' may be defined as the obligation or duty resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit."

[3] Lutz v. Boltz, 9 Terry 197, 100 A.2d 647 (Del. Super. 1952).

[4] 10 DEL. CODE, ch. 63 (1953).

[5] 18 C.J.S. *Contribution* § 1 (1939) states, "Contribution has been defined to be a payment made by each, or by any, of several having a common interest of liability of his share in the loss suffered, or in the money necessarily paid by one of the parties in behalf of the others." Contribution is distinguished from indemnity (see note 2, *supra*) "in that the latter springs from a contract express or implied, and also in the recovery, full reimbursement being sought in an indemnity action, while only ratable or proportional reimbursement is sought in an action for contribution."

[6] 21 DEL. CODE, § 6101 (1953).

guests, thereby eliminating the requisite "common liability" between the host and the defendant to the passengers. The second authority[7] relied upon by this defendant held that a defendant was not permitted to file a third party complaint against the operator of the car in which the operator's wife and co-plaintiff was a passenger. The court in that case recognized the husband-wife immunity and would have refused to let the wife do indirectly that which she could not do directly. The marital immunity precluded the "common liability" required by the contribution statute, thereby defeating the defendant's plea for contribution under the statute.

The Delaware court in the principal case distinguished the defendant's authorities as being founded upon a statutory requirement of "common liability," while the doctrine of respondeat superior, upon which this case rests, has no such requirement. The defendant's argument of indirection was further disposed of by the court's statement[8] that the employer's right of indemnity against the employee is based, not upon the original claim against the employee for his tort, but upon the failure of the employee to live up to his *independent* duty of care owed for the protection of the employer's interest.

Clearly, the husband in the instant case is not "liable" to his wife. Therefore, the basic question before the Delaware court was whether, under the doctrine of respondeat superior, the injured party's recovery against the employer arises from the employee's "liability" or from his "culpability." The landmark decision[9] holding the employer liable was written by Justice Cardozo, who stated, "Others may not hide behind the skirts of his [the husband's] immunity."[10]

The Delaware court accepted culpability as the basis of the doctrine with little discussion. Whether or not this determination of the historical foundation of respondeat superior is correct, the decision results in an extension of the doctrine, which has been accepted in a majority of jurisdictions.[11] While this extension does provide an additional basis for holding the employer liable, conceptually it is no more onerous than the general rule that a master is liable without fault for the tortious acts of his servant.[12] The same policy considerations justifying the general rule are pertinent to this extension: (1) the

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[7] Ferguson v. Davis, 9 Terry 299, 102 A.2d 707 (Del. 1953).

[8] 215 A.2d at 430. See rehearing of this case (same result) at 219 A.2d 374 (1966).

[9] Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928).

[10] *Id.* at 253, 164 N.E. at 43.

[11] Annot. 1 A.L.R.3d 666 (1965).

[12] 3 AM. JUR. *Agency* § 267 (1962); 3 C.J.S. *Agency* § 255 (1936); RESTATEMENT (SECOND), LAW OF AGENCY § 219 (1957).

employer is better able to spread the risk as a cost of the business; (2) the employer is encouraged to supervise the work of his employers in the interest of safety; and (3) the injured party is assured a source of recovery.

In its reasoning, the Delaware court makes a novel distinction between "cause of action" and "right of action."[13] The court rejected the defendant's argument that a husband could not commit a tort against his wife, which was based upon the common law fiction that husband and wife are one person. Having thus established that the wife had a "cause of action" since her rights could be infringed by her husband and that her right to be free from harm was violated in this case, the court then said she had no "right of action"[14] against her husband because of the marital immunity. However, the court would not leave the wife without a remedy and accordingly said the husband's employer could be liable since the foundation of the doctrine of respondeat superior is the employee's culpability, or wrongfulness, rather than his personal liability.

The reasoning used by the Delaware court to determine the foundation of the doctrine is sparse and clearly arises from policy considerations urging that the employee's wife be provided a remedy. In providing a means of redress to the plaintiff, the court dismissed the possibility of indemnification against the husband of the plaintiff in a purely academic fashion by making the distinction concerning the duty owed as noted above. However, the *Restatement of Agency*[15] indicates that the employer does have a right of indemnification, and recent cases indicate that this right is neither academic nor anachronistic.[16] Based upon these authorities, it appears that the Delaware court's cursory treatment of the defendant's argument was unrealistic.

A court in a recent case[17] held that a recovery by an employee's wife against his employer should not be allowed, reasoning from the possibility of collusion and fraud between the employee and his wife. Certain statements made by the plaintiff in the principal case during the course of the discovery process indicate that this reasoning is justifiable.

The facts as derived from the briefs of the parties indicate that the

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[13] 215 A.2d at 432.

[14] *Ibid.*

[15] RESTATEMENT (SECOND), LAW OF AGENCY § 401, comment *d* (1957).

[16] Pacific Nat'l Ins. Co. v. Transport Ins. Co., 341 F.2d 514 (8th Cir. 1965); American So. Ins. Co. v. Dime Taxi Serv., Inc., 151 So. 2d 788 (Ala. 1963); Klatt v. Commonwealth Edison Co., 204 N.E.2d 319 (Ill. App. 1964); Sell v. Hotchkiss, 141 S.E.2d 259 (S.C. 1965); Smith v. Henson, 381 S.W.2d 892 (Tenn. 1964).

[17] Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965). *Contra,* Kowaleski v. Kowaleski, 277 Ore. 45, 361 P.2d 64 (1963).

husband's place of business lies south of and midway between his home and the restaurant where he and his wife drank and dined prior to the accident. At the time of the accident, the plaintiff and her husband were travelling away from the interchange where they normally turned toward the place of employment, and thus were actually travelling away from their purported destination and toward their home. The plaintiff explains this by stating that her husband had missed the turn and was driving to the next interchange. The accident occurred near midnight which was four or five hours after they had left home, and during this period, the plaintiff and her husband were drinking. These events would not normally be beneficial to nor planned in accordance with, a trip made in the "scope of employment."[18] Clearly, if a wife is to recover from her husband's employer, she must establish *in some way* that her husband was acting for his employer. On facts such as these, the wife and her husband needed only to agree that they had missed the turnoff, rather than to admit that they were actually on their way home.

In holding as it did, the Delaware court flaunted reality in two ways. First, the court overlooked the availability of indemnity actions, thereby ignoring defendant's argument of indirection and failing to foresee the real possibility of an indemnity action against the husband, which would negate the wife's recovery. Second, cases of this type must be carefully analyzed for the possibility of collusion and fraud. The court must be extremely cautious in applying this rule, which now is a moot question in Kentucky,[19] because a husband and his wife are so related that they may easily collude to establish that the husband was acting within the scope of his employment.

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TORTS—NEGLIGENCE—FREEDOM FROM ILLEGITIMATE BIRTH.—A mentally deficient woman in a state mental hospital was raped by a male patient. An illegitimate infant was born, on whose behalf a suit was brought against the state. Predicated upon allegedly negligent care of the mother, damages were sought for the stigma of illegitimacy, deprivation of property rights, and loss of normal childhood and home life. Denying the motion to dismiss for failure to state a cause of action,

[18] RESTATEMENT (SECOND), LAW OF AGENCY § 219(2) (1957).

[19] The question is moot because the marital immunity no longer exists in Kentucky. Brown v. Gosser, 202 S.W.2d 480 (Ky. 1953), held that a wife can sue her husband in tort.