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Tort Suit by Wife Against Husband's Employer - Riegger v. the Bruton Brewing Company

TORT SUIT BY WIFE AGAINST HUSBAND'S EMPLOYER

Riegger v. The Bruton Brewing Company[1]

The report of this case did not set forth the exact facts but, from the question raised, it can be assumed that the plaintiff, a married woman, was injured by the negligence of her husband in the course of his employment, and she brought this suit against her husband's employer, the defendant, upon the doctrine of respondeat superior. The defendant demurred to the plaintiff's declarations and thus the question was flatly presented: "Is a husband's employer liable to an employee's wife for injuries sustained by her as the result of her husband's negligence while acting within the scope of his employment?" The Court of Appeals of Maryland affirmed the action of the lower court in sustaining the defendant's demurrer without leave to amend and thus answered the question in the negative.

In so declaring the law of Maryland the Court based its decision upon four somewhat interrelated grounds, anyone of which would be sufficient to justify the decision. First, citing *Furstenburg v. Furstenburg*,[2] which had held that the Maryland statute[3] controlling a married woman's rights did not change the common law rule that a wife could not maintain an action against her husband for a personal tort, the Court reasoned, therefore, that since the husband is not liable, although he is culpable, the employer cannot be liable either, because liability and not culpability is the true basis for the doctrine of *respondeat superior*. Secondly, citing the same case the Court concluded that since such a cause of action as this did not exist at common law in favor of the wife, the statute had not so enlarged her rights so as to permit the action. In support of this second ground the Maine case of *Sacknoff v. Sacknoff* was cited. There, in construing a statute very similar to our own, it was said:[4]

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[1] 178 Md. 518, 16 A. (2d) 99 (1940).

[2] Furstenburg v. Furstenburg, 152 Md. 247, 136 A. 534 (1927).

[3] Md. Code (1939) Art. 45, Sec. 5: "Married women shall have power . . . to sue for . . . torts committed against them as fully as if they were unmarried; . . . and they may also be sued separately . . . for wrongs independent of contract committed by them before or during their marriage, as fully as if they were unmarried; and upon judgments recovered against them, execution may be issued as if they were unmarried; nor shall any husband be liable . . . for any tort committed separately by her out of his presence, without his participation or sanction."

[4] Sacknoff v. Sacknoff, 131 Me. 280, 161 A. 669, 670 (1932).

> "This statute being in derogation of the common law has been construed strictly. The provision authorizing a married woman to prosecute suits at law in her own name, as if unmarried, refers to those by a wife against third persons and not to those against her husband . . . 'It related to cases when, by the very assumption, the husband may be a party with the wife, or may not at her election' . . . and, it only authorizes her to maintain alone such actions as previously could be sustained when brought by the husband alone or by the husband and wife jointly. It enlarges not her right of action, but, her sole right of action. It does not enable her to maintain suits which could not have been maintained before, but to bring in her own name those which before must have been brought in the husband's name either alone or as a plaintiff with her. . . ."

The inference is clear. The husband in this case, the actual wrongdoer, is not in a position to join himself as a co-plaintiff with the wife against his employer, and therefore, by strict construction of the statute the wife has no corresponding right of action in her own name.

Thirdly, the Court said that such an action "would introduce into the home, the basic unit of organized society, discord, suspicion, and distrust, and would be inconsistent with the common welfare."[5] The reason behind this third ground was that if the wife could sue and recover against the employer, then the employer could recover against the husband-employee who was the actual wrongdoer. The result would be the same on the family as if the wife had sued her husband directly, which is strictly forbidden.[6] Here, the Court acted and quoted from *Raines v. Mercer* where the Tennessee Court said that since the wife "could not maintain her action against her husband, alleged to be directly responsible for her injury, she could not avoid the forbidden frontal attack by the encircling movement against . . . (the employer) who had no part in the negligent transaction."[7] Fourthly, and in conclusion, the Court said that to hold otherwise would be inconsistent with the views heretofore expressed by the Court in cases: (a) denying the right of a wife to maintain a suit similar in

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[5] Riegger v. The Bruton Brewing Co., 178 Md. 518, 522, 16 A. (2d) 99 (1940).

[6] Furstenburg v. Furstenburg, *supra*, n. 2.

[7] Raines v. Mercer, 165 Tenn. 415, 55 S. W. (2d) 263 (1932).

character to the one under consideration against her husband directly;[8] (b) holding that she has no right of action for similar injuries against the partnership of which her husband is a member;[9] and (c) holding that a parent cannot enforce such an action against his child.[10] Therefore, said the Court: "The reasoning of those decisions would seem logically to commit us to the further step of holding that under the circumstances considered, a right of action in favor of the wife against the employer does not exist."[11]

The weight of authority in this country is in accord with Maryland in not permitting the wife to sue the husband for a personal tort under the emancipation statute,[12] but Maryland is decidedly in the minority on the question of a wife suing the husband's employer for the husband's negligence in the scope of his employment.[13] Conceding, therefore, that a wife cannot recover from her husband directly for a personal tort, would it necessarily follow that she could not recover from his employer? The majority of the cases allow this suit even though the wife could not sue the husband-servant who was the actual wrongdoer.

The first ground for Maryland's decision was that since the husband himself was not liable, the master was not liable, thus assuming that liability of the servant was a condition precedent to any liability upon the part of the

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[8] Furstenburg v. Furstenburg, *supra*, n. 2.

[9] David v. David, 161 Md. 532, 157 A. 755 (1932), noted (1936) 1 Md. L. Rev. 65.

[10] Schneider v. Schneider, 160 Md. 18, 152 A. 498 (1930).

[11] Riegger v. The Bruton Brewing Co., 178 Md. 518, 525, 16 A. (2d) 99, 102 (1940).

[12] 37 A. L. R. 165; 56 A. L. R. 331; 64 A. L. R. 296. For cases holding the minority view: (1935) 21 Corn. L. Q. 157, 165; 29 A. L. R. 482; 33 A. L. R. 1406; 44 A. L. R. 794; 89 A. L. R. 118.

[13] In accord with Maryland: Maine v. James Maine and Sons Co., 198 Iowa 1278, 201 N. W. 20, 37 A. L. R. 161 (1924); Meece v. Holland Furnace Co., 269 Ill. App. 164 (1934); Emerson v. Western Seed Co., 116 Neb. 180, 216 N. W. 297 (1927); Sacknoff v. Sacknoff, 131 Me. 280, 161 A. 669 (1932); Myers v. Tranquility Irr. Dist., 26 Cal. App. (2d) 385, 79 P. (2d) 419 (1938); Riser v. Riser, et ux., 240 Mich. 402, 215 N. W. 290 (1927). *Contra* Maryland: Caplan v. Caplan, 268 N. Y. 445, 198 N. E. 23, 101 A. L. R. 1223 (1935); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933); Cerrute v. Simone, 13 N. J. Misc. 466, 179 A. 257 (1935); Schubert v. August Schubert Wagon Co., 249 N. Y. 253, 164 N. E. 42, 64 A. L. R. 293 (1929); Metropolitan Life Ins. Co. v. Huff, 48 Ohio App. 412, 194 N. E. 429 (1935); Paulin v. Graham, 102 Vt. 307, 147 A. 698 (1939); Koontz v. Messer, 320 Pa. 407, 181 A. 792 (1935); Miller v. J. A. Tyrholm and Co., 196 Minn. 438, 265 N. W. 324 (1936); Rosenblum v. Rosenblum, 231 Mo. App. 276, 96 S. W. (2d) 1082 (1936); Pittsley v. David, 298 Mass. 552, 11 N. E. (2d) 461 (1937); My Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Miltimore v. Milford Motor Co., 89 N. H. 272, 197 A. 330 (1937); Broaddus v. Wilkenson, 281 Ky. 601, 136 S. W. (2d) 1052 (1940); Le Sage v. Le Sage, 224 Wis. 57, 271 N. W. 369 (1937).

master. According to the weight of the cases, this assumption is not justified. The master's liability is not secondary, but primary. It is held that he who acts through an agent acts himself, and both principal and agent are primarily liable.[14] It is the agent's negligence which makes the principal liable, but, because the agent is not liable due to the wife's disability to sue her husband, such fact does not make the agent's act any less negligent, and the principal cannot hide behind the agent's immunity. The Ohio Court puts the argument nicely:[15]

> "The right to sue the employer is not a dependent, but a primary right; the liability of the employer is not based upon the employee's liability and is not subordinate, or secondary thereto. The liability of the employee is for his wrongful conduct and the liability of the employer is for his breach of duty through his employee acting for him. The breach of duty as to each is so independent of the other that in a case such as the one at bar, the injured party, even if she were a stranger to the employer, could not maintain a joint action against the negligent employee and his employer."

This Court, as do most of the cases answering the question under consideration in the affirmative, cited the Restatement of Agency, Section 217 (2) to the effect that a master "may be liable for an act as to which the agent has a personal immunity from suit;" with its comment (b): "Thus if a servant while acting within the scope of his employment negligently injures his wife, the master is subject to liability."

Probably the most often quoted case is the *Shubert* case.[16] In New York when this case was decided, the common law rule was that neither spouse could sue the other for injury either wilfully or negligently inflicted, but the case allowed the wife to sue the husband's employer in an almost identical fact set up as in the case under consideration. The Court held, of course, that the principal is not

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[14] McLaurin v. McLaurin Furniture Co., *supra;* Schubert v. Schubert Wagon Co., *supra;* Metropolitan Life Ins. Co. v. Huff, *supra;* Paulin v. Graham, *supra;* Koontz v. Messer, *supra;* Miller v. J. A. Tyrholm and Co., *supra;* Mullally v. Langenberg Bros. Grain Co., 339 Mo. 582, 98 S. W. (2d) 645 (1936); My Lady Cleaners v. McDaniel, *supra;* Hudson v. Gas Consumers Ass'n, 123 N. J. L. 252, 8 A. (2d) 337 (1940); Cerrute v. Simone, *supra;* Broaddus v. Wilkinson, *supra.*

[15] Metropolitan Life Ins. Co. v. Huff, *supra,* n. 13.

[16] Shubert v. Shubert Wagon Co., *supra,* n. 13.

liable if the agent's act was lawful, and an accord and satisfaction or release to the agent would have the same effect as if the agent's act had been lawful. But, the principal is not exonerated when the agent has the benefit of a covenant not to sue or a discharge in bankruptcy, or has escaped liability upon grounds not inconsistent with the commission of a wrong unreleased and unrequited. The principal has committed the act by the agent's hand and the principal has a liability all his own. Trespass against the wife is unlawful and others cannot hide behind the skirts of the agent's immunity. Clearly then, it would seem that the cases and the Restatement do not support Maryland on this ground.

The Maryland Court, as its second ground, reasoned in effect that Article 45, Section 5 of the Code, only gave the wife the right to sue in her own name in cases where formerly suit could have been brought by the husband alone, or by the husband and wife jointly against the third person at common law before the statute, and it thus inferred that since the husband is the actual wrongdoer he would not have been in a position at common law to sue the principal himself, either alone or jointly with the wife.

This argument would apply to a suit by the wife against the husband directly, where at common law the husband would appear on both sides of the record as plaintiff and defendant. This is not allowed.[17] In the case under consideration the wife was suing a third person, the employer, who is liable independently of any liability of the agent, according to the weight of the cases. If Maryland's first ground is sound law, perhaps this second ground would follow; but, as pointed out in the preceding paragraph, the better line of reasoning seems to be that the wife, when injured under these circumstances, derives two causes of action: the first against her husband for his negligent act, the second against the employer for committing the act by the agent's hand. Both are primary rights of action and are separate and distinct. If this line of reasoning is sound, and it is generally considered to be the better of the two views, the reason behind the Maryland decision on this ground vanishes.

As a third basis for it's decision the Maryland Court argued that to allow the wife to sue the employer would foster discord, suspicion, and distrust in the home, the basic unit of organized society. This seems to be the true

[17] Thompson v. Young, 90 Md. 72, 44 A. 1037 (1899).

motive and only possible justification for the decision. Briefly, the Court said that if the wife recovers from the employer, then the employer can recover from the employee and the effect of such an "encircling movement" would be to allow the wife to sue her husband indirectly when admittedly she could not do so directly. The Court said:[18] "It cannot logically be contended that to permit the action would not result in a disturbance of the family relationship, creating discord and suspicion, which elements are the basis for the common law rule of non-liability." This vein of public policy runs through most of Maryland's decisions on suits between members of the family, such as those cases denying the wife the right to maintain action against the husband for personal tort, denying the right of the parent to sue the child, denying the wife the right to sue a partnership in which her husband is a member. In the *Schneider* case it was said:[19]

> "We need not dwell upon the importance of maintaining the family relation free for other reasons from the antagonisms which such suits imply. Both natural and politic law, morality and the precepts of revealed religion alike demand the preservation of this relation in its full strength and purity."

A further example of this policy of the Court of Appeals to refrain from involvement in domestic quarrels appears in divorce suits, such as *Cohen v. Cohen,*[20] where the Court said, in effect, that it only interferes where continuance of marriage is inconsistent with health, self respect, and reasonable comfort of the other spouse.

However, under Article 45, Sections 5 and 20 of the Code,[21] it has been decided that a wife may sue the husband at law or equity in contract, and likewise for the protection of her property.[22] In the *Cochrane* case a wife was allowed suit in equity against her husband for an accounting to the wife by the husband who wrongfully appropriated her property and misapplied the proceeds thereof.

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[18] Riegger v. The Bruton Brewing Co., *supra*, n. 1.

[19] Schneider v. Schneider, 160 Md. 18, 23, 152 A. 498, 500 (1930).

[20] Cohen v. Cohen, 170 Md. 630, 187 A. 104 (1936).

[21] Md. Code (1939) Art. 45, Sec. 20: "A married woman may contract with her husband and may form a copartnership with her husband or with any other person or persons in the same manner as if she were a femme sole, and upon all such contracts, partnership, or otherwise a married woman may sue and be sued as fully as if she were a femme sole."

[22] Cochrane v. Cochrane, 139 Md. 530, 115 A. 811 (1921); Masterman v. Masterman, 129 Md. 167, 98 A. 537 (1916).

In that case the Court used language quite broad enough to infer that recovery by the wife against the husband would be allowed for a tort by the husband against the wife's property and yet there was no mention of public policy.

Thus it appears that Maryland allows a wife to sue her husband, in law or equity, on contracts and for torts against her property, but forbids recovery for a tort against her person by the husband. It seems unlikely that such suits as are allowed foster less family strife and discord than those which are forbidden.

However, admitting that suits by the wife directly against the husband are against the pronounced public policy of Maryland, must a suit by the wife against the husband's employer be placed in the same class? Those cases which allow recovery by the wife against the employer recognize the public policy rule forbidding suits by a wife against the husband, but hold that the policy that gives the husband immunity from actions at law by the wife does not extend the immunity to his master. The Massachusetts Court has said:[23]

> "It is true that, if the wife recovers from the master, the husband would be bound to indemnify his master, and her recovery could not profit the family unless her husband should be financially irresponsible. Such reasons are unsound."

The master can recover back from the husband-servant, not by subrogation of the wife's cause of action, but directly against the husband for breach of his duty to his master. Any subsequent recovery against the employee by the employer would have to be satisfied out of employee's property without recourse to the wife's separate property, since her estate is immune from attack at the hands of the husband's creditors. Further, there could be cases in which injury to the plaintiff would not necessarily involve a breach of duty owed to the employer. For instance, the employee could be instructed that deliveries must be finished by a certain time and yet the route to be covered might be so large that, in order to do so, the employee would be obliged to drive at a reckless rate of speed. In such case a party injured might recover from the employer but the employee would not be liable to the employer because there would be no breach of duty. Other

[23] Pittsley v. David, 298 Mass. 552, 11 N. E. (2d) 461, 463 (1937).

instances of this type could happen. In such cases, the argument that the wife was suing the husband indirectly would not apply, yet in Maryland the employer would not be liable merely because the injured party happened to be such employee's wife.

Fourthly, the Maryland Court said that to hold otherwise, that is to allow recovery by the wife, would be inconsistent with former decisions. The reasoning to this point would indicate that the result should not have been controlled by the decisions denying a wife the right to maintain personal injury suits against her husband, or by the decisions denying such suits between parent and child. The only authority closely persuasive was *David v. David.*[24] In that case, in refusing to allow the wife to sue the partnership to which her husband belonged, the Court declined to view the firm as an entity, but regarded it as an aggregate of individuals, including the husband, each member being severally liable for torts of the firm, and thus the husband was bound to contribute to the co-partners his proportionate share of any sum advanced by them to satisfy the wife's claim against it. It is questionable whether that decision was sound, particularly when the real reason behind Maryland's decision was the public policy which would not allow the spectacle of a suit between husband and wife for a personal tort because it would result in a disturbance of the family relationship.[25] If it is questionable whether a suit against the partnership would create such a disturbance, it is even more questionable where the suit by the wife is against the husband's employer. At any rate, it is not reasonable for the Court to take further steps in the wrong direction merely for the sake of consistency, especially where no course of conduct or property rights are based on such former decision.

From the above discussion, it can be seen that the conclusion of the Court was avoidable; and it was not necessary because of any of the four reasons stated by the Court as the basis of the decision to refuse a remedy for the injury. On the contrary the Court easily could have distinguished the case from its former decisions, allowed the wife to recover in accord with the weight of authority, and prevented the resulting injustice. It would not have been impossible even, or improper, for the Court to have

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[24] *Supra*, n. 9.

[25] See Note, *Tort Suit by Wife Against Husband's Partnership* (1936) 1 Md. L. Rev. 65, noting David v. David, *supra*, n. 9.

retreated from its earlier holding in the partnership case,[26] which was the only one of great persuasive influence on the point involved. It is regrettable that a doctrine, stemming from the rapidly disappearing (if not obsolete) fiction of identity of husband and wife, should have led the Court to affirm the unwise social result of the instant case, particularly when it is contrary to the weight of authority and the law expressed in the Restatement of Agency.

[26] David v. David, *supra*, n. 9.