

1894

The Liability of a Telegraph Company for Failures and Delays in Delivering Messages

Hajime Oura
Cornell Law School

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THESIS.

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THE LIABILITY OF A TELEGRAPH COMPANY FOR
FAILURES AND DELAYS IN DELIVERING MESSAGES.

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BY

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HAJIME OURA.
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CORNELL UNIVERSITY SCHOOL OF LAW.

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1894.

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CHAPTER I.

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THE EMPLOYMENT OF A TELEGRAPH COMPANY AS DISTINGUISHED FROM THAT OF A COMMON CARRIER.

The business of telegraph companies is similar to that of the post office department in that they carry and deliver messages for all persons indifferently for hire; they resemble common carriers in that they assume to transmit messages for all persons alike, without discrimination or preference, but differ from them in the liability they assume for the safe and accurate delivery of messages.

Some of the authorities have attempted to classify the business of telegraph companies under the head of bailment, and to hold them to the same rules of law applicable to common carriers.

But these seem very, ridiculous, for "there is here no engagement in rem, no bailment worthy of the name, for even if the sender leave a written message, this writing is not delivered, but remains mere waste paper, or an office voucher,

after the company has made and delivered its own correct copy", as Mr. Schouler puts it. The reason of holding common carriers to such stringent liability as to make them responsible as insurers, was to protect the public interest against thefts and other misprision of the carriers, and their servants. But this reason entirely fails to apply in case of telegraph companies as there is nothing to steal in strict sense. Besides the operation of telegraphing is continually subject to dangers from accident, malice, and atmospheric influence of which the company has no control.

Johnson J., in delivering the opinion of the court in the case of Breese v. United States Tel. Co., says: " I can not refrain from observing here, that the business on which the defendant is engaged, of transmitting ideas only from one point to another, by means of electricity operating upon an extended and insulated wire, and giving them expression at the remote point of delivery by certain mechanical sounds, or by marks or signs indented, which represent words or single letters of the alphabet, is so radically and essentially different, not only in its nature and character, but in all its

methods and agencies from the business of transporting merchandise and material substance from place to place by common carriers, that the peculiar and stringent rules by which the latter are controlled and regulated, can have very little just and proper application to the former. And all attempts heretofore made by courts to subject the two kinds of business to the same legal rules and liabilities, will, in my judgment sooner or later, have to be abandoned as clumsy and indiscriminating efforts and contrivances to assimilate things which have no natural relation or affinity whatever, and at best, but loose and mere fanciful resemblance. The bearer of written or printed documents and messages from one to another if such was his business or employment, might very properly be called and held a common carrier; while it would obviously be little short of an absurdity to give that designation or character to the bearer of mere verbal messages delivered to him by mere signs of speech to be communicated in like manner. The former would have something which is, or might be the subject of property, capable of being lost, stolen, and wrongfully appropriated; while the latter would have nothing

in the nature of property which could be converted or destroyed, or form the subject of larceny or of tortious caption and appropriation even by the king's enemies."

It is then safe to say that all decisions agree that a telegraph company is liable only by the reason of negligence, willful default, or bad faith in the performance of the duty which it undertakes, but not as an insurer.

CHAPTER II.

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DEGREE OF CARE NECESSARY IN TRANSMISSION OF MESSAGES.

The degree of care which telegraph companies are bound to exercise in the performance of their duties is variously stated by different courts, but no doubt they all mean that telegraph companies should use a degree of care proportionate to the hazards in their business.

"The degree of care", says Foster, J. in *Fowler v. W.U. Tel. Co.*, "which these companies are bound to use, is to be measured with reference to the kind of business in which they are engaged. As compared with many other kinds of business, the care required of them might be called 'great care'. While meaning really the same, it is variously stated by different courts in the decisions to which we have referred: 'due and reasonable care'; 'ordinary care and vigilance'; 'reasonable and proper care'; 'a reasonable degree of care and diligence'; 'care and diligence adequate to the business which they undertake'; 'with skill, with care, and with

attention; a high degree of responsibility'. These are but the varied forms of expressing the requirement of what is known in law as ordinary care, as applied to an employment of this nature, an employment which is not that of an ordinary bailee. The public as a general rule have no choice in the selection of the company. They have none in the selection of its servants or agents. They have no control over the agencies or instrumentalities used in conducting the business of the company. The public must take the agencies which the company furnishes, and they have no supervision over its management or methods of performing the service which it holds itself out as willing and ready to perform. And while we do not hold that these companies are common carriers, and subject to the same severe rule of responsibility, we think that those who engage in the business of thus serving the public by transmitting messages should be held to a high degree of diligence, skill and care, and should be responsible for any negligence or unfaithfulness in the performance of their duties." This is supported by *Birney v. New York & Wash. Tel. Co.*, 18 Md., 341.

Here the court hold a telegraph company to a high degree of care, diligence and skill,. But this does not mean to impose a liability upon the company for want of knowledge or skill, which are not reasonably attainable in the art, nor for errors, or imperfections arising from causes which are beyond its power to control. Thus what may be called a 'reasonable degree of care' in the business of telegraphy, which requires a most delicate operation, would amount to a 'high degree of care' in other business.

CHAPTER III.

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STIPULATIONS AND REGULATIONS LIMITING THEIR LIABILITY.

As the operation of telegraphy is subject to electrical and atmospheric disturbances, and other kindred causes courts and legislatures have been very liberal and allow telegraph companies to stipulate and regulate their liability in many instances.

In the case of U.S.Tel.Co. v. Gildersleve, the judge says" in the view of the court, it would be manifestly unreasonable to hold these telegraph companies liable for every mistake of accidental delay that may occur in the operation of their lines. From the very nature of the service, while due diligence and good faith may be required at the hands of the company and its agents, accidents and delays, and miscarriages may occur, that the greatest amount of care can not avoid. Hence in England, and in many American States, provision has been made by Statutes authorizing these companies to prescribe rules and regulations whereby they may be pro-

tected against extraordinary liability."

But these stipulations and regulations in order to be valid, must be reasonable. They cannot establish any regulations which will relieve the companies from liability for the gross negligence, willful misconduct, fraud or bad faith of themselves or those of their servants.

A comprehensive statement of this doctrine is stated by Kent, J. as follows:-

1. Such companies offering to perform services for the public, at fixed rates, exercise a quasi-public employment
2. Telegraph company may enforce and adopt reasonable rules and regulations, for the convenience, prompt and satisfactory performance of the act or duty undertaken.
3. This right in a company is not absolute or unlimited but such rules are subject to the test of reasonableness, in view of the rightful claims of public policy and private rights, and the enforcement of the obligation of good faith and honest effort to perform.
4. The test must be applied by the court, whenever the question arises on the validity of any such regulation accord-

ing to the rule already stated.

5' A rule or stipulation which covers all possible delinquency, mistakes, delays, or neglect in transmitting or delivering, or not delivering a message, from whatever cause arising is not a reasonable regulation within these rules.

6. Such rule is not saved from these objections by the condition of liability to repay, if required by the sender the trifle paid to them. It is a mere evasion of the legal liability, and is never the measure of damages for non-performance of a contract of this kind.

Regarding the transmission of telegraph messages, the authorities generally agree that such regulations, as requiring messages to be repeated on half the usual charge to guard against mistakes, is reasonable, and a telegraph company is not liable in the absence of bad faith and gross negligence.

Massachusetts, and in recent cases, New York go so far as to exonerate the company from the liability beyond amount paid for transmission even where damages were caused by delay or non-delivery of messages where the condition in the blank

on which message is written contains a provision that the company should not be liable for mistakes delays or the non-delivery of any unrepeated message, beyond the amount received for sending the same.

But there are cases which hold that where the repeating of the message would not have prevented the damages complained of, the company is liable; that such a stipulation will not be allowed to operate so as to exonerate a negligent delay in delivering, or non-delivery. This seems to proceed on a principle more reasonable and just, as the object of repeating the message is to correct errors, and not to avoid delays in delivering it.

This view is expressed by Justice Breese of the Supreme Court of Illinois in the following words:- " If it be a contract, the sender entering into it was under a species of moral duress. His necessities compelled him to resort to the telegraph as the only means through which he could speedily transact the business in hand, and was compelled to submit to such conditions as the company in their corporate greed might impose, and sign such a paper as the company

might present. 'Prudential rules and regulations' such as the company is authorized by statute to establish, cannot be understood to embrace such regulations as shall deprive a party of the use of their instrumentality, save by coming under most onerous and unjust conditions. But it is said, a special agreement might have been made for insurance in writing. To do this, the amount of risk must be specified on the contract, and paid at the time of sending the message; and so there is but one person in the world, a superintendant, authorized to make a contract of insurance, he must be hunted up and the terms negotiated-- all which requires time-- and a favorable opportunity to the sender be irretrievably lost. At Chicago, or other large cities, where a superintendant is supposed to be, there might not be much loss, but we are declaring the law for the whole State, and it is well known that at subordinate, though important stations, on telegraph lines, superintendents are not to be found, the provision is to such perfectly valueless. As a party, repeating a message and paying fifty per-cent additional therefore, cannot recover of the company to the extent of his loss, we are free to say

such a contract, forced, as we have shown it is, upon the sender, is in our opinion, unjust, unscionable, without consideration and utterly void."

The very undertaking of a telegraph company whenever it receives a message for transmission, necessarily implies an engagement on its part to exercise care and diligence in transmitting as well as in delivering it, and negatively not to be guilty of negligence in doing so. Therefore it is absurd, unjust, and against the public policy to allow it to engage to exercise diligence in the undertaking, and to accept pay for it, the sender of the message thus executing the contract on his part, and then to allow it to stipulate that it shall not be liable if it do not exercise diligence.

CHAPTER IV.

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FAILURES AND DELAYS IN DELIVERING MESSAGES .

The telegraph company must make reasonable effort to find the person to whom the message is addressed , and to deliver the same within a reasonable time, and in failing to do so render itself liable for such damages as is the direct and necessary result of such failure.

As regards to the transmission of messages it is generally provided by the statutes of different states, that messages shall be forwarded in the order of time, with reference to other messages , in which they were delivered to the telegraph company. Doubtless this would be a proper requirement even in the absence of statutory provisions, as any preference is against public policy although there may be cases where the company is justified in forwarding urgent messages ahead of their turn; and this is also true in case of delivery

At any rate a prompt delivery is the essence of the contract and a failure in that respect will authorize the recov-

ery of at least the compensation paid.

What is an unreasonable delay in a delivery of a message to entitle plaintiff to recover damages depends upon the circumstances of each case; and the question is one for the jury to determine, except where it admits no doubt as to its unreasonableness, when it is for the court to determine.

The broad general rule as laid down in Hadley v, Boxendale as explained by the case of Griffin v. Clover, "that the injured by a breach of contract is entitled to recover all his damage including gains prevented as well as losses sustained provided they are certain and such as might naturally be expected to follow the breach", is applicable to the case of telegraph companies.

In Leonard v. N.Y.&c.Tel. Co., Judge Earl, says:- " The cardinal rule, undoubtedly is that the one party shall recover all the damages which have been occasioned by the breach of contract by the other party. But the rule is modified in its application by two others,. The damages must flow directly and naturally from the breach of contract, and they must be certain, both in their nature and in respect to the cause

from which they proceed. Under this latter rule, speculative contingent, and remote damages, which cannot be directly traced to the breach complained of, are excluded.

Under the former rule, such damages are only allowed as may fairly supposed to have entered into the contemplation of parties when they made the contract, as might naturally be expected to follow its violation. It is not required that the parties must have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may fairly be supposed to have contemplated when they made the contract.

Parties entering into contracts usually contemplate that they will be performed, and not they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into, I think a more precise statement of this rule is, that a party is liable for all the

direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts."

It can be said without any hesitation that the rule just stated is recognized by a large majority both in England and the United States if not universally.

A well known statement that where an accident happens, which in the ordinary course of things and according to common experience, would not happen if reasonable or ordinary care were exercised to prevent it by the person whose duty it is to prevent it, the happening of the accident is of itself evidence of negligence, sufficient, in an action for the resulting damages against the person guilty of the default, to warrant a jury in giving a verdict for the plaintiff is also governed by the rule above stated.

Therefore, unless, plaintiff at the time of delivering a message to the company for transmission, communicates its importance or urgency specially or that this is shown on its face, cannot recover for loss arising from special circum-

stances not so communicated.

Thus where a telegraph company neglected to deliver a message to a live-stock shipper as to the state of the market at a certain point, in consequence of which neglect the shipper sends his stock to the next nearest market, at which he receives ten cents per one-hundred less than the market price for the same stock ranged at the first point on the same day, it was held:- that the shipper is entitled to recover from the telegraph company the difference between the market price of the two points, with the difference in freight added.

And also where one has sold cattle for future delivery at the option of the purchaser, and the latter sends a dispatch notifying him that he will take the cattle in the morning of the next day, in pursuance of a custom among stock dealers to take and weigh cattle at early day-light, which dispatch the telegraph company fails to deliver promptly, whereby the weighing of the cattle is delayed and their weight decreased, it is said that the seller may recover for the loss of weight so resulting from the company's negligence.

Again in a case where one delivered a message for trans

mission to a telegraph company directed to his attorney at a certain city as follows:- "Hold my case till Tuesday or Thursday. Please reply." The plaintiff at the time informed the servant of the company, having charge of the receipt of messages that the message related to a cause in the said city, which was expected to be called, and that it was of great importance that he should get a reply the next day, in order that he might know when to go to the said place. The message never was sent at all. The plaintiff having received no reply supposing that an adjournment of the case could not be procured, went to the said place with his counsel to attend the trial, and found that the case had been adjourned. Consequently the plaintiff was obliged to go there again with his counsel at the adjourned day. It was held that the company was liable to the expense of the first journey for both the plaintiff and his counsel, and also for the counsel fee which the plaintiff was obliged to pay for going there the next time.

The above cases are a few of the instances where it was held, according to the rule already laid down, that damages

are proximate and were within the contemplation of the parties

On the other hand following cases are instances where the courts held that damages are too remote and contingent and therefore not within the contemplation of the parties:

Where in consequence of the delay of a telegraph company in delivering a dispatch a barge did not reach a lot of staves in time to prevent their being lost, by a flood; where owing to the failure to deliver a message ordering a saw, a mill did lie idle, but the message did not show for whom the article was intended, and the company did not know that the mill was lying idle on that account. So where the loss of a note which plaintiff claims his father would have given him, had he been able to see him before his death, was held a consequence too remote and contingent to sustain a claim for damages. And also where there was delay in delivering a telegram announcing the death of a person, without giving the company notice of his relationship to the person addressed, in consequence of which the person, a brother of the deceased failed to attend the funeral, it was held that the company is not responsible as it was not within the contemplation of the parties.

CHAPTER V.

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INJURY TO THE FEELING.

Ever since the *SoRelle* case held a telegraph company is liable for mental anguish caused by delay or non-delivery of messages if such damages are proximate consequence of the company's negligence, the urgency or importance of the message being explained, or understood by the company, the courts of Texas have followed it, although once overruled by the case of *Gulf &c.R.Co. v. Levy*,. And it seems that the question is now well settled in that State, for the Judge in delivering the opinion of the court in *Potts v. W.U. Tel. Co.*, which is ^a ~~probably~~ ^{very} ~~the~~ latest case in that State, says:- "It is no longer open question that a recovery can be had for mental suffering caused by negligent failure of a telegraph company to deliver a message.

This has also sometimes been followed by courts of Kentucky, North Carolina, Dakota, Mississippi, Illinois, Alabama and other States.

The view taken by those courts may be illustrated by quoting one or two opinions.

The Court of Appeals of Kentucky in holding a telegraph company liable for mental anguish says:- " Many of the text-writers say that a person cannot recover damages for mental anguish alone, and that he can recover such damages only where he is entitled to recover some damages upon some other ground. It will generally be found however, that they are speaking of cases of personal injury. If a telegraph company undertakes to send a message, and fails to use ordinary diligence in doing so, it is certainly liable for some damage. It has violated its contract; and whenever a party does so he is liable at least to some extent. Every infraction of a legal right causes injury, in contemplation of law. The party being entitled in such a case to recover something, why should not an injury to the feelings which is often more injurious than a physical one, enter into the estimate? Why, being entitled to some damages by reason of the other party's wrongful act, should not the complaining party recover all the damages arising from it? It seems to us that no sound

reason can be given to the contrary. The business of telegraphing, while yet in its infancy, is already of wonderful extent and importance to the public,. It is growing, and the end cannot yet be seen. A telegraph company is a quasi public agent, and as such it should exercise the extraordinary privileges accorded to it, with diligence to the public. If in matters of mere trade, it negligently fails to do its duty, it is responsible for all the natural and proximate damage. Is it to be said or held, that as to matters of greater interest of a person, it shall not be, because feelings or affections only are involved?

If it negligently fails to deliver a message which closes a trade for \$100, or even less, it is responsible for the damage. It is said, however, that if it is guilty of like fault as to a message to the husband that the wife is dying, or the father that his son is dead, and will be buried at a certain time, there is no responsibility save that which is normal. Such a rule at first blush, merits disapproval. It would sanction the company in wrong-doing. It would hold it responsible in matters of the least importance, and

suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the actual damages, and the jury be allowed to consider it. If it be said that it does not permit of accurate pecuniary measurement, equally so may it be said of any case where mental anguish enters the estimate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrong-doer for reparation.

If injury to the feelings be an element to the actual damage in slander, libel, and breach of promise cases, it seems to us it should equally be so considered in cases of this character. If not, then most grievous wrongs may often be inflicted with impunity; legal insult, added to outrage by the party, by offering one cent, or the cost of the telegram, as compensation to the injured party. Whether the

injury be to the feelings, or pecuniary, the act of the violation of a right secured by contract has caused it .

The source is the same, and the violator should answer for all the proximate damages."

These courts reason that it is against the public policy not to hold the telegraph company liable for damages to mental sufferings , and claim that mental anguish constitutes an element of actual damages, and a verdict for damages is justifiable when nothing appears to show that the jury acted under passion or prejudice. But, some of the recent cases disagree on the ground of difficulty in ascertaining the damages of this nature, and it is not within the province of courts in the absence of statutes so to do, though they agree as to the reasoning of public policy.

Thus in Graham v. W.U.Tel. Co., District Judge Williams says:- "Counsel has read from the Carolina report and I think that is the strongest the case can be put; and that is very much in consonance with the sentiment which must arise, to a large extent, in the breast of all men; but, when you come to analyze it, I think the best you can say is that this

sentiment has carried away the better judgment of the court. There is nothing to maintain it, and it is not as a principle of law sound in any respect..... The term "actual damages" has a significance and meaning of its own , and any attempt to reason a claim of this kind into actual damages certainly must fail etc."

In the case of the International Ocean Tel. Co. v. Saunders, Taylor, J. in maintaining that damages cannot be recovered for mental anguish unless coupled with or accompanied by substantive injury to the person , or estate, says:- "In the case under consideration, the plaintiff's suit, though sounding in tort, is for compensation only for the breach by the defendant telegraph company of its contract promptly to deliver a telegram summoning him to the death-bed of his wife. His only injury resulting directly from such breach of contract was mental suffering and disappointment in not being able to attend upon his wife in her last moments, and to be present at her funeral. The resultant injury is one that soars, so exclusively within the realm of spirit land that is beyond the reach of the courts to deal with, or to compensate

by any of the known standards of value. It presents a class of cases where legislative action fixing some standard of recovery would be highly appropriate, but, ~~would~~ until the action is taken, we do not feel that the courts are authorized to so widely diverge from the circumscribed limits of judicial action as to undertake to mete out compensation in money for the spiritual intangible."

Again Justice Cooper in the case of Telegraph Co. v. Rogers, upholding the long established rule of law upon this subject, says:- " We are not disposed to depart from what we consider the old and settled principle of law, nor to follow the few courts in which the new rule has been announced. The difficulty of applying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated and imaginary injuries are far less likely to be made than will be those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things, money can neither

palliate nor compensate the injury he has sustained. Mental pain and anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone."

Another difficulty in determining measure of damages in cases of mental anguish, is, as pointed out in Judge Lurton's dissenting opinion in *Wadworth v. Tel. Co.*, that the grief natural to the death of a loved relative itself ought to be separated from the added grief and anguish resulting from delayed information of such mortal illness or death.

In New York, the tendency is to follow the latter view as was decided in the case of *Lehman v. Brooklyn City R.R. Co.*, where a woman was standing in the door of her husband's house (in a state of pregnancy) took fright on account of a runaway horse of the defendant company, and suffered mental anguish.

Though in *Mitchell v. Rochester Ry. Co.*, where a woman was about to step aboard of a street car, another car of the defendant came from the other direction in such an enormous speed that the driver could not check or stop it until it nearly run over the plaintiff, consequently she became ill,

producing a miscarriage, and mental anguish , it was held the defendant company was liable, this was a case where the mental anguish was accompanied by physical injury.

From the above discussions, it may fairly be concluded that the authorities generally agree as to the proposition that the damages may be given as exemplary damages where there is malice, fraud, oppression, or negligence so gross as to evince a disregard of social duty and, therefore, tantamount to malice; but they disagree as to whether in the absence of some substantial injury accompanying the mental sufferings , the damages can be given as compensatory damages or not. And I may say that the view taken in opposition to the Texas decisions, goes a step further, and is sounder one, from the standpoint of law. Though the law opposes to the multiplication of litigation, which result is already shown in Texas, since the new rule has been announced, yet from the standpoint of public policy and justice, the telegraph companies ought to be held to the highest degree of care in such a case; and I do not doubt that the day will not be far distant when some appropriate measure will be taken by the legislatures.