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Allan W. Leiser

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RESPONDEAT SUPERIOR—INTENTIONAL TORTS AS BEING WITHIN THE SCOPE OF EMPLOYMENT

It is possible for a defendant to become liable in an action at law in two ways, the first being by virtue of his own acts or omissions and the second by virtue of the relationship in which he has placed himself. A master may be subject to liability for the acts of his servant in both or either of these respects.¹

A master may subject himself to liability based upon his own acts or omissions in several ways:

1. The master may be liable to third persons due to his negligence in the selection of his servant. This case arises when the particular servant is unfit or incompetent to perform the duties for which he was employed, especially if such duties require special skill or training.²
2. The master may be liable to third persons for his negligence in failing to instruct his servants as to the proper method for performing the work.³
3. The master is subject to liability for the torts of his servants where the act is done under his express instruction or under circumstances indicating an acquiescence by the master.⁴
4. The master may be liable due to his acquiescence in previous similar tortious acts of his servant, although outside the scope of the servant's employment.⁵
5. The master is subject to liability when he ratifies the tortious act of his servant.⁶

The master's liability may also be based upon his participation in the master-servant relationship itself. This liability results from what is known as the doctrine of respondeat superior. Under this doctrine, a master is liable for injury to person or property resulting from the acts of his servant done within the scope of his employment in the master's service.⁷ The doctrine seems to have been founded on public policy, its purpose being to allocate to the business the risks normally attendant thereto.⁸

It can be observed from the statement of the doctrine that there are two major requirements which must be met before it will apply. First, a true master and servant relationship must obtain in order that the master may be properly charged with the servant's act as his own.⁹ Second, the tortious act of the servant must be done within

¹ 39 C. J., MASTER AND SERVANT, §1446-1451.

² *Holladay v. Kennard*, 12 Wall. (U.S.) 254, 20 L.Ed. 390 (1870).

³ *Penas v. Chicago, etc., R. Co.*, 112 Minn. 203, 127 N.W. 926 (1910).

⁴ *Barden v. Felch*, 109 Mass. 154 (1872).

⁵ *Fletcher v. Baltimore, etc., R. Co.*, 168 U.S. 135, 18 S.Ct. 35 (1897).

⁶ *Lee v. Lord*, 76 Wis. 582, 45 N.W. 601 (1890).

⁷ *Ratcliffe v. Chicago, etc., R. Co.*, 153 Wis. 281, 141 N.W. 229 (1913).

⁸ Mechem, *OUTLINES OF THE LAW OF AGENCY*, §359.

⁹ *Pennsylvania Co. v. Roy*, 102 U.S. 451, 26 L.Ed. 141 (1880).

the scope of his employment.¹⁰ The scope of employment concept is not susceptible to minute delineation or definition. In general it can be said that those acts done with the express or implied authority of the master are within the scope of employment of the servant.¹¹ Acts which are done by the servant by virtue of his employment and in furtherance of its ends are deemed to be done within the scope of employment.¹²

It is well established that liability under the doctrine will result from the negligent acts of the servant.¹³ However, courts were reluctant to apply the doctrine to the wilful acts of the servant, although done within the scope of the servant's employment, unless the master had expressly authorized or assented to such acts.¹⁴ It seems to be generally conceded at this time, however, that the master is liable for the wilful and malicious acts of his servant if performed within the scope of his employment.¹⁵ Such liability is also predicated on the doctrine of respondeat superior.¹⁶ The Michigan court refused to adopt the modern rule in the *Ducré* case,¹⁷ denominating it as "an extreme which this court is not willing to follow." In that particular case the court denied recovery against the defendant whose clerk had assaulted the plaintiff, who had provoked the attack by using obscene language in the defendant's store.

With these basic principles in mind, it is the purpose of this discussion to review the construction which the courts have put on the scope of employment requirement in the area of intentional torts.

The courts look with disfavor or at least slight trepidation upon the decisions setting up scope of employment as the prime requisite. Although still adhering to the older rule, the New York courts held that even if scope of employment were the only consideration, a wilful tort is deemed by the law to be a stepping aside from the course of employment.¹⁸ The Texas court held that a wilful tort was prima facie evidence of an act done outside the scope and authority of the servant's employment.¹⁹ These courts seemed to think that public policy would be better served by refusing to allow recovery against the master when, due to the intentional nature of the tortious act involved, the master had so little of the element of control inherent in the master-servant relationship.

¹⁰ *Fireman's Fund Ins. Co. v. Schreiber*, 150 Wis. 42, 135 N.W. 507 (1912).

¹¹ *Gerstein v. C. F. Adams Co.*, 169 Wis. 504, 173 N.W. 209 (1919).

¹² *Hinkle v. Chicago, etc., R. Co.*, (Mo.) 199 S.W. 227 (1917).

¹³ *Blumenfeld v. Meyer-Schmid Grocery Co.*, 206 Mo. A. 509, 230 S.W. 132 (1921).

¹⁴ *Wright v. Wilcox*, 19 Wend. (N.Y.) 343 (1838).

¹⁵ 39 C. J., MASTER AND SERVANT, §1487.

¹⁶ *Marx v. Ontario Beach Hotel, etc., Co.*, 211 N.Y. 33, 105 N.E. 97 (1914).

¹⁷ *Ducré v. Sparrow-Kroll Lumber Co.*, 168 Mich. 49, 133 N.W. 938 (1911).

¹⁸ *Wright v. Wilcox*, 19 Wend. (N.Y.) 343 (1838).

¹⁹ *Gulf, C., and S. F. Ry. Co. v. Reed*, 80 Tex. 362, 115 S.W. 1105 (1891).

Some jurisdictions, although committed to the rule that the master is liable for wilful torts within the scope of the employment, have maintained a strict attitude and refused to consider a wilful tort as generally being within the scope of employment. In a recent Oregon case, the defendant railroad company had employed a servant to remove obstructions from its right of way. The servant attempted to put out a fire built by the plaintiff near the defendant's bunkhouse. An argument ensued which was abruptly concluded when the servant struck the plaintiff across the head with a shovel. The court, in holding that the defendant company was entitled to a directed verdict, said:

"Faherty was serving no purpose of the defendant, real or implied, in engaging in the argument. The injury arose out of the argument, not out of anything Faherty was doing in the interests of his master."²⁰

Under this strict construction of the scope of employment requirement, it appears that the tortious act of the servant must somehow be furthering the master's business. It follows that in such jurisdictions, a master is generally not subject to liability for the wilful torts of a servant. There is, however, one exception which appears to cover most of the cases in which the master's business would be served by a wilfully tortious act. This occurs when the nature of the particular employment authorizes the use or performance of tortious acts. The usual example of this type of employment is found in those cases in which the service to be rendered impliedly necessitates, authorizes, or at least anticipates the use of force.²¹ In such cases, the master may be liable to a third person for the assault and battery of his servant when such servant uses excessive force or uses any force against a third person without a right to do so.²²

This situation approximates an actual authorization, but the courts have held the master liable on the theory that the authorization arose from the employment rather than from the employer. The authority is considered as implied from the nature of the employment.²³

An example of this type of employment is found in the cases of night watchmen, doormen, and detectives. The master is subject to liability for the assaults of such servants, at least while they are performing their duties.²⁴

Another example of this type of employment is found in the cases of servants hired to retake the master's property from third persons. In such cases, the master is also subject to liability for excessive or unwarranted force.²⁵

²⁰ Barry v. Oregon Trunk Ry., 197 Ore. 246, 253 P.2d 260 (1953).

²¹ 39 C. J., MASTER AND SERVANT, §1506.

²² Denver, etc., R. Co. v. Harris, 122 U.S. 597, 7 S.Ct. 1286 (1887).

²³ Rogahn v. Moore Mfg., etc. Co., 79 Wis. 573, 48 N.W. 669 (1891).

²⁴ Dickson v. Waldron, 135 Ind. 507, 34 N.E. 506 (1893).

²⁵ Denver, etc., R. Co. v. Harris, 122 U.S. 597, 7 S.Ct. 1286 (1887).

Some cases have held that, when a servant is employed to collect money due the master, an assault committed on a third person renders the master subject to liability.²⁶

It can be deduced from these decisions that, in jurisdictions adhering to a strict construction of the scope of employment requirement, the master is not subject to liability for the intentional or wilful torts of his servant unless he can be held for his own acts or omissions, such as ratification or assent, or unless the type of employment by its nature authorizes the commission of such torts.

This classic conception of the master's non-liability for the wilful torts of his servant has been recently subjected to some sweeping liberalization. This is illustrated by a recent Georgia case.²⁷ In this case, the defendant's employee was playing baseball for the defendant's industrial league team. The plaintiff was searching for a lost child; and, in so doing, crossed the center field position played by the employee. The servant ordered the plaintiff to leave, an argument ensued, and the servant assaulted the plaintiff after the plaintiff had turned away to leave. In affirming the order overruling the defendant's demurrer, the court said the test of liability was not whether the servant had stepped aside from his employment, but whether the act was so closely connected to his employment that it could be considered a part thereof. The court made no mention of whether the employment authorized the use of force by its nature, but it would seem rather difficult to stretch these facts to fit this requirement.

The development of this attitude parallels the increasing liberality of decisions in workman's compensation cases. The rule in such cases is that the injury must arise from or out of the employment.²⁸ Courts have declared, however, that a liberal construction of this requirement is necessary.²⁹ The test of employer's liability has, under such liberal construction been merely the relation of the employment to the risk.³⁰

The courts are of the opinion that the liberalization is just since it is the duty of the employers to see that the acts authorized by him are properly performed.³¹ This might be better explained by stating that the acts of a servant are, in effect, the acts of the master at least in that they would not be performed but for the planning of the master. This instigation, plus the control inherent in the master-servant relationship, combine to make the servant's acts constructively those of the master. It seems then to follow that the master should be responsible

²⁶ *Bergman v. Hendrickson*, 106 Wis. 434, 82 N.W. 304 (1900).

²⁷ *Minnesota Mining, etc., Co. v. R. L. Ellington*, 92 Ga.App. 24, 87 S.E.2d 665 (1955).

²⁸ *Pacific Employers Ins. Co. v. Industrial Acc. Comm.*, 26 C.2d 286 158 P.2d 9 (1945).

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Jozwiak v. United States*, 123 F.Supp. 65 (1954).

in equal degree for his actual and constructive acts. The master would be liable if he committed an intentional tort while he himself was doing the act, therefore he should be liable for such torts committed while he was constructively acting.

It appears to the writer that the basis for the liberalization comes to rest in the "deeper pockets" doctrine favored in the law today. The doctrine of respondeat superior was based on public policy,³² which policy demands an increased application to the intentional tort area.

When this attitude is applied to situations arising out of an assault and battery by the servant, the courts hold that the dispute out of which the tort arises must merely be connected with the employment and the assault must merely grow out of the dispute in order to subject the master to liability.³³ This new trend of thought is opposed to the rule of the *Barry* case,³⁴ where the court denied recovery to the plaintiff because the injury arose out of the argument. Under the new attitude, the fact that the injury arose out of the argument is a factor upon which liability can be based.

Another striking example of the liberalized interpretation of the scope of employment requirement is found in a California case.³⁵ The court allowed the plaintiff to recover for injuries sustained in the following manner: The defendant's salesman was driving a company-owned car home from a night sales meeting. The plaintiff swerved his car in passing the salesman, forcing him off the road. The salesman turned his car, pursued the plaintiff, and forced him to pull over and stop. The salesman then proceeded to assault the plaintiff causing serious physical injury. The court, in allowing recovery, said that the servant need have no intent to further the business of the master as long as the assault grew out of a dispute which arose in the scope of employment, and that the assault was one of the risks which the business must bear.³⁶ It would appear that, although the act of driving home from such a meeting was within the scope of employment, the assault after a rather lengthy pursuit was an act entirely apart from the employment and should have been regarded as a "stepping-aside" from the service. The salesman stated at the trial that his purpose was to stop an incompetent driver.³⁷ This would clearly show that he was not acting for his employer.

The liberalization reached its logical conclusion in a case where it was held that the servant need not be furthering the master's business

³² Mechem, *OUTLINES OF THE LAW OF AGENCY*, §359.

³³ *Chicago Mill and Lumber Co. v. Bryeans*, 137 Ark. 341, 209 S.W. 69 (1919); *Tri-State Coach Co. v. Walsh*, 188 Va. 299, 49 S.E.2d 363 (1948).

³⁴ *Barry v. Oregon Trunk Ry.*, 197 Ore. 246, 253 P.2d 260 (1953).

³⁵ *Pritchard v. Gilbert*, 107 C.A.2d 1, 236 P.2d 412 (1951).

³⁶ *Ibid.*

³⁷ *Ibid.*

but the master could become liable for the personal animosity of the servant.³⁸ The only limit recognized in this case, and in most cases, arises when the employee completely abandons his employment at the time of the commission of the tort and is, at the time of the tortious act, wholly serving his own purpose.³⁹

It is possible that this liberalization could reach the point decided in an older case which rather prematurely held the master liable for the wilful tort of a servant-driver. The court held that any malice or animosity of the servant would not only fail to protect the master against liability, but could actually be considered to increase the damages awarded.⁴⁰

The end result of these decisions and changing attitudes has not resulted in a new rule of law. The doctrine of respondeat superior is still stated by the courts as subjecting the master to liability for any tortious acts of his servants committed within the scope of their employment. The liberalization has come in the application of the scope of employment requirement. The requirement is admittedly not susceptible of clear and concise definition being perhaps best defined as "whatever is done by the employee by virtue of his employment and in furtherance of its ends."⁴¹ It has been stated that in doubtful cases the question of whether the servant was within the scope of his employment will be resolved against the master, since he is responsible for setting the force in motion.⁴²

Some courts have held that the intent of the servant in his performance of the act is determinative of whether the act is within the scope of employment.⁴³ This appears contrary to the well-settled general rule that the intention of the servant has no effect as to whether the tortious act itself was done within the scope of employment.⁴⁴ The intent of the servant could prove useful in doubtful cases in helping to determine whether a particular act was within the scope of employment.⁴⁵ This would be logical when one considers that the policy of the law subjects a master to liability as a business risk. The liability is based upon the relationship or the business rather than the particular acts. Therefore, since the effect upon the third person remains the same regardless of the servant's intent, the intent should not be determinative of the master's liability.

Wisconsin has followed the general rule, but has refused to over-liberalize the construction of the scope of employment requirement.

³⁸ *Fields v. Sanders*, 29 C.2d 834, 180 P.2d 684 (1947).

³⁹ 35 AM. JUR., MASTER AND SERVANT, §556.

⁴⁰ *Hawes v. Knowles*, 114 Mass. 518, 19 Am.Rep. 383 (1874).

⁴¹ 39 C. J., MASTER AND SERVANT, §1472.

⁴² *Robards v. P. Bannon Sewer Pipe Co.*, 130 Ky. 380, 113 S.W. 429 (1908).

⁴³ *Hoffman v. Roehl*, 61 Mont. 290, 203 Pac. 349 (1921).

⁴⁴ *Craker v. Chicago, etc., R. Co.*, 36 Wis. 657, 17 Am.Rep. 504 (1875).

⁴⁵ *Colley v. Lewis*, 7 Ala. App. 593, 61 So. 37 (1913).

In the *Rogahn* case,⁴⁶ a complaint was allowed to stand which alleged that the defendant's foreman, who was authorized to hire and discharge employees, had maliciously assaulted the plaintiff in the course of discharging him from his duties. The Court recognized the doctrine of respondeat superior, and held that the act of the foreman was within the scope of his employment because authorized. The Court stated that, if the use of force was authorized, the fact that excessive force was used would not destroy the authorization. Thus, although the doctrine was stated, the case seems actually to have been decided on the grounds of implied authority. In another case, the Court allowed recovery to a plaintiff assaulted by the defendant's bartender. The bartender claimed that the plaintiff had insulted him and that he had no thought of furthering his master's business at the moment of the tortious act. The Court held that the collection of money, for drinks served, was within the scope of employment and the use of excessive force or the presence of a malicious intent did not obviate the master's liability.⁴⁷

In the *Gerstein* case,⁴⁸ the defendant's employee assaulted the plaintiff while repossessing a clock after the plaintiff had defaulted on her installment payments. The Court allowed recovery; and, although finding no express or implied authority to use force, held that the act was clearly within the scope of employment. The decision, therefore, seems to be directly based on respondeat superior, although the doctrine was not specifically mentioned. In the *Mandel* case,⁴⁹ the plaintiff claimed damages as a result of an assault by the defendant's rate clerk. The evidence tended to show that a rate dispute was followed by insults by the servant and plaintiff after which the alleged assault occurred. The Court held that the assault, although commencing within the scope of employment, was purely personal. The Court considered that the insults constituted a stepping aside. The case was reversed and a new trial ordered on the grounds that the question of scope of employment should have been submitted to the jury. This decision marks a point of departure from the liberal trend of the previous cases. It will be remembered that modern cases hold that recovery is allowed as a matter of law if the assault grew out of a dispute which in turn arose out of the employment.⁵⁰ In the *Linden* case, the Court was confronted with an assault by a cab driver on a porter who carried the luggage of a passenger to a cab belonging to another company. The Court held that a demurrer to the complaint should

⁴⁶ *Rogahn v. Moore Mfg., etc., Co.*, 79 Wis. 573, 48 N.W. 669 (1891).

⁴⁷ *Bergman v. Hendrickson*, 106 Wis. 434, 82 N.W. 304 (1900).

⁴⁸ *Gerstein v. C. F. Adams Co.*, 169 Wis. 504, 173 N.W. 209 (1919).

⁴⁹ *Mandel v. Byram*, 191 Wis. 446, 211 N.W. 145 (1926).

⁵⁰ *Chicago Mill and Lumber Co. v. Bryeans*, 137 Ark. 341, 209 S.W. 69 (1919); *Tri-State Coach Co. v. Walsh*, 188 Va. 299, 49 S.E.2d 363 (1948).

have been sustained, on the grounds that the assault was a complete stepping aside from the scope of employment.⁵¹ This decision follows logically from that in the *Mandel* case, since in this case the dispute itself did not arise from the employment. Since the *Mandel* case disallowed recovery when the dispute arose from the employment, it seems consistent to allow no recovery for a dispute arising independently of the employment. In conclusion, it seems that Wisconsin still requires that the act be actually within the scope of employment in order to render the master subject to liability.

The writer is in accord with the Wisconsin position. Although the liberalized attitude evidenced in recent decisions might seem to reach more equitable results in particular fact situations, the resulting trend appears to have dangerous implications. Modern courts have recognized the unenviable position in which a plaintiff finds himself when forced to depend upon the assets of a poor man for the satisfaction of his judgment. From this recognition, the philosophy that the loss should fall upon those most able to meet it has evolved. Although this is equitable, its application should be restricted to losses which are reasonable. It is important to realize that any unnecessary loss to business will be ultimately reflected on the general public. It then follows that the public as a whole is forced to compensate each individual for his losses. Although this result may seem theoretically desirable, it does not appear conducive to the success of a society based upon free enterprise.

It is good public policy to hold that each business should be subject to liability for the risks which normally follow therefrom. This is well stated by the American Law Institute:

“. . . the ultimate question is whether it is just that the loss resulting from the servant's act should be considered one of the normal risks of the business which that business should bear.”⁵²

The nature of the act, intentional or negligent, should be immaterial except as evidence of whether the act was done in the scope of employment. The purpose of the doctrine of respondeat superior is, as stated, to render the business liable for its own risks. The courts should not create new risks which seem entirely independent of the business by an over-liberalized interpretation of the scope of employment requirement which is necessary in order for the doctrine to operate.

ALLAN W. LEISER

⁵¹ *Linden v. City Cab Co.*, 239 Wis. 236, 300 N.W. 925 (1941).

⁵² REST. AGENCY, EXPLAN. NOTES, §440 (Tent. Draft No. 5, 1930); leading to 1 REST. AGENCY, §214.