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CIVIL PROCEDURE — THE EFFECT OF INTERSPOUSAL IMMUNITY
ON THE RIGHT TO CONTRIBUTION

Plaintiff, a passenger in an automobile driven by her husband, was injured in a collision with a car driven by defendant. In a suit for personal injuries by plaintiff-wife defendant sought contribution from the husband, who had been found contributorily negligent, and had been declared a co-tortfeasor in a prior suit by the husband against the defendant. The husband filed an exception of no right and no cause of action based on interspousal immunity. The trial court sustained the exception, and the court of appeal affirmed. On certiorari, the Supreme Court reversed. *Held*, interspousal immunity is restricted to suits between spouses and is not available to bar contribution from plaintiff's husband, who had been found to be a joint tortfeasor. *Smith v. Southern Farm Bureau Cas. Ins. Co.*, 247 La. 695, 174 So. 2d 122 (La. 1965).

In the instant case, the contributory negligence of the husband would properly give rise to two separate causes of action. First, he would be liable to his wife for the injuries she sustained through his fault;¹ however, the judicial enforcement of this substantive right is barred by R.S. 9:291, which prohibits a wife from suing her husband for his torts.² Second, the negligent husband would also be liable to his co-tortfeasor under Civil Code articles 2324 and 2103. The former provides that one who assists another in the commission of an unlawful act is answerable *in solido* with that person,³ and the jurisprudence has consistently held that joint tortfeasors are liable *in solido*.⁴ Article 2103 gives an obligor the right to enforce contribution against

1. LA. CIVIL CODE art. 2315 (1870): "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it"

2. LA. R.S. 9:291 (Supp. 1963): "As long as the marriage continues and the spouses are not separated judicially a married woman may not sue her husband except for:

- "(1) A separation of property;
- "(2) The restitution and enjoyment of her paraphernal property;
- "(3) A separation from bed and board; or
- "(4) A divorce."

3. LA. CIVIL CODE art. 2324 (1870): "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, *in solido*, with that person, for the damage caused by such act."

4. See *Cust v. Item Co.*, 200 La. 515, 8 So. 2d 361 (1942); *Reid v. Lowden*, 192 La. 811, 189 So. 286 (1939); *Jones v. Maestri*, 170 La. 290, 127 So. 631 (1930); *Johnson v. Legeai*, 147 La. 92, 84 So. 505 (1920); *Williams v. Pelican Creamery*, 30 So. 2d 574 (La. App. 1st Cir. 1947); *Grigsby v. Morgan & Lindsey*, 148 So. 506 (La. App. 2d Cir. 1933).

his solidary obligors⁵ and since co-tortfeasors are solidary obligors, each can enforce contribution against the other.⁶

Although it is clear that the law recognizes both interspousal immunity and the right to contribution between joint tortfeasors, the result is unclear when these two principles conflict. The husband clearly has an immunity from suit by his wife, but it is equally well established that a solidary obligor has a right to contribution from his co-debtor *in solido*. The problem is to determine which of these rules is to be enforced.

In the instant case the majority chose to enforce the right to contribution, reasoning that the substantive right of a joint tortfeasor, created by article 2103, should not be barred by *procedural* immunity existing between spouses.⁷ The court reasoned that the application of the immunity statute should be limited to suits between spouses and that, since the wife need not be joined in the suit,⁸ the statute was inapplicable.

Basing its argument on two Louisiana decisions,⁹ the dissent took the position that contribution should not be allowed. These supporting cases involved situations where an injured child brought suit against the defendant who sought to enforce contribution against the negligent parent. Contribution was de-

5. LA. CIVIL CODE art. 2103 (1870): "When two or more debtors are liable *in solido*, whether the obligation arises from a contract, a quasi contract, an offense, or a quasi offense, it should be divided between them. As between the solidary debtors, each is liable only for his virile portion of the obligation.

"A defendant who is sued on an obligation which, if it exists, is solidary may seek to enforce contribution, if he is cast, against his solidary co-debtor by making him a third party defendant in the suit, as provided in Article 1111 through 1116 of the Code of Civil Procedure, whether or not the third party defendant was sued by the plaintiff initially, and whether the defendant seeking to enforce contribution if he is cast admits or denies liability on the obligation sued on by the plaintiff."

6. See notes 3, 4, 5 *supra*.

7. For cases holding that a wife has a cause of action against her husband but no right of action, see, *e.g.*, *Dumas v. United States Fidelity & Guaranty Co.*, 241 La. 1096, 134 So. 2d 45 (1961); *Edwards v. Royal Indemn. Co.*, 182 La. 171, 161 So. 191 (1935); *Soirez v. Great American Ins. Co.*, 168 So. 2d 418 (La. App. 3d Cir. 1964); *Gremillion v. Caffey*, 71 So. 2d 670 (La. App. 1st Cir. 1954); *Addison v. Employees Mut. Liab. Ins. Co.*, 64 So. 2d 484 (La. App. 1st Cir. 1953).

8. LA. CODE OF CIVIL PROCEDURE art. 1113 (1960): "A defendant who does not bring in as a third party defendant a person who is liable to him for all or part of the principal demand does not on that account lose his right or cause of action against such person . . ." Manifest in article 1113 is the implication that the defendant could sue the third person separately to enforce his right.

9. See *Rouley v. State Farm Mut. Auto. Ins. Co.*, 235 F. Supp. 786 (W.D. La. 1964); *Johnson v. Housing Authority of New Orleans*, 163 So. 2d 569 (La. App. 4th Cir. 1964).

nied in both cases under R.S. 9:571,¹⁰ which prohibits a child from suing his parents during their marriage. These courts concluded that a tortfeasor's right should be no greater than that of his victim; and, since the victim could not sue the parent, the tortfeasor could not. The dissent also pointed out that a majority of other jurisdictions deny contribution under facts similar to those of the instant case.

If a wife is allowed to sue her husband for his torts, there is little doubt that this would adversely affect their marriage. The underlying principle behind the immunity statute is to preserve domestic tranquility, and to allow suit by the wife would constitute a violation of this principle. The problem arises when suit is brought not by the wife but by a third party. The court in the instant case allowed recovery, and the decision seems valid because personal conflict between husband and wife was avoided. Furthermore, the husband committed a wrongful act; and to let him escape the consequences, while at the same time compelling someone else to pay his share, is inequitable. It seems that a person's status as husband should affect only rights between spouses and should not adversely affect rights of third parties; hence, the defendant's right to contribution should not be limited by reason of the husband's immunity from suit by his wife.

The instant decision could indicate a trend to limit the applicability of the interspousal immunity doctrine; such a pattern seems to be emerging in other jurisdictions.¹¹ It is submitted that similar reasoning should cover situations in which contribution is sought against the parent of an injured child. In light of this decision careful consideration should be given to the question whether parent and child immunity will bar contribution, even though such immunity has not been clearly established as merely a procedural bar. It would seem that the personal relationship between parent and child would be the primary consideration in the application of such immunity and that, there-

10. LA. R.S. 9:571 (Supp. 1963) : "The child who is not emancipated cannot sue :

"(1) Either parent during the continuance of their marriage, when the parents are not judicially separated; or

"(2) The parent who is entitled to his custody and control, when the marriage of the parents is dissolved, or the parents are judicially separated."

11. See, e.g., *Bedell v. Reagan*, 159 Me. 292, 192 A.2d 24 (1963); *Puller v. Puller*, 380 Pa. 219, 110 A.2d 175 (1955).

fore, as in the case of interspousal immunity, the statute should act only as a *procedural bar*.

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CONSTITUTIONAL LAW — STATE TAXATION OF GROSS RECEIPTS

General Motors (GM), a Delaware corporation, manufactured automobiles and parts entirely outside the State of Washington and sold them at wholesale to dealers within the state. The corporation's business was conducted through the Chevrolet, Pontiac, and Oldsmobile automotive divisions and GM Parts division. These divisions, although not separately incorporated, operated independently of each other. All the Washington sales business of the automotive divisions was conducted under the general supervision of the western "zone offices" located at Portland, Oregon. In the case of the Pontiac and Oldsmobile divisions, the instate Washington Sales organization consisted of representatives ("district managers") who provided the direct contact with the dealers. Each district manager participated in the selection of dealers in his district and assisted the dealers in working out their sales programs. No offices were maintained for the district managers; each one worked out of his own home and made frequent visits to the dealers in his district. The Chevrolet sales organization was similar except that a "branch office" was maintained at Seattle out of which a majority of the Chevrolet representatives operated: this office was also under the Portland zone office. All orders for automobiles were sent directly to the Portland offices where they were accepted for shipment f.o.b. the factories, none of which were in Oregon or Washington. The General Motors Parts Division supplied dealers with parts of Chevrolet, Pontiac, and Oldsmobile automobiles. For this purpose, warehouses were maintained in Seattle and Portland, the more commonly used parts being kept on hand at the Seattle warehouse. No parts division representatives visited dealers.

The State of Washington imposed a gross receipts tax "for the act or privilege of engaging in business activities" within the state.¹ Among the businesses taxed were manufacturing and

1. WASH. REV. CODE ANN. 82.04.220 (1962): "There is levied and shall be collected from every person a tax for the act or privilege of engaging in business