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Torts: Absence of Privity as a Defense to a Negligence Action

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burden of expressly excluding adopted children does not weigh too heavily upon those who will draft testamentary instruments in the future, if such be the testator's genuine intention. Traditionally, the term "lawful issue" has had a technical, restrictive, and peculiar meaning. The *Heard* case has given it a less specific connotation.

There is a *possibility* that Emma Heard and other testators deceased before December 31, 1957 did not intend to bestow their bounty upon strangers adopted after their death. Conversely, there is a *certainty* that if the court had decided the *Heard* case to the contrary, an inequality in the status of adopted children would have been perpetuated. When a *possibility* of violating a testator's intent is balanced with a *certainty* that a beneficent principle of public policy will be impugned, which of the two considerations will prevail in the scale of justice? The decision in the *Estate of Heard* seems to have provided a singularly definite answer to this question in California.

D. L. Nay

TORTS: ABSENCE OF PRIVACY AS A DEFENSE TO A NEGLIGENCE ACTION.

"The assault upon the citadel of privity is proceeding in these days apace."¹ These words have taken on special meaning in California today. The citadel is the controversial rule which long denied recovery to a third party for harm suffered from the negligent performance of a contract. The assault has come in the form of *Biakanja v. Irving*,² in which the Supreme Court of California lays down some new law on this vexing problem of tort, contract, and privity.

A notary public, holding himself out as qualified to do so, had undertaken to draw a valid will for a consideration. Through ignorance and carelessness, he failed to have the instrument attested and it was denied probate. The sole beneficiary of the will thus received only one-eighth of the estate by intestate distribution. She sued the notary to recover the difference. He defended on the ground that no duty was owed to her as he had made a contract only with the decedent.

This was the problem presented to the court. Here was more than an ordinary careless defendant. This was a case of unlawful practice of law,³ directly resulting in frustration of a testator's intent and deprivation of an expected benefit to an innocent beneficiary. Here was conduct demanding redress; simple justice and policy required it.

Looming in the way of recovery, however, stood the venerable old case of *Buckley v. Gray*,⁴ and its younger disciple, *Mickel v. Murphy*.⁵ The *Buckley* case, decided by the Supreme Court in 1895, had been unchallenged in the courts of California and was accepted in other jurisdictions as sound law.⁶ It held that there could be no recovery by the beneficiary of an invalid will from an *attorney* whose negligence had caused the invalidity. The court stated that the attorney

¹ Cardozo, C.J., in *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

² 49 Cal., 320 P.2d 16 (1958).

³ CAL. BUS. & PROF. CODE §§ 6125, 6126.

⁴ 110 Cal. 339, 42 Pac. 900 (1895).

⁵ 147 Cal. App. 2d 718, 305 P.2d 993 (1957).

⁶ *Bilich v. Barnett*, 103 Cal. App. 2d Supp. 921, 925, 229 P.2d 492, 494, 495 (1951); *Johnson v. Clark*, 77 N.D. 14, 39 N.W.2d 431 (1949); *In re Crawford's Estate*, 307 Pa. 102, 112, 160 Atl. 585, 588 (1931); *Rosenberg v. Cyrowski*, 227 Mich. 508, 514, 198 N.W. 905, 906 (1924); *Currey v. Butcher*, 37 Ore. 380, 389, 61 Pac. 631, 634 (1900).

was liable for carelessness to his client *alone*, and laid down the broad rule that liability for the negligent performance of a contract was not to be extended beyond the parties privy to it. *Mickel v. Murphy*, on similar facts involving another notary, had denied recovery and by way of dictum⁷ affirmed the principle of the *Buckley* case.

Faced with the problem of policy against privity, the Supreme Court had to disapprove or distinguish *Buckley v. Gray*. While the latter course was open in view of the obvious difference between the classes of defendants and character of the conduct involved, the court reacted by disapproving the *Buckley* and *Mickel* decisions and held that the disappointed beneficiary could recover her loss from the defendant notary.

In disapproving *Buckley v. Gray* the Supreme Court has marked an important change in the law of California. By this holding it seems clear that lack of privity may no longer be invoked by a defendant whose negligent performance of a contract has directly caused harm to even *intangible*⁸ interests of a third party. How far this holding will be extended cannot be determined with any certainty at present.⁹

Certainly the decision does not mean that anyone can sue for the breach of a contract merely because its performance would be of benefit to him. This is to confuse the basis of the holding with the law of third party beneficiaries.¹⁰ The notary in *Biakanja* was held liable because of a breach of duty assumed when he undertook to carry out a transaction vitally affecting the plaintiff's interests. This was a duty imposed by the law of negligence.¹¹

Bearing in mind that the court chose not to distinguish the *Buckley* case, the writer believes that what this decision does mean is that the court has buried the last remnant of a doctrine that has obstructed deserving plaintiffs for over a century.

The rule laid down in *Buckley v. Gray* was only one expression of the general doctrine obtaining at that time.¹² It may be traced back to the English case of *Winterbottom v. Wright*.¹³ There a person injured because of failure to perform a contract to keep a mailcoach in repair was denied recovery because the contract was not made with him. No duty could be found owed him from the con-

⁷ There was no allegation that the notary who drew the will represented that he was qualified or that he was engaged as an attorney. The court treated him as acting as a mere scrivener. See *People v. Sipper*, 61 Cal. App. 2d Supp. 844, 142 P.2d 960 (1943).

⁸ Notice that the interest protected here was a non-contract expectancy. The great majority of courts allow recovery only for intentional interference with expectancies, and usually then only when they are of a commercial nature. See PROSSER, TORTS § 107 (2d ed. 1955). Cf. *Ross v. Wright*, 286 Mass. 269, 190 N.E. 514 (1934); *Re Solicitor, Ex parte Fitzpatrick*, 54 Ont. L. Rep. 3, [1924] 1 D.L.R. 981 (1923). As to fraudulent interference with expected gifts under a will, see *Evans, Torts to Expectancies in Decedent's Estates*, 93 U. PA. L. REV. 187 (1944).

⁹ For the general limits of liability as laid down by the leading cases in other aspects of the same problem, see *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); *Moch v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928).

¹⁰ In *Buckley v. Gray* the plaintiff also sought to recover on the theory that he was a third party beneficiary of the contract to make a will. The court held this untenable, and this would seem undisturbed by the holding in the principal case. See CAL. CIV. CODE § 1559.

¹¹ Cf. 2 HARPER & JAMES, TORTS § 18.6 (1956).

¹² *Savings Bank v. Ward*, 100 U.S. 195 (1879); *Roddy v. Missouri Pacific Ry.*, 104 Mo. 234, 15 S.W. 112 (1891); *Kahl v. Love*, 37 N.J.L. 5 (1874); *Earl v. Lubbock* [1905] 1 K.B. 253 (1904); *Fish v. Kelly*, 17 C.B. (N.S.) 193, 144 Eng. Rep. 78 (C.P. 1864).

¹³ 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

tract, and at that time there was no law of negligence as we know it today.¹⁴ It was said, "The only safe rule is to confine the right to recover to those who enter into the contract. . . ." From this case the doctrine became broadly stated that a person not a party to a contract could maintain no action for its negligent performance.¹⁵ He was not in privity. The fact that this negligent performance might also be a wrong causing injury to that person made no difference. The duties of the parties were measured and limited by their contract.¹⁶ In other words, the contract insulated the wrong.

The main line of cases stemming from *Winterbottom v. Wright* were those involving contractors and suppliers of chattels. In that field, the courts carved out exceptions in particularly harsh cases of bodily harm.¹⁷ However, in another area, the doctrine crystallized into a hard rule with the passage of time, and there was no such impelling reason to avoid its strict effect. This was where the only harm was to intangible interests. Sixteen years before the *Buckley* decision, the Supreme Court of the United States ruled that an attorney was not liable for carelessness to one other than his client.¹⁸ This became the leading case in the United States, and firmly established the principles of *Winterbottom v. Wright* as governing the liability of an attorney.

This was the atmosphere in which *Buckley v. Gray* was decided. And this was the philosophy it established as the law of California.

The underlying fallacy of the entire doctrine, of course, was the failure to modify the rule as the injuries caused to parties outside the contract became recognizable as separate torts. But as the law of torts expanded, privity had to yield.

The landmark decision in *MacPherson v. Buick Motor Co.*¹⁹ laid bare this fallacy and started privity on the way to ignominy so far as suppliers of chattels were concerned. In holding that a manufacturer owed a duty of care to the ultimate buyer of an automobile, Judge Cardozo stated:

"We have put aside the notion that the duty . . . grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."²⁰

This principle has now found almost universal acceptance,²¹ but with an unfortunate qualification. It was taken by many courts only as a broad expansion of the exceptions previously made to the *Winterbottom* doctrine.²² This was the approach used in the leading case of *Kalash v. Los Angeles Ladder Co.*,²³ which accepted the *MacPherson* rule in California.

¹⁴ 2 HARPER & JAMES, TORTS § 18.5 (1956).

¹⁵ PROSSER, TORTS 497-98 (2d ed. 1955).

¹⁶ Criticizing this and pointing out that *Winterbottom v. Wright* is no authority for it in the first place, see Bohlen, *Affirmative Obligations in the Law of Tort*, 53 AM. L. REG. 239, 273, 281-84 (1905).

¹⁷ See *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398 (1896); *Thomas v. Winchester*, 6 N.Y. (2 Seld.) *397 (1852); 2 HARPER & JAMES, TORTS § 18.5 (1956).

¹⁸ *Savings Bank v. Ward*, 100 U.S. 195 (1879).

¹⁹ 217 N.Y. 382, 111 N.E. 1050 (1916).

²⁰ *Id.* at 390, 111 N.E. at 1053.

²¹ PROSSER, TORTS 500 (2d ed. 1955).

²² See Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 COL. L. REV. 20, 24-27 (1939); 52 HARV. L. REV. 372, 376-79 (1939); 48 YALE L.J. 390, 394-97 (1939).

²³ 1 Cal. 2d 229, 34 P.2d 481 (1934).

Yet in other cases liability has been extended to property damage alone.²⁴ Dean Prosser points out that the *MacPherson* analogy is being extended to cases of building contractors.²⁵ California took this step in *Hale v. Depaoli*,²⁶ although treating it again as an "exception" to the general "rule."

Consequently, the impact of *MacPherson v. Buick* has been slow in reaching the cases of harm to intangible interests.²⁷ But there is no reason it should not logically apply in this area as well.²⁸ The problem may take different forms but its elements are always the same. In one case there is a negligently performed contract and a physical injury to a third person. In the other the injury is economic. Why should the defendant's fault in the first case be measured by accepted rules of negligence, and in the second be arbitrarily not measured at all? What is unsound law with respect to injuries from defective ladders, exploding bottles, or faulty construction is no less unsound with respect to loss under an invalid will.

But *Buckley v. Gray* continued to stand as authority in its particular area of the law²⁹ although the fundamental ideas upon which it rested have long since been repudiated. The sweep of *MacPherson v. Buick* has caused the "exceptions" to devour the "rule." The decision in *Biakanja v. Irving* recognizes this and declares that the law of California has changed in this area as well. It is believed that the change is sound and represents a significant step forward.

Gerald C. Sterns

²⁴ *Dunn v. Ralston Purina Co.*, 38 Tenn. App. 229, 272 S.W.2d 479 (1954); *Cohan v. Associated Fur Farms*, 261 Wis. 584, 53 N.W.2d 788 (1952); *Ellis v. Lindmark*, 177 Minn. 390, 225 N.W. 395 (1929); *Murphy v. Sioux Falls Serum Co.*, 44 S.D. 421, 184 N.W. 252 (1921).

²⁵ PROSSER, *TORTS* 519 (2d ed. 1955).

²⁶ 33 Cal. 2d 228, 201 P.2d 1 (1948).

²⁷ Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225, 1232-34 (1937).

²⁸ See 2 HARPER & JAMES, *TORTS* § 18.6 (1956). Perhaps the leading case extending the *MacPherson* principle to this field is *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922), in which the court in the principal case found strong analogous support. See also *Mulroy v. Wright*, 185 Minn. 84, 240 N.W. 116 (1931); *Doyle v. Chatham and Phenix Nat'l Bank*, 253 N.Y. 369, 171 N.E. 574 (1930).

²⁹ A recent illustration is *Bilich v. Barnett*, 103 Cal. App. 2d Supp. 921, 229 P.2d 492 (1951), where the court, while acknowledging that the authorities extending the *MacPherson* principle to intangible interests were "strongly persuasive," rejected them in favor of the *Buckley* rule.