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In *Cantwell v. Connecticut*,²⁶ this same Court added:

Thus the [First] Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.²⁷

The National Labor Relations Board, following these principles, has disallowed election campaigning for twenty-four hours prior to an election at which a collective bargaining representative is to be selected.²⁸ The court would not consider this a violation of the right of free speech. Similarly, the setting aside of an election where “prejudice prevailed” was not a violation of the First Amendment. Rather, it was a regulation of conduct in order to keep an ordered election, free from chaos, wherein the rights of all are sought to be protected in an atmosphere that makes protection possible.

Alan Sanders

Mark H. Plafker

LABOR LAW—TORT LIABILITY—MEMBER MAY SUE UNION FOR ITS NEGLIGENT CONDUCT.

Marshall v. Int'l Longshoremen's & Warehousemen's, Local 6 (Cal. 1962).

A member of the defendant labor union brought an action against the union and certain of its officers for personal injuries allegedly caused by the negligent maintenance of a parking lot. In the trial court the defendant's motion for a summary judgment was granted on the ground that the union was an unincorporated association and plaintiff's membership in the union at the time of the accident precluded recovery. The Supreme Court of California reversed, *holding* that a member of a labor union was entitled to sue the union for injuries sustained as a result of its alleged negligent act which he neither participated in nor authorized, and that any judgment that he may recover against the union can be satisfied from the funds and property of the union alone. *Marshall v. Int'l Longshoremen's & Warehousemen's Local 6*, 57 Cal. 2d 781, 371 P.2d 987 (Cal. 1962).

Traditionally, it has been held that an unincorporated association is not responsible to its members for its negligent torts.¹ The basic reasons

26. 310 U.S. 296, 60 S. Ct. 900 (1940).

27. *Id.* at 303-04, 60 S. Ct. at 903 (1940).

28. *Peerless Plywood Co.*, *supra* note 16.

1. *Carr v. No. Pac. Beneficial Ass'n*, 128 Wash. 40, 221 Pac. 979 (1924), (negligent selection of physicians and negligent hospital care furnished); *DeVillars v. Hessler*, 363 Pa. 498, 70 A.2d 333 (1950), (negligent operation of a steam table); *Duplis v. Rutland Aerie*, 118 Vt. 438, 111 A.2d 727 (1955), (negligent maintenance

for this rule have been that the association is not a legal entity and that each member of the association is liable as a principal under the doctrine of respondeat superior for the acts of the other members of the association.² For procedural purposes, the association may be sued in the name adopted by the association, but this in no way changes its substantive liability.³ Nevertheless, a member has been held to have a cause of action against the association for intentional harm caused by another member if the association authorized or ratified the wrongful conduct.⁴

Initially, the rule of non-liability of unincorporated associations was applied uniformly on the federal and state levels.⁵ However, in the federal courts, an unincorporated labor union was held responsible for its torts committed during a strike.⁶ Further, a judgment secured in such an action could be satisfied from union funds set aside for conducting strikes.⁷ Later, it was recognized that each member of a labor union was not liable under the doctrine of respondeat superior for the acts of its members, unless it was shown that he personally authorized or participated in the particular acts.⁸ Thus, at least as far as federal law was concerned, the principal effects arising from the non-liability of labor unions for the negligent acts of its members were swept away.⁹

The problem of suing a labor union has not been easily solved in the state courts.¹⁰ Deviations from the general rule have appeared, created both by judicial and legislative decree.¹¹ In some states, statutory change

of a stairway); *Hromek v. Gemeinde*, 238 Wis. 204, 298 N.W. 587 (1941), (negligent placement of a platform); *Koogler v. Koogler*, 127 Ohio St. 57, 186 N.E. 725 (1933), (negligent maintenance of a fire escape); *Marchitto v. Central Ry.*, 9 N.J. 456, 88 A.2d 851 (1952), (negligent prosecution of claims); *Roschmann v. Sanborn*, 315 Pa. 188, 172 Atl. 657 (1934), (negligent operation of a bus); *Mastrini v. Nuova Loggia Monte Grappa*, 1 Pa. D.&C.2d 245 (1954), (negligent maintenance of lodge's floor).

2. *Supra* note 1.

3. *Hromek v. Gemeinde*, *supra* note 1; *Koogler v. Koogler*, *supra* note 1; *Martin v. Curran*, 303 N.Y. 276, 101 N.E.2d 683 (1951); *Inglis v. Operating Eng'rs Local Union No. 12*, 18 Cal. Rptr. 187 (Dist. Ct. App. 1961), *vacated*, . . . Cal. 2d . . ., 373 P.2d 467 (1962); *Mastrini v. Nuova Loggia Monte Grappa*, *supra* note 1. *But see* *Fray v. Amalgamated Meat Cutters*, 9 Wis. 2d 631, 101 N.W.2d 782 (1960).

4. *United Ass'n of Journeymen v. Bordan*, 328 S.W.2d 739 (Tex. 1959); *Inglis v. Operating Eng'rs Local Union, No. 12*, *supra* note 3.

5. *Supra* note 1.

6. *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 42 S. Ct. 570 (1922), established the "merely procedural rule that any unincorporated association may sue or be sued to enforce a federal substantive right." *But see* *Comment*, 66 *YALE L.J.* 712, 721 (1957).

7. *United Mine Workers v. Coronado Coal Co.*, *supra* note 6.

8. *United States v. White*, 322 U.S. 694, 64 S. Ct. 1248 (1944).

9. *Supra* notes 7 and 8.

10. *Supra* note 1.

11. CAL. CIV. PROC. CODE § 388: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability." COLO. CODE OF CIV. PRO. § 14 (1955) is almost identical with California. N.Y. GEN. ASSOC. LAW § 13 permits an action against the association when it can be shown that all

only permits the labor unions to appear as defendants.¹² Several states, by judicial decision, have recognized that the member will not be liable for the acts of his associates unless he assents thereto.¹³ One state court, even with a statute permitting the labor unions to be sued, has decided that the statute does not permit the association to be sued as an entity.¹⁴ Other states have interpreted their statutes more liberally and have permitted such suits.¹⁵ The California courts, using Section 388 of the Code of Civil Procedure as a basis for their findings, have recognized the entity theory,¹⁶ and have used this as a basis for holding labor unions liable to suit in a variety of situations.¹⁷ The *Marshall* case, in interpreting § 388, has, in effect, declared that the statute changed the substantive tort liability of the members from several to joint, by limiting their liability to the extent of union funds and property.¹⁸ Understandably, part of the conflict between the states in handling the problem is caused by the varied wording of their statutes,¹⁹ but recently, in the absence of any statute at all, Wisconsin, in *Fray v. Amalgamated Meat Cutters*,²⁰ held that the labor union is an entity, and may be sued by a member where it negligently violated a duty to process a grievance against an employer for unlawful discharge, personally owed to the member.²¹ The *Marshall* and *Fray* cases have demonstrated that, even without the aid of a legislative decree, a court may declare a labor union an entity, and hold it responsible to its members

permits an unincorporated association to sue or be sued as an entity under its own name. *Fray v. Amalgamated Meat Cutters*, *supra* note 3.

12. California and New York statutes, *supra* note 11.

13. *Sweetman v. Barrows*, 263 Mass. 349, 161 N.E. 272 (1928); *Thomas v. Dunne*, 131 Colo. 20, 279 P.2d 427 (1955); *Fray v. Amalgamated Meat Cutters*, *supra* note 3; *Michaels v. Hillman*, 112 Misc. 395, 183 N.Y. Supp. 195 (Sup. Ct. 1920); *Moore v. Dist. 50 United Automobile Workers*, 131 N.E.2d 462 (Ohio Com. Pl. 1954).

14. *Prin v. DeLuca*, 218 N.Y.S.2d 761 (Sup. Ct. 1961).

15. *E.g.*, Colorado, in *Thomas v. Dunne*, *supra* note 13; Ohio, in *Lyons v. American Legion Post No. 650 Realty Co.*, 172 Ohio St. 331, 175 N.E.2d 733 (1961).

16. *Artanza v. San Jose Scavenger Co.*, 181 Cal. 627, 185 Pac. 850 (1919); *Bollman Co. v. Bachman & Co.*, 16 Cal. App. 589, 117 Pac. 690 (Dist. Ct. App. 1911); *Craig v. San Fernando Furniture Co.*, 89 Cal. App. 167, 264 Pac. 784 (Dist. Ct. App. 1928); *Ferry v. N. Pac. Stages*, 112 Cal. App. 398, 296 Pac. 679 (Dist. Ct. App. 1931).

17. *Cason v. Glass Bottle Blowers Ass'n*, 37 Cal. 2d 134, 231 P.2d 6 (1951), (union made to give suspended member a fair hearing); *DeMille v. Am. Fed'n Radio Artists*, 31 Cal. 2d 139, 187 P.2d 769 (1947), (union could spend money for any purpose calculated to promote objects of the association); *Elevator Operators v. Newman*, 30 Cal. 2d 799, 186 P.2d 1 (1947), (member could sue union for breach of contract); *Mooney v. Bartenders Local 284*, 48 Cal. 2d 841, 313 P.2d 857 (1957), (union member has a right to inspect financial records); *Shafer v. Registered Pharmacists Union*, 16 Cal. 2d 379, 106 P.2d 403 (1940), (union shop agreement runs between employer and union as an entity); *Deeney v. Hotel and Apartment Clerks' Union*, 57 Cal. App. 2d 1023, 134 P.2d 328 (1943), (member could sue union for breach of contract).

18. The *Marshall* decision will be significant in securing a similar interpretation for states with statutes like California, *e.g.*, Colorado and Ohio, *supra* note 11. The wording of the New York statute, *supra* note 11, is too restrictive to permit a similar interpretation.

19. *Supra* note 11 and statutes cited.

20. *Supra* note 11.

21. The *Fray* decision will be helpful to states that do not have any statute, or that have a restrictive statute, as, for example, New York, *supra* note 11, in reaching a conclusion similar to that of the *Marshall* case.

for its negligent torts to the extent of the amount of union funds and property available.

Although the labor union may technically be an unincorporated association, it is obvious that today's union is more like a corporation than a common law unincorporated social or fraternal order. Thus, in a suit by a member against the union, the rules applicable to corporations, including permitting suit against the entity and disallowing imputed negligence to "owners" of the entity, should be applied. It was the idea of smallness, voluntary participation, and lack of financial independence that led the courts to the common law rule that an unincorporated association is not a legal entity and that negligence of a member is imputed to every other member. This reasoning does not apply to modern labor unions. The membership of the modern union is constantly expanding. Increases in membership exceed the rate of attrition caused by death or quitting. The large membership in unions today has conferred upon them the collateral benefits of power and importance. A large labor union has the power to completely immobilize an entire city through a strike. Few political candidates are successful without the vote of "organized labor." The modern labor union lacks much of the voluntary participation common to the social or fraternal order. In fact, many members are required to join a union if they desire work in a particular factory or industry. The increase in size has brought a corresponding decrease in membership control of policy and operations. The union has been forced, to some extent, to adopt corporate methods of operation, including management through elected officers. These elected officers, and not the individual members, determine the policy of the union. Today's labor union is in a better financial position to absorb the loss caused by an injury to a member than are the members as individuals. Any loss that may be incurred as the result of a suit will be distributed over many members. Furthermore, the union may easily acquire liability insurance to protect itself.

Therefore, it appears that many of the reasons for the non-entity theory and imputed negligence theory are not present in the modern labor union. It would seem contrary to public welfare to declare the labor union immune from suit in circumstances such as are present in the *Marshall* case. Giving the labor union the capacity to be sued, and not imputing the negligence to its members, could be accomplished by judicial interpretation of existing statutes, as in the *Marshall* case (provided the statutes are broad enough), or by judicial decree, as in the *Fray* case. The California Supreme Court's decision is a proper judicial interpretation of the statute, and the court properly limited the liability of the union to the extent of union funds and property. The decision represents a logical progression of the law as concerns labor unions.

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