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IT IS WELL SETTLED at common law that the master stands liable for damage and injuries to third persons resulting from the torts of his servant within the course and scope of his employment.[1] This principle results from the agency doctrine of *respondeat superior* which imputes liability to the master for breach of duty to third persons by the servant.[2]

Two aspects of this principle affect the subject matter of this paper. The first one is that a master generally will be held liable for injuries inflicted upon third persons by his servant when the master was negligent in failing to select a servant who was competent or fit for the job.[3] The second one is that no liability will accrue under the doctrine of *respondeat superior* unless there exists at the time of the injury a relationship of master and servant between the person who committed the wrongful act and the employer.[4] The courts look to the facts of each case in determining whether or not the persons involved occupy the relationship of master and servant.[5] However, the right to direct and control the performance of the alleged servant is a necessary element.[6] This essential control must be complete and unqualified, and it must extend both to the result to be accomplished and to the manner and details of the performance of the work.[7] Another prerequisite to the finding of the relationship is the master's right to choose and select the servant.[8]

In view of these master-servant elements, should an employer be liable for the torts of his employee if he was compelled to employ him? The master is charged with the obligation of selecting competent work-

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* B.S., Northwestern Univ.; M.B.A., Univ. of Pittsburgh; Manager-Labor Relations, the Glidden Co., Cleveland, Ohio; Fourth-year Student at Cleveland-Marshall Law School of Baldwin-Wallace College.

1 Mirabel & Levy, Negligence 238 (1962); 1 Encyc. of Negligence 742 (1962); Prosser, Torts 490 (3d ed. 1964).

2 Clewell v. Pummer, 384 Pa. 515, 121 A.2d 459 (1956); Fleming, Torts, 455 (3d ed. 1965); Hulke v. International Mfg. Co., 14 Ill.App.2d 5, 142 N.E.2d 717 (1957).

3 Bradley v. Stevens, 329 Mich. 566, 46 N.W.2d 382 (1951); Grant v. Knepper, 245 N.Y. 158, 156 N.E. 650 (1927); Restatement (Second), Agency, Secs. 212-218 (1958).

4 Councell v. Douglas, 163 Ohio St. 292, 126 N.E.2d 597 (1955); Khoury v. Edison Elec. Illum. Co., 265 Mass. 236, 164 N.E. 77 (1928).

5 Cowan v. Eastern Racing Ass'n., 330 Mass. 135, 111 N.E.2d 752 (1953).

6 Restatement (Second), Agency, Sec. 220(1) (1958); Starego v. Soboliski, 11 N.J. 29, 93 A.2d 169 (1952); Van Drake v. Thomas, 110 Ind. App. 586, 38 N.E.2d 878 (1942).

7 Crum v. Walker, 241 Iowa 1173, 44 N.W.2d 701 (1950); McConnell v. Williams, 361 Pa. 355, 65 A.2d 243 (1949).

8 Broadway Motors v. Bass, 252 Ky. 628, 67 S.W.2d 955 (1933); Greaser v. Appaline Oil Co., 109 W.Va. 396, 155 S.E. 170 (1930); Merlo v. Public Service Co., 381 Ill. 300, 45 N.E.2d 665 (1942).

men.[9] Therefore, if the element of employee selection is removed as a prerogative of the employer, does not this remove the master-servant relationship? If the employer through no fault of his own cannot completely direct and control the employee, is not the necessary privity between master and servant absent? Is it reasonable that the employer be liable for the misconduct of a person whose selection and/or control has been taken out of his hands? A review of existing case law is required to answer these questions.

Pilotage Cases

In many states statutes exist which have the legal effect of making the employment of pilots mandatory in certain instances such as in directing the movements of a ship into or out of a harbor.[10] These statutes generally require the ship captain to take on board the first pilot to come along side his ship before it enters the harbor, and in the event of refusal the shipowner must nonetheless pay the pilotage fee. In interpreting these statutes, the shipowner is under a legal compulsion to accept the pilot because the statute imposes a penalty in the event of refusal.[11] It is noteworthy that the shipowner has no choice as to which pilot he accepts.

In cases arising under these compulsory pilotage statutes, the principle is well established that no action lies at law against the shipowner for damages resulting from the negligence of the pilot who was compulsorily employed on the vessel.[12] A case on this point was decided as early as 1815, *Carruthers v. Sydebotham,* in which Lord Ellenborough determined that there was no agency relationship between the pilot and shipowner because the shipowner was under compulsion of the law to take the pilot and place the ship in his hands.[13]

In actions at law the United States has uniformly followed this principle.[14] The major decision was the case of *Homer Ramsdell Trans-*

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[9] Bradley v. Stevens, *supra* note 3; Grant v. Knepper, *supra* note 3.

[10] Ala. Code, Tit. 38, Ch. 2, Sec. 82 (1940); Calif. Harbors and Navig. Code, Div. 5, Ch. 2-4 (1937); Fla. Code, Tit. XXI, Sec. 310.10-.20 (1927); La. Rev. Stat., Tit. 34, Ch. 6, Pilots, Sec. 953 (1948); Mass. Annot. Laws, Tit. XV, Ch. 103, Secs. 23-25 (1862); N.Y. Navigation Code, Ch. 37, Art. 6, Secs. 88, 89 (1941); Pa. Code, Tit. 55, Ch. 3, Secs. 172, 173 (1927); S.Car. Code, Tit. 56, Sec. 1427 (1952).

[11] Homer Ramsdell Transportation Co. v. La Compagnie, etc., 182 U.S. 406, 21 S.Ct. 831, 45 L.Ed. 1155 (1901); N.Y. Dock Co. v. N.Y. & Cuba Mail S.S. Co., 259 N.Y. 606, 182 N.E. 200 (1932).

[12] City of Los Angeles v. Grace S.S. Co., 116 Cal.App. 237, 2 P.2d 401 (1931); Crisp v. U.S. & Australasia S.S. Co., 124 F. 748 (S.D. N.Y. 1903); Harrison v. Hughes, 125 F. 869 (3d Cir. 1903); Homer Ramsdell Transportation Co. v. La Compagnie, *supra* note 11; Johnson v. Traynor, 243 F.Supp. 184 (D. Ct. Md. 1965); Jure v. United Fruit Co., 6 F.2d 7 (5th Cir. 1925); N.Y. Dock Co. v. N.Y. & Cuba Mail S.S. Co., *supra* note 11; The West Nohno, 29 F.2d 950 (S.D. N.Y. 1928).

[13] 4 Maule & S 77 (1815).

[14] *Supra* note 12.

portation Company v. La Compagnie Generale Trans-Atlantique.[15] In this case the Supreme Court of the United States held that the New York pilotage law is compulsory because a pilot must be taken or an equivalent fee paid. It pointed out that at common law there is a presumption that the master chooses his servant and gives him orders which he is bound to obey. The court held that when the law has taken the appointment of an individual out of the hands of the employer, the necessary element of privity does not exist. Because the pilot is not an agent of the shipowner, the shipowner cannot be liable for injury or damage caused by the pilot's negligence in directing the movements of the ship. The court clearly stated that the obligation of the master to take the pilot was the essence of the basis for the nonliability. The decision cites with approval Justice Story's Treatise on Agency in which it is stated that if the master of the ship takes the pilot voluntarily, although required to select from a particular class, then the master is liable for the pilot's torts, but if he is taken compulsorily (bound to do so under penalty) then the master is not liable.[16]

As a corollary, the pilot is personally liable for his torts.[17] Furthermore, the shipowner himself is liable where his own negligence rather than that of the pilot is the proximate cause of the damage.[18] The courts strictly construe the compulsory aspects of these pilotage laws so that if the shipowner elects to use a pilot in situations and areas not required by the statute, then the pilot is considered as voluntarily employed and his negligence is imputed to the shipowner.[19]

Many courts in holding for the employer mentioned, but did not rely upon, the shipowner's lack of control over the actions of the pilot. Since the right to direct and control the performance of an alleged servant is an essential element for the creation of a master-servant relationship, it would seem that this lack of control alone would be sufficient grounds for holding the shipowner not liable for the pilot's torts. However, the courts have uniformly held that it is the statutory compulsion upon the shipowner in his being required to take a pilot and his lack of selection that precludes the forming of a master-servant relationship.

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[15] 182 U.S. 406, 21 S.Ct. 831, 45 L.Ed. 1155 (1901).

[16] Story, Agency, 456a (2d Ed.).

[17] Matheson v. Norfolk & No. Am. S.S. Co., 73 F.2d 177 (9th Cir. 1934); Transportes Maritimos v. Rotch, 289 F. 115 (D. Ct. Mass. 1923).

[18] State Highway & Public Works Comm'n. v. Diamond S.S. Transp. Corp., 226 N.C. 371, 38 S.E.2d 214 (1946).

[19] South Carolina State Highway Dept. v. United States, 78 F.Supp. 598 (E.D. S.C. 1948).

Coal Mining Cases

States with coal mining operations have statutes regulating the operation and safety of these mines.[20] The typical statute provides in part for the creation of a State Mining Board with authority to grant certificates of competency to certain overseers or persons of authority in the mines and makes it unlawful for anyone to act in certain capacities in mines without having obtained a certificate of competency.[21] These statutes also require that duly certified overseers (mine boss, foreman, fire boss, etc.) must be employed in every mine and must perform numerous specified duties.[22] Some statutes expressly exempt the mineowner from liability for the mine foreman's negligence in carrying out the duties required by statute, while other statutes expressly impose strict liability upon him.[23]

Numerous cases have arisen over the question of the mineowner's liability for the injury or death of an employee, which resulted from the negligence of a mine foreman that the mineowner was compelled to hire. The earliest cases arose in Pennsylvania and West Virginia beginning in approximately 1885.[24] Cases from these and other states continued for some years thereafter.[25] In most cases, the courts held in favor of the mineowner either on grounds that the statute was repugnant to the mineowner's constitutional rights[26] or under the fellow servant doctrine.[27] Therefore, the courts did not come to grips with the issue of compulsory employment.

In 1904, the Seventh Circuit Court of Appeals in *Fulton v. Wilmington Star Mining Company*[28] held that the Illinois Mining Act[29] did not

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[20] Ala. Code, Tit. 26, Sec. 166(4) (1940); Ark. Stat., Secs. 52-501 to 52-517 (1947); Ill. Rev. Stat., Ch. 93, Secs. 8.01-8.18 (1953); Pa. Purdon's Stat., Tit. 52, Secs. 211-252, 841-858 (1927); Tenn. Code Anno., Ch. 4, Secs. 58-401 to 58-414 (1955); Va. Code of 1950, Tit. 45, Secs. 45-17 to 45-42; W.Va. Code of 1961, Ch. 22, Secs. 2396-2413.

[21] *Ibid.*

[22] *Id.*

[23] Ill. Rev. Stat., *supra* note 20; Tenn. Code Anno., *supra* note 20; Va. Code, *supra* note 20.

[24] Delaware & Hudson Canal Co. v. Carroll, 89 Pa. 374 (1879); Durkin v. Kingston Coal Co., 171 Pa. 193, 33 A. 237 (1895); Keystone Bridge Co. v. Newberry, 96 Pa. 246 (1880); Lehigh Valley Coal Co. v. Jones, 86 Pa. 432 (1878); Reese v. Biddle, 112 Pa. 72, 3 A. 813 (1886); Ross v. Walker, 139 Pa. 42, 21 A. 157 (1891); Waddell v. Simoson, 112 Pa. 567, 4 A. 725 (1886); Williams v. Thacker Coal & Coke Co., 44 W.Va. 599, 30 S.E. 107 (1898).

[25] Algoma Coal & Coke Co. v. Alexander, 136 W.Va. 521, 66 S.E.2d 201 (1950); Musin v. Pryor Coal Co., 68 Pa. Super. 88 (1914); Philadelphia & Reading Coal Co. v. Kever, 4 F.2d 531 (3d Cir. 1925); Strother v. U. S. Coal & Coke Co., 81 W.Va. 657, 95 S.E. 806 (1918).

[26] Durkin v. Kingston Coal Co., *supra* note 24; Salt Creek Coal & Coke Co. v. Priddy, 117 Tenn. 168, 96 S.W. 610 (1906).

[27] Reese v. Biddle, *supra* note 24; Ross v. Walker, *supra* note 24; Waddell v. Simoson, *supra* note 24; Williams v. Thacker Coal Co., *supra* note 24.

[28] 133 F. 193 (7th Cir. 1904).

[29] Ill. Laws of 1899, pp. 308, 309 & 7, 8.

exempt mineowners from liability for the defaults of their mine foremen. They specifically distinguished the situation from the pilot laws by stating that under the pilot laws the master was limited to employment of a specific individual, whereas under the mining laws the master was limited only to selection of an individual from a class of people who had obtained the requisite certificate of competency. The law only assured competency, and within this area the mineowner was free to employ as he saw fit. This case was appealed to the Supreme Court of the United States, and the constitutionality of the statute was upheld.[30] The court stated that such a statute did not deprive mineowners of property without due process of law where it was not obligatory upon the mineowner to select a particular individual or retain one if found incompetent.

The next case addressing itself to the compulsory employment aspect of these laws was *Ducktown Sulphur, Copper, and Iron Company v. Galloway*.[31] In this case the Sixth Circuit Court of Appeals held that the foreman whom the law required to be hired is deemed an employee of the owner so that the doctrine of *respondeat superior* applies for injury to miners by reason of the foreman's negligence, notwithstanding that the owner must make a selection from a restricted choice. The court in detail distinguished its decision from the Homer Ramsdell pilot case[32] by pointing out that the mineowner can make a choice, even though restricted, and can discharge the mine foreman at any time whereas the shipowner cannot.

Based on the above, it appears that the courts rejected the compulsory employment nonliability doctrine of the pilot cases in the mining cases on the narrow factual ground that the mineowner was not compelled to hire a specific individual, but only compelled to hire one individual from a restricted group who had been certified as competent by a state board.

Labor Union Cases

Apart from the pilot and mining cases, there are few cases on the question of compelled employee liability. The most interesting one is *Farmer v. Kearney*.[33] In this case the employer had yielded under pressure of work stoppages to the union the function of selection and assignment of employees to unload ships. The union determined not only who would work but also who would work which job. When the employee assigned to operate a derrick negligently injured another em-

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[30] Fulton v. Wilmington Star Mining Co., 205 U.S. 60, 27 S.Ct. 412, 51 L.Ed. 708 (1907).

[31] 262 Fed. 669 (6th Cir. 1920).

[32] Homer Ramsdell v. La Compagnie, *supra* note 11.

[33] 115 La. 722, 39 So. 967 (1905).

ployee, the injured employee brought an action against the employer. The state supreme court held (1) that when workmen make it a condition of their working that the employee yield to their union the right of selection and supervision, they absolve such employer from his normal responsibility, (2) that when the workmen delegate to a labor union the right of selection and superintendence, the actions of the union and its members are sufficient guaranty to them for their individual safety and protection, and (3) that neither justice nor reason justifies throwing responsibility upon the employer for acts over which the union and its members have taken control. On these bases the court held the employer not liable. The comments from *Lawyers' Reports Annotated* on this case are significant:

> This decision, if sound, establishes a novel exception to the general rule which holds the master liable for failure to exercise reasonable care in the selection of competent employees. . . .
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> This seems to be the only reported case which has considered the effect upon the master's duty and liability in these respects of the practical restriction or destruction of this freedom of selection and superintendence of employees by rules of a labor organization.
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> . . . in the Farmer case, the employer was not left free to select from a class of persons, i.e., members of a union, but was practically obliged to accept the individual selected by the union itself. This fact limits the scope of this decision, and renders it inapplicable . . . upon the question whether the fact that an employer is restricted in his choice to members of a labor union to which the injured workman belonged, but not to a particular individual designated by the union, will exonerate him from liability. . . . The difference . . . is one of degree only, but may be sufficient as the basis for a sound distinction.[34]

The above comment as well as the decision in the two relevant mining cases[35] emphasizes the distinction between selection from a restricted class of individuals and the master's requirement to take a specific individual, as in the pilot cases.

In two subsequent labor cases, the courts distinguished their holding from *Farmer v. Kearney*.[36] The first case involved a Missouri statute which held an employer strictly liable to an employee injured due to negligence of a fellow servant.[37] The company contended that this statute should not apply to their operation due to the fact that the employment of fellow servants was by contract controlled and dictated by their labor union. The court held that unless the company could prove duress of property or of the person of the company's managing officer, the agree-

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[34] Annot., 3 L.R.A. (N.S.) 1105 (1906).

[35] Fulton v. Wilmington, 133 F. 193 (7th Cir. 1904); Ducktown Sulphur v. Galloway, 262 F. 669 (6th Cir. 1920).

[36] *Supra* note 33.

[37] Hoover v. Western Coal & Mining Co., 142 S.W. 465 (Mo. 1911).

ment with the union could not be used as a valid excuse for escaping liability under the statute. The court specifically distinguished its holding from *Farmer v. Kearney*[38] based on the facts.

In *Worley v. Spreckels Brothers Commercial Company,*[39] the employer contended that because all of his workmen were compelled to be union members he had relinquished his rights of selection and control of their work and therefore could not be held liable for any employee's injury caused by another employee's incompetence. The court did not find sufficient impairment of the master's right to select competent workmen and replace them for lack of ability to relieve him of liability in failing to select a competent servant. The *Farmer v. Kearney*[40] doctrine was again rejected due to the factual differences.

Statutes

A discussion of a master's liability for the tortious acts of his servants would be incomplete without referring to the effect of certain statutes upon this common law principle. The Workmen's Compensation Acts, which exist in all states, the Federal Employers' Liability Act, the Jones Act, and others change the common law by eliminating the defenses of fault, assumption of risk, contributory negligence, and fellow servant doctrine in instances of employee torts resulting in injury to fellow employees.[41] These laws make the employer strictly liable for injuries to employees within the scope of employment. Therefore, they act to greatly narrow the cases that might otherwise arise on the question of compelled employee liability.[42] Consequently, for the purposes of the summary below, only the effect upon the master's liability for injury to third persons (nonemployees) resulting from the torts of a servant whom he is compelled to hire may be considered.

The Labor Management Relations Act of 1947 contains a limited ban on closed shop contracts, permits state right-to-work laws, and outlaws certain types of featherbedding. As a result, instances when unions can restrict or control an employer's hiring practices are reduced.[43]

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[38] *Supra* note 33.

[39] 163 Cal. 60, 124 P. 697 (1912).

[40] *Supra* note 33.

[41] Fleming, *op. cit. supra* note 2 at 470. Prosser, *op. cit. supra* note 1 at 555.

[42] 1 Encyc. of Negligence 240 (1962); note, 3 Fla. L. Rev. 368-73 (1950).

[43] Labor Management Relations Act (Taft-Hartley Act), Secs. 8(a)(3), 8(b)(6), 14(b), 61 Stat. 156 (1947).

Case Law Summary

The factual situations in the cases referred to previously separate into four categories:

1. A statute requires the employer to hire a specific individual or has the same practical effect.
2. A statute requires employers to hire only individuals from a specific designated class, but from which class they can freely select.
3. The employer through pressure from an organization such as a labor union enters into a contract which gives that organization control over the specific individuals who will be hired and on which jobs they will be placed.
4. The employer through pressure from an organization such as a union enters into a contract with that organization in which he agrees to hire only from a particular class of individuals, but from which class he can freely select and subsequently control their activity.

The first category above reflects the situation in the pilot cases.[44] It is settled case law that the master is not liable for pilot error.[45]

It has been said that the principle of the pilotage cases might be applied to compulsory hiring as under a labor union's featherbedding contract.[46] No sound analogy can be drawn between compulsory pilotage by statutes and featherbedding by contract. The nonliability of the master in the pilotage cases exists because there is statutory compulsion to hire and complete loss of selection opportunity.[47] In featherbedding the compulsion is by contract not statute. As discussed previously, this difference is material. The master acts voluntarily on entering into the contractual relationship, or he can void the contract based on duress, whereas the master acts compulsorily under the pilotage statutes. In featherbedding by contract, there is usually not complete usurping of selection rights, since the employer hires from a class of individuals (members of the union). Freedom to select from within a limited class has been held not to be compulsory employment.[48] Therefore, due to these substantial differences the pilotage doctrine cannot accurately be extended to featherbedding by contract.

The second category restates the circumstances of the coal mining cases.[49] In these cases the master's selection rights were restricted but

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[44] *Supra* note 12.

[45] *Ibid.*

[46] 1 Encyc. of Negligence 749 (1962).

[47] *Supra* note 12.

[48] Ducktown v. Galloway, *supra* note 35; Fulton v. Wilmington, *supra* note 35; Hoover v. Western, *supra* note 37; Worley v. Spreckels, *supra* note 39.

[49] *Supra* notes 24 and 25.

not removed, and he could freely select employees from a limited qualifying group and could thereafter discharge them for incompetence.[50] These decisions are sound law because the basic elements of a master-servant relationship fundamentally remain intact.

The third category is the situation in *Farmer v. Kearney*.[51] No other case has been found which supports or agrees with its holding. Is *Farmer v. Kearney*[52] good law? It is not. If a master voluntarily delegates his inherent rights of selection and control of workmen and contracts with a labor organization to exercise these rights, he cannot correctly state that he is compelled to accept the specific employees which the union then designates. The employment is not compulsory if it results from the terms of a voluntarily executed contract. Furthermore, if such a contract is obtained through duress or undue coercion, the employer can successfully bring an action to void it.[53] Therefore, in this category the employer should still be liable for his employee's torts.

In the fourth category stated above, there is case law which holds that the employer is liable for employee torts because he retains selection and control rights even though admittedly from a restricted group.[54] In addition, if duress is involved in consummating the contract the employer may successfully void it.[55] There is no sound reason why an employer should not be liable for employee torts when such employees were selected from a restricted group based upon the terms of a voluntary union agreement. No compulsion or substantial employment restriction exists in this circumstance.

Conclusion

The American and English Encyclopedia of Law states:

> Where a person or corporation is compelled by *law* to employ an *individual* in a given matter, no liability attaches for his tortious or negligent act.[56] (Italics supplied.)

Because the expanding of this principle to statutory compulsion to hire from a class of individuals or to contractual compulsion exerted by a union has been considered and rejected, it must be concluded that the above statement remains a proper analysis of the law as it applies to nonemployee injury or damage.

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[50] *Supra* note 35.

[51] *Supra* note 33.

[52] *Ibid.*

[53] Cappy's Inc. v. Dorgan, 313 Mass. 170, 46 N.E.2d 538 (1943); Lafayette Dramatic Productions v. Ferentz, 305 Mich. 193, 9 N.W.2d 57 (1943); Maisel v. Sigman, 123 Misc. 714, 205 N.Y. Supp. 807 (1924).

[54] Fulton v. Wilmington, *supra* note 35; Ducktown Sulphur v. Galloway, *supra* note 35.

[55] Cappy's Inc. v. Dorgan, *supra* note 53; Lafayette v. Ferentz, *supra* note 53; Maisel v. Sigman, *supra* note 53.

[56] 14 Am. & Eng. Encyc. Law 809 (2d ed., 1896-1905).