Volume 69
Issue 3 *Dickinson Law Review - Volume 69, 1964-1965*

3-1-1965

Doyle v. South Pittsburgh Water Co.: Liability of a Water Company to a Citizen for Fire Loss Due to Insufficient Water Pressure

Edwin I. Grinberg

DOYLE v. SOUTH PITTSBURGH WATER CO.: LIABILITY OF A WATER COMPANY TO A CITIZEN FOR FIRE LOSS DUE TO INSUFFICIENT WATER PRESSURE

The Pennsylvania Supreme Court has written another chapter in the negligence law of Pennsylvania with its recent decision in *Doyle v. South Pittsburgh Water Co.*[1] The court held that a public utility having a contract with a municipality to supply water was liable to a citizen for loss caused by the utility's failure to supply the water at sufficient pressure to extinguish fires. The plaintiff averred that the destruction could have been averted had the defendant's affirmative negligence not rendered the fire hydrants inoperative.

Numerous legal scholars advocate liability on the part of the water company in such a situation,[2] but the majority of cases have denied recovery to the party whose property is consumed by fire, regardless of whether the liability of the water company is predicated upon its contract with the municipality or in tort.[3] The rationales employed in denying recovery have been: (1) That there is no privity of contract between the citizen and the water company;[4] (2) that the relationship between the parties is too remote to impose a duty as a prerequisite for an action in tort;[5] (3) that the water company is an agent of the city and therefore shares the immunity of the city;[6] and (4) that public policy demands that no undue burden be placed on water companies

---

1. 414 Pa. 199, 199 A.2d 875 (1964). The companion case of Malter v. South Pittsburgh Water Co., 414 Pa. 231, 198 A.2d 850 (1964), was heard with *Doyle*. *Malter* joined the municipality as a party defendant. The Pennsylvania Supreme Court held that both the water company and municipality were required to answer the complaint.

2. See Corbin, *Liability of Water Companies for Losses by Fire*, 19 YALE L.J. 425 (1910); Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951), *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 392 (1939), and *Principles of Torts*, 56 HARV. L. REV. 72, 76; Sunderland, *Liability of Water Companies for Fire Losses*, 3 MICH. L. REV. 442 (1905).

3. *Cf.* Annot., 62 A.L.R. 1199.

4. See Germain Alliance Ins. Co. v. Home Water Supply Co., 174 Fed. 764 (4th Cir. 1909); Boston Safe Deposit & Trust Co. v. Salem Water Co., 94 Fed. 238 (N.D. Ohio 1899); Davis v. Clinton Waterworks Co., 54 Iowa 59, 6 N.W. 126 (1880); Hone v. Presque Isle Water Co., 104 Me. 217, 71 Atl. 769 (1908); Howsman v. Trenton Water Co., 119 Mo. 304, 24 S.W. 784 (1893).

5. See Davidson v. Nichols, 11 Allen 514 (Mass. 1866); Baum v. Somerville Water Co., 84 N.J.L. 611, 87 Atl. 140 (1913); Beck v. Kittanning Water Co., 117 Pa. 320, 11 Atl. 300 (1887); Grant v. Erie, 69 Pa. 420 (1871); Freeman v. Macon Gas Light and Water Co., 126 Ga. 843, 56 S.E. 61 (1906); Fowler v. Athens City Waterworks Co., 83 Ga. 219, 9 S.E. 673 (1889).

6. See Germain Alliance Ins. Co. v. Home Water Supply Co., 174 Fed. 764 (4th Cir. 1909); Howsman v. Trenton Water Co., 119 Mo. 304, 24 S.W. 784 (1892); Akron Water Co. v. Brownless, 10 Ohio Cir. Cts. 620 (1894); Thompson v. Springfield Water Co., 215 Pa. 275, 64 Atl. 521 (1906); Peck v. Sterling Water Co., 118 Ill. App. 533 (1905).

by compelling them to respond to such suits.[7] It is well settled in three jurisdictions, however, that the water company will be accountable for the damage arising from its breach of contract.[8]

The purpose of this Note is to analyze and evaluate these rationales and to specifically discuss the *Doyle* case in light of these considerations.

Public Policy Considerations

In a New Jersey case, *Reimann v. Monmouth Consol. Water Co.*,[9] the court denied recovery to the property owner, being principally concerned that the water company would become bankrupt or left in a poor financial position impeding its service to the public. This policy rationale was also determinative in *Hone v. Presque Isle Water Co.*,[10] the court holding that the water company would be required to assume the obligation of an insurer, and investors would exclude this industry which was exposed to "incalculable hazards and constant litigation."[11]

The New York case of *H. R. Moch Co. v. Rensselaer Water Co.*,[12] is frequently cited as authority for denying recovery to the private property owner for public policy reasons. The defendant, under a contract with the city, failed to supply a sufficient quantity of water with adequate pressure to suppress a fire before it spread to plaintiff's warehouse. Peculiar to New York, however, is the doctrine that liability is limited to the first building destroyed by fire;[13] a rule which was predicated upon the early necessity of maintaining infant railroads vital to the development of the state's economy.[14] The court in *Moch* reasoned that since a wrongdoer who negligently starts a fire is liable only to the owner of the first building, then one who negligently fails

7. Sidney Grossman Hotel Corp. v. Lakewood Water Co., 27 N.J. 91, 141 A.2d 541 (1958); Reimann v. Monmouth Consol. Water Co., 9 N.J. 134, 87 A.2d 325 (1952); Hone v. Presque Isle Water Co., 104 Me. 217, 71 Atl. 769 (1908).

8. See Woodbury v. Tampa Waterworks Co., 57 Fla. 243, 49 So. 556 (1909); Mugge v. Tampa Waterworks Co., 52 Fla. 371, 42 So. 81 (1906); Prestonsburg Water Co. v. Dingus, 271 Ky. 240, 111 S.W.2d 661 (1937); Terry v. Loudermilk, 158 Ky. 353, 164 S.W. 959 (1914); Tobin v. Frankfort Water Co., 158 Ky. 348, 164 S.W. 956 (1914); Kenton Water Co. v. Glenn, 141 Ky. 529, 133 S.W. 573 (1911); Lexington Hydraulic & Mfg. Co. v. Oots, 119 Ky. 598, 84 S.W. 774 (1905); Graves v. Ligion, 112 Ky. 775, 66 S.W. 725 (1902); Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S.W. 554, 13 S.W. 249 (1889); Gorrell v. Greensboro Supply Co., 124 N.C. 328, 32 S.E. 720 (1899).

9. 9 N.J. 134, 87 A.2d 325 (1952). See Sidney Grossman Hotel Corp. v. Lakewood Water Co., 27 N.J. 91; 141 A.2d 541 (1958).

10. 104 Me. 217, 71 Atl. 769 (1908).

11. *Id.* at 221, 71 Atl. at 775.

12. 247 N.Y. 160, 159 N.E. 896 (1928).

13. "[A] wrongdoer who by negligence sets fire to a building is liable in damages to the owner where the fire has its origin, but not to other owners who are injured when it spreads." *Id.* at 161, 159 N.E. at 898.

14. Ryan v. N.Y. Central R.R. Co., 35 N.Y. 210 (1866).

to supply sufficient pressure to extinguish a fire should not be liable for the entire damage when a city block is destroyed. Because of this unique doctrine, the influence of *Moch* in other jurisdictions is probably attributable to the eminence of the opinion writer, Mr. Justice Cardozo. What the result would have been had the "one building" rule not been in effect or if only one building had been destroyed by the conflagration is a matter of conjecture.

It is questionable whether public policy in cases of insufficient water pressure is an adequate reason for denying liability. The argument used in *Reimann* and *Hone* is precisely the same argument proposed by earlier courts in denying a third party recovery from a manufacturer when the manufacturer was negligent, *i.e.*, that the imposition of liability would prevent businessmen from entering these trades.[15] There has been, however, no mass exodus from the automobile manufacturing industry since *MacPherson v. Buick Motor Co.*,[16] nor has there been a decline in the number of water companies in Florida, Kentucky, or North Carolina where a water company is held liable for negligence to a citizen for failing to provide adequate water pressure.[17] That there is a strong public policy opposed to recovery is falacious. It reasonably follows that if a citizen is granted a right to recover, the public will be guaranteed more protection and greater assurance that goods will be safely made and that contracts will be fulfilled.[18] In a dissenting opinion in *Reimann* Chief Justice Vanderbilt said: "Considering property alone, the question is merely on whom shall the burden of loss, or of insurance therefor, fall. Sound principles of justice would indicate that it be on the party at fault."[19] Since it is the water company's negligence which caused the damage, and since the water company is better able to distribute the loss than the homeless citizen, public policy, if it is to be a deciding factor, should favor liability.

Governmental Immunity Considerations

Some courts, disregard whether an action is brought in tort or contract, reasoning that the water company undertakes to perform a public function, and that the municipality because of convenience and economy employed the water company as its agent.[20] It follows, therefore, that the water company is

15. See Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225, 1232 (1937).

16. 217 N.Y. 382, 111 N.E. 1050 (1916). The defendant was a manufacturer of automobiles. It sold an automobile to a retail dealer who in turn sold to the plaintiff. The plaintiff was subsequently injured when the vehicle collapsed because of a defective wheel.

17. See cases cited note 8 *supra*.

18. Corbin, *Liability of Water Companies for Losses by Fire*, 19 YALE L.J. 425 (1910).

19. Reimann v. Monmouth Consol. Water Co., 9 N.J. at 17, 87 A.2d at 332.

20. See Town of Ukiah City v. Ukiah Water and Improvement Co., 142 Cal. 173, 75 Pac. 775 (1904). When the municipality contracts with the water company, for practical purposes the water company is considered the agent or employers of the city.

entitled to the municipality's immunity.[21] The court in *Germain Alliance Ins. Co. v. Hone Water Supply Co.*,[22] in denying recovery said: "This conclusion deprives the property owner of no right, for if the city had owned the works, and had been guilty of the same acts as are charged against the water company here, no suit could have been maintained against the municipality."[23] The Pennsylvania Supreme Court in *Thompson v. Springfield Water Co.*[24] denied recovery in a similar case for the same reasons. The court discussed the case as if it were the municipality instead of an independent corporation running the water works.

The above rationale is untenable for two reasons. Generally, the evidence would establish that water companys are free from municipal control; therefore, to call water companies the municipality's agent or servant is to abort general agency principles.[25] But even if a water company is erroneously labeled the municipality's agent there are cases establishing that the municipality's immunity does not inure to the benefit of an agent or employee.[26] In consonance is the *Restatement of Agency* which states: "An agent does not have the immunities of his principal although acting at the discretion of the principal."[27] The tenor of this reasoning is to force the municipality to purchase liability insurance as an administration expense to be offset by taxing the public.[28] This seems to be a fair and equitable principle.[29]

The second reason is that even if the municipality had maintained its own fire fighting system, its immunity from liability is not as certain as the Court in *Germain Alliance* makes it appear. To determine when a municipal-

---

21. See Thompson v. Springfield Water Co., 215 Pa. 275, 64 Atl. 521 (1906).
22. 226 U.S. 220 (1912).
23. *Id.* at 232, 233.
24. Thompson v. Springfield Water Co., 215 Pa. 275, 64 Atl. 521 (1906).
25. MECHEM, OUTLINES OF AGENCY § 416 (4th ed. 1952).
26. See Voltz v. Orange Volunteer Fire Ass'n Inc., 118 Comm. 307, 172 Atl. 220 (1934), where the court permitted recovery for the negligent operation of a fire truck, even though the municipality employing the driver was exempt from liability. In Ference v. Booth & Flinn Co., 370 Pa. 400, 88 A.2d 413 (1952), the court said: "It is hornbook law that the immunity from suit of the sovereign state does not extend to independent contractors doing work for the state." *Id.* at 403, 88 A.2d at 414. The court in Miller v. Jones, 224 N.C. 783, 32 S.E.2d 594 (1945), in finding a street cleaner liable for damages said:

> It is a broad general rule that any person who violates a legal duty he owes to another is liable for the natural and probable consequences of his acts or omissions, and exceptions to that rule should *not*, by mere judicial rationalization, be extended beyond the recognized public policy out of which they spring.

Id. at 788, 32 S.E.2d at 597 (Emphasis added).
27. RESTATEMENT (SECOND), AGENCY § 347 comment (1958), Immunities and Standards of Care of Principal reads: "Immunities exist because of an overriding public policy which seems to protect an admitted wrongdoer from civil liability. They are strictly personal to the individual and cannot be shared."
28. See PROSSER, TORTS § 109 (2d ed. 1955).
29. See Meads v. Rutter, 122 Pa. Super. 64, 184 Atl. 560 (1936).

ity's immunity is applicable, the courts draw a distinction between functions which are governmental or public and those which are proprietary or private. In performing a proprietary function, which the maintenance of a water works should be considered,[30] the courts generally agree that the municipality would be liable in the same manner as a private corporation.[31] When courts call this activity a governmental function, there are further complications because of the distinctions between misfeasance and nonfeasance, and ministerial and discretionary acts.[32] Even when this governmental label is placed on the function of providing a fire protection system, the municipality still has the choice whether to install the system; however, once it undertakes to provide protection, "the municipality should be held accountable to the same extent as a private enterprise would be."[33] It follows that regardless of the label chosen by the court, the municipality may not be immune from suit if it maintained the water works instead of contracting with an outside company.

The situation is analogous to the municipality providing storm sewers.[34] A municipality is under no obligation to install storm sewers for the protection of its citizens; but once it exercises its discretion and installs the sewers, it is liable for damage resulting from their negligent maintenance.[35] The distinction between damage caused by inadequate maintenance of storm sewers and damage caused by inadequate maintenance of a fire fighting system is difficult to comprehend. If the government is precluded from standing behind the shield of immunity in the negligent maintenance of innocuous storm sewers, it certainly should be barred from the use of such shield when the perilous danger of an inadequate fire fighting system is at issue.

CONTRACT CONSIDERATIONS

After the impasses of public policy and governmental immunity are obviated, the court should ascertain whether the property owner can maintain an action *ex delicto* or *ex contractu*. If the property owner had contracted directly with the water company to furnish him an adequate water supply for fire fighting purposes, he could recover *ex contractu*.[36] Where, however,

30. 78 McQUILLIN, MUNICIPAL CORPORATIONS §§ 53.100 *et seq.* (3d ed. 1949) also states that the operation and maintenance of sewer systems, gas or electric plants, street railways, and airports are generally regarded as proprietory functions.

31. See Bochard, *Governmental Liability in Tort*, 34 YALE L.J. 129 (1924); Bochard, *Distinction Between Governmental and Proprietary of Municipal Corporations*, 23 MICH. L. REV. 325 (1925); Hobbs, *Tort Liability of Municipality*, 27 VA. L. REV. 126 (1940); Smith, *Municipal Tort Liability*, 48 MICH L. REV. 41 (1949).

32. See 2 HARPER AND JAMES, TORTS § 29.6 (1956).

33. See 2 HARPER AND JAMES, *op cit. supra* note 29.

34. See Yules v. Borough of Ebensburg, 182 Pa. Super. 423, 128 A.2d 118 (1956).

35. *Ibid.*

36. 74 N.J. Super. 490, 495, 181 A.2d 545, 548 (1962).

the water company is paid from taxes levied on the citizen it is settled that the taxpayer-property owner is to be considered a third party beneficiary.[37]

The Pennsylvania courts, after many years of discord as to whether third party beneficiaries should be able to maintain suit,[38] concluded that suit should be permitted in cases of donee or creditor beneficiaries.[39] Other courts, because of the difficulty in placing all beneficiaries into one of three categories, have adopted different standards for determining which beneficiaries should be protected, such as the "directness" or "remoteness" of the beneficiary to the contract.[40] Regardless of the theory employed, it is generally stated that the third party beneficiary must establish the fact that the contract was intended for his direct benefit.[41]

In order to ascertain the intent of the promisor, the court will examine the circumstances surrounding the formation of the contract, including the results which the parties sought to accomplish by the contract.[42] The court in *Paducah Lumber Co. v. Paducah Water Supply Co.*,[43] in deciding a case with facts substantially similar to those of *Doyle* said:

> It seems, if the contract before us is not to be treated as meaningless and totally ineffectual for every purpose, the parties to it must be

37. See Buchanan & Smock Lumber Co. v. East Jersey Coast Water Co., 71 N.J.L. 350, 59 Atl. 37 (1904); Middlesex Water Co. v. Kuappmann Whiting Co., 64 N.J.L. 240, 45 Atl. 692 (1899).

38. Until Commonwealth v. Great Am. Indemnity Co., 312 Pa. 183, 167 Atl. 793 (1933), where the supreme court overruled Greene County v. Southern Surity, 292 Pa. 304, 141 Atl. 27 (1927), the English rule requiring privity had been followed in Pennsylvania.

Formerly, in order for a party to maintain a contract action, privity had to exist. Consideration had to be furnished by the party to whom the promise was made. At the present time, nearly all American jurisdictions follow the rule that one for whose benefit a contract is made, may, although not a party to the contract and not furnishing any of the consideration, maintain an action against the promisor. 2 WILLISTON, CONTRACTS § 356 (3d ed. 1959), and RESTATEMENT CONTRACTS § 133 (1932) state that a third party may enforce a promise if he is a donee or creditor beneficiary. A person is a donee beneficiary if the purpose in obtaining the promise is to make a gift to the beneficiary; a person is a creditor beneficiary if the performance of the promise will satisfy a duty of the promisee to the beneficiary; and a person is an incidental beneficiary if the benefits to him are merely incidental to the performance of the promise, and he is neither of the other two types. Neither of the above authorities would allow an incidental beneficiary to recover under any circumstances.

39. See Pennsylvania Supply Co. v. National Cas. Co., 152 Pa. Super. 217, 31 A.2d 453 (1943).

40. See MacKay v. Loew, 182 F.2d 170 (9th Cir. 1950); Isbrandtsen Co. v. Local 1291, Int. Longshoremen's Ass'n, 204 F.2d 495 (3d Cir. 1953).

41. See Robbins Dry Dock Co. v. Flint, 275 U.S. 303 (1927). A Connecticut court in Byram Lumber v. Page, 109 Conn. 256, 146 Atl. 293 (1929), defines its guide as follows: "The intent which must exist on the part of the parties to the contract in order to permit the third party to sue was not a desire or purpose to confer a particular benefit on him, but an intent that the promisor should assume a direct obligation to him." *Id.* at 261, 146 Atl. at 294.

42. *Ibid.*

43. 89 Ky. 340, 12 S.W. 554 (1899).

> regarded as having contemplated and assented to the consequences of nonperformance . . . consequently appellee is liable in this case for such damage as its failure or refusal to perform may have caused to appellant.[44]

When first confronted with a similar question, the North Carolina Supreme Court stated: "It is true, the plaintiff is neither a party nor privy to the contract, but it is impossible to read the same without seeing that . . . the object is the comfort, ease, and security from fire of the people. . . ."[45] The beneficiaries of the contract were the water company on one hand and the citizens of the municipality on the other. The citizens were to pay the taxes which would compensate the water company which in return would supply sufficient pressure in the fire hydrants. Why should not the water company be liable for damage on a third party beneficiary theory?

As dogmatically as the courts mentioned above express their views, the majority of American courts still deny the citizen the right to recover in contract.[46] These courts stress that it was not the intent of the city to benefit the individual but rather to benefit the municipality as a whole.[47] Regardless of this abstract theory the ultimate recipient of the water will be the individual property owner.[48] It would then seem that the municipality contracted to prevent fire loss to private property. This would appear valid since these same courts which say no liability in water works cases have little difficulty in finding that other contracts made by the city encompass private property.[49]

---

44 *Id.* at 352, 12 S.W. at 557.

45. Gorrell v. Greensboro Water Supply Co., 124 N.C. 328, 32 S E. 720 (1899).

46. See RESTATEMENT, CONTRACTS § 145 (1932). Beneficiaries Under Promises to the United States, a State, or a Municipality.

> A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,
>
> (a) An intention is manifested in the contract as interpreted in light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences, or,
>
> (b) the promisor's contract is with a municipality to render services the nonperformance of which would subject the municipality to a duty to pay.

The Restatement gives a water company case as an illustration with this section and decides the case according to the prevailing weight of authority—no liability.

47. See Howsman v. Trenton Water Co., 119 Mo. 305, 24 S.W. 784 (1893). In H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928), Mr. Justice Cardozo said: "By the vast preponderance of authority a contract between a city and a water company to furnish water at the city hydrants has in view a benefit to the public that is incidental rather than immediate, as assumption of duty to the city and not to its inhabitants." *Id.* at 165, 159 N.E. at 897.

48. See Gorrell v. Greensboro Water Supply Co., 124 N.C. 328, 32 S.E. 720 (1899).

49. See Fowler-Chicago Rys. Co., 285 Ill. 196, 120 N.E. 635 (1918). A company contracted with a city to keep the city's streets in repair and the court said such company will be directly liable to a party injured because of the company's negligence; see also Independent School Dist. v. Le Mars Water and Light Co., 131 Iowa 14, 107 N.W.

If neither the taxpayer nor the city can recover for the damage to private property in these cases, the conclusion seems to be that this is damage for which there is no compensation.[50] It certainly would not have been the intent of the municipality to execute an illusory contract. For the contract to be efficacious, it must be intended to benefit the private property owner who should be entitled to a cause of action.

TORT CONSIDERATIONS

Instead of maintaining the action against the water company in contract, many injured citizens proceed upon a tort theory. The inability of a property owner to maintain an action *ex delicto* against the water company is predicated upon his inability to establish a duty between himself and the water company.[51] An analysis of the varying approaches used by the courts when the question of liability of the water company in tort is in issue reveals that a duty could exist.

When the alleged negligence of the water company is nonfeasance the property owner is precluded from recovery because no duty exists.[52] The *Moch*[53] case denied recovery because: "What we are dealing with at this time is a mere negligent omission, unaccompanied by malice or other aggravating elements. The failure in such circumstances to furnish an adequate supply of water is at most the denial of a benefit. It is not the commission of a wrong."[54] Often, there is little distinction between acts of nonfeasance and acts of misfeasance. When an individual has no obligation to perform a certain act, his omission creates no liability.[55] If he voluntarily attempts to perform or to do the particular thing, he comes under an obligation with respect to the execution of that act.[56] If the water company never advanced toward carrying out its contract, only the city could assert a breach of contract action against it since no duty was owed to the public. But once it actually undertakes and enters upon performance of installing fire hydrants, it has a duty to use due diligence. If the water company abandons its performance midway, mis-

944 (1906). The court said that every consumer of water is impliedly privity to the contract made by the municipality and the water company.

50. See FREEMAN 29 Am. St. Rep. 856, 863 (1893), commenting on Britton v. Green Bay and Ft. H. Waterworks Co., 81 Wis. 48, 51 N.W. 84 (1892).

51. The dissent in *Doyle* was concerned with this very question, 414 Pa. at 221, 199 A.2d at 887, where Justice Jones felt that the majority sidestepped the problem of actually finding a duty which the water company owed to the plaintiff.

52. See Fowler v. Athens City Waterworks Co., 83 Ga. 219, 9 S.E. 679 (1889).

53. See text accompanying note 12 *supra.*

54. 247 N.Y. —, 159 N.E. 899.

55. See PROSSER, TORTS § 54 (3d ed. 1964); GREEN, JUDGE AND JURY 62 (1930), says: "We have enough to do to keep our activities within control, without attempting to regulate the direction the latent energies that individuals should take." *Id.* at 62.

56. See Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (1928).

feasance is the result,[57] and the water company should be answerable for the new risk of harm which it has generated.[58]

One who engages in public construction is liable in tort for injury inflicted upon a third person by reason of his negligence with respect to performance of the public contract.[59] The water company being a monopoly enjoys special privileges, *i.e.*, the right of eminent domain; also, it has the right to have special taxes assessed so a profit can be made for its service.[60] Because the public is denied the usual control present in a competitive industry, a statutory duty is imposed when the corporation accepts its franchise so that control over the monopoly may be maintained. The Pennsylvania Public Utility Law[61] provides:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.[62]

Although it would seem that this statute was intended to apply to water companies, the cases have held that the statute is inapplicable to a fire fighting service.[63] A water company is liable to a property owner if its service is not adequate, sufficient, or safe in supplying business needs[64] or drinking consumption,[65] but a water company has no duty to the property owner for water to fight fires. The inequity is evident; the furnishing of water for fire protection is as much a monopoly, as much a public service, and as much a responsibility as furnishing water for consumption. The duty upon the water company should be comparable.

A duty could exist because the plaintiff relied upon the promise of the

57. See Osborne v. Morgan, 39 Am. Rep. 437 (Mass. 1881).

58. See Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 221 (1908).

59. See Guardian Trust Co. v. Fisher, 200 U.S. 57 (1905); Mugge v. Tampa Waterworks Co., 52 Fla. 371, 15 So. 81 (1906); Pond v. New Rochelle Water Co., 183 N.Y. 330, 76 N.E. 211 (1906).

60. Baum v. Sommerville Water Co., 84 N.J.L. 611, 87 Atl. 140 (1913); Enlich v. City of Clintonville, 238 Wis. 481, 300 N.W. 219 (1941).

61. PA. STAT. ANN. tit. 66, § 1171 (1959).

62. PA. STAT. ANN. tit. 66, § 1171 (1959).

63. Huddock v. Scranton Spring Brook Water Ser. Co., 39 Pa. D. & C. 346 (C.P. 1940). The Wisconsin Supreme Court in Britton v. Green Bay & Fort H. Waterworks Co., 81 Wis. 48, 51 N.W. 84 (1892), deciding a similar problem, held that a water company is outside the scope of this rule on the ground that an agreement which provides for a supply of water for fire fighting purposes subjects the contractor to no public duty.

64. Advance Specialty Co. v. Visco., 18 Pa. D. & C.2d 376 (C.P. 1959).

65. Hayes v. Torrington, 88 Ct. 609, 92 Atl. 406 (1914).

water company to supply water with adequate pressure, and the reliance was both reasonable and foreseeable.[66] The duty would be one of reasonable care to protect others who reasonably relied on the water company's ostensible protection. This principle was employed where a railroad company utilized a gateman to warn of approaching trains; when he failed to signal an oncoming traveler, the railroad was liable to the traveler who relied on the absence of the signal.[67] A more recent application of the reliance theory is in *Indian Towing Co. v. United States*[68] where the Coast Guard maintained a lighthouse on Chandeleur Island. Because the light was out, one of plaintiff's barges traveling in that vicinity, grounded on the island and as a result damaged its cargo. The Supreme Court in permitting recovery said:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order. . . .[69]

It follows that a water company which installs a fire protection system should be liable to a private citizen who, relying on such protection, forgoes another safeguard and suffers damage.

In the *Doyle* case the Pennsylvania Supreme Court pioneered a new area of tort law. Originally the duty of care was limited to the parties to the contract,[70] but the leading case of *McPherson v. Buick Motor Co.*,[71] marked the beginning of the modern development of the duty imposed by law concept.

---

66. See RESTATEMENT (SECOND), AGENCY § 378 (1958). Although this section deals primarily with agency situations, it could apply equally to tort liability. In the Reporter's Note to § 354 in discussing § 378 it is said: "As the language indicated, the entire basis of liability is the reliance by the promisee and the fact that at the time of the promise he would have used other means for protecting his interest, but for the promise which the promisor later failed to perform." See also RESTATEMENT, CONTRACTS § 90 (1932), and RESTATEMENT, TORTS § 325 (1938). In these three Restatement sections the basis of liability is obviously the reliance on the promise.

67. See Will v. Southern Pac. Co., 18 Cal. 2d 468, 116 P.2d 44 (1941); Westaway v. Chicago, St. P.M. & O.R. Co., 56 Minn. 28, 57 N.W. 722 (1893); Burns v. North Chicago Rolling Mill Co., 65 Wis. 312, 27 N.W. 43 (1886).

68. 350 U.S. 61 (1955).

69. *Id.* at 69.

70. The case cited as the forerunner in this area is Winterbottom v. Wright, 10 M. & W. 109, 153 Eng. Rep. 402 (1842), which was decided before negligence was recognized as an independent basis of liability. Professor Seavy wrote in 50 HARV. L. REV. 1225, 1232 (1937), the "privity is no longer the fetish that it was fifty years ago. Yet while on the wane, it still has vitality."

71. 217 N.Y. 382, Ill. N.E. 1050 (1916). Mr. Justice Cardozo wrote: "We have put aside the notion that the day to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of obligation where it ought to be. We have put its source in the law." *Id.* at —, 111 N.E. 1056.

Subsequent cases extended this concept to include casual bystanders,[72] purchaser's employees,[73] damage to other property,[74] and anyone who could foreseeably be expected to use the product.[75] It is apparent that the water company did foresee that its negligent acts could injure this private property owner; there is virtually no one who is a more foreseeable plaintiff than a property owner on a street where a fire hydrant is located.[76]

CONCLUSION

That tort liability is favored over the third party beneficiary rationale depends upon numerous factors; statute of limitations, degree of negligence, wording of the contract, and similar considerations. One determining factor is that of damages. Damages in a tort action attempt to place the plaintiff in the same condition as he would have been had the wrong not occurred.[77] To the normal plaintiff this would be an adequate remedy, but in order to recover this damage in a contract action, the plaintiff must show that the parties contemplated that the insuing damages would flow from the breach of contract.[78] This additional onus combined with the omnipresent task of proving that third party beneficiary status was intended by the original parties is a strong consideration why a tort remedy should be favored over a contract action.

EDWIN I. GRINBERG

72. See McLeod v. Linde Air Prods. Co., 318 Mo. 397, 1 S.W.2d 122 (1927); Reed & Barton Mfg. Co. v. Maas, 73 F.2d 359 (1st Cir. 1934).

73. See Kalash v. Los Angeles Ladder Co., 1 Cal. 2d 229, 34 P.2d 345 (1934); Rosebrock v. General Elec. Co., 236 N.Y. 227, 140 N.E. 171 (1923).

74. See Todds Shipyards v. United States, 69 F. Supp. 609 (D. Me. 1943); Marsh Wood Prods. Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932); Dunn v. Ralson Purina Co., 38 Tenn. App. 329, 272 S.W.2d 479 (1954).

75. See PROSSER, TORTS, ch. 19 (3d ed. 1964).

76. See RESTATEMENT, TORTS § 392 (1938). UNIFORM COMMERCIAL CODE § 2-318 states: "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in her home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty."

77. See MCCORMICK, DAMAGES § — (1935).

78. See Hadley v. Baxendale, 9 Ex. 341 (1854).