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Torts-Duty Arising from Contract-Privity

TORTS—DUTY ARISING FROM CONTRACT—PRIVITY.—The defendant, a railway corporation, contracted with the United States for the carriage of mail. The plaintiff's assignor, a bank, sent a package of currency through the mails. The currency was stolen as a result of the defendant's failure to supervise the carrying of the mail and to provide a mail clerk. The plaintiff insurance company paid the loss to the bank and now seeks recovery from the defendant. Held, the defendant did not owe the bank a duty to use reasonable care in handling the mails because there was no privity of contract.[1]

The duty of exercising care may be imposed by the common law, by legislative enactment, or by contract. The question then arises whether a duty to use due care to one person, as a result of a contract, prevents the imposing of a common law duty to others who suffer injury as a result of the negligent performance of the contractual duty. In Winterbottom v. Wright[2] the rule was announced that a cause of action in tort did not arise from the breach of a duty existing by virtue of contract unless there be a "privity of contract" between the plaintiff and the defendant. Due to the development of commercial relations near the end of the nineteenth century, the rule was found inapplicable in certain situations.

In cases where the contractual duty, even if carefully performed, involved

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21 Burns' Ann. Statutes, 1933, 4-3601, 4-3602, 4-3605; Ind. Const., Art. 1, § 13.

1 Aetna Insurance Company v. Illinois Cent. R. Co. (1936), 283 Ill. App. 527, 6 N. E. (2d) 189.

2 (1842) 10 Mees & W. 109, 109 Eng. Reprint 402. The rule was quickly adopted and found application not only in personal injury claims, but also in property damage; not only in injuries caused by physical force, but also in injuries caused by negligent misrepresentations.

danger to human beings, the rule of privity was repudiated.[3] This involved the doctrine of "inherently dangerous" instrumentalities.[4] The exception was then extended to cover situations where the instrumentality, though not dangerous in itself, was dangerous when coupled with negligent conduct.[5] A further distinction has been made where there is negligence in respect to the sale of an instrumentality the result of which is likely to cause personal injury.[6] But where the injury is to property instead of person some courts still adhere to the privity doctrine.[7]

Another situation involves the liability of a manufacturer or vendor of food products. The modern weight of American authority permits a recovery by a consumer against the manufacturer or vendor for the negligent preparation of food for human consumption irrespective of privity.[8] At first some courts found that improperly prepared food was "inherently dangerous,"[9] but the later cases speak in terms of warranty, deceit, negligence, and common law duties.[10]

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[3] Levy v. Langridge (1838), 4 Mees. & W. 337, 150 Eng. Reprint 1458; Thomas v. Winchester (1852), 6 N. Y. 397, 57 Am. Dec. 455; Norton v. Sewall (1870), 106 Mass. 143, 8 Am. Rep. 298; Huset v. J. I. Case Threshing Mach. Co. (1903), 120 Fed. 865; Fort Wayne Drug Company v. Flemion (1931), 93 Ind. App. 40, 175 N. E. 670. See Bohlen, "Liability of Manufacturer To Persons Other Than Their Immediate Vendees" (1929), 45 L. Q. Rev. 343.

[4] It seems that a thing is "inherently dangerous" only as a means of holding that the actor was negligent with respect to it, for the liability is imposed not because of the thing, but because of the conduct in respect to it. In conformity to the rule, it has been held that if the instrumentality was not inherently dangerous, there would be no liability except to those in privity of contract. Daugherty v. Herzog (1896), 145 Ind. 255, 4 N. E. 457; Laudeman v. Russel (1910), 46 Ind. App. 32, 91 N. E. 822; Husett v. J. I. Case Threshing Mach. Co. (1903), 120 Fed. 865. However, the result was that many things were dubbed "inherently dangerous" in order to hold a contractor or manufacturer who acted negligently liable to persons not in privity of contract.

[5] Delvin v. Smith (1882), 89 N. Y. 470, 42 Am. Rep. 311; Heaven v. Pender (1883), L. R. 11 Q. B. Div. 503, 19 Eng. Rul. Cas. 81 C. A.; Schubert v. J. R. Clark Co. (1892), 49 Minn. 331, 51 N. W. 1103; Peru Heating Co. v. Lenhart (1911), 48 Ind. App. 319, 95 N. E. 680; Lewis v. Terry (1896), 171 Cal. 39, 49 P. 398. *Contra,* Travis v. Rochester Bridge Co. (1919), 188 Ind. 79, 122 N. E. 1.

[6] Mr. Justice Cardozo, in MacPherson v. Buick Motor Co. (1916), 217 N. Y. 382, 111 N. E. 1050: "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, comes out of contract and nothing else."

[7] Windram Manufacturing Company v. Boston Blacking Co. (1921), 239 Mass. 123, 131 N. E. 454. See note, 28 Michigan Law Review 93.

[8] Boyd v. Coca-Cola Bottling Works (1914), 132 Tenn. 23, 177 S. W. 80; Doyle v. Continental Baking Co. (1928), 262 Mass. 516; 160 N. E. 325; Salmon v. Libby (1906), 219 Ill. 421, 76 N. E. 573; Brown Cracker Co. v. Jensen (Tex. Civ. App. 1930), 32 S. W. (2d) 227; Minutilla v. Providence Ice Cream Co. (1929), 50 R. I. 43, 144 A. 884.

[9] Boyd v. Coca-Cola Bottling Works (1914), 132 Tenn. 23, 177 S. W. 80.

[10] Doyle v. Continental Baking Co. (1928), 262 Mass. 516, 160 N. E. 325; Minutilla v. Providence Ice Cream Co. (1929), 50 R. I. 43, 144 A. 884. See Perkins, "Unwholesome Feed as a Source of Liability" (1920), 5 Iowa Law Bulletin 6, 86, 96 ff., for a full citation of cases.

However, where there is a property damage, i. e., injury to animals, from impure foods, the modern cases are in conflict.[11]

Another factual situation involves the liability of persons who prepare abstracts of title, certificates, and records which are relied upon in business activities by purchasers and mortgagees. In this field the doctrine that no cause of action arises in tort unless there is privity of contract seems quite prevailing.[12] As a general rule, purchasers or mortgagees cannot recover from the abstracter for the negligent preparation of the record.[13] In Indiana this rule has been relaxed where the abstracter knew that the plaintiff would take the property as security.[14] But such knowledge is a necessary allegation to state a cause of action.[15]

In respect to professional inspectors and certified public accountants the cases fall into similar categories, the great majority citing the basic case of Winterbottom v. Wright and refusing to impose a common law duty.[16] But the duty is imposed where the inspector or accountant has actual knowledge of the plaintiff's intended use of the certificate.[17] Thus it seems that courts which have loquaciously repudiated the doctrine of privity in personal injury cases have yielded to the original fear of "the means of letting in upon us an

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[11] Tompkins v. Quaker Oats Co. (1921), 239 Mass. 147, 131 N. E. 456. Compare Ellis v. Lindmark (Minn., 1929), 225 N. W. 395. The cases which refuse to impose the duty here hold that the cases which do so in respect to personal injury are inapplicable. It is submitted that there seems to be no sound basis for this distinction. Once the duty is imposed, it would seem that the interests in property should be protected as well as the interests in bodily safety.

[12] Ohmart v. Citizens Savings & Trust Co. (1924), 82 Ind. App. 219, 145 N. E. 577; National Savings Bank v. Ward (1879), 100 U. S. 195, 25 L. Ed. 621; Thomas v. Guarantee Title & Trust Co. (1910), 81 Ohio St. 432, 91 N. E. 183; Decatur Land, Loan and Abstract Company v. Rutland (Tex. Civ. App. 1916), 185 S. W. 1064; Bremerten Development Company v. Title Trust Co. (1912), 67 Wash. 268, 121 P. 69; National Iron & Steel Company v. Hunt (1924), 312 Ill. 245, 143 N. E. 833; Ultramares Corporation v. Touche (1931), 255 N. Y. 170, 174 N. E. 441; Buckley v. Gray (1895), 110 Cal. 339, 42 P. 900; Landell v. Lybrand (1919), 264 Pa. 406, 107 A. 783. *Contra,* Dickle v. Nashville Abstract Co. (1890), 89 Tenn. 431, 14 S. W. 896.

[13] National Savings Bank v. Ward (1879), 100 U. S. 195, 25 L. Ed. 621; Ohmart v. Citizens Savings & Trust Co. (1924), 82 Ind. App. 219, 145 N. E. 577; Thomas v. Guarantee Title & Trust Co. (1910), 81 Ohio St. 432, 91 N. E. 183.

[14] Brown v. Sims (1899), 22 Ind. App. 317, 53 N. E. 779.

[15] Ohmart v. Citizens Savings & Trust Co. (1924), 82 Ind. App. 219, 145 N. E. 577.

[16] National Iron & Steel Company v. Hunt (1924), 312 Ill. 245, 145 N. E. 833; Gordon v. Livingston (1882), 12 Mo. App. 267; Ultramares Corporation v. Touche (1931), 255 N. Y. 170, 174 N. E. 441; Landel v. Lybrand (1919), 264 Pa. 406, 107 Atl. 783.

[17] Glanzer v. Shepard (1922), 233 N. Y. 236, 135 N. E. 275; Tardos v. Bozant (1846), 1 La. Ann. 199. These cases expressly hold that even though a duty to such a plaintiff might be considered as an extension of the third party beneficiary doctrine in contract law, that nevertheless it does not derive its source from the contract, but is one imposed by law.

infinity of actions," as expressed in Winterbottom v. Wright, when there is a wrongful injury to business enterprise.[18]

In the principal case the defendant owed a contractual duty to the United States. Nevertheless, where mail clerks or soldiers suffer personal injuries from the negligent performance thereof, the courts have not hesitated to impose a common law duty in favor of the injured person or his representative.[19] On this point the courts in Illinois are in accord with the rule in Indiana and most states.[20] However, where the addressor or addressee of mails sues to recover for loss of property or money, caused by the negligence of the railroad in the performance of its contract, there is a definite split of authority.[21] Until the decision in the principal case it was believed that the modern tendency was to refute the privity doctrine and allow recovery to the addressor or addressee.[22] The exact question does not appear to have been as yet decided in Indiana.

Thus in many situations the contractual duty has not excluded the common law duty of due care toward persons likely to be harmed. However, in case of property damage, the courts, with a few exceptions, adhere to the privity doctrine. But this distinction seems questionable. The principal reason advanced in Winterbottom v. Wright was the danger of a multitude of actions and liability to an indeterminate number of plaintiffs.[23] To this objection the rule that a plaintiff to recover must be within the class of persons reasonably exposed to the danger of the defendant's misconduct seems a sufficient answer.[24]

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[18] Compare the opinions of Mr. Justice Cardozo, in the cases of MacPherson v. Buick Motor Co. (1916), 217 N. Y. 382, 111 N. E. 1050, and Glanzer v. Shepard (1922), 233 N. Y. 236, 135 N. E. 275, with that in Ultramares Corporation v. Touche (1931), 255 N. Y. 170, 174 N. E. 441. No reported case, among the few jurisdictions which have totally abolished the privity doctrine, has been found which complains of the courts being burdened with actions by plaintiffs who were within the class of persons likely to be harmed by the malfeasance of a contract duty.

[19] Barker v. Chicago, Peoria & St. Louis R. Co. (1909), 243 Ill. 482, 90 N. E. 1057; Malott v. Central Trust Co. (1906), 168 Ind. 428, 79 N. E. 369; Seybolt v. New York, L. E. & W. R. Co. (1884), 95 N. Y. 562, 47 Am. Rep. 75; Mellor v. Missouri R. R. Co. (1891), 105 Mo. 455, 16 S. W. 849.

[20] Barker v. Chicago, Peoria & St. Louis R. Co. (1909), 243 Ill. 482, 90 N. E. 1057; Malott v. Central Trust Co. (1906), 168 Ind. 428, 79 N. E. 369; Cleveland, C., C. & St. L. R. Co. v Ketcham (1892), 133 Ind 346, 33 N. E. 116.

[21] Compare Skaggs v. Missouri-Kansas-Texas R. Co. (1934), 228 Mo. App. 808, 73 S. W. (2d) 302; Central Railroad & B. Co. v. Lampley (1884), 76 Ala. 357, 52 Am. Rep. 334; Sawyer v. Corse (1867), 17 Gratt. (Va.) 230, 94 Am. Dec. 445, with Boston Insurance Company v. Chicago, R. I. & P. R. Co. (1902), 118 Iowa 423, 92 N. W. 88; German State Bank v. Minneapolis, St. P. & S. Ste. M. Ry. Co. (1901), C. C. A., 113 Fed. 414; Corwell v. Vorhees (1844), 13 Ohio 523, 42 Am. Dec. 206.

[22] Skaggs v. Missouri-Kansas-Texas R. Co. (1934), 228 Mo. App. 808, 73 S. W. (2d) 302. See full citation of cases in 51 A. L. R. 198. The lower appellate court in the principal case, after reviewing all the authorities, took this position, following the Missouri case above. See Aetna Insurance Company v. Illinois Cent. R. Co. (1936), 283 Ill. App. 527, 6 N. E. (2d) 189.

[23] See opinion of Lord Abinger, in Winterbottom v. Wright (1842), 10 Mees & W. 109, 109 Eng. Reprint 402. Accord, Judge Cordozo, in Ultramares v. Touche (1931), 255 N. Y. 170, 174 N. E. 441.

[24] Palsgraf v. Long Island R. Co. (1928), 248 N. Y. 339, 162 N. E. 99. See further, 59 A. L. R. 1253.

This is a basic principle in the analysis of all torts. Therefore the law sets the limits upon the number of plaintiffs who can sue. Further, can the parties by contract change tort law? The cases are definitely in the negative.[25] Also, if a liability exists for gratuitous negligent conduct[26] undertaken for another, it is difficult to justify non-liability for conduct undertaken for a consideration. Since Winterbottom v. Wright the increase in specialized activity engaged in under contract requires a revaluation of the relations of the participants.[27] In many transactions involving banks, loan companies, purchasers, and senders of mail matter, reliance in fact must be placed upon the reasonably careful conduct of abstracters, inspectors, and mail contractors. Thus, it is believed that the jurisdictions[28] which refuse the doctrine of Winterbottom v. Wright in cases of property damage as well as personal injury cases announce the more desirable rule.

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