



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 9 | Number 1

Article 23

12-1-1930

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Recommended Citation

Hugh B. Campbell, *Husband and Wife -- Torts -- Right of Wife to Sue Husband for Negligent Injury*, 9 N.C. L. REV. 89 (1930).
Available at: <http://scholarship.law.unc.edu/nclr/vol9/iss1/23>

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(2) Where false statements are published by the directors as to the condition of their bank, a duty to speak the truth is imposed.²²

Conclusion

In the principal case, the defendant volunteered positive assertions of material facts, susceptible of knowledge, with the intention that the plaintiff act upon them. He knew neither the falsity nor the truth of his statements. Modern artificial constructions defy detection by the inexpert examiner. The defendant was a real estate broker, an expert, while the plaintiff was a mere purchaser of a home. The defendant was in position to know, and the plaintiff had reasonable grounds to rely upon the statements of the defendant as importing verity. It is submitted that under the North Carolina decisions, liability should have been imposed.²³ If the North Carolina decisions are to be so restricted, then the requirement of scienter should be abolished completely; or, alternatively, liability should be determined according to the general principles of negligence, for which, our court has a precedent in its own decisions.

J. GLENN EDWARDS.

Husband and Wife—Torts—Right of Wife to Sue Husband for Negligent Injury

Under married women statutes¹ permitting married women to hold all their property of every description for their separate use as though they were unmarried and permitting them to sue and be sued as though unmarried, it was held, in an action for personal injury from the negligent driving of an automobile, that a wife could not recover from her husband though the action had been started before the marriage.²

This would be the result at common law,³ since on marriage the woman's choses in action may be reduced to possession by the husband (fiducial relationship); *Evans v. Davis*, 186 N. C. 41, 118 S. E. 845 (1923); *Corley Co. v. Griggs*, 192 N. C. 171, 134 S. E. 406 (1926) (scienter not necessary in all cases). But *cf. Peyton v. Griffin*, 195 N. C. 685, 143 S. E. 525 (1925) (no positive assertion of knowledge); (1928) 7 N. C. L. REV. 90, as to what constitutes reasonable reliance.

²² *Tate v. Bates*, 118 N. C. 287, 24 S. E. 482 (1896) (knowledge presumed by fiction); *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478 (1896); *Houston v. Thornton*, 122 N. C. 265, 29 S. E. 827 (1898) (duty to speak truth imposed).

²³ *Supra* note 21.

¹ D. C. CODE (1924) §§1154, 1155.

² *Spector v. Weisman*, 40 F. (2d) 792 (Ct. or App. D. C. 1930).

³ *Peters v. Peters*, 42 Iowa 182 (1875); *Phillips v. Barnet*, 1 Q. B. D. 436 (1876); *Abbott v. Abbott*, 67 Me. 309 (1877).

band and this union in one person of the right-duty relation discharges the duty as a matter of substance, and since the husband has a right to the services⁴ and earnings of the wife she could suffer no pecuniary loss. There is also the procedural difficulty in that the husband would be both plaintiff and defendant. The result of this is usually expressed in the fiction of unity of person and merger of identity.⁵ This is a result and not the reason, however, and was not recognized outside of the common law. It had exceptions even there in criminal matters.⁶

The statutes in question would seem to make applicable the legal maxim, *cessante ratione legis, cessat et ipsa lex*. The courts have shown a variegated inconsistency in the construction of such statutes. Some permit a tort action for a willful injury⁷ and some will permit it for a negligent injury.⁸ The majority will permit a contract action,⁹ but not a tort action.¹⁰ The reason seems to be one of policy, as either line could be logically followed. The court in the principal

⁴ Buckley v. Collier, 1 Salk. 114 (1701); Warren, *Husband's Right to Wife's Services* (1925) 38 HARV. L. REV. 421, 622.

⁵ 1 BL. COMM. (1765) 430-433.

⁶ Queen v. Jackson, 1 Q. B. D. 671 (1891); State v. Oliver, 70 N. C. 60 (1874) (assault); State v. Dowell, 106 N. C. 722, 11 S. E. 525, 8 L. R. A. 297, 19 AM. ST. REP. 568 (1890); State v. Fulton, 149 N. C. 485, 63 S. E. 145 (1908).

⁷ Brown v. Brown, 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185 (1914); Note (1914) 23 YALE L. J. 613; 12 MICH. L. REV. 473; Gillman v. Gillman, 78 N. H. 4, 95 Atl. 657 (1915), Note (1916) 1 CORN. L. Q. 289; Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917), Note (1920) 5 CORN. L. Q. 171 (1918) 27 YALE L. J. 1081.

⁸ Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432, 44 A. L. R. 785 (1925), Note (1926) 24 MICH. L. REV. 618; 10 MINN. L. REV. 439; 1 NOTRE DAME LAW. 195; Waite v. Pierce, 191 Wis. 202, 209 N. W. 475, 48 A. L. R. 276 (1926); Note (1926) 4 WIS. L. REV. 37; 26 COL. L. REV. 895; 12 IOWA L. REV. 93; 11 MINN. L. REV. 79; 11 MARQUETTE L. REV. 55.

⁹ Adams v. Custis, 4 Lans. 164 (N. Y. 1870); Benson v. Morgan, 50 Mich. 77, 14 N. W. 705 (1883); Kennedy v. Knight, 174 Pa. 408, 34 Atl. 585 (1896); DeBaun v. DeBaun, 119 Va. 85, 89 S. E. 239 (1916).

¹⁰ Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S. W. 628 (1915), L. R. A. 1916 B 881 (assault and battery); Woltman v. Woltman, 153 Minn. 217, 189 N. W. 1022 (1922). Note (1923) 21 MICH. L. REV. 473 (negligence); Newton v. Weber, 119 Misc. 240, 196 N. Y. Supp. 113 (1922); Note (1922) 36 HARV. L. REV. 346, 32 YALE L. J. 196 (negligence); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Note (1924) 19 ILL. L. REV. 198 (negligence); Allen v. Allen, 246 N. Y. 571, 159 N. E. 656 (1927); Note (1928) 37 YALE L. J. 834; 28 COL. L. REV. 818. But cf. Schubert v. Schubert Wagon Co., 249 N. Y. 253, 164 N. E. 42 (1928) (permits husband's employer to be held liable, although the husband himself is not liable and thus shows N. Y. to be interpreting the statute on grounds of policy). *Contra*: Maine v. Maine & Sons Co., 198 Iowa 1278, 201 N. W. 20, 37 A. L. R. 161.

case felt bound by an earlier decision¹¹ which denied the right through fear of disturbing the harmony of the home and due to a strict construction of the statute, since it was in derogation of the common law. That decision left the wife with a remedy in the divorce court and in the criminal court, but such a right is not here presented, as this is a negligent injury and not a willful one.

North Carolina and Wisconsin have adopted the liberal construction of their married women acts and permit tort actions by the wife, whether the injury is willful¹² or negligent.¹³ New York, on the other hand, under a similar statute has refused the tort action.¹⁴

It is submitted that the right of action should not be denied the wife because of vague public policy based on *a priori* reasoning which experience in other states has demonstrated to be unfounded. The married women statutes are remedial in character and should be liberally construed.¹⁵ There should be no procedural limitations on married women, as such. Instead, the right of a married woman to recover against her husband should be governed by reasonable limitations of substantive law, consistent with the relation of the parties.¹⁶

HUGH BROWN CAMPBELL.

Judgments—Setting Aside Judgment for Neglect of Attorney Not Residing in County of Trial

In a recent North Carolina case plaintiff instituted suit in Ashe County against defendant who lived in Gaston County. Defendant filed a verified answer but neither he nor his attorney appeared for trial. Judgment was rendered against defendant. Under \$600 of

¹¹ *Thompson v. Thompson*, 218 U. S. 611, 31 Sup. Ct. 111, 54 L. ed. 1180, 30 L. R. A. (N. S.) 1153, 21 ANN. CAS. 921 (1910); Note (1913) 22 YALE L. J. 250; 9 MICH. L. REV. 440 (It is to be noted that the remarks concerning property actions are against the great weight of authority).

¹² *Crowell v. Crowell*, 180 N. C. 516, 105 S. E. 206 (1920), 181 N. C. 66, 106 S. E. 149 (1921); Note (1921) 19 MICH. L. REV. 659, 7 VA. L. REV. 476.

¹³ *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9, 29 A. L. R. 1479 (1923); Note (1923) 33 YALE L. J. 315, 2 N. C. LAW REV. 113, 10 VA. L. REV. 161; *Waite v. Pierce*, *supra* note 8; *Earle v. Earle*, 198 N. C. 411, 151 S. E. 884 (1930).

¹⁴ *Newton v. Weber*, *supra* note 10. It is to be noted that the N. C. statute does not expressly permit the wife to sue her husband in tort but such a result is derived by construction only. N. C. ANN. CODE (Michie, 1927) §§454, 2506, 2513.

¹⁵ BLACK, INTERPRETATION OF LAWS (2d ed. 1911) 375-378.

¹⁶ See *Mathewson v. Mathewson*, 79 Conn. 23, 37, 63 Atl. 285, 287, 5 L. R. A. (N. S.) 611 (1906); *Brown v. Brown*, *supra* note 7. For excellent treatment of the subject see *McCurdy, Torts Between Persons in Domestic Relation* (1930) 43 HARV. L. REV. 1030.