LIBRARY

Meley v. Boundless Vacations, Inc.

1999 February

Restatement (Second) of Agency

§ 1. Agency; Principal; Agent

(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

(2) The one for whom action is to be taken is the principal.

(3) The one who is to act is the agent.

Comment:

Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him; the agent's acceptance of the undertaking; and the understanding of the parties that the principal is to be in control of the undertaking. The relation which the law calls agency does not depend upon the intent of the parties to create it, nor their belief that they have done so. To constitute the relation, there must be an agreement, but not necessarily a contract, between the parties; if the agreement results in the factual relation between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow.

A gratuitous agent, one who is to receive no compensation for his services, is subject to the same duty to give loyal service and to account as is a paid agent. His duty of obedience is the same except that he need not obey orders to continue to act as agent. He is subject to a duty of care, but the fact that his services are gratuitous is considered in determining the extent of his undertaking and the amount of care he should exercise.

* * * *

§ 379. Duty of Care and Skill

(1) Unless otherwise agreed, a paid agent is subject to a duty to the principal to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has.

(2) Unless otherwise agreed, a gratuitous agent is under a duty to the principal to act with the care and skill which is required of persons not agents performing similar gratuitous undertakings for others.

Comment:

The mutual duties of the principal and agent are, in the absence of statute, controlled by the agreement which the parties make.

If the agent receives compensation, he is subject to liability in an action of contract or of tort. The gratuitous agent is subject to liability in an action of tort. In such actions, the burden of proving negligence and damage there from is upon the principal.

The paid agent is subject to a duty to exercise at least the skill which he represents himself as having. Unless the circumstances indicate otherwise, a paid agent represents that he has at least the skill and undertakes to exercise the care which is standard for that kind of employment in the community. An agent who is given discretion as to the manner in which he performs his duty is under a duty to act competently and carefully. A mistake in judgment resulting from a failure to have the standard knowledge or to use the standard care subjects the agent to liability to the principal. The liability of gratuitous agents to their principals for failure to exercise care is determined by the same principles which apply to the liability of persons who are not agents and who gratuitously act for the benefit of others, such as gratuitous bailees and hosts rendering services to guests.

* * * *

§ 381. Duty to Give Information

Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.

Comment:

An agent may have an implied duty to act upon, or to communicate to his principal or to another agent, information which he has received, although not specifically instructed to do so. The duty exists if he has notice of facts which, in view of his relations with the principal, he should know may affect the desires of his principal as to his own conduct or the conduct of the principal or of another agent. The duty of the agent is inferred from his position, just as an authority is inferred. The extent of the duty depends upon the kind of work entrusted to him, his previous relations with the principal, and all the facts of the situation.

Loretti v. Air Land Travel Bureau
Franklin Court of Appeal (1993)

Karen Loretti, wishing to take a vacation, contacted Joan Lyons, a travel agent for Air Land Travel Bureau, in June of 1991. Lyons informed her that a tour booked by the Police Benevolent Association was scheduled to leave in September for Free port in the Bahamas. Those on the tour were scheduled to stay at the Bahamas Princess Hotel.

Although Loretti had never been to the Bahamas, she had gone on other trips arranged through defendant Air Land. What little Loretti knew about the Caribbean islands had made her concerned about personal safety. Loretti expressed these concerns to Lyons, who assured her that they would be staying at the Bahamas Princess Hotel, a well-known resort, and that they would be traveling with a police group.

Lyons drove the plaintiff to the airport and at this time told her that because the Bahamas Princess Hotel had been overbooked she would be staying at the Holiday Inn. Lyons assured her that the Holiday Inn was just as nice as the Bahamas Princess and had the advantage of being situated on the beach.

Upon her arrival at the Holiday Inn, Loretti was assured by a Holiday Inn security guard that it was safe to walk on the beach. The plaintiff later attended a meeting conducted by a man employed by the defendant who described activities available to tourists and stated that it was safe in the pool or on the beach at any time of day or night. That evening Loretti and another guest staying at the Holiday Inn took a walk on the beach and were accosted by two men who raped and assaulted the plaintiff at gunpoint.

Air Land presented evidence that it believed the Holiday Inn was a safe place for guests, having sent several clients to that location in the months preceding Loretti's trip. Air Land's manager stated in his affidavit that he had not received complaints from any of more than a half dozen clients who had stayed at the Inn and that the agency relied on the positive general reputation of Holiday Inns. On the other hand, the plaintiff offered evidence that in the months before her visit the Holiday Inn was the locale for several crimes, including two robberies of guests on the beach at knifepoint.

In this negligence action, the trial court granted Air Land's motion for summary judgment on the ground that even when the facts were construed in the light most favorable to Loretti, there was no evidence that Air Land breached any duty owed to the plaintiff.

In reviewing the lower court's judgment, we must define the duty, if any, of defendant Air Land to warn Loretti of the danger of crimes against the person on the beaches in the Bahamas. No Franklin court has addressed the issue of a travel agent's duty to warn clients of criminal activity. In *Wilson v. Trans Air, Inc.* (Indiana 1989), a traveler suffered injuries as a

result of a criminal assault at the hotel where she was staying in the Cayman Islands. The court held that a travel agent ordinarily had no duty to investigate the safety and security of the accommodations or conditions it arranged, absent a specific request from the traveler. The travel agency, which regularly planned and operated tours to the Cayman Islands, gave the plaintiff the option of staying at the hotel where the assault occurred or at other venues. The traveler alleged that there was substantial criminal activity involving guests at the hotel in the months preceding the attack, but there was no evidence the hotel was *in* a high-crime area or that it had experienced more safety problems than other hotels on the island. The agency denied any knowledge of significant criminal activity at the hotel and relied on the general reputation of the hotel, the fact that the hotel employed security guards, and the lack of complaints from other clients.

In *Cretean* v. *Liberty Travel, Inc.* (New York 1991), on the other hand, plaintiffs sued defendant travel agency in negligence when they were robbed (and one was raped, at gunpoint) at a hotel while vacationing in Jamaica. The court said the defendant would be liable if the agency, an experienced provider of travel services in the Caribbean, knew or could easily have learned about a rising crime rate in Jamaica and other relevant safety factors about which it failed to warn plaintiffs.

This court concludes that a travel agency is more than a mere ticket agent. An agency deals with carriers; plans an itinerary; arranges for hotel accommodations, guides, and tours of each city; and sets up the traveler's schedule. A travel agent cannot reasonably be expected to guarantee that a traveler will have a good time or will return home without having experienced an adverse adventure or harm. Nor can it reasonably be expected to divine or forewarn a traveler of the innumerable litany of tragedies and dangers inherent in foreign and domestic travel. This cannot mean, however, that a travel *agent* owes *no* duty to *its* client. Rather, we hold, a travel agent who has relevant information that his client would want to have has an obligation to provide that information to his client. This duty applies unless that information available to the client is so obvious that, as a matter of law, the travel agent would not be negligent for failing to disclose it.

Assuming that Loretti expressed a concern for her personal safety to Air Land's agent, Air Land would have had a duty to disclose reasonably obtainable information about the safety of the area which the plaintiff would be visiting.

The defendant claims that it fulfilled this duty, and its manager stated in her affidavit that she found the Holiday Inn to be safe and would not hesitate to recommend it.[1] The plaintiff reports, however, that an examination of the

---

1 In support of (his proposition, defendant refers to *Klinghoffer* v. *S.N.C. Arhitle Lattro* (S.D.N. *Y.* (993), a case involving the tragic hijacking of a cruise ship and the subsequent death and injury of passengers at the hands of criminals. There the court exonerated a defendant tour operator who established that before the 1985 hijacking Lauro was well respected within the travel industry, and it had received no complaints about security procedures aboard any Lauro ships

Holiday Inn's records showed there had been twenty incidents of crime within three months of the plaintiffs visit and that two of the crimes involved knifepoint robberies of Holiday Inn guests on the Inn's beach.

The court believes that there are at least two issues of material fact. The first issue is whether the beach near the Holiday Inn was safe. If a jury were to conclude that the beach was safe, then defendant Air Land would have satisfied its duty to the plaintiff by accurately reporting that there was no safety problem on the trip. If a jury were to conclude that the beach was unsafe, then it would have to reach the second issue of whether information that the beach was unsafe was reasonably obtainable by defendant Air Land. Even if the plaintiff is successful in showing that the defendant breached its duty to disclose reasonably obtainable information, if actual observations or the information available to her would have led a reasonable person to conclude the beach area was dangerous at night, Loretti cannot cast blame upon the defendant.

The court reverses the grant of Air Land's motion for summary judgment.

Yanase v. Automobile Club of Southern California
California Court of Appeal (1989)

George Yanase was injured by an unknown assailant at night in a parking lot of a motel in which he was staying. The theory of Yanase's complaint against Auto Club is negligent misrepresentation, i.e., Auto Club negligently failed to determine and publish information on the safety of the area and the existence and effectiveness of security measures.

The trial court found the complaint failed to state facts sufficient to constitute a cause of action against Auto Club. We affirm.

Yanase was a member of Auto Club. American Automobile Association (AAA), a co-defendant, and Auto Club are in the business of endorsing travel accommodations and services through their Tourbooks. Their Tourbooks contain listings of various hotels and motels in designated geographical areas and a rating system with reference to those accommodations. The California/Nevada edition of the Tourbook states:

> This Tourbook has only one purpose: to make your trip as enjoyable as possible by providing accurate, detailed information about attractions and accommodations in the area through which you are traveling. AAA field representatives cover the length and breadth of the North American Continent. These efficient, highly trained individuals are constantly on the move, systematically searching the highways for accommodations and restaurants that meet AAA's requirements for recommendation to our more than 22 million members. For every establishment selected to be listed in the Tourbooks, many others were inspected and found to be lacking in some important consideration. We believe, in the best interests of our members, that our standards are important. We will not lower them simply to achieve a greater volume of listings.

The complaint alleges that because of the relationship between Yanase and Auto Club, and AAA and Auto Club's business practice of endorsing travel accommodations and services, the defendants had a duty through their field representatives to determine the relative safety of the area where the recommended hotels and motels were located, to determine the existence and effectiveness of the security measures offered to the patrons, and to publish the information in the Tourbook. Further, Yanase alleges that had Auto Club exercised reasonable care it would have known that the motel "was located in a high-crime area wherein robberies and muggings were commonplace in the immediate radius of the motel and that the motel offered inadequate security for its patrons." Yanase claims to have read the Tourbook and relied on it in selecting the motel. Moreover, he would not have selected the motel if Auto Club had determined it was in a high-crime area and offered inadequate security.

Negligent misrepresentation consists of making a false statement honestly believing it is true but without reasonable ground for such belief. The tort is a form of deceit without, however, the element of scienter. Since the tort requires a "positive assertion," the doctrine does not apply to implied representations.

There is nothing in Auto Club's Tourbook listing or rating that consists of a positive assertion concerning neighborhood safety or the security measures taken in connection with the motel. In fact, as we discuss in more detail below, those matters are not even implied in the Tourbook listing or rating. Accordingly, the complaint does not state facts sufficient to constitute a cause of action in negligent misrepresentation.

We next consider the question of whether there exists a duty of care, a question of law to be determined on a case-by-case basis. The fact that Auto Club's Tourbook gives "information about attractions and a- ccommodations" adds nothing to the analysis. So far as we are concerned, the Tourbook speaks only of accommodations, i.e., "something that is supplied for convenience or to satisfy a need . . . lodging, food, and services (as at a hotel)." Webster's Third New International Dictionary (1968 ed.). Making trips enjoyable through providing information about accommodations is the stated purpose of the listing and rating in the T- ourbook. Nothing is said about inspecting for dangerous neighborhoods or determining the presence or absence of personal security measures taken by the owners of the accommodations on behalf of their patrons.
The puffing statements concerning the efforts of AAA's representatives in searching for accommodations and inspecting them do not suggest neighborhood safety or security measures are aspects of the listing and rating. In fact, the rating description speaks only of "physical and operational categories," "comfortable and attractive accommodations," and listing "on the basis of merit alone." Again, the quality of "accommodations" is the focus of the Tourbook listing and rating.

From what we have said, it follows that the "special relationship" described by Yanase as one "defined by a dependency and reliance" on Auto Club "in all matters of vehicular travel and services connected therewith," if it exists at all, is limited to the listing and rating of accommodations and does not include within its scope matters of neighborhood safety or security measures.

The present case is to be contrasted with cases such as *McCollum* v. *Friendly Hills Travel Center* (California 1985), where we held that a travel agent who arranges vacation plans is a special agent for the purpose of the transaction between the parties and thus owes a duty to disclose reasonably obtainable material information to the traveler unless the information was so clearly obvious and apparent to the traveler that, as a matter *of law,* the travel agent would not be negligent in failing to disclose it. Here, of course, Auto Club had no such special agency relationship with Yanase. Accordingly, we affirm.