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Liability for Gratuitous Services and Negligent Statements in Montana

The recent Montana Supreme Court decision of *Sult v. Scandrett*¹ presents an interesting study in the care required when rendering gratuitous services and liability for making negligent statements to others who can be foreseen as acting on them in a business way.

In this case, the Milwaukee Railroad maintained scales at Melstone, Montana, for the use of livestock shippers. The plaintiff, a prospective shipper over the railroad, informed the defendant's agent by letter that cattle would be weighed on the scales preparatory to being shipped and requested that the scales be placed in a good state of repair.

The railroad agent informed the plaintiff's agent that the scales were in good condition, so the plaintiff drove his cattle into Melstone. After commencing weighing, it was discovered that the scales were in a poor state of repair and did not weigh correctly because of which the purchaser declined to accept the cattle. Later, after driving the cattle back to the ranch, the plaintiff decided to ship the cattle over the same railroad to Sioux City and there received a lower price for the cattle than he would have received under the original contract.

Plaintiff based his complaint upon two main theories, the first being the general rule adopted in *Stewart v. Standard Publishing Co.*² which had been quoted from CORPUS JURIS.³ The rule states that

“ . . . where a person undertakes to do an act or discharge a duty by which the conduct of another may be properly regulated and governed, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of the negligent failure so to perform it.”

The rule, although commonly enough applied today to a variety of cases, hasn't always been so accepted. Courts in early common law were too much concerned with the “ancient patchwork built upon the doctrines

¹ (1947)Mont....., 178 P. (2d) 405.

² (1936) 102 Mont. 43, 55 P. (2d) 694.

³ 45 C. J. **Negligence**, p. 650.

of trespass"⁴ to be concerned with the failure of conferring a benefit upon another. The distinction between "misfeasance" and "nonfeasance" accentuated this difficulty, because the older cases held that when the wrong consisted in the failure to act, there was mere "nonfeasance" and no direct duty.⁵

The first imposition of liability appeared in those cases dealing with "public callings," when by holding themselves out to the public the defendants were regarded as having undertaken a duty. Then with the development of assumpsit it was extended to the relationship we now call a contract.⁶

Liability has been extended during recent years to those situations where public and social policy has found a relationship of potential economic advantage between the parties which demands that one party be protected in this relationship or to situations where there is a promise of gratuitous service involving reliance and resulting in the misleading of the promisee so that he fails to do what otherwise he would do to protect himself. The present tendency is also to abandon the superficial distinction between "nonfeasance" and "misfeasance" but we find ghosts of the old ideas still cropping up at times.⁷

It is with this problem of how far to extend liability and to what relationships that the courts are currently struggling. The doctrine can be an unlimited one, and some means must be sought to restrict liability within reasonable bounds.⁸ For example, it is still held by a majority that a water company which contracts with a city to supply water for fire fighting is not liable to a citizen for its failure to do so. Perhaps the most famous of these cases is *Moch Co. v. Rensselaer Water Co.*⁹ Cardozo, in writing the opinion, attempted to make a distinction on the ground that one is not under a duty to affirmatively confer a benefit upon another.

The case has been criticized, not so much as to the decision because the burden on the water companies by allowing recovery would be great, but because the reasoning used was not the best when it could have been based on the grounds of public policy.¹⁰ However, in view of the fact

⁴Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372 (1939).

⁵Note 4, *supra*.

⁶PROSSER ON TORTS, p. 191.

⁷HARPER ON TORTS, § 81.

⁸Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225 (1937).

⁹(1928) N. Y. 160, 159 N.E. 896, 62 A.L.R. 1199.

¹⁰Note 4, *supra*.

that the city failed to make other provision for the protection of its citizens, and lulled them into a false feeling of security so that they failed individually to take precautionary measures, it is difficult to see why the contractor should not be held liable. Three cases have so held¹¹ and another allowed damages for the negligent breaking of a water main leading to a home with the result that the owner was thus deprived of the assistance of the fire department.¹²

Another difficulty experienced by early courts was centered about the word "privity." Concerned with extending contract duties to a third person, many of them followed the idea that privity of contract was necessary before a duty of care was due.¹³ Although Cardozo exposed this error in *MacPherson v. Buick Motor Co.*,¹⁴ privity has remained to vex some courts.

The modern approach is typified in the case of *Woodbury v. Tampa Water Works Co.*¹⁵ in which the court said,

"No privity of contract is necessary to support an action in tort for a direct invasion of a legal right or for the infraction of a duty implied by law. . . . Where there is a duty and negligence in performing the duty with resulting injury, there is liability."

The rule expressed in the *Standard Publishing Co.* case¹⁶ clearly indicates that as a condition to liability there must be a reliance upon the defendant's gratuitous act and this appears to be the better rule. The reliance may result in an affirmative act as in the *Sult* case or in merely neglecting to do something essential which could have prevented the injury.¹⁷

A case which clearly expresses the better rule is that of *Erie R. Co. v. Stewart*.¹⁸ In this case, the defendant railroad, with no statute requiring it, voluntarily maintained a watchman at a particularly dangerous crossing. The watchman failed to give warning to an approaching automobile and as a result an accident ensued. The driver of the automobile had knowledge that the watchman was maintained, and relied upon his absence

¹¹*Fisher v. Greensboro Water Supply Co.* (1901) 128 N. C. 375, 38 S.E. 912; *Mugge v. Tampa Water Works Co.* (1906) 52 Fla. 371, 42 So. 81 *Harlan Water Co. v. Carter* (1927) 220 Ky. 493, 295 S.W. 426.

¹²*Gilbert v. New Mexico Const. Co.* (1935) 39 N. M. 216, 44 P. (2d) 489.

¹³Note 4, *supra*.

¹⁴(1916) 217 N. Y. 382, 111 N.E. 1050, L.R.A. 1916F 696.

¹⁵(1909) 57 Fla. 234, 49 So. 556, L.R.A. (N.S.) 1034.

¹⁶Note 2, *supra*.

¹⁷Note 11, *supra*.

¹⁸(1930) 40 F. (2d) 855.

as an assurance of safety and implied invitation to cross. The court said,

"But when the practice is known to the traveler upon the highway, and such traveler has been educated into reliance upon it, some positive duty must rest upon the railway with reference thereto . . . having led the traveler into reliance . . ., it should not be permitted thereafter to say that no duty arose. . . . Where the voluntary employment of a watchman was unknown to the traveler upon the highway, the mere absence of such watchman could probably not be considered as negligence toward him . . ., for in such case there is neither an established duty positively owing to such traveler . . ., nor had he been led into reliance upon the custom."

The Montana Supreme Court in the *Standard Publishing Co.* case took a very liberal view in regard to the furnishing of gratuitous services, because it apparently did not consider the matter of reliance. In that case, the plaintiff sought to recover damages for injuries received in a fall on an icy sidewalk adjacent to the defendant's place of business as a result of an accumulation of ice and snow thereon. The defendant had constructed and maintained the walk and had customarily cleared the walk of snow and ice early in the morning. On the morning of the accident the walk was not cleared until 10 o'clock, more than an hour after the accident occurred. The court held that the plaintiff should recover because the defendant had constructed the walk, assumed the duty of maintenance and had undertaken the duty of removing the accumulation of ice and snow.

In the Montana case of *Childers v. Deschamps*,¹⁹ the court affirmed the common law view that the occupant of property owes no duty to pedestrians to keep adjacent sidewalks free from snow and ice coming thereon from natural causes and an ordinance requiring lot owners to keep the sidewalks free doesn't impose civil liability.

In the *Standard Publishing Co.* case the court based its decision upon the prior voluntary cleaning of the walk, but it fails to point out in what manner the plaintiff relied upon the gratuitous service. It must have been apparent to the plaintiff that the walk had not been cleared because the accident occurred during the day, and even if the plaintiff knew of the defendant's practice of clearing the walks—and there is no showing of this—it is hard to see on what basis she walked there in reliance on the practice.²⁰ A blind man, who would probably choose his sidewalks carefully in the winter time, might be justified in claiming re-

¹⁹(1930) 87 Mont. 505, 290 P. 261.

²⁰Gilbert, *Voluntary Assumption of Duty*, 6 MONT. L. REV. 51 (1945).

liance, but the average person would not appear to have any justification for so claiming.

The court could have placed more emphasis on the fact that the sidewalk apparently was defective in that stones had become uneven so that water could collect and freeze, thus putting the case on the basis of *Childers v. Deschamps*,²¹ but there is no showing that such a theory was presented. In the *Childers* case a defective pipe used to convey water from the roof of a building to the ground permitted water to fall on the sidewalk and form an icy condition there. The court allowed recovery because it was the owner's negligence which allowed the pipe to become defective and the owner knew or should have known of the dangerous condition.

It would indeed come as a surprise to the average citizen to find himself subject to liability because he failed to clear his sidewalk of snow one morning after having done so for several months prior thereto while if he had never cleared it he would have escaped liability. Such distinction between the usually meritorious and the one lacking in merit can hardly be justified.

The court in the principal case relies heavily upon an Arizona case²² in which the defendant was charged with liability for failure to maintain a sidewalk. The court said that the abutting owner by voluntarily constructing and having under his control a sidewalk adjoining his premises and by maintaining it for a number of years was charged with the duty of exercising care to prevent the sidewalk from becoming a source of danger. It had apparently with the defendant's knowledge become dangerous.

However, the accident in the Arizona case was caused by a defective sidewalk and not by failure to clear it of ice and snow. The law is well settled in this state by a long line of decisions that an abutting property owner isn't liable for failure to keep the sidewalks in front of his premises in repair.²³ The Arizona court recognized the same rule, but pointed out that the decision was applicable to the particular facts of the case and should not be regarded as controlling when the facts are different. The difference between the Arizona case and the *Standard*

²¹Note 19, *supra*.

²²*Cummings v. Henninger* (1925) 28 Ariz. 207, 236 P. 701, 41 A.L.R. 207.

²³*Headley v. Hammond Building, Inc.* (1934) 97 Mont. 243, 33 P. (2d) 574; *Nord v. Butte Water Co.* (1934) 96 Mont. 311, 30 P. (2d) 809; *Mitchell v. Thomas* (1932) 91 Mont. 370, 8 P. (2d) 639.

Publishing Co. case appears to center around the word "reliance" for in the former the plaintiff relied upon the owner's assumption of duty and in the latter it is difficult to see how this was present.

There are numerous other cases applying the rule adopted by the Supreme Court in the *Sult* case such as landlords being held liable for gratuitously making repairs which injured the tenant,²⁴ where one gratuitously undertakes to render assistance to another who is hurt,²⁵ and when one picks up a hitch-hiker on the highway.²⁶

The RESTATEMENTS ON TORTS²⁷ has adopted the principle as has the RESTATEMENTS ON AGENCY²⁸ and both sections make the plaintiff's reliance upon the gratuitous conduct a necessary ingredient for liability. The former limits the liability to bodily harm while the latter does not. No good reason for such a limitation is apparent.

There can be no argument that in the *Sult* case the service was other than gratuitous, for the existence of any duty on the part of a carrier to install scales is expressly negated in several cases.²⁹ There is no doubt that the defendant could have discontinued the service any time before the plaintiff acted in reliance upon the undertaking, because in such a situation the plaintiff could not have been hurt. This idea of withdrawal has been expressed by statute.³⁰ However, in the principal case the railroad agent never informed the plaintiff before the cattle were driven to Melstone that the service was withdrawn. This principle was enunciated in *Erie R. Co. v. Stewart*³¹ where the court said,

"This duty has been recognized as not only actual and positive, but as absolute, in the sense that the practice may not be discontinued without exercising reasonable care to give warning of such discontinuance."

It thus appears that the defendant in the *Sult* case was rendering a gratuitous service upon which the plaintiff's conduct was regulated and

²⁴*Gill v. Middleton* (1870) 105 Mass. 477, 7 Am. Rep. 548; *Finer v. Nichols* (1913) 175 Mo. App. 525, 157 S.W. 1023.

²⁵*Slater v. Ill. Cent. R. Co.* (1911) 209 F. 480; *Gates v. Chesapeake & O. R. Co.* (1919) 185 Ky. 24, 213 S.W. 564.

²⁶*Avery v. Thompson* (1918) 117 Me. 120, A. 4, L.R.A. 1918D 205; *Munson v. Rupker* (1925) 148 N.E. 169.

²⁷RESTATEMENT, TORTS, §325.

²⁸RESTATEMENT, AGENCY, §378.

²⁹*Gt. Northern R. Co. v. Cahill* (1920) 253 U. S. 71, 64 L.Ed. 787, 40 S. Ct. 457, 10 A.L.R. 1335; *Gt. Northern R. Co. v. Minnesota* (1915) 238 U. S. 340, 59 L.Ed. 1337, 35 S. Ct. 753.

³⁰R.C.M. 1935, §7769.

³¹Note 18, *supra*.

upon which the plaintiff relied in the belief that the service would be properly performed. However, the service was not so properly performed and the plaintiff suffered a detriment. All of the essentials for liability were thus present and the Supreme Court recognized that fact.

The plaintiff based his second cause of action in the *Sult* case on the fact that he relied upon a false statement negligently made by the defendant while owing a duty to speak truthfully. This arose from the notification by the railroad's freight agent that the scales were in good condition upon which the plaintiff relied in driving his cattle into Melstone. But when the weighing began it was found that the scales did not weigh correctly because the pit was filled with mud and water.

The theory upon which the plaintiff relies is one of negligent misrepresentation which is as yet so intermingled with other actions as to cause considerable difficulty. Much of this confusion has arisen from failure to distinguish three different sets of legal principles which have often been lumped together under one classification of deceit or fraud. In reality, it can be broken down into intended wrongs, strict responsibility and negligent wrongs.³²

The English case, *Derry v. Peck*,³³ first separated the deceit action from the other two by classifying it as an intended wrong or what is equal to a conscious misrepresentation, and that deceit will not lie for negligent misrepresentations. The lines of demarcation still are not sharply divided and a minority of the American cases have extended the action of deceit into that of negligent misrepresentations by supplying scienter by means of such fictions as conclusive presumptions or imputations of negligence.³⁴

As a result of this divergence in courts, writers are not at all in accord as to which is the better view although to differentiate negligent misrepresentation from deceit appears to be the favored view. However, courts have been wary of extending liability caused from negligent misrepresentations to the extent they do in the cases of deceit, probably because of the danger of imposing liability for damage done to remote plaintiffs which could be far out of proportion to the sometimes slight inadvertent negligence involved. This general trend to limit the scope greatly has in some cases even been extended so far as to make it de-

³²Bohlen, *Misrepresentation as Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733 (1927); PROSSER ON TORTS, p. 726.

³³(1888) 14 A.C. 337, 58 L.J.Ch. 864.

³⁴*Tort Liability for Negligent Language*, 28 COLUM. L. REV. 216 (1928); HARPER ON TORTS, §76.

pendent upon the existence of a contract which directly involves the giving of information.³⁵

Where the negligent misrepresentations were made directly to the plaintiff, as in the *Sult* case, courts have little difficulty, which is also true when made to the third person with knowledge that he intends to communicate it to the specific individual for the purpose of inducing him to act. However, courts are reluctant to extend liability further and ". . . anticipation that the statement will be communicated to others, or even knowledge that the recipient intends to make a commercial use of it in dealing with unspecified strangers, is not sufficient to create a duty of care towards them."³⁶

The case of *Ultramares Corporation v. Touche*³⁷ has been a leading one in showing how courts differentiate in their imposing of liability in the case of negligence and of deceit. In this case, an accounting firm negligently certified a balance sheet without knowledge that the plaintiff would rely upon it, but with the knowledge that it would be used in general financial dealings. Liability in negligence was rejected because there was no contemplation of the plaintiff's reliance, but judgment was held for the plaintiff on the grounds of deceit because of neglect so great as to amount to scienter.

However, the trend in present cases is to extend liability beyond the present rule that defendant must have the particular plaintiff in mind as the end and aim of the transaction who might rely on the service. The trend appears to be to carry the negligent misrepresentation to any member of a class of persons to whom the defendant has authorized the recipient to transmit the information. This is the view adopted by the RESTATEMENT ON TORTS.³⁸

At the turn of the past century the rule expressed in the New York case of *Thorne v. Deas*³⁹ was still prevalent. In that case, the defendant a joint owner of a vessel, voluntarily promised to take out insurance on the ship. He failed to do so, the ship was lost at sea, and the plaintiff attempted to hold him on the promise. The court held for the defendant

³⁵*Scholes v. Brookes* (1891) 63 L.T.R. 837; *LeLievre v. Gould* (1893) 1 Q.B. 491. For a spirited exchange of views see Green, *Deceit*, 16 VA. L. REV. 749 (1930); Bohlen, *Should Negligent Misrepresentations Be Treated as Negligence or Fraud?*, 18 VA. L. REV. 703 (1932); Green, *Innocent Misrepresentations*, 19 VA. L. REV. 242 (1933).

³⁶PROSSER ON TORTS, p. 737.

³⁷(1931) 255 N. Y. 170, 174 N.E. 441, 74 A.L.R. 1139.

³⁸RESTATEMENT, TORTS, §552.

³⁹(1809) 4 Johns N. Y. 84.

in saying, ". . . one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss."

Since that time courts have extended the scope of liability and today even though the speaker has an honest belief in the truth of his statement he may be held because of "lack of reasonable care in ascertaining the facts, or in the manner of expression, or absence of the skill . . . required by a particular business or profession."⁴⁰

The court in the *Sult* case has relied heavily on *International Products Co. v. Erie Railroad Co.*⁴¹ There the defendant, about to become a bailee of the plaintiff's goods, in reply to the latter's inquiry known to the defendant to have been made for the purpose of insuring the goods, negligently misrepresented the location of the goods. Due to this misdescription, the plaintiff was unable to collect on the insurance policy when the goods were accidentally destroyed by fire. The defendant was held for liable for the losses, the court stating,

"Liability in such cases arises only where there is a duty, if one speaks at all, to give the correct information. And that involves many considerations. There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information and the other giving the information owes a duty to give it with care."

One recent case⁴² restricts the liability by requiring the representation to be made directly to the plaintiff, a requirement inferred by the language in the *International Products case*. One writer in commenting on the case argues that liability ought to be imposed for proximate damages determined by the established rules of the law of negligence, and that competing interests of freedom of utterance and protection against negligent misrepresentations could be balanced by determining whether in the particular circumstances the man of ordinary intelligence and prudence would have felt himself constrained not to speak unless he had first investigated the facts.⁴³

⁴⁰PROSSER ON TORTS, p. 733.

⁴¹(1927) 244 N. Y. 331, 155 N.E. 662, 56 A.L.R. 1377.

⁴²*Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp.* (1927) 245 N. Y. 377, 157 N.E. 272, 56 A.L.R. 1186.

⁴³*Tort Liability for Negligent Language*, note 34, *supra*.

Earlier cases which held the defendant liable are *Carr v. Maine Central R.*⁴⁴ and *Siegal v. Spear*.⁴⁵ In the former the court imposed liability because the defendant had promised to procure the consent of the ICC for allowance of the plaintiff's claim for a rebate. The defendant, in failing to forward the necessary papers in time, was liable for the rebate. In the latter case, a furniture company agreed to store furniture free which the plaintiff had bought from it and also agreed to obtain insurance upon it. The insurance wasn't obtained and a subsequent fire destroyed the furniture. The court held that the plaintiff could recover because he had given up his property to the defendant who had entered on the execution of the trust.

In *Glanzer v. Shepard*⁴⁶ a bean merchant requested the defendants, public weighers, to weigh beans which he had sold, make a return of the weight and furnish the buyer with a copy. The defendants carelessly certified the weight to be greater than that which in fact it was. On discovering the discrepancy the buyer, who had already paid on the basis of the false weight, brought suit against the defendants to recover the amount of the overpayment. The court allowed the recovery in saying that the defendant acted for the purpose of inducing action and that the liability was based not merely on careless words but on the careless performance of a service, the act of weighing.

Courts have little trouble imposing liability in the cases of gratuitous promises if they can find a bailment peg to hang it on, but it is clear that this is not a necessity today. Other cases imposing liability are fairly numerous.

As is the case in gratuitous undertakings, the promisee is not entitled to claim the benefit of the promise merely because it is made and a subsequent withdrawal made before injury and in time to enable the promisee to protect himself will result in no liability.

In the principal case we have a relationship which by the better view should be such that in morals and good conscience, the defendant had a right to rely upon the other for information—that of a prospective shipper with a railroad. In applying the rules laid down by the *International Products case*,⁴⁷ there can be little doubt but that the information concerning the scales was desired for a serious purpose, because the shipping

⁴⁴(1917) 78 N. H. 502, 102 Atl. 532, L.R.A. 1918E 389.

⁴⁵(1923) 234 N. Y. 479, 138 N.E. 414, 26 A.L.R.1208.

⁴⁶(1922) 233 N. Y. 236, 135 N.E. 275, 23 A.L.R. 1425.

⁴⁷Note 41, *supra*.

of cattle can scarcely be considered anything else. Also, the defendant knew the plaintiff was intending to ship his cattle over the railroad and that a contract would ensue; thus, it must have been apparent that the plaintiff was going to use the scales as he indicated he was and that he had relied upon the statement that the scales were in good condition by driving his cattle into Melstone.

But having established a duty and negligence, that alone is not enough to make out a case for the plaintiff. Also present must be an injury proximately caused by the negligence.⁴⁸ Exemplary damages in the principal case may be ruled out because of a Montana statute⁴⁹ which allows such damages only in the case of oppression, fraud, or malice, actual or presumed, in actions other than contract. One Montana case⁵⁰ has stated that something more than gross negligence must be shown in order to justify exemplary damages, and because none of the essentials are present in the *Sult* case, compensatory damages are the only ones involved.

*Rigney v. Swingley*⁵¹ in speaking of the code section dealing with compensatory damages stated that the injured party may recover those damages which directly flow from the act of the person causing them.

However, how is the measure of damage to be determined? Should the general contract law of "contemplation of the parties" or the usual compensatory principle of negligence law be applied? The courts have concerned themselves little with the problem and have applied the compensatory principle for the most part although a small minority apply the contract law test to negligence actions.⁵²

The Montana Supreme Court in defining proximate cause has stated it is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred.⁵³ The court has apparently adopted a combination of the "foreseeability" rule and of the "natural and probable consequences" rule in its test for proximate cause because in *Reino v. Mont. M.L.D. Co.*⁵⁴ it stated,

⁴⁸*Therriault v. England* (1911) 43 Mont. 376, 116 P. 581.

⁴⁹R.C.M. 1935, §8666.

⁵⁰*Cashin v. Northern Pac. R. Co.* (1934) 96 Mont. 92, 28 P. (2d) 862.

⁵¹(1941) 112 Mont. 104, 113 P. (2d) 344.

⁵²155 A.L.R. 157.

⁵³*Mize v. Rocky Mt. Bell Tel. Co.* (1909) 38 Mont. 521, 100 P. 971, 129 Am. St. Rep. 659.

⁵⁴(1909) 38 Mont. 291, 99 P. 853.

"It is not required that the 'specific' injury or 'such' an injury as is complained of was or ought to have been specifically anticipated as the natural and probable consequences of the wrongful act. It is sufficient if the facts and circumstances are such that the consequences attributable to the wrongful conduct charged are within the field of reasonable anticipation; that such consequences might be the natural and probable results thereof, though they may not have been specifically contemplated or anticipated by the person so causing them."

In later cases⁵⁵ the Supreme Court has said that one damaged is not required to show that the defendant who was negligent should have foreseen the particular damage suffered, but only that a reasonably prudent person should have foreseen that damage was likely to flow as a natural consequence of his negligent act.

What then, is the injury upon which damage can be predicated in the *Sult* case? The Supreme Court found it unnecessary to answer that question, because the issue involved was whether the complaint was subject to a general demurrer. The court held that because the plaintiff was entitled to some relief the complaint was proof against a general demurrer, but as to what particular relief should be given, the court did not state.

It might be argued that no damages were suffered unless the purchaser of the cattle was justified in refusing to buy them as a result of the faulty scales. If he wasn't so justified it might be urged that the plaintiff's relief should be directed against the purchaser for breaking the contract rather than against the railroad.

However, the contract between the plaintiff and the purchaser was for the sale of the cattle to be delivered at Melstone and there to be weighed on the defendant's scales, the purchase price to be paid and the cattle to be shipped to various destinations. It would thus appear that a material condition of the contract involved the weighing of the cattle, so that the purchasers were undoubtedly justified in refusing to buy the cattle when they discovered the scales to be faulty.

It must have been apparent to the defendant that some damage was likely to flow as a natural consequence of the negligent act, thus making some damage foreseeable and putting the situation squarely within the rule announced before in *Reino v. Mont. M.L.D. Co.*⁵⁶ Cattle aren't

⁵⁵Heckaman v. N. P. R. Co. (1933) 93 Mont. 363, 20 P. (2d) 1933; note 53, *supra*.

⁵⁶Note 54, *supra*.

sold as a general rule on the basis of a certain amount per head but upon the basis of weight. This fact must have been known to the defendant's agents as was also the fact that the plaintiff was going to rely on the scales to ascertain the weight of his cattle prior to shipment. In view of these circumstances, there can be but little doubt that the defendant should have known that some damage would ensue if the scales weren't in good condition.

The plaintiff alleged that as a result of the negligence he was forced to ship the cattle over the defendant's railroad to Sioux City and there sell them at a much lower price than the original contract called for. He asked \$6,000 for the loss of the contract and although the decision doesn't so state, it is reasonable to assume that amount represented the difference between the two contracts.

As previously stated, courts have been reluctant to extend the scope of damages in cases involving gratuitous services and negligent misrepresentations fearing that the defendant will be liable far out of proportion to the negligence involved. Thus the RESTATEMENT ON TORTS⁵⁷ illustrates the example of a doctor who promises to come immediately to the aid of an injured person but fails to do so for some time, the result of which is that the injury is aggravated because of the lack of immediate attention. Even if it were understood that the services were to be rendered gratuitously, the doctor is liable for the increased illness because he has induced the injured man from procuring other help. But on the other hand, if the doctor were the only one who could reach the injured man's bedside before the time at which he actually did arrive, the doctor would not be liable because there was no alternative protection which the injured man could have procured as in the first example.

It is difficult to see in the *Sult* case how the negligence was the natural and probable cause of the difference in contract prices or that the damages asked for had a casual difference in contract prices or that the damages asked for had a casual connection with the negligence. In *Lemos v. Madden*⁵⁸ the Wyoming Supreme Court in speaking of probable consequences stated,

"The question is not whether it was a possible consequence, but whether it was probable, that is, likely to occur, according to the usual experience of mankind . . . a wrongdoer is not responsible for a consequence which is merely possible, according to occasional

⁵⁷Note 27, *supra*.

⁵⁸(1921) 28 Wyo. 1, 200 P. 791; 45 C.J. *Negligence*, p. 913.

experience, but only for a consequence which is probable, according to the ordinary and usual experience."

The contract price difference appears to be in the "possible" class rather than in the "probable" class. Furthermore, the shipment to Sioux City was one made of the plaintiff's own volition, the defendant having nothing to do with the making of that contract. The making of the second contract appears to be an intervening and independent decision too remote to enter into the damage caused by the faulty scales.

The real damages occasioned by the negligence are those which took effect immediately—the shrinkage of the cattle in driving them into Melstone and back to their range and the expense incurred in so doing.

In conclusion, the Supreme Court has apparently extended the liability involved in rendering gratuitous services and for making negligent statements to a reasonable and desirable point needed in the modern complex society where dependence upon others is the rule rather than the exception in business activity. It is hoped that by this case the court has withdrawn from the too liberal rule applied in the *Standard Publishing Co.* case and has put liability on the firm basis of reliance.

Bill Bellingham.

Liability of the Manufacturer to the Ultimate Consumer Under Modern Merchandising Practices

A question that has perplexed the courts a great deal since the turn of the century is that of the liability of either the manufacturer or packer to the ultimate consumer for injuries sustained as a result of a defect in the article he has sold. Since both the orthodox tort and warranty remedies have proved inadequate to cope with this question there is a great need, by judicial interpretation or by legislation, to revise these rules, or to make new ones, in order to clarify the law and give the consumer his just relief.

Since the rule was first laid down in *Winterbottom v. Wright*¹ that a contractor, manufacturer, or vendor is not liable to a third person

¹(1842) 10 M. and W. 109, 152 Eng. Reprint 402. See also COOLEY, LAW OF TORTS (Throckmorton ed. 1930) §345, pp. 695-9.