[HIGH COURT OF AUSTRALIA.]

TOOTH AND COMPANY LIMITED . . APPLICANT ;
PLAINTIFF,

AND

TILLYER . . . . . RESPONDENT.
DEFENDANT,

ON APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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MELBOURNE, *June* 11 ; SYDNEY, *Aug.* 22.

Dixon C.J., McTiernan, Williams, Webb and Fullagar JJ.

Workers' Compensation (N.S.W.)—Statute—Interpretation—Injured worker—Receipt of compensation—Injuries resulting from negligence of worker's husband—Right of employer paying compensation to be indemnified by person liable to pay damages where injury caused "under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof"—Whether husband such a person—Workers' Compensation Act 1926-1954 (*No.* 15 *of* 1926—*No.* 18 *of* 1954) (*N.S.W.*), *s.* 64.

Section 64 of the *Workers' Compensation Act* 1926-1954 (N.S.W.) provides *inter alia* that "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(*b*) if the worker has recovered compensation under this Act, the person by whom the compensation was paid shall be entitled to be indemnified by the person so liable to pay damages as aforesaid."

Held, that under the section a husband is not liable to indemnify an employer who has paid compensation to a wife in respect of injuries sustained by her as a result of the husband's negligence.

The question whether the disability of one spouse to sue another for what would otherwise be a tort is substantive or merely procedural, discussed.

Broom v. *Morgan* (1952) 2 All E.R. 1007 ; (1953) 1 Q.B. 597, considered.

Decision of the Supreme Court of New South Wales (Full Court), affirmed.

APPLICATION for special leave to appeal from the Supreme Court of New South Wales.

On 29th April 1955 Tooth & Co. Ltd. commenced an action in the Supreme Court of New South Wales against Eric Tillyer claiming the sum of £908 7s. 3d. On 11th May 1955 the defendant demurred

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to the plaintiff's declaration. The facts appear in the judgments hereunder.

The demurrer was heard before a Full Court of the Supreme Court of New South Wales constituted by *Owen* J., *Roper* C.J. in Eq., and *Sugerman* J., which on 17th May 1956 upheld the demurrer.

From this decision the plaintiff sought special leave to appeal to the High Court of Australia.

R. W. Fox, for the applicant.

Section 64 (b) of the *Workers' Compensation Act* 1926 (N.S.W.) is in a common form and enables an employer who has paid compensation to be indemnified in certain circumstances by the person causing the injury. The purpose of the provision is to enable the employer to recover where the tortious act of a third party is responsible for the injury. The words " creating a legal liability in some person " are to be read in this sense. It seems clear that the section does not cover contractual liability between the injured and the person causing the injury, nor is the right of indemnity excluded by separate contractual arrangements between those parties, made either before or after the occurrence of the injury. The words " to pay damages " therefore describe the quality of the liability i.e. as tortious. They do not qualify the word " liability " so as to prevent the section applying where there is a personal immunity of suit on the part of the person causing the injury *vis-a-vis* the injured. The purpose of the section was dealt with in *Smith's Dock Co.* v. *John Readhead & Sons* (1); *Nettleingham & Co.* v. *Powell & Co.* (2); *Cory & Son Ltd.* v. *France, Fenwick & Co. Ltd.* (3) and all these cases support the present submission. The section is not concerned in any way with an action between injured and tortfeasor and does not therefore look to the enforceability of the liability. The amount of the indemnity has no reference to the amount of damages the injured could have recovered. If enforceability is to be insisted on, the section will have no application when it is most needed, namely in the case of an injury causing immediate death. The injured worker would have had no action at all. But the courts have held that the section applies in a case of instantaneous death (*Paul Ltd.* v. *Great Eastern Railway Co.* (4)). *Smith's Dock Co.* v. *John Readhead & Sons* (1), and *Shirvell* v. *Hackwood Estates Co. Ltd.* (5) also support this view. Several American cases show that unenforceability between a person injured and the tortfeasor is no bar in relation to a claim under the equivalent of *Lord Campbell's Act*, and

(1) (1912) 2 K.B. 323.
(2) (1913) 1 K.B. 113.
(3) (1911) 1 K.B. 114, at p. 124.
(4) (1920) 36 T.L.R. 344.
(5) (1938) 2 K.B. 577.

they deal directly with the position where the injury is caused by a husband to his wife (*Welch* v. *Davis* (1); *Kaczorowski* v. *Kalkosinki* (2)). The test under *Lord Campbell's Act* is that the injured must have been able "to maintain an action and recover damages", a much more difficult hurdle. The personal disability of the wife to sue her husband was ignored in each case. "Liable" is a word of flexible meaning (*Littlewood* v. *George Wimpey & Co. Ltd.* (3)). There can be an unenforceable liability and there is such between husband and wife (*Broom* v. *Morgan* (4); *Littlewood* v. *George Wimpey & Co. Ltd.* (5); *Glanville Williams, Joint Torts and Contributory Negligence* (1951) pp. 99, 100, 102)). If *Broom* v. *Morgan* (4) and *Waugh* v. *Waugh* (6) were decided on the basis of vicarious liability, they both involve "liability" in the spouse, leading to the liability of the master. The *Married Women's Property Act* 1901 (N.S.W.), s. 16 pre-supposes the existence of a tort between husband and wife, but prevents either suing. Section 64 (b) looks to the quality of the act (*Harding* v. *Council of the Municipality of Lithgow* (7)).

Cur. adv. vult.

Aug. 22.

The following written judgments were delivered:—

DIXON C.J., WILLIAMS, WEBB AND FULLAGAR JJ. This application for special leave was made for the purpose of obtaining from this Court a decision upon a question concerning s. 64 of the *Workers' Compensation Act* 1926-1954 (N.S.W.). Section 64 deals with the situation that arises when a worker is entitled to claim both against an employer under the Act and against a stranger independently of the Act. The question was raised by a demurrer to a declaration in an action brought by Tooth & Co. Ltd. as plaintiff against one Tillyer as defendant. It appears from the declaration that the defendant's wife Doreen Winifred Tillyer was an employee of the plaintiff. The plaintiff incurred a liability to pay her compensation under the *Workers' Compensation Act* for injuries which she sustained in consequence of a want of reasonable care on the part of her husband. Had he not been her husband he would have been legally liable to pay damages to her in respect of the injury she so sustained. The plaintiff, having paid workers' compensation to Mrs. Tillyer, brought the action against her husband claiming that under s. 64 he was bound to indemnify them in respect of the

(1) (1951) 28 Am.L.R. 2nd series, 656.
(2) (1936) 104 Am.L.R. 1267.
(3) (1953) 2 Q.B. 501, at p. 522.
(4) (1953) 1 Q.B. 597.
(5) (1953) 2 Q.B. 501, at p. 515.
(6) (1950) 50 S.R. (N.S.W.) 210; 67 W.N. 175.
(7) (1937) 57 C.L.R. 186.

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compensation so paid. The Supreme Court decided that he was not so bound and from that decision special leave to appeal is now sought.

Section 64, as it stands amended, is as follows :—" Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(a) the worker may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to retain both damages and compensation. If the worker recovers firstly compensation and secondly such damages he shall be liable to repay to his employer out of such damages the amount of compensation which the employer has paid in respect of the worker's injury under this Act, and the worker shall not be entitled to any further compensation. If the worker firstly recovers such damages he shall not be entitled to recover compensation under this Act ; (b) if the worker has recovered compensation under this Act, the person by whom the compensation was paid shall be entitled to be indemnified by the person so liable to pay damages as aforesaid ; (c) if the worker subsequently obtains judgment for damages against the person who has paid under such indemnity, such payment under the indemnity shall be, to the extent of the amount of such payment, a satisfaction of the judgment for damages ; (d) all questions relating to matters arising under this section shall, in default of agreement, be settled by action, or, with the consent of the parties, by the Commission."

The plaintiff's claim is, of course, based on par. (b). But that paragraph, in common with the rest of the section, applies only when the introductory words of the section are satisfied ; and they cannot be satisfied unless the worker's injury was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof.

It is perhaps desirable to state more fully what are the allegations of the declaration by which the plaintiffs attempt to bring themselves within the provision. The declaration was framed doubtless with the object of making it possible for the defendant to demur as a means of raising the question. For it includes a statement that Doreen Winifred Tillyer was at all material times the wife of the defendant. The declaration goes on to allege that she was a passenger in a motor vehicle being driven by the defendant on a public highway and that the defendant so negligently carelessly and unskilfully drove and managed the said vehicle that it was

forced and driven against another vehicle then standing stationary upon the said public highway whereby Doreen Winifred Tillyer was injured and was for a long time unable to attend her place of employment. Then follows an allegation that at the time of the injury the plaintiff was an employer within the meaning of the *Workers' Compensation Act* and Doreen Winifred Tillyer was a worker within the meaning of the Act employed by the plaintiff and that the injury was an injury within the meaning of the Act which she received on a daily or other periodic journey between her place of abode and her place of employment. Next it is stated that she proceeded under the *Workers' Compensation Act* for payment of compensation and hospital expenses and obtained an award and that the plaintiff has paid the sums awarded. The final allegation in the pleading is that the plaintiff has claimed indemnity from the defendant under the provisions of the *Workers' Compensation Act* in respect of the sum awarded to Doreen Winifred Tillyer and costs and that yet the defendant has denied liability to indemnify the plaintiff. The declaration concludes with a claim for £908.

It is, of course, clear that damages were not recoverable by Mrs. Tillyer from her husband in respect of the injuries alleged to have been sustained through his negligence. It would therefore appear at first sight to be an almost self-evident answer to the plaintiff's claim that her injury was not caused under circumstances creating a legal liability in some person other than the employer to damages in respect thereof within the meaning of that language as used in s. 64. It was upon that ground that the defendant demurred to the declaration and it was upon that ground that the Supreme Court allowed the demurrer.

The answer made on behalf of the plaintiff to this prima facie view depends in some measure upon an interpretation of s. 64 and in some measure upon the theory which is advanced that in those torts for which a married woman cannot sue, or be sued by, her husband it is only the remedy and not the liability which is absent.

The critical words in s. 64 are of course "injury . . . caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof". The husband is in this case the person other than the employer; his want of proper care is alleged to have caused the injury and accordingly the employers sue him to recover the statutory indemnity. For the plaintiff it is said that the words "under circumstances creating a legal liability" should be interpreted as descriptive only, that is to say, as referring to the kind of circumstances which must exist and not as requiring that there shall be an actual liability. Under

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the interpretation which this argument seeks to place upon the provision it is enough if the circumstances are such as would spell legal liability if considered apart from any particular privilege exemption immunity or bar attaching in a given case, attaching that is to say in consequence of special matter which does not touch the cause of the injury or its legal quality.

In support of this mode of interpreting the provision reliance is placed on two lines of authority, one English and the other American. Cases have been decided in England, under the provision forming the source of that now in question, where the workman has been killed in the accident without leaving relatives who might claim under *Lord Campbell's Act*. He has nevertheless left dependants who have obtained workman's compensation. Even at the time when a cause of action in tort did not survive the death of a person sustaining injury it was held that in these circumstances the employer could recover indemnity under what was finally s. 30 (2) of the *Workmen's Compensation Act* 1925. Such a case arose in *Smith's Dock Co.* v. *John Readhead & Sons* (1), a case decided by *Bray* J. in which the dependant was an illegitimate child of the deceased, who left no relatives qualified to claim under *Lord Campbell's Act*. But the argument seeks to find in this decision more than it decided. All that it established is that if a cause of action once arises in the deceased workman the critical words of the provision are satisfied although the liability soon afterwards comes to an end by his death. *Bray* J. put his decision on this ground: "Here the injury was so caused under circumstances creating a legal liability in persons other than the employers, namely, in the defendants, and the person to whom they were so liable to pay damages was the workman whose injury was caused by their negligence, and that liability was not the less created because it subsequently came to an end by reason of the man's death" (2). No case seems to have arisen where the workman died "instantaneously" as the result of the accident and left "dependants" not qualified to claim under *Lord Campbell's Act*. In *R. & W. Paul Ltd.* v. *Great Eastern Railway Co.* (3) his dependants doubtless were qualified to recover under *Lord Campbell's Act* and that too was presumably the case in *Shirvell* v. *Hackwood Estates Co. Ltd.* (4), in which *Greer* L.J. (5) approved the decision in *Smith's Dock Co.* v. *John Readhead & Sons* (1), and said that it had been frequently acted upon. But perhaps death can never be so "instantaneous"

(1) (1912) 2 K.B. 323.
(2) (1912) 2 K.B., at p. 327.
(3) (1920) 36 T.L.R. 344.
(4) (1938) 2 K.B. 577.
(5) (1938) 2 K.B., at p. 588.

that for some moment of time a cause of action does not vest in the deceased and thus provide a liability sufficient for the purposes of the provision under discussion.

In America the question has arisen with respect to the operation that should be given to statutes enabling the executors of a deceased whose death has been wrongfully caused to recover damages from the wrongdoer for the benefit of children or relatives or enabling the children or relatives to do so directly. The courts appear to draw a distinction between two types of statute. In one type the cause of action is regarded as inherited or transmitted from the deceased. Thus the cause of action is not more ample than, and is not different from, that which was or would have been vested personally in the deceased. A statute of this type seems generally to be interpreted as not giving to the executors, the children or the relatives of a spouse whose death was caused by another spouse any cause of action against the survivor, notwithstanding that, but for their married state, his or her act would have amounted to a tort.

In the second type of statute the cause of action is not derivative or transmitted but is newly created and, notwithstanding that it takes as an element the wrongful or tortious character of the act whereby the deceased died, such a statute is more generally construed as covering the case of the death of a spouse in consequence of an act of the surviving spouse which, but for their married state, would have involved the latter in liability. Decisions in various States were cited in which this construction was placed upon provisions which might seem *ex facie* to be so expressed as to require that, if death had not ensued, the dead person might have maintained an action in respect of the wrongful act. See *Welch* v. *Davis* (1) and *Kaczorowski* v. *Kalkosinski* (2).

Whatever may be said of the soundness or usefulness of the foregoing distinction, it seems impossible to treat s. 64 (b) as not depending for its application on the incurring by a person other than the employer of an actual legal liability in respect of the injury. The introductory words of s. 64 do not define or describe the person who has the right corresponding to the liability of which they speak. That no doubt is because it may be a right vested in an injured worker or in the executor or the relatives of a deceased worker under *Lord Campbell's Act* (*Compensation to Relatives Act* 1897-1953 (*N.S.W.*)). But the right which is given to the employer who has

(1) (1951) 28 Am. L.R. 2nd series, 656 (III.) and the annotation at pp. 662 et seq.

(2) (1936) 104 Am. L.R. 1267 (Pa.) and annotation at pp. 1271 et seq.

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paid compensation rests on the existence for however brief a time of a true liability to pay damages to some person or persons in respect of the injury for which compensation was payable and has been paid. In that sense it is derivative. The policy of the provision is to adjust the responsibilities arising from the co-existence of two liabilities as alternatives either of which might be pursued by the worker or, in case of his death, by some or all of the persons prejudiced by his death. It would be inconsistent with this evident policy to construe s. 64 (b) as depending not on a real liability in the employer but on no more than the existence of facts of a kind which, apart from some special matter, would ordinarily imply liability in an employer. What is even more decisive, it would be inconsistent with the terms of the provision itself.

But it is the existence of a liability which s. 64 (b) postulates, not a remedy, nor as already has appeared, the continuance or persistence of the liability. English law draws a distinction between right and remedy which makes it possible to say that there may be a liability sufficient to satisfy the opening words of s. 64 although there be a defect of remedy. Accordingly, if it were true that the incapacity of one spouse to recover damages from another for an ordinary tort is to be explained as forming no more than a part of the law of remedies and it were possible to suppose that behind the defect of remedy a real liability existed, then, in spite of what has already been said, the meaning which has been placed upon the material words of s. 64 might not prove necessarily fatal to the success of the present plaintiffs.

But is it right to say that a legal remedy is denied notwithstanding that a liability exists when the common law says that a husband cannot recover from his wife or a wife from her husband in respect of a tort, or when the statute says that, subject to the exception it provides, no husband or wife shall be entitled to sue the other for tort ? The decision of *Phillips* v. *Barnet* (1), is strong to show that it is not true of the common law rule. For it is a decision of *Blackburn*, *Lush* and *Field* JJ. that for an act otherwise tortious committed by a husband during the marriage a wife cannot sue him after the marriage has been judicially dissolved. It is said however that the question is now governed by the provision contained in s. 16 (1) of the *Married Women's Property Act* (N.S.W.) corresponding with s. 12 of the English Act, and further that when it concludes with the words " but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort " it impliedly acknowledges that a " tort ", with resulting liability of one spouse to the other,

(1) (1876) 1 Q.B.D. 436.

may be committed during the marriage, although it is not a wrong against which a married woman's separate property requires protection. Section 16 (1) speaks in terms of remedies, but its purpose is to give a married woman the means, civil and criminal, of protecting her separate estate. Separate estate is a conception of equity not law and there could be no common law liability to her if she were deprived of it or there were some derogation of her enjoyment of it. It seems plain enough that the concluding words were intended to ensure that the old rule otherwise remained. Nothing could be further from the mind of the draftsman than to create between husband and wife a tortious liability unknown to the common law. Even *Denning* L.J. conceded in *Broom* v. *Morgan* (1) that *Phillips* v. *Barnet* (2) still stood. His Lordship said: "I ought to say a word about *Phillips* v. *Barnet* (2). That case was decided in 1876 before the *Married Women's Property Act* 1882. In so far as it was based on the fiction that husband and wife were one, the reasoning is no longer valid; but I would not like to suggest that the case would be decided any differently today. The immunity from suit conferred by s. 12, once it has attached, is not lost by divorce" (3).

In *Broom* v. *Morgan* (4) Lord *Goddard* C.J. decided that the liability of a master for harm caused by his servant to a third party included a case where the third party and the servant were husband and wife. His decision was affirmed by the Court of Appeal consisting of *Singleton*, *Denning* and *Hodson* L.JJ. (5). The same conclusion had been reached in New South Wales: *Waugh* v. *Waugh* (6); a decision cited and approved in the Court of Appeal by *Singleton* L.J. (7). Lord *Goddard* appears to treat a liability in the master for harm caused by a want of proper care on the part of the servant as consistent with an absence of liability in the servant, at all events if the ground of the want of liability is that the servant and the person harmed are husband and wife. In America the views vary which the courts of the different States have adopted concerning the actual question decided in *Broom* v. *Morgan* (8). But Lord *Goddard* relied upon the judgment delivered by *Cardozo* C.J. for the New York Court of Appeals in *Schubert* v. *August Schubert Wagon Co.* (9), deciding that an action against the husband's

(1) (1953) 1 Q.B. 597.
(2) (1876) 1 Q.B.D. 436.
(3) (1953) 1 Q.B., at p. 610.
(4) (1952) 2 All E.R. 1007; (1953) 1 Q.B. 597.
(5) (1953) 1 Q.B. 597.
(6) (1950) 50 S.R. (N.S.W.) 210; 67 W.N. 175.
(7) (1953) 1 Q.B. 597, at p. 603.
(8) (1953) 1 Q.B. 597; see annotations, 37 Am. L.R. 165; 64 Am. L.R. 296; and 131 Am. L.R. 307.
(9) (1928) 249 N.Y. 253; 64 Am. L.R. 293; 164 N.E. 42.

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employer is maintainable by a wife injured by her husband's negligence in the course of his employment. *Cardozo* C.J. at no point in his reasoning places his judgment on the ground that a liability existed in the husband although by reason of the marriage the remedy was suspended or wanting. The basis of the decision is expressed in a passage in which *Cardozo* C.J. used the language of " liability " until the last sentence when he speaks in terms of remedy. "A trespass, negligent or wilful, upon the person of a wife, does not cease to be an unlawful act, though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity. The trespass may be a crime for which even a husband may be punished, but, whether criminal or not, unlawful it remains. As well might one argue that an employer, commanding a husband to commit a battery on a wife, might justify the command by the victim's disability. The employer must answer for the damage, whether there is trespass by direct command, or trespass incidental to the business committed to the servant's keeping. In each case the maxim governs that he who acts through another acts by himself. In all this there is nothing at war with the holding of some cases that the remedy against the husband is denied altogether and not merely suspended during coverture: *Phillips* v. *Barnet* (1). Unlawful the act remains, however shorn of a remedy: *Bennett* v. *Bennett* (2) " (3). (In *Bennett* v. *Bennett* (2) it was decided that no more than procedure was involved in the rule of the common law that the husband must be joined in an action by a married woman against a stranger.)

The greater part of the foregoing passage from the opinion of *Cardozo* C.J. is included in a citation made by *Singleton* L.J., who expresses the basis of his judgment as follows: " I base my judgment in this matter upon this short consideration: the fact that a wife has no right of action against her husband in respect of his tortious act, and negligence, does not mean in law that she has no right of action against her husband's employers if he, when he did that negligent act, or made that negligent omission, was acting within the scope of his employment. They remain liable, and there is no reason, either in law or in common sense, why they should be given an immunity which springs in the case of husband and wife from the fiction that they are one, and from the desire that litigation between husband and wife shall not be encouraged " (4).

(1) (1876) 1 Q.B.D. 436.
(2) (1889) 116 N.Y. 584; 6 L.R.A. 553; 23 N.E. 17.
(3) (1928) 164 N.E. 42, at p. 43.
(4) (1953) 1 Q.B., at p. 607.

Denning L.J. based his judgment upon a view of the responsibility of a master with respect to a servant acting in the course of his employment which is expressed in the following passage: "My conclusion on this part of the case is, therefore, that the master's liability for the negligence of his servant is not a vicarious liability but a liability of the master himself owing to his failure to have seen that his work was properly and carefully done. If the servant is immune from an action at the suit of the injured party owing to some positive rule of law, nevertheless the master is not thereby absolved. The master's liability is his own liability and remains on him notwithstanding the immunity of the servant" (1). His Lordship however said that even if this view were wrong he still considered that the employer was liable. The reason why, on that hypothesis, the employer was liable is stated thus. "His (the husband's) immunity nowadays rests simply on the wording of s. 12 of the *Married Women's Property Act* 1882, which is preserved in this respect by s. 1 of this Act of 1935. That section disables the wife from suing her husband for a tort in much the same way as the *Statute of Frauds* prevents a party from suing on a contract which is not in writing; but it does not alter the fact that the husband has been guilty of a tort. His immunity is a mere rule of procedure and not a rule of substantive law. It is an immunity from suit and not an immunity from duty or liability. He is liable to his wife, though his liability is not enforceable by action; and, as he is liable, so also is his employer, but with this difference, that the employer's liability is enforceable by action" (2).

It is difficult to accept the view that s. 12 operates to create a liability which theretofore did not exist, whilst barring the remedy. Of course *Denning* L.J. did not expressly say that it so operated. But unless that is the deduction to be made what his Lordship in fact said logically does no more than remit the inquiry once more to the real effect of the common law rule.

To say that the common law rule is based upon the conception of the unity of husband and wife is probably to invert the order of historical development. One may suppose that the conception of the unity of husband and wife was but an *ex post facto* explanation and not a source of the state of early English law upon the subject. What *Bracton* actually said in reference to "*vir et uxor*" was "*qui sunt quasi unica persona, quia caro una et sanguinis unus*": *Bracton De Legibus* fo. 429b (*Woodbine's* ed., vol. 4, p. 335). It is worth recalling the comment of *Maitland*, writing of the twelfth and thirteenth centuries: "If we look for any one thought which

(1) (1953) 1 Q.B., at p. 609.

(2) (1953) 1 Q.B., at pp. 609-610.

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governs the whole of this province of law, we shall hardly find it. In particular we must be on our guard against the common belief that the ruling principle is that which sees an 'unity of person' between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph, and may now and again lead us out of or into a difficulty; but a consistently operative principle it can not be" (*Pollock and Maitland, History of English Law*, 2nd ed. (1923), vol. II, pp. 405, 406). But even if the common law rule be attributed to the conception of the unity of husband and wife that conception is as much inconsistent with the existence of a liability of one to the other as it is inconsistent with the existence in one of a remedy against the other.

Hodson L.J. probably took the view that no true liability existed in the husband. For his Lordship expressed himself thus: "It might be said, having regard only to the language of s. 12 of the *Married Women's Property Act* 1882, that the disability is merely procedural, but I think that it goes further and that it is also a substantive disability based on public policy. The rule subsists, but that does not, in my opinion, involve the proposition that a husband is not in breach of duty to his wife if he injures her by his careless act" (1). The foundation on which *Hodson* L.J. placed his judgment was the conception that the husband committed a tort for which because of the marriage he enjoyed an immunity that was personal and not an immunity that would enure for the benefit of his master.

The case of *Broom* v. *Morgan* (2), and the doctrine or doctrines it may involve have been the occasion as well as the subject of a great deal of learned writing which discloses as little academical as there has been judicial agreement concerning the legal foundations upon which the decision proceeded or should have proceeded. Professor *Kahn-Freund* takes the view that "The decision itself is compatible with the view that the spouses are not only precluded from suing one another in tort, but that, as a result of the survival of the 'unity' rule, they cannot be mutually liable in tort" (3). *G. J. Hughes* and *A. H. Hudson* after a full discussion conclude as follows:—"A restatement of the law on this point should therefore in the present writers' view run something like this: A master is liable in tort for the act of his servant, if the servant's act was a breach of duty imposed on the servant by the law of tort and was

(1) (1953) 1 Q.B., at pp. 611, 612.
(2) (1952) 2 All E.R. 1007; (1953) 1 Q.B. 597.
(3) (1953) 16 M.L.R. 376, at p. 377.

done in the course of the servant's employment; the fact that the servant enjoys an immunity from action does not protect the master. . . . The master's liability is a true vicarious one in which he is only the automatic reflector of his servant's tort" (1).

Professor *C. J. Hamson* (2) is more concerned with the conception of vicarious liability than with the quiddity of the spouses' mutual immunity for tort.

The editorial discussion in 69 *Law Quarterly Review* (3) is against the view that there is a tortious liability defeated by immunity from suit.

In Australia there is a learned discussion by Professor *Sawer* (4) and one by Mr. *E. C. E. Todd* (5). In the former the alternative ground given by *Denning* L.J. is discussed and the writer observes: "We seem to have a situation where the alleged 'right of imperfect obligation' is so extremely imperfect that no circumstance known to man will permit it to be clothed with the means of enforcement. At such a point, the concept of 'unenforceability' seems offensive to the very 'common sense' which is so extensively called in aid in the opinions under discussion" (6). But the whole question is in the end considered rather in the aspect which the author describes thus: "These cases, therefore, represent the familar situation of courts driven towards a particular conclusion by considerations of value of policy and endeavouring to reconcile their decision with an established system of concepts, the concepts themselves being so ill-defined that their re-definition is still possible" (7). Mr. *Todd* appears to support the view of Professor *Kahn-Freund* but his paper rather treats the decisions as illustrating the process of legal development.

The field of inquiry may be a very large one that is opened by some of the grounds which seem first to have been judicially canvassed in England in *Broom* v. *Morgan* (8). But this Court has a limited duty in the present case. It is to say whether it is right to regard the condition upon the fulfilment of which s. 64 (b) depends as satisfied by the fact that the injuries for which the wife has obtained compensation from the employer were sustained by her owing to want of reasonable care on the part of her husband. That is to say is the legal situation arising from the husband's negligence such that it can be fairly said that, within the meaning of s. 64, a

(1) (1953) 31 Canadian Bar Review, at p. 32.
(2) (1954) 12 Cambridge Law Journal 45.
(3) (1953) 69 Law Quarterly Review 296.
(4) (1953) 27 A.L.J. 323.
(5) (1953) 27 A.L.J. 498.
(6) (1953) 27 A.L.J., at p. 325.
(7) (1953) 27 A.L.J., at p. 326.
(8) (1952) 2 All E.R. 1007; (1953) 1 Q.B. 597.

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legal liability in him was created ? To this question a very definite negative must be given. We may be certain that the notional " liability " which in America, and now to some extent in England, has been discovered or devised as something which is concealed under the delictual immunity attaching to husband and wife mutually had no place at common law nor in the minds of those responsible for the provision embodied in s. 64. Such a metaphysical unreality is not characteristic of common law doctrine relating to wrongs. But it is even more outside the conception of s. 64 which is dealing with such severely practical liabilities as may and do sound in money.

Rather than grant special leave to appeal and put the applicant to the fruitless trouble of an unsuccessful appeal we thought it better to consider at once whether in spite of our first impression there was enough doubt about the correctness of the judgment from which it is sought to appeal to warrant us in granting the application for special leave. We think that there is no such doubt.

The application is refused.

McTIERNAN J. The declaration in this action purported to plead a cause of action under s. 64 (b) of the *Workers' Compensation Act* 1926-1954 (N.S.W.). The defendant demurred to the declaration. The Supreme Court of New South Wales allowed the demurrer. The judgment of the court denies the assumption upon which the declaration was founded, namely, that s. 64 applies to an injury caused by the negligence of the person described in the side note as the " stranger ", if he is the husband of the " worker ". The question decided by the court is of some general importance. The plaintiff applies for leave to appeal against the judgment of the Supreme Court. I would, however, refuse the application because, in my opinion, the judgment is clearly right.

The allegations in the declaration were capable of constituting a good cause of action under s. 64 (b), if it were not the fact that the defendant and the " worker " were husband and wife. This fact was pleaded, no doubt, to invite a demurrer. It may be assumed that if the fact had not been alleged in the declaration it would have formed the substance of a plea. That the fact was alleged in the declaration was the basis of the demurrer. The plaintiff was not entitled to be indemnified under s. 64 (b) by the defendant unless he was liable to pay damages in respect of the " injury ". Looking at s. 64, the defendant was so liable if the injury was caused under circumstances creating a legal liability in him to pay damages in respect of it. The circumstances relied upon by the plaintiff were

pleaded as circumstances amounting to negligence on the part of the defendant. Under the law of New South Wales, a wife cannot bring any action in tort against her husband except an action for the security and protection of her separate property: *Married Women's Property Act* 1901, s. 16. The "injury" pleaded in the declaration was within the scope of the *Workers' Compensation Act* —a personal injury. An action of negligence in which a wife claims damages for a personal injury is clearly not an action for the security and protection of her separate property. Therefore, the circumstances under which the declaration alleged that the "injury" was caused to the "worker" did not give rise to an action for damages. For that reason the circumstances did not create a legal liability in the defendant to pay damages. It follows an action by the plaintiff does not lie against the defendant under s. 64 (b). It was argued for the plaintiff that s. 64 postulates a legal liability to pay damages without any cause of action arising with it. I think that it was precisely because no cause of action arose that the defendant was never under a legal liability to pay damages in respect of the injury. This is demonstrated by sub-pars. (a) and (c). The former assumes that the worker can sue for damages for the injury and the latter assumes that he has obtained a judgment for damages. The result of these considerations is that the allegations in the declaration did not show that the defendant was liable, within the meaning of s. 64 (b) to pay damages in respect of the "injury". Indeed, they showed the contrary, because it appeared thereby that the defendant and the worker were husband and wife. As I have already said, I would refuse this application.

Application for special leave refused.

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R. D. B.