UNINCORPORATED ASSOCIATIONS: REJECTION OF ASSOCIATIONAL IMMUNITY FROM TORT LIABILITY TO MEMBERS

THE recent decision of the California Supreme Court in *Marshall v. International Longshoremen's Union*[1] constitutes the first rejection of the generally recognized rule that an unincorporated association[2] is immune from tort liability to its members.

In the *Marshall* case, an active member of an unincorporated labor union brought an action against the union and two of its officers to recover damages for personal injuries suffered when he fell over an obstruction in a parking lot owned and maintained by the union. Plaintiff alleged negligence of the defendants in maintaining the parking lot and in failing to warn him of or guard him from the hazardous obstruction. The union moved for summary judgment, asserting its immunity from suit by virtue of its unincorporated status and plaintiff's membership at the date of the injury. The trial court granted the union's motion for summary judgment and the District Court of Appeal affirmed.[3]

On appeal the Supreme Court of California reversed, unanimously holding that the plaintiff was entitled to sue the unincorporated union as an entity for injuries sustained as the result of the alleged negligent acts which he did not authorize and in which he

[1] 371 P.2d 987, 22 Cal. Rptr. 211 (1962), *reversing* 17 Cal. Rptr. 343 (Dist. Ct. of Appeal 1961). This was the first judicial determination of the right of a member of an unincorporated association in California to sue his association for personal injuries resulting from the negligence of its agent.

This decision was followed in Inglis v. Operating Eng'rs Union, 373 P.2d 467, 23 Cal. Rptr. 403 (1962), *affirming* 18 Cal. Rptr. 187 (Dist. Ct. of Appeal 1961), in which the California Supreme Court sustained the right of a member to maintain an action against his unincorporated union for injuries received from an assault and battery by union officials and members while attending a regular union meeting.

[2] A frequently quoted definition of an unincorporated association is that it is a body of persons acting together, without a charter, but in a manner of incorporated bodies, for the purpose of some common enterprise. Hecht v. Malley, 265 U.S. 144, 157 (1924).

Examples of unincorporated associations include joint stock associations, syndicates, partnerships, college fraternity chapters, political parties, chambers of commerce, trade associations, women's clubs, professional clubs and societies, and local units of such organizations as labor unions, the American Legion, and other social and fraternal orders. As the list of examples above indicates, unincorporated associations may be organized not only to conduct business but also for social, literary, political, religious, scientific, professional, charitable, and an undefined number of other purposes. 4 AM. JUR. *Associations & Clubs* § 2 (1936); 11 U. PITT. L. REV. 308 (1950).

[3] 17 Cal. Rptr. 343 (Dist. Ct. of Appeal 1961).

did not participate.[4] The court, however, expressly limited its holding to unincorporated labor unions, "leaving to the future the development of rules to be applied to other types of unincorporated associations."[5]

In holding that the member could bring a neligence action against his unincorporated union as an entity, the court pointed out that the generally recognized associational immunity[6] from such actions rests upon two considerations. These considerations are the non-entity character of the unincorporated association and the operation of the principle of respondeat superior making each member liable as a principal for the acts of the association's officers and agents.[7] The court indicated, however, that these two foundations have been progressively undermined by both federal and state court decisions.

[4] The court also held that any judgment which the plaintiff-member might recover should be satisfied solely from the funds and property of the unincorporated association. 371 P.2d at 991, 22 Cal. Rptr. at 215.

[5] *Id.* at 991 n. 1, 22 Cal. Rptr. at 215 n. 1.

[6] In the briefs filed in the District Court of Appeal, the plaintiff-appellant contended that a minority view denying such immunity existed and cited Saltsman v. Shults, 21 N.Y. (14 Hun.) 256 (Sup. Ct. 1878); Gillette v. Allen, 269 App. Div. 441, 56 N.Y.S.2d 307 (1945); and United Ass'n of Journeymen v. Borden, 160 Tex. 203, 328 S.W.2d 739 (1959) as supporting cases. Brief for Appellant, p. 7, Marshall v. International Longshoremen's Union, 17 Cal. Rptr. 343 (Dist. Ct. of Appeal 1961). Respondent sought to distinguish these cases on their factual situations. Brief for Respondent, pp. 12-13. The District Court of Appeal accepted the respondent's distinctions; the California Supreme Court did not mention either the supposed minority cases or the respondent's attempted distinctions.

The two New York cases involved negligence actions against unincorporated joint stock associations which were covered by a special statute treating them as if they were incorporated entities. This statute had been previously interpreted as sufficiently inclusive to permit suit by shareholder associates. Westcott v. Fargo, 61 N.Y. (16 Sickles) 542 (1875).

The court in *Borden* distinguished between negligence and an intentional tort and allowed suit by a member who had suffered injury from an intentional wrong by a union agent which was ratified by the defendant union. It added in dicta that the member could not have recovered for negligence alone. Texas courts support the general associational immunity. Atkinson v. Thompson, 311 S.W.2d 250 (Tex. Civ. App. 1958).

[7] Because the unincorporated association is regarded as an aggregate rather than as an entity separate and distinct from its membership, any agent employed by the group is not technically the agent of the association but is the agent of each of the members who compose the association. As a principal for the agent, each member is thus answerable for the tortious conduct of the agent. If the agent's tortious conduct should injure a member of the association, that member is barred from suing the other association members by the imputation of the common agent's negligence to him as well as to all the other member-principals. The effect of the imputation of the agent's negligence is to make the injured member guilty of contributory negligence. Annot., 14 A.L.R.2d 473-74 (1950).

The first breakthrough came in *United Mine Workers v. Coronado Coal Co.*,[8] in which the Supreme Court held that a labor union was suable as an entity in the federal courts for the tortious acts of its members and agents, despite its unincorporated status and the absence of a federal statutory provision expressly authorizing such a suit.[9] Thereafter, another Supreme Court decision restricted the strict application of the doctrine of respondeat superior by holding that civil liability for the wrongful acts of the union or its agents could only be imposed upon those members who either personally authorized or participated in the tortious conduct.[10] A similar development occurred in the state courts, both in the treatment of unincorporated unions as entities for a variety of purposes[11] and in the limitation of the liability of members for the torts of the union officers and agents.[12]

The court in the instant case also relied upon policy factors to support its departure from the general rule of associational immunity. It noted that many unincorporated associations presently conduct their day-by-day operations and affairs through elected officials and employed agents over whom the individual members have little or no control. It referred to judicial decisions which recognize that with the frequent separation of membership and management which

[8] 259 U.S. 344 (1922).

[9] A similar decision was reached in England two decades earlier in Taff Vale Ry. v. Amalgamated Soc'y of Ry. Servants, [1901] A.C. 426.

[10] United States v. White, 332 U.S. 694 (1944).

[11] See *e.g.*, Mooney v. Bartenders Union, 48 Cal. 2d 841, 313 P.2d 857 (1957) (union treated as corporation for purpose of member's inspection of financial records); De Mille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 187 P.2d 769 (1947), *cert. denied*, 333 U.S. 876 (1948) (member dues and assessments become association property alone); Oil Workers v. Superior Court, 103 Cal. App. 2d 512, 230 P.2d 71 (1951) (union as entity found guilty of contempt for violating temporary restraining order); Amalgamated Clothing Workers v. Kiser, 174 Va. 229, 6 S.E.2d 562 (1939) (union constitution recognized as binding contract between members and union as entity); Local 261, UAW v. Schulze, 3 Wis. 2d 479, 89 N.W.2d 191 (1958) (union as entity allowed to sue member to collect unpaid dues).

[12] See *e.g.*, Sullivan v. Barrows, 303 Mass. 197, 21 N.E.2d 275 (1939); Michaels v. Hillman, 112 Misc. 395, 183 N.Y. Supp. 195 (Sup. Ct. 1920); Moore v. District 50, UMW, 131 N.E.2d 462 (Ohio Ct. Common Pleas 1954); Fray v. Amalgamated Meat Cutters, 9 Wis. 2d 631, 101 N.W.2d 782 (1960).

In determining the liability of members for the acts of an association agent, courts distinguish between commercial unincorporated associations and voluntary, non-profit associations. Members of a commercial association are liable as partners, while the liability of members of a non-profit association is governed by agency principles. Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955); Azzolina v. Order of Sons of Italy, 119 Conn. 681, 179 Atl. 201 (1935); Stone v. Guth, 232 Mo. App. 217, 102 S.W.2d 738 (1937). See BALLENTINE, CORPORATIONS § 2a (rev. ed. 1946).

exists in many unincorporated associations, especially labor unions,[13] the individual members are not in any true sense principals of the union officers and agents and thus should not be personally bound by their acts.

The court further noted that legislatures and courts in recent years have increasingly regarded unincorporated associations as "de facto" entities for some purposes.[14] It also mentioned the continuity of many modern associations despite changes in their membership and the organized, institutional activity in which they engage as additional factors demonstrating their status as an entity, from a practical standpoint. Moreover, there often exists in these institutional associations a group or organizational interest which is distinguishable from the individual interests of the members,[15] just

[13] For factual situations to which this principle is relevant, see United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922); McClees v. Grand Int'l Bhd. of Locomotive Eng'rs, 59 Ohio App. 477, 18 N.E.2d 812 (1938).

[14] At common law an unincorporated association has no entity or existence independent of its members and may not sue or be sued in its common name. BALLANTINE, CORPORATIONS § 2a (rev. ed. 1946). Enabling statutes in many jurisdictions and Rule 17(b) of the Federal Rules of Civil Procedure have altered that situation and now allow an unincorporated association to engage in litigation in its own name. The state enabling statutes show great diversity in their provisions. See, *e.g.*, CONN. GEN. STAT. ANN. § 52-76 (1960); N.J. REV. STAT. § 2A:64-1 (1951); N.C. GEN. STAT. § 1-69.1 (Supp. 1961); OHIO REV. CODE ANN. § 1745.01 (Page Supp. 1962); VT. STAT. ANN. tit. 1 § 128 (1958). These statutes have been interpreted to be solely procedural in nature and not to establish any substantive liability of the associations to their members. Huth v. Humboldt Stamm, 61 Conn. 227, 23 Atl. 1084 (1891); Koogler v. Koogler, 127 Ohio St. 57, 186 N.E. 725 (1933). The Connecticut statute is unique in that it expressly provides that a member shall be able to bring suit against his unincorporated association. CONN. GEN. STAT. ANN. § 52-76 (1960).

The California statutory provision provides: "When two or more persons, associated in any business, transact such business under a common name, . . . the associates may be sued by such common name, . . . CAL. CIV. PROC. CODE § 388. Although restricted to business associations, the statute has been interpreted to embrace a variety of enterprises, including labor unions. Armstrong v. Superior Court, 173 Cal. 341, 159 Pac. 1176 (1916).

For a general discussion of unincorporated associations in California, including a suggested statutory change to allow these associations to sue in their own name, see 39 CALIF. L. REV. 264 (1951); 35 CALIF. L. REV. 115 (1947).

Section 301(a) of the Labor-Management Relations Act (Taft-Hartley Act) further exemplifies the recognition of some unincorporated associations as entities by providing for a suit by or against an unincorporated labor union in the federal courts for breach of a collective bargaining agreement without regard for the jurisdictional amount or the citizenship of the parties involved. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

[15] "Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members." United States v. White, 322 U.S. 694, 701 (1944). *Accord*, United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 385 (1922); DeMille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 149, 187 P.2d 769, 776 (1947), *cert. denied*, 333 U.S. 876 (1948). *Cf.*, Superior Engraving Co. v. NLRB, 183 F.2d 783, 795 (7th Cir. 1950), *cert. denied*, 340 U.S. 930 (1951),

as the interest of the corporation is distinguishable from that of its shareholders. Referring to labor unions, the court declared that unincorporated associations can "approximate corporations in their methods of operation and powers."[16] Evidence of such an approximation may be seen in the comprehensive political activity, complex internal organizational hierachy, extensive ownership of real and personal property, independent financial status resulting from accumulated and invested funds, and other manifestations of the practical power possessed by some present-day unincorporated associations.

Although the court left them unarticulated, at least two additional policy factors support a rejection of the associational immunity. The first is the anomaly which exists under such an immunity, whereby the association is liable to a non-member[17] but not to a member although both parties are injured at the same time by the same tortious act of an association's agent. Reality seems to be disregarded when recovery from the association is denied one of the two injured parties upon the fiction that the injured member was a co-principal engaged in a joint enterprise and consequently is barred by imputed negligence from suing the other co-principals in their collective capacity for the tort of a common agent.[18] Courts have long held

concluding that the Supreme Court cases now establish that "the entity of the association [union] is as much separate and apart from the individual members as that of a corporation is from its stockholders."

[16] Oil Workers v. Superior Court, 103 Cal. App. 2d 512, 571, 230 P.2d 71, 106 (1951).

[17] Unincorporated associations are required to exercise the same care to avoid injury to others as are corporations and individuals. Feldman v. North British & Mercantile Ins. Co., 137 F.2d 266 (4th Cir. 1943); Pandolfo v. Bank of Benson, 273 Fed. 48 (9th Cir. 1921); 4 AM. JUR. *Associations & Clubs* § 43 (1936).

[18] Yet courts have consistently classified the unincorporated association as a joint enterprise, at least for purposes of negligence suits by its members, and have denied recovery to the injured member on the conceptualistic reasoning stated above. For decisions from all the American jurisdictions which have sustained the associational immunity from negligence to its members, see Goins v. Missouri Pac. Sys. Fed'n of Maintenance Employees, 272 F.2d 458 (8th Cir. 1959); Gilbert v. Crystal Fountain Lodge, 80 Ga. 284, 4 S.E. 905 (1887); Martin v. Northern Pac. Beneficial Ass'n, 68 Minn. 521, 71 N.W. 701 (1897); Marchitto v. Central R.R., 9 N.J. 456, 88 A.2d 851 (1952); Koogler v. Koogler, 127 Ohio St. 57, 186 N.E. 725 (1933); De Villars v. Hessler, 363 Pa. 498, 70 A.2d 333 (1950); Atkinson v. Thompson, 311 S.W.2d 250 (Tex. Civ. App. 1958); Duplis v. Rutland Aerie, 118 Vt. 438, 111 A.2d 727 (1955); Carr v. Northern Pac. Beneficial Ass'n, 128 Wash. 40, 221 Pac. 979 (1924); Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587 (1941).

As may be seen, less than a dozen jurisdictions have passed upon the question of the member's right to recover from his unincorporated association for injuries resulting from the negligence of an association agent, and an even smaller number have decided the issue when a union member and his unincorporated labor union were involved.

that an unincorporated association should properly bear the risk that its officer or agent may injure an outside party.[19] Once the concept of the unincorporated association as a joint enterprise lacking a separate entity is rejected, there is no valid reason why the association should not similarly bear the risk that its officer or agent may injure a member.

A second factor which the court did not discuss is the availability of liability insurance at a reasonable cost to the association.[20] The denial to the association of immunity from suit by its members for the negligence of its agents thus works no undue financial hardship upon the association.[21] Moreover, the association is in a more advantageous position than the individual member to guard against the negligence of its agent by means of insurance. It would therefore seem to accomplish sound and desirable results to make the association responsible to its members for the tortious conduct of its agents.

In addition to its rejection of a generally accepted rule of associational law, the *Marshall* case is significant for several other reasons. It is apparently the first American decision according to a member of an unincorporated association a status equivalent to that of an outside party for purposes of suing the association for a breach of a *common* duty,[22] such as the duty to maintain the premises and

[19] See note 17 *supra*.

[20] It is now well established that administration of risk is an important element in the determination of liability. See PROSSER, TORTS § 62 (2d ed. 1955); Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584-85 (1929).

[21] It is probable that many unincorporated associations already carry liability insurance to protect their assets from judgments in favor of non-members. The increase in the number of people who might recover judgments against the association would likely result in only a modest increase in the annual insurance premium. The cost of insurance to guard against the torts of its agents would seem a proper cost of operation which should be borne by the association in return for the legal privileges accorded to it, especially when the alternative is that an innocent member might not be compensated for an injury. For a discussion of this point, see 13 STAN. L. REV. 123, 126 (1960).

[22] This distinction between the *common* and *personal* duty owed by an unincorporated association to its members was apparently first articulated in Fray v. Amalgamated Meat Cutters, 9 Wis. 2d 631, 101 N.W.2d 782 (1960). The Wisconsin court there allowed suit by a member against his union for financial injuries resulting from negligent representation. It spoke of a *personal* duty owed to the member by reason of his membership and the function of the union in the collective bargaining process.

The Wisconsin court distinguished this *personal* duty from a *common* duty like that involved in Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587 (1941) where recovery from the union was denied a union member injured from the negligent maintenance of the meeting hall by union officials. The court in *Hromek* said that

equipment of the association in a safe condition. A few liberal courts have previously limited the general rule of associational immunity by permitting suit against labor unions by members who were financially injured by the wrongful conduct of a union agent in the performance of certain administrative proceedings in the collective bargaining process.[23] This development has allowed actions by members of labor unions for what the courts term a breach of a *personal* duty[24] owed individually to the member solely because of his associational membership, such as the duty to promptly and properly register the member's grievance with the employer or to request arbitration for the member's alleged unlawful discharge. However, it has not altered the general associational immunity from suit for tortious conduct of its agents which is not of this special character. The *Marshall* opinion contains no mention of this distinction between the *personal* and *common* duty owed by the association to its members. It would thus appear that the court intended for unincorporated labor unions to respond in damages for *any* injury, physical or financial, suffered by a member as the result of *any* negligence of an association agent.

The *Marshall* decision is also significant because it limited the member's recovery from the association to the funds and assets held by the association.[25] If an injured member is to assert the quasi-

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the negligent acts committed by the union officials were done as much for the benefit of the plaintiff-member as for any of the other union members and that the plaintiff thus could not sue her co-principals for the derelictions of a common agent.

By resorting to this distinction in the character of duty, the court in *Fray* was able to afford a remedy to an innocent injured member without openly repudiating *Hromek*.

[23] *Compare* Fray v. Amalgamated Meat Cutters, *supra* note 22 (negligent representation) *and* United Ass'n of Journeymen v. Borden, 160 Tex. 203, 328 S.W.2d 739 (1959) (intentional tort of agent while acting adverse to member's interest) *with* Marchitto v. Central R.R., 9 N.J. 456, 88 A.2d 851 (1952) *and* Brotherhood of R.R. Trainmen v. Allen, 230 S.W.2d 325 (Tex. Civ. App. 1950), *cert. denied*, 340 U.S. 934 (1951), for recovery by member on tort theory.

Recovery may be sustained on the theory that the union has undertaken a contractual obligation to represent the member in dealings with the employer. Glover v. Brotherhood of Ry. Clerks, 250 N.C. 35, 108 S.E.2d 78 (1959). *Cf.*, Bonsor v. Musicians' Union, [1956] A.C. 104.

For dicta to the effect that a union ought to be liable to a member for its arbitrary, negligent, or bad faith conduct in representing or failing to represent him in employment relations, see Guszkowski v. United States Trucking Corp., 162 F. Supp. 847 (D.N.J. 1958); Jenkins v. Wm. Schluderburg-T.J. Kurdle Co., 217 Md. 556, 144 A.2d 88 (1958); Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959).

[24] See note 22 *supra*.

[25] Such a holding is of itself another manifestation of the judicial recognition of

corporate status of the association as the basis for allowing him to sue it as an entity, it seems reasonable that he should likewise be bound by the limited liability characteristic of corporateness and be allowed to look only to the association assets in satisfaction of his judgment.[26]

In conclusion, the California court's rejection of the associational immunity as applied to unincorporated labor unions seems justified and in keeping with the practical realities of the association involved. By expressly limiting its decision to unincorporated labor unions, the court left unanswered the question of which, if any, other unincorporated associations will hereafter be held liable for negligence to their members. The current judicial trends noted in the reasoning of the instant case, the supporting policy factors, and the nature of many modern unincorporated associations demand an extension of the *Marshall* holding to those unincorporated associations which have operational and organizational characteristics similar to those of unions: *i.e.*, continuity, separation of membership and management, extensive associational activity conducted by employed agents, a distinguishable associational interest, accumulated financial resources, and an available means of shifting the financial burden of adverse judgments through liability insurance.

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unincorporated associations as entities. At common law there could be no impositon of collective liability upon the association because of its non-entity character, and the individual members were severally liable for the entire amount of any judgment recovered by a third party. Sperry Prods., Inc. v. Association of Am. R.Rs., 132 F.2d 408, 410 (2d Cir. 1942), *cert. denied*, 319 U.S. 744 (1943); Pandolfo v. Bank of Benson, 273 Fed. 48 (9th Cir. 1921); Comment, *Unions as Juridical Persons*, 66 YALE L.J. 712, 737 (1957).

Collective liability has been imposed upon unincorporated associations both by judicial decision and by statutory enactment. See, *e.g.*, United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 391 (1922); Thomas v. Dunne, 131 Colo. 20, 31, 279 P.2d 427, 432 (1955); Labor-Management Relations Act (Taft-Hartley Act) § 301 (b), 61 Stat. 156 (1947), 29 U.S.C. § 185 (b) (1958); CAL. CIV. PROC. CODE § 388; N.C. GEN. STAT. § 1-69.1 (Supp. 1961).

[26] *Accord*, Lyons v. American Legion Post Realty Co., 172 Ohio St. 331, 175 N.E.2d 733 (1961); Fray v. Amalgamated Meat Cutters, 9 Wis. 2d 631, 639, 101 N.W.2d 782, 786 (1960) (dictum).

Statutes in some jurisdictions expressly provide that a judgment against an unincorporated association sued as an entity can only be enforced against the association and cannot be satisfied from the property of the individual members. OHIO REV. CODE ANN. § 1745.02 (Page Supp. 1962); *contra*, N.J. REV. STAT. § 2A:64-4 (1951).

The *Marshall* decision affords the injured member an election of remedies, for he can proceed either against the association or the individual wrongdoing agent. Where an association has limited assets and has not secured liability insurance coverage, it may be more advantageous for the member to sue the agent rather than the association. However, since the association is likely to have more extensive financial resources than the individual agent, the right to sue the association makes it more probable that an injured member will actually receive satisfaction of any judgment entered for him.