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Tort Suit by Wife Against Husband's Partnership - David v. David

Casenotes and Comments

TORT SUIT BY WIFE AGAINST HUSBAND'S PARTNERSHIP—*DAVID V. DAVID*[1]

Plaintiff-appellant-wife brought an action against defendant-appellee-partnership for personal injuries sustained while upon the defendant's premises for business purposes. Defendants filed the general issue plea and a special plea setting up the marriage relation between the plaintiff and one of the members of the defendant partnership. Plaintiff's demurrer to the plea was overruled and a judgment of non pros was entered. On appeal the principal question was whether a married woman is entitled to maintain an action for negligence against a partnership when at the time of the negligent act her husband was a member of the partnership. *Held*: Judgment affirmed. Since a married woman cannot maintain an action in tort against her husband, she cannot maintain such an action against a partnership of which her husband is a member. The same public policies control in the two cases.

It was well settled at common law that a married woman could not sue her husband either in contract or in tort because of the existence of the marital relation.[2] Nor could she sue her husband's partnership because the partnership under the common law theory was considered an aggregate of individuals,[3] and under the rule of joinder of parties[4] the husband would have to be made a party defendant although it was also necessary for the husband to join the wife as co-plaintiff.[5] Were this allowed, the rule that a party cannot appear on both sides of the record[6] would be violated.

In 1898 the Maryland legislature passed the Married Women's Act[7] which permits married women to sue either

[1] 161 Md. 532, 157 Atl. 755, 81 A. L. R. 1100 (1931).
[2] Barton v. Barton, 32 Md. 214 (1869).
[3] McLane v. State Tax Comm., 156 Md. 133, 143 Atl. 656 (1928).
[4] Smith v. Crichton, 33 Md. 103 (1870).
[5] Sanarzevosky v. City Passenger Ry. Co., 88 Md. 479, 42 Atl. 206 (1898); Treusch v. Kamke, 63 Md. 278 (1885).
[6] Thompson v. Young, 90 Md. 72, 44 Atl. 1037 (1899).
[7] Md. Code, Art. 45.

in contract or in tort "as fully as if they were unmarried".[8] The question as to whether under this act a wife could maintain suit against her husband on a deed of separation without the intervention of a trustee was expressly left open in the case of *Barclay v. Barclay*,[9] but the court remarked that "it would seem the question would be presented in a very different light since the Act of 1898. . . ." It has been suggested[10] that Sec. 20 of Art. 45 may have grown out of the query in the *Barclay* case. This section passed in 1900, provided that "a married woman may contract with her husband . . . and upon all such contracts . . . may sue and be sued as fully as if she were a *feme sole.*" Under these two statutes it has been definitely decided that the wife may maintain a suit in contract either in law or in equity against her husband.[11]

The question as to whether the Act allows a married woman to sue her husband in a tort action was squarely presented in *Furstenburg v. Furstenburg*.[12] In that case the wife brought suit against the husband for injuries sustained as a result of his negligent operation of the car in which she was riding with him. In holding that the wife could not maintain the suit the court declared that the purpose of Section 5 of Article 45 was merely to give the wife a remedy, by her suit alone, without the necessity of complying with the common law requirement of joinder of the husband. "The intention to create, as between husband and wife, personal causes of action, which did not exist before the Act, is not, in our opinion, expressed by its terms." This opinion was based on the fact that the legislature passed a separate Act[13] allowing the wife to sue the husband in contract; and since no such express Act in regard to tort suits was passed, the intent of the legislature must have been that no such action should be permitted. This decision places Maryland in line with the ma-

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[8] Ibid, Sec. 5.
[9] 98 Md. 366, 375, 56 Atl. 804 (1904).
[10] Md. Code, Art. 45, Sec. 20, annotator's note.
[11] Cochrane v. Cochrane, 139 Md. 530, 115 Atl. 811 (1921).
[12] 152 Md. 247, 136 Atl. 534 (1927).
[13] Md. Code, Art. 45, Sec. 20.

jority view on the right of the wife to sue the husband in tort. There is, however, an ever increasing minority which offers weighty arguments to sustain the contrary view.[14]

It seems to be the well settled policy of the Court of Appeals to refrain wherever possible from becoming concerned with domestic quarrels. Even in divorce suits where, if ever, the function of the court is to deal with domestic disputes, it has expressed its reluctance to interfere except where "either of the parties has been guilty of such conduct as would make a continuance of the marital relation inconsistent with the health, self-respect, and reasonable comfort of the other,"[15] and has said: "It is not the function of the Court in such cases as this to arbitrate family quarrels. . . ."[16] The same consideration applied in *Schneider v. Schneider*[17] where the mother brought an action in tort against her minor son for injuries sustained in an automobile accident as a result of his negligence. In refusing to allow the action the court said: "We need not dwell upon the importance of maintaining the family relation free . . . from the antagonisms which such suits imply." This policy was adhered to in the *Furstenburg* case and seems to be the underlying reason for the limited construction of the statute.

The rules forbidding tort suits between husbands and wives and between parents and minor children[18] would seem to be based on two overlapping public policies, one, that domestic quarrels should not be aired in the courtroom, and the other, that to permit such suits might tend to disrupt the marital or family harmony, which is so socially desirable. This last policy ties in with several rules of evidence which exclude otherwise admissible evidence in order to foster marital harmony. Thus confidential communications between spouses are privileged in order to

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[14] On the right of wife to sue husband for personal injuries, see 29 A.L.R. 1482; 33 A. L. R. 1406; 44 A. L. R. 794; 48 A. L. R. 293; 89 A. L. R. 118. For list of states, see (1935) 21 Corn. L. Q. 157, 159.

[15] Cohen v. Cohen, — Md. —, 187 Atl. 104, 105 (1936), quoting from Singewald v. Singewald, 165 Md. 136, 146, 166 Atl. 441, 446 (1933).

[16] Ibid.

[17] 160 Md. 18, 152 Atl. 498 (1930).

[18] For tort actions between parent and child, see 31 A. L. R. 1157.

encourage spouses to communicate confidential matters to each other. Spouses are non-compellable to testify against spouses because to allow this would disrupt the marital harmony between them. The Lord Mansfield rule forbids spouses to testify to that non-access which would "bastardize the issue" because of the marital policy against dragging the intimate relations of spouses into the courtroom.

Several years prior to the *Schneider* case, in *Cochrane v. Cochrane,*[19] the court had already held that a wife may maintain a suit against the husband for the protection of her property either in a court of equity or in a court of law, and no mention was made of the public policy doctrine. In the *Furstenburg* case this decision was disposed of by the statement: "That the view is not inconsistent with our conclusion in this case. . . ." The result of the two decisions is obvious: The wife may maintain suit against her husband for a tort committed against her property but not for one against her person.

It is difficult to sustain this distinction in legal principle since in one case the Act was construed to give the wife a substantive right of action she did not possess at common law, while in the other it was construed not to give her a substantive right of action she did not possess at common law. Also, as a matter of abstract justice, the validity of the distinction is questionable. In both cases her rights have been invaded: yet in one she has legal redress, in the other she has none. It has been suggested that she has a remedy in criminal proceedings, divorce, etc.,[20] but actually this is the equivalent to no remedy at all.[21]

As a practical matter, when we consider suits by the wife, there are several arguments that may be advanced for the validity of the distinction and undoubtedly courts have had these in mind when making the rules. First, the wife is entitled to the benefit of her husband's assets by

[19] Supra note 11.
[20] Thompson v. Thompson, 218 U. S. 611, 54 L. Ed. 1180, 31 Sup. Ct. Rep. 111 (1910).
[21] McCurdy, *Torts Between Persons In Domestic Relations,* (1930) 43 Har. L. R. 1030, 1052.

virtue of her right to his support during his life. What real benefit will she gain by securing a judgment against him? He must pay her doctor's bills in any event and support her to the extent of his assets for the rest of their joint lives, unless divorced. But this argument fails to support the rule when we consider the other side of the picture, suits by the husband against the wife, which are also forbidden. There is no such expedient argument to support the denial of jurisdiction to entertain such tort suits. This points to the second argument in favor of not allowing tort suits between members of a family. The way would be open for fraud upon indemnity insurance companies. Even in the absence of fraud it would be allowing the husband to profit by his own wrong, since it is evident the damages recovered by the wife would work a practical benefit for him, regardless of the rule as to separate estates of husband and wife. But whether the distinction is founded upon the public policy doctrine[22] announced by the court, or on the practical grounds not announced by the courts, but inherent in their rulings, it seems desirable.

Turning to the principal case we find that the Court again invokes the doctrine of public policy. Quoting from *State v. Oliver*,[23] the court says:[24] " 'It is better to draw the curtain, shut out the public gaze and leave the parties to forget and forgive'. . . . It is apparent from what has been said that, in our opinion, this case is controlled by the *Furstenberg* case. . . ."

But in the *David* case, there was present no domestic quarrel which needed to be "shut out of the public gaze". The tort was not the wilful and direct action of the husband nor was it incidental to any personal relations. It was due to the negligence of the partnership and its employees. The liability arose vicariously. There would seem to be no reason why marital tranquility and bliss should be disturbed by allowing such a suit. Further, none

[22] For a criticism of the public policy doctrine, see Brown v. Brown, 88 Conn. 142, 89 Atl. 889, 891-892 (1914).
[23] 70 N. C. 60 (1874).
[24] 161 Md. 539.

of the elements which lend themselves to the practical reasons noted above are present. The wife has no right to support from the partnership. The fraud factor is absent, or at least remote and constant with tort suits generally. There is some question of the benefit to the husband but this is no reason for denying the wife legal redress under the circumstances. It seems clear that the substantial reasons of policy supporting the *Furstenburg* case are absent in the principal case.

As a matter of strict legal logic, however, the decision is correct. It is a logical extension of the rule in the *Furstenburg* case, inasmuch as the court adopted the aggregate rather than the entity theory of partnership. This refusal to view the partnership as an entity was based on the fact that the "difference between a partnership and a legal entity complete in itself . . . is that each partner is severally liable for the wrongful acts and omissions of the partnership, and that he is bound to contribute to his co-partners his proportionate share of any sum advanced by them to satisfy an enforceable demand against it". But is this a necessary reason for refusing to invoke the entity theory? Can it not be argued that even though the judgment obtained may be levied solely upon the property of the husband or that he may be required to contribute to its payment, the fact remains that the suit is against the partnership as such and not against any one individual.

Since the Married Women's Acts there is no longer the argument that the husband would have to appear both as plaintiff and defendant. The procedural barrier is removed. There is left only the question of public policy in allowing tort suits between members of the same family.

Unquestionably, much may be said for the legalistic reasoning of the court but the result it reaches is functionally undesirable. It has been suggested that the adoption of the entity theory requires resort to fiction. This is true, but courts on other occasions have not hesitated to adopt fictions where justice so required, and no conceivable harm would result from employing them. "At times

. . . changes in economic conditions and in legal concepts have not coincided, and the courts, in the interest of substantial justice, have adopted dogmatic fictions to suit the particular case whose circumstances did not seem to find an adequate remedy in the logical application of old established theories."[25] It is submitted that the court with equally good reasoning could have reached a more desirable result here.

In summary, it is seen that in Maryland a wife may maintain an action *ex contractu* against her husband, and an action *ex delicto* where the tort is committed against her property. She may not sue the husband for torts committed by him against her person, nor may she maintain such an action against his partnership, though the partnership is the wrongdoer. The questions whether she may bring suit against her husband's employer for a tort committed by the husband while in the scope of his employment, or may sue the husband for torts committed by his employee, are as yet unanswered in Maryland. In the first case, no question of public policy would stand in the way of such suit. The majority of the courts in this country have held that she cannot maintain such an action,[26] but an ever-increasing minority, reaching a more desirable result, have allowed such suits holding that the employer may not take advantage of the immunity of the employee.[27] In the second case supposed, it is fairly clear that such an action would not be allowed under the announced doctrine of public policy adhered to by the Maryland courts.

The implications arising from the decision in the principal case are numerous. Cases may be supposed from those where the partnership consists of the husband and an adult son, where it is clear no action will lie, to those where the suit is against a joint stock company or business trust in which the husband is a share-holder. A logical extension of the rule in the principal case would certainly bar such action, yet it is inconceivable that the court

[25] Carter, The Corporation as a Legal Entity (1919) 232.
[26] See 37 A. L. R. 165; 56 A. L. R. 331; 64 A. L. R. 296.
[27] See (1935) 21 Corn. L. Q. 157, 165.

would refuse to adopt the entity theory in such a situation.[28] Between these two extremes lies the suit against the limited partnership, and the suit against the large partnership, consisting of say fifteen or twenty members. It is possible such suits may be allowed under the Statute[29] which permits suits to be brought against an unincorporated association of seven or more members in the firm name, and also provides, that such an action "shall not abate by reason of the . . . legal incapacity of any officer or member of such association. . . ." But the statute was probably not intended to embrace ordinary partnerships, and literally read, it does not give much hope. It does, however, plainly recognize such an association as an entity for the purposes of procedure.

When we analyze the reasons for permitting suits between spouses on contracts and for property torts while those for personal torts are forbidden it should seem that a further exception should be made for personal tort suits against the partnerships, employers of the spouse, and against spouses for torts by employees.

It may be justifiable to reject suits between spouses for personal torts allegedly committed directly by the defendant spouse because such suits are so likely to arise out of the intimate personal relations of the spouses which are undesirable of being dragged into the courtroom. It is impractible to set up an objective standard to distinguish those personal torts which do involve intimate relations from those which do not and therefore could safely be litigated in court. So it is that all personal tort suits must be rejected.

But suits in contract and for property torts are so little likely of involving intimate relations that litigation concerning them may safely be permitted without impairing the relations of the spouses. Thus has the distinction been drawn in Maryland.

Why cannot it be said that the personal torts of a part-

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[28] For procedural purposes, such an association is treated as an entity, see Md. Code, Art. 73, Sec. 31.

[29] Md. Code, Art. 23, Sec. 104.

nership, or by the husband as an employee of someone else, or by the employee of the husband, similarly form a clear cut group very unlikely of growing out of intimate relations between the spouses and which may safely be demarcated from personal torts generally so that litigation concerning them should be permitted.

It is as simple to draw the line between these torts and other personal torts as it has already proven to be to draw the distinction between all personal torts on the one hand and the property tort and contract situations on the other.