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## THE DOCTRINE OF PUBLIC CALLING

WILLIAM H. McBRATNEY†

Although *Munn v. Illinois*<sup>1</sup> and *Nebbia v. New York*<sup>2</sup> seem to have very little in common with *McPherson v. Buick Motor Co.*,<sup>3</sup> they all stem from the same source of law and merely deal with different phases of one legal theory. In the earlier English common law cases, the courts spoke freely of public callings and the consequences incident to one's engaging in them. But the concept became entangled with the common law forms of action, and, later, in American law, with the constitutional definitions of state and national power. As a result, our approach to questions of police power, implied warranties, and various kinds of tort has been confined within artificial boundaries that tend to prevent our viewing those questions from a clear perspective.

The question of implied warranties, for example, has been studied as an incident to the law of contracts or to that of sales, but rarely, if ever, as an integral part of the public law. It is just as much an exercise of the power of the State over private affairs to write into contracts that a seller warrants the wholesomeness of the product, even though the parties themselves have not specifically so agreed, or, in fraud cases, one of the parties has deliberately intended otherwise, as it is to enact a dairy inspection law to assure the consumer that he will get nothing but healthful milk. The question is one of public power in either event, and error might certainly result from presuming that a difference exists in political theory when the action is taken by the courts and their rules of law rather than by the legislature and its statutes; both are instrumentalities of the State, and while they cannot transcend its power as a sovereign entity, they can exercise such powers in a full measure.

*McPherson v. Buick Motor Co.* rests upon an even broader foundation than that of implied warranty. The opinion by Cardozo derives a finding of liability from principles of tort—the Motor Co. could foresee that a defective automobile wheel might very well cause injury to persons not parties to the

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1. 94 U.S. 113 (1877).

2. 291 U.S. 502 (1934).

3. 217 N.Y. 382, 111 N.E. 1050 (1916).

contract and should therefore have taken the proper precautions to prevent such injury. It should be noted that the Buick Co. did not itself make the defective wheel in question, but merely offered the finished product to the public by way of its dealers who were independent contractors between the company and the ultimate purchaser. The opinion, therefore, does more than write a warranty of soundness into the successive contracts of sale; it imposes a tort liability, with a different measure of damages, upon a manufacturer for failure to protect the consumer and those who come in contact with him. The duty to the public is a positive one, arising from the nature of the business, and goes beyond the more restricted obligations assumed to be a part of contracts of sale.

Although the opinion does not discuss the nature of a public calling as conceived by the old English cases, it fully develops, as a matter of human experience and the necessities of the case, the consequences that should attend the making of articles for public consumption. Strangely enough, however, the case adds nothing new to the law, but rather goes back to doctrines of law that existed prior to the development of implied warranty and have persisted in one form or another from the earliest cases. The fundamental basis underlying both tort and contract liability in such cases is the familiar but ancient rule that when a person undertakes to do a thing, he must carry it through to the end and must accept the consequences attendant upon such an undertaking. That basis of liability is currently used to distinguish liability for misfeasance in a voluntarily assumed undertaking from non-liability for nonfeasance in cases in which one has no positive duty to act. In the older cases, the law imposed the same sort of duty upon one undertaking any sort of business or activity to which he invited the public trust, the liability not being developed as one of either tort or contract. It was not until later, when the action of *assumpsit*, which originated in the notion of a man's assuming to act, became primarily an action in contract, that positive duties by way of implied warranty became a part of the law of contract.<sup>4</sup> In fact, the early cases emphasized the public law nature of the situation to the exclusion of specific tort or contract theory, and so far

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4. HOLMES, *THE COMMON LAW*, Lectures V, VIII (1881); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888).

as there was a general or non-contractual duty whose breach would constitute a tort, it resulted primarily from the public law character of the matter.

Street traces the development of the law with admirable simplicity. He points out that the law of negligence starts with the idea of a failure to perform a definite legal duty, and that the law will imply such a duty on the part of a man who has undertaken to do a thing. He then speaks of general undertakings or public callings, and cites cases dealing with a ferryman, a surgeon, a stableman, and a barber.<sup>5</sup>

Of the law of implied warranty as it developed in connection with the action of *assumpsit*, he writes:

. . . it [liability] appears as a sort of parasitic obligation in connection with an actual contract or undertaking. It is evidently easier to import a fictitious term into an actual contract or undertaking than it is to create a positive obligation in the absence of any contract relation whatever. . . .

. . . this implied duty to use care was apparently at first limited to persons plying a common calling, like that of ferryman, surgeon, farrier, or barber. Upon other persons the law hesitated to impose such an implied duty, and would do so only when an express promise on the part of such persons to perform this undertaking in connection with which negligence was charged, was alleged in the writ. In a case from 1440, against one, not a common veterinarian, who doctored a horse so negligently . . . that the animal died, it was held that the defendant was not liable in the absence of an express promise on his part to effect a cure.<sup>6</sup>

Blackstone<sup>7</sup> speaks of the duty to render service (as we know it now in the law of public utilities) and the duty to employ due care in almost the same breath, indicating that both were merely particular duties flowing from the same proposition of law as it fell upon various types of business. He does not differentiate the obligations of public officials and those of persons in a public calling. To him, apparently, the duty of a jailer to prevent the escape of his prisoner is in the same category as that of a dairyman to sell only wholesome milk. He actually mentions the obligations of contracting parties

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5. 1 STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 182 *et seq.* (1906).

6. *Id.* at 188.

7. 3 BL. COMM. 163.

along with those of persons in public offices and public callings, but qualifies his statement.

. . . but if I employ a person to transact any of these concerns, whose common profession it is not, the law implies no such general undertaking, but in order to charge him with damages, a special agreement is required.<sup>8</sup>

It is the public character—the holding out to the public and inviting its trust—that gives rise to these concepts of duty, and not the law as pronounced either by the legislature or by the courts; the facts and circumstances surrounding the transactions that compose a business are the determinants. Many occupations and businesses which were formerly considered public would not now be so considered, and, conversely, many that are now public were not so considered heretofore. And furthermore, the nature of the legal consequences flowing from a given occupation has tended to change from time to time, depending upon the changing character of the occupation. In each case, one must examine the facts in order to determine the legal ramifications that should properly flow from them. Chief Justice Waite discussed the point with candor and clarity in *Munn v. Illinois*.

But a particular kind of business, because of characteristics peculiar to it, might readily give rise to a legal obligation entirely different from that of a public calling of another kind. Although persons following a common or public occupation, such as innkeepers, victuallers, taverners, smiths, tailors, carriers, sheriffs, and jailers were all treated in a somewhat similar way, the duty of each was to guard against some special kind of loss only. Holmes contended that the duties of all persons engaged in a common calling were similar and that the duties of carriers, up through the famous case of *Coggs v. Bernard*,<sup>9</sup> were nothing more than those of bailees in a common calling. Beale disagreed and argued that the facts surrounding each calling gave rise to particular and appropriate liabilities.<sup>10</sup> It is certainly true that the law governing the duty to render service, the law of implied warranties, the regulation of prices, the statutes governing public officials, and the insurance liability

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8. *Id.* at 164.

9. 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703).

10. Beale, *The Carrier's Liability: Its History*, 11 HARV. L. REV. 158 (1897).

of carriers have gone their separate ways to such an extent that it is now difficult to realize that they all started from the same place. This fact leads to the conclusion that common callings gave rise to different liabilities, depending upon the different natures of such callings, and that the law was applied in particular cases with so little reference to other types of cases that the whole subject was enabled to reach its present atomised state. As a matter of history, then, it is probably true that as the doctrine of common callings crystallized in the common law, a variety of rules were applied, depending upon the circumstances of the type of business in question.

Factual distinctions would certainly lead to that conclusion. Jailers would obviously be subjected to a set of rules different from those applied to blacksmiths. The one would be required to obey the orders of certain officials and to prevent the escape of designated persons, whereas the other would deal with the public at large and be required to have a reasonable skill in a particular calling. Cases dealing with persons furnishing food—victuallers, taverners, vintners, brewers, butchers—are naturally concerned with the obligation to furnish wholesome provisions and not, for example, with the peculiar liabilities of common carriers. Smiths, farriers, and tailors were obliged to acquire a degree of ability at their trades comparable to that of their fellows who followed it under similar circumstances. Innkeepers and carriers were denied the right to refuse service to applicants who appeared and asked for it in good faith, the rule being founded upon the inconvenience to the traveling public, away from home and in no position to dicker, if a capricious choice of clientele were tolerated. And, although I have never seen it cited as an incident of a public calling as such, the law of defamation treats public situations differently from purely private ones, there being a qualified privilege and a freedom of comment in public situations, and tends to lump together persons who actually hold public office and those whose activities are matters of general interest.<sup>11</sup> Furthermore, military law, which compels obedience and service, and denies the rights of freedom of speech and trial by jury<sup>12</sup>—to pick a few

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11. Yorkwich, *The Protection of Newspaper Comment on Public Men and Public Matters*, 11 LA. L. REV. 327 (1951).

12. Uniform Code of Military Justice, 50 U.S.C.A. §§ 551-741 (Supp. 1950).

bizarre characteristics at random—deals with a public calling of a very unique sort. But it must be kept in mind that none of these situations involves a public franchise (aside, perhaps, from the laws governing the army and the like) or anything beyond a set of facts impinging upon the general welfare. The power of the State was directed to the public's protection and was, in substance, the police power.

In *Munn v. Illinois* the State dealt with another, but not new, aspect of the matter—price. As the Court pointed out, none of the aspects of a public calling incident to those usually accepted as such and therefore subject to the general police power was involved. But, on the other hand, the financial aspect of the business in question was such that public effects of considerable magnitude might flow from it. Under those circumstances, the State could, in the legitimate exercise of its sovereign power, regulate the price. The same general situation prevailed in the *Nebbia* case, with a somewhat different twist. Basically, the fundamental theory of the two cases is identical—if the price of a commodity is a matter of public concern with reference to the general welfare, that price is subject to the regulatory power of the State. The fact that *Munn v. Illinois* involved a maximum price and *Nebbia v. New York* a minimum price makes no difference of any consequence.

Both these opinions refer in part, at least, to the public calling nature of the law involved. In *Munn v. Illinois*, the Court referred to ferries, carriers, hackmen, bakers, millers, wharfingers, innkeepers, chimney-sweeps, and auctioneers, to the public's interest in those particular callings, and to the various regulations concerning them. The opinion makes it abundantly clear that it is the facts surrounding a business, not the law, which determines its public character. The Court discusses at some length the various sorts of legal consequences of engaging in such callings and goes on to declare that price is not beyond the power of the State. In *Nebbia v. New York*, the Court goes even further in discussing the legal importance of engaging in a public calling and takes as a point of reference the dairy business—the one in litigation. The Court points out that dairymen have always been obliged to sell only wholesome food. At first, they encountered liability for negligence for failure to do so or, perhaps, liability on an implied warranty.

But as time went on, the State of New York established inspection laws, sanitation laws, inoculation laws, and other rules and regulations that would assure safe and wholesome milk to the people of the State. And by virtue of precisely the same authority, the State can supervise the economic aspect of the dairy industry to assure the proper volume of milk for its people. If doing so requires the regulation of prices, that power rests within the police power of the State.

The two cases display our reluctance to meddle with the operation of economic factors. But prior to the advent of comparatively modern economic theory, the matter of price was regulated quite as readily as anything else. As Holdsworth discusses the matter:

We pass statutes to insure honest manufacture in the interest of the consumer, and healthy conditions of work in the interests of both workman and consumer. But in other respects we leave buyer and seller to settle matters their own way. We consider that competition should settle prices and other conditions of trade, and that a case must be made out for legislative interference with the rule of free competition. In the Middle Ages it was thought that the law ought to interfere to secure not only a commodity honestly manufactured but also a fair and reasonable price, an adequate amount of skill in the producer, and a fair treatment of the laborers engaged in production. Most of our modern problems arise from an entirely different economic theory as to the proper limits of legislative interference.<sup>13</sup>

If we consider as a coherent whole the different parts of modern law that went into the older doctrine of public calling, we cannot help but arrive at Holdsworth's conclusion—that the only essential difference lies in the economic viewpoint of the courts. But, in any event, the power must be considered as resting in the State, or states, so far as American constitutional law is concerned, as a part of the police power. The wisdom of its exercise depends upon considerations not legal or judicial in content, but social, economic, and political.

However, Holmes, considering the subject of common carriers as an outgrowth of the law of common callings, believes that the entire theory has "given way to more liberal notions," even though "the *disjecta membra* still move." He describes it as:

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13. 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 468 (3rd ed. 1938).

. . . part of a protective system which has passed away. One adversely inclined might say that it was one of many signs that the law was administered in the interest of the upper classes . . . and Lord Holt stated the principle: 'If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends, and for refusal an action lies.' An attempt to apply this doctrine generally at the present day would be thought monstrous. But it formed part of a consistent scheme for holding those who followed useful callings up to the mark. Another part was the liability of persons exercising a public employment for loss or damages, enhanced in cases of bailment by what remained of the rule in *Southcote's Case*.<sup>14</sup>

Unfortunately, Holmes was considering only the direct descendants of the law in question as they now appear in the law of carriers. Had he examined and correlated the law of implied warranty, the health and sanitation laws of the states, the license laws, and the changing concept of "the public," he might have decided that the old law was still in effect, monstrous or not. Beale disagreed with him on his interpretation of the common law anyway, and if Beale's argument is correct, even Holmes would agree, I believe, that there was nothing monstrous about it.

But words even more colorful than the word "monstrous" have been applied to a recent statute that seems to apply the doctrines of public calling to another field of law—the Taft-Hartley Act. Apparently taking the position that the public should be protected against the stoppage of businesses which affect its health, safety, or welfare, the law discourages strikes in those businesses. According to the theory of the law of public calling as it underlies that Act, the employees in those businesses have undertaken to serve the public, even though vicariously, and must do so according to the tenor of the particular type of business. They may quit, of course, but they cannot organize together to deprive the public or any member of it of services that the State has passed laws to protect. To take the position that the State cannot prevent such organization is to deny its sovereign power. The opinion of the Court in *C.B. & Q. Ry. Co. v. Burlington, C.R. & N. Ry. Co.* boils it all down to this: "Now, the question is, what shall be obeyed—

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14. HOLMES, *THE COMMON LAW* 203 (1881).

the law of the land, or the order of the chiefs of the locomotive engineers?"<sup>15</sup>

Brandeis, with the same idea in mind, said in *Dorchy v. Kansas*:

But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. . . . Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.<sup>16</sup>

And the *Restatement of Torts* says:

An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers.<sup>17</sup>

It is certainly clear that no employer can violate his duty to the public, or to any one member of it, if he is engaged in a common calling. Or, in the succinct words of Calvin Coolidge, "There is no right to strike against the public safety by anybody, at any time, anywhere."<sup>18</sup>

However that may be, our concepts of police power and public law will be better co-ordinated if we examine them for a moment from the standpoint of the old doctrine of public calling. As Taney said in the *License Cases* when speaking of the police powers of the state they: ". . . are nothing more or less than the powers of government inherent in every sovereignty."<sup>19</sup> But sovereigns exercise their powers in different ways—by direct legislation, by rules of law, and by complete control, even by doing nothing at all. Such is the case when economic, social, or political pressures produce beneficial results without the interference of government, and government, therefore, declines to intrude. The concept of public calling derives its vitality from the governmental powers and purposes of the sovereign, but has, in later times, fallen apart into lesser concepts classified under such headings as Implied Warranty, Constitutional Law, Labor Law, Common Carriers, Military Law, and Licensure. To clarify our concepts of those subjects it is well to look again at the entire subject of which they are merely parts and from which they draw their substance.

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15. 34 Fed. 481 (C.C.S.D. Iowa 1888).

16. 272 U.S. 306 (1926).

17. RESTATEMENT, TORTS § 794 (1939).

18. Telegram to Samuel Gompers, Sept. 14, 1919.

19. 5 How. 504 (U.S. 1847).

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