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TORTS - DUTY BASED ON CONTRACT-MEASURE OF RECOVERY WHERE TELEPHONE SUBSCRIBER SUES FOR SPECIAL DAMAGES

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TORTS — DUTY BASED ON CONTRACT—MEASURE OF RECOVERY WHERE TELEPHONE SUBSCRIBER SUES FOR SPECIAL DAMAGES — Plaintiff, a telephone subscriber, alleged that the defendant telephone company negligently severed the telephone connection between the plaintiff's house and defendant's central operating station and negligently failed to give plaintiff notice of the disconnection; that as a result, the plaintiff was delayed in notifying the fire department of an outbreak of fire on his property; and that the property was thereby destroyed. Plaintiff sought to recover damages for the resulting injury to his property. *Held*, defendant's duty to use due care was an implied term of the contract, and special damages growing out of a breach of such a duty could not be recovered because they were not within the reasonable contemplation of the parties in making the contract. *Buskey v. New England Telephone & Telegraph Co.*, (N. H. 1941) 23 A. (2d) 367.

The theory underlying the decision in the instant case appears to be that if a tort duty to use due care coincides with a similar contract duty, and plaintiff sustains injury from a breach of that duty, plaintiff must sue in contract rather than in tort, and so be limited in the measure of his recovery by the doctrine of *Hadley v. Baxendale*.[1] This theory becomes particularly interesting in view of the fact that a previous case decided by this court, *Carr v. Maine Central R. R.*,[2] has been uniformly regarded as having decided that there could be recovery in tort for negligent failure to carry out a promise that was reasonably relied on by the plaintiff.[3] The proposition laid down in the principal case is logically unsound, as applied to the above fact situation, since the duty to use due care in carrying out the contract is imposed by law not merely because of an implied term in the contract but also because of the relationship that has been been created between the parties to the contract.[4] It is well established that, even

[1] 9 Ex. 341, 156 Eng. Rep. 145 (1854). It was stated in the principal case, 23 A. (2d) 367 at 369: "The obligation to use due care thus became an implied term of the contract between the parties. . . . there is no disguising the fact that the plaintiff thus seeks to recover special damages growing out of a breach of the contract by the defendant. The Barrett case decided that this cannot be done."

In view of the fact that telephone companies frequently hold themselves out in their advertising as being dependable in case of emergencies, there would seem to be some basis, at least, for the argument that special damages of this general kind are within the reasonable contemplation of the parties in making the contract, so that the rule of Hadley v. Baxendale, supra, does not prevent recovery.

[2] 78 N. H. 502, 102 A. 532 (1917).

[3] See 90 UNIV. PA. L. REV. 740 (1942). The court in the principal case expressly stated that there was no inconsistency in these opinions because the Carr case was really a suit on the contract. But this would seem to be an unjustified interpretation of the express language used in the Carr opinion. "Declaration sounds in tort. . . . The common law imposes that duty [to use average care in performing any service undertaken for others] on every member of the community for the benefit of all those with whom he comes in contact regardless of whether he is or is not to be compensated for his services." Carr v. Maine Central R. R., 78 N. H. 502 at 503, 102 A. 532 (1917).

It is also contrary to authoritative opinion as to what was decided by the Carr case. Bohlen, "Fifty Years of Torts," 50 HARV. L. REV. 1225 at 1236 (1937).

[4] Douglas v. United States Fidelity & Guaranty Co., 81 N. H. 371, 127 A. 708

where a person has no duty to perform some act, if he once undertakes to do that act, he assumes an obligation to do it carefully.[5] So here, the defendant's duty to use due care can be said to have arisen from its assuming to furnish telephone service to the plaintiff.[6] The fact that a binding contract existed between them should not alter or reduce the tort duty engendered by the relationship which was created when the defendant undertook to act. This analysis seems especially applicable to the principal case, for the action was not one for failure to perform the contract,[7] but rather appears to be based on tort principles.[8] While many courts have agreed that the plaintiff can sue in tort in these telephone cases,[9] they have frequently been very reluctant to allow recovery of special damages. It has been held that even though the plaintiff is suing in tort, he can recover special damages resulting from the injury only if he gave the defendant telephone company notice of the importance of the particular call that he wanted to make.[10]

(1924); Flint & Walling Mfg. Co. v. Beckett, 167 Ind. 491, 79 N. E. 503 (1906); 12 L. R. A. (N. S.) 924 (1908); PROSSER, TORTS 202 (1941); 38 AM. JUR. 661-662 (1941).

[5] HARPER, TORTS 200-206 (1933); Erie R. R. v. Stewart, (C. C. A. 6th, 1930) 40 F. (2d) 855; Burns v. North Chicago Rollingmill Co., 65 Wis. 312, 27 N. W. 43 (1886) (duty imposed on railroad not to withdraw without notice a flagman from a crossing where he usually gave warning of approaching trains); DuBois v. Decker, 130 N. Y. 325, 29 N. E. 313 (1891) (where a physician undertook to treat a patient, he assumed a duty to use due care even though there was no contractual relationship between them); Black v. Goldweber, 172 Ark. 862, 291 S. W. 76 (1927) (duty to use due care imposed on driver of an automobile in favor of a self-invited guest); Carr v. Maine Central R. R., 78 N. H. 502, 102 A. 532 (1917) (where a railroad company undertook to get a permit for giving a rebate on freight charges, it had a duty to do so with the care an average man would have used); Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703) (where a man undertook to carry goods for another, he had a duty to do so carefully even though the service was gratuitous and he was not a common carrier).

[6] "That obligation is ordinarily imposed by law upon all who undertake a service." Douglas v. United States Fidelity & Guaranty Co., 81 N. H. 371 at 375, 127 A. 708 (1924), quoted by the principal case, 23 A. (2d) 367 at 369.

[7] There is no intention of implying by this statement that a distinction should be made between cases of active misfeasance and mere nonfeasance in not carrying out the terms of the contract since that controversial issue is beyond the scope of this note.

[8] The plaintiff expressly alleged that the telephone service had been established and then cut off, i.e., that the defendant had begun to act and had done so negligently. ". . . the third count alleges that the defendant negligently severed the telephone communication . . . and negligently failed to give the plaintiff notice of such disconnection. . . ." Principal case, 23 A. (2d) 367 at 368.

[9] Carmichael v. Southern Bell Tel. & Tel. Co., 157 N. C. 21, 72 S. E. 619 (1911); Peterson v. Monroe Independent Telephone Co., 106 Neb. 181, 182 N. W. 1017 (1921); Volquardsen v. Iowa Telephone Co., 148 Iowa 77, 126 N. W. 928 (1910); Lebanon, Louisville & Lexington Telephone Co. v. Lanham Lumber Co., 131 Ky. 718, 115 S. W. 824 (1909); Chesapeake & Potomac Telephone Co. v. Carless, 127 Va. 5, 102 S. E. 569 (1920); Glawson v. Southern Bell Tel. & Tel. Co., 9 Ga. App. 450, 72 S. E. 747 (1910), overruled by Southern Bell Telephone & Telegraph Co. v. Reynolds, 139 Ga. 385, 77 S. E. 388 (1913).

[10] Southwestern Bell Telephone Co. v. Carter, 181 Ark. 209, 25 S. W. (2d)

This effectively precludes recovery since, if the plaintiff cannot make his call, he cannot usually give notice. Other courts have been willing to regard these cases as ordinary tort actions, but have refused to allow the case to go to the jury because they have felt that the causal chain is too remote,[11] or that the damages are too speculative.[12] It has been urged that there are considerations of public policy which make it advisable to protect the telephone companies from liability in these cases, since the damages might otherwise be so unlimited that the companies would be unable to protect themselves by reasonable methods, and since the burden of the added expense would be shifted onto their subscribers in the form of higher rates.[13] To be logically consistent with the accepted doctrines of tort liability, it would seem that the courts should either admit the soundness of the policy arguments and frankly refuse to extend the orbit of duty to include telephone companies,[14] or where the court feels that there should be a duty to use due care, and the breach of that duty is evident or admitted, as in the principal case, recognize the problem as an ordinary one of causation. An analysis of this kind would clear up the needless confusion that exists in this field and at the same time furnish a sufficiently elastic basis for the exercise of discretion by the court in particular cases.

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448 (1930); Emery v. Rochester Telephone Co., 271 N. Y. 306, 3 N. E. (2d) 434 (1936).

This notice requirement has apparently been taken from cases involving negligence in sending telegraph messages. Some courts hold that the plaintiff in such cases must sue on a contract theory, so that the notice limitation becomes a part of the Hadley v. Baxendale rule of recovery. Kerr Steamship Co. v. Radio Corp. of America, 245 N. Y. 284, 157 N. E. 140 (1927); Marriott v. Western Union Telegraph Co., 84 Neb. 443, 121 N. W. 241 (1909). Other courts allow plaintiff to sue on either a tort or a contract theory, and even if the suit is in tort, require that notice be given. Kennon v. Western Union Telegraph Co., 126 N. C. 232, 35 S. E. 468 (1900); Western Union Telegraph Co. v. Hall, (C. C. A. 4th, 1923) 287 F. 297. It is submitted that whether or not such a requirement is logical where the suit is on a tort theory, it has at least the recommendation of being feasible since the sender can, if he chooses, mention the importance of the message to the agent.

[11] Forgery v. Macon Telephone Co., 291 Mo. 539, 237 S. W. 792 (1922); Lebanon, Louisville & Lexington Telephone Co. v. Lanham Lumber Co., 131 Ky. 718, 115 S. W. 824 (1909); Seifert v. Western Union Telegraph Co., 129 Ga. 181, 58 S. E. 699 (1907); Clay, "The Liability of a Telephone Company for Its Negligent Failure to Furnish Promptly Service for Summoning a Physician in Case of Sickness," 1 VA. L. REV. 337 (1914).

[12] Volquardsen v. Iowa Telephone Co., 148 Iowa 77, 126 N. W. 928 (1910).

[13] 46 YALE L. J. 167 (1936); 6 BROOKLYN L. REV. 230 (1936).

[14] That the courts could handle the problem in this manner seems evident from the case of Moch Co. v. Rensselaer Water Co., 247 N. Y. 160, 159 N. E. 896 (1928). Even though there was a contractual relationship between the parties, in an action on a tort theory the court might conceivably hold that the defendant telephone company had merely neglected to confer a benefit. Such an approach does not seem logical in a fact situation like that involved in the principal case, but at least it would be inconsistent only in the application of the accepted principles of law rather than in the principles themselves.