Contracts: Impossibility of Performance Caused by Promisor's Negligent Mistake

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be considered a servant of the hospital. At the most, the hospital has merely divided its control over the employee and not relinquished it completely to the doctor. In such a case, there is an inference that the original service continues and the employee remains in the hospital's employment during the performance of any work entrusted to him by the hospital.\(^\text{20}\)

The application of the doctrine of respondeat superior to hospitals, places the liability of the hospital on the familiar principles applied to all other employers. It assures the injured person that he can look to the proper party for compensation.

"Certainly, person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility."\(^\text{21}\)

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**Contracts: Impossibility of Performance Caused by Promisor's Negligent Mistake** — Plaintiff was third party beneficiary of a contract entered into by her father, the deceased, with her mother, which contract was embodied in a divorce decree. Under the agreement, deceased promised to continue paying premiums upon an insurance policy in which plaintiff was named beneficiary. Unknown to both contracting parties, the policy in question had lapsed some twelve years prior to the divorce agreement. When plaintiff discovered this fact, after her father's death, she filed a claim against his estate for the face value of the policy. Defendant, the executrix of his estate, contended that the nonexistence of the insurance policy at the time the alleged contract was entered into prevented any contract from having been formed. The trial court ruled in favor of plaintiff and defendant appealed. **Held**: Judgment affirmed. The nonexistence of the essential subject matter to a contract does not void the contract when the promisor, due to his own negligence, failed to discover the facts which made performance by him impossible. *In re Zellmer's Estate*, 1 Wis. 2d 46, 82 N. W. 2d 891 (1957).

The established rule concerning the effect of the nonexistence of the subject matter of a contract may be briefly stated as follows:

"Where parties assume to contract and there is a mistake with reference to any material part of the subject, there is no contract because of the want of mutual assent necessary to create one; and in this connection it has been said that mistake does not so much affect the validity of a contract, as it does to

\(^{20}\) Restatement, Agency §227, comment b (1933). But see the Swigerd case, supra note 19, where the court held that when an employee is acting pursuant to a doctor's instructions, the hospital is liable only if the injury-producing act is "administrative." Like the Schloendorff rule, this bases the whole question of responsibility on the nature of the act alone, rather than on all of the facts involved in the particular case.

\(^{21}\) 2 N.Y.2d at 667, 163 N.Y.S.2d at 11, 143 N.E.2d at 8.
prevent its inception, and that mistake may be such as to prevent any real agreement from being formed, so that the apparent contract is void both in law and equity and not . . . merely voidable.”

This rule, of course, is always qualified by the statement that a contract is valid if one or both of the parties has assumed the risk of the nonexistence of the subject matter. But it is manifestly evident that such were not the facts in this case.

The decided cases on the question of the nonexistence of essential subject matter are few and the question of the negligence of the promisor in this regard can be found in only one other case. The Wisconsin Court bases its decision squarely upon the Restatement of Contracts where it is stated:

“Except . . . where a contrary intention is manifested, a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made of which the promisor neither knows nor has reason to know.”

The comments to the section do not refer at all to the final phrase, nor is the question discussed in any of the standard legal treatises on contracts. The Wisconsin Court seems, therefore, to have taken the initial step concerning this admittedly seldom litigated point of law.

In holding the contract valid because of the promisor's negligence, while refraining from discussing at any length the implications of such a holding, the Court leaves unanswered some interesting questions. In cases of this sort, but where the negligence is not so manifest, will the issue go to the jury with instructions the same as would be given in a tort action of negligence? Or will the defendant, on some theory of estoppel, be denied the opportunity to show the nonexistence upon which he relies? This rather anomalous blending of tort action with contract action could produce unusual results. Of course the question will not go to the jury if the promisor admits that he either knew or assumed the risk of the nonexistence of the subject matter. If it is claimed that he had reason to know of the nonexistence, then it will be a fact issue which properly should go to the jury after the promisor has been given a chance to attempt to convince the jury that his position was not unreasonable. Estoppel would only apply if there were fraud or perhaps gross negligence coupled with a change of position by the promisee.

The possible difficulties mentioned above could not arise if the Court had based its decision on the theory advanced by the High

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1 17 C.J.S. Contracts §135 (1939).
2 5 Williston, Contracts §1559 (rev. ed. 1936).
4 Restatement, Contracts §456 (1932).
5 1 Williston, Contracts §398 (rev. ed. 1936).
Court of Australia in the *McRae* case. It was there held that the defendants were liable because the contract impliedly included a promise that the subject matter existed, and since there was no subject matter, the contract was breached and defendants must respond in damages. Admittedly this is an ingenious means to reach a desired result, but, notwithstanding scholarly support for such reasoning, the Wisconsin Court was astute enough to see where the consequences of such a holding might lead. Carrying the Australian Court’s reasoning to its logical conclusion, liability would be imposed on a completely innocent promisor, where, by mutual mistake the essential subject matter was nonexistent. This, in effect, would render the doctrine of impossibility of performance a nullity.

Granted that the impossibility doctrine is a relatively recent addition to the common law, having been engrafted thereon from Roman civil law, nevertheless it has had a salutary effect on the harshness of contract law as developed under early common law principles. This doctrine, along with the related doctrine of frustration of purpose, has been steadily growing in importance in recent years. However, in the light of the position taken by the Restatement and the holdings in the *Zellmer* and *McRae* cases, it appears that there is a recognized need for some limitations on the doctrine lest the basic principles governing contract law be too narrowly circumscribed.

It is submitted that such a limitation could be achieved by basing decisions arising from facts such as are present in the instant case on principles of mistake rather than those of impossibility. True, the general principal is that mutual mistake of a material fact will make a contract voidable by either side. However a long line of Wisconsin decisions hold that a party cannot claim mistake when his erroneous belief is the result of his own negligence. Hence, in the instant case, since Dr. Zellmer’s own negligence resulted in his erroneous belief as to existence of the insurance policy, he could not rely on the mistaken theory to invalidate the contract. It is suggested, therefore, that should future controversies arise, involving facts similar to those in the *Zellmer* case, they be decided, whenever possible, on familiar principles of mistake, thereby not only achieving an equitable limitation upon the impossibility doctrine but also providing a more authoritatively sound basis for the decision than that in the instant case.

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6 See note 3 *supra.*
10 5 PAGE, *Contracts* §2670 (1921).
12 Kowalke v. Milwaukee E. R. & L. Co., 103 Wis. 472, 79 N.W. 762 (1899); Grant Marble Co. v. Abbot, 142 Wis. 279, 124 N.W. 264 (1910); Meeme Mut. H.P.F. Ins. Co. v. Lorfield, 194 Wis. 322, 216 N.W.507 (1927)