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Negligence--Telephone Companies--Section 130 of Decedent Estate Law--Damages (Emery v. Rochester Telephone Corp., 271 N.Y. 306 (1936))

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NEGLIGENCE—TELEPHONE COMPANIES—SECTION 130 OF DECEDENT ESTATE LAW—DAMAGES.—This is an action to recover for the death of plaintiff's intestate brought under Section 130 of the Decedent Estate Law,[1] which provides that, an action may be maintained by an executor or administrator to recover damages for a wrongful death only in the event an action could have been brought by the deceased, if he had survived. Plaintiff, administrator, contends that the death has been occasioned through the negligence of the defendant, a public service corporation, in failing to furnish prompt and efficient telephone service by reason of which medical aid could not be promptly secured for the decedent. On appeal, *held,* complaint dismissed. A telephone company cannot be deemed to have assumed responsibility for special damages where, as here, the company did not have notice of so indefinite a risk of failure of its service. Since here there would have been no liability to the decedent had she survived, it follows that the plaintiff has no cause of action under Section 130 of the Decedent Estate Law. *Emery* v. *Rochester Telephone Corp.,* 271 N. Y. 306, 3 N. E. (2d) 434 (1936).

In this state there is a statutory duty upon telephone and telegraph companies to use due care in the transmission of messages.[2] Liability for breach of this duty will result in at least nominal damages or recovery of the amount paid for the service.[3] Where special damages are sought in a contract action, no recovery will lie unless the defendant had notice of the particular risks involved.[4] New York has followed the present weight of authority and has held the measure of damages to be the same whether the form of action be tort or contract.[5] There are many grounds upon which it would seem that this

[1] N. Y. Decedent Estate Law § 130 reads as follows: "The executor or administrator * * * of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued".

[2] N. Y. Pub. Serv. Comm. Law § 91 states: "Every telegraph corporation and every telephone corporation shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable". Section 93 provides that where a telegraph or telephone corporation shall fail in the performance of its statutory obligations as a public service corporation, "such corporation shall be liable to the person or corporation affected thereby for all loss, damage or injury caused thereby or resulting therefrom".

[3] Baldwin v. U. S. Tel. Co., 45 N. Y. 744 (1871); Hart v. Direct U. S. Cable Co., 86 N. Y. 633 (1881); Kiley v. Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75 (1888); Taggart v. Western Union Tel. Co., 198 App. Div. 366, 190 N. Y. Supp. 450 (1st Dept. 1921).

[4] Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

[5] Kerr Steamship Co. v. Radio Corp., 245 N. Y. 284, 157 N. E. 140 (1927) (this case has removed the effectiveness of N. Y. Pub. Serv. Comm. Law § 93, by requiring actual notice to the companies); Bertuch v. U. S. Hayti Tel. Co., 79 Misc. 10, 139 N. Y. Supp. 289 (1913). For other jurisdictions see: Southwestern Bell Tel. Co. v. Carter, 181 Ark. 209, 25 S. W. (2d) 448 (1930); Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930); Fitch v.

doctrine is not satisfactory in the present case, namely: the special risk might have been within the contemplation of the parties as the defendant advertised its efficiency and promptness in cases of emergency;[6] or the inability of the subscriber to reach the operator because of the alleged failure of service obviously may make it impossible for him to inform the company of the risk.[7] Moreover, as damages for mental anguish in telephone and telegraph cases are not recoverable[8] in New York the courts would not be burdened with a great deal of litigation,[9] nor would an undue burden be placed upon these companies. Thus, recovery in favor of the subscriber would seem to be proper. However, the viewpoint of the majority opinion, which states that notice is necessary, appears to be a sound rule. If these companies were to pay for unknown risks the rates would necessarily become exorbitant, affecting all, while the protection would benefit few.[10] Also, the courts need not become involved in the confused issue of proximate cause, as to the injury, which would invariably crop up in these cases.

The right of action which the plaintiff brings, under Section 130 of the Decedent Estate Law, is a new and distinct one,[11] and recovery will be denied unless the decedent had a right of action at the time of his death.[12] Thus if the decedent had been guilty of contributory negligence,[13] had accepted settlement of his claim or executed a release therefor,[14] had recovered in an action for damages,[15] or failed to bring the action within the period prescribed by the Statute of

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Tel. Co., 150 Mo. App. 149, 130 S. W. 44 (1910); Merriott v. Western Union Tel. Co., 84 Neb. 443, 127 N. W. 241 (1909); Newsome v. Western Union Tel. Co., 153 N. C. 153, 69 S. E. 10 (1916).

[6] 96 N. Y. L. J. 922, col. 3, Sept. 30, 1936 (to the effect that the Rochester Tel. Corp. used the advertising slogan, "When Seconds Count *etc.*"); Finch, J., dissenting in the instant case at p. 312: "Not only is it foreseeable that the telephone may be used to summon a physician to the household in time of need but such use is commonly desired by the average family".

[7] (1936) 46 YALE L. J. 170.

[8] Curtin v. Western Union Tel. Co., 13 App. Div. 253, 42 N. Y. Supp. 1109 (1st Dept. 1897).

[9] (1936) 46 YALE L. J. 170.

[10] See (1936) 22 CORN. L. Q. 146.

[11] Matter of Meekin v. Brooklyn H. R. R., 164 N. Y. 145, 58 N. E. 50 (1900); Kelliher v. New York Central R. R., 212 N. Y. 207, 105 N. E. 824 (1914); Note (1937) 11 ST. JOHN'S L. REV. —.

[12] Whitford v. Panama R. R., 23 N. Y. 465 (1861); McKay v. Syracuse R. T. Ry., 208 N. Y. 359, 101 N. E. 885 (1913).

[13] See 2 COOLEY, TORTS (4th ed. 1932) § 211, n. 96; Curran v. Warren Chem. Mfg. Co., 36 N. Y. 153 (1867); Van Schaick v. Hudson R. R., 43 N. Y. 527 (1871).

[14] Littlewood v. Mayor, 89 N. Y. 24 (1882); Hodge v. Rutland R. R., 112 App. Div. 142, 97 N. Y. Supp. 1107 (3d Dept. 1906), *aff'd*, 194 N. Y. 570, 88 N. E. 1121 (1909); Dibble v. N. Y. & Erie R. R., 25 Barb. 183 (N. Y. 1857).

[15] Littlewood v. Mayor, 89 N. Y. 24 (1882).

Limitations,[16] the action would be barred. Since no notice had been given, the defendant would not be liable to the decedent in case of her survival, therefore, the plaintiff has no cause of action under the Decedent Estate Law.

H. K.

PARENT AND CHILD—ADOPTION—LIABILITY OF NATURAL PARENT FOR SUPPORT.—The petitioner, twenty-three years of age, legitimate daughter of the respondent, was adopted by her maternal grandparent soon after her mother's death, when said petitioner was twelve years of age. She was well provided for by her grandparent, until, due to an illness, she was removed to a hospital. Now, upon her discharge from the hospital, being physically incapable of working for some time, having no property or means of support, and likely to become a public charge, she petitions for support from her natural parent—her foster parent being unable to provide for her. Defendant contends that by the express provisions of the statute establishing the effect of adoption, he was relieved of all parental duties, responsibilities and rights.[1] *Held,* an order of adoption under the statute [2] does not result in such a complete severance from parental ties as to relieve the natural parent from all liability. It was not the intention of the legislature to allow a parent by his own act to be relieved of this liability when as in the case at bar, the child is about to become a public charge. *Betz, petitioner* v. *Horr, respondent,* 160 Misc. 674, 290 N. Y. Supp. 500 (1936).

Adoption, although completely unknown at common law,[3] was practiced in antiquity.[4] And in those states which derive their jurisprudence from the common law, adoption is based entirely on statute which must be strictly complied with and strictly construed.[5]

Domestic Relations Law, Section 114, relied upon by the defendant, at the outset expressly states that the effect of adoption is to

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[16] Kelliher v .New York Central R. R., 212 N. Y. 207, 105 N. E. 824 (1914); Casey v. Auburn Tel. Co., 155 App. Div. 66, 139 N. Y. Supp. 579 (4th Dept. 1913).

[1] N. Y. DOM. REL. LAW § 114—Effect of adoption. "Thereafter the parents of the person adopted are relieved from all parental duties toward, and all responsibility for, and have no rights over such child, or to his property by descent or succession."

[2] In New York DOM. REL. LAW §§ 110–118 govern adoption.

[3] Matter of Thorne, 155 N. Y. 141, 49 N. E. 661 (1898).

[4] For history of adoption see Matter of Ziegler, 82 Misc. 346, 143 N. Y. Supp. 512 (1913), also Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585 (1906). Adoption was practiced by Egyptians, Hebrews, Greeks, Assyrians, and Romans. First N. Y. adoption statute was passed in 1873.

[5] Murphy v. Brooks, 120 Misc. 704, 199 N. Y. Supp. 660 (1923); *In re* Monroe's Ex'rs, 132 Misc. 279, 229 N. Y. Supp. 476 (1928).