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Insurance -- Torts -- Liability of Agent for Failure to Insure

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submitted that the Georgia Court might have reached a better result had they accepted this view.

CEcil J. Hill.

Insurance—Torts—Liability of Agent for Failure to Insure

The plaintiff purchased from the defendants certain equipment under a conditional sales contract and installed it in his theatres. Defendants carried insurance on their interest in the property, and two years later agreed to provide the plaintiff with repair or replacement insurance for one year against loss by fire on equipment installed in one of plaintiff’s theatres. Extended coverage arrangement was agreed on, and bills for premiums were rendered and paid at 90-day intervals. The defendants provided such insurance for the first three quarters of the year; but when the plaintiff’s equipment was destroyed by fire 11 months later, it was discovered that no insurance had been provided for the last quarter. Defendants denied liability, but the jury returned a verdict for the plaintiff from which judgment thereon the defendants appealed. The Supreme Court held that when an agent or broker undertakes to procure insurance for another, affording protection against a designated risk, the law imposes upon him a duty, in the exercise of reasonable care, to perform the obligation which he has assumed, and within the amount of the proposed insurance, he may be held liable for the loss properly attributable to his negligent default. In so holding, the court followed a long line of decisions, both in this jurisdiction, and in other jurisdictions—domestic and foreign.

It is well settled that the law will not impose on one agreeing gratuitously to effect insurance the duty to perform his promise.* But where a person voluntarily takes steps toward effecting insurance, the law immediately imposes upon him a duty of care to carry out the

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5* Prescott v. Jones, 64 N. H. 305, 41 Atl. 352 (1898) ("While a gratuitous promise is binding in honor, it does not create a legal liability."); Thorne v. Deas, 4 Johns. 84 (N. Y. 1808); Hughes, Law of Insurance (1828) 94.
undertaking. It is in the imposition of this duty upon various persons and in various fact situations that the accepted rule finds difficulty of application and need for qualification.

It would seem that an agent who acts gratuitously is liable only in case of gross negligence; whereas, if he acts for a commission, his liability is based upon want of ordinary diligence. The term "gross negligence," however, is not in itself determinative of the point at which liability of a gratuitous agent will arise, since the nature of the negligence may be tempered by the facts of each case. Nor can it always be ascertained with certainty what will constitute "ordinary diligence" without taking into consideration relative factors. Indeed, the courts have interpreted and qualified the term "diligence" until it has acquired numerous and sometimes hardly distinguishable prefatory adjectives: "common diligence," "due diligence," and "reasonable diligence" are exemplary of this state of affairs.

A major factor in determining the amount of diligence to be required in the particular case is the skill and experience of the agent. In Milliken v. Woodward the court regarded a fire insurance broker as a specialist in the field of fire insurance who holds himself out to the world as possessing sufficient skill requisite to his calling. The court held that if the agent failed to exercise the proper care and skill in securing the insurance of the property of the person for whom he is acting, under his instructions and agreement with such person, the neglect of such skill and diligence would be actionable if it proximately resulted in loss or damage to the insured by whom the agent was retained and employed.


* Erie Bank v. Smith, 3 Brewst. 9, 14, 17 (Pa. 1868). ("Ordinary diligence is that degree of care which men of common prudence generally exercise in their affairs in the country and age in which they live.").

* See Litchfield v. White, 7 N. Y. 438, 442 (1862). * Perry v. City of Cedar Falls, 87 Iowa, 315, 54 N. W. 225 (1893) ("Due diligence is the diligence due from one as a reasonable and prudent man under the same circumstances.").

* Bacon v. Casco Bay Steamboat Co., 90 Me. 46, 37 Atl. 328, 329 (1897) ("Reasonable diligence is that diligence which would be deemed reasonable by reasonable and prudent men under the same circumstances.").


* 64 N. J. 444, 45 Atl. 796 (1900).
Thus, where the broker has, by his mere act of undertaking to procure insurance for another, held himself out to possess the requisite skill, the court has held him liable to the extent of the damage to an automobile, where the policy which he had undertaken to effect on the automobile was invalid because of his misdescription of the manufacture of the car.\textsuperscript{17} So, too, in a Kansas case\textsuperscript{18} it was held that where a firm of agents representing several fire insurance companies were instructed to insure certain goods in a "No. 1 Company," they were liable to the insured for the amount of the policy where—upon the occurrence of a loss—it was discovered that the company chosen was not licensed to do business in the state.

The Tennessee court in \textit{Morton v. Hart Bros.}\textsuperscript{19} has announced the same principle where the insured had instructed the agent to secure the policy from a "good company" and the company selected had insufficient capital to comply with statutory requirements. Where insurance brokers are employed by the insured with no specific instructions as to the companies from which the policies are to be secured, and they are instructed by the insured with the physical possession and control of the policies, it is the duty of the brokers to (1) get policies that insure the property; (2) inform the insured if they fail to secure valid insurance; and (3) inform the insured of the conditions of the policies they obtain, so that the insured may live up to all conditions contained in the policies.\textsuperscript{20} Liability has also been imposed on the agent where he obtained a policy containing an invalidation clause and thus failed to protect the insured against designated risk.\textsuperscript{21*}

Where the agent or broker has undertaken to procure the insurance and has exercised reasonable diligence to obtain it on the terms and conditions agreed upon but has been unable to procure it on the agreed terms and conditions, the law imposes upon him the further duty of giving timely notice to his principal.\textsuperscript{22} The Minnesota view as expressed in \textit{Backus v. Ames}\textsuperscript{23} seems somewhat more lenient since it expressly provides that the broker's duty to notify the principal should arise only after he has had reasonable time to determine whether the

\textsuperscript{17} Affleck v. Kean, 50 R. I. 405, 148 Atl. 324 (1929) (misdescribed Willys-Overland as Willys-Knight).
\textsuperscript{18} Latham Mercantile & Commercial Co. v. Harrod, 71 Kan. 565, 81 Pac. 214 (1905); Mallery v. Frye, 21 App. D. C. 105 (1903). (Company had not undergone examination of their affairs and had not appointed resident agent as required by statute.)
\textsuperscript{19} 88 Tenn. 427, 12 S. W. 1026 (1890).
\textsuperscript{21*} Ursini v. Goldman, 118 Conn. 554, 173 Atl. 789 (1934) (Theft policy contained a clause making it invalid if insured had sustained loss by burglary within the previous five years.).
\textsuperscript{22} Rezac v. Zima, 96 Kan. 752, 153 Pac. 500 (1915).
\textsuperscript{23} 79 Minn. 145, 81 N. W. 766 (1900).
insurance could be placed. In this case the court held that, as bearing
on the question of the broker's negligence, evidence tending to show the
hazardous nature of the risk to be insured against and the difficulty of
securing insurance on the property in question was competent and
material.

Relative agreement seems to exist in regard to the duties of agents
in cases where the insurer becomes insolvent after the effecting of the
policy. In *Diamond v. Duncan*, the insurer became insolvent and
suspended business before the term of the original policy expired; and
the principal not knowing of that fact, requested the agent to reinsure
the property. This the broker agreed to do, and the property burned
before any insurance had been procured. The court held that it was
the duty of the broker to notify the insured of the insolvency so that
the insured might take steps to protect himself. To the contrary the
Kentucky court held that where the insurer became insolvent sub-
sequent to the effecting of the original policy and the agent—rather
than fraudulently representing the insurer to be solvent—merely failed
to notify the policy holders of the insolvency of the company, there
was no liability. This court reasoned that the imposition on him of
such a duty to notify would be to require him to perform an act not
in the interests of the company, which act might be deemed by the
company a breach of his duties to it. However the Kentucky court
agreed with the decision in *Diamond v. Duncan*, supra, that if the agent
fraudulently represented the company to be solvent when he knew it to
be insolvent, and thus procured the insured to take the policy, he would
be liable for the fraud so practiced. The law will impose no liability
on an insurance broker if, in the exercise of reasonable care and dili-
gence, he selects a company then in good standing though it subse-
quently becomes insolvent.

In an attempt at recovery for loss through failure of a broker to
effect insurance, the insured, if he can show a pre-existing duty in the
broker, may bring the action on either a contract or tort theory. If
recovery is to be had in contract, the insured must show the existence
of a valid contract between the broker and himself. Should he suc-
cceed, the recovery is generally the amount of loss for which the in-
sured would have been compensated had the insurance actually been
effected. In the *Elam* case the court held: "Where, in a case of this

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25 Eastham v. Stumbo, 212 Ky. 685, 279 S. W. 1109 (1926).
26 Gettins v. Scudder, 71 Ill. 86 (1873); cf. Hartmen & Daniels v. Hollowell,
127 Iowa 643, 102 N. W. 524 (1905); Beckman v. Edwards, 59 Wash. 411, 110
Pac. 6, Ann. Cas. 1912 B 40 (1910); RESTATEMENT, AGENCY (1938) sec. 422, com-
ment c.
28 Lindsay v. Pettigrew, 5 S. D. 500, 59 N. W. 726 (1894); Sheller v. Seattle
Title Trust Co., 120 Wash. 140, 206 Pac. 847 (1922).
kind, the action is for tort, and there is a negligent default on the part of the plaintiff contributing to the injury [injury meaning lack of insurance at time of loss], this would have the effect of defeating the action. But where the action is brought for breach of contract, and that is established, contributory negligence is not allowed to defeat the action in toto, but the negligence of the claimant contributing is to be properly considered on the issue as to damages.”

Many of the cases in contract involving the effecting of insurance arise out of a clause in the conditional sales contract giving the seller an option to insure. The diversity of wording of these options makes for difficult interpretation. The Washington court, in a case where the plaintiff purchased an automobile under a conditional sales contract containing the clause that the seller could insure during the life of the contract, and the seller exacted from the buyer at the time of the sale—in addition to the selling price—sufficient money to keep it insured, held that the contract between the buyer and seller was valid and enforceable. In spite of the seller’s promise to insure, should the seller later choose not to exercise his option, the buyer—after he has received notice that the lessor has not procured insurance—cannot thereafter rely on the lessor to furnish the insurance, but is required to insure himself. In Black Motor Co. v. Thomas there was an automobile conditional sales contract which provided that the seller or assignee could purchase theft or other insurance in such form and amounts as the seller or assignee might require relating to the respective interests of conditional seller and buyer. The Kentucky court held that the agreement merely authorized the seller to secure insurance to protect itself as well as the buyer and was not an agreement on the part of the seller to act as insurance broker for the buyer.

Where buyer and seller enter into a contract of conditional sale which imposes on the buyer the duty to insure, but grants the seller an option to insure, which option he undertakes to exercise, the buyer cannot set up the complaint that the seller did not insure for an amount equal to what he had agreed by verbal stipulations, since such agreement was invalid and without consideration; and the seller, exercising an option rather than performing a duty to insure, cannot be held to

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31 Dahlhjelm Garages, Inc. v. Mercantile Ins. Co. of America, 149 Wash. 184, 270 Pac. 434 (1928).
33 285 Ky. 267, 147 S. W. (2d) 696 (1941) (distinguished from Eastham v. Stumbo, 212 Ky. 685, 279 S. W. 1109 (1926); Gay v. Lavina State Bank, 61 Mont. 449, 202 Pac. 753 (1921); Elam v. Smithdeal Realty & Ins. Co., 182 N. C. 599, 109 S. E. 632, 18 A. L. R. 1210 (1921) in that here the Motor Company had something at stake as well as did Thomas).
the exercise of good faith and reasonable care in the manner of doing so.\textsuperscript{34}

In Wisconsin, where the agent agrees under an oral contract to procure insurance for another person and negligently fails to do so, he cannot be held liable as an insurer, since a state statute prohibits issuance of fire insurance contracts by anyone except authorized fire insurance companies.\textsuperscript{35}

It was in \textit{Wallace v. Hartford Fire Ins. Co.}\textsuperscript{36} that the Idaho court held that the failure of the agent, through negligence, to obtain a policy of insurance, where the agent has led the insured not to obtain insurance elsewhere through an oral agreement that the agent should write insurance in his company in the same amount as that expressed in an expiring policy, is a tort for which both principal and agent are liable; the agent for his negligence and the company as responsible for his acts as agent within the scope of his employment and in the course of his duties. The dissenting judge, however, contended that the action was not brought to recover damages on account of the failure of the agent and company to perform any duties required by law, but was based on the oral agreement of the parties. The same question might well have been raised in the \textit{Meiselman} case, for the parties had entered into an agreement that the equipment should be insured for the period of one year. However, the writer feels that the better method is that of treating the action as one in tort, where the court may better apply the rules of negligence to the facts at hand.

\textit{ChamEs F. ComA, Jr.}

\textsuperscript{34}Gober Motor Co. v. Morrow, 218 Ala. 324, 118 So. 545 (1928); cf. Cunningham v. Holzmark, 225 Mo. 762, 37 S. W. (2d) 956 (1931); motion overruled 47 S. W. (2d) 1097.

\textsuperscript{35}Wis. Stat. (Brossard, 1941) §203.07.

\textsuperscript{36}31 Idaho 481, 174 Pac. 1009 (1918).