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frequently admitted to the bar who are altogether unacquainted with the laws which they stand pledged to expound and profess to practice," who "are generally better acquainted with the forms and technicalities of the King's Bench and the High Court of Chancery in England than with those of the various courts of the Commonwealth" and who are "unaware of the numerous and radical changes introduced into the law by our constitution and acts of assembly."

W. H. Hitchler

NOTES

JOINDER OF CAUSES OF ACTION FOR INJURIES SUSTAINED BY THOSE STANDING IN FAMILIAL RELATIONSHIP

Prior to the Act of 1895, P. L. 54,¹ it was held consistently that separate actions had to be brought by a husband and wife for their respective damages growing out of an injury to the wife. This practice of submitting the same issue to two different juries often resulted in duplication of damages, to say nothing of the multiplicity of suits. Ordinarily, the husband's suit was tried first. To establish his injury and the extent of his deprivation of her services, the injury and suffering of the wife were naturally part of the evidence. Such necessary evidence often unconsciously influenced the husband's measure of damages. Later, the wife would bring her action, and the jury would be carefully told that her husband's verdict did not include any recovery for her. As a result, she generally was granted a liberal amount by another and usually sympathetic jury. This evil of duplication was real and substantial.² Again, juries were often passing upon the findings of other juries involving the claims of husband and wife. For instance, the jury in the husband's action would grant him damages, thus finding the defendant negligent. Later, another jury in the wife's suit might find that the defendant was not negligent or that the wife was contributorily negligent. This latter finding in effect not only reflected upon the action of another jury but also irrevocably granted damages to the husband who may not have been really deserving of them. Consequently, the Act of 1895 was enacted to obviate these evils. For the same reasons, the Act of 1897, P. L. 62³ was passed also.

¹12 P. S. 1621.

²Donoghue v. Traction Co., 201 Pa. 181 (1901).

³12 P. S. 1625.

SITUATIONS UNDER ACTS OF 1895 AND 1897

The first section of the Act of 1895 provides: "whenever injury, not resulting in death, shall be wrongfully inflicted upon the person of the wife, and a right of action for such wrongful injury accrues to the husband also, these two rights of action shall be redressed in only one suit brought in the names of the husband and wife." This section was construed as mandatory and the word "shall" really means "must."⁴ Because of this construction, it was argued in *Donoghue v. Traction Co.*, supra, that this section was unconstitutional on the ground that the husband had to join with his wife to collect his damages. The court held that while at common law the husband had an action for damages for injury to his wife because he was entitled to her earnings, the husband's right was based solely on the unity of relationship which the legislature could sever and regulate without objection. This decision has firmly established the rule that where a husband seeks to recover damages due to an injury to his wife, he must join with her or waive his right to bring a separate suit in his own behalf.⁵ It must be noted that this statute applies only to tort actions involving personal injury. It does not apply to claims which arise out of contract in favor of husband and wife against the same defendant.⁶ In such case, separate actions must be brought. Neither does the act apply to actions for slander. The courts have held that slander must be redressed in separate suits since it is not such a personal injury as is contemplated by the act.⁷

While the act specifically covers the situation where the wife is injured and the husband suffers injury because of loss of services, loss of consortium and payment of medical expenses, it is silent as to the situation where both husband and wife sustain personal injuries. In such case, the courts have held that "in an action to recover damages for injuries sustained as the result of a defendant's negligence, the plaintiff must seek in one action all items of damage to which he is entitled."⁸ Hence if the husband and wife are injured in a common accident, the husband must join the following causes of action in one suit: (a) damages for injuries sustained by himself, (b) damages for injuries sustained to his wife and (c) damages for injuries sustained by the husband by reason of the wife's injury, such as medical expenses incurred, loss of companionship, etc. Incidentally,

⁴Note 2, cited supra.

⁵*Reeves v. Phila. Gas Works Co.*, 107 Pa. Super. 422 (1933); *Brownhill v. Greenwood*, 21 D. & C. 47 (1934); *Ellis v. Prebish*, 18 D. & C. 389 (1932).

⁶*Sturiale v. Penna. Burial Co.*, 119 Pa. Super. 402 (1935).

⁷*Fero v. Contreazon*, 13 Dist. 394 (1904).

⁸*Ellis v. Prebish*, 18 D. & C. 389 (1932); *Falsey v. Park*, 20 D. & C. 347 (1933).

the husband must also include his cause of action for any damage done to his clothing, his car, etc.⁹

The Act of 1897, P. L. 62 is substantially the same as the Act of 1895, *supra*, except that the former covers the situation of parent and child. It provides in substance that "where a minor child is injured and a derivative cause of action arises in favor of the parent by reason of the child's injury, the two rights of action shall be redressed in one suit brought in the names of the parent and child." The action is styled: A, in his own right and B, by his next friend. But suppose the husband, wife and child sustain injuries in an automobile accident due to the negligence of a third person. Is it possible to join all the causes of action in one suit? This query arose recently and was ably answered in a decision handed down by Judge Reese in the case of *Brownbill v. Greenwood*.¹⁰ In that case, the parents, a minor child and the automobile were all injured. The plaintiffs joined all their rights of action in one suit in the following manner:

- (1) Plaintiff's (husband) damages:
 - (a) For personal injuries and damage to his car and clothing.
 - (b) For damages resulting from his wife's injuries (medical expenses incurred, loss of companionship, etc.)
 - (c) Damages resulting by reason of his son's injuries (medical expenses).
- (2) Plaintiff's (wife) damages:
 - (a) For personal injuries and damage to clothing.
- (3) Plaintiff's (son) damages:
 - (a) For personal injuries.

In response to an affidavit of defense questioning the propriety of joining the various causes of action, the court announced the following conclusions:

- (1) In an action to recover damages resulting from a defendant's negligence, the plaintiff must seek in one action all the various items of damage to which he is entitled: where personal injuries are sustained by both husband and wife, their claims as well as the husband's claim for property damage must be joined under the Act of 1895.¹¹
- (2) Under the Act of 1897, P. L. 62, a claim of a minor child for personal injuries is properly asserted in a single suit with the claim of its parents arising by reason of the child's injury, but may not be

⁹Hug v. Hall, 79 Pa. Super. 392 (1922); Fields v. Phila. R. T. Co., 273 Pa. 282 (1922) where the court held that the plaintiff should have joined his right of action for personal injuries with his action for damage to his horse and harness.

¹⁰21 D. & C. 47 (1934).

¹¹Reeves v. Phila. Gas Works Co., 107 Pa. Super. 422 (1933); 1 C. J. 1735, Sec. 349; Donoghue v. Traction Co., 201 Pa. 181 (1901).

included in the action in which recovery is sought for personal injuries sustained by the parents as the result of the negligent act.¹²

- (3) The right of action conferred upon the parents by the Act of 1925, P. L. 638 for injuries to their minor child is a joint one and not an individual right of either parent; it may not, therefore, be asserted in the same suit in which they seek recovery for injury to themselves.

The court concluded by quoting the language of Judge Valentine in the case of *Ellis v. Prebish*, supra: "to submit all the issues involved in the various claims designated, to a single jury would tend to confuse both the court and the jury. It is incredible to think that the separate and distinct causes of action asserted by three plaintiffs and which involve different rules of law as to the question of contributory negligence of the various plaintiffs, should or could be passed upon and determined by a single jury." Adopting this holding, it is submitted that in a situation as above indicated, it is the better practice to institute two separate suits, one joining the causes of action accruing to the husband and wife respectively and one joining the causes of action arising in favor of the minor and the parents.

RULE TO JOIN OR BE BARRED

Section 2 of the Act of 1895, P. L. 54 provides: "Either the husband or the wife may waive his or her right of action, and his or her failure to join in a suit within 20 days after service of a rule to join or be barred, shall be conclusive evidence of such waiver." When read with Section 1 of the same Act, this section seems to be inconsistent therewith. As noted above, Section 1 has been declared to be mandatory while this section, of itself, seems to allow separate suits in the absence of a rule upon one of the plaintiffs to join. This apparent inconsistency was raised in the *Donoghue* case, supra. There the court held that the Act compels joinder of the husband and wife and that the second section was intended to obviate the hardship which would result if the husband refused to join in any event. So construed, the section allows the wife to bring an action in her own favor without regard to her husband's claim. He must assert his claim with her if he wishes to recover for any wrong done to him. Failure to do so is a bar even though the husband is not ruled to join. In the *Donoghue* case, the husband was non-suited because he had not joined with his wife, though he had not been ruled to join.¹³ Section 2 of the Act of 1897 is substantially the same as that of the Act of 1895.

¹²In *Re Charles Mikasinovich*, 110 Pa. Super. 252 (1933); *Mahoney v. Park Steel Co.*, 217 Pa. 20 (1907); *Cook v. Conestoga Traction Co.*, 20 Lanc. 317 (1903).

¹³*Loughrey v. Pa. R. Co.*, 284 Pa. 267 (1925) holding that where a wife, deserted by her husband, recovers damages for loss of earnings and earning power, judgment in her favor is a bar to a subsequent suit by the husband.

APPEALS, VERDICTS, JUDGMENTS

Under Section 3 of both statutes, above referred to, there must be separate verdicts, separate judgments, separate appeals and separate executions.¹⁴ As to appeals, the husband and wife or the parent and child, as the case may be, must take separate appeals. The appeals may, however, be argued together on one set of paper books disclosing the real points of the controversy as affecting the separate judgments.¹⁵ A joint appeal is improper¹⁶ and will be quashed but failure of the jury to bring in separate verdicts is not reversible error as it does not prejudice the defendant.¹⁷

MEASURE OF DAMAGES

The Acts of 1895 and 1897 did not in any manner affect the amount of damages recoverable by the parties to the action. As said in *Falsey v. Park*,¹⁸ "the Act of 1895 does not convert two rights of action into a single action but only requires them to be redressed together if both parties assert them," the question of damages remains unchanged. Generally the husband's measure of damages for injury to his wife alone is the loss of the wife's services plus any amount expended for medical care and attendance and any liability incurred therefor.¹⁹ The husband is entitled to compensation without proving the value of his wife's aid, her society and assistance in dollars and cents.²⁰ The husband may also show as an element of damage, the assistance which his wife gave him in his business.²¹ The wife's measure of damages where she is injured is limited to those flowing from the injury: pain, suffering, damage to clothing, etc. She may recover damages in her own name for loss of earning capacity only when it appears that she has been deserted by her husband.²² Although the courts have not specified the period of desertion necessary to enable the wife to recover

¹⁴*American Steel and Wire Co. v. Tynan*, 106 C.C.A. 289 (1911) to the effect that separate judgments must be entered for husband and wife. *Linhose v. Hodgson*, 310 Pa. 339 (1933); *Lackstein v. Morris*, 80 Pa. Super. 352 (1923) holding that there are separate rights to execution.

¹⁵*Rinker v. Colonial Iron Co.*, 68 Pa. Super. 258 (1917) that appeals must be separately taken.

¹⁶*Shaw v. Plains Township*, 270 Pa. 287 (1921) as to appeals under the Act of 1897, P.L. 62.

¹⁷*Wesley et ux v. Rhodes*, 113 Pa. Super. 409 (1934); *Zarko v. Kramer*, 117 Pa. Super. 443 (1935) holding that it is the duty of the trial judge to instruct the jury to bring in separate verdicts but in failing to do so, the court may in its discretion mould the verdict to prevent injustice; *Smith v. Bergdall*, 104 Pa. Super. 49 (1932) where the sheriff's jury failed to apportion the damages in favor of a parent and child, the court held that such a failure was a fatal defect and refused to apportion the damages.

¹⁸20 D. & C. 346 (1934).

¹⁹*Platz v. McKean Township*, 178 Pa. 601 (1897); *Kelly v. Mayberry*, 154 Pa. 440 (1893).

²⁰*Henry v. Klopfer*, 147 Pa. 178 (1892); *Reegan v. Harlan*, 24 Pa. Super. 27 (1903).

²¹*Standen v. Penna. R. R. Co.*, 214 Pa. 601 (1897).

²²*Schmelzer v. Chester Traction Co.*, 10 Del. 121 (1906).

for her loss of earning power, it may be said that "if when the action is brought by the wife, it appears that she is living apart from her husband under circumstances indicating a desertion, then the wife is free to recover damages for injury to her earning capacity."²³ But if it appears that her husband's claim is on the record at the time of trial or that the wife is living with the husband, then her claim for damage to her earning power is barred.²⁴

When the action is brought under the Act of 1897 in the name of the minor by his next friend and in the name of the parent in his own right, the damages of the father are compensatory. The damages include the loss of the child's services and the expenses of his illness.²⁵ The minor's claim is restricted to damages for pain and suffering and loss of earnings after he becomes of age.²⁶ The minor cannot recover loss of earnings during his minority since it is presumed in such case that the parent will support him until the minor becomes of age. Thus, it was held in *Phila. Traction Co. v. Orbann*,^{26*} that the minor is limited to damages for pain and suffering and by way of dictum, that the father is entitled to damages for loss of services of the son until he becomes 21 years of age. Under the wrongful death statute, the parent can recover the loss of earnings of a minor if he specifically proves that the child would have gone to work and it appears that when the child was killed, that he was able to earn wages. Thus it was held in *Hammaker v. Watts Township*,^{26a} "the measure of damages is the possible return the parents might have received from the earnings and services of the child until it reached the age of twenty-one, plus medical expenses and funeral expenses, less the cost of his board, clothing and maintenance."

PERSONS ENTITLED TO SUE

Thus far, we have seen when and how actions are joined and by whom brought. Numerically, the parties who bring the action may be listed as follows:

- (a) Action brought by the husband in the name of husband and wife to recover for injuries to the wife and consequential injury to the husband.²⁷
- (b) Action brought by the husband in the name of the husband and wife for injuries to the wife, to himself and to his property.²⁸

²³Note 13, cited supra.

²⁴*King v. Thompson*, 87 Pa. 365 (1878).

²⁵*Oakland Ry. Co. v. Fielding*, 48 Pa. 420 (1864); *Woecker v. Erie Electric Co.*, 182 Pa. 182 (1897); *Reese v. Hershey*, 163 Pa. 353 (1894).

²⁶*Freed v. Penna. R. R. Co.*, 93 Pa. Super. 75 (1927).

^{26*}119 Pa. 37 (1888).

^{26a}71 Pa. Super. 554 (1919).

²⁷*Hug v. Hall*, 79 Pa. Super. 392 (1922).

²⁸Note 8, cited supra.

- (c) Action by the wife in her own name when she has been deserted by her husband for injuries to her person.²⁹
- (d) Action by the husband and/or wife in the name of husband and/or wife and in the name of the minor child for injury to the child and consequential injury to the parents.³⁰

For the sake of completeness and to enlarge the above instances of when and by whom action is brought, the Acts of 1895, P. L. 316 as amended by the Act of 1925, P. L. 638³¹ and the Act of 1893, P. L. 344 should be mentioned. As a general rule, a mother of a minor child has no right of action, for injury to her minor child, not resulting in death, because of the common law rule that the husband or father is entitled to the services of the minor child, as it is incumbent upon him to support the child.³² The Act of 1895 as amended in 1925 did not confer upon the mother a right of action for injuries to the minor child. These Acts in brief provide that under special circumstances, the mother is entitled to equal control and custody over the child with its father. The primary purpose of these statutes was to enlarge the right of a married woman (mother) in case of a dispute between the parents as to the custody of the child.³³ Where it is shown that the mother supports the child by her own exertions and that she is of a good character, then and only then may she bring an action in her own name for loss of services of the child resulting from personal injury to it.³⁴ In absence of proof that she has supported the child without the aid of the father, her action will not succeed. Any action that she might bring in the name of herself and her minor child under these Acts will be considered as an action brought by her as next friend of the infant.³⁵ The Acts allow a joint right of action for injuries to the minor child by either the father or the mother in the name of both. If the parents live apart, the action is maintainable by the parent having custody and control of its services. Thus it has been held that where the parents are living apart and the mother maintains the child, she may sue in her own right for any injury to the child's earning capacity.³⁶ The reason assigned by the courts is that inasmuch as the mother is performing the common law obligation of supporting the

²⁹Note 22, cited *supra*.

³⁰Note 10, cited *supra*.

³¹48 P. S. 91.

³²*O'Brien v. Phila.*, 215 Pa. 407 (1906); *Hause v. Hause*, 47 C.C. 295 (1918); *Kelly v. Phg. & Birmingham T. Co.*, 204 Pa. 623 (1903).

³³*O'Brien case*, note 32, cited *supra*.

³⁴*Ibid*.

³⁵*Powell v. Township*, 15 Sch. 61 (1918).

³⁶*Ibid*.

³⁶*Eustice v. Plymouth Coal Co.*, 120 Pa. 299 (1888).

child, she is entitled to its earnings.³⁷ Likewise, it has been decided that a widowed mother has a right of action, under the statutes in question, for loss of services of her minor child and the expenses of his illness.³⁸ So also may a deserted mother sue in her own right and name.³⁹ Finally there remains the Act of 1893, P. L. 344⁴⁰ which allows a wife the right to recover for a tort committed upon her as the action is her separate property. An action under this Act cannot be interfered with or controlled by the husband. If the tort is separate,⁴¹ a separate action is brought by the wife; but if the injury is of such a nature that it falls within the statutes already referred to, then the wife still has a right to sue for the wrong done to her but the husband may join if he wished to assert his claim. Having noted these additional situations, our numerical list will then be completed thusly:

- (e) Action by the wife in her own name and in the infant's name to recover for her child and in her own right where she supports the child without aid of the father and where she is of a good character.
- (f) Action by the wife in her own name and right when the injury sustained is of such a character as not to fall within the Act of 1895, P. L. 54.

Louis C. Glasso

LIABILITY OF THE HUSBAND FOR THE TORTS OF HIS WIFE

Since its acknowledgment as a part of the Pennsylvania common law, great changes have been wrought in the law regarding the husband's liability for the torts of his wife. Today, by interpretation of the various statutes, the husband's liability has been so reduced as to render it of little importance. In order, however, to show the magnitude of these changes, it is necessary to discuss the principles which were followed by our courts until about fifty years ago.

³⁷Note 33, cited supra; *Matthews v. Koch*, 20 C. C. 363 (1898) that this act applies only to minor children and that in the absence of an express contract for services, a married woman cannot recover for the seduction of an adult daughter.

³⁸*Windle v. Davis, Director-General*, 275 Pa. 23 (1922) construing the Act of 1911, P.L. 177 which has been repealed and partly re-enacted by the Act of 1925, P.L. 638.

³⁹Note 33, cited supra.

⁴⁰48 P. S. 31.

⁴¹*Fero v. Contreaso*, 13 Dist. 394 (1904) that a libel on the wife is a separate injury to her capable of being redressed by an action in her own name and right. *Walker v. Phila.*, 195 Pa. 168 (1900).