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Agency -- Assault by Employee of Public Utility

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NOTES AND COMMENTS

Agency—Assault by Employee of Public Utility

The liability of the master for the torts of his servant is usually based upon the doctrine of respondeat superior. No recovery is allowed on this ground unless the servant was acting within the scope of his employment,[1] even though at the time the act complained of was committed, he was in the master's general employment and pay.[2]

In *Hoppe v. Deese and Southern Bell Telephone & Telegraph Company*,[3] the trial court sustained the company's demurrer to a complaint which alleged that an employee of the company was sent into plaintiff's home on a business mission; that while there he willfully and maliciously committed an assault and battery upon the plaintiff by placing her upon a bed; and that this was done with licentious intent and purpose. On appeal, the ruling on the demurrer was held to be correct as it appeared on the face of the complaint that the wrongful act of the employee was outside the scope of his employment.[4]

This decision is sound if the liability of the telephone company is to be based solely upon respondeat superior. However, since the defendant is a public utility,[5] liability might have been predicated on another ground. A public utility is clearly distinguishable from a private business.[6] For instance, it enjoys special franchise rights which subjects it to a greater degree of control and regulation than ordinary businesses are subjected to, but which gives it a field relatively free from competition.[7] It has the right in carrying out its duties to take property through eminent domain proceedings upon paying a reasonable com-

[1] Parrish v. Boysell Mfg. Co., 211 N. C. 7, 188 S. E. 818 (1937) (evidence showed assault on plaintiff outside scope of employment); Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096 (1913) (chauffeur took personal pleasure trip with family car, employer not liable); Bucken v. South and Western R.R., 157 N. C. 443, 73 S. E. 137 (1911) (assault by servant for own purpose and in pursuit of own personal desires, master not liable).

[2] Wyllie v. Palmer, 137 N. Y. 248, 33 N. E. 381 (1893) (employee of seller acting under control of buyer injured plaintiff; held: buyer, not seller, liable).

[3] 232 N. C. 698, 61 S. E. 2d 903 (1950).

[4] Hill v. Western Union Tel. Co., 67 Fed. 487 (5th Cir. 1933) (similar holding). N. C. GEN. STAT. §62-93 (1943), which provides that the willful act of any agent of a utility, acting within the scope of his employment, shall be deemed to be the willful act of the utility, has never been referred to by the North Carolina court.

[5] State v. Holm, 138 Minn. 281, 164 N. W. 989 (1917); Hildebrand v. Southern Bell Tel. Co., 219 N. C. 402, 14 S. E. 2d 252 (1941); Western Union Tel. Co. v. Lamb, 140 Tenn. 107, 203 S. W. 752 (1918).

[6] Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 S. E. 189 (1907).

[7] New Decatur v. American Tel. and Tel. Co., 176 Ala. 492, 58 So. 613 (1912); State *ex rel.* Shaver v. Iowa Tel. Co., 175 Iowa 607, 154 N. W. 678 (1915).

pensation to the owner.[8] As a result of these differences, a public utility owes a greater obligation to the public than do private businesses.[9] Included in this obligation is the duty to render its services impartially and indiscriminately to members of the public.[10] The right to enjoy utility services without being subjected to assaults or abuses is a corollary of this duty to serve all comers.[11] This peculiar nature of the business of a public utility, with its privileges and obligations, together with the right of the public to demand its services, creates a special relationship between the two.[12] This relationship is not based on contractual or quasi-contractual rights between the parties.

It is well established that certain utilities are liable for assaults committed upon customers by employees and by strangers. For example, railroads owe an absolute duty to protect passengers from assaults by employees,[13] and owe a duty to exercise a high degree of care to prevent assaults by co-passengers[14] and by strangers.[15] A railroad has been held liable for an assault committed upon a plaintiff while he was in the railroad station checking out freight.[16] The court in that case

[8] Richmond v. Southern Bell Tel. and Tel. Co., 174 U. S. 761 (1899); Louisville Company v. Western Union Tel. Co., 195 Ala. 124, 71 So. 118 (1915); Union Pacific R.R. v. Colorado Postal Tel. Co., 30 Colo. 133, 69 Pac. 564 (1902); State *ex rel.* National Subway Co. v. St. Louis, 145 Mo. 551, 46 S. W. 981 (1898); Postal Tel. Cable Co. v. Oregon Short Line R.R., 23 Utah 474, 65 Pac. 735 (1901).

[9] Buder v. First National Bank, 16 F. 2d 990 (8th Cir. 1927) (public utility charged with duty to supply public with use of all property and facilities owned or furnished by them); Richardson v. Railroad Commission of California, 191 Cal. 716, 218 Pac. 418 (1923); State v. Holm, 138 Minn. 281, 164 N. W. 989 (1917) (telephone company is public utility owing special duty to public); Hildebrand v. Southern Bell Tel. Co., 219 N. C. 402, 14 S. E. 2d 252 (1914) (telephone company as a public service company owes special duty to public); Southern Ohio Power Co. v. Pacific Utilities Commission of Ohio, 110 Ohio St. 246, 143 N. E. 700 (1924) (Public utilities are devoted to the public use.).

[10] State *ex rel.* Goodwine v. Cadwallader, 172 Ind. 619, 87 N. E. 644 (1909) (Telephone exchanges are impressed with a public use and must furnish impartial service without discrimination to all persons in the same or a similar class.); Clay County Co-op Tel. Co. v. Southwestern Bell Tel. Co., 107 Kan. 169, 109 Pac. 747 (1920) (Telephone companies are obligated to serve without discrimination all applicants for services within the field they occupy.).

[11] Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 S. E. 189 (1907) (Public utilities should provide safe access to the place opened for the transaction of business in question.); Buchanan v. Western Union Tel. Co., 115 S. C. 433, 106 S. E. 159 (1920).

[12] Chesapeake and Ohio Tel. Co. v. Baltimore and Ohio Tel. Co., 66 Md. 339, 7 Atl. 809 (1887).

[13] Bledso v. West, 186 Mo. App. 460, 171 S. W. 622 (1914); William v. Gill, 122 N. C. 967, 29 S. E. 879 (1898); Jones v. Atlantic Coast Line R.R., 108 S. C. 217, 94 S. E. 49 (1917); Neville v. Southern Ry., 126 Tenn. 96, 146 S. W. 846 (1912); Whitlock v. Northern Pacific Ry., 59 Wash. 15, 109 Pac. 188 (1910).

[14] Hines v. Miniard, 208 Ala. 174, 94 So. 302 (1922); New Orleans, St. L. and C. R.R. v. Burke, 53 Miss. 200 (1876).

[15] Southern Ry. v. Haynes, 186 Ala. 60, 65 So. 339 (1914); Seawell v. Carolina Central R.R., 132 N. C. 856, 44 S. E. 620 (1903).

[16] Georgia R.R. v. Richmond, 98 Ga. 495, 25 S. E. 565 (1896).

called attention to the fact that the relationship of carrier and passenger did not exist. A pullman company has been held responsible for an indecent assault made upon a female passenger by a porter of the company.[17] A like result was reached where the porter was not even employed by the company at the time.[18] A cab company has been held liable for an assault committed upon a passenger by its driver;[19] also when the assault was committed by a person having no connection with the company.[20] A telegraph company has been held liable for an indecent proposal made by a messenger boy to the recipient of a telegram.[21] A bus company has been held liable for an assault committed upon a passenger by a stranger.[22] A city-owned public utility was held liable for an assault committed by its superintendent on a customer while he was trying to pay his gas bill.[23] Hotels and inns, even though they are not public utilities, have been held liable for assaults committed upon guests by their employees[24] and by strangers.[25] Since some public utilities, and other companies owing a special duty to serve, are held liable for torts committed upon patrons by employees acting without the scope of their employment and even by strangers, it is obvious that the basis for liability in this type of case is not confined to respondeat superior. The basis for liability includes the breach of the special duty owed to the injured party.

There are other reasons for holding the utility liable in a situation such as that presented in the instant case. Members of the public should not be discouraged from cooperating with public utilities in their rendering of services. For example, owners should allow utility employees to have free access to utility installations on their property. Furthermore, members of the public should not be handicapped in obtaining the services rendered by public utilities by having to take the risk of being subjected to physical injury or abusive language. The

[17] Campbell v. Pullman Palace Car Co., 42 Fed. 484 (C. C. N. D. Iowa 1890).

[18] Dwinelle v. New York Central & H. R.R., 120 N. Y. 117, 24 N. E. 319 (1890).

[19] Korner v. Cosgrove, 108 Ohio 484, 141 N. E. 267 (1923).

[20] Yellow Cab Company of Atlanta v. Carmichal, 33 Ga. App. 364, 126 S. E. 269 (1925).

[21] Buchanan v. Western Union Tel. Co., 115 S. C. 433, 106 S. E. 159 (1920).

[22] Wilson v. Pan-American Bus Lines, Inc., 217 N. C. 586, 9 S. E. 2d 1 (1940); Southern Plains Coaches, Inc. v. Box, 111 S. W. 2d 1151 (Tex. Civ. App. 1937).

[23] Munick v. City of Durham, 181 N. C. 188, 106 S. E. 665 (1921).

[24] Duckworth v. Appostalis, 208 Fed. 936 (E. D. Tenn. 1913); Clancy v. Barker, 71 Neb. 83, 98 N. W. 440 (1904); Rommel v. Schambacker, 120 Pa. 579, 11 Atl. 779 (1887).

[25] Curran v. Olson, 88 Minn. 307, 92 N. W. 1124 (1903); Molloy v. Coletti, 114 Misc. 177, 186 N. Y. Supp. 730 (1921); Furren v. Casperson, 147 Wash. 257, 265 Pac. 472 (1928).

employee's presence in the plaintiff's home in the instant case was in the exercise of a privilege necessarily extended to him as an employee of a telephone company. The employee's action was clearly an abuse of this privilege.

It would seem, therefore, that the defendant company should be liable since the commission of the tort constituted a breach of a special duty owed to the plaintiff by the company. If this reasoning is followed members of the public will be given protection from such incidents when taking advantage of the conveniences which public utilities were created to provide and in which its patrons have a right to share.

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Conflict of Laws—Divorce—Collateral Attack Barred by Laches

The jurisdiction of a state to grant a divorce is based upon the domicile of one or both of the parties within the state at the commencement of the action. Accordingly, a divorce decree rendered by a court without such jurisdiction is not entitled to full faith and credit in other states.[1] The finding of domicile by the divorce court is not conclusive and is subject to collateral attack in other states by a party not personally before the court when the decree was granted.[2]

In a recent case[3] H obtained a Nevada divorce decree from W-1, a resident of the District of Columbia, who did not appear in the divorce action. H, subsequent to the decree, married W-2. In a proceeding before the Federal District Court in Florida, W-1 contended that the decree was void as H was never domiciled in Nevada. The court held that W-1, knowing of the divorce decree and delaying, without excuse, for nearly twenty years, was now guilty of laches and estopped from attacking its validity.

In theory the Nevada divorce decree was void and could not be vitalized by delay or non-action of the deserted spouse. Some cases have so held.[4] Others have held that laches will attach by reason of

[1] Williams v. North Carolina, 325 U. S. 326, 229 (1944); Crouch v. Crouch, 28 Cal. 2d 243, 169 P. 2d 897, 900 (1946); Coe v. Coe, 136 Mass. 423, 55 N. E. 2d 702 (1944). For a complete list of cases see Note, 157 A. L. R. 1399 supplementing annotation in 143 A. L. R. 1294; GOODRICH, CONFLICTS OF LAWS §127 (3d ed. 1949).

[2] Rice v. Rice, 336 U. S. 674 (1949); RESTATEMENT, CONFLICTS OF LAWS §111, comment *a* (1934).

[3] Carpenter v. Carpenter, 93 F. Supp. 225 (S. D. Fla. 1950) (The court also found that the evidence offered by W-I was insufficient to rebut the presumption of H's domicile in Nevada.).

[4] McNutt v. McNutt, 366 Cal. App. 652, 98 P. 2d 253 (1940); Mills v. Mills, 119 Conn. 612, 179 Atl. 5 (1935); Field v. Field, 215 Ill. 496, 74 N. E. 443 (1905); Sammons v. Pike, 108 Minn. 291, 122 N. W. 168 (1903); Lawler v. Lawler, 2 N. J. 527, 66 A. 2d 855 (Sup. Ct. 1949); Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929); Melnick v. Melnick, 147 Pa. Super. 564, 25 A. 2d 111 (1942); Richmond v. Sangster, 217 S. W. 723 (Tex. Civ. App. 1920).