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Respondeat Superior: Basic Test for Application of Doctrine

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this reasoning is especially true where it is admitted that no liability exists in the absence of such protection, but, as the *Kojis* case demonstrates, logical objections impose no barrier to the Wisconsin court if insurance is involved. Although Missouri seems to be the only jurisdiction which has completely abolished the parent's immunity, at least seventeen other jurisdictions hold the parent liable for willful or wanton negligence.[43] The Wisconsin court is now demonstrating an ability to resolve questions based upon public policy. Since the availability of insurance would protect the family coffers, and since the wife is permitted to sue the husband, it is not a remote possibility that an unemancipated minor will be allowed to recover from his parent in negligence cases.

In conclusion, the *Kojis* case not only destroys charitable immunities,[44] but, also, it casts grave doubts as to the future longevity of defenses such as governmental immunity and parental immunity in Wisconsin.

DONALD F. FITZGERALD

Respondeat Superior, Basic Test for Application of Doctrine— Plaintiff was injured when the automobile in which she was a passenger was struck by another auto driven by an employee of co-defendants. Flodeen, the employee, was a day laborer of Tracy and Son Farms, a co-partnership engaged in general farming.

In the normal routine of employment, laborers reported to the home farm of Tracy and Son, where they received assignments to work in designated fields. Transportation was customarily furnished by the employer to carry the workers to the particular fields to which they had been assigned.

On the day of the accident, Flodeen drove his car to the home farm where he received his assignment to drive a tractor in a designated field. A truck, with driver, was on hand to take him and the other workers to the fields. The weather threatened rain, and Flodeen told the foreman that he would drive his own car to the field, so that if rain began and field work was discontinued he would not

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[43] *Supra* note 34.

[44] Judicial decisions abolishing the immunity have been reversed by statute in three states. (1) Rhode Island: Glavin v. Rhode Island Hospital, 12 R.I. 411 (1879); changed by sec. 38, ch. 177, R.I. Gen. Laws (1896); R.I. Gen. Laws §7-1-22 (1956); *cf.* 44 MARQ. L. REV. 153 at 159-160; see Morrison v. Henke, 165 Wis. 166, 169, 160 N.W. 173 (1917). (2) Kansas, Noel v. Menninger Foundation, 175 Kan. 751, 267 P. 2d 934 (1954) overruled by statute, Laws of Kansas (1959) Chapter 127. (3) New Jersey has many cases denying immunity but a statute was recently passed, though held not retroactive, granting immunity to charitable associations from liability to any persons who suffer damages from the negligence of any agents or servants of the charitable associations. L. 1959, c. 90, on June 11, 1959, N.J.S.A. 2A: 53 A-7 *et seq.* See 25 A.L.R. 2d 29-200 in the 1960 and 1961 supplements.

have to wait for the truck to come for him, but could start back to Janesville without delay. He had an afternoon job in Janesville for another employer. It was not unusual for employees to use their own cars in this way, and the foreman made no objection to Flodeen's proposal. Soon after the truck left, Flodeen started for the fields. On the way, his auto collided with the car in which the plaintiff was a passenger.

In the Circuit Court the defendant employer moved for summary judgment dismissing the action as to itself. The court denied the motion, stating in its opinion:

> A jury issue exists as to whether the employee, Flodeen, had stepped aside the business of his principal to accomplish an independent purpose of his own, or whether he was actuated by an intent to carry out his employment and to serve his master.

Held Order reversed: cause remanded with instructions to order summary judgment in accordance with appellant's motion.[1]

The issue presented by the facts was whether or not Flodeen was acting within the scope of his employment so as to render his master vicariously liable. The court determined the controlling principle to be that stated in 1 *Restatement, Agency, Second* §228(2):

> Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or *too little actuated by a purpose to serve the master.* [Emphasis by the court.]

The doctrine of respondeat superior, despite its firm entrenchment in our jurisprudence, is a doctrine of ambiguous origin.[2] In considerable degree, its militates against a fundamental notion of Anglo-American law that personal liability should be posited on personal fault;[3] a notion which schools of sociological jurisprudence have recently challenged.[4] Regardless of the jurisprudential school to which one belongs, however, there is inherent in the principle of imputed liability the vexing problem of how to limit the principle: the problem of determining precisely where to stop the imputation process. The nominal limitation universally accepted is that suggested by the "scope of employment."[5]

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[1] Strack v. Strack, 12 Wis. 2d 537, 107 N.W. 2d 632 (1961).
[2] 35 AM. JUR. *Master and Servant* §543 (1941).
[3] "I assume that common-sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility, —unless, that is to say, he has induced the immediate wrong-doer to do acts of which the wrong, or, at least wrong, was the natural consequence under the circumstances known to the defendant." Holmes, *Agency,* 5 HARV. L. REV. 1, 14 (1891).
[4] 2 HARPER AND JAMES, TORTS §26.5 (1956).
[5] 56 C.J.S. *Master and Servant* §181 (1948).

The application of this somewhat amorphous concept to precise circumstances ordinarily proves to be a process of extreme difficulty.[6] The plain fact is that an employed person does not cease to be a person; he does not cease to eat, sleep, and generally to live as a person, nor to be motivated by the same personal considerations which influence his behavior, irrespective of employment. The employment simply superimposes new, separate and sometimes different influences on the motivations of the employed person. This process of admixture is not resultant in an act motivated purely by the employment, nor in one motivated by personal considerations alone. It is inextricably the product of the two combined.

To a considerable extent, the imputation of liability will be governed by considerations of underlying public policy.[7] This fact can no more aptly be illustrated than by the history of the term "scope of employment" as used in Workmen's Compensation cases. Despite the fact that compensation statutes most commonly employ the term "arising out of and in the course of employment"[8] many courts fell into the unfortunate practice of equating that phrase to "scope of employment." The two were regarded as being at least broadly analogous; in fact they are still so regarded by a number of courts.[9] The analogy between the two areas of law seems to have reached its apex in the case of *Kohlman v. Hyland,*[10] when the North Dakota Court stated:

> We have heretofore said that the underlying philosophy of the Workmen's Compensation Act is that industry, not the individual, shall bear the risk of injury to the laborers engaged therein. . . . There is always present the possibility of injury to employees, notwithstanding every conceivable precaution may be taken to guard against it. So it is when we look at the situation from the viewpoint of the public. There is an ever-present probability that third persons will suffer injury because somebody's servant is careless, disobedient, or unfaithful to his matser. This is a real, not an imaginary risk, to which bear abundant witness the development of the doctrine of respondeat superior and the myriad cases where courts have been lost in the maze of metaphysical refinement in definition between frolic and detour. This latter risk to the public is clearly one which industry, (on) the analogy of the Compensation Act, may well be required to carry, within reasonable bounds.[11]

The point of particular interest here, however, is that the force

[6] Great Atlantic & Pacific Tea Co. v. Noppenberger, 171 Md. 378, 189 Atl. 434 (1937).
[7] PROSSER, TORTS 350 (2d, ed. 1955).
[8] 1 LARSON, WORKMEN'S COMP. LAW §6.10 (1952).
[9] Porter v. South Penn. Oil Co., 125 W.Va. 361, 24 S.E. 2d 330 (1943).
[10] 54 N.D. 215, 210 N.W. 643 (1926).
[11] *Id.* at 645.

of the analogy was ultimately rejected in certain jurisdictions, principally because of the determination that the policy-bases of the two were different.[12] "Scope of employment" implied a degree of conservatism of extension which was deemed inconsistent with the liberal philosophy of Workmen's Compensation.

A signal feature of the principal case is its failure to advert to the much cited "Cardozo Test," which has dominated a substantial percentage of respondeat superior cases involving traveling employees for thirty years. The test was suggested in *Marks Dependents v. Gray*,[13] and was formally introduced into Wisconsin jurisprudence in 1931.[14] The test squarely faced the problem of an employee undertaking a journey under mixed motivation, partly business and partly personal. It suggested a local device for determining whether the trip should be regarded as primarily business and incidentally personal, or vice versa; a simple "but for" concept. On the face of the matter, the test appeared to be complete. The flaw, however, lay in the assumption that it was "the trip," rather than an aspect or circumstance of "the trip," upon which the concept should be applied.

In the instant case, for example, the Cardozo test could be applied to produce contradictory results. On the one hand, the only circumstances prompting the employee to travel from the home farm to the assigned work field, regarding the simple termini of his "trip," was the requirement of the employment. Hence, had the employment been discontinued, "the trip" would not have been made; and by the logic of the test, it should be deemed business travel. On the other hand, under the circumstances here present, no trip by the employee's personal automobile was in any sense required by the exigencies of the business. In this aspect, under the test, the movement of the employee's car was the primary purpose of "the trip" and it was, therefore, personal.

Because of these two facets of the test, dependence upon it may prove impossible. In the case of *Erickson v. Great Northern Railway*,[15] which the court cites as strongly parallel in its facts to the instant case, the Cardozo test was urged upon the court by the plaintiff in support of his contention, but turned back upon him in the opinion:

> If the facts shown in the record justify the premise upon which the test assumed is founded, it may be conceded that plaintiff's position is tenable. But as we have seen the trouble with plaintiff is that the premise does not exist. That Johnson

[12] Anderson v. Miller Scrap Iron Co., 169 Wis. 106, 170 N.W. 275 (1919).
[13] 251 N.Y. 90, 167 N.E. 181 (1929).
[14] Barragar v. Industrial Commission of Wisconsin, 205 Wis. 550, 238 N.W. 368 (1931).

> was the servant of the railway company and that he was being paid wages at the time the trip was made are conceded facts. But in making this trip he was not on an errand of his employer, but made the same for his own purpose and convenience only. It is also true that he had no personal reason for getting to the coach yards except that of getting his car to that particular point to suit and serve his own personal convenience. And applying plaintiff's own test, it conclusively appears that Johnson was not in any sense in the furtherance of his employer's business.[16]

The Wisconsin Court, aware of the fact that uniform results have not been obtained in the decisions of cases of this nature, states:

> It must be admitted that the reported decisions in substanstially similar circumstances are not unanimous in determining that the employee has or has not gone outside the scope of his employment when driving his own automobile. The present parties find citations in good measure to support their respective contentions. Many of such contrary results cannot be reconciled with each other.[17]

Perhaps a more familiar background tending to demonstrate the deficiency of the Cardozo test is that provided by the detour cases. Again, viewed simply as involving a single "trip," most of the cases would tend to answer themselves, because it is generally conceded that the "main" travel is performed in the business of the employer. The problem is in separating off the particular segment or aspect of the travel which is alleged to constitute the non-business detour, and which casts the particular activity in a totally different context. Radical divergencies of judicial viewpoint have developed over this question, both on the issue of what personal detours take the employee outside the scope of his employment, and on the companion issue of precisely when he is deemed to have returned within the scope.[18]

It is doubtful that the effort of the *Restatement of Agency* to meet the basic problem suggests any new or improved test or standard. That portion of the *Restatement of Agency, Second* §228(2) taking conduct out of the scope of employment which is ". . . too little actuated by a purpose to serve the master," shifts upon the court the burden of interpretation of a standard, the controlling factors of which may radically diverge from case to case. Again the litigants and the courts are faced with considerations of time, space, pay status, and the multitude of other factors which may in a given situation be considered controlling.[19]

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[15] 191 Minn. 285, 253 N.W. 770 (1934).
[16] *Id.* at 772.
[17] Strack v. Strack, *supra* note 1 at 542.
[18] 2 HARPER AND JAMES, TORTS §26.8 (1956).
[19] 38 WORDS AND PHRASES, *Scope of Employment* 347-362.

The question is whether subjective motivation ought to be regarded as having controlling significance. Considerable stress was placed, both in the principal case and in the *Erickson* case, upon the sworn declarations of the employee that he was, in fact, motivated entirely by personal considerations, even to the point of convincing the court that: "Not only is there 'little' actuation by a purpose to serve the master—there is no such purpose at all."[20] This would seem incautious and unrealistic. If grounded, as it appears to have been, upon the employee's declarations after the event, then it would seem to rest the entire issue upon the credibility of the employee in making the declaration.

In last analysis, we must probably return to our original supposition: that motivation, especially as a subjective thing, is an unreliable gauge at best by which to test the propriety of imputing fault to the employer. Indeed section 228(1) of the *Restatement* tends in some measure to contradict the above cited provision of §228(2), in requiring only that conduct of the servant must be actuated *at least in part,* by a purpose to serve the master. [Emphasis supplied.] Motivation will usually be found, realistically, to be mixed.

Little assistance is provided by regarding the question as one of employer consent. The reason is that such alleged "consent" may, equivocally, amount either to an "authorization" or "direction" to do the employer's work by the particular instrumentality, means, or method suggested by the employee; or it may amount to a mere acquiescence in the employee's temporary departure from his employment to accomplish a purpose of his own.[21] By much the same token, the "right of control" factor suggested in *Restatement of Agency, Second,* §239, and also relied upon in support of the principal decision, tends to beg the ultimate question.

Perhaps a more objective and surer test would lie in an examination of the sources of the particular risks which produce the injury complained of. In the principal case, it is inescapable that the transportation of employees to their respective fields was solely the concern and business of the employer. The risks inherent in that process were, broadly and generally, risks created by him. At the same time, however, the employer had acted to limit such risks to those incident to a given method of accomplishing his purpose: a single truck trip to the respective fields. Had business necessity prompted the substitution of the employee's private automobile for this method, a logical connection would have existed between the business and the particular risk which occasioned the injury. But it is substantially uncontradicted that, regardless of the obvious busi-

[20] Strack v. Strack, *supra* note 1 at 541.
[21] 52 A.L.R. 2d 287-396 (1954).

ness connection of the journey itself, the risk incident to performing it by private car was undertaken solely for the employee's personal convenience. In this aspect of the case, no mixed motivation objectively existed. Much the same sort of reasoning appears to underlie the frolic and detour cases.[22] To escape imputed responsibility for the conduct of an employee who is substantially within the authorized time and space limits of his employment, the employer should be, and ordinarily is, required to demonstrate that the particular act in which the employee was engaged was undertaken entirely for his own purposes, and involved a risk of harm, separate and distinct from that involved in the general course of the employment.[23] This appears to be the underlying principle of the *Restatement of Agency* §239, and the *Erickson* case.

It must be appreciated that the problems of definition above suggested are ultimately problems of policy. Each attempt to determine a close case will ultimately founder upon shoals of indefiniteness and uncertainty, until at least a single universal policy is determined to constitute the governing principle of imputability.

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[22] HARPER AND JAMES, *supra* note 18.
[23] *Ibid.*