

DAMAGES—PROXIMATE CAUSE—LIABILITY OF GAS COMPANY FOR
ILLNESS CAUSED BY NEGLIGENTLY SHUTTING OFF THE GAS

The defendant, a supplier of natural gas to the public, was sued in tort for physical suffering and loss of income allegedly caused by its negligently cutting off the service to the plaintiff, who heated her home with this fuel. The defendant mistakenly thought that the plaintiff's bill was unpaid. The plaintiff established that the pneumonia which she contracted was occasioned by her repeatedly going out into a blizzard to call the defendant and by her exposure in the cold house. The trial court submitted the question whether the gas company's negligence was the proximate cause of the plaintiff's injuries to the jury, and it returned a verdict in favor of the plaintiff for \$350. The Supreme Court of Oklahoma unanimously sustained the action of the trial court.¹

Although the relationship between a consumer and a public utility, such as the defendant gas company, is normally created by contract, an action in tort will nevertheless frequently lie. "It is often the case that the same wrong is both a breach of contract and a tort."² The duties inherent in the nature of a public calling exist apart from those created by a contract with the consumer. The contract merely creates the relationship to which these inherent duties attach. For example, when a gas company was held liable in tort for failing to notify the plaintiff that his service would be temporarily halted while the gas lines were repaired, it was said:

From the nature of the business, and out of the relation thus established between the parties, the law independently of the contract, implied certain duties on the part of the company. A breach of its duty by turning off the gas supply in cold weather . . . was a distinct wrong, and the right to recover compensation for the tortious injury was neither dependent upon the existence of a specific contract nor subject to be defeated by proof that there was a contractual relation between the parties.³

1. Oklahoma Natural Gas Co. v. Gray, 204 Okla. 362, 230 P.2d 256 (1951).

2. PROSSER, HANDBOOK ON THE LAW OF TORTS 202 (1941). *Accord*: Coy v. Indianapolis Gas Co., 146 Ind. 655, 46 N.E. 17 (1897); Warfield Natural Gas Co v. Clark's Adm'x, 257 Ky. 724, 79 S.W.2d 21 (1934); Hoehle v. Allegheny Heating Co., 5 Pa. Super. 21 (1897).

3. Hoehle v. Allegheny Heating Co., 5 Pa. Super. 21, 25 (1897). See also the statement in Warfield Natural Gas Co. v. Clark's Adm'x, 257 Ky. 724, 79 S.W.2d 21 (1934).

The action's being in tort rather than contract is important for several reasons. The most important difference is in the measure of damages. A breach of contract gives rise to damages redressing only those losses which were reasonably foreseeable at the time the contract was entered into. In practice this means that a contractual recovery is limited to the "natural and probable consequences" of a breach, unless it is shown that the parties contemplated more extensive liability.⁴ In contrast, liability in tort extends to all losses proximately caused by the defendant's breach of duty. The precise extent of tort liability is incapable of definition, but it will, in general, encompass much more than would be included in a recovery in contract.

In addition, the contributory negligence of a plaintiff might be a bar to recovery in tort, whereas there is no such doctrine in the field of contract.⁵ Also, in order to proceed in contract, the plaintiff must be in privity with the defendant or perhaps qualify under a third party beneficiary rule adopted in the jurisdiction, whereas this technical requirement need not be satisfied when one sues in tort.

Many courts are ordinarily reluctant to allow a tort recovery when the defendant has been guilty of no more than a non-feasance.⁶ Nevertheless, the few courts passing upon the point have held that a gas company will be liable in tort for a negligent delay in commencing service.⁷ This view has the sanction of Professor Prosser, who says:

... if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not.⁸

The necessary relationship exists in this class of cases because the gas company in accepting its franchise as a public utility assumes to supply all who request its services, after complying with reasonable regulations.

All the cases agree that once the utility has begun performing

4. *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N.E. 17 (1897); MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 318 (1935).

5. In a contract action, the requirement of minimizing damages will sometimes operate to reduce damages and might, in some instances, prevent any recovery, but this is founded upon a completely different theory.

6. PROSSER, *op. cit. supra* note 2, at 205 (1941).

7. *Ft. Smith Gas Co. v. Cloud*, 75 F.2d 413 (8th Cir. 1935); *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N.E. 17 (1897).

8. *Op. cit. supra* note 2, at 205. *Accord: Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 661, 46 N.E. 17, 19 (1897).

it is guilty of a tort if it cuts off the consumer's supply without sufficient cause.⁹ However, it may discontinue its service when there are unpaid bills, or if the customer has failed to comply with reasonable regulations.¹⁰ When there is an honest dispute between the parties about the amount of the bill, however, the company cannot arbitrarily shut off the supply.¹¹ Nor can it, as a general rule, refuse its service because of a collateral matter, *i.e.*, one not related to the service.¹²

The principal case, then, falls within a category in which the defendant's duty and breach are clear. (The defendant admitted that there was no justification for cutting off the gas.) Also, the cause-in-fact relationship of the negligence to the injury presented no serious problem.¹³ A slightly more difficult issue was that of proximate cause. In general, the courts say that the negligent gas company will be liable for all injuries proximately caused.¹⁴

Under the guise of proximate cause are subsumed those policy

9. Birmingham Gas Co. v. McKinley, 228 Ala. 596, 154 So. 289 (1934); Carson v. Ft. Smith Light & Traction Co., 103 Ark. 452, 158 S.W. 129 (1913); Warfield Natural Gas Co. v. Clark's Adm'x, 257 Ky. 724, 79 S.W.2d 21 (1934); Oklahoma Natural Gas Co. v. Graham, 188 Okla. 521, 111 P.2d 173 (1941); Hoehle v. Allegheny Heating Co., 5 Pa. Super. 21 (1897); Wink Gas Co. v. Huskey, 42 S.W.2d 819 (Tex. Civ. App. 1931).

10. Oklahoma Natural Gas Co. v. Young, 116 F.2d 720 (10th Cir. 1940); Detroit Gas Co. v. Moreton Truck & Storage Co., 111 Mich. 401, 69 N.W. 659 (1897).

11. Birmingham Gas Co. v. McKinley, 228 Ala. 596, 154 So. 289 (1934). Also inferentially in point are cases in which the courts have not allowed water and electric companies to cut off the service where there is an honest dispute about the amount of the bill. Sims v. Alabama Water Co., 205 Ala. 378, 87 So. 688 (1920); Schultz v. Lakeport, 5 Cal.2d 377, 54 P.2d 1110, modified 5 Cal.2d 377, 55 P.2d 485 (1936); Steele v. Clinton Electric Light & Power Co., 123 Conn. 180, 193 Atl. 613 (1937); Dodd v. Atlanta, 154 Ga. 33, 113 S.E. 166 (1922).

12. Seaton Mountain Electric Light, Heat and Power Co. v. Idaho Springs Inv. Co., 149 Colo. 122, 111 Pac. 834 (1910); Snell v. Clinton Electric, Light, Heat & Power Co., 196 Ill. 626, 63 N.E. 1082 (1902); Vanderberg v. Kansas City Missouri Gas Co., 126 Mo. App. 600, 105 S.W. 17 (1907); State *ex rel.* Deeney v. Butte Electric & Power Co., 43 Mont. 118, 115 Pac. 44 (1911); Miller v. Roswell Gas & Electric Co., 22 N.M. 594, 166 Pac. 1177 (1917); People *ex rel.* New York Telephone Co. v. Public Service Comm'n, 157 App. Div. 156, 141 N.Y. Supp. 1018 (3d Dep't 1913); Miller v. Wilkes-Barre Co., 206 Pa. 254, 55 Atl. 974 (1903); Allen v. Park Place Water Light & Power Co., 266 S.W. 219 (Tex. Civ. App. 1924).

13. Cause in fact, as defined by Prosser, means that the defendant's conduct was a substantial factor in bringing about plaintiff's injury, or that plaintiff's injury would not have occurred "but for" defendant's negligent conduct. PROSSER, *op. cit. supra* note 2, at 342 (1941).

14. Warfield Natural Gas Co. v. Clark's Adm'x, 257 Ky. 724, 79 S.W.2d 21 (1934); Oklahoma Natural Gas Co. v. Graham, 188 Okla. 521, 111 P.2d 173 (1941).

factors which must limit the defendant's liability someplace short of all the consequences of his act. It is unanimously agreed that the defendant will be held for all foreseeable consequences of his conduct.¹⁵ And most of the decisions in a situation like that of the principal case have held that illness of the plaintiff as a result of exposure to the cold is a foreseeable consequence.¹⁶ To be foreseeable:

. . . the consequences must be a normal, substantial part of the risk, which a reasonable man would recognize as fairly to be taken into account by the defendant at the time of the act.¹⁷

It is difficult to quarrel with the findings of most courts that the contracting of influenza or pneumonia meets this test.

Moreover, even though such injuries as those suffered by the plaintiff in the principal case be found not reasonably foreseeable, they would probably create a liability in the defendant under the majority American view. Under this view, despite the unforeseeable nature of the injuries, if they were directly caused by the defendant's act without the aid of intervening forces, he is liable.¹⁸ A statement from *Coy v. Indianapolis Gas Co.*, sets forth this point of view:

All damages directly traceable to the wrong done and arising without any intervening agency and without fault of the injured person himself are recoverable. The wrong in such case is said to be the proximate cause of the injury.¹⁹

Again, just as most of the courts have found the bodily illnesses of the plaintiff to have been foreseeable, most of the decisions have said that those injuries were directly caused by the defendant's shutting off the gas supply.²⁰ In finding that the injuries were directly caused, the courts are saying either that there was in fact no intervening force²¹ or that, if there was any intervening agency, it was a foreseeable or normal one which

15. PROSSER, *op. cit. supra* note 2, at 342 (1941).

16. *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N.E. 17 (1897); *Warfield Natural Gas Co. v. Clark's Adm'x*, 257 Ky. 724, 79 S.W.2d 21 (1934); *Oklahoma Natural Gas Co. v. Graham*, 188 Okla. 521, 111 P.2d 173 (1941); *Hoehle v. Allegheny Heating Co.*, 5 Pa. Super. 21 (1897).

17. PROSSER, *op. cit. supra* note 2, at 343 (1941).

18. *Id.* at 340, 343.

19. 146 Ind. 655, 663, 46 N.E. 17, 20 (1897).

20. See note 16 *supra*.

21. Intervening forces ". . . should be understood in a very general sense of concurring causes of either natural or human origin, which comes into active operation at a later time to change a situation resulting from the defendant's conduct." PROSSER, *op. cit. supra* note 2, at 354.

does not absolve the defendant from liability. The plaintiff's remaining in the house, if it is an intervening agency at all, is certainly to be anticipated by the defendant. And, although the plaintiff's venturing outside to call the company is properly designated an intervening force, it too is a foreseeable and normal event. The courts ordinarily do not indulge in an analysis as detailed as this. Rather, if the new and independent cause is not of such an unusual nature that it will operate to relieve the defendant of liability, the courts summarize this conclusion by saying the injury was "directly caused."²²

Thus a decided majority of the jurisdictions would concur in the holding of the court in the instant case that the negligence of the gas company was the proximate cause of the plaintiff's injuries. They would find either foreseeability or direct causation or both.

One further obstacle might remain in the way of the plaintiff's recovery, however. This is the problem of contributory negligence. Although only a few of the courts have talked in terms of contributory negligence, this seems to have been what some of them had in mind when discussing intervening causes. That inference is particularly reasonable because when the subsequent activities of the plaintiff are dealt with as intervening forces, their quite normal and foreseeable nature should make any substantial discussion of the proximate cause problem unnecessary. On the other hand, since they are activities of the plaintiff, even though they be labeled foreseeable, if they be found unreasonable, they will nevertheless absolve the defendant of liability. However, in most cases where the consumer has conducted himself in much the same way as the plaintiff in the case under discussion, the courts have found no contributory negligence.²³ For example, in an almost identical case, *Oklahoma Natural Gas Co. v. Graham*,²⁴ it was held that the plaintiff acted with reasonable prudence in leaving her house to report the

22. If the defendant's tort be deemed one of continuous duration until the service is restored, then the activities of the plaintiff in the interim would be a concurrent, rather than supervening, force. This analysis has not been perceived in the cases, however.

23. *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N.E. 17 (1897); *Warfield Natural Gas Co. v. Clark's Adm'x*, 257 Ky. 724, 79 S.W.2d 21 (1934); *Oklahoma Natural Gas Co. v. Graham*, 188 Okla. 521, 111 P.2d 173 (1941).

24. 188 Okla. 521, 111 P.2d 173 (1941).

fact that her gas had been disconnected and in then returning to her unheated house.

However, in one instance, after finding the defendant not negligent, the court by a dictum indicated that it considered the consumer's remaining in an unheated house to be contributory negligence because he could have found shelter with the rest of his family in a neighboring house.²⁵

Although some examples of carelessness might be hypothesized,²⁶ the plaintiff's ordinary course of conduct in remaining in his own home and perhaps venturing outside only to communicate with the defendant is almost invariably held not contributory negligence. That result seems quite correct, for there is little else that the plaintiff can do.

In conclusion, it is not surprising that the court should find the gas company liable for illness caused by its negligently cutting off the gas. Conventional analysis in negligence cases yields this result. There are also several policy factors which probably influence the court to allow recovery. The monopolistic position of the public utility, which places the consumer at the mercy of the gas company, is probably a factor. Public utilities traditionally owe a high standard of care to the public, and permitting recovery in a situation of this kind motivates the company to adhere to this standard as nearly as possible.²⁷

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25. *Fort Smith Gas Co. v. Cloud*, 75 F.2d 413 (8th Cir. 1935). The value of the case on this point is very limited. In the first place, it was a mere dictum; secondly, it was a non-feasance case; and thirdly, the plaintiff and his family were just moving into the house so that there was no particular reason for plaintiff to remain there.

26. For example, taking a bath in the unheated house.

27. This consideration undoubtedly explains the liberality with which interests less substantial than bodily integrity are sometimes protected. In one instance, an award of \$500 for embarrassment at not being able to cook for dinner guests was upheld. *Glover v. Southern Cities Distributing Co.*, 142 So. 289 (La. App. 1932). And in *Birmingham Gas Co. v. McKinley*, 228 Ala. 596, 154 So. 289 (1934), damages were allowed for the annoyance and inconvenience arising out of plaintiff's being unable to cook and heat water for her family. *Contra*: *Detroit Gas Co. v. Moreton Truck & Storage Co.*, 111 Mich. 401, 69 N.W. 659 (1897); *Wink Gas Co. v. Huskey*, 42 S.W.2d 819 (Tex. Civ. App. 1931).