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Damages - Injury to the Person of Another - Recovery Denied for Shock Resulting from Observation of Injuries to Husband

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interpretation of a contract should be determined according to the laws of the state where the contract is made,[10] contending that the obligation to support is not a matured contract, but a continuing liability.

Most authorities maintain that the statute of a foreign jurisdiction should be enforced, if doing so would not be against public policy.[11] While in the instant case the Texas Court was of the opinion that the California statute was not repugnant to the public policy of Texas, it appears that in some instances such statutes are of such nature as to be contrary to the public policy of another state. Statutes requiring an adult child to support his indigent parents vary as to the financial need of the parent,[12] the past and present conduct of the parent,[13] the martial condition of the daughter,[14] and the financial ability of the child to support the parent.[15]

There is a great difference in the laws of the various states which make the adult child responsible for the support of his indigent parent, as well as in the administration of these laws. Due to these differences it appears that the action of the National Conference on Uniform Laws in amending section 7 of the Uniform Reciprocal Support Act was sound in providing that the laws of the state in which the obligor lives should apply in support cases. The majority decision in the instant case was in accordance with this amended act and appears to be sound from the standpoint of public policy as well as legal precedent.

MERVIN A. TUNTLAND.

DAMAGES — INJURY TO THE PERSON OF ANOTHER — RECOVERY DENIED FOR SHOCK RESULTING FROM OBSERVATION OF INJURIES TO HUSBAND. — Plaintiff

10. See Holder v. Aultman, 169 U. S. 81 (1898); Baxter Nat'l Bank v. Talbot, 154 Mass. 213, 28 N.E. 163 (1891).

11. Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593 (1892); Howarth v. Lombard, 175 Mass. 570, 56 N.E. 888 (1900); Corrington v. Crosby, 54 N. D. 615, 210 N.W. 342 (1920).

12. In many states the test for family responsibility is the same as the test for need of public assistance. See Mandelker, *Family Responsibility Under the American Poor Laws*, 54 Mich. L. Rev. 497, 514 (1956).

13. In the absence of statute, misconduct by a parent does not ordinarily relieve the child of the responsibility of support. See Hummel v. Hummel, 22 N.Y.S.2d 977 (N.Y. Dom. Rel. Ct. 1940). In that case a son was compelled to contribute to the support of his father who drank excessively. Gen. Code of Ohio § 12431, Rev. Code § 2901.4 provides that no person shall be required to support his parent, if the parent refused or neglected to support him while he was under sixteen years of age.

14. A son-in-law is not liable for the support of his wife's parents; and unless she has an income of her own, a married woman is not usually held liable for the support of her indigent parents. In Commonwealth v. Goldman, 179 Pa. Super. 521, 118 A.2d 271 (1955), the court held that a married daughter with a three year old child whose husband received $7,500 per year did not have to contribute to the support of her indigent parents. In Dunway v. Commissioner of Pub. Welfare, 174 Misc. 735, 22 N.Y.S.2d 69 (Co. Ct. 1940), the court held that a daughter receiving $300 per month alimony for the support of herself and child was not required to contribute to the support of her indigent father. *But see* Moore v. Palen, 228 Minn. 148, 36 N.W.2d 540 (1949), where damages were awarded to the parents of a married woman on the basis of her potential ability to contribute to their support.

15. In Mendelson v. Mendelson, 192 Misc. 1014, 80 N.Y.S.2d 913 (N.Y. Dom. Rel. Ct. 1948), a 27 year old unmarried daughter earning $30 per week and contributing the major portion of the support of her divorced mother, was ordered to contribute $4.30 per month to the support of her father. In some states the minimum earnings which an adult child must have before being held liable for the support of an indigent parent is determined by statute. See Mont. Rev. Code Ann. § 411.425 (1953). The Oregon Code provides a graduated scale of liability for support, depending upon income and number of dependents in the immediate family of the adult child. A married man with a wife and two children would not be liable to contribute if the net as established for income tax purposes is less than $5,000 per year.

sustained a miscarriage as a result of mental shock and fright caused by her observation of a collision between an automobile driven by her husband and one driven negligently by the defendant. The District Court of Appeals, Third District, California, *held* that injuries sustained from shock or fear at the sight of another's peril are not compensable. *Reed v. Moore,* 319 P.2d 80, (Cal. 1957).

It is generally held that one may not recover for emotional distress which results from observing a threat of or actual injury to a third person although there exists an immediate family relationship.[1] A few isolated cases have allowed recovery in such situations, but no doctrine has been formulated which stands as a persuasive precedent.[2]

Recovery is denied on three grounds: (1) failure to find a duty owed by the defendant to the particular plaintiff;[3] (2) failure to ascertain proximate cause;[4] (3) fear of fraudulent claim and increased litigation.[5]

North Dakota does not have a decision on the question, but the Supreme Court has impliedly required "physical injury" to the plaintiff[6] and presumably would deny recovery where injuries arise out of fear for another.

It is submitted that recovery should be allowed for emotional distress emanating from a defendant's negligence toward a third person provided the action is restricted so as not to leave the defendant's liability boundless,[7] such as limiting the cause of action to members of the immediate family.[8] In addition, the injury threatened or inflicted should be sufficiently disturbing

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1. Preece v. Baur, 143 F. Supp. 804 (E.D. Idaho 1956); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Restatement, Torts, (1938) Caveat to 313: "The Institute expresses no opinion as to whether an actor whose conduct is negligent as involving an unreasonable risk of causing bodily harm to a child or spouse is liable for an illness or other bodily harm caused to the parent or spouse who witnesses the peril or harm of the child or spouse and thereby suffers anxiety or shock which is the legal cause of the parent's or spouse's illness or other bodily harm."

2. Spearman v. McCrary, 4 Ala. 473, 58 So. 927 (1912), *cert. denied,* 4 Ala. 677, 58 So. 1038 (1912), where it was held proper to permit the plaintiff to prove that her children were in danger and that she was frightened for their safety, the court saying only that: "This fact was part of the situation properly to be taken into account in considering the effect upon the plaintiff of such an occurance." Lone Star Gas Co. v. Haire, 41 S.W.2d 424 (Tex. Civ. App. 1931), plaintiff included statement that at time of accident "she was riding with her young daughter for whose safety she greatly feared as well as her own, and such fact added to the severe shock to her nervous system." The court overruled without explanation an exception by the defendant to this statement as "improper, inflammatory, and prejudicial". Hambrook v. Stokes Bros., 1 K. B. 141-CA (1925), was considered for many years the leading case allowing recovery and was criticized by many courts denying recovery. See, *e. g.,* Waube v. Warrington, *supra note* 1. However, in Hay v. Young, AC 92 (1943), 2 All Eng. 396 (1942), the same court resorted to the argument that in *Hambrook v. Stokes Bros.* the defendant had admitted a breach of duty directly to the plaintiff by his general admission of negligence in his answer and thus deprived the case of authority.

3. Minkus v. Coca Cola Bottling Co., 44 F. Supp. 10 (N.D. Cal. 1942); Sanderson v. Northern Pac. Ry., 88 Minn. 162, 92 N.W. 542 (1902); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950): "Such consequences are an unusual and extraordinary result of the careless operation of an automobile and to impose liability therefor would place an unreasonable burden upon users of the highways"; Gulf, C. & S. F. Ry. v. Overton, 101 Tex. 583, 110 S.W. 736 (1908). *Compare with* Gulf, C. & S. F. Ry. v. Coopwood, 96 S.W. 102 (Tex. Civ App. 1906) where recovery was allowed on basis of contract on similar facts.

4. Angst v. Great Northern Ry., 131 F. Supp. 156 (D.C. Minn. 1955); Carey v. Pure Distributing Corp., 133 Tex. 31, 124 S.W.2d 847 (1939).

5. 19 Va. L. Rev. 253 (1933).

6. See Wilson v. Northern Pac. Ry., 30 N. D. 456, 153 N.W. 429 (1915).

7. See Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

8. *Cf.,* Wesern Union Tel. Co. v. Watson, 161 S.W.2d 350 (Tex. Civ. App. 1942).

or of a nature to cause shock to the plaintiff.[9] Finally, as a third prerequisite, the plaintiff should recover only for fright or mental anguish suffered at the time of the mishap and not for consequential injuries arising later.[10] Such a restriction of the right of action would alleviate the court's fear of increased litigation. Of course this policy reason is not present and recovery is granted, where the shock is caused by an intentional act of the defendant.[11] Modern achievements in medicine make it possible in most cases to distinguish valid from fraudulent claims.[12]

The shock of a mother at the sight of her child in danger or that of a wife present at her husband's negligent death is real and raises human sympathies in favor of recovery against the negligent defendant,[13] and within the above restrictions recovery should be allowed.

WILLIAM F. HODNY.

DECLARATORY JUDGMENTS — SUBJECTS OF DECLARATORY RELIEF — SUIT BY INSURER TO DETERMINE DUTY TO DEFEND ON AUTOMOBILE LIABILITY POLICY. — Defendant was sued for damages arising out of an automobile accident allegedly due to his intoxication. Before termination of that suit, plaintiff brought this action for a declaratory judgment to have its rights determined as insurer under a contract with defendant. The insurance policy contained a clause suspending coverage when the car was operated by a driver "under the influence of alcohol". The Supreme Court of Utah, one justice dissenting in part, *held* that this was a proper action for a declaratory judgment. *Utah Farm Bureau Ins. Co. v. Chugg*, 6 Utah 2d 399, 315 P.2d 277 (1957).

A suit for declaratory judgment is proper where there is an actual and justicable controversy.[1] A controversy between an insurer and the insured as to the existence or extent of liability to injured persons by the insurer under the policy is the proper subject of a declaratory judgment.[2] The same is true where the parties seek to determine the insurer's duty to defend the insured.[3] However, this presupposes the fact that the insurance company is not a party to another action where the same facts and same parties are involved.[4] In

9. Renner v. Canfield, 36 Minn. 90, 30 N.W. 435 (1886); Norris v. Southern Ry., 84 S. C. 15, 65 S.E. 956 (1909).

10. See Kalleg v. Fassio, 125 Cal. App. 96, 13 P.2d 763 (1932).

11. Recovery has been allowed where the defendant commits a willful wrong toward a third person although no bodily injury accompanies the mental anguish and the plaintiff's person is not threatened. Alabama Fuel & I. Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951). Mental distress caused by negligent threats or actual injury to property is not compensable. State v. Baltimore Transit Co., 197 Md. 528, 80 A.2d 13, (1951). But if defendant's conduct is willful recovery may be allowed. *Cf.*, Bryson v. Phelps, 23 Ala. App. 346, 125 So. 795, *cert. denied*, 220 Ala. 389, 125 So. 798 (1929).

12. 19 Albany L. Rev. 320 (1955).

13. Prosser, Torts, § 37, (2d ed. 1955).

1. Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U. S. 270 (1941); G. W. Jones Lumber Co. v. City of Marmarth, 67 N. D. 309, 272 N.W. 190 (1937); N. D. Rev. Code § 32-2306 (1943); See Langer v. State, 69 N.D. 129, 284 N.W. 238 (1939), in which the court held that a declaratory judgment would not be given where there was no "actual, justiciable controversy", and what was sought was merely an "advisory opinion."

2. Travelers Indemnity Co. v. Cochrane, 155 Ohio St. 305, 98 N.E.2d 840 (1951); *cf.*, Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (1937).

3. Reed v. Fidelity & Cas. Co. of N. Y., 254 Ala. 473, 48 So.2d 773 (1950); State Farm Mut. Auto. Ins. Co. v. Skuluzacek, 208 Minn. 443, 294 N.W. 413 (1940); New Amsterdam Cas. Co. v. Kirschenbaum, 194 Misc. 104, 85 N.Y.S.2d 866 (Sup. Ct. 1948).

4. Brillhart v. Excess Ins. Co., 316 U. S. 491 (1942); Hudson v. Travelers Ins. Co., 145 Kan. 732, 67 P.2d 593 (1937).