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Recent Decisions

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TORTS: LIABILITY OF BANK FOR NEGLIGENT DISHONOR OF DEPOSITOR'S CHECK: *WEAVER v. BANK OF AMERICA* (CAL. 1964)

The relationship between a bank and its depositor-customer is traditionally based on contract.

> The essence of the bank's obligation under such debtor and creditor contract is that in consideration of the deposit by the customer or depositor, the bank will whenever by the presentation of a genuine check in the hands of a person entitled to receive the amount of such check, a demand for payment is made, honor such check if sufficient funds to cover the amount thereof are on deposit.[1]

The contractual nature of the relationship imposes this obligation on the bank to honor checks of its customers.[2] When a bank, through mistake or negligence, fails to honor a merchant's check, the obligation is patently breached.[3] Before the bank's obligation to honor checks was statutorily defined, California, like most jurisdictions, adhered to this traditional view in allowing recovery of damages for a bank's dishonor. When the dishonored depositor was a trader or merchant, a presumption was raised that substantial damages had been sustained.[4] The distinction between merchant and non-merchant was eclipsed by Civil Code Section 3320,[5] and proof of actual damage is now required in every case.

The recent decision of *Weaver v. Bank of America*[6] is the latest extension of this doctrine. In this case Weaver had a standard checking account in the Bank of America. He drew a check on his account, payable to a merchant. After the merchant negotiated the check it was returned to him bearing the stamp "Account Closed." Actually, Weaver had more than sufficient funds to cover the amount. It was conceded that through some negligence the bank had marked the check in this manner. Without seeking any confirmation from the

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1 Allen v. Bank of America Nat. Trust & Sav. Ass'n., 58 Cal. App. 2d 124, 127, 136 P.2d 345, 347 (1943); *accord.* Glassel Dev. Co. v. Citizens' Nat. Bank, 191 Cal. 375, 216 Pac. 1012 (1923); Reeves v. First Nat. Bank, 20 Cal. App. 508, 129 Pac. 800 (1912), see cases collected in *Annot.*, 126 A.L.R. 206 (1940).

2 See 10 AM. JUR. 2d *Banks* § 567 (1963).

3 Bearden v. Bank of Italy, 57 Cal. App. 377, 207 Pac. 207 (1922); Simminoff v. Jas. H. Goodman & Co. Bank, 18 Cal. App. 5, 121 Pac. 939 (1920); Hartford v. All Night & Day Bank, 170 Cal. 538, 150 Pac. 356 (1915).

4 See cases in *Annot.*, 4 A.L.R. 948 (1919).

5 CAL. CIV. CODE § 3320. This section of the Civil Code was replaced by section 4402 of the Commercial Code on January 1, 1965.

6 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963).

bank, the merchant swore out a warrant resulting in Weaver's arrest on a charge of petty theft. Weaver sought damages in both tort and contract from the bank. At the trial level, the bank's demurrer was sustained. On appeal, the California Supreme Court held unanimously that Weaver could recover: the claim stated a cause of action sounding in both tort and contract.

In California, the issue of a bank's tort liability has had a checkered history of dissatisfying results.[7] The Weaver case is one decision on the logical side of this controversy. The plaintiff alleged that although the payee was the immediate cause of her confinement and detention, the Bank of America was the proximate cause of her injury. By defendant's dishonor of her check, she was placed in a position of vulnerability to such prosecution. Plaintiff's argument was that such arrests are not infrequent under like circumstances and are entirely foreseeable.

In ruling favorably on plaintiff's contentions, the court adhered to the more reasonable theory that foreseeability is the rightful test in the chain of causation. Speaking for the court, Justice Tobriner stated:

> Not only do these cases [in other jurisdictions] sustain the conclusion that the negligence of the bank operated as the proximate cause of the damage, but that conclusion finds support in the doctrine of recent cases that the intervening acts of a third party will not terminate the defendant's liability for negligence if that act were reasonably foreseeable.[8]

In so holding, the court overruled two prior California decisions. The rule had substantially been set forth in the leading case of *Hartford v. All Night and Day Bank*.[9] This case presented a question of dishonor of a check where the plaintiff maintained a savings account. Here the court held that arrest broke the chain of causation as a matter of law.

> It did not necessarily follow that plaintiff would be arrested and charged with a felony because of the bank's acts. There was no causal connection between the two things. There was an interruption and the intervention of an entirely separate cause, which cause was an independent human agency acting with an independent mind.[10]

The other decision upon which defendant relied was the later

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[7] Abramonowitz v. Bank of America Nat. Trust & Sav. Ass'n., 131 Cal. App. 2d 892, 281 P.2d 380 (1955), and note 1 *supra*.

[8] Weaver v. Bank of America Nat. Trust & Sav. Ass'n, 59 Cal. 2d 428, 433, 380 P.2d 644, 648, 30 Cal. Rptr. 4.

[9] 170 Cal. 538, 150 Pac. 356 (1915).

[10] *Id.* at 539, 150 Pac. at 357.

case of *Bearden v. Bank of Italy*.[11] In this case the court refused to distinguish *Hartford*, although *Bearden* involved a checking account. It denied recovery on the basis of proximate cause. Both these cases held as a matter of law that arrest and prosecution could not be the proximate result of defendant bank's negligence. Decisions in other jurisdictions challenged the rule in these cases,[12] and they received substantial criticism by certain text writers.[13]

In *Weaver*, plaintiff's claim hinged upon the applicability of Section 3320 of the Civil Code. This statute, enacted in 1917, provides:

> No bank shall be liable to a depositor because of the non-payment through mistake or error and without malice of a check which should have been paid unless the depositor shall allege and prove actual damages by reason of such non-payment and in such event the liability shall not exceed the amount of damage so proven.[14]

The enactment of this section was urged by the American Banker's Association. The Association wanted the protection afforded by the "actual damages" provision. Now, with the adoption of the Commercial Code, Section 3320 of the Civil Code will be replaced by Section 4402 of the Commercial Code.[15] Thus, the very statute urged by the bankers for their protection is now being repealed by one directed toward protection of the depositor. In adopting the bulk of the Uniform Commercial Code, the Legislature chose to omit the last two sentences of the official text. These provide:

> If so, proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.[16]

In effect, the *Weaver* case presented an opportunity for the court to inferentially acknowledge these deleted sentences of Section 4402. The court did this in what appears to be an expeditious means of correcting legislative omission. It was the opinion of the California State Bar Committee on the Commercial Code that one

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11 57 Cal. App. 377, 207 Pac. 270 (1922).

12 Collins v. City Nat. Bank & Trust Co., 131 Conn. 167, 38 A.2d 582 (1944); Mouse v. Central Sav. & Trust Co., 12 Ohio St. 599, 167 N.E. 868 (1929); Woody v. First Nat. Bank 194 N.C. 549, 140 S.E. 150 (1927); First Nat. Bank v. Stewart, 204 Ala. 199, 85 So. 529 (1920); see cases in *Annot.*, 153 A.L.R. 1035 (1944).

13 PROSSER, Proximate Cause in California, 38 CALIF. L. REV. 369 (1950); 1 WITKIN, SUMMARY OF CALIFORNIA LAW, Negotiable Instruments, § 71 (7th ed. 1960); 7 HASTINGS L.J. 322 (1956); see also, RESTATEMENT, TORTS, § 447-449 (1934).

14 CAL. CIV. CODE § 3320.

15 CAL. COMM. CODE § 4402 (West's 1964).

16 UNIF. COMM. CODE § 4-402.

particular item of damage, namely, arrest and prosecution resulting from dishonor, should not be singled out for special treatment.[17] The Committee's reluctance to adopt these sentences does not appear to be consistent with current case law.[18]

It should further be noted that plaintiff in the *Weaver* case based her claim on both tort and contract. The court inferred that damages could be recovered under either theory.[19] However, it might have been difficult to argue that arrest and confinement were damages "within reasonable contemplation of the parties."[20] Be that as it may, the court concluded that plaintiff had justifiably alleged a breach of duty and consequential damages which raised issues of fact that could only be resolved by the jury.

With the advent of collection agencies and highly efficient credit departments, retailers have surely been aware of the abundance of bad checks. It seems axiomatic that banking institutions are as aware, if not more so. Since the writing of such checks is expressly forbidden by the Penal Code,[21] the resulting arrest and prosecution of a depositor can scarcely be said to be a remote possibility.

> When a bank bounces a check of a customer even though he has sufficient funds, and the payee has the arm of the law put on him, to say that the bank's action had nothing to do with his incarceration is fantastic. It is recommended that California seize the opportunity afforded by the code to abrogate this unrealistic rule.[22]

Thus, tort liability as found in *Weaver* appears consistently sound with both the weight of American jurisdictions and the commercial practices of the times. Even with increased usage of banking institutions, the essence of the depositor-bank relationship is a personal one. When a depositor opens an account, the bank incurs a strict duty to safely handle the depositor's funds. Of course, proof of actual damages is vital to the cause of action. But, as in *Weaver*, it should not be doubted that arrest of the innocent through banking negligence is an actual and substantial injury. It is an obvious consequence of the bank's clerical errors.

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17 37 J. OF ST. BAR OF CALIF. 169 (1962).

18 *Cf.* authorities cited note 12, *supra.*

19 Weaver v. Bank of America Nat. Trust & Sav. Ass'n, 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963).

20 *Id.* at 434, 380 P.2d at 649.

21 CAL. PEN. CODE § 47(6a).

22 Sixth Progress Report to the Legislature by Senate Fact Finding Committee on Judiciary, pt. 1, The Uniform Commercial Code, at 481-482 (1961).