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Liability Insurance and Inter-Spouse Negligence Actions: The Effect of Section 167(3) of the Insurance Law

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It is interesting to note that the policy in the *Glickman* case contained a clause which provided that "no claim for damages shall arise or be maintainable under this policy . . . for liability voluntarily assumed by the insured in settling any claim or suit without the consent of this company." [51] At this time, this clause has not been raised as a possible means of avoiding liability. If it is raised, the defense may possibly fail due to the practice of construing the policies strictly against the insurer. The clause refers to the "insured" and if a time element can be introduced showing that plaintiff assumed before he became an "insured," the defense will fail. At any rate, contesting this clause would appear to be the next barrier the company can raise as a bar to recovery.

Conclusion

The *Empire* case has remained precedent for over forty years. The law therefore is well settled on the question of when a loss has been incurred under a contract for title insurance. While the broader construction of the term "loss" is adverse to the interests of the title insurers, it does not appear that the title insurers are taking any action as far as changing the form of their policies to include a possible catch-all condition. Rather they would appear to be adopting a policy of learning by previous mistakes. If the company is ordered to pay after litigating a claim, they must try to be more careful and be on guard against such exclusions in their future policies.

The argument of the defendant in the *Glickman* case attests to the fact that the insurance companies feel that the contract should be considered one of *strict* indemnity. That argument was practically a reiteration of the defendant's argument in the *Empire* case. Therefore, the insurers seem content to limit their efforts to sway the courts to their view of the contract as one of *strict* indemnity.

LIABILITY INSURANCE AND INTER-SPOUSE NEGLIGENCE ACTIONS: THE EFFECT OF SECTION 167(3) OF THE INSURANCE LAW

Recently a defendant in an automobile negligence action obtained a declaratory judgment requiring an insurance company to defend and pay any judgment rendered against him. The plaintiff in the original action was the wife of one of the defendant's employees. Her injuries were the result of her husband's negligent operation of a car

[51] See Home Title Guarantee Co., policy of title insurance, NYBTU Form No. 100 C, Condition 3(g).

while returning from a dance sponsored by the defendant.[1] The policy sued on was issued in the name of the husband, on the husband's car. Had the wife sued her husband she would not have obtained the coverage of the policy because of the exclusion in Section 167(3) of the New York Insurance Law.[2] Instead, she brought the action against the employer alleging respondeat superior and the employer was held to be entitled to the benefit of the husband's insurance as an "additional insured." [3]

Background

At common law a reciprocal disability existed between husband and wife precluding one from bringing an action, sounding in tort, against the other.[4] Among the many underlying reasons for this rule the most commonly stated are that husband and wife are one person, the wife's legal identity being merged in that of her husband,[5] and that it is against public policy that the delicate relations of marriage should be endangered by legal controversy.[6] In fact, a wife's coverture even prevented her from maintaining an action against one who assisted her husband in the commission of a tort against her person.[7] The common law required the husband's joinder with her in such a suit but his complicity in the tort would prevent such joinder.[8]

New York, in 1860, enacted the forerunner of the present Section 57 of the Domestic Relations Law removing the disability of coverture so as to allow actions, brought in the wife's own name as if femme sole, for injuries to her person and character against any person.[9] But the court refused to construe this statute as allowing inter-spouse suits in tort.[10] In 1880 this statute was repealed.[11] The Laws of 1890 reinstated the wife's right to sue, as if femme sole, for

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[1] Transcript of Record, p. 23, Catania v. Hartford Acc. and Indemnity Co., 4 A.D.2d 440, 166 N.Y.S.2d 389 (1st Dep't 1957).

[2] "No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy." N.Y. INS. LAW § 167(3).

[3] Catania v. Hartford Acc. and Indemnity Co., 4 A.D.2d 440, 166 N.Y.S.2d 389 (1st Dep't 1957).

[4] Freethy v. Freethy, 42 Barb. 641 (N.Y. Sup. Ct. 1865).

[5] Lindley v. Cusson, 22 N.Y.S.2d 516 (Sup. Ct. 1940).

[6] Newton v. Weber, 119 Misc. 240, 196 N.Y. Supp. 113 (Sup. Ct. 1922).

[7] See Lindley v. Cusson, note 5 *supra;* Freitag v. Bersano, 123 N.J. Eq. 515, 198 Atl. 845 (1938); Cerruti v. Simone, 13 N.J. Misc. 466, 467, 179 Atl. 257, 258 (1935).

[8] *Ibid.*

[9] Laws of N.Y. 1860, c. 90, § 7, as amended, Laws of N.Y. 1862, c. 172, § 3.

[10] See, *e.g.*, Freethy v. Freethy, 42 Barb. 641 (N.Y. Sup. Ct. 1865); Longendyke v. Longendyke, 42 Barb. 366 (N.Y. Sup. Ct. 1863).

[11] Laws of N.Y. 1880, c. 245, § 38.

injuries to her property, person, character or injuries arising out of the marital relation.[12] Again the courts refused to construe this as permitting one spouse to sue the other for personal injuries, whether negligent or willful.[13] In 1909, Section 57 of the Domestic Relations Law was enacted.[14] Under this law, spouses were still unable to sue each other in tort although the wife could now sue, femme sole, a third-party principal for personal injuries inflicted through the hand of the husband as agent.[15] Finally in 1937, the legislature swept away the last vestige of reciprocal disability in the area of tort to allow all inter-spouse actions.[16]

In the same act the legislators revised the Insurance Law of 1909[17] and included a provision exempting insurers from responsibility in this new field of litigation between husband and wife.[18] The carrier was similarly excluded when one spouse charged the other with vicarious liability for the negligence of a permissive user of his or her automobile.[19]

The legislative intent ascribed by the courts to the Domestic Relations Law is to allow actions between husband and wife.[20] As to the Insurance Law, the courts have consistently maintained the legislative purpose was to protect insurers against collusive suits.[21] There are two general methods of collusion associated with this area: (1) collusion between spouses in manufacturing false claims; and (2) where actual injury exists, collusive attempts to circumvent the statute by finding a suable third party behind whom the insurer will be required to stand. It appears that the statute was intended to

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[12] Laws of N.Y. 1890, c. 51.

[13] Abbe v. Abbe, 22 App. Div. 483, 48 N.Y. Supp. 25 (2d Dep't 1897).

[14] Laws of N.Y. 1909, c. 19.

[15] Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928). The outstanding exception was where the principal was a partnership of which the husband was a member. Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23 (1935).

[16] N.Y. DOM. REL. LAW § 57, as amended, Laws of 1937, c. 669, which reads in part: "A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury . . . as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts resulting in any such personal injury to her husband . . . as if they were unmarried."

[17] Laws of N.Y. 1909, c. 33.

[18] N.Y. INS. LAW § 167(3) set forth in note 2 *supra*.

[19] N.Y. VEHICLE & TRAFFIC LAW § 59 which makes an owner of a motor vehicle liable for death or injuries resulting from the negligent operation of the vehicle by any person using it with the owner's permission. It provides that all insurance protect against such liability ". . . but this provision shall not be construed as requiring that such a policy include insurance against any liability of the insured . . . for death of or injuries to his or her spouse. . . ." *Ibid.*

[20] Fuchs v. London & Lancashire Indemnity Co., 258 App. Div. 603, 17 N.Y.S.2d 338 (2d Dep't 1940).

[21] *Ibid.*; Jacobs v. United States Fidelity & Guaranty Co., 2 M.2d 428, 152 N.Y.S.2d 128 (Sup. Ct. 1956).

prevent or, at least minimize, the former type. It is the latter type which the statute necessarily, though unintentionally, encourages.

There are three general situations where one spouse is involved in the injury to the other:

(1) A spouse is the active tortfeasor but a third party is the named insured in the underlying policy.

(2) A spouse is the named insured but a third party is the active tortfeasor.

(3) A spouse is both the named insured and the active tortfeasor.

Spouse as Active Tortfeasor

A common case to illustrate this situation is where one spouse is the negligent driver of a car owned and insured by a third-party non-spouse. The injured spouse brings the action against the third party either under Section 59 of the Vehicle and Traffic Law or under the doctrine of respondeat superior and the insurer is required to defend and indemnify. The carrier cannot invoke Section 167(3) because the parties to the action are not spouses. This is eminently just. To allow the insurer to be excused by virtue of the statute would be to deprive the defendant of the insurance protection for which he contracted and paid. Even if the defendant pleads over against the active tortfeasor the insurer will not be relieved. A named insured will not be deprived of protection because an additional insured who happens to be a spouse is brought into the action.[22]

But when the negligent spouse, as third-party defendant, or as defendant in a subsequent action initiated by the insurer as subrogee, attempts to force the same insurer to defend and indemnify him as "additional insured" the courts reverse the reasoning employed in the original action. Even though the suit is not by one spouse against the other spouse the courts will refuse to bring in the insurer because indirectly it amounts to an inter-spouse suit. For example, a wife was injured in an automobile driven by her husband and owned by the husband's corporate employer. She brought the action against the employer who in turn impleaded the husband. The insurer had to defend and indemnify in the original action but the husband was defeated by the statute in his bid to bring in the insurer for his benefit as "additional insured."[23] In *Peka, Inc. v. Kaye*,[24] the insurer defended an action brought by a wife against her husband's employer for injuries suffered as a result of her husband's negligent operation of an airplane owned by the employer. After rendition of judgment,

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[22] General Acc. Fire & Life Assur. Corp. v. Katz, 3 M.2d 328, 150 N.Y.S.2d 667 (Sup. Ct. 1956).

[23] Katz v. Wessel, 207 Misc. 456, 139 N.Y.S.2d 564 (Sup. Ct. 1955).

[24] 208 Misc. 1003, 145 N.Y.S.2d 156 (Sup. Ct. 1955).

the insurer instituted suit against the husband in the employer's name. The husband was barred from coverage by the operation of the statute.

The inconsistency here is obvious. In the original action Section 167(3) is not applicable because the parties are not spouses. In a subsequent action Section 167(3) is applicable but the parties are not spouses. By circuity of reasoning it could be stated that, after judgment in the original action, the defendant employer is subrogated to the rights of the plaintiff spouse. The insurer as subrogee of the employer to these rights stands in place of the injured spouse in the action against the tortfeasant spouse.

Whatever the reasoning employed, it is within the fair intendment of Section 167(3) to relieve the insurer whether the action be between the spouses directly or indirectly.[25]

Spouse as Named Insured

A different situation obtains where the spouse is the named insured and a non-spouse is the active tortfeasor. For example, in *Manhattan Casualty Co. v. Cholakis*,[26] the husband was killed as a result of the negligent operation of an automobile, owned and insured in the name of his wife but operated, at the time of death, by their son. The wife, as executrix of her husband's estate, had brought an action against herself as owner and her son as the negligent driver. Section 167(3) operated as a bar in the action against herself but was not applicable in the action against her son. The son was considered an "additional insured" by virtue of the omnibus clause [27] in the policy. Thus coverage by the wife's policy was prohibited in one part of the action but was permitted in the other, giving the impression that the form and not the substance is controlling. The result was that the wife, albeit in a representative capacity, received the benefit of insurance coverage under a policy issued to herself. Of course, the wife was not suing for her own direct benefit,[28] but she was eminently qualified to share in the recovery.[29] This is exactly what both the statute and the policy intended to prevent. It is submitted that the statute did not merely intend that a spouse be deprived

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[25] Feinman v. Bernard Rice Sons, Inc., 2 M.2d 86, 133 N.Y.S.2d 639 (Sup. Ct. 1954), *aff'd mem.*, 285 App. Div. 926, 139 N.Y.S.2d 884 (1st Dep't 1955). To require the insurer to defend because the spouse is brought into the action as a third-party defendant rather than an original defendant ". . . would be to open the door to the very evil contemplated by the prohibition of the statute." *Id.* at 88, 133 N.Y.S.2d at 641.

[26] 206 Misc. 287, 133 N.Y.S.2d 90 (Sup. Ct. 1954).

[27] The standard omnibus clause found in most policies reads in part: The unqualified word "insured" includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission.

[28] N.Y. DECED. EST. LAW §§ 119, 130.

[29] *Id.* § 133.

of insurance coverage when suing the other spouse directly, but rather it was intended that coverage of the policy itself be unavailable directly or indirectly to a spouse of the named insured.

The tendency of the legislature has been to afford the ultimate insurance protection to innocent third parties. At the same time, it excludes a spouse from this class when the other spouse's policy is involved. For example, Section 167(1) of the Insurance Law [30] states that its provisions or ones equally or more favorable to the insured and to judgment creditors, as far as such provisions relate to judgment creditors, must be contained in every policy. However, it also expressly excludes these provisions from a policy when the liability is between spouses.[31] Moreover, Section 59 of the Vehicle and Traffic Law commands a provision be included in every policy of insurance indemnifying or securing an owner against the vicarious liability of a permissive user. But again, the statute states that it shall not be construed as requiring that a policy include insurance against the liability of the insured for death or injuries to a spouse.[32] More recently, the Motor Vehicle Financial Security Act [33] stated its purpose to be the protection of innocent injured parties from financially irresponsible drivers.[34] Here too, even a compulsory policy will not be deemed to insure against liability for injuries to the spouse.[35] And finally, Section 167(3) itself expressly states that "No *policy or contract* shall be deemed to insure against any liability of an insured . . ." [36] to his or her spouse. Thus, when a spouse is permitted to realize on such a policy, he or she is being afforded a right which the legislature did not intend to give them.

It might be argued that the policy is subject to any action for the benefit of the third-party operator rather than the plaintiff-spouse. Under the omnibus clause the third-party operator becomes an additional insured and, as such, is entitled to the protection of the policy. This might be so from a contractual view of the omnibus clause. It is not required by statute. It becomes obvious from a reading of the relevant statutes that nowhere therein can be found a provision re-

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[30] This section includes, *inter alia*, provisions that the insolvency or bankruptcy of the insured shall not release the insurer [§ 167(1)(a)]; and thirty days after notice of an unsatisfied judgment an action may be maintained against the insurer directly [§ 167(1)(b)].

[31] N.Y. INS. LAW § 167(1). "No policy or contract insuring against liability for injury to person, *except* as stated in subsection three [167(3)] . . . shall be issued . . . unless it contains in substance the following provisions . . . ." *Ibid.* (Emphasis added).

[32] N.Y. VEHICLE & TRAFFIC LAW § 59. ". . . [B]ut this provision shall not be construed as requiring that such a policy include insurance against any liability of the insured . . . for death of or injuries to his or her spouse. . . ." *Ibid.*

[33] *Id.* § 93 (Supp. 1957).

[34] *Id.* § 93(2).

[35] N.Y. INS. LAW § 167(3).

[36] *Ibid.* (Emphasis added).

quiring that coverage be extended to a permissive user, as such. Section 59 of the Vehicle and Traffic Law plainly states that all policies of insurance issued to the *owner* of a motor vehicle ". . . shall contain a provision for indemnity or security against the liability and responsibility provided in this section . . . ." [37] Section 167(2) of the Insurance Law enacts the same command. But any interpretation of this statute requiring the insurer to protect the permissive user as well as the vicariously liable owner is not justified. The statute expressly provides that every policy shall contain a provision insuring the named insured against the liability of the permissive user —not insuring the permissive user against his own liability. It was not the intent of the legislature to protect a user against his own negligence under someone else's policy. The true intent appears to be to protect the named insured, who purchased his protection, and an injured non-spouse, who receives his protection through legislative fiat. But because of the concept of an "additional insured," the relationship of the parties in an action such as *Manhattan Casualty Co. v. Cholakis* [38] is greatly over-emphasized. As a result, the contract underlying the suit is disregarded—a contract which in contemplation of law does not extend its coverage to either party to an action. The resulting anomaly can best be pointed up by a comparison between the *Cholakis* case and *General Acc. Fire and Life Assur. Corp. v. Katz.*[39] The latter was an action for a declaratory judgment to establish the rights of the insurer in an action brought by the administrator of the wife's estate against her son. She was killed by the negligent driving of her husband. However, the son owned the vehicle and was named insured. The insurer was required to defend the son. The ultimate liability fell upon the negligent operator, for the insurer was subrogated to the rights of the owner and impleaded the husband. But in the *Cholakis* decision, since the son, the active tortfeasor, was considered an additional insured, the ultimate liability fell upon the insurer rather than on the wrongdoer, and the wife successfully reached her own policy.

It is not the purpose here to consider the propriety for extending the scope of the omnibus clause. In order to show the inefficacy of Section 167(3) in this fact situation it suffices to point out that the greater the extension of the omnibus clause, the greater will be the source of suable non-spouses. Inversely, the necessity of direct interspouse actions will be lessened. In other words, every increase in the effectiveness of Section 167(2) decreases the effectiveness of Section 167(3).

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[37] N.Y. VEHICLE & TRAFFIC LAW § 59.
[38] 206 Misc. 287, 133 N.Y.S.2d 90 (Sup. Ct. 1954).
[39] 3 M.2d 328, 150 N.Y.S.2d 667 (Sup. Ct. 1956).

Spouse as Named Insured and Active Tortfeasor

Normally this situation would leave no avenue of insurance recovery open to the injured spouse unless the tortfeasor happened to be only one of several named insureds. For example, where injuries to a wife are caused by the negligence of her husband while in the scope of his employment for a firm of which he is a partner, the insurer must defend the action and pay any judgment rendered against those partners other than the husband.[40] Actually, there is little distinction between the situation here and one where a non-spouse named insured is held liable by a wife for the negligence of her husband as permissive user. The non-spouse partners are entitled to insurance coverage under their own policies for the tort of the husband-partner. The insurer in turn is subrogated over against the negligent husband. But with this limited exception, the area covered in this section was the last effective field for the operation of Section 167(3). It now appears, with the *Catania v. Hartford Acc. and Indemnity Co.*[41] decision, that even here the applicability of the statute is negligible.

Again, it is the extension of the scope of the omnibus clause that enables the spouse to avoid the effect of Section 167(3). The injured spouse can now place the policy within reach merely by alleging user to a third party, whether it be scope of employment or merely an errand.[42] Of course, the carrier may attempt to indemnify itself by impleading the negligent spouse who in turn would be deprived of coverage because of Section 167(3). This presents the strange situation of a named insured being subject to subrogation by his own insurer. However, the important point is that there is hardly any situation where a party cannot place the proceeds of his or her spouse's policy in jeopardy. Furthermore, with the great decrease in the effectiveness of Section 167(3), collusive actions become, as a matter of practicality, a relatively simple method. Collusion, both in the creating of actions, and in the circumventing of the statute, is simplified by finding a non-negligent non-owner to be defendant. In such a situation, it is an open question whether there would be any more possibility of collusive actions if the statute were eliminated altogether.

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[40] Traveler's Indemnity Co. v. Unger, 4 M.2d 955, 158 N.Y.S.2d 892 (Sup. Ct. 1956). This action was brought against the partnership in the partnership name as authorized by New York Civil Practice Act § 222-a. Should any judgment, rendered in such an action go unpaid for thirty days, the wife could maintain a direct action against the insurer, standing in place of the non-spouse partner so that § 167(3) would not be applicable. Jacobs v. United States Fidelity and Guaranty Co., 2 M.2d 428, 152 N.Y.S.2d 128 (Sup. Ct. 1956); N.Y. INS. LAW § 167(1)(b). In the *Unger* case, *supra*, the wife also obtained the benefit of New York Insurance Law § 167(1)(a) for at the time of the declaratory judgment requiring the insurer to defend the action against the partnership, the firm had already been adjudged bankrupt.

[41] 4 A.D.2d 440, 166 N.Y.S.2d 389 (1st Dep't 1957).

[42] Brief for Defendant, p. 10, Catania v. Hartford Acc. and Indemnity Co., 4 A.D.2d 440, 166 N.Y.S.2d 389 (1st Dep't 1957).

Conflict of Laws

Unusual situations are normally expected in the area of conflicts. The application of Section 167(3) provides no exception. In *Williamson v. Massachusetts Bonding & Ins. Co.*,[43] the Connecticut court held that the statute did not apply where the injuries were suffered outside New York; that the *lex loci delicti* controlled no matter where the policy was issued. The *Williamson* case was followed by the New York Supreme Court in *New Amsterdam Casualty Co. v. Stecker*.[44] Subsequently, the New York Supreme Court rejected decisions in both the above cases in *General Acc. Assur. Corp. v. Ganser* [45] holding that Section 167(3) did apply to injuries occurring outside the state if the policy was issued in New York. The court relied on *Lamb v. Liberty Mutual Ins. Co.*,[46] in which it was stated, ". . . this suit is brought not upon an accident but upon a contract made in New York and performable here. The statute applies to it." [47] This reasoning, that the law of the place of contract applies to the question of the applicability of Section 167(3), was upheld by the Appellate Division, reversing the lower court in the *New Amsterdam* case.[48] Thus, the New York interpretation is that the *lex loci delicti* controls the issues in the tort action but the *lex loci contractu* is determinative of the responsibilities of the insurer.

In *Clement v. Atlantic Cas. Ins. Co.*,[49] the plaintiff-wife was injured through the negligence of her husband. The accident occurred in New York, but both spouses were residents of New Jersey, in which state the insurance contract was made. Apparently because New Jersey still retains the common-law disability against interspouse suits in tort,[50] the wife brought her action in the New York courts where she obtained a judgment against her husband. After the judgment remained unpaid for ninety days, she brought a direct action against her husband's insurer in New Jersey.[51] She was allowed to recover. The court held that, despite the New Jersey common-law immunity between spouses, the intendment of the policy

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[43] 142 Conn. 573, 116 A.2d 169 (1955).

[44] 208 Misc. 858, 145 N.Y.S.2d 148 (Sup. Ct. 1955).

[45] 2 M.2d 18, 150 N.Y.S.2d 705 (Sup. Ct. 1956). See also Globe Indemnity Co. v. Anastasio, 5 M.2d 238, 158 N.Y.S.2d 641 (Sup. Ct. 1956); General Acc. Fire & Assur. Corp. v. Javian, 2 M.2d 94, 152 N.Y.S.2d 345 (Sup. Ct. 1956).

[46] Lamb v. Liberty Mut. Ins. Co., 5 M.2d 236, 161 N.Y.S.2d 703 (Sup. Ct. 1941), *aff'd mem.*, 263 App. Div. 859, 32 N.Y.S.2d 788 (1st Dep't 1942).

[47] *Id.* at 239, 161 N.Y.S.2d at 705.

[48] New Amsterdam Cas. Co. v. Stecker, 1 A.D.2d 629, 152 N.Y.S.2d 879 (1st Dep't 1956), *aff'd*, 3 N.Y.2d 1, 143 N.E.2d 357 (1957).

[49] 13 N.J. 439, 100 A.2d 273 (1953).

[50] N.J. REV. STAT. ANN. § 37:2-5 (1937). See Kennedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954).

[51] N.J. REV. STAT. ANN. § 17:28-2 (1937).

was to protect against liability in New York[52] where, ironically, Section 167(3) is available to protect New York insurers. *Quaere:* What would the courts of New York have done if the husband had called the New Jersey insurance company to defend and pay any judgment in the original New York action?

Conclusion

In its present state of effectiveness, it would be well to repeal Section 167(3). The present ease with which the spouse taps the proceeds of the policy at the expense of the insurer will not be rectified until the statute is interpreted as an absolute bar to recovery on a policy issued to the other spouse.

RECENT DEVELOPMENTS IN THE NEW YORK LAW OF PRIMA FACIE TORT

In 1923 the New York Court of Appeals[1] first[2] assented to Lord Bowen's famous proposition[3] that the intentional infliction of injury upon another without justification is prima facie actionable. Since that time the prima facie tort doctrine has come increasingly into use by injured parties in search of a remedy not afforded by traditional tort actions. This increase in prima facie tort litigation provides the occasion for the courts to define the doctrine more precisely and to limit its application within discernible boundaries. It is the purpose of this article to analyze the recent developments in the application of the prima facie tort doctrine in New York.

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[52] *But cf.* Metzler v. Metzler, 8 N.J. Misc. 821, 151 Atl. 847 (1930), where it was held that a wife could not sue her husband in New Jersey on a judgment obtained in New York.

[1] Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923).

[2] Dicta in an earlier New York case had expressed disapproval of the prima facie tort doctrine. See Foster v. Retail Clerks' Protective Ass'n, 39 Misc. 48, 53-56, 78 N.Y. Supp. 860, 864-66 (Sup. Ct. 1902). However, in 1920 the Appellate Division held a complaint sufficient as an "action on the case" where it alleged injury resulting from words not in themselves defamatory. Husted v. Husted Co., 193 App. Div. 493, 184 N.Y. Supp. 844 (2d Dep't 1920). See text at note 7 *infra*.

[3] "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong. . . ." Mogul Steamship Co. v. McGregor, Gow & Co., [1889] 23 Q.B.D. 598, 613, *aff'd*, [1892] A.C. 25.