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Action for Wrongful Dishonor of Bank Check Damages - Magness v. Equitable Trust Co.

Comments and Casenotes

ACTION FOR WRONGFUL DISHONOR OF BANK CHECK—DAMAGES

Magness v. Equitable Trust Co. [1]

The appellant, a depositor, brought an action of tort against the defendant bank alleging the wrongful dishonor of checks drawn by the appellant. The usual practice of the bank, when checks were presented for payment, was to examine the drawer's account as it appeared on the books at the close of the preceding day. For several years the appellant had been anticipating credit at the bank by issuing checks and making subsequent deposits to cover them. The bank had agreed with the appellant to search the deposits of the current day before dishonoring his checks. A service charge was made for this investigation. The bank, after a previous warning, notified the depositor that this additional service would be discontinued on April 12, 1937. The appellant then assured the bank that his deposits would be made more promptly and that he would straighten out his account. The bank then continued to furnish the special service until the appellant's account was closed, which was sometime subsequent to May 7, 1937.

The appellant alleged that the defendant had negligently failed to pay six checks drawn by the appellant, although the bank had sufficient money of the appellant's to pay the checks when presented. The appellant was only able to show covering deposits for two of these checks. Both were issued at night, on April 15, 1937 and on April 30, 1937. The covering deposit for one check was made in a night deposit box shortly after its issue. The covering deposit for the second check was not made until noon of the day following its issue. Both checks were presented the day after issue, both were dishonored and returned to the holder, who presented them again several days later, at which time they were paid. There was no evidence as to the time of day when the checks were presented, nor was there any evidence of injury to the depositor. In

[1] 176 Md. 528, 6 A. (2d) 241 (1939).

the absence of a showing that a covering deposit was made before presentment of the second check, any liability of the defendant bank had to be based on the dishonor of the first check, for which the covering deposit was made during the night preceding its presentment. The plaintiff-appellant-depositor was a physician, and the checks were drawn in favor of a pharmacy where he purchased medical supplies. Both of the checks in question were drawn for $175. The appellant used the proceeds to pay small bills which he owed the pharmacy, the balance of the money was used to make up the greater portion of the covering deposit. The pharmacist who was the holder of the checks testified that there had been no change in his relations with the doctor as a result of the defendant's refusal to pay the checks. The lower court directed a verdict for the defendant. On appeal, *Held:* Affirmed.

The liability of a bank to a depositor for the wrongful dishonor of the latter's checks is well established. The courts have consistently followed the rule announced in *Marzetti v. Williams*[2] and *Rolin v. Steward*[3] to the effect that although the action is founded on the contract implied between the bank and the depositor, an action of tort will lie. The contract between the parties creates a duty on the bank to pay the depositor's checks, provided the depositor has sufficient funds to his credit. For the wrongful dishonor of a check, the depositor may sue for the breach of the banking contract or he may sue in tort for the breach of his legal right which arose from the contract.[4] The Court of Appeals stated in its opinion that the duties and rights of the parties depend on the contract ordinarily implied in banking relations, with any modification which the parties might make. The usual banking contract requires that deposits covering outstanding checks be made no later than the close of the business day preceding presentment of the check.

If the defendant bank had followed this custom and had refused to furnish the special service to the appellant, it could not be contended that the bank had acted unreasonably or negligently in dishonoring the checks in question. Consequently the liability of the bank depends solely on the existence of the alleged agreement by the bank to search and credit covering deposits made during the

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[2] 1 B. & D. 415, 109 Eng. Repr. 842 (1830).
[3] 14 C. B. 594, 139 Eng. Repr. 245 (1854).
[4] 7 Am. Jur. 537, 9 C. J. S. 360, and cases there cited.

current day. In affirming the judgment for the bank, the Court held that there was no evidence of a special agreement after April 12, 1937 and that the bank had continued the searching "only on sufferance, in the continuing expectation of being relieved of the problem."

An examination of the transcript of the record in the instant case supports the Court's conclusion that when the checks were dishonored there was no longer any contract which bound the bank to search for appellant's deposits. At most, all that can be said is that there was an offer by the depositor to a series of unilateral contracts. However, in the absence of any binding contract, the bank did continue to furnish the special service until the appellant closed his account and to charge the account for this service. It might possibly be argued that the bank's conduct amounted to a representation on which appellant relied to his damage. The Court, in its opinion, did not mention the possibility of an estoppel, and properly so. The presence of the bare requisites of the doctrine of estoppel does not, *ipso facto,* justify the application of the principle. Since the bank had warned the appellant twice that the "original arrangement" was to be discontinued, it could not be seriously contended that the appellant was justified in relying on any such representations which the bank might be said to have made. To have held the bank to be estopped to deny liability would tend to encourage the unsound business practices of which appellant was guilty and to restrict the freedom of a bank to furnish such special services to its depositors. In all respects, the result reached by the Court of Appeals seems sound and in complete accord with the authorities.

The opinion in the instant case is very brief. However, it does suggest an interesting question: Assuming the liability of the defendant, what would be the proper measure of damages? When cases involving wrongful dishonor of checks have been presented to the courts, the question of damages has been the most controversial and has invoked the greatest discussion. The difficulty arises because the nature of such cases renders it unlikely that the plaintiff can furnish distinct proof of any actual damage. Yet where such a wrong is committed, some injury naturally results. The dishonor of his check hurts a depositor's credit and undoubtedly reflects on his reputation, particularly in the business world. In this respect some authorities have drawn an analogy between cases of wrong-

ful dishonor and actions for defamation *per se*.[5] Whether the action is brought in tort or contract the plaintiff is entitled to recover nominal damages, at least, which the law presumes from the wrongful act of the defendant. A plaintiff is entitled only to such damages as are definitely proved with reasonable certainty to have resulted as a natural, proximate and direct effect of the tort or breach of contract.[6]

The problem arises when the plaintiff's right to recover substantial damages, without proof thereof, is considered. The English view restricts the right to cases in which the plaintiff is a merchant or trader. A great number of the American authorities support the distinction drawn between traders and non-traders.[7] The basis of the rule seems to be that if the plaintiff is not a merchant the wrongful dishonor of his check may only possibly injure him and if so, he can recover for the damages proved. Whereas, if a merchant's check is dishonored, the Courts feel that an especial injury inevitably results. The rule has been much criticized and many courts have refused to recognize the distinction. A leading case taking this position is *Woody v. National Bank of Rocky Mount*,[8] which points out that "the conditions upon which the distinction was founded no longer prevail." In the modern world the use of bank checks in financial transactions is far wider than in the early nineteenth century when the English Courts developed the rule. Today people from all walks of life are bank depositors and make use of checks. Non-traders are just as susceptible to injury, when a check is wrongfully dishonored, as traders, although it is conceded the injury is more likely to be of a moral, rather than a pecuniary nature.

If a Court adopts the trader distinction, the question which it must then face is, what category does the plaintiff fall in? The appellant in the *Magness* case relied heavily on the case of *Columbia National Bank v. MacKnight*[9] which held that a physician was a "trader" within the meaning of the rule and therefor entitled to substantial damages. The emphasis on this case shows an im-

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[5] 2 MORSE, BANKS & BANKING (6th Ed.) Sec. 458.
[6] Tidewater Oil Co. v. Spoerer, 145 Md. 151, 125 A. 601 (1924).
[7] 4 A. L. R. 954, 13 A. L. R. 305, 34 A. L. R. 205, 58 A. L. R. 732, 15 L. R. A. 134, 18 Am. St. Rep. 865, and cases there noted.
[8] 194 N. C. 549, 140 S. E. 150 (1927).
[9] 29 App. D. C. 580 (1907).

plicit recognition of the trader distinction as the law. The defendant bank argued that since the plaintiff-appellant-doctor was not a "trader" and could prove no injury, there could be no recovery in any event. Yet in the case of *State Bank v. Marshall*,[10] it was held that a keeper of a public boarding house was not a trader. The uncertainty in the application of the rule lends weight to the *Woody* case and others which repudiate the distinction.

A third view on the question is the one commonly known as the "New York rule."[11] This line of cases does not recognize the trader rule but reaches a result diametrically opposed to the result in the *Woody* case. In the latter, the Court held that regardless of the plaintiff's economic characteristics, the jury may "give such temperate damages as they conceive to be a reasonable compensation for that indefinite mischief which such an act must be assumed to have inflicted." The "New York rule" is that the damages recoverable should be restricted to those actually proved. Such a principle has been criticized on the ground that it would be against the interest of the public to place banks in the position where they could dishonor checks wrongfully with comparative impunity.[12] This criticism seems to be of little merit. Banks are quasi-public institutions, yet they operate in competition with other banks. The wrongful dishonor of a check is seldom wilful, but it is the result of an innocent mistake which the banks try to avoid. To be sure, a legal right of the depositor has been breached, but in a case such as the *Magness* case where there was no change in the relations of the depositor with the payee-holder of the check and where no actual damage is shown, does it not unduly penalize the bank to award the plaintiff substantial damages? Moreover, the depositors are protected by the general principle which is embodied in all the various views as to the measure of damages, that where the tort or breach of contract is the result of fraud, malice or gross negligence, exemplary damages may be given.

It is submitted that the "New York rule" is the preferable view. It ignores the now unfounded distinction between traders and non-traders, it awards the depositor

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[10] 163 Ark. 566, 260 S. W. 431 (1924).

[11] T. B. Clark Co. v. Mt. Morris Bank, 181 N. Y. 533, 73 N. E. 1133 (1905); Spiegel v. Public National Bank, 184 N. Y. Supp. 1 (1920).

[12] Patterson v. Marine National Bank, 130 Pa. 419, 18 A. 632, 17 Am. St. Rep. 778 (1889).

substantial damages when there is proof of an injury over and above the breach of a technical legal right and it only imposes a penalty on the bank where such penalty is deserved, i. e. where the bank acts maliciously or fraudulently. This rule has been adopted by statute in several jurisdictions, among which are Alabama, North Carolina and Pennsylvania.[13]

[13] 9 C. J. S. 365, note 45.