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THE LIABILITY OF AN EMPLOYER FOR THE WILFUL TORTS OF HIS SERVANTS

RALPH L. BRILL*

THE DOCTRINE OF *respondet superior*—let the master respond!—is solidly entrenched in Anglo-American law. It is also, in varying forms, applied in many European countries.¹ Mr. Justice Holmes has traced the apparent origin of the doctrine to ancient Greek and Roman laws which made the master of the family responsible for the harm caused by his animals, his slaves and by the members of his family.²

Under the doctrine of *respondet superior*, a master is held vicariously liable for the tortious conduct of his servant committed within the scope of the servant's employment.³ The employer's liability is merely substituted for the servant's, whose wrongful act caused the injury, and it is not dependent in any way upon the fault of the master.

Since liability of the master is not based upon fault, it is not surprising that the rule of *respondet superior* has been criticized by some legal scholars. Mr. Justice Holmes, for example, stated that the doctrine was in opposition to common sense,⁴ and Thomas Baty said that the rule was "derived from an inconsiderate use of precedents and a blind reliance on the slightest word

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¹ Smith, *Frolic and Detour*, 23 Colum. L. Rev. 444, 452-3 (1923); Neuner, *Respondet Superior in the Light of Comparative Law*, 4 La. L. Rev. 1 (1941).

² Holmes, *The Common Law*, Lecture 1 (1881); Holmes, *The History of Agency*, 4 Harv. L. Rev. 345 & 5 Harv. L. Rev. 1 (1891).

³ 1 Restatement (Second), Agency § 219 (1957).

⁴ Holmes, *The History of Agency*, 4 Harv. L. Rev. 345 & 5 Harv. L. Rev. 1, 14 (1891).

of an eminent judge [Lord Holt, in *Jones v. Hart*⁵]; and from the mistaken notion that his flights of imagination in picturing highway accidents were actual decided cases. . . ."⁶

There have been far more supporters of the rule than critics, however, and numerous justifications have been offered for the creation, continuance and expanded application of the principle. Two early theories emphasized the employer's "control" over the servant, and the "benefit" derived from his acts.⁷ Lord Brougham combined these in one case when he said: "[B]y employing him, I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it."⁸ A similar theory, the "implied command" theory, was popular for some time, and it justified liability because the master had impliedly commanded the servant to commit the harmful act.⁹ The "identification" theory rationalized responsibility because the victim who has been run down by a Standard Oil truck feels that he has been injured by Standard Oil, not simply by the driver of the truck.¹⁰ Bentham and others advocated holding the master liable as an incentive to making him more careful in selecting competent and careful servants,¹¹ a premise that was used and has been borne out in the analogous field of Workman's Compensation.¹²

The most prevalent current theory rests on a base of broad social policy. Baty, an opponent of the doctrine of *respondeat superior*, called it the "deep-pocket" theory;¹³ Young B. Smith, an advocate of the doctrine, labelled it the "entrepeneur" theory.¹⁴

⁵ 2 Salk. 441, 90 Eng. Rep. (K.B. 1698). This case was the first judicial recognition, in dicta, of the doctrine of *respondeat superior*. "For whoever employs another, is answerable for him, and undertakes for his care to all that make use of him." *Ibid*.

⁶ Baty, *Vicarious Liability* 29 (1916).

⁷ Mechem, *Agency* § 1856 (2d ed. 1914); Wigmore, 3 *Select Essays in Anglo-American Legal History* 536 (1909).

⁸ *Duncan v. Finlater*, Cl. & F. 894, 910 (1839).

⁹ Wigmore, *supra* note 7, at 474.

¹⁰ Mechem, *Outlines Agency* § 362 (4th ed. 1952); 2 Pollack & Maitland, *History of English Law* 530 (1899).

¹¹ Bentham, *Collected Works* i, 383 (1838); Pothier, *Obligations* 72 (1761); Morris, *The Torts of an Independent Contractor*, 29 Ill. L. Rev. 339-341 (1935); Seavey, *Speculations to Respondeat Superior*, *Studies in Agency* 129, 148 (1949).

¹² Smith, *Frolic and Detour*, 23 Colum. L. Rev. 444, 456 *et seq.* (1923); Seavey, *supra* note 11, at 149.

¹³ Baty, *Vicarious Liability* 29 (1916).

¹⁴ Smith, *supra* note 12. See Douglas, *Vicarious Liability and the Administration of Risk*, 38 Yale L.J. 584 (1929); Laski, *The Basis of Vicarious Liability*, 26 Yale L.J. 105 (1916).

Under this theory, *respondeat superior* is justified as a risk-spreading device. It is recognized that servants are an "impecunious race," and if the servant were unable to pay, the innocent victim would have to bear his injuries without compensation. The employer, however, can better bear the responsibility and spread it on to society as a whole, mainly through insurance, with the premiums passed on to the public through slightly higher charges for the employer's product or services. As stated by Smith:

[I]t is socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry, than to cast the loss upon a few.

. . . . [T]he loss will not fall on him alone. Like the employer under workman's compensation statutes, it is feasible for him (through the medium of insurance) to spread the loss among others carrying on a similar business, and he can pass his proportionate part of the loss (the insurance premium) in the form of slightly higher charges to [his customers] and thus "the shock of the accident may be borne by the community."¹⁵

Whatever the reasons for *respondeat superior*, it is clear that the doctrine is black letter law today. For any tortious conduct of the servant—negligent, reckless, intentional, or acts falling within the class of strict liability—the employer will be held liable so long as the conduct was within the scope of the employee's employment. As always, the difficult problem is the application of the rule. What conduct is within the scope of employment, or at least may be said to be only a minor deviation from it? When will the servant be said to have stepped aside from the employment to engage in a "frolic of his own?"¹⁶

These questions are difficult enough when an employee does something not clearly a part of his duties and *negligently* injures another person; they are exceedingly difficult when there is substituted the fact that the servant has *intentionally* or *maliciously* injured another person. This article will attempt to analyze the master's liability for the wilful torts of his servant under the doctrine of *respondeat superior*. In addition, some alternative theories of liability of the employer will be examined. Following a general

¹⁵ Smith, *supra* note 12, at 457-8.

¹⁶ This is the phrase first used in *Joel v. Morrison*, 6 C. & P. 501, 172 Eng. Rep. 1338 (Exch. 1834), to describe a substantial deviation which would remove the servant from the scope of his employment.

analysis, the article will focus on the law of one jurisdiction, Illinois, and the attempt to synthesize its cases.

RESPONDEAT SUPERIOR

The early common law view was that a master was not liable for injuries that had been wilfully inflicted by his servant.¹⁷ A partial explanation for this view was the then current justification for *respondeat superior*, the "implied command" theory. It was felt that while negligent conduct could reasonably be found to have been impliedly commanded by the master, the master could not reasonably be said to have ordered his servant to intentionally cause harm.¹⁸ In the leading case of *Wright v. Wilcox*,¹⁹ a small boy attempted to climb on an ice wagon driven by the defendant's servant. The servant, seeing the boy's attempt, whipped the horses into a trot, causing the boy to be thrown off under a wheel. Judge Cowan ruled that the master was not responsible, since the servant had apparently acted by design. The court said that "the dividing line is the wilfulness of the act . . ." and that to be responsible "it must be proved that he [the master] actually assented, for the law will not imply assent."²⁰ Thus, only where express authority to commit the wilful act existed—an express order to injure—could the master be liable.

Gradually, as the implied command theory gave way to other theories of justification, it came to be recognized that the wilfulness of the act and an intention to do injury did not, alone, take the act outside the scope of employment, though the wilfulness of the act made it more likely that the servant was acting for his own purposes only.

One of the first kinds of cases in which it was recognized that the master could be responsible for the wilful tort of his servant was where the servant was in a position with actual authority to use

¹⁷ Huffcutt, *Law of Agency* 305-6 (1901); 2 Mechem, *Agency* § 1926 (2d ed. 1914); Seavey, *Studies in Agency* 250-251 (1949).

¹⁸ Seavey, *supra* note 17.

¹⁹ 19 Wend. (N.Y.) 343, 32 Am. Dec. 507 (1838). See also *Mali v. Lord*, 39 N.Y. 381 (1868).

²⁰ *Ibid.* See, e.g., *Herring v. Hoppock*, 15 N.Y. 409 (1854); *Grossbart v. Samuel*, 65 N.J.L. 543, 47 Atl. 501 (1900) (master yelled "give it to him, so he will keep his mouth shut.").

some force, but in the specific case mistook the need for it or exceeded the amount of force necessary. Most of these cases involved employees in custodial positions, charged with the responsibility of protecting the master's property, and authorized to use some force to do so.²¹

Thus, in *Tripp v. American Tobacco Co.*,²² the servant was employed as a night watchman at the defendant's warehouse. The servant saw the plaintiff walking near the warehouse and, thinking him to be a trespasser and a pillager, the servant called to him and ordered him to stop. When the plaintiff, who was properly on the land, did not stop, the guard shot him in the chest. A finding that the servant was in the scope of his employment was sustained.

Extension of liability to the use of force by custodial servants was not a difficult step. In cases where a servant had negligently injured another, the courts had emphasized the factors of *time*, *place* and *purpose* to determine whether the servant was within the scope of his employment.²³ If the servant was within the time limits of his job, and was at a place where he could properly be as an incident of his job, or not substantially far from such a place, and if he was actuated, at least in part, by a purpose to serve the master, the servant's negligent conduct was found to be within the scope of his employment, even though not specifically authorized. A servant who injured another by negligently speeding, for example, was undoubtedly not specifically authorized to speed; in fact, he may have been instructed not to drive in excess of a fixed speed limit. Nevertheless, it was early recognized that if the servant, while performing his duties, did speed and thereby injured another, he was still within the scope of his employment.²⁴ The servant was driving within the working hours of his job; he had not deviated geographically from the space limitations of the

²¹ See, e.g., *Stewart v. Reutler*, 32 Cal. App. 2d 195, 89 P.2d 402 (1939) (bouncer); *J.J. Newberry Co. v. Judd*, 259 Ky. 309, 82 S.W.2d 359 (1935) (store manager); *Schmidt v. Vanderveer*, 110 App. Div. 755, 97 N.Y. Supp. 441 (1906) (guard); *Ploof v. Putnam*, 83 Vt. 252, 75 Atl. 277 (1910) (caretaker). See cases cited in Ferson, *Principles of Agency* § 70 (1954); Mechem, *Outlines Agency* § 396 (4th ed. 1952); Seavey, *Studies in Agency* 253-255 (1949); 6 Am. Jur. 2d, *Assault & Battery* § 140 (1963).

²² 193 N.C. 614, 137 S.E. 871 (1927).

²³ 1 Restatement (Second), *Agency* § 229(b) (1957); Annot., 51 A.L.R.2d 10, 12 (1957). See, e.g., *Fiocco v. Carver*, 234 N.Y. 219, 137 N.E. 309 (1922).

²⁴ See, e.g., *Gillis v. Jurzyna*, 284 Ill. App. 174, 1 N.E.2d 773 (1st Dist. 1936).

job; and he was still acting for the master's purposes. Since he was performing the main act he was employed to perform—driving—the fact that he was doing it badly would not relieve the master of responsibility.²⁵

By using the same reasoning, it would not be difficult to establish the proposition that where the servant is authorized to use force for the master's purposes, the fact that he has mistaken the need for it, or that he has exceeded the amount of force required, should not, of itself, establish that the servant had stepped aside from his employment. So long as the servant was still within the time limits of his agency, had not geographically deviated from it, and sought primarily to serve his master's interests, the fact that he served him badly should not negate the master's responsibility.

Of course, it was still possible to find that the servant who had been authorized to use force had, in the specific case, acted solely out of personal malice and not for a purpose connected with the master's business. In such a case, the factors of time and space would be present, but purpose would not. It was therefore held that a servant who was authorized to use force, but who acted for personal spite or revenge, was not acting within the scope of his employment.²⁶

In addition to jobs in which the use of force is expressly authorized, there are many kinds of employment in which an employee, while not specifically told to do so, will commonly have to use some force in order to do his job. An usher or a guard might have to physically move someone back in line or restrain a person from entering without authority. An employee sent to recapture chattels may frequently have to overcome resistance from the buyer of the article being repossessed. If the employee in one of these positions should mistake the need for force, or exceed the amount of force which he might be privileged to use, the factors of time, place and purpose would still be present, and a finding

²⁵ "Although Dollar was serving defendant badly, defendant was liable." *Moore v. Rosenmond*, 238 N.Y. 358, 360, 144 N.E. 639, 640 (1924).

²⁶ See *Dagger v. Central of Ga. Ry. Co.*, 36 Ga. App. 782, 138 S.E. 266 (1927) (station agent shot a person who objected to his failure to open the station); 6 Am. Jur. 2d, *Assault & Battery* § 140 & n.9 (1963); Annot., 34 A.L.R.2d 372, 402-410 (1954). . .

that the employee was within the scope of his employment could be sustained.²⁷ The servant was at and on his job, and was acting for his employer's benefit.

To support a finding of liability in this kind of case, reference can be made to general agency principles. A principal is liable for contracts made by his agent within the scope of the agent's actual or apparent authority.²⁸ The agent's actual authority is not confined, however, to the kinds of contracts or limitations expressly outlined by the principal; the agent has an inherent or incidental authority from his position to make contracts necessary and proper to carry out his expressed authority, authority which is customarily possessed by an agent in his position.²⁹ A general manager of a store has authority to order supplies for the store even if he has not specifically been told that he can by his principal, since that authority normally is possessed by a person in the position of general manager, it is necessary and proper to carry out his duties, and he has not been told not to make such contracts.³⁰ By analogy, it can be argued that although the employee who has resorted to force for his employer's benefit was not expressly told that he could use force as part of his job, the position the employee occupied is

²⁷ See, e.g., *C.I.T. Corp. v. Brewer*, 146 Fla. 247, 200 So. 910 (1941); *Sturgis v. Kansas City Ry. Co.*, 228 S.W. 861 (Mo. App. 1921); *Rich v. Dugan*, 135 Neb. 63, 280 N.W. 225 (1938); *Dierkes v. Hauxhurst Land Co.*, 80 N.J.L. 369, 79 Atl. 361 (1911); *Wilson v. Singer Sewing Mach. Co.*, 184 N.C. 40, 113 S.E. 508 (1922). For other recapture of chattels cases, see *Ferson*, *Principles of Agency* 103 (1954); *Seavey*, *Agency* 157 (1964); *Seavey*, *Studies in Agency* 260 (1949); 57 C.J.S., *Master & Servant* § 575(c) (1948); *Annot.*, 9 A.L.R. 1180 (1920), supplemented, 105 A.L.R. 926 (1936). See also 1 *Restatement (Second), Agency* § 245, comment a & illustr. 3 (1957).

²⁸ 1 *Restatement (Second), Agency* § 140 (1957).

²⁹ "Unless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it." 1 *Restatement (Second), Agency* § 35 (1957). See generally, *Mechem, Outlines Agency* § 43 (4th ed. 1952).

³⁰ "Unless otherwise agreed, authority to manage a business includes authority:

- (a) to make contracts which are incidental to such business, are usually made in it, or are reasonably necessary in conducting it;
- (b) to procure equipment and supplies and to make repairs reasonably necessary for the proper conduct of the business;
- (c) to employ, supervise, or discharge employees as the course of business may reasonably require;
- (d) to sell or otherwise dispose of goods or other things in accordance with the purposes for which the business is operated;
- (e) to receive payment of sums due the principal and to pay debts due from the principal arising out of the business enterprise; and
- (f) to direct the ordinary operations of the business.

1 *Restatement (Second), Agency* § 73 (1957). See also 1 *Restatement (Second), Agency* § 8A (1957).

commonly accompanied by the use of force, force was often necessary to carry out his expressed duties, and the employer had not instructed the employee not to use force.

Illustrative of this group of cases is *Gerstein v. C.F. Adams Co.*³¹ There, the defendant's employees were sent to collect a balance due on a clock purchased by the plaintiff. The plaintiff told them that she was unable to pay the full balance, but was told that this was unacceptable and the clock would have to be repossessed. The plaintiff tried to stop the men from taking the clock, and one of the men struck her and caused her to fall. The Wisconsin court found that the acts of the servants were within the scope of their employment even though they were not authorized by the master.

The next kind of case in which scope of employment was extended was where an employee, whose job did not usually involve force, or who had in fact been told not to use force, committed a wilful act, but for the main purpose of serving his master. For example, a theatre manager assaults a drunk who, after being ejected from the theatre, has been cursing and yelling in front of the theatre and urging patrons not to go inside.³² Or the foreman of a telephone company in charge of putting up telephone poles has a landowner arrested in order to prevent the owner from interfering, as he had threatened to do.³³ In these cases, it may be argued that the important factors of time, place and purpose are reasonably established. The employee is working at his job and performing the main act he was employed to perform. The wilful act which he has committed was primarily for the purpose of serving his employer, though in his zeal it has turned out badly. Though there is more disagreement than in the previous categories,³⁴ many cases have found that the employee who has overzealously acted for his master was still within the scope of his employment and not on a frolic of his own.³⁵

³¹ 169 Wis. 504, 173 N.W. 209 (1919).

³² *Basket v. Banks*, 186 Va. 1022, 45 S.E.2d 173 (1947).

³³ *Jackson v. American Tel. & Tel. Co.*, 139 N.C. 347, 51 S.E. 1015 (1905).

³⁴ See, e.g., *Plotkin v. Northland Transp. Co.*, 204 Minn. 422, 283 N.W. 758 (1939); *Porter v. Grennan Bakeries*, 219 Minn. 14, 16 N.W.2d 906 (1945); *Magnolia Petroleum Co. v. Guffey*, 95 S.W.2d 690 (Tex. Com. App. 1936).

³⁵ See *M.J. Uline Co. v. Cashdaw*, 171 F.2d 132 (D.C. Cir. 1948) (hockey player struck fan instead of other player; for jury; could have been for purpose of winning or making game interesting); *Pacific Tel. & Tel. Co. v. White*, 104 F.2d 923 (9th Cir. 1939) (assault

The leading case in this category is *Limpus v. London General Omnibus Co.*³⁶ The defendant's servant and the plaintiff were drivers of competing buses. They had both attempted to pick up the same three passengers, with the plaintiff being successful. At the same time, the plaintiff stopped his bus in such a way as to prevent the defendant's servant from passing, and thus gaining an advantage for the next group of passengers. The defendant's bus finally succeeded in passing, and when the plaintiff in turn tried to pass, the defendant's servant intentionally pulled across the road to block him, and caused the plaintiff's bus to overturn. The trial judge charged the jury that if they believed

that the real truth of the matter was that the defendant's driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly and improperly, but in the course of his service and employment, and *in doing that which he believed to be for the interests of the defendants*, then the defendants were responsible for the act of their servant.³⁷

The Court of Exchequer affirmed a verdict for the plaintiff, Willes, J. stating: "He was employed not only to drive the omnibus, which alone would not support this summing up, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road."³⁸

Thus far, it has been established that the master may be liable for wilful torts committed by a servant whose position involves the use of force, such as a bouncer or a watchman, or by a servant whose position is "not uncommonly accompanied by the use of force,"³⁹ such as a repossessor of chattels or an usher, or by a ser-

while questioning a suspect); *McKay v. Irvine*, 10 Fed. 725 (N.D. Ill. 1882) (jockey struck competing jockey); *Sullivan v. People's Ice Corp.*, 92 App. 740, 268 Pac. 934 (1928) (assault on competitor); *Minnesota Min. & Mfg. Co. v. Ellington*, 92 Ga. App. 24, 87 S.E.2d 665 (1955); *Frances v. Barbazon*, 16 La. App. 509, 134 So. 789 (1931); *Nelson Bus. College v. Lloyd*, 60 Ohio St. 448, 54 N.E. 971 (1899).

³⁶ 1 H. & C. 526, 158 Eng. Rep. 993 (Exch. 1862).

³⁷ *Id.* at 539, 158 Eng. Rep. at 998 (*Emph. added*).

³⁸ *Ibid.*

³⁹ Tentative Draft No. 4 of the Restatement (Second), Agency § 245, described the master's liability for a servant's use of force as:

- (1) A master who authorizes a servant to perform acts which involve the use of force against persons or things, or which are of such a nature that they are *not uncommonly accompanied by the use of force*, is subject to liability for a trespass to such persons or things caused by the servant's unprivileged use of force exerted for the purpose of accomplishing a result within the scope of employment.
- (2) A master employing servants whose position brings them into argumentative contacts with others may be found liable for batteries naturally arising out of and resulting from such arguments. (*Emph. added*).

vant who has acted for the purpose of serving his master, though overzealously. The next extension was made by some courts in cases where the servant, acting within the general scope of his employment, became involved in an argument related to his job or set off by some aspect of the job, especially if the job itself was one which was argumentative in nature. While trying to collect a bill, the collector gets into an argument and commits a battery upon a surly debtor.⁴⁰ Or a customer at a lunch counter complains about the quality of meat he has been served, and the counterman responds by striking him over the head with a club.⁴¹ Unlike the previous categories, the factors of time, place and purpose are not completely satisfied here. While the employee is at his job, and the act occurs during his working hours, his purpose is mainly to satisfy his own temper, not to serve his employer.

In negligence cases, where the servant has deviated to perform a task for his own purposes, the trend has been to find that the deviation was minor and thereby sustain liability. In *Ford v. Reinoehl*,⁴² an automobile salesman, driving a dealer's car back to the showroom, stopped at a grocery for some butter and then struck the plaintiff as the driver headed for his home to have supper. And in *Freehill v. Consumer's Co.*,⁴³ an iceman left his prescribed district to go home and change his shoes, which were hurting him, and ran over the plaintiff, a small child, as the employee was leaving his house. In these cases, the courts have played down the purpose factor, or have emphasized the servant's overall purpose to return to his employment after the short deviation, in order to sustain findings that the servants were within the scope of their employment.⁴⁴

The draft which was adopted generalized these specific categories into:

A master is subject to liability for the intended tortious harm by a servant to the person or things of another by an act done in connection with the servant's employment, although the act was unauthorized, if the act was not unexpected in view of the duties of the servant. 1 Restatement (Second), Agency § 245 (1957).

The comments make clear that if the servant is employed in a position which involves the use of force, or is not uncommonly accompanied by the use of force, or which brings him into argumentative contacts with others, then the use of force by the servant is "not unexpected," and is thus within the scope of his employment.

⁴⁰ See, e.g., *Moffit v. White Sewing Mach. Co.*, 214 Mich. 496, 183 N.W. 198 (1921).

⁴¹ *Dilli v. Johnson*, 107 F.2d 669 (D.C. Cir. 1939). See *Langguth v. Bickford's, Inc.*, 71 N.Y.S.2d 278, 272 App. Div. 907 (1947), *aff'd*, 297 N.Y. 982, 80 N.E.2d 363 (1948). *Contra*, *Fisher v. Hering*, 38 Ohio App. 107, 97 N.E.2d 553 (1948).

⁴² 120 Pa. Super. 285, 182 Atl. 120 (1935).

⁴³ 243 Ill. App. 1 (1st Dist. 1926).

⁴⁴ See also *Krzikowsky v. Sperring*, 107 Ill. App. 493 (1st Dist. 1903); *Embry v.*

Also, in the analogous field of Workman's Compensation, many recent cases have allowed an injured employee to recover from the employer after being injured in a fight which arose out of a job connected activity.⁴⁵ In *Gregory v. Industrial Commission of Ohio*,⁴⁶ for example, a driver for a non-unionized mine was attacked and severely beaten by a group of union members. It was found that the attack was a risk to which his employment had exposed him, and thus arose out of his employment. Likewise, in an Illinois case, *Scholl v. Industrial Commission*,⁴⁷ a foreman had fired an employee. The employee approached the foreman on his way to work and asked him to reconsider. The two men quarreled and the discharged employee became enraged, took out a pistol and shot the foreman, killing him. An award of compensation was sustained.

An increasing number of cases have taken the extended view of scope of employment and have held the master liable for the intentional torts of his servant where they are, in a broad sense, job connected. Thus, where the employee is serving in an argumentative position, as, for example, a bill collector,⁴⁸ or a bar

Reserve Natural Gas Co. of La., 124 So. 572 (La. 1929); *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519 (1912).

⁴⁵ See, e.g., *Stewart v. Chrysler Corp.*, 350 Mich. 596, 87 N.W.2d 117 (1957); *Newell v. Moreau*, 94 N.H. 439, 55 A.2d 476 (1947); *Martin v. Snuffy's Steak House*, 46 N.J. Super. 425, 134 A.2d 789 (1957). See Horowitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 Ill. L. Rev. 311, 325-367 (1946); and Small, *The Effect of Workman's Compensation Trends on Agency-Tort Concepts of Scope of Employment*, 12 N.A.C.C.A. L.J. 21 (Nov. 1953), in which it is pointed out that workman's compensation principles are increasingly affecting tort and agency. "Employment is coming to have the same meaning for both." *Id.* at 52. And in *Parotto v. Standard Paving Co.*, 345 Ill. App. 486, 494, 104 N.E.2d 102, 105-6 (1st Dist. 1952), the court said:

We conclude, therefore, that the deviation from the terms of employment which bars an employee from a recovery under the Workmen's Compensation Act need not be so substantial as one which would bar a third party from a recovery against the employer of a tortious employee. While the distinction may be challenged from the standpoint of strict logic, it is not without sanction from the standpoint of sound policy. To permit the employee or his personal representative to recover from an employer for the injury or death of the employee who is killed while returning from a mission undertaken in violation of the terms of his employment would allow him to take advantage of his own willfulness. . . . [T]he deviation from employment rule . . . should not be used as a refuge by the employer to escape application of the doctrine of "respondeat superior" when a non-negligent third party seeks his common law remedy.

⁴⁶ 129 Ohio St. 365, 195 N.E. 699 (1935).

⁴⁷ 366 Ill. 588, 10 N.E.2d 360 (1937). *Accord*, *Chicago, Rock Island, and Pacific Ry. Co. v. Industrial Comm'n*, 288 Ill. 126, 123 N.E. 278 (1919).

⁴⁸ See *Ferson*, *Principles of Agency* 105 (1954); *Seavey*, *Agency* 157 (1964); *Seavey*, *Studies in Agency* 261 (1949); *Annot.*, *Assault By Employee Collecting A Debt*, 22 A.L.R.2d

tender,⁴⁹ the master may be responsible under this view if the employee loses his temper and wilfully injures the plaintiff. The result is not unexpected in view the servant's job.⁵⁰ The same result may also be reached when the argument which precipitates the wilful tort arises from the servant's performance of his job. One such case is *Stansell v. Safeway Stores*.⁵¹ Plaintiff, a fourteen year old girl, was sent by her mother to pick up groceries on a relief order. The store manager was unable to find a relief order on file. He called the girl's mother and argued with her over the phone. He then escorted the girl out of the store, without any groceries. The girl accused the manager of trying to gyp them out of the groceries, and the manager responded by cursing the girl's mother. When the plaintiff returned a curse to him, the manager chased the girl, and struck and kicked her to the ground. In sustaining a judgment for the plaintiff, the court said:

. . . [I]t must be held that the evidence sustains the finding that the wrongful acts here in question were committed while the appellant's manager was acting within the scope of his employment. He first lost his temper while he was handling the matter of the order, which was clearly within the line of his duty. He became more angry in answering a question asked by the girl with respect to the groceries, and in replying to that question accused her mother of lying and called her mother a vile name. The girl's answering epithet increased his anger but did not change the nature of the quarrel which arose in, from and as a part of his performance of the duty for which he was employed.⁵²

The extended view of liability for personal torts connected with the employment has also been applied in cases where the defendant's employee became embroiled in an argument after a traffic accident or a near collision. In *Tri-State Coach Corp. v. Walsh*,⁵³ the defendant's bus driver started to make a right turn

1227 (1952); 6 Am. Jur. 2d, *Assault & Battery* § 144 (1963); 57 C.J.S., *Master & Servant* § 575(d) (1948); 1 Restatement (Second), *Agency* § 245, comment a & illustr. 1.

⁴⁹ *Haworth v. Elliott*, 67 Cal. App. 2d 77, 153 P.2d 804 (1945); *Starnes v. Monsour's* No. 4, 30 So. 2d 135 (La. App. 1947); *Guipe v. Jones*, 320 Mich. 1, 30 N.W.2d 408 (1948); *Annot.*, 34 A.L.R.2d 372, 415 (1954).

⁵⁰ 1 Restatement (Second), *Agency* § 245 (1957). See note 39, *supra*.

⁵¹ 44 Cal. App. 2d 822, 113 P.2d 264 (1941).

⁵² *Id.* at 827, 113 P.2d at 266.

⁵³ 188 Va. 299, 49 S.E.2d 363 (1948). For other traffic dispute cases, see *Joyce v. Southern Bus Lines*, 172 F.2d 432 (5th Cir. 1949); *Neary v. Hertz Corp.*, 231 F. Supp. 480 (D.D.C. 1964); *Pritchard v. Gilbert*, 107 Cal. App. 2d 1, 236 P.2d 412 (1951); *Bova v. St. Louis P.S. Co.*, 316 S.W.2d 140 (Mo. App. 1958); *Schisano v. Brickseal Refractor Co.*, 62 N.J. Super. 269, 162 A.2d 904 (1960); *King v. Magaw*, 104 Ohio App. 469, 150 N.E.2d 91 (1957); *Felder v. Houston Transit Co.*, 203 S.W.2d 831 (Tex. Civ. App. 1947).

in front of plaintiff's car, which was stopped at the intersection. Fearing that the bus was about to strike his fender, the plaintiff shouted for the bus driver to stop. The driver stopped, but in opening the bus door he struck the plaintiff's fender. An argument ensued about whether the bus had given a turn signal, which vehicle had done the crowding, and the respective rights of the vehicles on the road. The bus driver lost his temper and struck the plaintiff, causing him to lose control of his car, which started forward and struck a building. The court ruled that the jury was justified in finding that the employee had not abandoned the scope of his employment.

In extending the master's liability to include personal torts engendered by the servant's employment many cases have strongly relied on recent liberal workman's compensation cases which have allowed an employee to recover for injuries suffered in on-the-job fights, even if they were not job related. In *Hartford Accident & Indemnity Co. v. Cardillo*,⁵⁴ Judge Rutledge explained:

Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as their emotional make-up. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. . . . These expressions of human nature are incidents inseparable from working together.

Justice Traynor of California applied the above reasoning quite broadly in *Carr v. Wm. C. Crowell Co.*⁵⁵ The defendant was a general building contractor. One of his employees had tacked a temporary plate in place on the floor of a building under construction. The plaintiff, an employee of a subcontractor, told the employee not to go so fast, and he dislodged the plate and threw it down to a lower part of the building. The defendant's servant grumbled a bit, but found other work to do for fifteen minutes.

⁵⁴ 112 F.2d 11, 15 (D.C. Cir. 1940). In *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 471, 128 N.E. 711 (1920), Justice Cardozo stated:

The claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment.

⁵⁵ 28 Cal. 2d 652, 171 P.2d 5 (1946).

He then retrieved the plate and began to put it in place. The plaintiff walked to the plate and kicked it off the floor. The defendant's servant then threw his hammer at the plaintiff, striking him on the head and seriously injuring him. A judgment for the defendant contractor was reversed, since the injury was "an outgrowth of Enloe's employment," and "[n]ot only did the altercation leading to the injury arise solely over the performance of Enloe's duties, but his entire association with plaintiff arose out of his employment on the building under construction."⁵⁶

Thus, it would seem that the trend of decisions is to broaden substantially the meaning of "scope of employment," and to include within its coverage personal failings of the servant which have some causal relationship to his job.

OTHER BASES OF LIABILITY

Ratification

Ratification, or adoption, is a doctrine which is usually applied to bind a principal to a contract made by his agent in excess of the agent's actual or apparent authority.⁵⁷ However, it has also been used in tort cases to sustain the employer's liability. Under the theory of ratification, even though the act of an employee is found to have been outside the scope of his employment at the time it was performed, if the employer afterwards ratifies the act, the authority to perform the act relates back to the time of commission and makes the act authorized from its inception, and thus within the scope of the servant's employment at that time.⁵⁸

In order for ratification to be applied, it is necessary that the employer have knowledge of the employee's act and that he manifest his intention to be bound by it, either expressly or by conduct, such as by accepting the benefits of the unauthorized act.⁵⁹ Thus, in a negligence case, *Dempsey v. Chambers*,⁶⁰ an unauthorized

⁵⁶ *Id.* at 658, 171 P.2d at 8.

⁵⁷ "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." 1 Restatement (Second), Agency § 82 (1957).

⁵⁸ *Ibid.* See comment b., and sections 100-102.

⁵⁹ 1 Restatement (Second), Agency §§ 97-99 (1957). See, e.g., *Tauscher v. Doernbecher Mfg. Co.*, 153 Ore. 152, 56 P.2d 318 (1936).

⁶⁰ 154 Mass. 330, 28 N.E. 279 (1891).

helper took it upon himself to fill an order for coal, and, while unloading the coal, broke a window. The employer, with knowledge of the unauthorized act and of the damage, sent the customer a bill. It was held that the employer was responsible for the broken window since by seeking the benefits of the unauthorized transaction he had ratified the entire transaction.

There are very few cases where ratification has been found in wilful tort cases. Some of these have involved express approval of the servant's act;⁶¹ more often the plaintiff attempts to show ratification from the fact that the employer has retained the servant in his employment after the altercation without censure or punishment. Several cases have found that the employer ratified the servant's wilful tort by a failure to express disapproval and by retaining him in his employ.⁶² More often it is found that retention of the employee is only evidence of ratification,⁶³ or that retention, coupled with other affirmative acts,⁶⁴ showed an adoption.

Negligent Hiring

Sometimes liability for the plaintiff's injuries can be placed on the master directly instead of vicariously, even though the actual wilful tort was committed by the servant. This result can occur when the master himself is also at fault in some way, usually by not taking proper and reasonable care in selecting or supervising the servant. This does not mean that merely because a servant has committed a tort the master must have been careless in selecting him. But if the master has knowledge that an employee has dan-

⁶¹ *Caldwell v. Farley*, 134 Cal. App. 2d 84, 285 P.2d 294 (1946); *Gardin v. Baron*, 11 N.J. Super. 215, 78 A.2d 297 (1951).

⁶² *Jameson v. Gavett*, 22 Cal. App. 2d 646, 71 P.2d 937 (1937); *Bass v. The Chicago & Northwestern Ry. Co.*, 92 Wis. 654 (1877); *cf. Tauscher v. Doernbecher Mfg. Co.*, *supra* note 59.

⁶³ *Novick v. Gouldsberry*, 173 F.2d 496 (9th Cir. 1949); *McChristian v. Popkin*, 75 Cal. App. 2d 249, 171 P.2d 85 (1946); *cf. Edmunds v. Atchison, Topeka & Santa Fe Ry. Co.*, 174 Cal. 246, 162 Pac. 1038 (1917). *Contra*, *Chaney v. Frigidiaire Corp.*, 31 F.2d 977 (5th Cir. 1929); *Riddle v. Aero Mayflower Trans. Co.*, 73 So. 2d 71 (Fla. 1954); *Fisher v. Hering*, 38 Ohio App. 107, 97 N.E.2d 553 (1948).

It is rare to find ratification as the sole basis for sustaining the master's liability. Usually, the court believes that the servant was within the scope of his employment, and ratification is used as an added reason for affirming the lower court's judgment against the employer. See, *e.g.*, *Novick v. Gouldsberry*, *supra*.

⁶⁴ *Rosenberg v. J.C. Penney Co.*, 30 Cal. App. 609, 86 P.2d 696 (1939); *State ex rel. Kansas City Publ. Service Co. v. Shain*, 345 Mo. 543, 134 S.W.2d 58 (1939) (employer's attorney represented the employee in criminal trial and appeal).

gerous propensities, such as a violent temper or sadistic tendencies, and the master nevertheless hires him or keeps him in his employ, the master is foreseeably exposing people who will come into contact with the servant to a serious risk of harm. The master can therefore be found negligent in hiring or retaining the dangerous servant, and will be responsible for the proximate consequences of that negligence—an assault or other wilful injury inflicted upon the plaintiff by the servant.

A Washington case, *La Lone v. Smith*,⁶⁵ is illustrative of the theory of negligent hiring. The landlord of an apartment building retained one Trask as janitor. Trask quickly built a reputation among the tenants as irresponsible and quarrelsome, and had exhibited on many occasions a violent temper and a propensity for drunkenness. He had assaulted one tenant in a previous episode, to the landlord's knowledge. On the occasion precipitating the suit, Trask was entertaining a friend and became inebriated. He sought to borrow money from the plaintiff and the latter's refusal angered him. He later berated the plaintiff, apparently over a parking place, and then knocked the plaintiff down, jumped on him, beat him, and sought to choke him. The court emphasized that *respondeat superior* was not involved, but found liability because of the landlord's negligence in retaining a dangerous servant in his employ.

Non-delegable Duty

Under well established common law principles, carriers, innkeepers and telegraph companies, due to their quasi-public utility status, owe a high duty of care to their customers and prospective customers.⁶⁶ Likewise, business entities are charged with making their premises safe for use by business invitees.⁶⁷ Many courts have held that these high duties are breached not only by negligently created conditions or negligently conducted activities, but also by failure to protect the plaintiff from wilful acts of people on the

⁶⁵ 234 P.2d 893 (1951). See *Fleming v. Bronfin*, 80 A.2d 915 (Mun. App. D.C. 1951); cf. *Stricklin v. Parsons Stockyard Co.*, 192 Kan. 360, 388 P.2d 824 (1964). See generally, Annot., 34 A.L.R.2d 372, 390 (1954); Mechem, *Outlines Agency* § 403 (4th ed. 1952).

⁶⁶ Restatement (Second), Torts § 314 A (1964).

⁶⁷ Restatement (Second), Torts §§ 341 A, 343, 343 A (1964). See generally Prosser, *Business Visitors and Invitees*, 26 Minn. L. Rev. 573 (1942); James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 Yale L.J. 605 (1954).

premises, including servants and strangers.⁶⁸ Thus, in *Frewen v. Page*,⁶⁹ servants of the defendant's hotel invaded the room of the plaintiffs, entirely proper hotel guests, and allegedly committed an assault, false imprisonment and slander. In affirming a verdict for the plaintiffs, the court said:

The guest is entitled to respectful and considerate treatment at the hands of the innkeeper and his employees and servants, and this right created an implied obligation that neither the innkeeper nor his servants will abuse or insult the guest, or engage in any conduct or speech which may unreasonably subject him to physical discomfort, or distress of mind, or imperil his safety.⁷⁰

ILLINOIS DECISIONS

The Illinois courts have alternated between a narrow and liberal attitude in scope of employment cases. In each of two negligence cases, *Kavale v. Morton Salt Co.*⁷¹ and *Parotto v. Standard Paving Co.*,⁷² the court affirmed a jury finding that the servant had been within the scope of his employment at the time of the accident even though the servant in each case had been away from his assigned place of employment for a long period of time (three hours in *Kavale*; seven hours in *Parotto*), had deviated substantially geographically (the servant had returned to within several blocks in *Kavale*, but was still four miles away in *Parotto*), and had no clear intent of serving his master other than by driving the master's vehicle back toward its garage after a long drinking episode (and in *Kavale* it was not even clear that the servant was driving back to the garage, since he testified that he really was looking for a barber shop at the time of the accident). On the other hand, in *Cohen v. Fayette*,⁷³ the appellate court ruled, as a matter of law, that a servant, who was supposed to be back at the company's garage at 6:00 p.m., but who first stopped off at his home for dinner, and at 7:30 p.m. negligently injured the plaintiff at a distance of a mile and one half from the company garage, was outside the

⁶⁸ See, e.g., *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202 (1869) (carrier); *Overstreet v. Moser*, 88 Mo. App. 72 (1901) (innkeeper); *Robinson v. Sears Roebuck & Co.*, 216 N.C. 322, 4 S.E.2d 889 (1939) (department store). For an extreme example, see *Jenkins v. General Cab Co. of Nashville*, 175 Tenn. 409, 135 S.W.2d 448 (1940) (passenger in taxi assaulted by her husband, who was the driver of the cab).

⁶⁹ 238 Mass. 499, 131 N.E. 475 (1921).

⁷⁰ *Id.* at 505, 131 N.E. at 477.

⁷¹ 242 Ill. App. 205 (1st Dist. 1926), *aff'd*, 329 Ill. 445, 160 N.E. 752 (1928).

⁷² 345 Ill. App. 486, 104 N.E.2d 102 (1st Dist. 1952).

⁷³ 233 Ill. App. 458 (1st Dist. 1924).

scope of his employment. Likewise, in *Brill v. Davajon*,⁷⁴ the appellate court reversed a jury's finding that a cab driver was within the scope of his employment when, for one dollar, he pushed a stalled vehicle and ran into the plaintiff's car, even though the act took place during the driver's working hours, the driver could have been hired by a customer a moment later, and even though judicial notice might perhaps be taken that cab drivers often perform extra services, such as carrying luggage, for higher tips.

In wilful tort cases, the Illinois courts likewise have exhibited various attitudes. The courts early recognized that the master could be liable when the servant was employed in a position in which force was authorized, as in a custodial position. However, the Illinois courts at first required a clear showing of authority to use force before the servant could be found to be within the scope of his employment.

Thus, in *Illinois Central Ry. Co. v. Ross*,⁷⁵ the servant, Tucker, was employed as a flagman at a railroad crossing in the City of Bloomington. His statutory duty was to signal travelers in the public street and warn them of approaching locomotive engines. A group of children had habitually played on the railroad right of way nearby and the flagman had on several occasions remonstrated with them. The boys had responded by splashing paint on the flagman's watchhouse. On the occasion in question, the flagman found the children on the right of way, grabbed the plaintiff by the collar, accused him of painting the watchhouse, and shook and kicked him. The boy threatened to throw a rock and he cursed at the flagman, who then picked up a lump of coal and threw it at the fleeing thirteen year old. The boy was struck in the back and suffered permanent spinal damage.

The appellate court overturned a jury's verdict for the plaintiff and ruled that, as a matter of law, Tucker was outside the scope of his employment at the time of the wilful act. The court first held that the use of force by the flagman was not authorized, expressly or impliedly. His express duties were merely to warn of approaching trains at the intersection of the railroad crossing and

⁷⁴ 51 Ill. App. 2d 445, 201 N.E.2d 253 (1st Dist. 1964).

⁷⁵ 31 Ill. App. 170 (3d Dist. 1888).

the public street. No authority existed to chase boys off the right of way, if that was what he was doing, especially since the boys were doing no harm to the tracks and were in no danger themselves. Such action was not necessary or proper to carrying out his express duties. Additionally, the court ruled that the evidence was clear that the servant's act was purely personal and not connected with the business or interests of his employer, since the servant himself stated on cross-examination that he threw at the boy because the boy had cursed him.⁷⁶

*Chicago, Rock Island & Pacific Ry. Co. v. Brackman*⁷⁷ more clearly illustrates the early view that authority to use force had to vividly appear, and the facts that the act was committed during working hours, on the job, and for the master's benefit were not enough to support *respondeat superior* liability. In that case, the plaintiff, seventeen years old, had been stealing a ride on the defendant's car. He alleged that the defendant's servant, Gaynor, a brakeman, had ordered the plaintiff off the moving train, and as he held onto the side of the car the brakeman struck the plaintiff's fingers with a stick, causing him to fall under the train. The plaintiff's ankle was crushed.

The court overturned the lower court's verdict for the plaintiff, and ruled that the brakeman, as a matter of law, was outside the scope of his employment in striking the plaintiff. The court emphasized testimony given by the conductor that it was not part of the brakeman's duty to keep trespassers off the train or to eject them; that if the brakeman discovered trespassers, he was to notify the conductor. The printed rules of the company showed that direction and control of the train was in the conductor, and that the brakeman's duties were only to ride atop the train and apply the brakes on signal. The court said:

⁷⁶ Compare *Kavale v. Morton Salt Co.*, *supra* note 71, where the court indicated that the jury is not required to believe a servant who testifies that he was not in the scope of his employment, at least where there are indirect contradictions or the testimony is inherently improbable. See also *Boland v. Gay*, 201 Ill. App. 359 (3d Dist. 1916), and *Sutherland v. Gaccione*, 8 Ill. App. 2d 201, 131 N.E.2d 130 (1st Dist. 1955).

See also *Belt Ry. Co. v. Banicki*, 102 Ill. App. 643 (1st Dist. 1902), where a railroad watchman shot a trespasser. The court said that authority to keep trespassers away did not involve authority to shoot them.

⁷⁷ 78 Ill. App. 141. (2d Dist. 1898).

Even if the servant does the act because he thinks it will benefit the master, still if it is no part of the duty he was hired to perform he is but a volunteer, and his act ought not to bind the master.⁷⁸

While not a case of a custodial servant using force, *Singer Mfg. Co. v. Hancock*⁷⁹ is another example of the strict view on the master's liability for wilful torts. The agent, Preston, was employed to sell and lease sewing machines for the defendant company on a commission basis. Preston caused the arrest of the plaintiff for maliciously damaging a sewing machine, but later dismissed the charges. The contract of agency by which Preston was employed gave him power to make sales and collections, and provided that if any special act were required of him, the power to perform it had to be obtained in writing. No power to prosecute the plaintiff had been given. Both the Appellate and Supreme Courts of Illinois held that the agent had no authority to commit the act and that the employer was therefore not responsible for the wilful tort. The fact that the act was done solely for the master's benefit, though badly, was without legal significance.⁸⁰

Actual authority to use force or to commit a wilful tort was found in a number of cases. In contrast to the *Brackman* case, above,⁸¹ the court in *Illinois Central Ry. Co. v. King*⁸² found that a railroad brakeman was authorized to eject trespassers, and he made the company liable when he used excessive force in doing so. The plaintiff, a thirteen year old boy, had attempted to board a freight car. The brakeman pulled the boy off, and then hit him with a thrown rock, causing the boy to fall beneath the wheels, crushing his leg. The court found that all of the servants of the defendant had been expressly instructed to stop the train and put off any person who attempted to ride the train without payment of fare. The fact that the servant used excessive force in executing his authority did not place the act outside of his employment. The court said:

⁷⁸ *Id.* at 147. See *Illinois Central Ry. Co. v. Andrews*, 78 Ill. App. 80 (2d Dist. 1898) (dictum).

⁷⁹ 74 Ill. App. 556 (4th Dist. 1897).

⁸⁰ In *Kehoe v. Marshall Field & Co.*, 141 Ill. App. 140 (1st Dist. 1908), a private detective stationed at the defendant's store accused the plaintiff of stealing, and assaulted her. Taking a highly restrictive view, the court said that authority to do general detective work did not impart authority to arrest or assault suspected persons.

⁸¹ *Supra* note 77.

⁸² 77 Ill. App. 582 (4th Dist. 1898), *aff'd*, 179 Ill. 91, 53 N.E. 552 (1899).

When a servant is doing an act falling within the scope of his employment, if he also wreaks his vengeance on the person or thing he is dealing with, it is absolutely impossible to determine where the sense of duty terminates and the thirst for vengeance commences, and hence the law holds the master responsible for the acts as a unit,⁸³

In an 1899 case, *Alton Ry. Illuminating Co. v. Cox*,⁸⁴ a special policeman was authorized to keep all persons out of a park at certain hours. In trying to keep the plaintiff and his family out of the park, an argument ensued and the employee struck the plaintiff with a stone. A finding that the servant was within the scope of his employment was affirmed. The policeman had specifically been authorized to use force as part of his job. That he had exceeded the amount needed did not relieve the employer of liability.

Another case where authority to commit the wilful tort was found was *Kovatch v. Ross*.⁸⁵ There, the employee was a policeman employed by the railroad to protect its property. If he caught anyone destroying or carrying away the railroad's property, he was expressly authorized to cause that person's arrest. The policeman saw the plaintiff taking some grass from the defendant's right of way, which the plaintiff claimed was customarily permitted. The policeman chased him and shot him. The appellate court overturned a directed verdict for the employer and ruled that since the servant was authorized to arrest, and since he was attempting to arrest the plaintiff when he was shot, the jury could find that the servant was acting within the scope of his employment.⁸⁶

A liberalization in attitude was shown in a number of early cases where the courts found that, although the servant did not

⁸³ 77 Ill. App. at 589. See *Devine v. Chicago City Ry. Co.*, 141 Ill. App. 583 (1st Dist. 1908), *aff'd*, 237 Ill. 278, 86 N.E. 689 (1908) (conductor); and *Taneski v. St. Louis Merchant's Bridge Terminal Ry. Co.*, 230 Ill. App. 300 (4th Dist. 1923) (yard watchman).

⁸⁴ 84 Ill. App. 202 (4th Dist. 1899). *Accord*, *Illinois Steel Co. v. Novak*, 84 Ill. App. 641 (1st Dist. 1899), *aff'd*, 184 Ill. 501, 56 N.E. 966 (1900).

⁸⁵ 230 Ill. App. 330 (4th Dist. 1923).

⁸⁶ See also *Dean v. Chicago & Northwestern Ry. Co.*, 183 Ill. App. 317 (1st Dist. 1913) (Abstr.) (refusal to serve Negro); *Busick v. Illinois Central Ry. Co.*, 201 Ill. App. 63 (3d Dist. 1915) (special policeman arrested and assaulted apparent trespasser). The court in *Kovatch* distinguished *Haynie v. Illinois Central Ry. Co.*, 194 Ill. App. 113 (4th Dist. 1915) (Abstr.), in which it was shown that the railroad employee's duties were specifically limited to questioning suspected trespassers and notifying the watchman if they did not leave. The railroad was found not responsible when the employee shot and killed a fleeing trespasser.

have express authority to commit the wilful act, the nature of his position gave him incidental authority to perform the act. Thus, in *West Chicago St. Ry. Co. v. Luleich*,⁸⁷ a conductor accused the plaintiff of giving him a counterfeit dollar and caused his arrest. The dollar was apparently legitimate and the plaintiff was released. There was no evidence that the conductor had any express authority to arrest passengers. However, the court reasoned that the company itself had the power to expel from its trains persons who were disorderly and persons who refused to pay their fares; that the defendant, being a corporation, could only exercise its power by its agents; that the conductor, being in charge of the train, must therefore be the one who had the power.

A good statement of the theory of incidental authority is found in *Chicago, Milwaukee & St. Paul Ry. Co. v. Doherty*,⁸⁸ where an engineer threw a piece of coal at a boy and knocked him off the train. Said the court:

The engineer was in the possession, management and control of the engine, and he is to be presumed to have the powers commonly exercised by that class of servants. Nothing is more common than for courts to take notice of the power and duties of conductors, engineers and other agents where common observation and experience furnishes knowledge of what they are. Placing the engineer in the management and control of the engine could imply, in the absence of proof to the contrary, power to keep trespassers off from it and we cannot doubt that he was acting within the scope of his employment in what he did.⁸⁹

As was discussed in the first part of this article, there is a split of authority on the liability of the employer of a bill collector who loses his temper and assaults a debtor, though there is more agreement on liability where the employee is sent to recapture chattels and uses excessive force. In the latter case, the job involves the use of force, or at least is not uncommonly accompanied by force; in the former, in order to find liability the court must recognize the "overzealous acts for the master's benefit" theory.

The three recapture cases in Illinois have presented a progression from a narrow view of scope of employment to a recogni-

⁸⁷ 85 Ill. App. 643 (1st Dist. 1899).

⁸⁸ 53 Ill. App. 282 (2d Dist. 1893).

⁸⁹ *Id.* at 286. See also *North Chicago City Ry. Co. v. Gastka*, 128 Ill. 613, 21 N.E. 522 (1889); *George v. Illinois Central Ry. Co.*, 197 Ill. App. 152 (4th Dist. 1915); *but cf.* *Pinkerton v. Gilbert*, 22 Ill. App. 568 (1st Dist. 1887).

tion that force is an incident to the position and therefore within the scope of employment. In *Titcomb v. James*,⁹⁰ Titcomb, a partner in Titcomb & Pratt, ordered an employee to repossess some furniture. The employee sent for the other partner, Mr. Pratt, before retaking the goods, but the two of them thereafter maliciously assaulted the plaintiff. It was held that Titcomb was not responsible for the acts of his employee nor for those of his partner, since he had not authorized them to assault the plaintiff. The court apparently required a showing of express authority to assault.

On the other hand, in *Roman v. Silbertrust*,⁹¹ the court indicated in dictum that evidence that the servants of the defendant were instructed to reclaim furniture and assaulted the plaintiff in the process of doing so would render the defendant liable. The progression was completed in *Carlberg v. Spiegel Home Furnishing Co.*⁹² The defendant company had sold furniture to Frank Troutman, who paid some installments and then moved. His wife was the plaintiff's daughter. The defendant's crew were sent to the plaintiff's home with directions to obtain the money owed or to bring back the goods. When told that Troutman was not there, one of the crew demanded that he be allowed to search the house. The servant threw himself against the door, jammed the plaintiff between the wall and the door, and held her there by force while the other men searched the house. Nothing was found. The appellate court affirmed a verdict for the plaintiff for \$1000 for forcible entry and assault, holding that the wilful acts were performed in the line of the servant's employment and under the instructions of the employer. In other words, the servants had been authorized to recapture the chattels, a job which might necessarily require the use of some force as an incident, and the fact that the servants exceeded the force required would not inure to the master's benefit.⁹³

In the bill collection cases, two cases have found that the

⁹⁰ 57 Ill. App. 303 (1st Dist. 1894).

⁹¹ 159 Ill. App. 485 (1st Dist. 1911).

⁹² 178 Ill. App. 424 (1st Dist. 1913).

⁹³ Cf. *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455, 29 Am. Rep 43 (1877) (servant took machine back from plaintiff under employer's instructions; employer liable for forcible entry and punitive damages).

servants had abandoned their employment when they committed assaults, while one case applied the "overzealous servant" theory and found the employer liable. The cases are not necessarily contradictory, however.

In the first case, *Callahan v. Hyland*,⁹⁴ the servant, Gegan, was sent to collect an installment from Mrs. Hathaway. Mrs. Hathaway insisted that she had already paid, and stated that the plaintiff, her landlady, could help her prove it. They went up to the plaintiff's apartment, where the plaintiff vouched for the fact that the bill had been paid. The employee, who was drunk, became abusive in his language and the plaintiff asked him to leave. Mrs. Hathaway left, but Gegan remained outside the plaintiff's door. Gegan turned to the plaintiff and said that he had come to get money so he would get a little money out of her, and he commenced beating the plaintiff. A directed verdict for the defendant was granted in the trial court and the appellate court affirmed, holding that Gegan was outside the scope of his employment.

In *Callahan*, the servant could not be said to have been acting for the master's benefit in attacking the plaintiff, since she was not the debtor nor directly involved. The servant's drunkenness, and his apparent intent to rob the plaintiff, indicate that he was acting solely for his own purposes, and the master would not have been liable even under the "overzealous servant" theory.

In a 1908 case, *Klugman v. Sanitary Laundry Co.*,⁹⁵ the complaint alleged that the defendant's laundryman, while delivering a package of laundry, accused the plaintiff of defrauding the defendant, used vile and opprobrious language, threw her on the floor and struck her. The court held that the complaint was insufficient to charge the defendant with liability. "It is entirely consistent with the allegation of the declaration that the servant beat the plaintiff because he had a quarrel with her, and that he was not doing nor attempting to do any act in the prosecution of the business of the defendant, in the line of his employment, when he made the assault."⁹⁶ Thus, the case was decided on a pleading

⁹⁴ 59 Ill. App. 349 (1st Dist. 1895).

⁹⁵ 141 Ill. App. 422 (1st Dist. 1908).

⁹⁶ *Id.* at 425-6.

point and it is possible that if the plaintiff had better detailed the nature of the argument to show that the dispute was connected with payment of the laundry charges the court might have sustained the complaint.

The "overzealous servant" theory was applied in *Ziegenhein v. Smith*,⁹⁷ and liability was sustained when a servant, sent to collect a bill, but told by the debtor that the payment was not yet due, pulled the plaintiff from the door and threw him against a bannister. The court said:

Was the agent, Slack, at the time of the assault, acting in good faith in the line of his employment for the furtherance of the business in which he was engaged and the interest of those by whom he was employed? He was sent to the house of appellee to collect money claimed by appellants to be due them. Meeting with some opposition in making his collection *he became overzealous*, attempted to enter the house, threw appellee inside and injured her. There was no proof that appellants, or any of them, instructed their agents to commit the assault, but he was at the time undoubtedly attempting, in good faith, in his own way, to carry out the purpose for which he was sent. Under such circumstances there can be no doubt of the liability of the principal for the act of the servant.⁹⁸

Another group of Illinois cases have involved situations where a person, not in a custodial position, and not actually authorized to force, acted for the master's benefit to protect his property. Though several cases have sustained liability on the theory of incidental authority, these cases probably fit better under the theory used in *Ziegenhein*—overzealous acts of the servant for the benefit of the master.

Thus, in *Field v. Kane*,⁹⁹ an usher in the defendant's store accused the plaintiff of stealing, seized her, took her to a room and searched her. There was no showing that the usher's duties expressly included protection of the property in the store, but it is clear that the servant was overzealously acting for the benefit of the master, who was found liable. Likewise, in *Vrchootka v. Rothschild*,¹⁰⁰ a salesman in the defendant's store accused the plaintiff

⁹⁷ 116 Ill. App. 80 (4th Dist. 1904).

⁹⁸ *Id.* at 82. See *McKay v. Irvine*, 10 Fed. 725 (N.D. Ill. 1882) (jockey struck competing jockey).

⁹⁹ 99 Ill. App. 1 (1st Dist. 1901).

¹⁰⁰ 100 Ill. App. 268 (1st Dist. 1902).

of stealing, and searched him and took him to the police. The court sustained liability, and stated:

The arrest was for purposes of searching for and recovering the master's property, not with the objective of punishing crime against the public The servant here was salesman and custodian in one. Whatever the master might do in the protection of his property he expected his servant to do in his absence If in the performance of his duty he mistook the occurrence for it, or exceeded his power, or employed an improper degree of compulsion, the mistake and the excess must be answered for by the master.¹⁰¹

*Metzler v. Layton*¹⁰² is one of the few Illinois Supreme Court cases involving wilful torts of servants. There, robbers invaded the office of a loan company, of which Layton was manager. Layton and the plaintiff, a messenger boy, were locked in a closet. They later escaped. Layton got a pistol and chased after the robbers. Mistaking the plaintiff for a robber, Layton shot the plaintiff twice. The court sustained a jury's verdict for the plaintiff, finding that the servant was acting primarily for the purpose of protecting the master's property.

Where the servant's wilful act has arisen from a job connected argument, most of the Illinois cases have not found liability unless there was a showing of actual authority. However, one fairly recent case seems to indicate a relaxation in the requirement.

In an early case, *Horecker v. Pere Marquette Ry. Co.*,¹⁰³ the plaintiff went to the defendant's depot to put his wife and son on a train. The servant, a gateman, told the plaintiff that he would have to buy a full fare ticket for his son. An altercation followed and the plaintiff demanded to see the superintendent in order to complain about the servant's conduct. The plaintiff did make a complaint. Later, the servant, on his lunch hour, went through the waiting room, saw the plaintiff, and asked the nature and result of the plaintiff's complaint. The argument grew heated,

¹⁰¹ *Id.* at 271, quoting *Staples v. Schmid*, 18 R.I. 224, 231, 26 Atl. 193, 196 (1893). See *Coolahan v. Marshall Field & Co.*, 159 Ill. App. 466 (1st Dist. 1911); *but cf.* *Waters v. West Chicago St. Ry. Co.* 101 Ill. App. 265 (1st Dist. 1902).

¹⁰² 373 Ill. 88, 25 N.E.2d 60 (1940). Compare *Shannessy v. Walgreen Co.*, 324 Ill. App. 590, 59 N.E.2d 330 (1st Dist. 1945), discussed *infra* at note 106.

¹⁰³ 238 Ill. App. 278 (1st Dist. 1925). See *Buckley v. Edgewater Beach Hotel Co.*, 247 Ill. App. 239 (1st Dist. 1928).

and the servant and another gateman, also off duty, brutally assaulted the plaintiff.

The appellate court ruled that a directed verdict should have been given for the defendant. It emphasized that the servant's duties were merely to inspect tickets at the gate, apparently inferring that there was no authority to use force. The court also emphasized the fact that the servant was off duty, at lunch, at the time of the assault, and stated that the injuries were inflicted "in a spirit of vindictiveness, or to gratify personal animosity or to carry out an independent purpose of their own" ¹⁰⁴

It would seem that the court placed undue emphasis on the fact that the gateman was on his lunch hour. A servant may perform many acts for the master's benefit, or even as part of his duties, on his own time. ¹⁰⁵ For example, if the manager in the *Metzler* case had been on a coffee break or at lunch when he saw what looked like a hold-up, would there be any question of liability if the manager committed a false arrest or a mistaken assault? As for the question of benefit to the employer, although the gateman was not authorized to use force as part of his job, it is clear that the argument itself—concerning the validity of half fare status for the plaintiff's son—was for the master's benefit, and the argument and the ensuing assault grew out of the servant's performance of his duties.

In *Shannessy v. Walgreen Co.*, ¹⁰⁶ the defendant's servant was the manager of a drug store. The plaintiff and his friend came

¹⁰⁴ 238 Ill. App. at 283.

¹⁰⁵ "There is, however, authority for the proposition that the relation of employer and employee does not necessarily begin or terminate the instant the particular duties the employee has to perform begin or end. Thus, it has been held that where the employee begins a quarrel while acting within the scope of the employment, and immediately follows it up by a violent assault, his employer will be liable for that assault, since the law, under the circumstances, will not undertake to determine when, in the course of the assault, the employee ceased to act as such and acted upon his own responsibility." 6 Am. Jur. 2d, *Assault & Battery* § 142 (1963). See also Annot., 34 A.L.R.2d 372, 435 *et seq.* (1954). See, e.g., *Rakowsky v. United States*, 201 F. Supp. 74 (E.D. Ill. 1961) (lunch); *Becker v. Brummel*, 319 Ill. App. 499, 48 N.E.2d 419 (1st Dist. 1943) (eating and drinking in a tavern while looking for a customer); *Flood v. Bitzer*, 313 Ill. App. 359, 40 N.E.2d 557 (4th Dist. 1942) (dropping off a part on his way to his fiancée); *East St. Louis Connecting Ry. Co. v. Reames*, 75 Ill. App. 28 (4th Dist. 1897), *aff'd*, 173 Ill. 582, 51 N.E. 68 (1898) (lunch); *cf.* *Turnbow v. Hayes Freight Lines*, 15 Ill. App. 2d 57, 145 N.E.2d 377 (1957) (driving to motel to go to sleep).

¹⁰⁶ 324 Ill. App. 590, 59 N.E.2d 330 (1st Dist. 1945).

into the store for coffee at 3:30 a.m. While the plaintiff was in the washroom, the manager approached the companion and said: "I just as soon you didn't come in. Every time he comes in here he causes trouble. The last time he was in here, he stole a hot water bottle or electric heating pad. If he comes in here again I will hit him with a baseball bat." After the two boys left, the plaintiff was told what the manager had said. He started back into the store. The manager yelled for him to "get the hell out of here," and then, true to his word, he picked up a baseball bat and struck the plaintiff three times, breaking his arm.

The appellate court overturned the trial court's verdict for the plaintiff and ruled that the defendant should have received a directed verdict, since the manager's act was either through fear of violence by the plaintiff or in resentment over the previous misconduct of the plaintiff, or in punishment for it, and he was not engaged in protecting the defendant's property from theft or damage or in recovering property which had been stolen.

It would seem that the court in *Shannessy* also took an overly restrictive view of scope of employment. If the manager's motives for attacking were important, as the court indicated by its suppositions as to what they were, shouldn't the determination of that motive have been left to the trier of fact? The jury might have felt that since the plaintiff was known to the manager to be a trouble maker the manager was motivated by a desire to protect the store and its property by trying to keep the plaintiff out. Under an extended view of *respondeat superior*, a court could reasonably conclude that the argument grew out of the manager's performance of his duties—keeping an undesirable person out of the store.

The liberal Illinois decision previously referred to is *Bonnem v. Harrison*,¹⁰⁷ in which Rodgers, an employee of a service station owner, was sent to an automobile agency to purchase a light switch needed for repairing an automobile. The servant testified that while he was inside the office of the automobile agency, the plaintiff, an employee of the dealer, yelled to him to move his car. The servant offered the plaintiff the keys and told him to move the

¹⁰⁷ 17 Ill. App. 2d 292, 150 N.E.2d 383 (2d Dist. 1958).

car himself. The plaintiff replied "Big boy, come on and let us get the car the hell out of here." Rodgers moved the car, returned to the office and told the plaintiff that he should be more careful how he spoke to customers, and that he should have asked his name. The plaintiff replied, "I don't give a damn about your name and that is all I say about you black boy," at which point Rodgers struck the plaintiff with a broom.

The Appellate Court for the Second District overturned a directed verdict for the defendant and ruled that the issue of scope of employment should have been decided by the jury. Quoting from *American Jurisprudence*, the court stated:

Whether the extent of his departure from the scope of his employment, or the area of his service, was so unreasonable as to make of his act of deviation an independent journey of his own, rather than a mere detour or one incidental to his employment, is a question of degree which depends on the facts of the case and is a matter for the determination of the jury, unless the deviation is so great, or the conduct so extreme, as to take the servant outside the scope of his employment and make his conduct a complete departure from the business of the master. When the deviation and its purpose are not in dispute, and it appears beyond reasonable controversy that the purpose had no connection with the duties of the servant, there is no liability, and it is the duty of the court to dismiss the action or direct a verdict, or, if a verdict has been rendered in favor of the plaintiff, to set it aside on motion. On the other hand, in cases where the deviation is slight and not unusual, the court may, and often will, as a matter of law, determine that the servant was still executing his master's business. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions.¹⁰⁸

The court concluded that Rodger's acts and motives did not, beyond reasonable disagreement, indicate a complete departure from the employment, and "whether or not his action was a departure from his employment or was his own method of furthering his employer's interest, no matter how poorly conceived, was a proper question for the jury to determine."¹⁰⁹

However, the most interesting part of the decision is found in the following language:

The defendant-employer had a chance to judge and pass upon Rodger's qualifications and the duties to be imposed upon him,

¹⁰⁸ *Id.* at 298, 150 N.E.2d at 386.

¹⁰⁹ *Id.* at 299, 150 N.E.2d at 386.

prior to employment. The employer must have known his temperament, his mentality and his capacity to act under stress and unusual circumstances and, having selected him as his employee, he sent him out into the world to act in his behalf. He should, therefore, be responsible for his acts committed in and during the course of his employment, and while acting within the scope of his authority. Whether or not he was so acting at the time in question is a very disputed question of fact which should have been submitted to the twelve judges of fact, the jury.¹¹⁰

This opinion comes very close to adopting the theory underlying the decisions, previously discussed,¹¹¹ which found liability for all injuries arising out of arguments in the course of the servant's employment. The dispute would seem to have been largely personal, growing out of the frustration by the servant at having to move his car and over a racial slur. Yet, the court seems to say that since the servant's employment exposed him to the conditions which led to the assault, and it would not have happened but for the employment, the jury could validly find that the action was within the scope of the servant's employment.¹¹²

Where the servant's act is purely personal, though committed during working hours, except for the *Bonnem* case, the Illinois decisions agree that the servant is outside the scope of his employment as a matter of law and the master will not be liable unless he ratifies, is himself at fault, or owed the plaintiff a non-delegable duty.

Thus, in *Ulrich v. Knickerbocker Ice Co.*¹¹³ and *Mozk v. Chicago City Ry. Co.*,¹¹⁴ drivers of carts struck at small boys running near their wagons, not shown to be trying to get on. In *Schindler v. Link Belt Mach. Co.*,¹¹⁵ a guard assigned to protect employees on the way home during a strike got into a purely personal altercation with a person not connected with the strike. And in *Apex Smelting Co. v. Burns*,¹¹⁶ a guard went berserk and

¹¹⁰ *Id.* at 300, 150 N.E.2d at 387.

¹¹¹ *Supra* at notes 51 *et seq.*

¹¹² *Cf.* C.A. *Dunham Co. v. Industrial Comm'n*, 16 Ill. 2d 102, 156 N.E.2d 560 (1959), adopting a broad "but for" test for "arising out of the employment" in workmen's compensation cases.

¹¹³ 191 Ill. App. 337 (1st Dist. 1915) (Abstr.).

¹¹⁴ 80 Ill. App. 411 (1st Dist. 1898).

¹¹⁵ 197 Ill. App. 373 (1st Dist. 1916) (Abstr.).

¹¹⁶ 175 F.2d 978 (7th Cir. 1949). See *Ewald v. Piolet Scrap Iron & Metal Co.*, 310 Ill. App. 218, 33 N.E.2d 930 (1st Dist. 1941) (watchman in junk yard called plaintiff into the yard, cursed him and hit him with a revolver); *Shein v. John R. Thompson Co.*, 225 Ill. App. 490 (1st Dist. 1922) (Plaintiff struck by a plate thrown by the defendant's servant while plaintiff seated in defendant's lunch room).

set fire to the plaintiff's plant. In each of these cases it was ruled that the servant was outside the scope of his employment as a matter of law.

The doctrine of ratification has been asserted as a basis of liability in several cases, without success thus far. In each of the three Illinois cases, the alleged act of ratification was the retention of the employee in the master's employment after the commission of a personal and wilful tort. In *Buckley v. Edgewater Beach Hotel Co.*,¹¹⁷ the employee was a security guard at a hotel, charged with keeping the premises free from disorderly conduct. He got into an argument, apparently personal in nature, which culminated in a free-for-all fight. After first finding that the intentional assault was without the scope of the guard's employment, the court ruled that the mere retention of the servant for a period of time after the improper act did not constitute a ratification by the master. The court delimited what would be required to show ratification by saying:

It is true that a principal, while not present, may ratify the acts of his servant so as to become personally liable. In our opinion there must be some such affirmative act as would indicate an expressed intention to concur in the acts of the servant. We do not believe that the mere retention of a servant alone would be sufficient.¹¹⁸

The theory of negligent hiring has likewise found limited application in Illinois. The theory was asserted in *Pascoe v. Meadowmoor Dairies*,¹¹⁹ without success. There, the servants, helpers on dairy products delivery trucks, went on a drinking binge after finishing work and later returned to a delicatessen on the route of one of them. They there robbed and raped the owner's wife and fourteen year old daughter, and one of them shot the wife several times. Testimony was offered that the servants were often intoxicated, the servants themselves admitting that they were drunk at least two times a week. The plaintiffs charged that the defendants were negligent in retaining the servants with knowledge of their dangerous propensities, and they specifically

¹¹⁷ 247 Ill. App. 239 (1st Dist. 1928).

¹¹⁸ *Id.* at 246. *Accord*, *Neville v. Chicago & Alton Ry. Co.*, 210 Ill. App. 168 (1st Dist. 1918) (Abstr.); *Wilkinson v. Hart's Drive-In*, 338 Ill. App. 210, 86 N.E.2d 870 (2d Dist. 1949) (Abstr.).

¹¹⁹ 41 Ill. App. 2d 52, 190 N.E.2d 156 (1st Dist. 1963).

acknowledged that liability was not sought under the doctrine of *respondeat superior*. The appellate court found that there was no basis for concluding that the defendants could anticipate any harm to the plaintiffs by their act of hiring and retaining the two servants. Justice Burke stated:

The defendants, as reasonable men, could not have foreseen that Davenport and Fields, who according to the plaintiff's evidence were steady workers over a long period of time and whose only vice was that they were addicted to drinking intoxicating liquor to excess, would suddenly and without any apparent reason embark on an orgy of rape, robbery and attempted murder.¹²⁰

The concept of non-delegable duty has been used in several cases to support judgments against quasi-public utilities and business entities.¹²¹ In *Callaghan v. Harvey*,¹²² an innkeeper was held responsible for the unwarranted and unauthorized act of a menial servant who had a guest arrested for allegedly cutting a towel off of a hook. The court rested liability on the innkeeper's duty to provide safe premises for his guests, and said that the employer must be responsible for the wrongful act of his servant in violating the duty the hotel owed to the guest. And in *McMahon v. Chicago City Ry. Co.*,¹²³ liability was based on the carrier's duty to protect

¹²⁰ *Id.* at 58, 190 N.E.2d at 159. In *Ewald v. Pielet Scrap Iron & Metal Co.*, *supra* note 116, a junk yard watchman called the plaintiff into the yard and hit him with a pistol. The plaintiff sought recovery against the employer under the theory of *respondeat superior*. The plaintiff offered testimony, however, that the watchman was in the habit of getting drunk and had previously assaulted other persons. The court found the master not liable, and said:

If the plaintiff's theory is that the defendants are liable under the doctrine of respondeat superior, the fact that the watchman had previously assaulted someone else, at a different time and place, would throw no light on the assault in the instant case but, on the contrary, would be very prejudicial and we think that the court erred in admitting such evidence.

310 Ill. App. at 222, 33 N.E.2d at 932. The plaintiff's attorney thus learned a hard lesson. The plaintiff's complaint should have had an alternative count charging negligent hiring and retention of the dangerous servant.

¹²¹ "The defedant is liable for any injury caused to its passengers by any [assault] [abuse] [intentional harm] to them by an employee of the carrier [then on duty]." I.P.I. 100.04 (1961). See also I.P.I. 100.01 (1961).

"The [owner] [occupant] of property [owes an invitee] [owed the plaintiff] the duty to exercise ordinary care [to keep the property reasonably safe for use by the (invitee) (plaintiff)] [for his safety]." I.P.I. 120.06 (1961).

¹²² 225 Ill. App. 353 (1st Dist. 1922). *Cf. Galesburg Sanitarium v. Jacobson*, 103 Ill. App. 26 (2d Dist. 1902) (assault by servant of mental institution on patient); *Schramko v. Boston Store of Chicago*, 243 Ill. App. 251 (1st Dist. 1927) (department store liable for false imprisonment and slander of customer).

¹²³ 239 Ill. 334, 88 N.E. 233 (1909). *Accord, Chicago & Eastern Ry. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33 (1882) (brakeman punched passenger).

its customers from harm, including harm from the unauthorized acts of its servants, in that case an assault by the conductor of a street car.

A somewhat novel theory was used in *Lipscomb v. Coppage*¹²⁴ to sustain the liability of the owner of a tavern for the wilful assault and murder by a part-time bartender. Coppage was one of three bartenders employed by the defendant. Lester was the head bartender and was in charge in the absence of the owner. Coppage, who had been drinking himself, became embroiled in an argument with a patron, Lipscomb, and his wife, and he ordered them to leave. When Coppage went off duty, the argument was resumed outside the tavern. Coppage had taken a revolver with him and he shot and killed Lipscomb.

Count three of the plaintiff's complaint alleged that Lester, the supervising bartender, had permitted Coppage to become intoxicated and quarrelsome, and to display a loaded revolver, and that he knew or should have known of Coppage's violent conduct and should have prevented him from assaulting the plaintiff's intestate. There was evidence that Lester had served Coppage the liquor and had seen him take out a revolver from a fire alarm box. He also witnessed both altercations with Lipscomb.

The appellate court upheld the complaint and the verdict for the plaintiff, saying that:

The circumstances brought out in the evidence would indicate a potentiality of violence which should have been apparent to Lester. Under those circumstances a duty would then devolve upon Lester to call the police, and a violation of that duty under the doctrine of respondeat superior could be laid upon the defendant Feldman.¹²⁵

Thus, the employer was responsible not for the acts of the servant who committed the wrongful act, but for the failure of another servant to control or prevent the wrongdoer from committing the act. The duty to take action was part of Lester's job responsibilities, and his failure to act was negligence within the scope of his employment.

¹²⁴ 44 Ill. App. 2d 430, 197 N.E.2d 48 (1st Dist. 1963).

¹²⁵ *Id.* at 430r, 197 N.E.2d at 57.

CONCLUSION

The trend of decisions in the United States, and specifically in Illinois, seems clearly toward expansion of the scope of “scope of employment.” This trend validly reflects the underlying justification for *respondeat superior*—that the employer is the one best able to absorb the injured person’s losses as a risk of doing business and to pass them on to society as a whole.

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