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Domestic Relations -- Actions -- Wife's Tort Liability to Husband

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quently the term, "injury to the family" was used in that case, and later cases merely repeated it. Later cases seem to omit the phrase "to the family," and in a more recent case[17] it is stated that the recovery for the value of a child's life is not what his services might have been worth to someone else during his minority, but what his entire life would have been worth to *himself* if he had lived. In *Queen City Coach Co. v. Lee*[18] the judge's charge was "pecuniary worth (of deceased) to his estate," and this was held to be in accordance with North Carolina authorities. If there is no family or next of kin to take the recovery, the University of North Carolina is entitled to the recovery[19] indicating clearly that the recovery does not depend on loss to the family of the decedent.

Evidence of the provident attitude of the deceased was admited in one case[20] when offered by the plaintiff, but it was considered that the evidence of deceased's having been a good provider for his family showed a constant attention to his business, and thus was admitted to show earning capacity. In the principal case, the non-support order, the divorce complaint, and the inventory do tend to show lack of a provident attitude by deceased, but tend very remotely, if at all, to show earning capacity or decedent's own living expenses. When the evidence on non-support, however, is coupled with the inventory of decedent's estate there is an indication of the decedent's personal expenditures, and on this ground these two offers could be relevant, for if a man has given his family a small amount of his wages and his estate shows almost nothing, then a high degree of probability exists that personal expenditures were high. But as pointed out by the dissent, there was nothing in the record to show that deceased's contributions to his family were controlled by the support order. Accordingly this combination of evidence has little probative value.

Inasmuch as the majority opinion would permit the excluded evidence to come in to show lack of provident attitude, this case seems to be out of line with the other North Carolina cases holding to a strict net-income theory and rejecting the loss to beneficiaries theory.

BASIL SHERRILL.

Domestic Relations—Actions—Wife's Tort Liability to Husband

In *Scholtens v. Scholtens*,[1] plaintiff husband brought an action against his wife to recover damages for personal injuries which he received in an automobile accident allegedly caused by her negligence. Thus the

[17] Russell v. Windsor Steamboat Co., 126 N. C. 961, 36 S. E. 191 (1900).
[18] 218 N. C. 320, 11 S. E. 2d 341 (1940).
[19] Warner v. Western N. C. R. R., 94 N. C. 250 (1886).
[20] Hicks v. Love, 201 N. C. 773, 161 S. E. 395 (1931).

[1] 230 N. C. 149, 52 S. E. 2d 350 (1949).

question of whether a husband may maintain an action against his wife for a personal tort committed during coverture was presented for the first time in this state. The North Carolina Supreme Court held that the husband had no right to maintain such an action.

It is well known that at common law the husband and wife became one by marriage.[2] The legal existence of the wife was suspended during coverture and incorporated into that of her husband, she being unable to sue or be sued without his joinder. As one could not sue himself, neither spouse could sue the other. The majority of states still recognize the common law disability of husband and wife to maintain personal tort actions *inter se*,[3] the reasons advanced being similar in most jurisdictions denying liability. One reason is that the various Married Women's Acts, some of which purport to allow the wife to sue and be sued as if she were single, are said to be in derogation of the common law and thus to be strictly construed. Suits between husband and wife are declared to be against public policy in that they tend to break up the family unit. It is also reasoned that husband and wife have an adequate remedy in the criminal and divorce laws.

In 1868 the common law disability of a wife to sue was partially removed in North Carolina by a statute allowing her to sue without her husband's joinder under certain circumstances.[4] This was held to mean that a wife might sue her husband when the action concerned her separate property.[5] In 1913 another statute further enlarged married

[2] Thompson v. Thompson, 218 U. S. 611 (1910); Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909); Aldrich v. Tracy, 221 Iowa 84, 269 N. W. 30 (1936); Drake v. Drake, 145 Minn. 388, 177 N. W. 624 (1920); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Butterfield v. Butterfield, 195 Mo. App. 37, 187 S. W. 295 (1916); Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923).

[3] Thompson v. Thompson, *supra* note 2; Ewald v. Lane, 104 F. 2d 222 (D. C. Cir. 1939); Cubbison v. Cubbison, 73 Cal. App. 2d 437, 166 P. 2d 387 (1946); Carmichael v. Cirmichael, 53 Ga. App. 663, 187 S. E. 116 (1936); Broaddus v. Wilkenson, 281 Ky. 601, 136 S. W. 2d 1052 (1940); Harvey v. New Amsterdam Casualty Co., 6 So. 2d 774 (La. Ct. of App. 1942); Anthony v. Anthony, 135 Me. 54, 188 A. 724 (1937); Callow v. Thomas, 322 Mass. 550, 78 N. E. 2d 637 (1948); Kircher v. Kircher, 288 Mich. 669, 286 N. W. 120 (1939); Keralis v. Keralis, 213 Minn. 31, 4 N. W. 2d 632 (1942); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); Mullally v. Langenberg Bros. Grain Co., 339 Mo. 582, 98 S. W. 2d 645 (1936); Lang v. Lang, 24 N. J. Misc. 26, 45 A. 2d 822 (1946); Tanno v. Elby, 78 Ohio App. 21, 68 N. E. 2d 813 (1946); Fisher v. Diehl, 156 Pa. Super. Ct. 476, 40 A. 2d 912 (1945); Lunt v. Lunt, 121 S. W. 2d 445 (Tex. Civ. App. 1938); Comstock v. Comstock, 106 Vt. 50, 169 A. 903 (1934); Staats v. Co-operative Transit Co., 125 W. Va. 473, 24 S. E. 2d 916 (1943); McKinney v. McKinney, 59 Wyo. 204, 135 P. 2d 940 (1943).

[4] N. C. CONSOL. STAT. §454 (1941): "When a married woman is a party, her husband must be joined with her, except that—1. When the action concerns her separate property, she may sue alone. 2. When the action is between herself and her husband, she may sue or be sued alone. In no case need she prosecute or defend by a guardian or next friend." This statute was deleted in the codification of the North Carolina General Statutes of 1943 as having been superseded by Chapter 52 entitled *Married Women.*

[5] Graves v. Howard, 159 N. C. 594, 75 S. E. 998 (1912); Perkins v. Brinkley, 133 N. C. 154, 45 S. E. 536 (1903); Robinson v. Robinson, 123 N. C. 136, 31 S. E. 371 (1898); McCormac v. Wiggins, 84 N. C. 278 (1881); Manning v. Manning, 79 N. C. 293 (1878); Shuler v. Millsaps, 71 N. C. 297 (1874).

women's rights to sue in tort.[6] Under these two statutes a wife was allowed recovery against her husband for a willful assault.[7] In 1923 the North Carolina Supreme Court held for the first time in the United States that a wife might sue her husband in tort for negligent injury.[8] Now it is well settled in North Carolina that such an action will lie.[9]

In North Carolina the husband has been allowed to sue the wife for negligent tort where the cause of action arose prior to their marriage, since by statute the subsequent marriage cannot affect her antenuptial liability.[10] In that case the court referred to, but expressly refused to decide, the question presented in the *Scholtens* case. In the *Scholtens* case the court reasoned that, since there is no statutory authorization for the husband to sue his wife for personal injury inflicted during coverture, the husband had only his common law rights against the wife. The decision is based to some extent upon the fact that the statute of 1868 was deleted in the adoption of the General Statutes of 1943.[11] Since this statute of 1868 specifically enabled a married woman to sue *or be sued* alone when the action was between herself and her husband, it thus implied that the husband could indeed sue the wife. There is some doubt as to whether the result of the *Scholtens* case would have been the same had this statute not been deleted.

The question presented by the principal case has been decided on similar facts in two other jurisdictions, Wisconsin and West Virginia. The Wisconsin statute purports to allow a married woman to bring an action in her own name for any personal injury as if she were *sole*.[12] Under this statute it was held that a wife might sue her husband for personal injuries caused by his negligence.[13] The Supreme Court of Wisconsin recognized that by statute the wife's rights were superior to

[6] N. C. GEN. STAT. §52-10 (1943): "The earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried."

[7] Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206 (1920), *rehearing denied*, 181 N. C. 66, 106 S. E. 149 (1921) (husband infected his wife with a venereal disease).

[8] Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923) (negligent automobile accident). See also Roberts v. Guaranty Co., 188 N. C. 795, 125 S. E. 611 (1924) (husband held entitled to recover on his indemnity policy the amount of his wife's judgment against him in Roberts v. Roberts, *supra*; questions of public policy and sound morals were addressed to the Legislature).

[9] Bogen v. Bogen, 219 N. C. 51, 12 S. E. 2d 649 (1940); Alberts v. Alberts, 217 N. C. 443, 8 S. E. 2d 523 (1940); York v. York, 212 N. C. 695, 194 S. E. 486 (1937); Earle v. Earle, 198 N. C. 411, 151 S. E. 884 (1930).

[10] Shirley v. Ayers, 201 N. C. 51, 158 S. E. 840 (1931).

[11] N. C. CONSOL. STAT. §454 (1941). See note 4 *supra*.

[12] WIS. STAT. §246.07 (1947) (". . . And any married woman may bring and maintain an action in her own name for any injury to her person or character the same as if she were sole. . . .").

[13] Wait v. Pierce, 191 Wis. 202, 209 N. W. 475 (1926).

those of her husband[14] and, when the question of the principal case was presented, held that the husband had only his common law rights against his wife.[15] As a result of this decision the Wisconsin Legislature passed a statute giving the husband the right to maintain an action against his wife "for recovery of damages for injuries sustained to his person caused by her wrongful act, neglect or default."[16] In West Virginia, where the statute provided that a married woman might sue or be sued as if she were single,[17] the decision was also against the husband. The Court reasoned that the only effect of the statute was to make it possible for a married woman to sue or be sued by third persons without her husband's joinder, not to authorize the husband to sue the wife.[18]

There are certain practical considerations which may have influenced the Court's decision in the *Scholtens* case. In most tort actions between husband and wife, especially the automobile accident cases, the real defendant is an insurance company. The danger of collusion between the insured and the person injured, present in liability insurance cases, is considerably increased by the relationship of the parties. Hence the Court may not have wished to further extend liability. This element of collusion, however, has not hampered the wife's cause of action against her husband, and there is certainly no more danger of collusion when the husband sues the wife. Also the conventional public policy argument that such actions split the family is not applicable in the insurance cases, since neither spouse is in fact paying the bill.

It is submitted that the result of the *Scholtens* case is illogical and that had the Court so desired, it had legitimate grounds for allowing the suit. That North Carolina has been liberal in this field heretofore is well illustrated by the fact that it was the first state to recognize the wife's cause of action against the husband for negligent tort.[19] Judging by the majority opinion of Chief Justice Clark in *Crowell v. Crowell*,[20] it seems that he would have no trouble reaching a different result in the principal case. He recognized that we have by statute adopted the common law except as it has been "abrogated, repealed or become *obso-*

[14] *See* Singer v. Singer, 245 Wis. 191, 197, 14 N. W. 2d 43, 47 (1944).

[15] Fehr v. General Accident Fire & Life Insur. Corp., Ltd., 246 Wis. 228, 16 N. W. 2d 787 (1944).

[16] WIS. STAT. §246.075 (1947): "A husband shall have and may maintain an action against his wife for the recovery of damages for injuries sustained to his person caused by her wrongful act, neglect or default." New York also changed its common law rule by a statute enabling husband and wife to sue each other for personal tort (N. Y. DOM. REL. LAW §57) under which it was held that a husband might sue his wife for malicious prosecution of a divorce action. Weidlich v. Weidlich, 177 Misc. 246, 30 N. Y. S. 2d 326 (1941).

[17] W. VA. CODE ANN. §4749 (1943).

[18] Poling v. Poling, 116 W. Va. 187, 179 S. E. 604 (1935); *accord*, Staats v. Co-operative Transit Co., 125 W. Va. 473, 24 S. E. 2d 916 (1943).

[19] Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923).

[20] 180 N. C. 516, 105 S. E. 206 (1920), *rehearing denied*, 181 N. C. 66, 106 S. E. 149 (1921).

lete."[21] In view of the wife's rights against her husband at the present time in North Carolina, it seems that these common law principles as to the husband's rights against his wife are clearly antiquated. Our Court has said that the legislature in passing the Married Women's Act intended to equalize the legal status of husband and wife.[22] If applying the common law as to the husband's rights gives the wife rights superior to those of her husband, the common law in this respect is obsolete and should not be the law. Further our court has long recognized that the common law unity of husband and wife no longer exists, having been changed by statute.[23] Since the wife by statute is no longer a part of the unit, but is separate enough even to sue her husband for personal tort, it is a mere fiction to say they are one for purposes of the husband's suit against his wife.

Since the court clearly indicated in the principal case that legislative action will be necessary to change the rule enunciated, it is urged that the Legislature of North Carolina enact a statute specifically enabling the husband to sue his wife for personal injuries caused by her during coverture.

MASON P. THOMAS, JR.

Domestic Relations—Child's Interest in the Parental Relation—Suit by Infant for Enticement of Mother

The authorities are recent and in conflict on the question of whether a minor child has a cause of action against an outsider for damages suffered as a result of the outsider's enticement of the child's parent from the family home.

The Supreme Court of North Carolina has no decision on this question. It is, however, in accord with the view that damage to relational interests[1] is the true basis of similar actions of alienation of affections[2]

[21] N. C. GEN. STAT. §4-1 (1943). Italics added.

[22] Helmstetler v. Duke Power Co., 224 N. C. 821, 825, 32 S. E. 2d 611, 614 (1944) "The effect of the legislation on the subject is to equalize the legal status of husband and wife. . . . But if the legislative intent of equality is to prevail, the same cause of action which is denied to the wife may not be retained or preserved to the husband"; Hipp v. Dupont, 182 N. C. 9, 108 S. E. 318 (1921).

[23] Roberts v. Roberts, 185 N. C. 566, 569, 118 S. E. 9, 11 (1923) "The unity of person in the strict common-law sense no longer exists in this jurisdiction, because many of the common law disabilities have been removed. This change relates to remedies as well as rights."

[1] Green, *Relational Interests*, 29 ILL. L. REV. 461, 462 (1934). "Relational interests are distinct interests. They extend beyond the personality, and are not symbolized by any tangible thing which can legitimately be called property. . . The situation is this: the plaintiff stands in relation to some other person; defendant hurts plaintiff's relation with that person. This is a hurt done to a relational interest."

[2] Chestnutt v. Sutton, 207 N. C. 256, 176 S. E. 743 (1934); Cottle v. Johnson, 179 N. C. 426, 102 S. E. 759 (1920) (holding that the gravamen of the cause of action for alienation of affections of the plaintiff's wife is the deprivation of the plaintiff of his conjugal rights to the society, affection, and assistance of his wife).