Marquette Law Review

Volume 34
Issue 3 *Winter 1950-1951*

Article 10

Torts - Scope of Employment Under the Federal Tort Claim Act

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in the sale of used coal barges which sunk immediately after the sale, the court said:

> "Such implied warranty of fitness would not be that they were equal in quality to new, and would not extend to the length of time they would last, but would be satisfied if they were presently seaworthy."

Thus, the fitness for purpose and the duration of the warranty both depend upon the facts, and the fact that the article is used is important in determination of these questions. It does not seem that the inclusion of used goods within the coverage of the sales act will affect to any great extent the previous relations established in sales of used goods.

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Torts — Scope of Employment Under the Federal Tort Claims Act — Plaintiffs, the husband and three children of the deceased, brought an action against the United States of America under the Federal Tort Claims Act to recover for the death of the deceased who was struck by an army truck driven by a soldier of the United States Army. The soldier had taken the truck under the authority of his Commanding Officer to convey other military personnel to town for entertainment. He then, contrary to instructions, used the vehicle for his own personal business. It was while he was in pursuit of his own affairs that the accident occured. His negligence was conceded. The trial court held that the soldier was not acting within the scope of his employment and rendered a judgment for the defendant. *Held:* Judgment reversed. The military personnel were taken into town to improve their morale. The soldier involved here was in search of entertainment to improve his morale. Improvement of morale of a single soldier is as much military in character as improvement in morale of several. Therefore the use of the truck to improve his morale was within the scope of his employment. *Murphy et al v. United States, 179 F. (2d) 743 (C.C.A. 9th, 1950).*

The pertinent provisions of the Federal Tort Claims Act are: ". . . The district court . . . shall have . . . jurisdiction to . . . render judgment . . . against the United States . . . on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable . . . in accordance with the law of the place where the act or omission occured."[1]

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[1] 1948 Revised Judicial Code, 28 U.S.C.A. 1346.

The effect of the decision in the principal case is to put a higher degree of responsibility upon the United States than seems to be contemplated in the Federal Tort Claims Act. The Act expressly states that the United States is liable if a private person would be liable according to the law of the place where the act occured. In a California decision it was held that the employer is liable if the employee is indirectly serving his master while directly serving himself.[2] Applied to the decision in the instant case the obvious conclusion is that a soldier seeking recreation to improve his morale is indirectly serving his employer, and acting within the scope of his employment. Yet the majority in the instant case says "We are not holding that in any case where the soldier is on a frolic of his own he can make the government liable simply because he there found entertainment." What other construction can be put on the holding? As the dissenting opinion points out "The decision of the court appears to rest solely on the ground that recreation and pursuit of pleasure are, as a matter of law, a part of a soldier's duty and within the scope of his army employment."

Search of the authorities for the meaning of "scope of employment," nowhere discloses such a strained construction of the phrase as the majority opinion in the principal case puts upon it.[3] In fact one of the cases upon which the dissent is primarily based seems to expressly refute the interpretation used in the majority decision.[4]

Much is made of the fact that use of the truck in the instant case might have been with the implied permission of the soldier's superior officer. This argument also is of little or no weight, for even with the express permission of his superior officer, the use of the truck for the personal business of the soldier should not make the government liable.[5] The only issue involved is whether or not the soldier's use of

[2] Ryan v. Farrell, 208 Cal. 200, 280 P. 945 (1929).

[3] Crowell v. Duncan, 145 Va. 489, 134 S.E. 576 (1926). "A master is not relieved from liability for injury inflicted by his servant, if at the time of injury the servvant is combining his pleasure or business with that of the master." Musachia v. Jones, et. al., 65 Cal. A. 283, 223 P. 1006 (1924). "If it appears that the agent was seeking his own ends exclusively, in pursuit of his own business or pleasure, then and in that case the master is not liable." Slater v. Friedman, et. al., 62 Cal. A. 668, 217 P. 795 (1923). "A master is only answerable for the acts of his servant when the servant is acting "in the course of his employment," which means "while engaged in the service of the master." If engaged on a mission of his own, the master is not liable." Thomas Cooley, A Treatise on the Law of Torts. pp. 1032, 1033. Vol. II Third Edition. "When a servant acts without any reference to the service for which he was employed, and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the master is not responsible in that case for either act or omission of the servant."

[4] Kish v. California State Auto. Ass'n., 190 Cal. 249, 212 P. 27 (1922).

[5] Brown v. Chevrolet Motor Co. of California et al, 39 Cal. App. 738, 179 P. 697 (1919). Where a salesman borrowed a car from his employer with permission of the employer. The court said, "The liability of an owner of an automobile for the negligence of its driver depends on the existence of the relation of

the truck was in prosecution of the business he was employed to do.[6] And by no stretch of the imagination is it possible to place a duty upon a soldier to use a United States Army truck to seek recreation. If we were to make it the duty of every soldier to keep up his morale regardless of the means employed, and were to make the government liable for all the torts of the soldiers while seeking to improve their morale, the tort claims against the government would soon reach a fantastic amount.[7] Yet that is in reality the doctrine which this case advocates. The decision appears to be contrary to authority and correct reason, and in my opinion should not be followed.

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principal and agent between the two. This relation does not result from the mere borrowing of such automobile. Hence it is uniformly held that the owner is not responsible for injuries resulting from the negligence of a driver only relation to the owner is that of borrower."

[6] Stephenson v. Southern Pacific Co., 93 Cal. 558, 29 P. 234 (1892). ". . . when a servant acts without any reference to the service for which he is employed, and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the master is not responsible. . . ." Also Cosgrove v. Ogden, 49 N.Y. 257.

[7] United States v. Campbell 172 F. (2d) 500 (1949). Certiorari denied 337 U.S. 957, 69 S.Ct. 1532 (1949).