Master and Servant - Master's Liability to Wife of Servant for Tort Committed by Husband in the Course of His Employment

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(1877); Cammerer v. Muller, 14 N.Y. Supp. 511, 133 N.Y. 623, 30 N.E. 1147 (1892). Yet the courts have admittedly applied tort rules as the measure of damages regardless of the form of the complaint. McKane v. Howard, 202 N.Y. 181, 95 N.E. 642 (1911); Blattmacher v. Saal, 29 Barb. 22 (N.Y. 1888); Dauphin v. Laudigran, 187 Wis. 633, 205 N.W. 557 (1925); McQuillan v. Evans, 353 Ill. 239, 187 N.E. 320 (1933). Even though in form this action is a contract action, it has been said to be one arising from the personal conduct of the defendant and affecting the personality of the plaintiff. Finlay v. Chirnay, 20 Q.B. 494 (1888). Also, in Grubb v. Sult, 32 Grat. 203 (Va., 1879) the court, in denying the right of action based on assumpsit against an executor, said that although a contract is involved, it is essentially a tort to the person and comes so fully within the reason and influence of the principles governing actions ex delicto it is impossible to distinguish them. Vernier, American Family Laws (1931) § 10.

It is evident, therefore, that the plaintiff who frames his complaint on a tort basis, as in the principal case, has no more reason to escape the statutory prohibition than one who alleges a breach of contract.

PHILIP W. GROSSMAN, JR.

Master and Servant—Master’s Liability to Wife of Servant for Tort Committed by Husband in the Course of His Employment.—Plaintiff was injured through the negligent acts of her husband, an employee of the defendant. In an action for damages for these injuries the only question was whether, since she could not sue her husband in tort, a wife might recover from her husband’s employer for injuries received as a result of the negligence of her husband, acting within the scope of his employment. Held, that to make the employer liable because of the acts of its agent, against whom no liability exists in favor of the person injured, would result in holding the defendant liable notwithstanding plaintiff’s inability to have legal redress against the person causing her injuries. Also, it would result in permitting the wife to do indirectly that which she could not do directly, since if defendant is liable to plaintiff, it may sue and recover against her husband, the actual wrongdoer. Rieger v. Bruton Brewing Co., 9 U. S. L. Week-2294, 16 A. (2d) 99 (Md. 1940).

This is a subject upon which there is a distinct split of authority, and arises most often in automobile cases, where the husband is driving the defendant’s car, and the wife, plaintiff, is a passenger. Those jurisdictions which deny the wife recovery say that the employer’s liability depends on that of the servant. Unless the servant is liable there can be no liability on the part of the master. And where the only negligence alleged against the employer is that of the servant, the former is not liable as a joint wrongdoer, since he did nothing except through his employee, but his liability arises because of his responsibility for the acts of his servant. But since the wife may not sue her husband, there is no liability on his part, and thus, the servant not being liable, there is no liability on the part of the master. Maine v. James Maine & Sons Co., 198 Iowa 1278, 201 N.W. 20, 37 A.L.R. 161 (1924); Riser v. Riser, 240 Mich. 402, 215 N.W. 290 (1927). These jurisdictions also use the reasoning that was used in the principal case, that if the wife could sue the employer, he, in turn, could sue the employee, since the employee is liable to the employer in such cases, and the wife would then simply be doing indirectly that which she could not do directly. Emerson v. Western Seed and Irrigation Co., 116 Neb. 180, 216 N.W. 297, 56 A.L.R. 327 (1927).
The Maine court reaches the same conclusion, but by entirely different reasoning, to wit, that the Married Woman's Statute, permitting a wife to sue alone, applies only to the extent of letting her sue alone in those actions which formerly could be brought only by her husband alone, or by her husband and her jointly. But the husband could not sue here, either alone or jointly with his wife, since it was his negligence that caused the injuries. Quoting with approval from an earlier Maine case the court says: "If there is no injury to the husband there is none to the wife. They are one." And if there is no injury, there is no right of action. Sacknoff v. Sacknoff, 131 Maine 280, 161 Atl. 669 (1932).

This is an extreme case, especially in view of the fact that it was decided so recently. Even the common law of the Middle Ages did not go so far. It merely required that the husband join as plaintiff in an action to recover for injuries to the wife, since she had no legal standing to bring the action. Barber v. Barber, 21 How. 582, 16 L. Ed. 226 (U.S. 1858). But the Maine statute, allowing her to sue alone gives her such standing.

Where the husband was permitted to use the car for pleasure as well as business purposes, and he had taken his wife along on a combined business and pleasure trip, the accident occurring as he was returning home Sunday night so as to be at work the following morning, it was held that the husband was acting within the scope of his employment, but that the wife was only the guest of the husband, and not of the husband's employer. As to her the trip was for her own pleasure and for purposes not connected with the defendant's business, and on that basis recovery was denied. McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933).

The weight of authority, however, seems to hold the husband's employer liable to the wife in such a case. New York holds that a trespass on the person of a wife does not cease to be an unlawful act by the mere fact that the husband is by law exempt from liability for the damage. The employer is thus still liable, under the maxim that he who acts through another acts by himself. Nor is the situation changed by the fact that the employer may have a remedy against the employee, since that right is not based on any theory of subrogation to the plaintiff's cause of action, but is a right of the master against the servant for the latter's breach of his duty toward the master to render faithful service. Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42, 64 A.L.R. 293 (1928); Miller v. J. A. Tyrholm & Co., 196 Minn. 438, 265 N.W. 324 (1936).

Connecticut is in accord, holding that the master's liability is not derivative, depending on that of the servant; the liability of each exists without relation to the other. As to the argument that since the master will have a right of action against the husband the ultimate result will be a paying back of the sum recovered, it is fallacious for two reasons: 1. The recovery of the wife does not belong to the husband, but to the wife. Thus, although the recovery by the employer will reduce the husband's property, it will not, in the eyes of the law, reduce that of the wife; 2. It assumes that there will be a recovery against the employee. Practically, this will rarely happen, since in most cases the employee is judgment proof. Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 Atl. 107, 68 A.L.R. 1497 (1930); Poulin v. Graham, 102 Vt. 307, 147 Atl. 698 (1929).

This problem does not arise in Wisconsin, since Wis. Stat. (1925) Sec. 6.015 has been construed as authorizing the wife to sue her husband in tort, Wait v. Pierce, 191 Wis. 202, 209 N.W. 475, 210 N.W. 822 (1926). However, in an action for personal injuries that happened in Ohio, and thus had to be decided
under Ohio law, the question not yet having been presented in Ohio, the Wis-
consin court affirmed liability on the part of the employer, saying that this is
the modern rule and the better rule. Hensel v. Hensel Yellow Cab Co., 209 Wis.
489, 245 N.W. 159 (1932).

In Miller v. J. A. Tyrholm & Co., supra, the husband had merely taken out
defendant's car to try it, with a view to buying it for his son. The injured wife
was allowed to recover under a statute which provides that whenever a motor
vehicle is operated by anyone other than the owner, with the owner's consent,
in case of accident the operator should be deemed the agent of the owner.
The court said that since the husband's negligence was conceded and his agency
for the defendant established, liability followed. In Iowa, the statute provides
that where damage is negligently caused by a car driven with the consent of
the owner, the owner should be liable for such damage. The Iowa court said
that this is a liability created by the statute, and is dependent on the driver's
negligence. If no liability is created on the part of the driver by his negligence,
there is no liability to be imposed on the owner. Maine v. James Maine & Sons
Co., supra.

Those states which allow a wife to recover against her husband's employer
also seem to allow recovery by a minor against his parent's employer, where the
minor is injured through the negligence of his parent, acting within the scope
of his employment. Thus Wisconsin has held that the fact that the plaintiff
minor could not sue her father for damages did not defeat her right to recover
from his employer. Though public policy exempts the husband or parent from
an action by the wife or child directly against him for his negligent act, it does
not exempt the employer. The two actions are totally dissimilar. Le Sage v.
Le Sage, 224 Wis. 57, 271 N.W. 369 (1937); Chase v. New Haven Waste Material
Corp., supra.

The Restatement sums up the rule as follows: “Likewise, if an agent has an
immunity from liability, as distinguished from a privilege of acting, the principal
does not share the immunity. Thus, if a servant, while acting within the scope
of his employment, negligently injures his wife, the master is subject to liabil-
ity. Restatement Agency, Sec. 217, Comment b.

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