Kentucky Law Journal

Volume 17 | Issue 2 Article 2

1929

Deviation and Departure by Servant

Elizabeth Turner Rouse

DEVIATION AND DEPARTURE BY SERVANT

Under the doctrine of "respondeat superior" the master is liable for negligent acts of his servant occurring in the course of and within the scope of his employment. This doctrine had its origin in public policy and rests on the principle that it is more just to make the person who has intrusted his servant with the power of acting in his business, responsible for injury occasioned to another in the course of so acting, than that the other and entirely innocent party should bear the loss. Clearly the liability of the master does not extend to acts done solely for the servant's own purposes. Where a servant steps aside from the master's business for however short a time to do an act disconnected from it and an injury results from such independent act, the master is not liable.[1] However, a slight deviation by the servant for his own purposes when he is on business for his master does not excuse the master though the injury occurs during the detour.[2]

The difficulty arises in determining whether the servant's act was an entire departure from the employment or only a roundabout way of doing the master's business. If there was clearly an abandonment of the master's business or if the deviation was very slight the court may determine the master's liability or non-liability; but cases falling between the two ex-

[1] *Stone* v. *Hills*, 45 Conn. 44, 29 Am. Rep. 635 (1877). This was clearly a case of departure. The defendant sent a servant on an errand of four miles, with instructions as to return route. On his arrival, the person to whom he had been sent requested him to go four miles further on business for him. The injury occurred when the servant reached his second destination, and it was held that the servant was not acting in the course of his employment. Other departure cases are: *Mitchell* v. *Crasswelller*, 13 C. B. 236 (1853): *McCarty* v. *Timmins*, 178 Mass. 378, 59 N. E. 1038 (1901); *Eakin's Admr.* v. *Anderson*, 169 Ky. 1, 183 S. W. 217 (1916); *Healey* v. *Corkrill*, 133 Ark. 327, 202 S. W. 229 (1918).

[2] In *Phelon* v. *Stiles*, 43 Conn. 426 (1876), the act causing the injury was done for the servant's own purposes but was also in the scope of his employment. The defendant flour merchant employed a servant to make deliveries for him. The servant left bags of bran by the road while he went up a side road to make a delivery, intending to take the bran on his return. His object was to save unnecessary transportation of bran in order that he might finish earlier and have time to attend to his own business. Plaintiff's horse became frightened at the bags by the road and was injured. The defendant was held liable as a matter of law. See also, *Thomas* v. *Lockwood Oil Co.*, 174 Wis. 486 (1921); *Tyler* v. *Stephan's Administratrix*, 163 Ky. 770, 174 S. W. 790 (1915).

tremes involve a question of fact for the jury.[3] It is in this third situation that the conflict arises. The question is what issues shall determine and what elements shall be considered in determining whether the deviation from the master's business has been great enough to constitute an abandonment and a frolic of the servant's own which will excuse the master from tort liability.

In 1834 the words "frolic" and "detour" were first used in *Joel* v. *Morrison*[4] by Parke, B., who ruled that "if a servant was going out of his way against his master's implied command while driving on his master's business he will make the master liable; but if he was going on a frolic of his own without being on his master's business the master will not be liable." Since this time courts have been trying to find an adequate test for determining whether the servant was on a detour or frolic at the time the injury occurred. Decisions have rested on the distance of the detour with respect to the distance the servant was supposed to go, or whether the servant originally started in his master's business, and on his purpose to return to his place of employment. Some courts have said that the circumstances of the case must determine the liability and that no definite criteria can be applied to every case.[5] A test often used is whether the servant's objective is some goal he was employed to attain.[6]

[3] *Ritchie* v. *Waller*, 63 Conn. 255, 28 Atl. 29 (1893). Defendant's servant went a few blocks out of the direct route of his master's business to have his own shoes repaired. While in the shop the team he was driving ran away and injured the plaintiff. The jury found as a matter of fact that the servant was acting in the scope of his employment and had merely deviated. See also, *International Co.* v. *Clark*, 147 Md. 34, 127 Atl. 647 (1925).

[4] 6 C. & P. 501 (1834). The plaintiff was knocked down by the negligent driving of defendant's servant. It was proved that defendant's cart was not in the habit of being driven into the city where the injury occurred. The instructions were "if the servant, on his master's business took a detour to call on a friend the master is responsible; but if he was going on a frolic of his own the master is not liable."

[5] *Edwards* v. *Earnest*, 206 Ala. 1, 89 So. 729 (1921); *Riley* v. *Standard Oil Co.*, 231 N. Y. 301, 132 N. E. 97 (1921); *Atkins* v. *Points*, 748 La. 958, 88 So. 231 (1921).

[6] *McCarty v. Timmins*, 178 Mass. 378, 59 N. E. 1038 (1901). The driver of defendant's carriage was ordered to take it to the barn. He went a short distance in the opposite direction to a saloon, leaving the horse unhitched and causing injury to plaintiff. The master was not liable, the court holding that "the rule as to the extent of the liability of the master is that if the servant was not acting for the purpose of doing his work he is not liable."

Under it the master is held responsible where the servant's dominant purpose is the performing of the master's business, though he makes a detour for purposes of his own. In other words, to hold the master liable the servant must have been acting within the course of and scope of his employment.

Most of the above mentioned criteria are clearly inadequate. It would be impossible to reconcile all the decisions, or to give a reasonable basis for using the distance test. A servant may have departed for a short distance and time and still be on a frolic,[7] or he may have taken a more roundabout route and be on a detour.[8] Clearly the master is not liable if the servant started out on business of his own,[9] but this is not a case of departure or abandonment, and does not furnish any basis for determining the master's liability where the servant deviated or departed from his employment. Likewise, if a servant, after starting out on business for his master, completely abandons it with no intention of returning, the master cannot be held liable, but this does not furnish any test for determining whether the servant has abandoned his employment or not.

The dominant purpose test is based on sound logic and if the purpose could be determined it would be a good criterion. However, it is impractical because the servant usually has a dual purpose and it is impossible to determine what was the motivating one at the time the accident occurred. The servant, wishing to relieve his master of liability, would be inclined to say he was actuated by purely personal motives at the time even though he also had his master's business in mind. On the other hand, the servant might even be on the prescribed route at the time of the injury and not intend to fulfill the errand on which he was sent. In such case the master should not be relieved of liability, yet by the above stated test he would be.

The deficiencies of the dominant purpose test may be demonstrated by the confusion and conflicting decisions in juris-

[7] See note 6, *supra*.

[8] *Cummings* v. *Republic Truck Co.*, 135 N. E. (Mass. 1922) 134. In this case the servant went four miles for purposes of his own, and was held not to have completely abandoned his employment.

[9] *Saunder's Exors.* v. *Armour & Co.*, 220 Ky. 719, 295 S. W. 1014 (1927). An employee of defendant company took one of the automobiles belonging to the company to go to his home, and when returning to work the next morning ran over the plaintiff's testator. The defendant was not liable.

dictions using it. In *Seidle v. Knop*,[10] a truck driver in the employ of the defendant digressed from the right to the left side of the road to pick up the plaintiff and by his negligent driving injured him. The court held that the driver, in going from the right to the left side of the road, abandoned his master's employment and relieved the defendant from liability. The servant had two objectives, picking up the plaintiff and completing the trip on which he had been sent, and this court held that picking up the plaintiff was the predominant one at the time of the accident. In another case[11] in the same jurisdiction it was decided that driving around a block to see a friend was a mere deviation. An early English case using the purpose doctrine allowed a driver to detour four miles.[12] In *Gulf Refining Co.v. Texarkana & Ft. S. Railway Co.*,[13] the defendant's truck driver in returning from a trip pursuant to his duty deviated from his route, intending to go to his home several blocks distant for lunch and later return to his employer's warehouse. The accident occurred during the trip home, about two blocks from his route, and the court held that his dominant purpose was still to perform the duties of his employment, and that the trip home was a mere deviation. It seems impossible to reconcile these cases and many similar ones on the basis of the dominant purpose of the driver or to say which is the correct holding. It is impossible to determine what was the driver's motive and intention at the time of the accident.

Dean Pound has said "there is a strong and growing tendency to ask, in view of the exigencies of social justice, who can best bear the loss and hence to shift the loss by creating liability where there has been no fault."[14] A broader and more elastic test is needed to meet this modern view. The basis for fixing liability suggested by Professor Y. B. Smith[15] seems to

[10] 174 Wis. 397, 182 N. W. 980 (1921).

[11] *Thomas* v. *Lockwood Oil Co.*, 174 Wis. 486, 182 N. W. 841 (1921).

[12] *Sleath* v. *Wilson*, 9 C. & P. 505 (1839).

[13] 261 S. W. 169, Tex. Civ. App. (1924).

[14] "The End of Law," 27 Harv. L. Rev. 233.

[15] "Frolic and Detour," 23 Columbia Law Review, 724. Under this test the court would be allowed greater freedom in fixing the liability. Even though the servant has gone a little beyond the place of his master's business, on a purpose of his own, the master can be held, because in view of the nature of servants this might have been expected. It is a risk the master should take.

be the one most in accord with this tendency, and also with the underlying economic principles of "respondeat superior." This test is whether the servant was in the zone of his employment at the time of the accident. The zone might be defined as the radius in which under all the circumstances the servant might be expected to go. To render the master liable the conduct of his business must have been a contributing cause of the servant's act in starting out. The real question, however, would be "whether in view of what the servant was actually employed to do it was probable that he would do what he did,"[16] rather than whether his motive at the time a master sends a servant on business in a vehicle he necessarily exposes third parties to danger both from expressly authorized acts and from such deviation as a servant would be likely to make under the circumstances. It is quite as essential that the third parties have redress for injuries occurring through negligence of the servant on the deviation as for those occurring on the direct route. It is only just that the master pay for injuries occurring in a radius where it might be contemplated from the nature of the employment and of servants in general that they would occur.

This criterion is broad enough in its scope to include various tests that have been formerly used. To determine whether the deviation was probable, whether the servant was in the zone of his employment, circumstances of location in time and space, the distance the servant was supposed to go, and the distance he actually went would be important. He must have had the furtherance of his employment in mind in starting out to render the master liable. In some cases the extent of the departure is so clearly disproportionate to the distance of the trip as to entirely remove the servant from the employment. This was true in *Fleischner v. Durgin*[17], where the servant was sent to a shop less than a mile away and drove six miles out of the way for a chain for his own use. Circumstances of travel must also be considered. If a servant is sent on a route which would not take him to a city and he goes to a crowded portion of the city, the

[16] "Frolic and Detour," supra note 15.

[17] 207 Mass. 435, 93 N. E. 801 (1911).

master should not be held. The servant takes a risk that was not contemplated by the master.[18]

In *Fleischman Company v. Howe*,[19] the plaintiff was injured when an employee of the defendant had deviated about two blocks from the route of a forty block delivery trip for the purpose of getting money from his home, and the employer was held liable. In *D'Aleria* v. *Shirey*,[20] when a servant was told to take a car to the garage and he deviated several blocks for purposes of his own the master was held liable for injuries occurring on the detour. These are typical cases. It would be impossible to say that the servant's dominant purpose in these cases at the time the injury occurred was the conduct of the master's business, yet the master should be held. Such decisions might better be based on the fact that the servant was in the zone of his employment.

There is a difference of opinion as to when a servant who has abandoned his master's business and departed on a mission of his own resumes his employment, and this difference is due to the diversity of tests for deviation and departure. The courts which hold that the primary test is the dominant purpose of the servant would logically hold that when the servant has completed the purpose for which he turned aside and is returning to his duties he is, while so returning, engaged in the business of his master. After his own purpose is accomplished his dominant purpose is usually the conduct of his employer's business. Louisiana courts have held that "when the servant, having completed the purpose for which he turned aside, is returning to resume duties, he is while so returning engaged in business for his master."[21] In *Barmore v. Vicksburg*,[22] the servant deviated two miles for a purpose not in the line of his employment. The injury occurred while returning to the prescribed route, and the master was held liable because the servant's mind

[18] *Mathewson* v. *Edison Electric Illuminating Co.*, 232 Mass. 576, 122 N. E. 743. "It should be considered that an automobile can be run over smooth ways where there is little traffic more safely and quickly than over rough roads."

[19] 213 Ky. 110, 280 S. W. 496 (1926).

[20] 286 Fed. 523 (1923).

[21] *Duffy v. Hickey*, 151 La. 274, 91 So. 737 (1922); *Cusimano* v. *Spiess Sales Co.*, 153 La. 551, 96 So. 118 (1923).

[22] 85 Miss. 426, 38 So. 210 (1905).

at the time was turned toward the furtherance of the master's business.

Professor Mechem criticises these decisions because the servant was only returning to resume his employment and had not returned.[23] But the servant's purpose at the time was to accomplish his master's business, and using the dominant purpose test there seems no logical reason for holding otherwise. The weight of authority is with Professor Mechem and supports the view that the servant does not enter the scope of his employment until the zone has been reached.[24] Where the emphasis is placed on the zone of employment rather than the servant's purpose, he is held not to have returned to his master's service "until he has at least reached a point in a zone within which his labor would have been consistent with an act of deviation merely, had the original act been such in its other circumstances as to have been one of deviation and not of temporary abandonment."[25] In other words, the master is liable only when the servant has returned to a point at which he would have been liable had the servant been starting out on the detour.

The strongest argument for the zone test is that it better harmonizes and gives a real basis for the majority rule that a servant has not necessarily entered his employment again when he has accomplished his own mission and is returning. In *Carder v. Martin*,[26] where the agent, after fulfilling his errand, set out on an independent mission wholly unconnected with the employer's business, and the injury occurred while he was returning to his employment, the employer was not held liable. The servant had no goal other than that of his employment. The holding is correct but should be based on the fact that the agent had not reached the zone of his employment. In *Riley v.*

[23] "Mechem on Agency," Sec. 1900.

[24] *Fioco* v. *Carver*, 234 N. Y. 219, 137 N. E. 309 (1922).

[25] *Dockweiler* v. *American Piano Co.*, 160 N. Y. S. 270 (1916). Defendant's servant abandoned his employment to drink intoxicants and afterwards started to defendant's garage by way of his home, as was customary. Plaintiff was injured on the way to the garage. The court held that the servant had returned to the zone of his employment.

[26] 250 Pac. (Okla.) 906 (1926).

Standard Oil Co.[27] there is dicta to the effect that a "re-entry into the master's business is not effected merely by the mental attitude of the servant. There must be a reasonable connection in time and space. It cannot be said that he again becomes a servant only when he reaches a point which he would have passed had he obeyed orders. He may choose a different way back." This dicta supports the view that the servant must be in the zone of employment and that the mere purpose of the driver cannot be the determining factor.

Kentucky courts have seemingly based their decisions on the dominant purpose of the servant. In most of the cases where there is dicta to this effect, the servant really started out on a mission of his own, and using any criteria the master would not be liable.[28] In *Wyatt* v. *Hodson*,[29] a salesman took out a car to demonstrate it to a proposed customer who was not at his office when the salesman called. The salesman then used the car for personal purposes, going one-half mile beyond the route required by service. By either the purpose test or the zone test the master would be relieved of liability, and in this case either would seem logical. As has been previously shown,[30] in *Fleischman Co. v. Howe* the holding is correct but can be better justified by the zone test than the dominant purpose test. Kentucky holds with the majority, that a servant who has abandoned his master's business does not necessarily re-enter his employment after he has accomplished his personal mission and is returning to his master's business.[31] This holding cannot be justified by the dominant purpose test, and should be based on the zone

[27] 231 N. Y. 301, 132 N. E. 97 (1921). The facts are as follows: A chauffeur went two and one-half miles to the freight yard for paint. After loading the truck he drove four blocks out of the way for purposes of his own and on his way back, before reaching the freight yard, the accident occurred. The master was held liable and this decision can be justified by the fact that he had entered the zone of employment.

[28] *Tyler* v. *Stephan's Administratrix*, 163 Ky. 770, 174 S. W. 790 (1915); *Eakin's Admr.* v. *Anderson*, 169 Ky. 1, 183 S. W. 217 (1916); *Keck's Adm'r* v. *Louisville Gas & Electric Co.*, 179 Ky. 314, 205 S. W. 452 (1918); *Saunder's Ex'rs.* v. *Armour & Co.*, 220 Ky. 719, 295 S. W. 1014 (1927).

[29] 210 Ky. 47, 275 S. W. 15 (1925).

[30] See note 19, *supra*.

[31] *Grady* v. *Greer*, 183 Ky. 675, 210 S. W. 167 (1919). A chauffeur, directed to make a certain trip and return, when nearly home went in the opposite direction on his own account. When returning, but further from home than when he abandoned his master's services, he collided with the plaintiff. The master was not liable.

test. Thus it can be seen that in most cases the holding would be the same, using the dominant purpose test or the zone test, but the latter would give a more reasonable basis for the decision.

To summarize, the zone test seems best for the following reasons:

1. It is in accord with the fundamental principles of "respondeat superior" and is best as a matter of public policy. The master is better able to bear the loss. He exposes others to danger from such deviation as a servant would be likely to make, and should bear the loss.

2. The purpose test is not adequate because so often the purpose cannot be determined, and it has led to great conflict in decisions.. The zone test does not lead to such conflict because whether the servant is in the probable radius of his employment is a question of fact that can be determined more easily than the intention of the servant.

3. This test is broad enough in its scope to include others, and to fit any circumstances of detour or departure.

4. It gives a basis for the majority rule that a servant has not necessarily entered his employment again when he has accomplished his own mission and is returning.

ELIZABETH TURNER ROUSE.

Lexington, Kentucky.