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Insurance Coverage and Inter-Spouse Liability

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V. CONCLUSION

It is the writer's opinion that the *Detenbeck* and *Goldberg* decisions present the correct view of the law. A person who is pre-disposed to injury or disease should not be allowed to recover in instances where there is no particular hazard connected with the employment. If there has been a trend in this direction it is fortunate that the *Detenbeck* case has made the rule clear in New York. It is felt that these decisions will not preclude recovery where it has been previously had but that they merely put a limit upon the liability of the employer. An employee will be permitted to recover despite his pre-existing susceptibility provided he can show that the hazard which caused his "disease" is one peculiar to the industry in which he works and provided that it is not convincingly shown that such hazard would not in any event cause a similar affliction in the normal employee.

Vincent P. Furlong

INSURANCE COVERAGE AND INTER-SPOUSE LIABILITY

In 1937 the legislature amended Section 57 of the Domestic Relations Law[1] and removed the common law disability of suits between spouses. This legislation followed soon after decisions by the Court of Appeals which applied the common law rule of nonliability in an action by a wife against a partnership based on injuries caused by the act of her husband who was a partner[2] and to an inter-spouse suit between New York residents upon a foreign cause of action which was sued upon in New York.[3]

At the same time as Section 57 was enacted the former version of what is now Section 167(3)[4] of the Insurance Law was passed. The Section[5] provides, in effect, that no liability policy shall be deemed to insure against any liability of an

1. N. Y. DOMESTIC RELATIONS LAW §57 . . . A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury . . . as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts . . . as if they were unmarried.
2. *Caplan v. Caplan*, 268 N. Y. 445, 198 N. E. 23 (1935).
3. *Mertz v. Mertz*, 271 N. Y. 466, 3 N. E. 2d 597 (1936).
4. N. Y. ISURANCE LAW §167(3). No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically therto is included in the policy. Except for the words "of death" which were inserted in 1941 this provision is identical with the former Section 109 (3a) of the Insurance Law. See N. Y. Sess. Laws 1937, c. 669 §2. The 1941 amendment was the result of the decision in *Gen. Acc. Fire And Life Assur. Corp. v. Morgan*, 33 F. Supp. 190 (W. D. N. Y. 1940) which held that the section did not apply to a wronful death action between spouses.
5. Hereinafter the writer shall refer to 167 (3) as the Section.

insured for causing death or injury to his or her spouse unless this risk is expressly assumed by the terms of the insurance contract. The purpose of this statute was stated in *Fuchs v. London & Lancashire Indemnity Co. of America*:[6] "These simultaneous enactments disclose a considered legislative intent to create a right of action theretofore denied, and at the same time to protect insurance carriers against loss through collusive actions between husband and wife. In such actions there is a manifest opportunity for fraud . . ."

Until 1956 only two cases[7] involving the scope of the Section came before the Court of Appeals, and only in one was it actually construed.[8] The Court then decided *American Surety Company v. Diamond*.[9] This case involved a declaratory judgment action brought by an insurance company seeking to have the policy forfeited on grounds of non-cooperation by the insured. The insured had permitted his mother to use his automobile. An accident occured in which her husband was killed. The mother, as executrix of her husband's estate, brought a wrongful death action against her son, the owner, on the theory that under the Vehicle and Traffic Law[10] the owner is liable for the injuries caused by his permittee-driver. The son refused to verify a third-party complaint[11] in an action over against his mother. It was the son's contention that under the policy's "omnibus" clause the mother as driver was also an insured so that the company would be commencing an action against one of its own insureds who it was also required to defend. The Company's position was that this third-party action was an attempt to hold the mother liable for injuries to her spouse; and since there was no express provision in the policy assuming this risk, the mother was not an insured for purposes of the son's action over.

The Court in a 4-3 decision held for the son on the point of non-cooperation.[12] The majority did not decide whether the Section applied in this instance but Judge Desmond did make this statement in his decision written for the

6. 258 App. Div. 603, 17 N. Y. S. 2d 338 (2d Dep't 1940), *appeal denied*, 259 App. Div. 731, 19 N. Y. S. 2d 311 (2d Dep't 1940). This case was, in effect, reversed on other grounds in *Stonborough v. Preferred Acc. Ins. Co. of N. Y.* 292 N. Y. 154, 54 N. Y. 2d 342 (1944).

7. *Coster v. Coster*, 289 N. Y. 438, 46 N. E. 2d 509 (1943), *motion for reargument denied*, 290 N. Y. 662, 49 N. E. 2d 621 (1943); *Stoneborough v. Preferred Acc. Ins. Co. of N. Y.*, note 6, *supra*.

8. In *Stonborough v. Preferred Acc. Ins. Co. of N. Y.*, note 6 *supra*, the Court held that the insurer's liability became fixed at the date of the accident so that subsequent marriage of the parties before final judgment did not bring the case under Section 167 (3) of the Insurance Law.

9. 1 N. Y. 2. 594, 136 N. E. 2d 876 (1956).

10. N. Y. VEHICLE AND TRAFFIC LAW §59.

11. N. Y. CIVIL PRAC. ACT §193 (a) 1. After the service of his answer, a defendant may bring in a person not a party to the action, who is or may be liable to him for all or part of the plaintiff's claim against him, by serving as a third-party plaintiff upon such person a summons and a copy of a verified complaint.

12. For a review of the Court's reasoning on this point see 6 BUFFALO L. REV. 203 (1957).

majority: ". . . we do not reach any question as to the meaning or application of sub-division 3 of section 167 of the Insurance Law as to 'inter-spouse' liabilities. We do mention in passing that David Diamond's (the son) liability, if any, to his father's executors was certainly not that of one spouse to another." The minority, on the other hand, felt that the facts of this case fell within the meaning of the Section because, though this action was not directly between spouses, it was in fact liability resulting from injuries caused by one spouse to the other. It is certainly not clear just what the import of Judge Desmond's dictum is. Perhaps it was only made to ensure that the insurer would not take the position that the Section applied in the basic suit between the estate and the son. But it does cast considerable doubt upon the answer to this question: if the mother had requested the company to defend her in the action over, would it be bound to do so? One might reasonably infer that under this dictum it would not be an attempt to hold one spouse liable for injuries to another. The remainder of this writing is devoted to an analysis of the New York cases which have decided this question and presents the author's viewpoints on the matter.

Let us first explore the consequences of the ultimate result under the interpretation of Judge Desmond's dictum which would hold that the wife is insured in the third-party action. If the estate recovers a judgment and the company makes payment so as to be subrogated to the right of action over by its insured, and if the mother is insured so that the company is obligated to defend her and to pay any amount which she may become liable for, then the right of subrogation is, in effect, nullified. Also, the wife, presumably as beneficiary of the estate, would receive the insurance proceeds free of any claim against her, thus profiting from her own wrongful conduct. Few will disagree with the proposition that this is a perversion of justice; and it poses the question of whether the Section should apply in the subrogee's action over where the wrongdoer has caused the death of his or her spouse in the operation of a motor vehicle owned by someone other than one of the spouses. Althrough theoretically the wrongdoer will ultimately collect only in the instance where the injury results in death, we shall later see that the same reasons apply where the injury falls short of death.

The cases dealing with this exact problem have come before the courts in two kinds of fact situations: the first is where the owner of the vehicle is related to the driver;[13] in the second the owner is generally the husband's employer.[14] In *Rozewski v. Rozewski*,[15] the plaintiff's wife was fatally injured in an accident

13. *Gen. Acc. Fire And Life Assur. Corp. v. Katz*, 150 N. Y. S. 2d 667 (Sup. Ct. 1956); Son owned the car and permitted his father to use it; mother was killed in the accident.

14. *Kane v. Kane Ship Repair Corp.*, 202 Misc. 530, 118 N. Y. S. 2d 515 (Sup. Ct. 1952). Corporate employer permitted husband to use automobile and wife was injured. *Peka, Inc. v. Kaye*, 208 Misc. 1003, 145 N. Y. S. 2d 156, (Sup. Ct. 1955),

(Footnote continued on following page.)

in which the plaintiff was driving his brother's automobile. In a wrongful death action[16] the court granted plaintiff's motion to strike an affirmative defense[17] which alleged that the plaintiff, as sole beneficiary of his wife's estate, should not be able to recover for an act which was caused solely by his negligence. Though the applicability of the Section was not passed upon, the court did imply that, if the defendant were insured, this case would probably not come under the terms of the statute. *Feinman v. Bernard Rice Sons, Inc.*,[18] involved an action by a wife against her husband's employer for injuries sustained as a passenger in an automobile driven by her husband and owned by his employer. The employer impleaded the husband who in turn brought a so-called fourth-party action against his employer's insurer when it refused to defend the husband in the third-party action. The court held that not only was the purpose of the Section to cover this case, but also the statute's broad terms of "any liability of an insured for injuries to his or her spouse" clearly applied.[19]

Other than the implication of *Rozewski v. Rozewski*,[20] the only other case seems to indicate that the driver will be insured in the subrogee's action over is *Kane v. Kane Ship Repair Corp.*[21] This also involved an action by the wife against the corporate employer who impleaded the husband. The court denied the company's motion ot dismiss[22] the husband's cross-complaint against the insurer holding that it stated a good cause of action as a matter of pleading (thus the court held that the insurer had to defend the active tort-feasor). It does not appear, however, that the Section was pleaded in this case.

We therefore find except for these two cases, the courts have held that, even though the third-party action is not directly between spouses, the Section will apply so that the insurance company will be able to effectively exercise its right of subrogation. This writer is of th eopinion that this is clearly the correct result and that the language *"any liability for injuries to his or her spouse"* is cer-

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rev'd upon other grounds, 1 A. D. 2d 879, 150 N. Y. S. 2d 774 (1st Dep't 1956); wife injured in crash of airplane owned by a corporation and operated by her husband. *Feinman v. Bernard Rice Cons, Inc.*, 133 N. Y. S. 2d 639 (Sup. Ct. 1954) *aff'd*, 285 App. Div. 926, 139 N. Y. S. 2d 884 (1st Dep't 1955), motion for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution, 309 N. Y. 750, 128 N. E. 2d 797 (1955); action by wife against corporate employer for injuries sustained while a passenger in automobile owned by the employer and driven by the husband. *Katz v. Wessel*, 207 Misc. 456, 139 N. Y. S. 564 (Sup. Ct. 1955); facts identical with *Feinmann v. Bernard Rice Sons, Inc., supra.*

15. 181 Misc. 793, 46 N. Y. S. 2d 743 (Sup. Ct. 1944).
16. N. Y. DECEDENT'S ESTATE LAW §130.
17. N. Y. R. CIV. PRAC. 109 (6).
18. Note 14, *supra.*
19. Accord: *Peka, Inc. v. Kaye; Katz v. Wessel,* note 14, *supra. Gen. Acc. Fire & Life Assur. Corp. v. Katz,* note 13, *supra.*
20. Note 15, *supra.*
21. Note 14, *supra.*
22. N. Y. CIV. PRAC. ACT §193 (a) (4); N. Y. R. CIV. PRAC. 106 (4).

tainly broad enough to be construed as applying. There is a fairly strong argument in favor of the position of not applying the Section to the case where the owner is a corporate employer. This is based upon a decision prior to 1937 in *Schubert v. August Schubert Wagon Co.*[23] The court there held that the common law disability in suits between spouses did not apply in an action against the corporate employer of plaintiff's husband who caused her injury. This is a leading case in which Judge Cardozo distinguished between ths husband's culpability for an admittedly negligent act and liability therefor.[24] The Court held that the corporation was liable for the culpable acts of its agent refusing to extend the common law disability in this case. It may be argued, then, that when the legislature simultaneously enacted Section 57 of the Domestic Relations Law and the Section, the latter was only to apply to the newly created rights, and since a spouse previously could maintain an action against her husband's corporate employer, the Section should not apply.[25]

As tenable as the argument appears this writer feels that there is no valid reason for making a distinction between the two types of cases. Nor does he feel that the attempt to prevent fraudulent recoveries is outweighed by a policy of making sure that spouses with bona fide causes are not precluded from recovery. Although the Courts generally accept[26] the purpose of the Section as being that stated in *Fuchs v. Londan & Lancashire Indemnity Co. of America,*[27] it is submitted that there are two other reasons for applying the Section in this area so that the insurance company will receive the benefit of its right of subrogation.

The first is the fundamental principle that one ought not profit by his own wrongful conduct.[28] The second, which is somewhat connected with the first, is that, although a spouse now has the right to sue the other, in the normal husband-wife relationship one does not seek redress for an injury which is the result of the other's negligence. In the average case there is sufficient economic unity so that one has no interest in obtaining a judgment against the other. Then why, when the third-party insurance company enters the picture—as it must do under recent compulsory insurance legislation—should we place a construction

23. 249 N. Y. 253, 164 N. E. 42 (1928), *aff'd,* 223 App. Div. 502, 228 N. Y. S. 604 (4th Dep't 1928).

24. The Court, however refused to apply this reasoning to an action by a wife against a partnership for injuries caused by her husband who was a partner. *Caplan v. Caplan,* 268 N. Y. 445, 198 N. E. 23 (1935).

25. For a similar argument in the instance determining the Section's effect where the accident is outside of New York, see 31 N. Y. U. L. REV. 1442 (1956).

26. *American Sur. Co. v. Diamond,* 1 N. Y. 2d 594, 136 N. E. 2d 876 (1956) (minority opinion).

27. Note 6, *supra,* and text reference thereto.

28. See *e. g., Riggs v. Palmer,* 115 N. Y. 506, 22 N. E. 340 (1889). The writer is aware of the criticism of this case and the fact that it involved willful as distinguished from negligent conduct.

on the statute which would create litigation? This is not another attempt to eliminate litigation where it will vindicate just causes; but it is an attempt to render justice where it is due. It would seem that spouses who need this kind of insurance coverage should be required to obtain a policy which has an express provision relating thereto.

Richard F. Griffin

NOTE: DEFAMATION VIA TELEVISION AD LIB; LIBEL AND SLANDER DISTINCTIONS

On a motion to dismiss a complaint alleging a cause of action in libel for a television commentator's ad lib. Held: Motion denied; a telecast of defamatory matter not read from a prepared script constitutes libel and not slander. *Shor v. Billingsley.*[1]

Defamation consists of the torts of libel and slander, libel, generally speaking, being publication by written or printed words of unprivileged, false and defamatory matter, while slander is publication of the above matter by spoken words.[2] Libel is actionable without proof of damages,[3] while slander is actionable only if there is proof of special damages,[4] viz: a pecuniary loss,[5] unless the defamation is within the narrow category known as slander per se. Imputation of unchastity to a woman,[6] imputation of an indictable offense involving moral turpitude,[7] imputation of a loathsome disease,[8] and imputation affecting one in his trade, business or office,[9] are the only spoken words which are actionable per se.

Snyder v. Andrews[10] established the principle that a letter read in the presence of another is libel. Although criticized,[11] this holding has been followed.[12]

1. 158 N. Y. S. 2d 476 (Sup. Ct. 1957).
2. GAITLEY, LIBEL AND SLANDER IN CIVIL ACTION, 1 (2d ed. 1929); ODGERS, LIBEL AND SLANDER, 1 (6th ed. 1929); RESTATEMENT, TORTS §558, §568 (1) (2) (1938).
3. *Thorley and Lord Kerney,* 4 Taunt. 355, 128 Eng. Rep. 367 (1812); RESTATEMENT, TORTS §569 (1938).
4. *E.g., Torres v. Hunter,* 150 App. Div. 798, 135 N. Y. Supp. 332 (2d Dep't 1912).
5. *E.g., Beach v. Ranney,* 2 Hill 309 (N. Y. 1842); RESTATEMENT, TORTS, §575, comment *b* (1938).
6. *E.g., Biggerstoff v. Zimmerman,* 108 Colo. 194, 114 P. 2d 1098; N. Y. R. CIV. PRAC. 97. *Contra, Barnett v. Phelps,* 97 Ore. 242, 191 Pac. 502 (1920).
7. *E.g., Brooker v. Coffin,* 5 Johns. 188 (N. Y. 1809).
8. *E.g., Williams v. Holdredge,* 22 Barb. 396 (N. Y. 1854).
9. *E. g., Rager v. McCloskey,* 305 N. Y. 75, 111 N. E. 2d 214 (1953).
10. 6 Barb. 43 (N. Y. 1849).
11. *Hartman v. Winchell,* 296 N. Y. 296, 300, 73 N. E. 2d 30, 32 (1947) (concurring opinion); *Osburn v. Thomas Boulter & Son,* [1930] 2 K. B. 226, 231, 236 (dictum); *Meldrum v. Australian Broadcasting Co.,* [1932] Vict. L. R. 425.
12. *Hartman v. Winchell,* 296 N. Y. 296, 73 N. E. 2d 30 (1947); *Bander v. Metropolitan Life Ins. Co.,* 313 Mass. 337, 47 N. E. 2d 595 (1943); *Peterson v. Western Union Telegraph Co.,* 72 Minn. 41, 74 N. W. 1022 (1898); RESTATEMENT, TORTS §568, comment *e.*