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Negligence - Breach of Duty - Liability of Telephone Company for Failure to Relay Fire Alarm

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NEGLIGENCE—BREACH OF DUTY—LIABILITY OF TELEPHONE COMPANY FOR FAILURE TO RELAY FIRE ALARM—Upon discovering a fire within his business building, plaintiff immediately went to the telephone and dialed the operator. After telling her his address and requesting that she call the fire department, he left the telephone to fight the fire. The message was not transmitted. When the fire department finally arrived in response to an alarm by a neighbor, the fire was out of control and the entire building was destroyed. Plaintiff sought damages, alleging that the telephone company held itself out to the public as willing to convey messages in case of emergency, and that failure to transmit his message caused the building to be destroyed. The trial court granted defendant's motion for summary judgment. On appeal, *held,* reversed. While defendant was under no duty to deliver messages, if it voluntarily assumed such a duty in case of emergency, it must exercise reasonable care in performing it

or become liable in tort to those who rely upon such assumption of duty. *Abresch v. Northwestern Bell Telephone Co.*, (Minn. 1956) 75 N.W. (2d) 206.

Ordinarily a telephone subscriber may not recover from a telephone company special damages caused by a failure of services.[1] If the action is regarded as based upon a subscription contract, the rule of *Hadley v. Baxendale*[2] is usually imposed, and this type of liability is found to have been beyond the contemplation of the parties.[3] Strong arguments have been made in favor of imputing knowledge of emergency uses of telephone service to the companies,[4] but the limitation is quite uniformly imposed. Similar difficulties are confronted when the action is viewed as one in tort for negligence. Courts generally treat the damages as too remote and speculative and find no proximate cause as a matter of law.[5] The typical statement in cases involving reporting of fires is that too many assumptions must be made to trace the damage to the failure of service,[6] although naturally this varies with the fact situation. Where the telephone company simply fails to relay a message at the subscriber's request, there is no breach of contract, for it is normally not within the function of telephone companies to relay messages.[7] It may be said that acceptance of a message by the operator forms a new contract which binds the company because the practice is within the operator's apparent authority,[8] but this analysis is open to criticism. Consideration for this second contract might be surmounted by theories of detrimental reliance by the subscriber, but it clearly is not the custom for operators to accept messages and make contracts for their employers in modern times.[9] In any event, the express prohibition against accepting messages utilized by telephone companies makes this question moot.[10] A plaintiff is thus left without a

1 The various theories of liability are discussed in 3 DRAKE L. REV. 82 (1954).

2 9 EX. 431, 156 Eng. Rep. 145 (1854).

3 Southwestern Bell Tel. Co. v. Norwood, 212 Ark. 763 207 S.W. (2d) 733 (1948). Emery v. Rochester Tel. Corp., 271 N.Y. 306, 3 N.E. (2d) 434 (1936), noted in 46 YALE L. J. 167 (1936); Barrett v. New England Tel. & Tel. Co., 80 N.H. 354, 117 A. 264 (1922). See also Kerr Steamship Co. v. Radio Corp. of America, 245 N.Y. 284, 157 N.E. 140 (1927).

4 See the dissent in Emery v. Rochester Tel. Corp., note 3 supra, at 310. For argument against imputing notice, see 33 MINN. L. REV. 191 (1949).

5 Lebanon, Louisville, & Lexington Tel. Co. v. Lanham Lumber Co., 131 Ky. 718, 115 S.W. 824 (1909); Volquardsen v. Tel. Co., 148 Iowa 77, 126 N.W. 928 (1910). Many of the cases are discussed in Foss v. Pacific Tel. & Tel. Co., 26 Wash. (2d) 92, 173 P. (2d) 144 (1946). The court in the principal case follows the liberal view and lets the question of proximate cause go to the jury. Cf. Boldig v. Urban Tel. Co., 224 Wis. 93, 271 N.W. 88 (1937).

6 Volquardsen v. Tel. Co., note 5 supra, at 83.

7 Mentzer v. New England Tel. & Tel. Co., 276 Mass. 478, 177 N.E. 549 (1931), noted in 45 HARV. L. REV. 393 (1931), 11 BOST. UNIV. L. REV. 600 (1931), 80 UNIV. PA. L. REV. 316 (1931).

8 Cumberland Tel. & Tel. Co. v. Brandon, 154 Ky. 644, 157 S.W. 1119 (1913). But see Mentzer v. New England Tel. & Tel. Co., note 8 supra.

9 See Clay v. Chesapeake & Potomac Tel. Co., (D.C. Cir. 1950) 184 F. (2d) 995.

10 See the regulation quoted in principal case at 209.

remedy unless he can establish a tort duty to relay the message and then seek recovery in a negligence action. In the principal case defendant is said to have assumed a duty if it represents that it will deliver messages in certain cases of emergency, and it is consequently liable for failure to perform when plaintiff is injured by his reliance upon such representations. This result is in accord with the modern approach to the problem of enforcing gratuitous promises,[11] as opposed to the old view that there was no liability for non-performance.[12] The reliance doctrine is applicable to this situation because plaintiff did have an alternative means of summoning the fire department—he could have called it directly. While the principal case illustrates a liberal view toward both the enforcement of gratuitous promises and the presentation of the proximate cause question to the jury, its scope is limited to the comparatively rare situation before it. The assumption of duty approach utilized in the principal case is inapplicable to the ordinary failure of service situation since there is no effective alternative to the use of the telephone in an emergency.[13] The telephone is the best and often only means of communication available to the subscriber. In the light of the common use of the telephone for emergency purposes and the fact that this is one of the principal reasons for subscribing, it would seem not unreasonable to charge the company with knowledge of this purpose and find some degree of liability to have been contemplated by the parties to the subscription contract. However, this development does not appear likely, and liability outside of the atypical assumption of duty situation as presented in the principal case will continue to be difficult to establish.

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[11] The court relies upon 2 TORTS RESTATEMENT §325 (1934) and 2 AGENCY RESTATEMENT §378 (1933). See generally Seavey, "Reliance Upon Gratuitous Promises or Other Conduct," 64 HARV. L. REV. 913 (1951); PROSSER, TORTS, 2d ed., §38 (1955). See, also, 1 CONTRACTS RESTATEMENT §90 (1932).

[12] The leading case is Thorne v. Deas, 4 Johns. (N.Y.) 84 (1809).

[13] See 2 TORTS RESTATEMENT §325, comment *b* (1934), which states, ". . . apart from any contract which he may have entered into with the other, the actor is liable only to the extent to which the alternative protection, which he has induced the other to refrain from procuring, would have been effective." The availability of other means of calling fire protection thus becomes crucial in the ascertainment of liability. To the same effect see 2 AGENCY RESTATEMENT §401, comment *b* (1933).