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Torts-Insurance-Duty of Insured Company on Receipt of an Application

TORTS—INSURANCE—DUTY OF INSURANCE COMPANY ON RECEIPT OF AN APPLICATION—M. B. made application for life insurance. Company delayed action twenty days, and then refused the application and dispatched a substitute policy to the Indianapolis office, where it was received two days later. No attempt was made to deliver that policy until eight days later, when an agent calling to deliver the policy, refused to do so on learning that M. B. the previous day had contracted a severe cold. Prior to taking the cold, M. D. was an insurable risk, but thereafter and until her death she was not. A reasonable time for delivery of the policy after the application was ten days, while in fact thirty days elapsed before the attempted delivery. A reasonable time for delivery after receipt at the Indianapolis office was twenty-four hours, while the actual time elapsed was nine days after receipt. R. B. as administrator of M. B. sued for damages for failure to act promptly on the application, and for failure to deliver the policy promptly, before M. B. became ill. Verdict and judgment were for plaintiff. *Held*, that judgment must be reversed. The basis for reversal was stated to be that the company owed no duty either statutory or contractual; and that, without a duty being imposed, the company was not liable for unreasonable delay. The "tort liability doctrine" was stated to be inapplicable since the premium was not paid in advance. *Metropolitan Insurance Co. v. Brady*, Appellate Court of Indiana, Dec. 30, 1930, 174 N. E. 99.

The application was treated as an offer for a unilateral contract to be accepted by delivery of the policy. This offer was rejected, and a counter offer for a unilateral contract made by sending a substitute policy, which was to be accepted by payment of the first premium. Since there was no delivery, there could be no acceptance, and no contract was consumated. The court was correct therefore in saying that no contract duty arose to act promptly, since there was no contract. The court did not repudiate the tort liability doctrine, but it made the distinction that it did not apply to cases in which the premius was not paid in advance. The cases depending upon tort liability have been cases in which the premium was paid in advance, *Duffie v. Bankers Ass'n*, 160 Ia. 19, 139 N. W. 1087, being a typical example. For a criticism of placing contract limitations on this tort liability, see 40 *Yale L. J.* 121 (1930).

The distinction made in this case overlooks the stipulation which permitted the payment of the premium on the delivery of the policy. Yet the court in touching on the agent's representation that it was not necessary to pay it until the delivery of the policy, when the premium was offered with the application, stated that it was not inconsistent with the application. Though payment of the premium is stated to be one of the elements on which tort liability is based, it is but one of the conditions for the application of the duty to act with reasonable promptness. Nor does it seem logical to consider it the most important, since the applicant is permitted to reject the policy and recover the premium. Another element is that the applicant refrains from seeking insurance elsewhere in justifiable reliance on the prompt consideration of his application. The main element, however, seems to be that the company accepted a charter to engage in a business affected with a public interest. To permit the company to avoid the duty to act promptly by inducing the appellant not to pay the premium in advance, is to permit fraud, not only against the applicant, but also against the state which granted it permission to engage in business within the state. Furthermore the company, if the insurance is effected, receives compensation for a risk it did not assume, namely the interim between the application and the attachment of liability which is stipulated to be after delivery of the policy and the payment of the first premium, and under the rule announced in this case, is permitted to increase that period at will.

The basis for liability should not depend on the payment of the premium in advance. The business of insurance is a public calling, and therefore subject to regulation. *German Alliance Ins. Co. v. Lewis,* 233 U. S. 389. This regulation has been permitted even to the extent of limiting the rates and also the compensation of agents. *O'Gorman & Young v. Hartford Fire Ins. Co.,* 51 Sup. Ct. R. 130. This is additional proof that the insurance business is a public calling, as the Supreme Court of United States has declared that rates cannot be regulated outside of public callings. *Williams v. Standard Oil,* 49 Sup. Ct. 115, 278 U. S. 235. Since it is a public calling, the public calling duties should attach. Among these are the duties to furnish reasonably adequate facilities, and to act with due diligence. *Telegraph Co. v. Griswold,* 37 Ohio State R. 301. Thus such delay as was present in this case would be a violation of a public calling duty, and would give rise to a cause of action for the loss occasioned thereby. Such duty being imposed, the company should not be able to avoid its liability by inducing the non-payment of the premium until after the delivery of the policy, but should be liable in all events for negligent delay resulting in loss to the applicant, a much more desirable result in view of its public calling character.

H. N. F.