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Liability of Unincorporated Association for Tortious Injury to a Member

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Professor Crane discusses three distinct theories of tort liability of the unincorporated association, distinguishing the various types of organizations as to limits of liability. The author advocates the cessation of the fiction of coprincipalship in the case of large associations where there is centralization of management. He urges acceptance of the entity theory of partnerships and an amendment to section 13 of the Uniform Partnership Act.

Whether a partnership should be treated as a legal entity has been discussed in connection with the drafting of the Uniform Partnership Act[1] and its interpretation.[2] It seems that the act is in some respects consistent with the entity theory, particularly in the creation of "tenure in partnership" of the joint property. As to liability of the partnership for tortious injury of a member by the partners or partnership employees, it seems clearly to have adopted the non-entity or aggregate approach. Section 13 provides that the partnership is liable for loss or injury by wrongful act or omission caused to any person *not being a partner in the partnership*.[3] This is an application of a general proposition that the participants in a joint enterprise are coprincipals as to the acts or omissions of co-participants and their employees.[4] Under

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1. Mazzuchelli v. Silberberg, 29 N.J. 15, 148 A.2d 8 (1959); Crane, *The Uniform Partnership Act—A Criticism*, 28 HARV. L. REV. 762 (1915); Crane, *The Uniform Partnership Act and Legal Persons*, 29 HARV. L. REV. 838 (1916); Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 158, 291 (1916); Comment, *The Partnership as a Legal Entity*, 41 COLUM. L. REV. 698 (1941).

2. CRANE, PARTNERSHIP § 3 (2d ed. 1952). Many statutes defining "person" as including partnerships have been held to have treated the partnership as an entity for the purpose of the statnte. See United States v. A & P Trucking Co., 358 U.S. 121 (1958) imposing criminal liability on the partnership as a distinct legal person.

3. UNIFORM PARTNERSHIP Act § 13: "Section 13—(Partnership Bound by Partner's Wrongful Act.) Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of the co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act."

The partners are liable for harm caused by the negligent act of an employee, Soberg v. Sanders, 243 Mich. 429, 220 N.W. 781 (1928).

4. Non-liability for negligent acts injuring a member of an unincorporated association is set forth with citations of cases in an annotation, "Recovery by Member from Unincorporated Association for Injuries Inflicted by Tort of Fellow Member," 14 A.L.R.2d 473 (1950), from which a quotation is made in Inglis v. Operating Union 12, 18 Cal. Rptr. 187 (1961), *aff'd*, 23 Cal. Rptr. 403 (1962).

the aggregate view, partners are coprincipals. The negligence of a partner or employee is imputed to all the partners, including a partner injured thereby. He cannot sue himself for his own negligence, nor can he sue himself along with his associates, to all of whom the negligence is imputed. This rule has been carried to the extent of denying a partner injured by the concurring negligence of a third person and his copartner a right of action against the third person, as he is legally charged with contributory negligence.[5] That under procedural rules a partnership or other unincorporated association can be sued in the common name does not alter the substantive law as to liabilities.[6] It makes the association an entity only for procedural purposes.

If an association is treated generally as a legal entity there is no such difficulty in holding it liable for a tortious injury to an associate. This is illustrated in the cases of a New York joint stock company.[7] A limited partnership association, still possible in a few states, is held liable under workmens' compensation acts for injury to a working member.[8]

While a partner in an ordinary partnership is generally not entitled to the benefits of workmens' compensation, unless it is expressly provided for by terms of the statute, the partner is covered in a jurisdiction which treats the partnership as a legal entity.[9] In several situations other than personal injury to a partner, workmens' compensation acts have been applied in a way consistent with the entity approach.[10]

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5. Buckley v. Chadwick, 45 Cal. 2d 183, 288 P.2d 12 (1955).

6. Inglis v. Operating Union 12, *supra* note 4; Marchitto v. Central R.R., 9 N.J. 456, 88 A.2d 851 (1952).

7. Saltsman v. Shults, 14 Hun 256 (N.Y. 1878), a nuisance, citing Westcott v. Fargo, 61 N.Y. 542 (1875), a contract action.

8. Carle v. Carle Tool & Eng'r Co., 36 N.J. Super. 36, 114 A.2d 738 (Super. Ct. 1955). Where the period for which the association was organized has run out, but it continues in business it is neither *de jure* nor *de facto* a limited partnership association, but an ordinary partnership, whose members, though working for pay, are not entitled to the benefits of the workmen's compensation act. Leventhal v. Atlantic Rainbow Printing Co., 68 N.J. 177, 172 A.2d 710 (1961).

9. Trappey v. Lumbermens' Mutual Cas. Co., 77 So. 2d 183 (La. App. 1954), *aff'd*, 86 So. 2d 515 (1956), noted in 7 HASTINGS L.J. 213 (1956).

10. Keegan v. Keegan, 194 Minn. 261, 260 N.W. 318 (1935), allowed an award to a widow, member of a partnership, for the death of her husband, an employee of the firm. The opinion refers to the entity approach of parts of the Uniform Partnership Act, to the Bankruptcy Act, and to the statutes permitting suit against the partuership in the common name, all as showing a trend away from the common law aggregate theory. A similar result was reached in Felice v. Felice, 34 N.J. Super. 388, 112 A.2d 581 (Super. Ct. 1955), where there was an injury to the employed wife of a partuer. In Mouson v. Arcand, 239 Minn. 336, 58 N.W.2d 753 (1953), *aff'd*, 70 N.W.2d 364 (1955) it was held that an injured employee of a partuership, which is subject to a workmen's compensation act, and carries insurance, can maintain an action for injuries against a partner whose fault caused the injuries, as a third party, he not

The coprincipal doctrine has been carried over into the field of non-profit unincorporated associations. This occured in the often cited case of a member of a grange, helping serve meals at a concession at a county fair, injured by an exploding steam table due to negligence of a fellow member.[11] It may make sense to view the members of a relatively small social organization in the activities of which most of the members take part in the same light as partners in an ordinary partnership or joint adventure in which management is shared. But in the case of a large, well financed social group, such as a Temple of the Mystic Shrine, with concentration of management in a fairly stable group of elected officers, it is not so clear that the rank and file member is a coprincipal. In a case of an initiate who was injured in the course of horseplay following the ritualistic initiation, and who was therefore a member, liability was imposed on the local association.[12]

It is in the field of labor organizations that the coprincipal doctrine has been most frequently invoked in recent years. The prevalence of the union shop has forced many workers to join, like the lawyer in the jurisdiction whose bar is integrated, and who must pay dues to the bar association with whose objectives he has little sympathy.[13] Not only may there be no real freedom of choice, sometimes, for the member as to whether he will join or abandon his occupation, but there is no *delectus personarum* as to his fellow members, some of whom may become officers. There is concentration of management in the elected officers. Union democracy is a goal toward which progress is slowly being made, largely as a result of legislation.[14]

Many courts have treated the labor organization like the general partnership in applying the coprincipal doctrine as regards liability for negligent action or inaction. A leading case is *Hromek v.*

being an employer of the firm's employee. The partner's individual liability is not covered by the insurance carried by the firm. A contrary result was reached in Mazzuchelli v. Silberberg, 29 N.J. 15, 148 A.2d 8 (1959), holding that a partner negligently injuring an employee of the partnership was within the protection of the workmen's compensation act, and not subject to a common law action as a third party. The opinion reviews decisions and arguments as to whether under the Uniform Partnership Act a partnership should be treated as an entity.

11. De Villars v. Hessler, 363 Pa. 498, 70 A.2d 333 (1950), with copious annotation at 14 A.L.R.2d 473 (1950).

12. Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955). The action was brought under a common name statute against the Temple and some of its officers. Liability, however, was restricted to the treasury of the Temple. While members of an association can by contract restrict liability to the joint funds, it has seemed questionable that they should evade liability for tort committed by their agents within the scope of their authority. See LLOYD, UNINCORPORATED ASSOCIATIONS 158 (1938).

13. Lathrop v. Donohue, 367 U.S. 820 (1961).

14. Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960); Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609 (1959).

Gemeinde[15] in which the plaintiff member was denied a remedy in an action against the union for injuries suffered as a result of negligence of its representatives. It was held that the union was not a legal entity, although for procedural convenience it could be sued in the common name. But there is, in such circumstances, no cause of action. The same result has been reached where the member has attempted to recover from the union for negligent inaction in preserving his rights against the employer under collective bargaining agreements.[16]

A variance from the conventional coprincipal rule was introduced in the Wisconsin Supreme Court, which had decided the *Hromek* case, by distinguishing the situation in which the union owes a duty of representation, particularly to the member, from that where a duty is owed to the public.[17] It had previously been held that where the union is acting intentionally adversely to the member, he has a cause of action. Such cases include wrongful expulsion from the organization,[18] discharge by the employer caused by the union,[19] and more recently assault and battery in order to quell opposition to the policies of the management of the union.[20]

A difficulty with the cause of action for negligent or wilful failure to represent the member in a controversy with the employer is that the right of the organization to act, as in demanding grievance procedure, is based on the collective bargaining agreement, which creates rights in the organization.[21] Whether the management of the organization should assert such rights in a particular situation is a question of business judgment to be decided in the light of all the interests involved,[22] somewhat similar to the question of whether the management of a corporation should have instituted some proceeding against

15. 238 Wis. 204, 298 N.W. 587 (1941).

16. Marchitto v. Central R.R., 9 N.J. 456, 88 A.2d 851 (1952); McClees v. Grand Int'l Bhd. of Locomotive Eng'rs, 59 Ohio App. 477, 18 N.E.2d 812 (1938).

17. Fray v. Amalgamated Meat Cutters Local 248, 9 Wis. 2d 631, 101 N.W.2d 782 (1960), noted in 13 STAN. L. REV. 123 (1960) (failure to set in motion grievance procedure against employer, as provided for by collective bargaining agreement).

18. International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958); Williams v. National Ass'n of Masters Local 2, 384 Pa. 413, 120 A.2d 896 (1956).

19. Kuzma v. Millinery Workers Union Local 24, 27 N.J. Super. 579, 99 A.2d 833 (Sup. Ct. 1953).

20. Inglis v. Operating Eng'rs Local 12, 18 Cal. Rptr. 187, 373 P.2d 467 (1961), *aff'd*, 23 Cal. Rptr. 403 (1962).

21. Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956). There are no direct rights in the members unless the agreement so provides. Finnegan v. Penn. R.R., 76 N.J. Super. 71, 183 A.2d 779 (Super. Ct. 1962).

22. Pahlau v. Detroit Edison Co., 301 F.2d 702 (6th Cir. 1962); Fiorita v. McCorkle, 222 Md. 524, 161 A.2d 456 (1960); Donnelly v. United Fruit Co., 75 N.J. Super. 383, 183 A.2d 415 (Super Ct. 1962).

an officer or a third person, later made the subject of a shareholder's derivative suit.[23]

Finally, there has been a breakthrough of the rule of non-liability of the labor organization for injuries caused by negligence in a matter in which there is no special personal duty owed the member. *Marshall v. International Longshoreman's & Warehousemen's Union*[24] is the pioneer case. Plaintiff, a union member, was injured by falling over a concrete obstruction in a parking lot maintained by the union for the convenience of members attending its meetings. Alleging negligence, plaintiff sued the union and certain of its officers. In the superior court defendants' motion for summary judgment was granted. The district court of appeal affirmed.[25] The supreme court granted a hearing and reversed. After noting that labor unions have often been treated as entities, the opinion of the court states that the coprincipal rule was developed in dealing with business partnerships treated as aggregates. The large social organization or labor organization is quite different in numbers and lack of authority of rank and file members over management. To apply to them the same rule as in partnership would sacrifice reality to theoretical formalism. Quoting Justice Cardozo, *The Paradoxes of Legal Science*,[26] the court held that concepts proper enough in the field where first developed should not be applied with disregard of consequences in the very different field of the relationship between unions and their members.[27] Any judgment plaintiff may recover can be satisfied out of the funds and property of the union alone.

It is to be hoped that the fiction of coprincipalship will cease to be invoked in cases against large unincorporated associations where there is concentration of management and no *delectus personarum*. That this trend may extend to partnerships is perhaps too much to hope for until the entity view of partnerships is more widely accepted and the legislatures persuaded to amend section 13 of the Uniform Partnership Act.

The labor organization is more and more being regarded by courts and lawmakers as a legal entity. The rank and file member should have the same remedy for harm done to him by his union, whether breach of contract, intentional tort, or negligent tort, as the shareholder in a corporation when harmed by corporate activity. The idea

23. HENN, CORPORATIONS 576 (1961). See also Polikoff v. Dole & Clark Bldg. Corp., 37 Ill. App. 2d 29, 184 N.E.2d 792 (1962).

24. 57 Cal. 2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962).

25. Marshall v. International Longshoreman's & Warehousemen's Union, 197 A.C.A. 697, 17 Cal. Rptr. 343 (1961).

26. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 62 (1947).

27. 57 Cal. 2d at 787, 22 Cal. Rptr. at 215, 371 P.2d at 991.

that the labor organization is a joint enterprise in which every member is a principal is a fiction. As the unions become more and more wealthy[28] and active in many fields it seems appropriate that the union treasury should bear the risk of harm to the union members, as well as to the public.

Whether the member of the social club should be compensated out of the common fund for injuries received while participating in activities as a member should turn on the effectiveness of his control of the course of activities, and the degree of concentration of management in officers.[29] The courts should be as well able to draw a line between the Mystic Shrine Temple, with hundreds or thousands of members and an ample treasury, and the village grange, as is done often when a passenger is injured by the negligence of the driver of an automobile concurrent with that of a third person, and it has to be decided whether the passenger and driver are engaged in a joint enterprise for the purpose of imputing negligence.

The coprincipal rule originated with partnerships at a time when the aggregate view universally prevailed. If we come around to the entity view, we shall find that the partner has been harmed by the conduct of the "partnership" and not by his copartners or by the servant of himself and his copartners. Even under the aggregate view why should not the group jointly owe a duty to refrain from injuring a partner? William Draper Lewis, the draftsman of the Uniform Partnership Act and champion of the aggregate view of partnership, accepts the validity of a contract between partnership and partner, such as a promissory note, and asserts that unenforcibility between the original parties is for a purely procedural reason.[30] The Uniform Partnership Act provides for a claim against the partnership in liquidation by a partner for the return of his capital investment and advances.[31] A partner who risks the safety of his person, or of his separate property, while participating in carrying on the partnership business should be as much entitled to protection as he is as regards his financial investment in the business. If he suffers harm while having some dealings or contact with the firm as a member of the

28. The wealth of our national unions is such as to put them in a class with some of our large industrial corporations. Kutner, *Due Process of Economy: Antitrust Control of Labor*, 24 U. PITT. L. REV. 1, 12 (1962).

29. A member of an incorporated club may recover from the club for injuries suffered from mistreatment by an employee. McClean v. University Club, 327 Mass. 68, 97 N.W.2d 174 (1951). The existence of a remedy should not turn on whether the club is or is not incorporated.

30. Lewis, *The Uniform Partnership Act, A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 158, 186 (1915). See also RESTATEMENT, CONTRACTS § 17 (1932).

31. UNIFORM PARTNERSHIP ACT § 40(b).

public, he should be entitled to compensation as well.[32] The Uniform Partnership Act should be amended by deleting from section 13 the phrase "not being a partner in the partnership."

32. Compare Farney v. Hauser, 109 Kan. 75, 198 Pac. 178 (1921). A partner who had deposited grain as a customer in an elevator operated by the partnership was held to have a claim on accounting for loss caused by embezzlement of his property by an employee of the firm.