PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 69
Issue 2 *Dickinson Law Review - Volume 69, 1964-1965*

1-1-1965

Recent Cases

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Recommended Citation
Recent Cases, 69 DICK. L. REV. 213 (1965).
Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol69/iss2/8

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RECENT CASES

CONSTITUTIONAL LAW—JURY TRIAL—DETERMINATION OF PATERNITY—DEFENDANT HAS NO RIGHT TO JURY TRIAL UNDER AMENDED CIVIL PROCEDURAL SUPPORT LAW

Commonwealth *ex rel.* Miller v. Dillworth, 204 Pa. Super. 420, 205 A.2d 111 (1964)

In *Commonwealth ex rel. Miller v. Dillworth*,[1] plaintiff filed a petition for support with the Woman's Criminal Division of the County Court of Philadelphia, alleging the defendant to be the father of her child. Defendant's counsel at the outset of the hearing made a motion for a jury trial to contest the allegation of paternity. The motion was denied on the ground that under the amended provisions of the Pennsylvania Civil Procedural Support Law[2] paternity could be determined by a judge without a jury. On appeal, the superior court affirmed.

The superior court was presented with the questions of (1) whether the legislature intended to authorize the determination of paternity of an illegitimate child by a judge alone, and if so, (2) whether such an authorization violated the jury trial guarantees of section 6 and section 9 of article I of the Pennsylvania Constitution.[3]

The Civil Procedural Support Law, as originally enacted,[4] did not provide for the support of illegitimate children. However, "duty of support" as defined by the statute was amended in 1963 to include any ". . . duty of support imposed or imposable by law or by any court order . . . [in a] prosecution for failure to support a child born out of lawful wedlock, or otherwise."[5] Prior to this amendment an order for the support of an illegitimate child could only be made after a determination of paternity in a

1. 204 Pa. Super. 420, 205 A.2d 111 (1964).
2. PA. STAT. ANN. tit. 62, § 2043.32, 2043.35 (Supp. 1963).
3. PA. CONST. art. I, § 6 provides, "Trial by jury shall be as heretofore, and the right thereof remain inviolate." PA. CONST. art. I, § 9 provides, "In all criminal prosecutions the accused hath a right to . . . a speedy trial by an impartial jury of the vicinage. . . ." There is nothing in the United States Constitution to restrict the power of the states to abolish, modify, or alter the right of trial by jury so long as due process requirements are met. See Hardware Dealers M. F. Ins. Co. v. Glidden Co., 284 U.S. 151 (1931); Fay v. New York, 332 U.S. 261 (1947).
4. PA. STAT. ANN. tit. 62, § 2043.31-.44 (1959).
5. PA. STAT. ANN. tit. 62, § 2043.32 (Supp. 1963).

criminal action for either fornication and bastardy[6] or wilful neglect to support a bastard.[7] The defendant contended that the legislature could not be presumed to have intended to change this procedure of determining paternity.[8] While acknowledging that the amendatory language was somewhat equivocal, the court held that unless a finding of paternity was authorized the amendments would be totally without effect, since the same type of a support order could be made under the existing criminal actions. This portion of the decision appears to be sound.

To answer the second question, the constitutionality of the 1963 amendments, it is necessary to analyze the historical background and development of bastardy proceedings. At common law the bastard was *filius nullius*, or the child of no one.[9] This was altered somewhat by the Poor Law,[10] which provided that two justices of the peace could make a determination of paternity and make an order for support. That this English statute was ever the law in Pennsylvania is doubtful.[11]

The Act of January 12, 1705-06,[12] provides in section III that a man charged by an unmarried mother to be the father of her child ". . . *shall be the reputed father*; and she persisting in the said charge in the time of her extremity of labor, or afterward in open court upon the trial of such person so charged, the same shall be given in evidence *in order to convict such person of fornication.*"[13] Section VII, which must be read in conjunction with section III, provides ". . . that every person, *being legally convict to be the reputed father* of a bastard child, shall give security . . . to perform such order for the maintenance of such child as the justices of the peace in their sessions shall direct and appoint."[14] It would seem paternity was to be determined by a jury.

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6. See PA. STAT. ANN. tit. 18, § 4506 (1963).

7. See PA. STAT. ANN. tit. 18, § 4732 (1963). A parent is not subject to proceedings under this section whenever he is paying support of the child. Conviction can bring a fine not exceeding $500, or imprisonment not exceeding one year, or both, compared to a maximum $100 fine for fornication and bastardy.

8. The legislative history reflects no debate on the 1963 amendments. See also Brief for R. Alan Stotsenburg as Amicus Curiae, p. 9, Commonwealth *ex rel.* Miller v. Dillworth, 204 Pa. Super. 420, 205 A.2d 111 (1964).

9. See the discussion in Hard's Case, 2 Salk. 427, 91 Eng. Rep. 371 (1696).

10. Poor Law, 1576, 18 Eliz. 1, c.3 (Repealed).

11. In Cock v. Rambo, Penny. Col. Cas. 79 (Phila. Quarter Sess. 1685), the defendant was indicted for housebreaking and fornication, and a jury found that he had made an unmarried girl pregnant.

Early Pennsylvania statutes concerning fornication and bastardy can be found in CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA 1682-1700, at 27, 145, 210 (1879).

A jury was used to try a paternity charge in an early Massachusetts case. See SMITH, COLONIAL JUSTICE IN WESTERN MASSACHUSETTS 1639-1702, at 104 (1961).

12. 2 Stat. at Large of Pa. 180-82 (Mitchell & Flanders 1896).

13. 2 Stat. at Large of Pa. 181 (Mitchell & Flanders 1896). (Emphasis added.)

14. 2 Stat. at Large of Pa. 182 (Mitchell & Flanders 1896). (Emphasis added.)

The above state of Pennsylvania law remained unchanged when the Pennsylvania Constitution of 1776 was adopted. The superior court agreed that prior to 1776 the only way to determine paternity in Pennsylvania was by a jury conviction for fornication and bastardy.[15] However, the court concluded, without citing authority, that this would not preclude the legislature from providing a non-criminal procedure for determining paternity without a jury.

Article 1, section 9 of the Pennsylvania Constitution, which guarantees the right of trial by jury in all criminal prosecutions, was held to be inapplicable here because the court reasoned that the Civil Procedural Support Law imposes no penalty or punishment but merely enforces a civil duty to support the child.[16] This reasoning has been accepted in a majority of the states,[17] though its rationale has not been free from criticism.[18]

The court also rightly determined that the legislature can provide for a non-criminal determination of paternity. The constitution does not guarantee to the citizen the right to insist that he be tried for a crime if the state determines otherwise.[19] Nor does he have a right to complain of a change in procedure, even if it is applied retroactively.[20] However, it is submitted that the court erred in holding that the determination of paternity could be made without a jury.

Article I, section 6 of the present Pennsylvania Constitution reads: "Trial by jury shall be as heretofore, and the right thereof remain inviolate." Substantially the same provision has appeared in all Pennsylvania's previous constitutions. This constitutional guarantee has been held to apply to rights as they existed at common law when the first constitution was adopted in 1776, but does not extend to new offenses or remedies created by statute.[21] It looks to the preservation and not the extention of the right

15. 204 Pa. Super. at 427, 205 A.2d at 114-15.

16. The same reasoning has been applied to desertion and nonsupport actions under PA. STAT. ANN. tit. 18, § 4733 (1963). See Commonwealth v. Trichon, 189 Pa. Super. 395, 150 A.2d 176 (1959); Commonwealth v. Henderson, 170 Pa. Super. 559, 87 A.2d 797 (1952).

17. See 10 AM. JUR. (SECOND) *Bastards* § 75 (1963).

18. See Wysong, *The Jurisprudence of Labels-Bastardy as a Case in Point*, 39 NEB. L. REV. 648 (1960); Schatkin, *Should Paternity Cases be Tried in a Civil or Criminal Court?*, 1 CRIM. L. REV. (N.Y.) 18 (1954).

19. See Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1917). A juvenile could not demand to be tried on the charge of the felony for which he had been arrested.

20. See West Arch Bldg. and Loan Ass'n v. Nichols, 303 Pa. 434, 154 Atl. 703 (1931).

21. See Tax Review Bd. v. Weiner, 398 Pa. 381, 157 A.2d 897 (1960); Commonwealth v. Bechtel, 384 Pa. 184, 120 A.2d 295 (1956), Premier Cereal & Beverage Co. v. Pennsylvania Alcohol Permit Bd., 292 Pa. 127, 140 Atl. 858 (1928). The Workmen's Compensation Act eliminated trial by jury, but was held constitutional in Anderson v. Carnegie Steel Co., 255 Pa. 33, 99 Atl. 215 (1916), because neither party was compelled to be covered by the act. Thus, acceptance of the act acted as a waiver.

to trial by jury.[22] Therefore, the test of whether there is a right to trial by jury now, is whether such a right existed for the issue in question when the first Pennsylvania Constitution was adopted in 1776.[23]

Merely changing the name of the offense should not affect the constitutional right of the accused to a jury trial. In *Mountain v. Commonwealth*,[24] a school teacher charged with the statutory offense of "unnecessary cruel punishment" was held to be entitled to a jury trial, because prior to the statute vesting jurisdiction in a justice of the peace, the defendant could have been indicted for assault and battery, an offense entitling her to a jury trial. Similarily, in *William Goldman Theatres, Inc. v. Dana*,[25] the Motion Picture Control Act of 1959 was declared unconstitutional, one reason being that it violated article I, sections 6 and 9 of the state constitution. The court held that the utterance of obscene matter was a crime at common law for which a defendant was entitled to a trial by jury, and, therefore, this was a constitutional right. It could not be subverted by granting the power to define obscenity to administrative officials. The *Dana* and *Mountain* cases were both criminal actions. However, the principle would seem to apply equally to civil proceedings.[26]

The Civil Procedural Support Law as applied to the support of illegitimates does not create a new offense, rather it changes the existing law only by designating the action a civil one and eliminating the defendant's right to a trial by jury. It is submitted that the legislature is without power to deny a trial by jury in bastardy proceedings since such a right existed at the adoption of the first constitution.[27]

The underlying reason for the superior court decision seems to be one of policy.[28] Eliminating the jury trial will help to lessen the backlog of cases crowding court dockets. In an effort to bolster its opinion the superior court cited statistics showing that judges sitting alone acquit more

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22. See Commonwealth v. Reilly, 324 Oa. 558, 188 Atl. 574 (1936). The constitution does not expressly or impliedly prohibit summary convictions "except in so far as they are not to be substituted for a jury, where the latter mode of trial had been previously established." Van Swartow v. Commonwealth, 24 Pa. 131, 134 (1854).

23. See William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 173 A.2d 59 (1961); Commonwealth v. Wesley, 171 Pa. Super. 566, 91 A.2d 298 (1952).

24. 68 Pa. Super. 100 (1917).

25. 405 Pa. 83, 173 A.2d 59 (1961).

26. See Rhines v. Clark, 51 Pa. 96 (1866).

27. No problem exists with regard to a right to a jury trial in actions for support of legitimate children or spouses, because prior to the constitution of 1776 such actions were tried by a justice of the peace. See 8 Stat. at Large of Pa. 93 (Mitchell & Flanders 1902).

28. See Brief for Commonwealth as Amicus Curiae, Commonwealth *ex rel.* Miller v. Dillworth, 204 Pa. 420, 205 A.2d 111 (1964).

defendants in paternity cases than do juries, thus, implying that justice will prevail without juries. This may all be true, but, "expediency cannot justify the denial of a right guaranteed by the Constitution."[29]

RICHARD H. WIX

29. Commonwealth v. Heiman, 127 Pa. Super. 1, 10, 190 Atl. 479, 482 (1937).

TORT—HUSBAND AND WIFE RELATIONSHIP—WIFE COULD NOT GET A JUDGMENT AGAINST HER HUSBAND IN A PERSONAL INJURY ACTION WHERE HE WAS JOINED AS AN ADDITIONAL DEFENDANT

Daly v. Buterbaugh, 207 A.2d 412 (Pa. 1965)

Donald and Nancy Daly, husband and wife, were both injured while riding in an automobile driven by Donald. The injuries were suffered as the result of a collision with the Buterbaugh automobile, and the Dalys instituted a joint trespass action against Buterbaugh. The defendant then secured a severance of the action and joined Donald Daly as an additional defendant in the Nancy Daly—Buterbaugh action. A jury verdict was rendered in favor of the plaintiff, Nancy Daly. Buterbaugh filed no post-trial motions and a judgment against him was entered immediately. Donald Daly filed several post-trial motions which were dismissed. Upon dismissal of these motions a "judgment in favor of Nancy Daly against Donald Daly, additional defendant . . ."[1] was entered. It is from this judgment for a wife against her husband that an appeal was taken.

The Supreme Court of Pennsylvania, in deciding this appeal, rejected the recent doctrine of *Ondovchik v. Ondovchik*,[2] which allowed a wife to recover damages from her husband alone where he had been joined as an additional defendant by the original defendant. With the rejection of *Ondovchik*, the court reversed the decision of the lower court which allowed the wife to recover a judgment against her husband.

The general rule that a wife cannot sue her husband originated from the common-law concept that a husband and wife were one, and all of the wife's property belonged to her husband.[3] With the enactment of the Married Women's Acts which gave the wife a right to sue in her own name and to hold separate property, this legal concept disappeared. With the abolition of the basis for the rule that a wife cannot sue her husband for personal injuries, it should have followed that the rule itself would disappear, since where the policy behind the rule no longer exists, the rule should no longer exist.[4] But this did not happen. Today, a majority of the states still adhere to the common-law rule that one spouse has no right of action against the other spouse to recover damages for the personal injuries caused

1. Daly v. Buterbaugh, 207 A.2d 412, 413 (Pa. 1965).
2. 411 Pa. 643, 192 A.2d 389 (1963).
3. See Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936); Meisel v. Little, 407 Pa. 546, 180 A.2d 772 (1962).
4. Kaczorowski v. Kalkosinski, 321 Pa. 438, 444, 184 Atl. 663, 665 (1936).

by the other.[5] The modern reason for the rule is the principle of public policy to promote family unity and avoid family discord and disturbance.[6] Pennsylvania is bound by the rule and the policy behind the rule, not only by case law, but also by statute. A Pennsylvania statute expressly provides that a spouse may not sue the other spouse except in a proceeding for divorce, or in a proceeding to protect and recover his or her separate property.[7]

Even with the new basis for the old common law rule, the rule has been attacked as antiquated and no longer practical. The argument in favor of the abrogation of the rule is based mainly on the realization that today it is the insurance companies insuring the husband and wife who will have to pay the judgment in a suit between a husband and wife. These critics point out that family harmony will not be disrupted in such a suit because in the final analysis it will be the plaintiff spouse recovering against the insurance company of the defendant spouse and not against the defendant spouse himself.[8] Thus, neither family harmony nor the family purse is affected.

The insurance argument, sound as it appears on the surface, may overlook one important point. Most insurance contracts require the insured to cooperate with the insurer in avoiding such a judgment or to settle for the smallest amount possible.[9] It is this obligation of the insured, a condition precedent to payment by the insurance company, that brings the basis of the rule back into the fore. The insured is caught between two opposing obligations: the obligation to his spouse who is injured and the duty to his insurance company. If he accepts the obligation to the insurance company as opposed to the obligation to his family there will be a disruption of the family relationship, which the courts try to avoid by the rule. On the other hand, if the spouse accepts the duty to provide for his family there is the risk of collusion. In order to guard against this possibility, many insurance companies have inserted a clause in their policies excluding pay-

5. Annot., 43 A.L.R.2d 632 (1955).

6. See Johnson v. People First Nat'l Bank and Trust Co., 394 Pa. 116, 145 A.2d 716 (1958); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936).

7. PA. STAT. ANN. tit. 48, § 111 (1950).

> . . . but she may not sue her husband, except in a proceeding for divorce, or in a proceeding to protect and recover her separate property; nor may he sue her except in a proceeding for divorce, or in a proceeding to protect or recover his separate property . . . .

8. See Meisel v. Little, 407 Pa. 546, 180 A.2d 772 (1962) (Musmanno, J., dissenting). It is further argued that by not allowing recovery where there is liability insurance the public policy in favor of a husband taking care of his own is defeated. The policy is defeated upon the realization that a spouse may take out insurance to protect the entire world against his negligence, but he may not protect his own family against such negligence. Meisel v. Little, *supra* at 565, 180 A.2d at 781.

9. See Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957); Puller v. Puller, 380 Pa. 219, 110 A.2d 175 (1955).

ment to the family of the insured or members of his household.[10] The collusion aspect also appears to be one reason why the courts are holding on to the basic rule even in cases where liability insurance is involved. Although the *Daly* case did not raise the insurance argument it was pointed out in the dissent by Justice Roberts that Donald Daly in appealing the decision was acting on behalf of his insurance company. Justice Roberts then went on to use the insurance argument as one of the reasons he did not agree with the majority of the court.[11]

The *Daly* case, while not a direct suit by a wife against a husband, did result in a direct judgment by a wife against a husband in the lower court. This result, while contrary to other cases in form, is not contrary to other cases in the final result. In Pennsylvania, a wife cannot sue her husband directly for personal injuries, but this does not prevent the original defendant from joining the husband as an additional defendant to protect his right of contribution.[12] The fact that one joint tortfeasor is the husband of the plaintiff and immune from a direct personal injury action by her does not prevent the original defendant from getting contribution from the husband tortfeasor.[13] The rule of contribution which allows the spouse to be joined as an additional defendant has the net result of allowing the wife to do indirectly what she could not do directly. This point is illustrated by an earlier Pennsylvania case.[14] In this case the wife was injured while a passenger in a car driven by her husband. The husband was acting within the scope of his employment when the accident occurred. The wife sued the employer and recovered a judgment against him. The employer was then allowed to sue the husband for the amount of the entire judgment. The husband then paid the employer and the employer paid the wife. Although the case did not involve a direct suit between a husband and wife, the husband in effect paid his wife for her injuries.[15] The employer here acted

10. *Ibid.*

11. 207 A.2d at 418-19 (dissenting opinion).

12. See Puller v. Puller, 380 Pa. 219, 110 A.2d 175 (1955); Yellow Cab Co. v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950); Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945). See also PA. STAT. ANN. tit. 12, § 2083 (1951), recognizing that "the right of contribution exists among joint tortfeasors . . . ."

13. See Koontz v. Messer, 320 Pa. 487, 181 Atl. 792 (1935). Most of the jurisdictions passing upon this question have denied contribution from a joint tortfeasor where the joint tortfeasor was the spouse of the plaintiff. Those jurisdictions require a joint tortfeasor to be liable to the plaintiff before there will be contribution. This requirement is not met if the plaintiff is the spouse of the joint tortfeasor and the result is that there can be no contribution. In this respect, Pennsylvania favors a plaintiff spouse more than other jurisdictions. Annot., 19 A.L.R.2d 1003 (1951).

14. Koontz v. Messer, *supra* note 13.

15. In Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945), a similar result was achieved. In this case a wife got a judgment against the defendant who was allowed contribution from her husband, the additional defendant, upon payment of the

as a middle man to enable circumvention of the prohibitory rule. From a decision such as this, it would appear that the next step logically would be to eliminate the middle man and allow the wife to recover in a direct verdict against her husband; but no matter what the logical next step may be, it seems to be clear from the decision in the *Daly* case that the Pennsylvania courts will not take it. When the court pointed out that joinder of one spouse as an additional defendant does not enlarge the wife's right to recover and overruled the *Ondovchik* case, it may have foreclosed any further movement of the law toward an approval of a direct husband-wife suit.[16]

The *Ondovchik* case did take the logical next step and eliminated the middleman in a suit which was originally filed before the Ondovchiks were married. The wife sued a third party who then joined the husband as an additional defendant,[17] and the jury returned a verdict against the husband alone. The lower court set this verdict aside on the ground that the plaintiff and the additional defendant were husband and wife. The Supreme Court of Pennsylvania reversed the lower court's decision and reinstated the verdict by the wife against the husband. To support this decision the court pointed out that there is no prohibition against a wife receiving a verdict against her husband. The Pennsylvania statutory prohibition is only against the wife bringing suit against her husband.[18]

By basing the decision in *Ondovchik* on such a distinction the court indicated, at least for the moment, that it could by-pass the Pennsylvania statute if it so desired. Why the court in the *Daly* case came back and rejected the *Ondovchik* decision is difficult to determine. The court claimed that upon a careful examination of past case law and legislative intent such a rejection was inevitable.[19] The court indicated that *Ondovchik* was completely at variance with the results reached in previous cases on the subject and thus, one or the other had to fall. Why *Ondovchik* was the one chosen to fall was questioned by Justice Roberts in his dissenting opinion. The dissent concedes that there was a conflict between *Ondovchik* and prior cases but claims ignorance of any authority ". . . which holds that earlier cases

judgment by the original defendant. It was the contention of the husband that this was the same as allowing the wife a direct action against him. The court in rejecting this contention indicated that the judgment against the husband could not be enforced by the wife; it was only for the benefit of the original defendant.

16. 207 A.2d at 416-17.

17. Ondovchik v. Ondovchik, 411 Pa. 643, 192 A.2d 389 (1963). The marriage occurred six months after the suit was instituted and six months before the trial. If the date of the trial had been six months earlier or the marriage six months later the problem of a wife suing a husband would not have occurred. These facts, more than a desire of the court to change the Pennsylvania law, might have been the real basis for the *Ondovchik* decision.

18. Ondovchik v. Ondovchik, *supra* note 17, at 647, 192 A.2d at 391.

19. 207 A.2d at 417.

prevail over the most recent decisions and that the latest cases must be overruled."[20] Perhaps the court had misgivings about the manner in which they had circumvented the statutory prohibition in *Ondovchik* and thus, allowed the wife to recover against her husband despite this prohibition.

Perhaps the court felt that its task lay in the interpretation and not in the alteration of statutes. If this suggestion was the motivational force in rejecting *Ondovchik* then the proposition prohibiting one spouse from suing another spouse for personal injuries can be expected to be applied by the Pennsylvania courts until such time as the legislature determines otherwise.

MICHAEL E. RISKIN

20. *Ibid.*