Michigan Law Review

Volume 49 | Issue 2

1950

PRACTICE AND PROCEDURE-THIRD-PARTY PRACTICE-SUBROGATION AND CONTRIBUTION- RIGHT OF DEFENDANT TO JOIN PHYSICIAN WHO AGGRAVATED INJURIES

Richard B. Gushée S.Ed.
University of Michigan Law School

PRACTICE AND PROCEDURE—THIRD-PARTY PRACTICE—SUBROGATION AND CONTRIBUTION—RIGHT OF DEFENDANT TO JOIN PHYSICIAN WHO AGGRAVATED INJURIES—*A* brought an action against *B* for injuries suffered in an automobile accident and aggravation of those injuries by the negligent treatment of a physician, *D*. *B* filed a third-party complaint against *D* for malpractice contending that *D* was liable over to him for all or a part of the judgment recovered by *A*. *D's* motion to dismiss the third-party complaint for want of a sufficient cause of action was denied. On appeal, *held*, affirmed. A tort-feasor who has been held liable for injuries is subrogated to any right of action which the injured party may have had against a physician for malpractice. On the second trial the physician will not be bound by the original judgment and may litigate the issue of the alleged wrongdoer's liability as well as that of the charge of malpractice. *Clark v. Halstead, Wheeler v. Blash*, (N.Y. 1949) 93 N.Y.S. (2d) 49.

The contribution statute of New York[1] provides for contribution in the event that the plaintiff recovers a joint judgment against tort-feasors. Thus a substantive right of the defendant is in many instances placed in the hands of the plaintiff who can work the defendant irreparable harm simply by refusing to join the party from whom the defendant could seek reparation.[2] The principal case presents a possible alternative to contribution which will permit the defendant, either in a separate action, or by use of impleader, to recover against one who should bear a partial share of the damages suffered by the plaintiff. It is clear that the person causing the initial injury is liable for the aggravation of the injury due to the negligence of a doctor.[3] However, the doctor is liable as well and the plaintiff may sue either of the tort-feasors or both of them.[4] A release of the initial tort-feasor without a reservation of rights against the doctor is a release of him also, for a full recovery is presumed.[5] The courts approve this

[1] N.Y.C.P.A. §211a. It was held in Fox v. Western N.Y. Motor Lines, 257 N.Y. 305, 178 N.E. 289 (1931), that a defendant cannot implead a joint tort-feasor because of this contribution law although broad provisions are made for the impleading of parties who would be liable over to the principal defendant under N.Y.C.P.A. §193.

[2] For a criticism of this result of the New York law see Gregory, "Tort Contribution Practice in New York," 20 CORN. L.Q. 269 (1935).

[3] See cases collected in 8 A.L.R. 506 (1920). The reason for holding the initial tort-feasor liable for the aggravation is that his action is deemed to be the proximate cause of the aggravation.

[4] 4 TORTS RESTATEMENT §879 (1939).

[5] Martin v. Cunningham, 93 Wash. 517, 161 P. 355 (1916); and Pitkin v. Chapman, 121 Misc. 88, 200 N.Y.S. 235 (1923). See also 50 A.L.R. 1108 (1927) and 30 MICH. L. REV. 1349 (1932).

last mentioned result even though it is generally only with respect to joint liability that a release of one tort-feasor operates as a release of the others.[6] The theory adopted by the courts is that the initial injury and the aggravation constitute a single injury caused by separate torts which give rise to several liability as to the aggravation. Thus if the initial tort-feasor is held accountable for the total injuries to the plaintiff, the courts do not feel that as against the doctor he is justly chargeable with the damages arising from the aggravation.[7] Therefore it is not surprising that a theory of subrogation has been developed which permits the initial tort-feasor to implead the doctor in the principal action, or to start a separate action against him for the amount of damages which accrued from the aggravation.[8] Thus through the medium of subrogation a just result may be obtained which might otherwise be impossible in view of contribution statutes like that in New York.

Richard B. Gushée, S.Ed.

[6] 4 TORTS RESTATEMENT §885 (1939).

[7] See Fisher v. Milwaukee Electric Ry. & Light Co., 173 Wis. 57, 180 N.W. 269 (1920); Retelle v. Sullivan, 191 Wis. 576, 211 N.W. 756 (1927); and Bost v. Metcalfe, 219 N.C. 607, 14 S.E. (2d) 648 (1941).

[8] In 50 AM. JUR., Subrogation, §37, the subrogation of the initial tort-feasor to the rights of the plaintiff against the physician is stated to be an exception to the general rule that subrogation is not given to relieve one from the consequences of his own wrongful act.