Michigan Law Review

Volume 36 | Issue 2

1937

TORTS - LIABILITY OF POWER COMPANY TO RESIDENT FOR NON-PERFORMANCE OF CONTRACT WITH CITY TO KEEP STREET LIGHT BURNING

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TORTS — LIABILITY OF POWER COMPANY TO RESIDENT FOR NON-PERFORMANCE OF CONTRACT WITH CITY TO KEEP STREET LIGHT BURNING — Defendant public utility was under contract to a municipality to light the streets. Plaintiff, a local resident, was injured in an automobile collision which, he alleged, was caused by defendant's negligent failure to keep a certain street light burning. Defendant demurred. *Held*, that the demurrer was properly sustained. *Tollison v. Georgia Power Co.*, 53 Ga. App. 795, 187 S. E. 181 (1936).

In reaching its decision in the principal case, the Georgia court followed its decision in an earlier and similar case, involving the negligent failure to furnish adequate light,[1] and the decisions in the so-called "water company cases." Despite one or two cases to the contrary, and the arguments of some legal scholars who advocate liability,[2] it is generally held that citizens cannot recover for a fire loss caused by the breach of a water company's contract with a municipality. In the leading case in the field,[3] Justice Cardozo declared that it could not be said that the public utility, once it began to perform its contract with the city, brought itself into such relationship with potential beneficiaries of proper performance as to give its negligent performance tortious qualities. Defendant's failure was at worst, Cardozo said, "the denial of a benefit." [4] Or, as Justice Holmes had said,[5] "the law does not spread its protection so far." The misfeasance-nonfeasance distinction, with its roots in the agency relationship,[6] has its greatest vigor, perhaps, in this type of case. A most interesting Maryland case, involving an injury from an earlier type of street lighting, is authority for liability for injuries arising from distribution of gas through defective pipes (misfeasance), and for non-liability for negligent failure to supply gas in accordance with a contract with the city (non-feasance).[7] Admitting the validity of the principle which holds even the gratuitous defendant for the negligent performance of a service undertaken, it would appear that "liability would be unduly . . . extended by this enlargement of the zone of duty" [8] were our courts to declare that the mere entrance upon performance of a contract with the city raises a duty to all who might be benefited by the continued performance of that contract.[9]

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[1] Quinn v. Georgia Power Co., 51 Ga. App. 291, 180 S. E. 246 (1935).

[2] Divergent views on the question are suggested by Sunderland, "Liability of Water Companies for Fire Losses," 3 MICH. L. REV. 442 (1905), and Kales, "Liability of Water Companies for Fire Losses—Another View," 3 MICH. L. REV. 501 (1905).

[3] Moch v. Rensselae Water Co., 247 N. Y. 160, 159 N. E. 896 (1928).

[4] 247 N. Y. 160 at 169.

[5] Robins, etc. Co. v. Flint, 275 U. S. 303 at 309, 48 S. Ct. 134 (1927).

[6] See, for example, Osborne v. Morgan, 130 Mass. 102 (1880).

[7] Consolidated Gas Co. v. Connor, 114 Md. 140 at 156-157, 78 A. 725 (1910).

[8] Moch v. Rensselae Water Co., 247 N. Y. 160 at 168, 159 N. E. 896 (1928).

[9] German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220, 33 S. Ct. 32 (1912).