angus *v.* sun alliance insurance co., [1988] 2 S.C.R. 256

Sun Alliance Insurance Company *Appellant*

v.

Diane Hart Angus *Respondent*

and

Owen Hart and James Angus *Respondents*

INDEXED AS: ANGUS *v.* SUN ALLIANCE INSURANCE CO.

File No.: 19902.

1988: May 26, 27; 1988: October 20.

Present: Dickson C.J. and Beetz, McIntyre, Lamer and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Statutes--Interpretation--Retrospective operation--Statutes barring action in effect when accident occurred--Statutes barring action repealed before action commenced--Whether or not repeal operating retrospectively--Married Woman's Property Act, R.S.O. 1970, c. 262, s. 7--Insurance Act, R.S.O. 1970, c. 224, s. 214(b)(i)--Family Law Reform Act, 1975, S.O. 1975, c. 41, ss. 1(3)(a), 5, 6.

Family law--Spousal immunity--Statutes barring action in effect when accident occurred--Statutes barring action repealed before action commenced--Whether or not repeal operating retrospectively.

Respondent Diane Angus had been a passenger in a car driven by her husband, respondent James Angus, and was seriously injured in an accident caused by his own negligence. The car was owned by Diane Angus' father, Owen Hart. Diane Angus brought action against her husband and her father to recover damages. Diane and James Angus have since been divorced. At the time of the accident, s. 7 of *The Married Woman's Property Act* prevented spouses' suing each other in tort and s. 214 of *The Insurance Act* provided that an insurer was not liable for liability resulting from the bodily injury or death of a daughter, son, wife or husband. *The Family Law Reform Act, 1975* repealed these provisions after the accident but before the suit was commenced. The father's insurance policy on the car also contained a provision absolving the appellant insurance company from third-party liability in terms similar to those of s. 214. The principal issue here was whether *The Family Law Reform Act, 1975* operated retrospectively so as (1) to permit one spouse to bring an action in respect of a tort committed by the other before the Act's commencement and (2) to eliminate s. 214 of *The Insurance Act* as a defence to the action against the insurance company.

Held: The appeal should be allowed.

A provision is substantive or procedural for the purposes of retrospective application not according to whether or not it is based upon a legal fiction, but

according to whether or not it affects substantive rights. Here, procedure was not being affected at all. The provision in question provided a complete defence to an action and as such is a substantive matter just as much as the creation of a cause of action itself. In any case, whether the provision is deemed to be substantive or procedural, it is not one to which a presumption of retrospectivity can be applied. This would amount to a serious deprivation of an acquired right of the husband, and it should not lightly be assumed that this was the intention of the legislature.

Section 214 of *The Insurance Act* operated as a bar to recovery against the father's insurance company. This section, too, was a substantive provision to which the ordinary principle against retrospective operation applied.

Cases Cited

Disapproved: *Broom v. Morgan*, [1953] 1 Q.B. 597; **referred to:** *Manning v. Howard* (1975), 8 O.R. (2d) 728; *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403; *Maxwell v. Callbeck*, [1939] S.C.R. 440; *Midland Bank Trust Co. v. Green (No. 3)*, [1979] 2 All E.R. 193; *Upper Canada College v. Smith* (1920), 61 S.C.R. 413; *Merrill v. Fisher* (1975), 11 O.R. (2d) 551; *Martin v. Perrie*, [1986] 1 S.C.R. 41; *Foy v. Foy* (1978), 20 O.R. (2d) 747; *Phillips v. Barnet*, [1875-76] 1 Q.B.D. 436.

Statutes and Regulations Cited

Contributory Negligence Act, S.A. 1937, c. 18.

Family Law Reform Act, 1975, S.O. 1975, c. 41, ss. 1(3)(*a*), 5, 6.

Insurance Act, R.S.O. 1970, c. 224, s. 214(*b*)(i).

Married Woman's Property Act, R.S.O. 1970, c. 262, s. 7.

Rules of Civil Procedure, Rule 21, formerly *Rules of Practice*, s. 124.

Authors Cited

Côté, Pierre-André. *The Interpretation of Legislation in Canada*. Cowansville, Quebec: Yvon Blais, 1984.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Maxwell, Sir Peter B. *Maxwell on Statutory Interpretation*, 12th ed. By P. St. J. Langan. London: Sweet & Maxwell, 1969.

APPEAL from a judgment of the Ontario Court of Appeal (1986), 53 O.R. (2d) 793, dismissing an appeal from a judgment of Galligan J. (1984), 45 O.R. (2d) 667. Appeal allowed.

John Nelligan, *Q.C.*, and *Stuart Hendin*, *Q.C.*, for the appellant.

David M. McFadyen, for the respondent Diane Hart Angus.

Rodger Brennan, for the respondents Owen Hart and James Angus.

The judgment of the Court was delivered by

1. LA FOREST J.--The principal issue in this appeal is whether ss. 1, 5 and 6, of *The Family Law Reform Act, 1975*, S.O. 1975, c. 41, which provide that spouses have separate legal personalities and have a right to bring an action in tort against one

another, operate retrospectively, so as to permit one spouse to bring such an action in respect of a tort committed by the other before the Act's commencement.

Facts

2. On April 30, 1975, the respondent Diane Angus was seriously injured in a car accident. Her husband, respondent James Angus, was driving the car in which she was a passenger. The accident was caused by his own negligence. The car was owned by Diane Angus' father, Owen Hart. On April 5, 1977, Diane Angus brought action against her husband and her father to recover damages for the injuries and losses she sustained from the accident. Diane and James Angus have since been divorced.

3. At the time of the accident, two provisions of law would have barred recovery. Section 7 of *The Married Woman's Property Act*, R.S.O. 1970, c. 262, provided:

> **7.** Every married woman has in her own name against all persons, including her husband, the same remedies for the protection and security of her own separate property as if such property belonged to her as a *feme sole*, but, except as aforesaid no husband or wife is entitled to sue the other for a tort.

Section 214 of *The Insurance Act*, R.S.O. 1970, c. 224, provided in relevant part as follows:

> **214.** The insurer is not liable under a contract evidenced by a motor vehicle liability policy for any liability,

> (*b*) resulting from bodily injury to or the death of,
>
> (i) the daughter, son, wife or husband of any person insured by the contract . . . .

4. The father's insurance policy on the car itself contained a provision absolving the appellant insurance company from third-party liability in terms similar to those of s. 214.

5. Slightly more than two months after the accident, but well before the suit was commenced, the above provisions were repealed by ss. 5 and 6 of *The Family Law Reform Act, 1975*. As well, ss. 1 and 5 of that Act provide in relevant part:

> **1.**--(1) For all purposes of the law of Ontario, a married man has a legal personality that is independent, separate and distinct from that of his wife and a married woman has a legal personality that is independent, separate and distinct from that of her husband.
>
> ...
>
> (3) Without limiting the generality of subsections (1) and (2),
>
> (*a*) each of the parties to a marriage has the like right of action in tort against the other as if they were not married;
>
> ...
>
> **5.** Subclause i of clause *b* of section 214 of *The Insurance Act*, being chapter 224 of the Revised Statutes of Ontario, 1970 is repealed.

The Courts Below

6. An application (pursuant to s. 124 of the *Rules of Practice*; see now Rule 21 of the *Rules of Civil Procedure*) was brought before Galligan J. of the Supreme Court of Ontario ((1984), 45 O.R. (2d) 667) for a determination as to whether or not the provisions just quoted operated retrospectively so as to eliminate defences based on s. 7 of *The Married Woman's Property Act* and s. 214 of *The Insurance Act*. The motion also sought an order that the statement of claim disclosed no reasonable cause of action against the husband, the father or the insurance company.

7. Galligan J. determined that these provisions of *The Family Law Reform Act, 1975* did operate with retrospective effect, and the defences were not available. The two basic issues before him were these:

> 1. Is section 7 of *The Married Woman's Property Act* a defence to the action against James Angus, or do the provisions of *The Family Law Reform Act, 1975* operate retrospectively to eliminate this defence by repealing s. 7?
>
> 2. Is section 214 of *The Insurance Act* a defence to the action against the insurance company, or do the provisions of *The Family Law Reform Act, 1975* operate retrospectively and eliminate this defence by repealing s. 214?

8. Galligan J. began, at p. 669, by recognizing the "fundamental rule" of statutory interpretation that

> ...no legislation is to be construed as being retrospective in operation so far as substantive rights and obligations are concerned unless the

> statute clearly provides or such retrospective operation is required by clear implication. A procedural enactment, however, is *prima facie* to be given a retrospective interpretation unless it would prejudice a substantial right of a party.

9. Galligan J. relied on *Manning v. Howard* (1975), 8 O.R. (2d) 728 (Ont. C.A.), in determining that s. 7 contained a procedural and not a substantive rule. It was simply a procedural bar to certain plaintiffs invoking otherwise subsisting rights. As such, its repeal must be given retrospective effect "unless it prejudices a substantial right of the defendant." The husband, he continued at p. 670,

> ...had no right given by any rule of substantive law to injure the plaintiff...All that happened [on the passing of the Act] was that a bar to the injured person seeking redress was removed.

10. For the husband it had been argued that *The Family Law Reform Act, 1975* should be dealt with in a manner analogous to that traditionally accorded limitations provisions. Limitations provisions, although in some sense procedural, are normally not given retrospective effect. Galligan J. declined to follow this reasoning, holding that the policy reasons underlying the treatment of limitations provisions were absent in the present case. He stated at pp. 670-71:

> It has long been recognized that limitations must be placed upon the time within which plaintiffs can launch actions. It is not difficult to understand why the courts have traditionally refused to construe legislation in a way that would take away a person's right to be free of a particular suit by retrospective interpretation.
>
> It does not appear to me that the same considerations ought to apply when a procedural bar to a particular person or class of persons seeking redress for wrongs occasioned to them is removed by statute.

11. Galligan J. then considered the effect of *The Family Law Reform Act, 1975* on s. 214. Section 214, as opposed to s. 7 of *The Married Woman's Property Act*,

was in his view a substantive provision. The presumption against retrospectivity, then, should apply to it. However, he concluded that the repeal of s. 214 followed as a matter of necessary implication from the removal of spousal immunity. The change to *The Insurance Act*

> ...was a consequential amendment made necessary by the removal of spousal immunity. I cannot accept that the Legislature would remove that immunity without intending to remove the prohibition against indemnity in actions that would be brought as a result of the removal of the immunity.
>
> ...
>
> To permit a spouse to be sued in tort by his or her spouse and to maintain an exemption of insurance against such liability would appear to me to be an injustice that the Legislature cannot have intended.

12. Galligan J. stated that he found it unnecessary to deal with whether s. 214 applied retrospectively to provide indemnity for the father. Since the husband as driver was an unnamed insured under the policy and s. 214 required the insurance company to indemnify him for liability for the damages he had caused his wife, the issue regarding indemnity for the father became moot.

13. In a brief endorsement, the Court of Appeal upheld the judgment of Galligan J. Citing *Manning*, *supra*, it added that the defence provided by s. 7 was in any case no longer available to James Angus since the parties had been divorced.

Analysis

14. The initial propositions recited by Galligan J. regarding retrospective effects are unexceptionable. There is a presumption that statutes do not operate with retrospective effect. "Procedural" provisions, however, are not subject to the presumption. To the contrary, they are presumed to operate retrospectively; see E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at pp. 202-3; *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403.

15. The distinction between substantive and procedural provisions, however, is far from clear. Thus, in the present context, Jessup J.A. in *Manning*, *supra*, determined that s. 7 was a procedural provision. This was done largely on the basis of Lord Denning's judgment in *Broom v. Morgan*, [1953] 1 Q.B. 597 (C.A.) *Broom* concerned the vicarious liability of an employer for injuries suffered by a woman due to the negligence of her husband when both husband and wife were employees of the defendant. The English legislation in question in *Broom* was essentially identical to that in issue here. Lord Denning had this to say, at pp. 609-10, about the husband's primary liability:

> It is plain, to my mind, that the husband owed a duty to everyone lawfully in the house to use reasonable care, and that he was negligent so far as all of them were concerned, including his wife. If the barman fell down the hole and was injured, the husband would clearly be guilty of a tort and be liable for the damage. So he is when his wife falls down the hole. The only difference is that by statute she is not permitted to sue him for it. His immunity does not rest on the theory that husband and wife are one. That fiction has no longer any place in our law. His immunity nowadays rests simply on the wording of section 12 of the Married Women's Property Act, 1882, which is preserved in this respect by section 1 of the 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.

16. With respect, the concluding distinction made by Lord Denning strikes me as artificial. There seems to be little content to a "liability" that is unenforceable. Lord Denning states that the husband has in fact committed a tort, though by operation of the "procedural" provision he simply cannot be held accountable for it. This position seems insupportable. In *Maxwell v. Callbeck*, [1939] S.C.R. 440, the plaintiff, while driving a motorcycle, was injured in a collision with the defendant's automobile in Alberta. The accident occurred on October 30, 1936, and the plaintiff brought action in negligence against the defendant on October 12, 1937. This Court agreed with the trial judge that the plaintiff was the author of his own misfortune but it further held that even if he were not solely at fault, his negligence had contributed to the collision. At the time of the accident, the common law prohibition against apportionment of liability among tortfeasors had not been removed. However, in the interval between the accident and the time when the action was brought, the province had enacted *The Contributory Negligence Act*, S.A. 1937, c. 18, which provided for such apportionment, and the plaintiff contended that he was entitled to rely on its provisions. The Court, however, briefly dismissed the argument on the basis of the "well established" rule of prospective application of statutes. If Lord Denning's argument were accepted, a case like *Maxwell* would have to be decided otherwise, since by contributing to the accident the contributory tortfeasor certainly committed a wrong; at common law he was simply not liable for it.

17. This example in my view exposes the poverty of the attempted distinction between a liability and its enforcement. A "tort" is a legal construct and is not to be confused with a "wrong" in the general sense. It only exists where the law says it exists, i.e., where the law provides a remedy. While an action may not entail

legal liability and yet be "wrong" in many senses, it is only wrong in the sense required by Lord Denning's argument if it is actionable.

18. Lord Denning determined that the husband's immunity from suit was "a mere rule of procedure" in large part because the initial common law rule from which the provision was descended had rested upon the now-discredited fiction that "husband and wife are one". In the absence of that fiction, the immunity is apparently, in Lord Denning's view, denuded of substantive content. What remains is purely procedural; *Broom*, at p. 609.

19. I also find it difficult to follow this argument. Whether or not the provision is based on the common law fiction is irrelevant. As Oliver J. put it in *Midland Bank Trust Co. v. Green (No. 3)*, [1979] 2 All E.R. 193 (Ch. D.), at p. 211:

> Of course, the fact that the law has evolved a rule, applying a particular fiction in given circumstances as a matter of policy does not involve the conclusion that a court is at liberty to alter the rule because it thinks that public policy has changed, although policy may be a cogent factor in ascertaining what the law is where there is no clear and certain guide in previous authority. What the court cannot do is to legislate to alter a clear and established rule . . . .

A provision is substantive or procedural for the purposes of retrospective application not according to whether or not it is based upon a legal fiction, but according to whether or not it affects substantive rights. P.-A. Côté, in *The Interpretation of Legislation in Canada* (1984), has this to say at p. 137:

> In dealing with questions of temporal application of statutes, the term "procedural" has an important connotation: to determine if the provision will be applied immediately [i.e. to pending cases], . . . the question to be considered is not simply whether the enactment is one affecting procedure but whether it affects procedure *only* and does not

> affect substantial rights of the parties." [Quoting *DeRoussy v. Nesbitt* (1920), 53 D.L.R. 514, 516.]

20. In the present case, it is difficult to see how procedure is being affected at all. The provision in question provides a complete defence to an action. Whatever may be the reasons for this, and whether one agrees or disagrees with them, the provision of a complete defence to an action, just as much as the creation of a cause of action itself, is a substantive matter.

21. Even if one assumes that the provision in question is procedural in some sense, the judicially created presumptions regarding the retrospective effect of procedural rules were not devised with this sort of distinction in mind. Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use. P. St. J. Langan, *Maxwell on Statutory Interpretation* (12th ed. 1969), at p. 222, puts the matter this way:

> The presumption against retrospective construction has no application to enactments which affect only the procedure and practice of the courts. No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and if an Act of Parliament alters that mode of procedure, he can only proceed according to that altered mode.

Alteration of a "mode" of procedure in the conduct of a defence is a very different thing from the removal of the defence entirely. The latter is in essence an interference with a vested right.

22. This is the reason for the judicially-created exception for limitations statutes. Although in some sense "procedural", they will not be presumed to have

retrospective effect since they may deprive a plaintiff of a right of action which he had at the time of the passage of the legislation; see *Upper Canada College v. Smith* (1920), 61 S.C.R. 413; *Merrill v. Fisher* (1975), 11 O.R. (2d) 551 (C.A.), at p. 552. In a decision more closely related to the present case, this Court has recently held that the extension or alteration of a period of limitation will not deprive a person of the defence he had acquired under the limitation period in existence before the change; see *Martin v. Perrie*, [1986] 1 S.C.R. 41. However much sympathy one may have for Diane Angus, in my respectful view, the conclusion that s. 7 is of a procedural nature such as to entail a retrospective interpretation cannot be accepted. The rule against retrospective application should certainly have effect in a context such as the present one, where a party is deprived of a defence to an action by the operation of the new statute; see *Foy v. Foy* (1978), 20 O.R. (2d) 747 (C.A.), at pp. 747-48 *per* Jessup J.A. *in obiter*. This is the whole point of the presumption. The law is leery of retrospective legislation to begin with; the legislature will not lightly be presumed to have intended a provision to have retrospective effect when the provision substantially affects the vested rights of a party.

23. Galligan J. also maintained that James Angus had no "right to injure" his wife and was, therefore, not being deprived of anything. The reality seems to me to be quite otherwise. A retroactive application of s. 7 would clearly deprive him of a complete defence to the action.

24. It is not necessary here to untangle the complex distinctions between substantive and procedural legislative provisions. The provision in this case is clearly substantive. In any case, whether the provision is deemed to be substantive or procedural, it is not one to which a presumption of retrospectivity can be applied. This

would amount to a serious deprivation of an acquired right of the husband, and it should not lightly be assumed that this was the intention of the legislature.

25. The Court of Appeal, relying on its earlier decision in *Manning*, *supra*, also held that the divorce of Diane and James Angus subsequent to the commencement of the action put the parties outside the purview of s. 7. It seems to me, however, that this conclusion is in the end based on the characterization of the spousal immunity as procedural, which I have already rejected. In the realm of civil liability, a "victim's rights are crystallized at the moment of the wrongdoing", Côté, *supra*, at p. 103. No subsequent change of mere status can deprive a party of a substantive right subsisting at that time. Lord Denning in *Broom*, at p. 610, agreed:

> In so far as [*Phillips v. Barnet*] 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 section 12, once it has attached, is not lost by divorce.

Phillips v. Barnet, [1875-76] 1 Q.B.D. 436, concerned precisely the same situation as we are confronted with here, i.e., a divorced woman attempting to sue her former husband for damages inflicted during the marriage. It is worthy of notice that *Broom*, and several other cases relied upon by the appellants, involved facts substantially different from those before us. They concerned the vicarious liability of an employer when husband and wife were both employees and the wife suffered injury as a result of the negligence of the husband. Thus the effect of the husband's immunity was indirect, whereas in the present case it is direct.

26. The preceding discussion is sufficient to dispose of the case against the husband and of that against the insurance company for any liability flowing

through him. Indeed, the insurance company would be absolved of the liability simply on the basis of the terms of the insurance policy. However, the liability of the father, Owen Hart, is in no way dependent on s. 7. As counsel for the appellant noted, for years children have had the right to sue their parents for damages resulting from the negligent operation of a motor vehicle. Section 214 of *The Insurance Act*, however, operated as a bar to recovery against the father's insurance company. This then, brings up the issue whether the repeal of s. 214 by s. 5 of *The Family Law Reform Act, 1975*, is to be construed as having retrospective effect.

27. The arguments made respecting s. 7 of *The Married Woman's Property Act* are equally applicable here. But the argument against the retrospective repeal of s. 214 is even stronger. To begin with, there can be no doubt that s. 214 is a substantive provision to which the ordinary principle against retrospective operation applies. Galligan J. agreed with this, but construed the repeal as retrospective because of the relationship of s. 5 to s. 7. In view of my conclusion on s. 7, this argument loses all its force.

28. This case is a good illustration of the policy reasons why statutes should not be given retrospective operation in the absence of an intention to do so that is either expressed in, or is necessarily implied by the statute. Substantial rights of insurance companies are affected by the decision of Galligan J. The reasoning regarding limitations Acts applies *a fortiori* to the situation of the insurance companies. Insurance companies calculate their premiums according to known risk factors. When the rates for the contract in question here were calculated, it was "known" that this particular risk--a suit in tort by Diane Angus against her husband--was precluded by s. 7. The insurance company relied upon that "knowledge"

in setting its rates. A retrospective change to that circumstance should not lightly be implied. In *Martin v. Perrie*, *supra*, this Court held that the change of a limitation period for medical malpractice actions (from one year from the date of the Act to one year from the date of discovery of the damage) could not be given retrospective effect since physicians could have relied on the older provision to order their affairs (e.g., by destroying records) in such a way that they would be prejudiced by the change. The analogy here, in my view, is clear.

Disposition

29. For these reasons, I would allow the appeal, set aside the order of the Ontario Court of Appeal and dismiss the action as against Sun Alliance Insurance Company. The action against James Angus is also dismissed. The action against Owen Hart should be returned to the trial judge to be dealt with as required by law. There should be no order as to costs.

Appeal allowed.

Solicitors for the appellant: Hendin, Hendin & Casey, Ottawa.

Solicitor for the respondent Diane Hart Angus: David M. McFadyen, Willowdale.

Solicitors for the respondents Owen Hart and James Angus: Bell, Baker, Ottawa.