CLASS 1: COMPUTERS

The first (and perhaps most important) of the four major course themes is whether and how law changes when computers—rather than people—make and enforce decisions. Thus, we begin our study of Internet Law with three cases in which the Internet doesn't even appear. These cases all involve people who've interacted with a computer in some form; the question facing a court should how to apply traditional legal standards once a computer enters the picture. I've deliberately chosen three areas of law—banking, public utilities, and civil rights—that aren't at all part of the rest of our curriculum. Don't worry about trying to learn the specific doctrines. Instead, determine what the rule would be if there weren't a computer involved, and then ask whether that rule makes sense in an "computerized" context. As we'll see—repeatedly—even when there's no doubt that law applies "to computers," figuring out *how* law applies in a new factual context can be a tricky problem.

Preparation Questions:

(1) "Can I have a word with the manager?" "Computer says no." What's the joke here? Have you had experiences like this? Why are computers so often associated with bureaucracy, frustration, and terrible customer service?

(2) The *Kennison* court implies that the result would have been different if the defendant had dealt with a human, rather than with a computer. Why? Would the result in *Pompeii Estates* have been different if the defendants there had dealt with a human, rather than a computer?

(3) Who programmed the computer in *Kennison*? Who programmed the computer in *Pompeii Estates*? How about the NCIC? Did any of them make design mistakes?

(4) Why did Easybank use a computer? Why did ConEd? How about the police arresting Buttle? What advantages does a computer provide? What are the disadvantages? Would society be better off if we prohibited the use of computers for these purposes altogether? If not, what safeguards do we need on their use?

(5) If you receive some information from a computer, are you allowed to take the computer at its word? If you put information into a computer, are you now responsible for all the consequences? What about the person who provides the computer? The person who programmed it? Who, if anyone, *ought* to be held responsible?

BLOWN TO BITS, ch. 1

Please read chapter 1 of *Blown to Bits*.

Little Britain, *Computer Says No*

Please watch the video at http://www.youtube.com/watch?v=7TYAQ0JWBzE.

Kennison v. Daire
High Court of Australia

[1986] HCA 4; (1986) 160 CLR 129

GIBBS C.J., MASON, WILSON, DEANE, DAWSON JJ.:

1. The appellant was convicted of larceny . . . . He was the holder of an Easybank card which enabled him to use the automatic teller machine of the Savings Bank of South Australia to withdraw money from his account with that bank. It was a condition of the use of the card that the customer's account could be drawn against to the extent of the funds available in that account. Before the date of the alleged offence, the appellant had closed his account and withdrawn the balance, but had not returned the card. On the occasion of the alleged offence, he used his card to withdraw $200 from the machine at the Adelaide branch of the bank. He was able to do so because the machine was off-line and was programmed to allow the withdrawal of up to $200 by any person who placed the card in the machine and gave the corresponding personal identification number. When off-line the machine was incapable of determining whether the card holder had any account which remained current, and if so, whether the account was in credit.

2. It is not in doubt that the appellant acted fraudulently with intent permanently to deprive the bank of $200. The appellant's submission is that the bank consented to the taking. It is submitted that the bank intended that the machine should operate within the terms of its programme, and that when it did so it gave effect to the intention of the bank.

3. In the course of an interesting argument, Mr Tilmouth pointed out that if a teller, having the general authority of the bank, pays out money on a cheque when the drawer's account is overdrawn, or on a forged order, the correct conclusion is that the bank intends that the property in the money should pass, and that the case is not one of larceny . . . . He submitted that, in effect, the machine was invested with a similar authority and that if, within the instructions in its programme, it handed over the money, it should be held that the property in the money passed to the card holder with the consent of the bank.

4. With all respect we find it impossible to accept these arguments. The fact that the bank programmed the machine in a way that facilitated the commission of a fraud by a person holding a card did not mean that the bank consented to the withdrawal of money by a person who had no account with the bank. It is not suggested that any person, having the authority of the bank to consent to the particular transaction, did so. The machine could not give the bank's consent in fact and there is no principle of law that requires it to be treated as though it were a person with authority to decide and consent. The proper inference to be drawn from the facts is that the bank consented to the withdrawal of up to $200 by a card holder who presented his card and supplied his personal identification number, only if the card holder had an account which was current. It would be quite unreal to infer that the bank consented to the withdrawal by a card holder whose account had been closed. The conditions of use of the card supplied by the bank to its customers support the conclusion that no such inference can be drawn. It is unnecessary to consider what the position might have been if the account had remained current but had insufficient funds to its credit. . . .

5. For these reasons . . . the appeal should be dismissed.

Pompeii Estates, Inc. v. Consol. Edison Co. of N.Y., Inc.

Civil Court of the City of New York, Trial Term, Queens County
397 N.Y.S.2d 577 (1977)

Posner, J.:

The "Dawn of the Age of Aquarius" has also ushered in the "Age of the Computer".

There is no question that the modern computer is as indispensable to big business as the washing machine is to the American household. To ask the American housewife to go back to washing clothes by hand is as unthinkable as asking Consolidated Edison to send out its monthly bills by any other method than the computer.

This is an action in negligence by a builder against a public utility for damages sustained as a result of the alleged "wrongful" termination of electricity at an unoccupied one-family house (that had recently been constructed by the plaintiff) at 200-15 Pompeii Rd., Holliswood. Sometime in October, 1975, the defendant had installed electric services to the plaintiff's property. On or about January 20, 1976, the defendant terminated such service because of two unpaid bills amounting to $ 25.11. Since the premises were unoccupied, the lack of electricity caused the motor which operated the heating unit to go off, which resulted in frozen water pipes, which burst and caused $ 1,030 of proven damages to the premises. . . .

Defendant through the use of five witnesses, made out a good case proving that the notice to disconnect was probably mailed even though no witness had actual knowledge of mailing this specific notice. Obviously, it would be overly burdensome, if not impossible, to expect a utility mailing out thousands of disconnect notices a day to be able to prove that each one was individually mailed. . . .

Accordingly, this court finds that the defendant did comply with the statutory requirement of mailing even though we are also convinced that the plaintiff had never received the notice because an expert witness from the U. S. Postal Department testified that the postal service does not leave mail at an unoccupied address. Unless a statute or the contract between the parties calls for actual notice proof of mailing is sufficient to prove notice, even though the notice was never received.

While the parties, at the trial and in their memoranda of law devoted considerable time to the issue of "notice", the court finds that this is not the main issue in this case. Let us say that this was a "procedural" hurdle which Consolidated Edison cleared successfully. However, the court has serious doubts as to whether the defendant has cleared the "substantive" hurdle—did it act reasonably or negligently in discontinuing plaintiff's electric service?

. . . The defendant's witnesses stated that a customer's file is opened when a new account is established and that all correspondence and other documents involving the customer are included in this file. Defendant's attorney admitted that he had found in such file the original letter from plaintiff requesting the opening of electrical current. This letter is reproduced in its entirety because of its significance to the case:

> POMPEII ESTATES INC.
> 34-34 Bell Blvd.
> Bayside, N.Y. 11361
> 212-631-4466
>
> June 12, 1975

Con Edison
40-55 College Pt. Blvd.
Flushing, N.Y. 11354
Att: Mr. A. Vebeliunas—670-6152

To Whom It May Concern:

Please be advised that there have been no changes in the original Building Plans for the 2 Houses located at the following addresses:

House #1-200-15 Pompeii Rd., Holliswood, N.Y.—Lot #163

House #2—200-19 Pompeii Rd., Holliswood, N.Y.—Lot #160

Be further advised that the electrical load within the house will be:

6KW Lighting and 3 1/2 Horse Power Air-Conditioning

1/4 Horse Power Blowers

1.2 KW Dishwashers

There will be 1-150 AMP—3 wire socket type electric meter for each house.

Sincerely yours,
POMPEII ESTATES
AT: SWR
ALBINO TESTANI—PRESIDENT

Between the date of this letter (June 12, 1975) and the time service was installed (Oct. 24, 1975) four months elapsed. There was no other correspondence; but the plaintiff's witness (Testani) testified that he had numerous conversations with Mr. Vebeliunas on the phone and at the job site. Mr. Vebeliunas, defendant's employee never appeared in court, even though the case was tried on three separate occasions over a period of two weeks. Though Vebeliunas was defendant's field representative and the only contact plaintiff had with defendant, he was never consulted when the decision was made to discontinue service for the nonpayment of the first two months rent. The testimony of defendant's witnesses bore out the fact that said decision was a routine procedure activated by the computer and ordered by a Mr. Chris Hagan. Did defendant produce Mr. Hagan to testify what human input there was to the computer's order? No, like Mr. Vebeliunas, he never graced the courtroom scene. Failure to produce two key witnesses under the defendant's control can only lead to the inference that they would not contradict the plaintiff's contention that defendant acted unreasonably.

Negligence is lack of ordinary care. It is a failure to exercise that degree of care which a reasonably prudent person would have exercised under such circumstances. The statute only requires the notice of discontinuance to be sent to the premises where the service is provided; though, by regulation, the Public Service Commission has said that the customer may direct another address for mailing purposes. While the plaintiff's letter (supra) does not specifically direct that the mail be sent to 34-34 Bell Boulevard, any reasonably prudent person examining the letter would realize that this is a builder building new homes and that it is not customary for a builder to occupy the homes he builds. Certainly, any reasonably prudent person, if in doubt, would contact Mr. Vebeliunas to ascertain the facts. This is especially so when the termination of service is in the middle of winter and the foreseeable consequences to the heating system and the

water pipes are apparent. Where there is a foreseeability of damage to another that may occur from one's acts, there arises a duty to use care. In this instance, a one-minute cursory glance at plaintiff's letter (supra) would have alerted Mr. Hagan to the fact that there was something unusual in this situation. To the contrary, the computer said, "terminate," and Mr. Hagan gave the order to terminate.

This court finds the defendant liable to the plaintiff for damages in the amount of $ 1,030, with interest and costs. While the computer is a useful instrument, it cannot serve as a shield to relieve Consolidated Edison of its obligation to exercise reasonable care when terminating service. The statute gives it the discretionary power to do so, and this discretion must be exercised by a human brain. Computers can only issue mandatory instructions—they are not programmed to exercise discretion.

NCIC Confidential problem

The following is a slightly edited version of the statement of facts in from *Rogan v. City of Los Angeles*, 668 F. Supp. 1384 (C.D. Cal. 1987):

> During 2006, Rollo Tomasi, an escapee from an Alabama state prison, started using Archibald Buttle's name after he obtained Buttle's birth certificate. Tomasi obtained the birth certificate at Saginaw, Michigan, Buttle's birthplace and place of residence.
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> After obtaining Buttle's birth certificate, Tomasi proceeded to California. Tomasi there used Buttle's birth certificate to obtain a California driver's license and various other identification documents in Buttle's name.
>
> Sometime during 2007, Tomasi was arrested by the Los Angeles Police Department ("LAPD") on suspicion of murder. Tomasi was using the false identification in Buttle's name at the time of his arrest. The LAPD released Tomasi for reasons presently unknown.
>
> Approximately three months later, but still during 2007, Tomasi left Los Angeles and stopped using the identification in Buttle's name.
>
> On or about April 20, 2008, LAPD Lieutenant Dudley Smith caused an arrest warrant to issue in the name of Archibald Buttle, charging him with two robbery-murders that occurred in Los Angeles during April 2008. This warrant listed Buttle's name and an alias, but did not list Tomasi's known physical characteristics (e.g. Tomasi's scars and tattoos).
>
> On approximately May 10, 2008, another LAPD officer, Sergeant Ed Exley, caused the warrant information to be placed into the national computer arrest warrant notification system known as the National Crime Information Center ("NCIC"). Entry of this information into the NCIC system ensured that any police officer in the United States having access to the system would be made aware that a robbery-murder warrant in the name of Archibald Buttle was outstanding in California. Like the warrant upon which it was based, this information set forth Buttle's name and an alias, but did not contain Tomasi' known physical characteristics. . . .

On or about October 31, 2008, Buttle came into contact with Patrolman Jack Vincennes of the Carrollton Township Police Department in Saginaw County, Michigan, during the course of a trespassing dispute. Buttle was arrested a charge of disturbing the peace. Patrolman Vincennes made an inquiry of the NCIC system. The resulting computer report reflected the existence of the California robbery-murder warrant in Buttle's name.

On or about November 1, 2008, the Carrollton police contacted LAPD about the California arrest warrant. The Carrolton police established four days later through fingerprint comparison and Buttle's lack of certain scars and tattoos that were visible on the body of the wanted suspect, Tomasi, that Buttle was not the man wanted by the LAPD. Buttle then pleaded (either guilty or *nolo contendre*, the record does not reveal which) to the charge of resisting arrest and was sentenced to "time served" of five days, and released. Upon Buttle's initial arrest, the NCIC record regarding the California warrant was automatically removed from the NCIC system.

Later during November, 2008, LAPD Sergeant Exley caused the arrest warrant information in Buttle's name to be re-entered into the NCIC system without modifying same to reflect either the suspect's known unique physical characteristics (i.e. Tomasi's scars and tattoos) or the duplicate name/misidentification problem. As reflected by the relevant NCIC data entry form, a NCIC computer record contains a miscellaneous field that allows for the entry of up to 121 characters of information regarding identifying physical characteristics or possible duplicate name/mistaken identity situations.

During February or March, 2009, Buttle was a passenger in an automobile which was stopped by Bay County sheriff's deputy Bud White outside of Saginaw, Michigan, for failure to use a turn signal. Deputy White ran a computer check on Buttle after he showed his identification. The California robbery-murder warrant was reported back to White in response to the computer check. As a result, Buttle was ordered out of the car at gunpoint, searched, handcuffed, and transported to the jail in Bay City, Michigan. Buttle was there handcuffed to metal bars while Deputy White made telephone calls to the Saginaw police and the LAPD in order to determine Buttle's status. Buttle was released after being held in jail for approximately two hours.

Buttle has been arrested three more times, twice at gunpoint, by police in Michigan and Texas. Each time, he was released after his true identity was confirmed. He sought the assistance of the FBI, who confirmed that the NCIC contained a murder warrant in his name, but informed Buttle that "only the originating state agency (i.e. the LAPD) could delete, amend, or correct the computer warrant entry."

Buttle has come to you for legal advice. He would like to stop being arrested for crimes he didn't commit, and, if possible, recover damages for the past arrests. What, if anything, can he do? You may find it helpful to ask first whether he would have a remedy if it were the same police officer who arrested both Tomasi and Buttle, and then ask how the situation changes because two different police departments are involved, both of whom use the NCIC.