

Case and Comment

DRINKWATER AND ANOTHER v. KIMBER

Husband and wife-Action by husband and wife for injury to wife-Husband's contributory negligence-Liability to contribute towards damages awarded to wife-Law Reform (Contributory Negligence)

Act, 1945 (c. 28), s. 1 (1)

The Courts, have always shown great reluctance to consider an Act of Parliament as altering or modifying a previous enactment, unless it does so in clear words. This is another decision which speaks eloquently in favour of this principle.

The fact situation which gave rise to this action involves no intricacy. Mrs. D. was driving with her husband when their vehicle collided with a car driven by Mr. K. Mr. and Mrs. D. brought this action for injuries suffered by Mrs. D. as a result of the collision: liability for the wife's injury was admitted, but the husband plaintiff was found partly to blame. The defendant's counterclaim raised the issue whether under section 1 (1) of the Contributory Negligence Act (1945) the husband would be liable towards his wife for his proportionate contribution to the injury.

At the very outset of his case, counsel for the defendant was met with strong opposing legislation: the English Tortfeasors Act (sec. 6 ss. 1) recites that "Where damage is suffered by any person as a result of a tort (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been liable in respect of the same damage." As husbands and wives may not sue each other in tort, this Act is ostensibly of no avail to the defendant but may prove fatal to his case.

Despite the clear words of the Tortfeasors Act, counsel for the defendant argued strenuously that sec. 1 (1) of the Contributory Negligence Act had the effect of defeating the tortious immunity which existed between husband and wife. The pertinent section relied upon, provides: "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage." As this section makes no mention of the husband and wife limitation, the defendant contended that the husband plaintiff came within the words "any other person." Hence the husband should be made to compensate the defendant for damages arising out of the injury to the wife since he was partly responsible for it.

Devlin J., rejecting counsel's contentions first directed his attention to the general scope of the Contributory Negligence Act. Having remarked that the "Act is not intended to alter any substantive defence to a cause of action," he continues: "The defendant's construction of subs (1) depends on reading the word "damage" as meaning more than physical damage and as wide enough to include the sort of financial loss which arises when, as the result of a wrongful act, a man has to make a payment to the third party. It might perhaps, be read that way if there were nothing to point to the contrary...but that reading makes subs. 3 at best superfluous and at worst contradictory. If contribution between joint tortfeasors is among other cases covered by subs. (1), it is superfluous, and, indeed almost incomprehensible, to provide that s. 6 shall apply to persons who would be liable by virtue of sub. s. (1). If however the meaning of "damage" is restricted to physical damage, the two sub-sections fall into place and are complimentary."

If I were to add to that sound expose of statute exegesis it would be to agree with the conclusion of Devlin J. by resorting to different means. Indeed I should prefer to tread a shorter path to reach a similar result.

Without elaborating extensively on the history of the relevant statutes involved in this case, it is possible to restrict their application, thus leaving their content intact and the word "damage" to be defined by a higher authority.

As I propose to discard the Contributory Negligence Act as irrelevant to the issue on the counterclaim, I shall deal with it now. This Act was evolved to meet situations where the cause of damages due to negligence was divisible and attributable to different agents. It apportions damages in terms of causation; but its application is restricted to definite relationships. To claim under the Act, independently of some other enactment, the parties must have been at the same time agents and victims of the negligent act complained of: both must have given and received. If one of those essentials is lacking, the relationship is not established and the Act will not apply unless some other statute grants the privilege.

Let me illustrate what I wish to convey by referring to the case at hand. Here the plaintiff husband and the defendant were found negligent and both partly to blame for the collision. As between themselves, the Act clearly applies; but will it be applicable to all the damages which have issued from the impact?

Glancing back on the facts, we are met with the wife's claim for her injuries. The Court has found no negligence, either personal or imputed on her part. Were it not for the rule that wife and husband may not sue each other in tort, she would have a perfectly good claim against either perpetrator of the negligent act. But even then, she is not precluded from collecting her entire damages. The law on

this subject is thus expressed in 'The American Restatement Of Torts, No. 883: "Where two persons would otherwise be liable for a harm, one of them is relieved from liability by the fact that the other has an absolute privilege to act or an immunity from liability to the person harmed." At this stage, the defendant admits liability for the wife's claim but counterclaims against the husband for the latter's proportionate contribution to the wife's injuries. As he was responsible for part of the wife's injuries only, he contends that he should be compensated by the husband plaintiff for the other portion of the damages. The fallacy of defendant's argument may easily be detected; he relies primarily and exclusively on the Contributory Negligence Act, while he should first direct his attention to the Tortfeasors Act. Considered in relation to Mrs. D., both drivers were tortfeasors; they were co-tortfeasors. Therefore, the liability issuing from that relationship should be governed primarily by the Tortfeasors Act. This Act provides for compensation between co-tortfeasors; but one may recover from the other only if the party injured could have sued that co-tortfeasor from whom recovery is sought. If the injured party in this case could have sued D. then the Act would apply and the amount of damage recoverable by K. would be defined by the Contributory Negligence Act. But as the facts in the counterclaim preclude us from enquiring beyond the Tortfeasors Act, it is submitted that any discussion of the Contributory Negligence Act was superfluous and irrelevant to the counter-issue.

Donat J. Levesque, 2nd year.

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