North Dakota Law Review

Volume 31 | Number 3 Article 7

1955

Insurance - Effect of Nonliability Clause upon Right to Contribution form Tortfeasor's Insurer

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New York, Minnesota, Missouri, and California.[11] California has recently reversed its position in *Price v. Atchison, T. & S. F. Ry.*[12] New York limits its application to tort actions.[13] However, Missouri and Illinois still refuse to apply the doctrine to Federal Employers' Liability Act actions.[14] The question has not been raised in North Dakota.

By the decision in the instant case, the Minnesota court has overruled the case of *Boright v. Chicago, R. I. & P. Ry.*,[15] which held that the doctrine could not be applied in transitory actions brought by residents of foreign states. It has thus alleviated the hardship to defendants[16] and the unfair burden to local taxpayers,[17] and has effectuated the result desired from the 1948 amendment.[18]

JEROME J. MACK

INSURANCE — EFFECT OF NONLIABILITY CLAUSE UPON RIGHT TO CONTRIBUTION FROM TORTFEASOR'S INSURER — W, while a passenger in an automobile owned and operated by her husband, sustained injuries in a car-train collision. A suit against the Railroad Company and the husband as negligent joint tortfeasors resulted in recovery of a judgment against both defendants which was collected in full from the Railroad Company. In an attempt by the latter to enforce its right of contribution against the husband's insurer, the court *held,* that enforcement of such right was precluded by a provision in the insurance policy absolving the insurer from all liability for injuries to the insured or members of his household. *Puller v. Puller,* 110 A.2d 175 (Pa.1955).

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11. Hearings before Subcommittee No. 4, Committee on the Judiciary, on H. R. 1639, 80th Cong., 1st Sess. (1947); See Barrett, *The Doctrine of Forum Non Conveniens, Supra* note 3 at 383, "A survey conducted by 51 leading railroads showed that during a five year period ending in 1946, 2512 suits were filed outside the federal districts in which the accident occurred or in which the Plaintiff resided at the time of the accident and that 92% of these suits were concentrated in the states of Illinois, New York, Minnesota, Missouri and California".

12. 268 P.2d 457 (Calif. 1954).

13. White v. Boston & M. Ry., 129 N. Y. S.2d 15 (1954); Wurnan v. Wabash Ry., 246 N. Y. 244, 158 N.E. 508 (1927); Gregonis v. Philadelphia R. C. & I. Co., 235 N. Y. 162, 139 N.E. 223 (1923).

14. See note 9 *Supra;* Wintersteen v. National Cooperage Co., 316 Ill. 95, 197 N.E. 578 (1935); Bright v. Wheelock 323 Mo. 840, 20 S.W.2d 684 (1929).

15. 180 Minn. 52, 230 N.W. 457 (1930).

16. Mooney v. Denver & R. G. W. Ry., *Supra* note 3; Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508 (1947); *cf,* Davis v. Farmers Co-operative Co., 262 U. S. 312 (1923); *But see* Baltimore & Ohio Ry. v. Kepner, *supra* note 5. See Barrett, *The Doctrine of Forum Non Conveniens, supra* note 3.

17. Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N.E. 152; Gulf Oil Corp. v. Gilbert, *supra* note 16; *cf.* Davis v. Farmers Co-operative Co., *supra* note 16; *But see* Baltimore & Ohio Ry v. Kepner, *supra* note 5.

18. See note 7 *supra.* If state courts do not invoke the doctrine when federal courts must, the plaintiff when dismissed in the federal court may re-enter the jurisdiction through the state courts, thus frustrating the purpose of the amendment.

The instant case also pointed out that actions brought by tourists who spend considerable time in the state or by residents of border states shall not be disturbed. Maloney v. New York, N. H. & H. Ry., 88 F.Supp. 568 (S.D. N.Y. 1949) suggested the following for consideration in determining if the doctrine should be invoked: "(a) relative ease of access to source of proof; (b) availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; (c) possibility of view of premises, if such be appropriate; (d) all other practical problems that may make the trial of a case easy, expeditious and inexpensive." See Naughton v. Pennsylvania Ry., *supra* note 4 at 763.

Tort actions between husband and wife were forbidden at common law,[1] first on the theory of unity of the spouses[2], and later on the supposition that domestic harmony would be thereby destroyed.[3] Pennsylvania confirmed this principle by enacting a statute declaratory of the common law.[4] Recognizing that there is very little harmony left to preserve when one spouse is attempting to sue the other, many jurisdictions now allow such actions either by express statute,[5] or by liberal constructions of the Married Women's Acts.[6]

Refusing to assist a wrongdoer, the common law courts permitted no contribution between wilful or negligent joint tortfeasors.[7] A few states, including Pennsylvania, have modified the common law rule to the extent of allowing contribution where the tortious act is negligent as distinguished from intentional.[8] These courts proceed on the theory that it is inequitable for the entire loss to be born by one tortfeasor who may have been selected by the mere whim of the injured party or by his actual collusion with the other wrongdoer.[9] Generally however, even in these jurisdictions it is not held that contribution will be allowed solely by virtue of the fact that there was unity or concert of action between the negligent joint tortfeasors. It must be shown in addition, that the joint tortfeasors are subject to common liability to the injured party. Consequently, where tort actions between husband and wife are prohibited, contribution is usually denied if one of the joint tortfeasors is the spouse of the injured party, since the essential element of common liability is lacking.[10] Pennsylvania by statute, paradoxically provides for contribution between negligent joint tortfeasors even though the injured party is the spouse of one of the liable parties and is thus prevented from recovering from him directly.[11]

In jurisdictions allowing actions betwen husband wife it is usually held, in the absence of a clause relieving the insurer from liability for injuries to members of the insured's family, that an insured who has been successfully

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1. *E.g.* Furey v. Furey, 193 Va. 727, 71 S.E.2d 191 (1952); McCurdy, *Torts Between Persons in Domestic Relations*, 43 Harv. L. Rev. 1030, 1056 (1930).
2. *See, e.g.*, Furstenburg v. Furstenburg, 152 Md. 247, 136 Atl. 534, 535 (1927).
3. *See, e.g.*, Brown v. Gosser, 262 S.W.2d 480, 482 (Ky. 1953).
4. Pa. Stat. Tit. 48 §111 (Purdon 1936).
5. *See, e.g.*, Jernigan v. Jernigan, 236 N.C. 430, 72 S.E.2d 912, 913 (1952); Fitzmaurice V. Fitzmaurice, 62 N.D. 181, 242 N.W. 526 (1932).
6. *E.g.*, Damm v. Elyria Lodge, 158 Ohio St. 107, 107 N.E.2d 337 (1952); *See*, Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660, 668 (1938) Prosser, Torts 904 (1941).
7. Prosser, Torts 1111, 1112 (1941).
8. Quatry v. Wicker, 178 La. 289, 151 So. 208 (1933); Fisher v. Diehl, 156 Pa. Super 476, 40 A.2d 912 (1945) (In order to establish the liabilities of all parties preparatory to enforcing their respective rights of contribution, Pennsylvania permits a defendant to join a joint tortfeasor even though he is a spouse of the injured party. Of course, the judgment cannot be enforced by the injured party against the spouse). *See* Employers Mut. Cas. Co. v. Chicago etc. Ry. Co., 235 Minn. 304, 50 N.W.2d 689, 693 (1951); Leflar, *Contributions and Indemnity Between Joint Tortfeasors*, 81 U. Pa. L. Rev. 130, 144 (1932).
9. Prosser, Torts 1111 (1941).
10. Yellow Cab. Co. v. Dreslin, 181 F.2d 626 (D. C. Cir. 1950); American Auto Ins. Co. v. Molling, 239 Minn. 74, 57 N.W.2d 847 (1953); Norfolk Southern Ry. Co. v. Gretakis, 162 Va. 597, 174 S.E. 841 (1934); Zutter v. O'Connell, 200 Wis. 601 229 N.W. 74 (1930).
11. Pa. Stat. Tit. 12 §2081 (Purdon 1936).

sued by his spouse is entitled to reimbursement from his insurer.[12] Conversely, the presence of such a clause effectively bars recovery.[13]

Since Pennsylvania requires contribution between negligent joint tortfeasors and thus would ordinarily allow the Railroad Company to enforce contribution against the husband, the further question of whether the non-liability clause should prevent the enforcement of contribution against the husband's insurer is squarely posed. The manifest purpose of such a clause is to discourage fraudulent and collusive law suits.[14] It is at once apparent that this danger is in no way lessened merely because the negligent joint tortfeasor rather than the insured is seeking to recover from the insurer. Since the exclusion clause will prevent the husband from obtaining payment directly from the insurer, it should be equally effective to prevent a joint tortfeasor from indirectly obtaining such payment through enforcement of contribution. If, in the instant case, the insurer has been compelled to indemnify the joint tortfeasor, the indemnification would, for all practical purposes, have constituted payment to the insured's wife. It is submitted that this result would be undesirable as making the insurance policy applicable in contradiction of its express terms.

WALTER AURAN

PUBLIC TRIAL — EXCLUSION OF THE PRESS AND PUBLIC — The defendant was accused of compulsory prostitution. The trial judge, shortly after the start of the trial, on his own motion and over the defendant's objection, made an order excluding the general public and press from the court room. Friends and relatives of the defendant were allowed to remain. On appeal it was *held*, that allowing only the friends and relatives of the accused to remain in the court room did not satisfy the statutory[1] requirement of a public trial. A statute providing for exclusion of the public from trials involving certain sordid crimes[2] must be strictly construed. The mere anticipation of the introduction of obscene or indecent evidence is not sufficient justification for excluding the public from trials for offenses not specifically designated in the statute. *People v. Jelke*, 123 N.E.2d 769 (N.Y. 1954).

Pennsylvania was the first state to grant the accused the common law right

12. Roberts v. United States Fidelity and Guaranty Co., 188 N.C. 795, 125 S.E. 611 (1924); *cf.* Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33 (1940).

13. Morris v. State Farm Mut. Auto Ins. Co., 88 Ga.App. 844, 78 S.E.2d 354 (1953); Indemnity Ins. Co. of North America v. Geist, 270 Mich. 510, 259 N.W. 143 (1935); Tomlyanovich v. Tomlyanovich, 239 Minn. 250, 58 N.W.2d 855 (1953);Sibothan v. Neubert, 168 S.W.2d 981 (Mo. 1943).

New York, by statute, permits spouses to sue each other but removes the incentive by preventing collection from an insurer even in the absence of a non-liability clause in the insurance policy. Insurance Law §109 Subd. 3-a.

14. *See*, State Farm Mut. Auto Ins. Co. v. James, 80 F.2d 802, 803, 804 (4th Cir. 1936); Tomlyanovich v. Tomylanovich, *Supra* Note 13 at 58 N.W.2d 864; Cartier v. Cartier, 84 N. H. 526, 528, 153 Atl. 6, 7 (1931.

1. N. Y. Code of Criminal Procedure §8 "In a criminal action, the defendant is entitled: 1. To a speedy and public trial . . ."; N. Y. Civil Rights Law §12 "In all criminal prosecution, the accused has the right to a speedy and public trial . . ."

2. N. Y. Judiciary Law §4 "The sittings of every court within this state shall be public and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy and filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court."