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Workmen's Compensation - Liability Under the Borrowed Servant Doctrine

Merwin M. Brandon Jr.

WORKMEN'S COMPENSATION — LIABILITY UNDER THE BORROWED SERVANT DOCTRINE

Plaintiff, widow of deceased employee, filed suit for workmen's compensation death benefits. The deceased had been borrowed from his general employer and was electrocuted while working for the special employer.[1] The district court imposed liability upon the insurers of both employers in solido. The court of appeal reversed the judgment and held only the borrowing employer's insurer liable, basing its decision on the "Borrowed Servant Doctrine." On rehearing[2] the Supreme Court reinstated the district court judgment holding both insurers liable in solido. The general as well as the special employer was held liable by virtue of the hiring contract, since the special service of the loaned employee also arose out of his employment with the general employer. *Humphreys v. Marquette Casualty Company*, 103 So.2d 895 (La. 1958).

Sometimes an employer will lend his employee to another person without terminating the original employment contract. When the borrowing person has the right to control the worker, and the employee has consented to the lending arrangement, a borrowed servant situation comes into existence.[3] The question then arises whether the general employer, special employer, or both will be liable for workmen's compensation payments. Generally, the courts have held only the special employer liable, employing the control test of the borrowed servant cases to determine this liability.[4] Historically, the borrowed servant doctrine

1. Throughout the Note, the lending employer will be referred to as the general employer, and the borrowing employer as the special employer.

2. On the first hearing, the Supreme Court held that the borrowed servant doctrine was applicable, citing Benoit v. Hunt Tool Co., 219 La. 380, 53 So.2d 137 (1951), as enunciating the doctrine as applied in Louisiana.

3. Carnes v. Industrial Comm'n, 73 Ariz. 264, 240 P.2d 536 (1952); Stroud v. Zurich, 271 S.W.2d 549 (Mo. 1954) (driver leased with truck killed, no consent to change of employers, deceased not borrowed servant); Schepp v. Mid City Trucking Co., 291 S.W.2d 633 (Mo. App. 1956) (no control and no consent by employee — no borrowed servant); Shamburg v. Shamburg, 153 Neb. 495, 45 N.W.2d 446 (1950); Traders & General Ins. Co. v. Jaques, 131 S.W.2d 133 (Tex. Civ. App. 1939); Cayll v. Waukesha Gas & Elec. Co., 172 Wis. 554, 179 N.W. 771 (1920). See Mitchell v. East Nantmeal Township, 181 Pa. Super. 482, 124 A.2d 150 (1956). See 1 LARSON, WORKMEN'S COMPENSATION § 48 (1952); MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 57 (1951); Comment, 26 CALIF. L. REV. 370 (1938).

4. Carnes v. Industrial Comm'n, 73 Ariz. 264, 240 P.2d 536 (1952); Byrne Doors, Inc. v. State Industrial Comm'n, 193 Okla. 541, 145 P.2d 754 (1944); Crutchfield v. Melton, 270 P.2d 642 (Okla. 1954) (loaned bulldozer operator killed by lightning, special employer had control, liable); Wall v. Penn Lumber & Millworks, 171 Pa. Super. 512, 90 A.2d 273 (1952); Hoffman v. Montgomery County, 146 Pa. Super. 399, 402, 22 A.2d 762, 763 (1941) ("Where it is established that

evolved from tort law. In tort law, *respondeat superior* was used to hold the master liable for the acts of his servant.[5] The control test, which imputed the fault of the servant to the master, was utilized to determine whether *respondeat superior* would be applied to a particular situation.[6] The possibility of a man having two masters was specifically denied.[7] Thus when a servant was loaned, and committed a tort, the control test was applied to determine liability. The courts found either the special or general employer liable, depending on the control over the servant.[8] The application of the control test in borrowed servant situations became known as the "borrowed servant doctrine."[9] Not all

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the temporary master has control over the work to be done and the manner of doing it, he alone is liable for compensation"); Tarr v. Hecla Coal & Coke Co., 265 Pa. 519, 109 Atl. 224 (1920).

5. PROSSER, TORTS 350, § 62 (2d ed. 1952): "The idea of vicarious liability was common enough in primitive law. Not only the torts of servants and slaves, or even wives, but those of inanimate objects, were charged against their owner. The movement of the early English law was away from such strict responsibility, until by the sixteenth century it was considered that the master should not be liable for his servant's torts unless he had commanded the particular act. But soon after 1700 this rule was found to be far too narrow to fit the expanding complications of commerce and industry, and the courts began to revert to something like the earlier rule, under the fiction of a command to the servant 'implied' from the employment." The master was held liable because: "he has a fictitious 'control' over the behaviour of the servant . . . . [This is] in accord with the general common law notion that one who is in a position to exercise some general control over the situation should bear the loss."

6. Dixie Machine, Welding & Metal Works v. Boulet Transp. Co., 38 So.2d 546 (La. App. 1949); Billig v. Southern Pacific Co., 189 Cal. 477 (1922); Cotter v. Lindgren, 106 Cal. 602, 39 Pac. 950 (1895); Gorden v. Byers Motor Car Co., 309 Pa. 453, 164 Atl. 334 (1932). PROSSER, TORTS 352, § 63 (2d ed. 1952): "But his [the master's] vicarious liability, beyond any conduct of his own, extends to the tortious conduct of the servant within the 'scope of the employment' . . . . [This] refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though improper ones, of carrying out the master's orders."

7. Atwood v. Chicago, R.I. & P. Ry., 72 Fed. 447, 455 (W.D. Mo. 1896) ("It is a doctrine as old as the Bible itself, and the common law of the land follows it, that a man cannot serve two masters at the same time; he will obey the one and betray the other. He cannot be subject to two controlling forces which may at the time be divergent"); Laugher v. Pointer, 5 B. & C. 547, 108 Eng. Rep. 204, 208 (1826) ("The coachman or postillion cannot be the servant of both. He is the servant of one or the other, but not the servant of one and the other.").

8. C. W. Greeson Co. v. Harnischfeger Corp., 231 La. 934, 93 So.2d 221 (1957); Miller v. B. Lewis Contractors, Inc., 103 So.2d 592 (La. App. 1958); Gallagher Transfer & Storage Co. v. Public Service Co., 111 Colo. 162, 138 P.2d 926 (1943); Kessler v. Bates and Rogers Const. Co., 155 Neb. 40, 50 N.W.2d 553 (1951); Falk v. Unger, 33 N.J. Super. 589, 111 A.2d 283 (1955); Jackson v. Joyner, 236 N.C. 259, 72 S.E.2d 589 (1952); Joachim v. Hawkins, 311 P.2d 953 (Okla. 1957); Hopfer v. Staudt, 207 Ore. 487, 298 P.2d 186 (1956); Minogue v. Rutland Hosp. Inc., 119 Vt. 366, 125 A.2d 796 (1956).

9. B. & G. Crane Service, Inc. v. Thomas W. Hooley and Sons, 227 La. 677, 80 So.2d 369 (1955); Benoit v. Hunt Tool Co., 219 La. 380, 389, 53 So.2d 137, 140 (1951) ("It is a well settled principle of law that the master is liable for the torts of his servant committed in the scope and course of his employment, but it is often difficult where two masters are involved to determine which is liable for the

courts have employed the control test in borrowed servant cases; some courts have employed the "whose business" test instead.[10] Under this test liability is imposed on the employer whose business is being furthered by the acts of the employee at the time of injury.[11]

In the field of workmen's compensation, the courts have generally applied the control test in borrowed employee situations, holding the special employer alone liable for compensation by virtue of control exercised over the employee.[12] In a minority of jurisdictions, the courts have refused to apply the borrowed servant doctrine and have held both the general and special employers liable.[13] These holdings are predicated on the the-

tort, and to determine such liability we must look to the doctrine of the borrowed servant."); Wittgrove v. Green Lea Dairies, 223 S.W.2d 114 (Mo. App. 1949); Indemnity Ins. Co. of North America v. Cannon, 94 N.H. 319, 52 A.2d 855 (1947). The "borrowed servant doctrine" is frequently referred to as the loaned servant doctrine. See also Blair v. Durham, 134 F.2d 729 (6th Cir. 1943); Seward v. State Brand Division, 75 Idaho 467, 274 P.2d 993 (1954); Ishmael v. Henderson, 205 Okla. 344, 286 P.2d 265 (1955).

10. Jones v. Getty Oil Co., 92 F.2d 255 (10th Cir. 1937); Chicago & Illinois Midland Ry. v. Industrial Comm'n, 362 Ill. 257, 199 N.E. 828 (1936); Braxton v. Mendelson, 233 N.Y. 122, 135 N.E. 198 (1922); Kempkau v. Cathey, 198 Tenn. 17, 277 S.W.2d 392 (1955); Owen v. St. Louis Spring Co., 175 Tenn. 543, 546, 136 S.W.2d 498, 499 (1940) ("It is frequently a matter of difficulty to determine whether an employee . . . should be regarded as a loaned employee in the service of a special employer, or whether he should be regarded as remaining in the service of his general employer. A test running through the cases, although not always in terms noted, is indicated by the question 'In whose work was the employee engaged at the time?'").

11. It has been said that the "whose business" test and the control test are the same. See Standard Oil Co. v. Anderson, 212 U.S. 215, 221 (1909), where the court held in determining whether the special or general employer was liable that "we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work."

12. See note 4 *supra*.

13. Diamond Drill Constructing Co. v. Industrial Acc. Comm'n, 199 Cal. 694, 250 Pac. 862 (1926); Famous Players Lasky Corp. v. Industrial Acc. Comm'n, 194 Cal. 134, 228 Pac. 5 (1924); Employers' Liab. Assurance Corp. v. Industrial Acc. Comm'n, 179 Cal. 432, 177 Pac. 273 (1918); Wright v. Cane Run Petroleum Co., 262 Ky. 251, 255, 90 S.W.2d 36, 38 (1935) (after citing a number of tort cases dealing with control as determinative of liability of the special or general employer, the court said: "The Workmen's Compensation Act was neither considered nor construed, and the question here presented was not determined in any one of those cases. The principles so well and admirably stated in them do not apply to, and control, the liability of the employer and the remedy and right of the employee where they have accepted the Workmen's Compensation Act and are acting thereunder."); DeNoyer v. Cavanaugh, 221 N.Y. 273, 275, 116 N.E. 992, 992 (1917) ("The fact that a workman has a general and a special employer is not inconsistent with the relation of employer and employee between both of them and himself. . . . Thus at one and the same time they are generally the employees of the general employer and specially the employees of the special employer. As they may under the common law of master and servant look to the former for their wages and to the latter for damages for negligent injuries, so under the Workmen's Compensation Law they may, so far as its provisions are applicable, look to the one or to the other or to both for compensation for injuries

ory that liability for workmen's compensation is based upon the employment relationship. Because an employment relationship exists between the employee and the special employer as well as between the employee and the general employer, both employers should be held liable. These courts have reasoned that since workmen's compensation is a statutory remedy not based on fault liability, the common law rules of fault liability have no application in workmen's compensation cases.

In the instant case, the court, finding a borrowed employee situation, held both the general and special employers liable in solido. The decision was based on the provision of the workmen's compensation statute that an employee injured while "performing services arising out of and incidental to his [the employer's] . . . trade, business or occupation,"[14] is entitled to compensation. Since the deceased was clearly within the course of his special employment at the time he was electrocuted, the special employer was liable for compensation. The court reasoned that the liability of the special employer did not preclude the general employer from being liable if the accident also arose out of and occurred in the course of the general employment. In determining that the injury occurred in the general employment, the court applied the test adopted in *Kern v. Southport Mill*[15] and *Dobson v. Standard Accident Insurance Co.*[16] Under this test, whenever an employer calls upon an employee to render any particular service, the employer is no longer in a position to deny that services thus requested arose out of and incidental to the employment. Applying this test to the instant case the court held that the general employer could not use the employment relationship to place the employee outside the course of his employment and consequently deprive him of workmen's compensation.

The instant case in effect precludes use of the borrowed servant doctrine in Louisiana compensation cases, and aligns Louisiana with the minority position which holds the general and special employers liable in solido for compensation payments. This result appears to be sound since it eliminates the anomalous application of the control test to determine workmen's compensa-

due to occupational hazards."); Dale v. Saunders Brothers, 218 N.Y. 59, 112 N.E. 571 (1916).

14. LA. R.S. 23:1035 (1950): "The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, businesses and occupations."

15. Kern v. Southport Mill, Ltd., 174 La. 432, 141 So. 19 (1932).

16. Dobson v. Standard Acc. Ins. Co., 228 La. 837, 84 So.2d 210 (1955).

tion liability which is based upon the employment relationship without regard to fault. By applying the rule of the *Dobson* case the court also precluded the use of the "whose business" test. Under that test liability is imposed on the employer whose business is being furthered by the acts of the employee at the time of injury. In the *Dobson* case the employee was injured while performing work directed by his employer which did not further the employer's trade, business, or occupation. Nevertheless the employer was held liable for compensation. Similarly in the instant case it mattered not that the general employer's business was not being furthered at the time of injury. To prevent an employee from being faced with the predicament of either obeying his employer's order and thereby thrusting himself outside the protection of compensation, or disobeying the order and facing discharge, an employee is not deprived of compensation because of compliance with his employer's order. Furthermore, as pointed out by the dissenting opinion in the court of appeal,[17] since insurance is not required in Louisiana, relieving the general employer of liability would force the employee to look solely to the special employer who might be uninsured and insolvent.

It is submitted that the holding of the instant case is sound. Recovery of workmen's compensation benefits is predicated entirely upon the employment relationship, rather than on the irrational application of a test designed to impose fault liability, which has no place in workmen's compensation.

Merwin M. Brandon, Jr.

17. Holland v. Marquette Casualty Co., 95 So.2d 878, 887 (La. App. 1958) (dissenting opinion) (incorporated in *Humphreys v. Marquette Casualty Co.* by reference): "[I]t is not difficult to foresee unfortunate and unjust results that can occur when the employee is directed by his financially responsible employer to report to work for a financially irresponsible 'special' employer, in the course of which borrowed employment the disabling injury is sustained."