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Recent Cases

CONFLICT OF LAWS—BURDEN OF PROOF IN MISSOURI ON CONTRIBUTORY NEGLIGENCE

Gerhard v. Terminal R.R. Ass'n of St. Louis
O'Leary v. Illinois Terminal R.R.

Two recent cases,¹ decided by the Supreme Court of Missouri sitting en banc, have settled a tort conflict of laws question which has been somewhat uncertain since 1954. A short background on the problem would seem appropriate before the two cases are discussed.

The question involved arises because of conflicting rules in certain jurisdictions in regard to the burden of proof as to contributory negligence in tort actions. It is well settled in Missouri that in a tort action the defendant has the burden of pleading contributory negligence as an affirmative defense² and the burden of proving the plaintiff to be contributorily negligent unless it is established as a matter of law by the plaintiff's evidence.³ Although this seems to be the majority rule, some states, including Illinois, follow the view that a plaintiff in a tort action must allege and prove that he was exercising due care at the time his claim arose.⁴ The problem is thus presented as to which of these rules will be followed by a Missouri court hearing a tort claim which arose in Illinois. The Missouri courts have stated many times that they will follow the *substantive* law of Illinois in tort actions arising in that state, but will apply Missouri *procedural* law in the same action.⁵

Prior to 1954, the Missouri cases were in agreement that Missouri would consider the Illinois requirement placing the burden of proof on the plaintiff to be procedural. Therefore, Missouri courts applied their own rule.⁶

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1. *Gerhard v. Terminal R.R. Ass'n of St. Louis*, 299 S.W.2d 866 (Mo. 1957) (en banc); *O'Leary v. Illinois Terminal R.R.*, 299 S.W.2d 873 (Mo. 1957) (en banc).
 2. § 509.090, RSMo 1949.
 3. *Parsons v. Noel*, 271 S.W.2d 543 (Mo. 1954); *Thompson v. Byers Transp. Co.*, 362 Mo. 42, 239 S.W.2d 498 (1951).
 4. *Hanson v. Trust Co.*, 380 Ill. 194, 43 N.E.2d 931 (1942); *Newell v. Cleveland C.C. & St. L. Ry.*, 261 Ill. 505, 104 N.E. 223 (1914).
 5. *Connole v. East St. L. & S. Ry.*, 340 Mo. 690, 102 S.W.2d 581 (1937).
 6. *Menard v. Goltra*, 328 Mo. 368, 40 S.W.2d 1053 (1931); *Williams v. East St. L. Ry.*, 100 S.W.2d 51 (St. L. Ct. App. 1936).

Then, in 1954, the Missouri supreme court, in a division opinion, handed down its decision in the case of *Redick v. M. B. Thomas Auto Sales*.⁷ The court stated that the rule of the previous cases on the problem being considered should not be followed; rather that the Illinois requirement is substantive. Therefore, it concluded that the Illinois rule should be followed by Missouri courts in regard to tort actions arising in Illinois.

The problem was complicated by the fact that the Missouri supreme court, sitting en banc, had stated as dictum in the same year as the decision in *Redick*, that the Illinois rule was a matter of procedure and thus not to be followed by Missouri courts.⁸

This question has been resolved, it would seem, by the two opinions handed down March 11, 1957. In the case of *Gerhard v. Terminal R.R. Ass'n of St. Louis*,⁹ an administrator brought an action against a toll bridge operator for the wrongful death of one Kastner. Kastner was killed on a Mississippi River bridge connecting East St. Louis, Illinois and St. Louis, Missouri, when his automobile struck the curved curbing on a ramp approach to the bridge, veered to the other side, and crashed through the railing. The entire occurrence transpired on the Illinois side of the bridge. Plaintiff administrator, in bringing the action, did not allege that decedent was in the exercise of due care at the time of his fatal injury. The issue was, however, submitted to the jury in the instructions. The jury found a verdict for the plaintiff and the defendant appealed.

The Missouri supreme court reversed the case. It first considered the problem of which state's substantive law to apply. This question arose because of the Missouri Enabling Act of March 6, 1820, which provided that Missouri's eastern boundary would be the middle of the Mississippi River, but that Missouri would have concurrent jurisdiction with bordering states "on the river Mississippi."¹⁰ The court considered the problem of whether this accident happened "on the river Mississippi," and determined that it had not. As a consequence, it was held that the accident happened under Illinois jurisdiction and the Illinois substantive law should apply.¹¹

This brought up the problem whether the Illinois requirement that the plaintiff must allege and prove his (or his decedent's in this case) freedom from contributory negligence was of such a character that the Missouri courts would follow it instead of their own. The court re-examined the *Redick* case and reaffirmed it, deciding that the Illinois requirement was substantive and therefore to be followed by Missouri courts in considering cases arising in Illinois.

7. 364 Mo. 1174, 273 S.W.2d 228 (1954).

8. *Sanders v. Illinois Central R.R.*, 364 Mo. 1010, 1016, 270 S.W.2d 731, 735 (1954) (en banc).

9. *Supra* note 1.

10. RSMo 1949, at 36.

11. It is beyond the scope of this note to discuss this question in detail. However, those interested in this problem might compare this holding with the holding in *Smoot v. Fischer*, 248 S.W.2d 38 (St. L. Ct. App. 1952), which the court approves and distinguishes in the principal case.

The court stated it was unnecessary to consider the effect of plaintiff's failure to allege that decedent was in the exercise of due care (which was not challenged by defendant prior to trial) for the reason that, in the court's opinion, the plaintiff had not made a submissible case on the issue of freedom from contributory negligence, and it should not have gone to the jury. The case was therefore reversed.

In the case of *O'Leary v. Illinois Terminal R.R.*,¹² decided on the same day as the *Gerhard* case, the plaintiff was a passenger in an automobile being driven in Granite City, Illinois. The automobile was struck by defendant's electric railway train at a crossing causing plaintiff to sustain injuries. Upon this action being brought in Missouri for those injuries, the defendant affirmatively pleaded the plaintiff's contributory negligence in not looking for trains at the crossing and therefore not being able to warn the driver.

Upon the trial of the case, the trial judge instructed the jury that the defendant had the burden of proving its affirmatively pleaded defense of contributory negligence. The jury found a verdict for the plaintiff and defendant appealed to the St. Louis Court of Appeals. That court was confronted with the *Redick* decision and the *Sanders*¹³ case, with its contrary dictum. Therefore, that court transferred the case to the Missouri supreme court to re-examine the law on the subject.

That court, sitting en banc, considered anew the authorities on the subject and reaffirmed the *Redick* case, quoting a large section of it. Cases previous to the *Redick* decision, which had been considered, were overruled, and the principal case was reversed and remanded to the trial court for a new trial.

The court decided that the plaintiff had a submissible case on the exercise of due care on her part, but granted the new trial because of the erroneous instruction on burden of proof.

The basis for the *Redick* decision and consequently the *Gerhard* and *O'Leary* decisions seems to be that the Illinois requirement of pleading and proving contributory negligence is an essential element of plaintiff's right to recover under Illinois law, and therefore is substantive.

There is clearly a conflict of authority on this point. As far as could be determined by this writer, the decisions on the precise point involved here are split about evenly.¹⁴ Most of the decisions in other jurisdictions, as in Missouri, are based on the question whether the requirement of pleading and burden of proof as to contributory negligence is substantive or procedural.

However, one New Hampshire case¹⁵ proceeded on a middle ground. That court

12. 299 S.W.2d 873 (Mo. 1957) (en banc).

13. *Sanders v. Illinois Central R.R.*, *supra* note 8.

14. For some jurisdictions agreeing with the present Missouri rule, see *Alcaro v. Jean Jordeau, Inc.*, 138 F.2d 767 (3d Cir. 1943); *Olson v. Omaha & C.B. St. Ry.*, 131 Neb. 94, 267 N.W. 246 (1936). For some jurisdictions disagreeing, see *Midland Trail Bus Lines v. Martin*, 100 Ind. App. 206, 194 N.E. 862 (1935); *Gregory v. Maine Central R.R.*, 317 Mass. 636, 59 N.E.2d 471 (1945).

apparently conceded that the rule of burden of proof on contributory negligence was procedural, but held that in cases where the remedy prescribed by the *lex loci* is so inseparably connected with and incorporated in the substantive rule creating the right that to ignore that remedy and substitute the procedure of the forum would render ineffective the right to which it is attached and substitute a different cause of action, the rules of the *lex loci* in its entirety will be given effect. The court felt that this was the case with respect to the requirement of the *lex loci* that plaintiff had the burden of proving his freedom from contributory negligence.

It is submitted that this approach is more realistic than the method used by the Missouri court and many other courts of finding the burden-of-proof requirement to be either substantive or procedural. By using the New Hampshire court's process, each type of case can be considered to determine just how far the right to sue in the *lex loci* will be affected, without determining first whether the requirement is procedural or substantive. This would eliminate a rather useless middle step since, in most cases, the forum has discretion to determine whether or not to apply the law of the *lex loci*.

The immediate import of the two principal decisions discussed here is that in tort cases arising in Illinois and sued upon in Missouri, the plaintiff will have to plead and prove his freedom from contributory negligence. It might be expected that the Missouri courts will render the same holding as to other states which have requirements in regard to contributory negligence similar to the requirement in Illinois.

For instance, among the states bordering Missouri, Iowa has a rule similar to the Illinois requirement.¹⁶ The remainder of the border states have rules similar to Missouri's, thus creating no problem in this field.¹⁷

It would appear that the two principal cases should be noted by members of the Missouri bar, especially those practicing close to our borders, as many close tort actions may turn on the point of burden of proof of contributory negligence.

WILLIAM O. WELMAN

COSTS—MISSOURI—INTERPLEADER PROCEEDINGS

*Badeau v. National Life & Acc. Ins. Co.*¹

The National Life and Accident Insurance Company (hereafter referred to as A) issued its policy of non-assignable life insurance in the amount of \$260 to Will Turner, the insured, with his daughter, Rosetta Turner, designated as beneficiary. Will

15. *Precourt v. Driscoll*, 85 N.H. 280, 157 Atl. 525 (1931).

16. *Spooner v. Wisecup*, 227 Iowa 768, 288 N.W. 894 (1940).

17. See *Lion Oil Refining Co. v. Smith*, 199 Ark. 397, 133 S.W.2d 895 (1939); *Samms v. Regier*, 167 Kan. 556, 207 P.2d 414 (1949); *Owen Motor Freight Lines v. Russell's Adm'r*, 260 Ky. 795, 86 S.W.2d 708 (1935); *Griess v. Borchers*, 161 Neb. 217, 72 N.W.2d 820 (1955); *Kurn v. Thompson*, 187 Okla. 664, 105 P.2d 422 (1940); *Pierce v. United States*, 142 F. Supp. 721 (E.D. Tenn. 1955).

1. 305 S.W.2d 876 (K.C. Ct. App. 1957).

Turner died while the policy was in force. Arthur L. Badeau (hereafter referred to as C_1), a funeral director, obtained an *ex parte* order from the probate court awarding him the policy as creditor of the deceased. C_1 brought suit, after an agreed transfer to the circuit court, against A on the policy for the sum of \$260. A filed a third-party petition against Rosetta Turner (hereafter referred to as C_2), stating that it believed C_2 to be alive but personal service could not be obtained on her as her whereabouts were unknown and service was had by publication. A prayed, among other things, that the court hear the evidence and determine who was entitled to the proceeds of the policy which it had tendered into court, and that A be relieved of further liability under the policy and that the costs be assessed against the proceeds of the policy. C_2 did not appear at the trial and the trial court found her to be dead and awarded the balance of the proceeds of the policy, after A 's costs had been deducted, to C_1 . Motion to retax the costs against A was filed by C_1 . The motion was overruled on appeal by C_1 to the Kansas City Court of Appeals, *held*, reversed. This was not a true interpleader proceeding and A was not entitled to its costs from the proceeds of the policy paid into court. C_1 , as prevailing party, was awarded his costs and the proceeds of the policy.

In Missouri it has been the practice to allow an applicant who has made out a case for interpleader to be awarded his costs² either out of the fund in controversy or from some of the defendants.³ This is not invariably the rule, however, as it is held that an interpleader proceeding is an equitable remedy, existing independently of statute,⁴ and as such, allowance of costs is discretionary with the court.⁵ The dividing line as to when costs shall be given to one who interpleads seems to be drawn between true interpleader proceedings and those in the nature of interpleader—the courts generally awarding costs to the applicant in the former and denying his recovery in the latter.⁶

After the applicant-stakeholder is allowed to withdraw from the action, the disputing claimants litigate their rights to the fund deposited into court. The successful claimant is generally allowed his own costs and attorney's fees as the prevailing party plus those costs and attorney's fees allowed to the stakeholder which were deducted

2. John A. Moore & Co. v. McConkey, 240 Mo. App. 198, 203 S.W.2d 512 (K.C. Ct. App. 1947); State v. Goldstein, 209 Mo. App. 102, 237 S.W. 814 (St. L. Ct. App. 1922); Sovereign Camp Woodmen of the World v. Wood, 100 Mo. App. 655, 75 S.W. 377 (K.C. Ct. App. 1903).

3. John A. Moore & Co. v. McConkey, *supra* note 2; Spicer v. New York Ins. Co., 237 Mo. App. 725, 167 S.W.2d 457 (Spr. Ct. App. 1942); Oldham v. McKay, 235 Mo. App. 348, 138 S.W.2d 735 (K.C. Ct. App. 1940); Clay County Court v. Baker, 210 Mo. App. 65, 241 S.W. 447 (K.C. Ct. App. 1922); State v. Goldstein, *supra* note 2; Sovereign Camp Woodmen of the World v. Wood, *supra* note 2; Christitan v. National Life Ins. Co., 62 Mo. App. 35 (St. L. Ct. App. 1895).

4. § 507.060, RSMo 1949.

5. Woodson v. Woodson, 358 Mo. 972, 224 S.W.2d 978 (1949); Spicer v. New York Ins. Co., *supra* note 3; Clay County Court v. Baker, *supra* note 3; 48 C.J.S., *Interpleader* § 50, at 110.

6. Standard Surety & Casualty Co. v. Baker, 105 F.2d 578 (8th Cir. 1939); Equitable Life Assur. Soc. of United States v. Maloney, 85 F. Supp. 212 (E.D. Mo. 1948) (plaintiff not entitled to have its attorneys allowed a fee in a proceeding by a bill in the nature of interpleader).

from the fund.⁷ Thus, the unsuccessful defendant-claimant stands the costs and attorneys' fees of both the applicant-stakeholder and the successful claimant of the fund.

In the case at bar, the court was careful to point out that this was not a properly brought interpleader proceeding as the only claim made or indicated was made by C₁. C₂ was not shown to be alive or capable of interpleading.⁸ There was no evidence to indicate the trial court's finding that C₂ was dead was incorrect. Thus, A had not shown the necessity for the use of an equitable interpleader proceeding in that it was not shown that A was under threat of double vexation or double liability.⁹ The court, deciding that this was not a properly brought interpleader proceeding, then allowed C₁ the proceeds of the fund and his costs as is the rule in Missouri for prevailing parties.¹⁰

DONALD K. HOEL

TORTS—NEGLIGENCE—MISSOURI—ACTION BY WIFE
AGAINST ADMINISTRATOR OF ESTATE OF
DECEASED HUSBAND FOR PERSONAL INJURY

*Ennis v. Truhitte*¹

This case presents the question whether a widow can recover against the estate of her deceased husband for a personal tort committed during coverture. On motion by defendant, the trial court dismissed the action. On appeal to the Missouri supreme court, sitting en banc, *held*, reversed. The facts alleged, if accepted, stated a cause of action.

Plaintiff sued in two counts charging negligence in the first and wilful and wanton conduct in the second. Most courts have drawn no distinction between the two in applying the rule of spousal disability, but it is said that the instances of

7. *Sovereign Camp Woodmen of the World v. Wood*, *supra* note 2, at 600, 75 S.W. at 378 ("that the successful and rightful claimant simply has the misfortune to have his right disputed by a contesting claimant which is the cause of the costs being charged against the fund. But in the end, the whole costs, including that taken out of the fund for the plaintiff, will be charged against the party whose invalid claim caused the proceeding to be instituted"); *Oldham v. McKay*, *supra* note 3; *Clay County Court v. Baker*, *supra* note 3.

8. In this connection, see *Brown v. Curtin*, 330 Mo. 1156, 52 S.W.2d 387 (1932) (en banc). Interpleader cannot be maintained unless it is shown that the claimant sought to be brought in is in existence and capable of interpleading. 33 C.J., *Interpleader* § 10, at 427.

9. See *Barr v. Snyder*, 358 Mo. 1189, 219 S.W.2d 305 (1949).

10. § 514.060, RSMo 1949.

1. 306 S.W.2d 549 (Mo. 1957) (en banc).

simple negligence are not so readily persuasive and satisfying.² The Missouri court recognized this but made no distinction.³

Closely associated with the right of a widow to sue for a personal tort is the right of either spouse to sue the other for a personal tort committed during coverture or to bring an action based on a personal tort committed before marriage but prosecuted during coverture. Many of the arguments pertaining to these rights may be applied to the cause of action in the *Ennis* case.⁴

The majority of courts, on the basis of legal identity, public policy, and lack of statutory authorization, have disallowed personal injury suits between spouses.⁵ Such suits are said to be violative of public policy because they would disturb domestic tranquillity, tend to cause marital discord and divorce, cause fictitious, collusive, and fraudulent claims, cause a rise in the cost of liability insurance, and promote trivial actions. It is argued that a spouse has an adequate remedy for civil wrongs inflicted by the other spouse through the criminal and divorce courts.

The court finds in the principal case that the reasons of policy upon which the common law is based have vanished because of the husband's death. The general rule of disability is not applicable because recognized public policy is not violated.⁶

Another recent Missouri decision was based in the alternative on the theory that there is no public policy against an action for an ante-nuptial personal tort between spouses, while the principal case holds that a widow may sue her husband's administrator for a personal tort because such action is not violative of existing public policy against actions between spouses.⁷ Whether the cases are consistent on this theory is at least questionable.

2. Annot., 43 A.L.R.2d 632, 641 (1955). Oregon now allows recovery for intentional torts committed against the wife by the husband, but does not for negligent torts. *Apitz v. Dames*, 205 Or. 242, 287 P.2d 585 (1955) (intentional murder of wife); *Smith v. Smith*, 205 Or. 286, 287 P.2d 572 (1955) (gross negligence in operation of automobile injuring wife).

3. 306 S.W.2d at 550.

4. See PROSSER, *TORTS* 670-75 (2d ed. 1955); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1041-56 (1930).

5. PROSSER, *op. cit. supra* note 4, at 673. For Missouri cases, see *Willott v. Willott*, 333 Mo. 896, 62 S.W.2d 1084 (1933) (wife suing husband for negligence in operation of automobile); *Rogers v. Rogers*, 265 Mo. 200, 177 S.W. 382 (1915) (wife suing husband for false imprisonment). During the January 1958 session of the Missouri supreme court, *Brawner v. Brawner* was argued before division No. 2. Appeal was taken to the supreme court after respondent's motion to dismiss had been granted by the Circuit Court of St. Louis County. The husband is suing for injury sustained through the wife's negligent operation of her automobile. No opinion had been rendered at the writing of this note. *But see* *Leach v. Leach*, 300 S.W.2d 15 (Ark. 1957) 23 Mo. L. REV. 103 (1958) (allowing recovery to husband for negligent injury inflicted by wife).

6. There is also no violation of marital public policy in Missouri when the wife sues her husband's employer for her personal injuries resulting from her husband's negligence while acting in the scope of his employment, even though the employer could recover over from the husband. *Mullally v. Langenberg Bros. Grain Co.*, 339 Mo. 582, 98 S.W.2d 645 (1936); *Rosenblum v. Rosenblum*, 231 Mo. App. 276, 96 S.W.2d 1082 (K.C. Ct. App. 1936).

7. *Hamilton v. Fulkerson*, 285 S.W.2d 642 (Mo. 1955), 22 Mo. L. REV. 216 (1957), 25 U. KAN. CITY L. REV. 51 (1956).

The *Ennis* opinion theorizes that not only do the circumstances of this particular case not infringe upon public policy but that "the married women's acts and the survival statutes do not preclude the action."⁸ No such action was known at the common law.⁹ One might inquire whether these statutes grant this cause of action, for in the absence of statutory enactment by our legislature, the right would seem to spring from judicial decision. Practically all jurisdictions allowing a similar recovery between spouses find the common law rules specifically abrogated by the married women's acts.¹⁰

In the instant case there is a recognition that the wife had the cause of action during the marriage but procedurally could not bring it.¹¹ The right to bring the action was created by the husband's death. Logically divorce, legal separation, or abandonment could create a similar right.

The purpose of the married women's acts, as expressed by our legislatures and courts, has been to emancipate a married woman by endowing her with ability to sue and be sued, to manage her own property, and to have the earnings of her labor. Most jurisdictions allow the wife to recover for injury by the husband to her property.¹² Such suits are consistent with the spirit of the married women's acts yet equally, by logic, violate public policy. The fact remains that it does "believe reality and fact" to say that there is no tort when the husband negligently or intentionally injures his wife.¹³

A dissent filed in the case stated that the strict rule of disability was based upon sound public policy, recognizing that liberalization has been encouraged by the presence of insurance.

The case would seem to represent a trend toward extension of tort liability in family actions where undoubtedly the motivating force is the presence of automobile liability insurance. The effect of *Ennis v. Truhitte* will be significant. Actions for personal injury between spouses, or by children against parents, may be logically based upon the underlying philosophy. Insurance companies must alternatively raise premiums or write family exclusions in their policies. Releases must be obtained from persons who before had no cause of action. Perhaps the real solution lies in the clarification of Missouri public policy by legislation.¹⁴

WILLIAM A. R. DALTON

8. 306 S.W.2d at 551-52.

9. *Brandt v. Keller*, 413 Ill. 503, 109 N.E.2d 729 (1952).

10. Annot., 43 A.L.R.2d 635 (1955).

11. 306 S.W.2d at 551. This view is necessary. It was argued by respondent that under the common law, death extinguished any cause of action for personal tort. Survival has only been permitted by statute, but no survival has been permitted unless a cause of action was in being to survive.

12. 41 C.J.S., *Husband and Wife* § 395.

13. 306 S.W.2d at 551.

14. The New York solution to the problem presented appeals to the writer. By Domestic Relations Law § 57 either spouse is permitted to sue the other for personal injury. A companion statute, New York Insurance Law § 167(3) provides that no insurance policy theretofore or thereafter issued shall be deemed to insure against any liability of an insured for injuries to his or her spouse, unless express provision for such coverage is included in the policy. The right is thereby recognized but insurance companies are properly protected from fraudulent, collusive claims.

TORTS—NEGLIGENCE—MISSOURI—LIABILITY OF TELEPHONE
COMPANY FOR NEGLIGENT FAILURE TO CONNECT
SUBSCRIBER WITH FIRE DEPARTMENT

*Jennings v. Southwestern Bell Telephone Co.*¹

Plaintiff, being awakened from her sleep at about 1:30 a.m., discovered that her couch in the downstairs living room was smouldering. Due to the smoke, plaintiff was unable to ascertain the telephone number of the fire department and dialed for and was connected with an operator of the defendant. Plaintiff told the operator of the emergency and asked to be connected with the fire department, but the operator negligently failed to make the connection. Plaintiff again attempted to call about 1:40 a.m. with the same result. At about 1:50 a.m., and while plaintiff was calling for the third time, the fire suddenly spread from the couch to the living room and to other rooms. Thereupon the fire department was notified and responded, arriving approximately two or three minutes later, and did then extinguish the fire. Plaintiff alleged that had defendant promptly connected the telephone facilities, the fire department could have and would have responded in time to have confined the fire solely to the couch. The trial court sustained defendant's motion to dismiss for failure to state a cause of action. On appeal to the Supreme Court of Missouri, *held*, reversed. The case was remanded for trial.

This case is distinguishable on its facts from the line of cases involving the liability of telephone companies where there was no connection with the operator,² failure to furnish service,³ or failure to deliver, relay or transmit a message.⁴ Ordinarily a telephone subscriber may not recover from the company special damages caused by a failure of services,⁵ unless the company has notice of the special circumstances out of which the damages might arise.⁶ Most of the cases hold that the nature of the duty upon the companies is such that the contract rule rather than the tort rule applies.⁷ But the Missouri statute has made telephone companies liable in tort for the negligence of their operators in furnishing telephone service.⁸ This does not dispense with the necessary element of proximate cause.⁹

The majority of the cases holding a telephone company not liable based the

1. 307 S.W.2d 464 (Mo. 1957).

2. For a collection of cases on the question of proximate cause as affecting liability for damages for failure to obtain telephone connections, see Annot., 19 A.L.R. 1419 (1922), 10 A.L.R. 1456 (1921).

3. For a consideration of damages recoverable from a telephone company for failure to furnish, or interruption of services, see Annot., 23 A.L.R. 952 (1923).

4. For a collection of cases on the duty and liability of a telephone company for failure to deliver, relay, or transmit a message, see Annot., 78 A.L.R. 661 (1932).

5. *Barrett v. New England Tel. & Tel. Co.*, 80 N.H. 354, 117 Atl. 264 (1922).

6. *Vinson v. Southern Bell Tel. & Tel. Co.*, 188 Ala. 292, 66 So. 100 (1914); *Southern Tel. Co. v. King*, 103 Ark. 160, 146 S.W. 489 (1912); *Barrett v. New England Tel. & Tel. Co.*, *supra* note 5; *Foss v. Pacific Tel. & Tel. Co.*, 26 Wash. 2d 92, 173 P.2d 144 (1946); *Boldig v. Urban Tel. Co.*, 224 Wis. 93, 271 N.W. 88 (1937); 52 AM. JUR., *Telegraphs and Telephones* § 99 (1944).

7. *Mentzner v. New England Tel. & Tel. Co.*, 276 Mass. 478, 177 N.E. 549 (1931) (duty of telephone company limited to its agreement to place subscribers in communication with one another); *Barrett v. New England Tel. & Tel. Co.*, *supra* note 5.

8. § 392.170, RSMo 1949 ("every telephone or telegraph company now organi-

ruling on the theory that the delay caused by the neglect of the company could not have been the proximate cause of the damage,¹⁰ that both the cause and the amount of damages were too remote and speculative,¹¹ or that several links in the chain of sequence are involved in doubt and speculation.¹²

In the case of *Forgey v. Macon Telephone Co.*¹³ the Missouri supreme court sustained a dismissal for failure to state a cause of action, on grounds that the cause and amount of damages were too remote and speculative to fasten liability on the telephone company. There the plaintiff was unable to contact defendant's operator in an attempt to call the fire department. As the fire department was under no legal duty to respond¹⁴ had it been notified, there was no presumption that it would have done so.

In the instant case plaintiff alleged that for twenty minutes after the first attempt to call the fire department the fire was confined to the couch; upon notification the fire department responded within three minutes and put out the fire; and defendant had knowledge of the emergency and thereafter was negligent in failing to make the connection.

The *Forgey* case, upon its peculiar facts, has not been disturbed¹⁵ as it was distinguished from the instant case on the pleadings. But it is now settled in Missouri that the negligence of a telephone company *can be* the proximate cause of injury to the plaintiff. This decision may cause a re-examination of the telephone companies' heretofore safe insulation against liability.

DALE REESMAN

zed under the laws of this state, and every telephone or telegraph company now organized, or which may hereafter be organized under the laws of any other state or territory, and doing business in this state, shall be liable for special damages occasioned by the failure or negligence of their operators or servants in receiving, copying, transmitting or delivering dispatches; and for the disclosure of any of the contents of any private dispatches to any person other than to him to whom it was addressed, or to his agent, they shall be liable to the sender of the dispatch, and to the person to whom it was addressed, in the sum of fifty dollars to each, recoverable by any action before a magistrate, and for all special damages in addition thereto").

9. § 10140, RSMo 1919, is identical with § 392.170, RSMo 1949, quoted in note 8 *supra*, and was in effect at the time of the decision in *Forgey v. Macon Tel. Co.*, 291 Mo. 539, 237 S.W. 792 (1922) (en banc), which held that there was no liability because there was no proximate cause. See *Christenson & Arndt, Inc. v. Wisconsin Tel. Co.*, 264 Wis. 238, 58 N.W.2d 682 (1953). In this case the court held that a Wisconsin statute, similar to that in Missouri, quoted in note 8 *supra*, has not only not abrogated the contract liability of a telephone company but has introduced a tort liability as well.

10. See *Foss v. Pacific Tel. & Tel. Co.*, *supra* note 6, in which the court reviews cases from many states.

11. *Forgey v. Macon Tel. Co.*, 291 Mo. 539, 237 S.W. 792 (1922).

12. *Volquarsden v. Iowa Tel. Co.*, 148 Iowa 77, 126 N.W. 928 (1910).

13. *Supra* note 11.

14. But see *Glawson v. Southern Bell Tel. & Tel. Co.*, 9 Ga. App. 450, 71 S.E. 747 (1911) (held for plaintiff where plaintiff had a contract with a physician to attend his wife and physician was under a legal duty to do so).

15. But the court noted that the opinion in the *Forgey* case, *supra* note 11, was concurred in by only three judges, one concurred in result, two judges dissented, and one judge was absent.