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“essentially” employees and as such protected by R.S. 23:921. It would seem that the problem in this area also relates to the proper interpretation of the statute in that the courts must decide exactly who is to be considered within the statute’s definition of employee. It appears that the courts, although using divergent reasoning, have reached the most equitable result in the majority of the partnership and association cases, but have done so at the expense of certainty. The statute, as drafted, seems to apply only to the strict employer-employee relationship, and not to a partner or associate. Interpreting the statute in this way, the courts could still reach just results in partnership and association noncompetition agreement litigation by using the reasonableness test.

In the final analysis, the perplexities of many of the non-competition clause cases could be clarified by a more uniform court interpretation of R.S. 23:921. As this is unlikely, it is suggested that the legislature amend the statute to eliminate the uncertainty surrounding its meaning. In this way the Louisiana courts would have a more efficient and workable vehicle to determine the validity of noncompetition agreements.

*James M. Duncan*

#### MASTER’S VICARIOUS LIABILITY FOR TORTS UNDER ARTICLE 2320—A TERMINOLOGICAL “TAR-BABY”

Under Civil Code article 176, “the master is answerable for the offenses and quasi-offenses committed by his servants, according to the rules which are explained under the title: *Of quasi-contracts, and of offenses and quasi-offenses.*” Thus a master’s liability for physical harm caused by the negligent conduct of his servant is governed by Civil Code articles 2315-2320, especially article 2320. It is the purpose of this Comment to examine the exact and concise distinction between the *master-servant* and *principal-agent* relationships insofar as liability for the negligent tort of a servant or a non-servant agent is concerned. A study of article 2320, its judicial “amendment” and a view of the jurisprudence in four particular areas<sup>1</sup> will emphasize the dis-

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1. The four areas that have given the courts particular difficulty deal with the liability for the torts resulting in physical injury in the following cases: the husband for the wife’s automobile accidents; the automobile dealer

inction now being made by the Louisiana Supreme Court<sup>2</sup> between masters and principals concerning their liability for the physical torts of their servants and non-servant agents, respectively.

#### *Distinction Between Servant and Non-Servant Agent*

The legal and factual distinction between a *servant* and a *non-servant* agent is an important one, for both under the Louisiana Civil Code and at common law, the *master* is liable for the torts of his *servant*, while the *principal* is not liable for the torts of a *non-servant agent* resulting in physical harm.<sup>3</sup> Article 2320 provides that "masters and *employers* are answerable for the damage occasioned by their *servants* and *overseers*, in the exercise of functions in which they are employed." (Emphasis added.) No mention is made in article 2320 of a principal's liability for the damage caused by his agent, and under the doctrine that "there is no liability in this state for damages sounding in tort except where it is expressly or impliedly authorized by the codal [*sic*] articles and statutes of the state,"<sup>4</sup> no such liability should be imposed. The Civil Code articles dealing with mandate<sup>5</sup> are found in Book III—Of the Different Modes of Acquiring the Ownership of Things—and deal with only the *contractual* nature of the principal-mandatory relationship, not the tort liability of principals for the negligent conduct of their non-servant agents.

The factual distinction between an agent and a servant is most important. The *Restatement (Second) of Agency* defines an agent as the fiduciary who acts for a principal with his consent and under his control.<sup>6</sup> Using the same agency terminology,

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for the prospective purchaser's accidents; the oil producing company for the distributor's accidents; and the state for the accidents of its convicts and prisoners.

2. See *Blanchard v. Ogima*, 253 La. 34, 215 So.2d 902 (1968).

3. RESTATEMENT (SECOND) OF AGENCY § 250 (1957): "A principal is not liable for physical harm caused by the negligent physical conduct of a non-servant agent during the performance of the principal's business . . ."

4. *Adams v. Golson*, 137 La. 363, 369, 174 So. 876, 878 (1937).

5. LA. CIV. CODE arts. 2985-3033.

6. RESTATEMENT (SECOND) OF AGENCY § 1 (1957): "(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

"(2) The one for whom action is to be taken is the principal.

"(3) The one who is to act is the agent."

a servant is defined as "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."<sup>7</sup> It is the *right to control* the physical movements of the servant in the performance of his master's business that differentiates the servant from the non-servant agent and serves as the basis for imposing liability for the servant's torts on the master. Thus a principal who neither controls nor has the right to control the details of an agent's physical movements will not be responsible for the agent's negligence while he is performing the authorized transaction.<sup>8</sup> In light of the above distinctions, it is apparent that "although a servant may possess the qualities of an agent, all agents do not qualify as servants."<sup>9</sup>

#### *Historical Development of Respondeat Superior*

A view of the differing scholarly theories on the historical development of *respondeat superior*<sup>10</sup> should accompany definitions of the terminology so that the nature of the vicarious liability imposed by article 2320 can be better understood. Holmes traced the development back through the frankpledge<sup>11</sup> of Saxon origin to the responsibility of the Roman *paterfamilias* for the torts of his slaves.<sup>12</sup> This unlimited liability arose from what had been merely a privilege of buying the forgiveness of a party offended by the slave by paying for the slave's offense.<sup>13</sup> It was extended by the praetor in some cases to the misconduct of the

7. *Id.* § 2(2).

8. *Id.* § 240, comment: "It is only when to the relation of principal and agent there is added that right to control physical details as to the manner of performance which is characteristic of the relation of master and servant that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor."

9. *Blanchard v. Ogima*, 253 La. 34, 47, 215 So.2d 902, 906 (1968).

10. The term "respondeat superior" literally means "let the master answer," BLACK'S LAW DICTIONARY 1475 (4th ed. 1951), and is used to describe the master's vicarious liability for the torts of his servants done within the scope of the servants' employment, *See, e.g.*, *James v. J. S. Williams & Son*, 177 La. 1033, 1039, 150 So. 9, 11 (1933).

11. Holmes, *Agency*, 4 HARV. L. REV. 345, 355 (1891): "[T]he master was made the pledge of his servants to hand them over to justice or to pay the fine himself."

12. *Id.* at 364: "[T]he common law has started from the *patria potestas* and the *frithborh*,—whether following or simply helped by the Roman law, it does not matter,—and that it has worked itself out to its limits through the formula of identity."

13. *Id.* at 350.

free servants of innkeepers and shipowners, masters in whom the public had special confidence.<sup>14</sup> This same extension of liability gradually developed into the identity fiction: the act of the servant is the act of the master and they are considered as one person, conferring upon the master the benefit of the act if it is right and the responsibility for it if it is wrong.<sup>15</sup> One legal writer has taken opposition to the identity fiction, stating that the basis for the rule was the public policy of holding a businessman responsible for his servant's torts to minimize the disturbance to the balance of social order.<sup>16</sup> Lord Holt, through dicta found in a series of cases beginning in 1690, made "a conscious effort to adjust the rule of law to the expediency of mercantile affairs";<sup>17</sup> thus began the modern doctrine of respondeat superior, though such reliance on dicta has not been without sharp criticism.<sup>18</sup>

#### *French and Louisiana Code Provisions*

The historical source for the respondeat superior doctrine in Louisiana is found in articles 1382-1384 of the Code Napoleon. Article 1384, which is the basis for Louisiana Civil Code article 2320, provides that "masters and trustees [are responsible], for

14. *Id.*

15. *Id.* at 351.

16. Laski, *The Basis of Vicarious Liability*, 26 *YALE L.J.* 105, 112 (1916): "If that employer is compelled to bear the burden of his servant's torts even when he is himself personally without fault, it is because in a social distribution of profit and loss, the balance of least disturbance seems thereby best to be obtained."

Laski felt that Lord Holt had created the modern theories of respondeat superior and said: "[I]t may be urged that Holt found good reason for the incisive certitude of his dicta in an age which saw so enormous a growth of corporate enterprise." *Id.* at 113.

Maitland is also critical of any "slave-master" analogy since he points out that by the end of the twelfth century slavery was practically extinct and "almost every vestige of the lord's liability had disappeared." 2 *F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW* 528 (1st ed. 1895).

Pothier felt such a policy had been established "in order to render masters cautious not to employ any but careful servants." *POTHIER, OBLIGATIONS* no. 121 (Evans transl. 1839).

17. Wigmore, *Responsibility for Tortious Acts: Its History*, in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 536 (1909).

18. T. BATY, *VICARIOUS LIABILITY* 28 (1916): "What one would like to know is the precise process by which Holt's dicta acquired the force of law between, say, 1698 and 1725 . . . . It will . . . be clear to most students that the doctrine of the employer's responsibility was due to no considered theory of civil liability, and to no survival of early medieval notions, but was derived from an inconsiderate use of precedents and a blind reliance on the slightest word of an eminent judge . . . ."

the injury caused by their servants and managers in the functions in which they have employed them . . . ."<sup>19</sup> Speaking of the exceptional nature of article 1384 that imposes liability on one through a presumption of fault, Plainol warns that "this text should receive a strict interpretation, as should all those which contain legal presumptions."<sup>20</sup>

Louisiana Civil Code articles 2315, 2317 and 2320 impose liability on the master for the servant's offenses and quasi-offenses. The Code makes one liable for the damage caused to another by his own tortious acts *and* by the tortious acts of those for whom he is answerable.<sup>21</sup> When the master-servant (or employer-employee) relationship exists within the exercise of the function in which the servant is employed, the master is liable for the servant's torts.<sup>22</sup> However, the Code limits this liability to those cases in which the master might have prevented the tortious act but did not.

The articles in the Code dealing with mandate confer on the agent, or mandatary, the legal authority to act judicially for another and to bind the principal contractually.<sup>23</sup> Since "the object of the mandate must be lawful, and the power conferred must be one which the principal himself has a right to exercise,"<sup>24</sup> the non-servant agent can bind the principal only when he acts in a legal manner in making contractual agreements. Since tortious acts of a non-servant agent resulting in physical harm are neither contractual agreements nor lawful acts which

19. FRENCH CIV. CODE art. 1384 (Barrister of the Inner Temple transl. 1824).

20. 2 PLAINOL, CIVIL LAW TREATISE no. 909A (La. St. L. Inst. transl. 1959).

21. LA. CIV. CODE art. 2315: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it . . . ."

*Id.* art. 2317: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

22. *Id.* art. 2320: "*Masters and employers* are answerable for the damage occasioned by their *servants and overseers*, in the exercise of functions in which they are employed.

"Teachers and artisans are answerable for the damage caused by their scholars or apprentices while under their superintendence.

"In the above cases, responsibility only attaches, when the *masters or employers*, teachers and artisans, might have prevented the act which caused the damage, and have not done it." (Emphasis added.)

23. *The Work of the Louisiana Supreme Court for the 1944-1945 Term—Obligations, Contracts, Mandate*, 6 LA. L. REV. 587, 596 (1946).

24. LA. CIV. CODE art. 2987.

the principal himself could perform, the Code articles on mandate should not be relied upon to create liability in the principal for the torts of a non-servant agent.

*Judicial "Amendment" of Article 2320*

In a number of early cases the last paragraph of article 2320<sup>25</sup> was strictly interpreted to restrict the application of respondeat superior to a narrow range of torts committed in the physical presence of the master, resulting generally in a verdict for the defendant-master after the plaintiff failed to allege and prove that the master might have prevented the tortious act and did not.<sup>26</sup> Several of these were suits by slave owners against the owners of riverboats onto which their slaves had absconded.<sup>27</sup> Until 1841, in order to impose liability on the ship's owner for the acts of the ship's master in such circumstances, the Louisiana Supreme Court required the allegation and proof by the slave owner that the ship owner knew of the ship master's illicit act and failed to prevent it.<sup>28</sup>

Although the supreme court applied the limitation in *Duncan v. Hawks*,<sup>29</sup> a year earlier it had expressed disfavor with such a restriction and had urged legislative change.<sup>30</sup> When such change was not forthcoming, the supreme court began a new line of jurisprudence disregarding the limitation on the master's lia-

25. *Id.* art. 2320: "In the above cases, responsibility only attaches when the masters or employers, teachers and artisans, *might have prevented the act which caused the damage*, and have not done it." (Emphasis added.)

26. *Palfrey v. Kerr*, 8 Mart. (N.S.) 503 (La. 1830); *Strawbridge v. Turner & Woodruff*, 8 La. 537 (1835), 9 La. 213 (1836); *Burke v. Clarke*, 11 La. 206 (1837); *Ware v. Barataria & Lafourche Canal Co.*, 15 La. 169 (1840); *Duncan v. Hawks*, 18 La. 548 (1841).

27. *Palfrey v. Kerr*, 8 Mart.(N.S.) 503 (La. 1830); *Strawbridge v. Turner & Woodruff*, 8 La. 537 (1835), 9 La. 213 (1836); *Duncan v. Hawks*, 18 La. 548 (1841).

28. *See, e.g., Palfrey v. Kerr*, 8 Mart. (N.S.) 503, 505 (La. 1830): "[T]he plaintiff cannot recover, because he has not shown that the defendant could have prevented the acts, from which the damages they claim are said to have resulted."

29. 18 La. 548 (1841).

30. *Ware v. Barataria & Lafourche Canal Co.*, 15 La. 169, 171 (1840): "It is said that in most cases, the restriction in the code [sic] will do away entirely with every thing like responsibility in the master or employer . . . . This may be and we believe is true, but our duty is to apply the law when its letter is clear . . . . The law, if defective, can be modified by that branch of the government whose province it is to make our laws, or amend them when experience shows their inadequacy to subserve the purposes of justice. This restriction to the liability of masters . . . was an unfortunate and unadvised departure from the Napoleon Code . . . ."

bility.<sup>31</sup> In the first of these cases, *Hart v. New Orleans & Carrollton Railroad Co.*,<sup>32</sup> the court approved the trial judge's refusal to charge the jury according to the limitation, which would have absolved the master, and noted "if the law were such as is alleged [by defendant], a master or employer could never be made responsible for the acts of his agents or servants, unless he were present and did not endeavor to prevent the act which caused the damage."<sup>33</sup>

From the strictly imposed limitation in 1841, the supreme court made a great shift toward vicarious liability. In *McCubbin v. Hastings*,<sup>34</sup> a druggist was held civilly liable for a death resulting from the injection of a toxic potion negligently prepared by his employee while the druggist was absent. The supreme court refused to apply the previous limitation and said, "we know that this has never been considered law, and that where injuries have occurred as the result of carelessness on the part of the employees of such parties, the principals have been made to respond in damages."<sup>35</sup> No cases were cited as authority for this statement, but the reason for the court's disregard of the limitation became apparent in *Nelson v. Crescent City Railroad Co.*<sup>36</sup> Quoting from Boilleaux, the court decided the limitation on liability had never applied to masters under the Code Napoleon and should not apply in Louisiana.<sup>37</sup>

The current posture of the court is reflected in the following language from *Blanchard v. Ogima*:<sup>38</sup> "the needs of society would not permit such a stringent and severe limitation of the liability

31. *Hart v. New Orleans & Carrollton R.R. Co.*, 1 Rob. 178 (La. 1841); *McCubbin v. Hastings*, 27 La. Ann. 713 (1875); *Nelson v. Crescent City R.R.*, 49 La. Ann. 491, 21 So. 635 (1897); *Anderson v. Elder*, 105 La. 672, 30 So. 120 (1901); *Weaver v. W. L. Goulden Logging Co.*, 116 La. 468, 40 So. 798 (1906); *Stanley v. Schumpert*, 117 La. 255, 41 So. 565 (1906); *Regas v. Douglas*, 139 La. 773, 72 So. 242 (1916).

32. 1 Rob. 178 (La. 1841).

33. *Id.* at 181.

34. 27 La. Ann. 713 (1875).

35. *Id.* at 717: "If it was the master who did the wrong, the master is responsible. If it was his servant who did it, he is still responsible, for the master is responsible for the acts of his servant when done in the course of his usual employment."

36. 49 La. Ann. 491, 21 So. 635 (1897).

37. *Id.* at 492, 21 So. at 635: "The commentators on that Code maintain that masters must be deemed able, by selecting careful servants, to avoid all damages arising from their acts, and hence the French jurists reach the conclusion that inability to prevent the act cannot be urged by masters, when sought to be made liable for damages caused by their servants."

38. 253 La. 34, 215 So.2d 902 (1968).



of a master for his servant."<sup>39</sup> The court concluded that the Code limitation has fallen into desuetude and is obsolete by failure of application by the courts, but cited numerous cases as establishing reasonable definitions and limitations on the master's vicarious liability.<sup>40</sup> The cases cited deal primarily with the classification of one as an employee and the "scope of employment."<sup>41</sup>

#### *Application of Article 2320 to Selected Areas*

Though purporting to follow the respondeat superior provisions of the Civil Code, the Louisiana courts have often demonstrated their misunderstanding of the crucial distinction between servants and non-servant agents.<sup>42</sup> In most cases liability has been correctly imposed upon the master because the individual in question has been an agent with servant status, but the occasional case that has held a principal liable for the physical torts of a non-servant agent is inconsistent with Civil Code article 2320 and should not be followed.<sup>43</sup> The careless and imprecise use of agency terminology by the Louisiana courts has created problems in several particular areas.

#### *Husband's Liability for Wife's Torts*

The effort of the courts to place the family's financial responsibility behind the injuries inflicted by family members while operating vehicles "has given rise to one of the most colorful chapters in American tort history."<sup>44</sup> American common law jurisdictions developed the "family purpose" doctrine to deal with the problem,<sup>45</sup> but the doctrine is not applicable in

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39. *Id.* at 43, 215 So.2d at 905.

40. *Id.* at 43-44, 215 So.2d at 905.

41. *Jones v. Shehee Ford Wagon & Harness Co.*, 183 La. 293, 163 So. 129 (1935) (employee status); *James v. J. S. Williams & Son*, 177 La. 1033, 150 So. 9 (1933) (scope of employment); *Valley v. Clay*, 151 La. 710, 92 So. 308 (1922) (scope of employment); *Godchaux v. Texas & Pac. Ry. Co.*, 144 La. 1041, 81 So. 706 (1919) (scope of employment); *McAllister v. Jackson Brewing Co.*, 6 So.2d 179 (La. App. Orl. Cir. 1942) (employee status); *Crysel v. Gifford-Hill & Co.*, 158 So. 264 (La. App. 2d Cir. 1935).

42. *See Atkins v. Points*, 148 La. 958, 88 So. 231 (1921); *Black v. Rock Island, A. & L. R.R. Co.*, 125 La. 101, 51 So. 82 (1910); *Carmouche v. Bouis*, 6 La. Ann. 95 (1851); *Taylor v. Mexican Gulf Ry. Co.*, 2 La. Ann. 654 (1847).

43. *See Taylor v. Mexican Gulf Ry. Co.*, 2 La. Ann. 654 (1847).

44. *The Work of the Louisiana Supreme Court for the 1949-1950 Term—Torts*, 11 LA. L. REV. 186, 190 (1951).

45. *See, e.g., King v. Smythe*, 140 Tenn. 217, 204 S.W. 296 (1918); Note, 38 HARV. L. REV. 513 (1925); Note, 14 TEXAS L. REV. 234 (1936); Note, 39 YALE L.J. 1058 (1930).

Louisiana.<sup>46</sup> Though the Civil Code provides for parental tort liability for the child's acts, it makes no mention of the husband's liability for his wife's torts.<sup>47</sup> In the search for a solvent defendant in suits arising from the wife's negligent operation of the family automobile, the Louisiana Supreme Court produced the "community errand" doctrine, which has been referred to as "stranger and more cumbersome to administer than even the family purpose doctrine."<sup>48</sup> The doctrine was firmly established in the jurisprudence in the case of *Adams v. Golson*,<sup>49</sup> though in several cases prior to 1937<sup>50</sup> the Louisiana courts had used the agency rationale found in *Adams*. The finding of a principal-agent relationship between husband and wife in which the wife was authorized to perform community functions and *was actually performing* such functions at the time of the accident was the basis of the "community errand" principle.<sup>51</sup> There is no doubt that the supreme court was imposing liability on the husband for the torts of his "agent." Chief Justice Fournet, the author of *Adams*, said later in *Martin v. Brown*,<sup>52</sup> "the very basis of liability in such cases for a tort committed in the husband's absence by the wife while using an automobile belonging to the community is agency . . . ."<sup>53</sup>

After *Adams*, with the husband's liability for his wife's torts predicated on her status as an *agent* of the community on a

46. *Adams v. Golson*, 187 La. 363, 174 So. 876 (1937); *Benton v. Griffith*, 184 So. 371 (La. App. 1st Cir. 1938); *Tuck v. Harmon*, 151 So. 803 (La. App. 2d Cir. 1934); *Davis v. Shaw*, 142 So. 301 (La. App. 2d Cir. 1932); *Globe Indemnity Co. v. Quesenberry & Wife*, 1 La. App. 364 (1st Cir. 1924). Comment, 7 La. L. Rev. 558 (1947): "Louisiana has expressly rejected the 'family purpose' doctrine on the ground that liability for damages in Louisiana must clearly be expressed or implied from the articles of the Code. The courts have interpreted articles 2315-2320, dealing with offenses and quasi-offenses, as not recognizing the liability upon which the doctrine is based."

47. LA. CIV. CODE art. 2320. Note, 15 TUL. L. REV. 614, 615 (1941): "The same construction [as given in LA. CIV. CODE arts. 2317-2322] is given to similar provisions of the French Civil Code . . . . Hence, in both Louisiana and France a husband is not liable for the torts of his wife, since such liability is not specifically recognized by the Code."

48. *The Work of the Louisiana Supreme Court for the 1949-1950 Term—Torts*, 11 La. L. Rev. 186, 190 (1951).

49. 187 La. 363, 174 So. 876 (1937).

50. See *Tuck v. Harmon*, 151 So. 803 (La. App. 2d Cir. 1934); *Tarleton-Gaspard v. Malochee*, 133 So. 409 (La. App. Or. Cir. 1931).

51. *Adams v. Golson*, 187 La. 363, 371, 174 So. 876, 879 (1937). Interpreting LA. CIV. CODE arts. 2317-2322, the court concluded that a husband was not liable for his wife's torts committed out of his presence. *Id.* at 370, 174 So. at 878, citing *McClure v. McMartin*, 104 La. 496, 29 So. 227 (1901).

52. 240 La. 674, 124 So.2d 904 (1960).

53. *Id.* at 682, 124 So.2d at 907.

community mission, it became necessary to formulate, piecemeal, what was or was not a "community errand."<sup>54</sup> Illustrative of the confusion created by this development was *Aetna Casualty & Surety Co. v. Simms*,<sup>55</sup> in which the wife, desiring to make a personal trip in the family car, had to take the car to a garage for repairs before leaving. As the wife turned into the garage, she injured plaintiff and suit was brought against the husband. The court found the journey to get the repairs merely incidental to her personal mission and refused to hold the husband liable.<sup>56</sup> In 1950 the supreme court reconsidered *Adams v. Golson*<sup>57</sup> and considerably broadened the scope of the "community errand" in *Brantley v. Clarkson*.<sup>58</sup> The court abandoned the distinction between the purpose of the wife's mission as was made in *Adams*, and recognized that the torts committed by the wife while on an errand to indulge in her own pleasures and recreation should be the responsibility of the community as long as she has the husband's expressed or implied permission to use the community automobile.<sup>59</sup>

It is submitted that basing the husband's liability for the wife's torts on a principal-agent relationship is incorrect. A correct basis for the liability would be reliance on Civil Code article 2404: "the husband is the head and master of the partnership or community of gains; he administers its effects . . ." and the finding of a master-servant relationship between husband

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54. Cases finding a community errand include *Levy v. New Orleans & Northeastern Ry.*, 20 So.2d 559 (La. App. Or. Cir. 1945) (a trip to wife's dressmaker); *Meibaum v. Campisi*, 16 So.2d 257 (La. App. Or. Cir. 1944) (trip to repair furniture used in community household); *Paderas v. Stauffer*, 120 So. 886 (La. App. Or. Cir. 1929) (any errand for selecting clothes, hats or articles for adornment of the wife).

A personal errand, with no community liability, was found in *Aetna Cas. & Sur. Co. v. Simms*, 200 So. 34 (La. App. 2d Cir. 1941) (visit to wife's relatives); *Adams v. Golson*, 187 La. 363, 174 So. 876 (1937) (attending a style show or a fraternal meeting); *Durel v. Flach*, 1 La. App. 758 (Or. Cir. 1925) (a "joy ride").

55. 200 So. 34 (La. App. 2d Cir. 1941).

56. Professor Malone, speaking of *Simms*, said: "Even the bastard 'family purpose doctrine' involves no such nonsense." *The Work of the Louisiana Supreme Court for the 1949-1950 Term—Torts*, 11 LA. L. REV. 186, 191 (1951).

57. 187 La. 363, 174 So. 876 (1937).

58. 217 La. 425, 46 So.2d 614 (1950).

59. *Id.* at 433, 46 So.2d at 617: "If the husband, in using a car belonging to the community, commits a tort while on an errand in which he is to indulge in his own pleasures and recreation and thereby becomes liable, there is no reason which suggests itself why the same community, out of which the liability may have to be paid, should not likewise be liable for a tort committed by the wife under the same circumstances."

and wife. The wife would then be a gratuitous servant<sup>60</sup> and the husband-master would have the right to control her physical movements which is necessary to hold him and the community liable for her torts committed while she was reasonably performing a community function.<sup>61</sup> By using the proper Code basis for liability, the same result could be reached and the rationale would be in strict accordance with the Civil Code.

#### *Automobile Dealers and Prospective Purchasers*

An automobile dealer's liability for damages inflicted by the negligent driving of prospective purchasers is another area in which Louisiana courts have used incorrect agency terminology. The accidents occur either with a representative of the dealer in the car, or with the prospective purchaser alone or accompanied by a guest passenger.

When the prospective purchaser is alone in the car or with a guest passenger, the Louisiana courts refuse to allow recovery against the dealer by an injured third person,<sup>62</sup> except when a dealer or one acting for him allows an incompetent driver to operate the automobile.<sup>63</sup> In *Graham v. American Employers' Insurance Co.*<sup>64</sup> the court said, "we conclude that Mrs. Rogers [the prospective purchaser] was not the agent of McConathy-Young, Inc. [the dealer], and that it is not responsible for the injuries sustained."<sup>65</sup> Although the court held the prospective purchaser to be a bailee for whose torts the bailor [dealer] was not liable and thus reached a correct result, it is submitted that even if the court had determined that Mrs. Rogers *was* an agent, the dealer would not have been liable under the Civil Code.<sup>66</sup>

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60. The gratuitous servant concept is recognized in *Bates v. Largars*, 193 So.2d 375 (La. App. 2d Cir. 1966); *Smith v. Foucha*, 172 So.2d 318 (La. App. 4th Cir.), *writ refused*, 247 La. 678, 173 So.2d 542 (1965).

RESTATEMENT (SECOND) OF AGENCY § 225 (1957): "One who volunteers services without an agreement or expectation of reward may be a servant of the one accepting such services."

61. See RESTATEMENT (SECOND) OF AGENCY § 229, comment *a* (1957).

62. *E.g.*, *Massony v. Truett Nash Motor Co.*, 177 So. 829 (La. App. Or. Cir. 1938); *Graham v. American Employers' Ins. Co.*, 171 So. 471 (La. App. 2d Cir. 1937).

63. See *Serpas v. Collard Motors*, 178 So. 261 (La. App. Or. Cir. 1938) (salesman allowed intoxicated prospective purchaser to operate the car alone).

64. 171 So. 471 (La. App. 2d Cir. 1937).

65. *Id.* at 473.

66. LA. CIVIL CODE arts. 2985-3033. See also note 7 *supra* and accompanying text.

The prospective purchaser must have been a *servant* of the dealer to impose *tort* liability on the dealer, and without the right to control the physical movements of the servant, a right clearly absent in this situation, no such master-servant relationship exists.<sup>67</sup>

The same result is reached when damage is caused by the negligent operation of the car by one acting not for the prospective purchaser, but out of his own curiosity. In *Bogus v. Strange*,<sup>68</sup> the accident occurred on the parking lot of a grocery store and resulted from the negligence of a curious friend of the prospective purchaser. The court found no relationship between the third person and either the prospective purchaser or the dealer on which vicarious liability could be based.

When a representative of the dealer is in the car with the prospective purchaser-driver at the time of the accident, the status of the dealer's representative, whether servant or agent, should determine the dealer's liability. Unfortunately, the Louisiana courts usually have failed to examine the representative's status and have held the representative to be the dealer's agent and the prospective purchaser a subagent, thus making the dealer liable for any damage caused by the subagent.<sup>69</sup> The salesman may well be an employee of the dealership, which would make him a servant for purposes of tort liability. However, the courts should make clear his servant status, since if he were a non-servant agent it would be incorrect to hold the dealer liable for a prospective purchaser's accident. Such language as "the dealer is exposed to liability for the negligence of Aiken [prospective purchaser], the subagent . . . since the salesman remained in the car beside Aiken . . . and was in a position to . . . direct and control the driver,"<sup>70</sup> is incorrect and the proper inquiry should be into the status of the dealer's repre-

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67. *Mohr v. Schmitt*, 189 So.2d 46, 49 (La. App. 1st Cir. 1966): "In all instances of vicarious liability, the right of control is sacramental. The basis for holding the principal for the acts of the agent, the master for the servant, . . . the parent for the acts of the child, all stem from the right of control. In the absence of the right of control, there is no liability."

68. 192 So.2d 566 (La. App. 2d Cir. 1966). The third person, on his own, attempted to start the standard shift automobile, thinking it was in neutral. The car was actually in gear and lurched forward, pinning plaintiff between the auto and a vending machine.

69. *See, e.g., Smith v. Howard Crumley & Co.*, 171 So. 188 (La. App. 2d Cir. 1936).

70. *Id.* at 193.

sentative. The proper basis for the dealer's liability would be a master-servant relationship between dealer and salesman, coupled with recognition of the salesman's power, within the scope of his employment, to allow prospective purchasers to test drive the automobile.

When the salesman alone negligently operates one of the dealer's automobiles and the injured person seeks to hold the dealer liable, the court's inquiry should again be into the relationship between dealer and salesman. Such was the situation in *Blanchard v. Ogima*,<sup>71</sup> involving a "bird-dog"<sup>72</sup> salesman who negligently parked the dealer's car on a hill so that it rolled down the hill and struck plaintiff. In the automobile business a "bird-dog" salesman, as opposed to a full-time employee-salesman, may obtain buyers for several different dealers and is usually not considered an employee by any of them. The dealers have no control over the "bird-dog" salesman's methods or his physical movements and merely supply him with cars for which he has found a buyer. Agreeing with the lower court's finding that the relationship between the dealer and the salesman was one of principal-agent, the supreme court held that the dealer was free from liability since the salesman was a non-servant agent.<sup>73</sup> *Blanchard* represents the first clear recognition by the supreme court of the distinction between a *non-servant agent*, whose principal is not liable for the agent's physical torts, and a *servant*, upon whose master article 2320 imposes liability for the physical torts of the servant.

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71. 253 La. 34, 215 So.2d 902 (1968).

72. *Id.* at 38, 215 So.2d at 903: "This term is derived from such a salesman's practice of 'flushing' out a prospect for the purchase of a certain type of car. The salesman then makes an arrangement with a car dealer to offer the car to the prospect, and is paid on commission or by retaining all of the purchase price above an agreed figure."

73. *Id.* at 48-49, 215 So.2d at 907: "The only control which Russo [the dealer] exercised over Ogima [the salesman] was that he should obtain at least a fixed minimum sum for the car he sold. Russo could not determine to whom the sale was to be made, the time to be spent in effectuating the sale, or the place of sale, nor could he control any of the details of Ogima's physical conduct in effecting the sale."

It is submitted that in *Morton v. American Employers Ins. Co.*, 104 So.2d 189 (La. App. Cir. 1958), the principal was *not* held liable for the torts of his agent, but his insurer was held liable under the omnibus clause in the insurance policy.

*Gasoline Dealers and Distributors*

The nature of the distribution system utilized by the major oil producing companies to supply the consumer with their products has created confusion in the jurisprudence concerning the producer's liability for the torts committed by the distributors and their employees. These distributors are normally of two kinds: the wholesale bulk distributor operating primarily within one geographical area and usually dealing exclusively in the products of one company, and the retail service station operator.

In an early case, *Montgomery v. Gulf Refining Co.*,<sup>74</sup> the Louisiana Supreme Court held the producer liable for the injury inflicted on plaintiff by the negligent driving of an employee of the distributor. The court based its holding on the facts that under the contract between Gulf and the distributor, the gasoline still belonged to Gulf, and that gasoline is a dangerous instrumentality for which its owner must be liable. The determination of the producer's liability should be made on the basis of its right to control the physical movements of the distributor rather than product ownership. If the producer has the right to control the physical manner in which the operations are to be carried out, the distributor will be a servant for whose torts the producer is liable.<sup>75</sup>

The contractual arrangement between the distributor and the producer may specify that the product is to remain the property of the producer until sold, that the proceeds of all sales are to go to the refiner, that the company can set prices and control the extension of credit and also may contain a "hold-harmless" clause in which the distributor agrees to be liable for any tortious act committed by himself or his employees.<sup>76</sup> The Louisiana courts view any "hold-harmless" clause between the producer and the distributor as ineffective and unenforceable against third persons.<sup>77</sup> In these oil distributor cases,

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74. 168 La. 73, 121 So. 578 (1929).

75. See note 66 *supra*.

76. See *Goff v. Sinclair Ref. Co.*, 162 So. 452 (La. App. 2d Cir. 1935). Under such an arrangement a court might view all the controls by the producer as merely contractual features rather than control of the details and physical movements of selling oil products. See *Jones v. Standerfer*, 296 Ill. App. 145, 15 N.E.2d 924 (1938).

77. *Goff v. Sinclair Ref. Co.*, 162 So. 452 (La. App. 2d Cir. 1935).

as elsewhere, there is no basis in law for holding a principal liable for the torts of his non-servant agent. Such statements as "[the distributor] is the agent of the Texas Company . . . and, consequently, the driver of the truck is the sub-agent of the Texas Company and the Texas Company is answerable for the tort committed by either . . . ."<sup>78</sup> clearly demonstrate the confusion of the courts. The retail distributors may be independent business men or employees of the producing company. In *Monetti v. Standard Oil Co.*,<sup>79</sup> the court held the producer liable for plaintiff's injuries suffered when a service station employee, clearing the station's driveway, negligently pushed a motorcycle into plaintiff's softdrink stand. Though referring to the retailer as an agent, it is apparent from the facts that the retailer was an employee-servant<sup>80</sup> of Standard Oil Co., and thus the producer was correctly held liable for the torts of one of its servants. In the case of a retailer over whom the producer neither exercises nor has the right to exercise any control, the producer should not be held liable for the torts of the retailer or his employees.<sup>81</sup>

#### *Convicts and Prisoners*

Only a few Louisiana cases have considered the relationship between the State of Louisiana and the prisoners held in its penal institutions with regard to the State's vicarious liability for a prisoner's torts.<sup>82</sup> In *Aguillard v. State*,<sup>83</sup> the State was held liable for the injuries plaintiff sustained in a head-on

78. *Dockens v. LaCaze*, 78 F. Supp. 515, 517 (W.D. La. 1948).

79. 195 So. 89 (La. App. Or. Cir. 1940).

80. *Id.* at 91: "It is well to remember that Gomez himself was not an independent contractor. Not only is he designated in the contract as an agent of the oil company and not only is he shown to have been employed to manage and operate the oil station for the company, but it appears that the company retained the right to control entirely his operations in managing the said station and the further right to discharge him at will by terminating the contract."

81. *See Donovan v. Standard Oil Co.*, 197 So. 320 (La. App. 2d Cir. 1940). The retailer had borrowed a Standard Oil truck from the bulk plant next door, to return plaintiffs to their automobile and replace a tire. En route, the retailer's employee negligently lost control of the truck and the plaintiffs sought unsuccessfully to hold the producer liable for damages inflicted by the employee. The retailer in this case had the right to buy and sell any goods whether handled by Standard Oil or not, could set prices on his goods and services, and employed his own assistants.

82. *See Dauzat v. Crites*, 237 So.2d 697 (La. App. 4th Cir. 1970); *Trahan v. State*, 158 So.2d 417 (La. App. 3d Cir. 1963); *Aguillard v. State*, 7 So.2d 645 (La. App. 1st Cir. 1942).

83. 7 So.2d 645 (La. App. 1st Cir. 1942).



collision with an Angola Prison truck being negligently driven by a prison trustee. Plaintiff claimed that the negligence occurred while the trustee was in the course and scope of his employment. In none of its defenses did the State claim the trustee was not an employee or a servant.<sup>84</sup> Therefore, by holding the State liable for the injuries caused by a negligent trustee, the court, at least impliedly, found the trustee to be a servant.

Though the result reached in *Aguillard* would appear to be desirable from a policy viewpoint, two later cases have reached the opposite conclusion and have denied recovery against the State for a prisoner's torts.<sup>85</sup> In *Trahan v. State*,<sup>86</sup> a trustee sued the State to recover for the injuries he sustained when he was struck by a ricocheting bullet fired by a second trustee at prisoners who were allegedly escaping. The court, in refusing recovery, listed four factors necessary to establish a master-servant relationship: selection and engagement, payment of wages, power of dismissal, and power of control.<sup>87</sup> It was then said that "the factors of selection and payment of wages warrant a finding of no master-servant relationship. . . . The state does not select the prisoner to be its employee, nor does the prisoner voluntarily agree to work for the state."<sup>88</sup> The importance of the voluntary nature of the employment and the pay involved in the trustee program was considered and rejected, since the trustee program was found not to be a method of hiring employees for the State.<sup>89</sup>

In *Dauzat v. Crites*,<sup>90</sup> an Orleans Parish Prison trustee,

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84. *Id.* at 647.

85. *Dauzat v. Crites*, 237 So.2d 697 (La. App. 4th Cir. 1970); *Trahan v. State*, 158 So.2d 417 (La. App. 3d Cir. 1963).

86. 158 So.2d 417 (La. App. 3d Cir. 1963).

87. *Id.* at 418.

88. *Id.*

89. *Id.* The court relied on a statement in *Brown v. Jamesburg State Home for Boys*, 60 N.J. Super. 123, 158 A.2d 445 (1960), that to consider prisoners the employees of the penal officers would be contrary to public policy. *Brown* dealt with a workman's compensation claim filed by a prisoner when he was run over by a tractor while working on a prison farm.

Strictly from a policy standpoint, a distinction might be made between *Trahan* and *Aguillard v. State*, 7 So.2d 645 (La. App. 1st Cir. 1942), in that *Aguillard* involved an innocent member of the general public while another prisoner had caused the injury in *Trahan*. It is submitted that cases of this nature are rare and to prevent imposition of a loss on a totally innocent third party (since a judgment against a prisoner would probably be meaningless), the state should admit its liability for the negligent torts of prisoners involving injury to members of the public.

90. 237 So.2d 697 (La. App. 4th Cir. 1970).

directed to move an employee's car from one parking place to another, negligently pulled out in front of plaintiff-motorcyclist. In refusing to allow recovery against the State, the court said, "we are in complete agreement with the conclusion that a trusty [sic] in a penal institution is not an employee . . . of the State and the State is not responsible for his negligence under the doctrine of respondeat superior."<sup>91</sup>

It is submitted that in both *Dauzat* and *Trahan* the absolute right to control the inmates existed in the prison authorities, thereby creating a master-servant relationship sufficient to impose tort liability on the master. Trustees are selected from the general prison populace, can be stripped of their trustee status, and may be paid some form of wages or may receive "good time" credit which shortens the period of their incarceration. Though it is submitted that the payment of wages is not a necessary factor in finding a master-servant relationship,<sup>92</sup> the four requirements for servant status called for in *Trahan*<sup>93</sup> are at least partially present in the case of trustees. Under the Civil Code the courts should hold the sheriff liable for the torts of his employee-servant if a deputy is directed to move the car and injures the plaintiff.<sup>94</sup> Therefore, it seems inequitable to deny plaintiff in the *Dauzat* situation relief simply because a trustee, rather than an employee, was ordered to move the car.

### Conclusion

The Louisiana Civil Code clearly provides a basis for the liability of a *master* for the torts committed by his *servants* in the course of their employment.<sup>95</sup> The imposition of such vicarious liability on any other basis is incorrect and the Louisiana courts should determine the nature of the relationship involved whenever they seek to apply vicarious liability. Such a determination was correctly made in *Jones v. Maryland Casualty Co.*,<sup>96</sup> an action against a homeowner's liability insurer for the drowning of a 14-year-old boy in the homeowner's swim-

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91. *Id.* at 699, citing *Trahan v. State*, 158 So.2d 417 (La. App. 3d Cir. 1963).

92. See note 60 *supra*.

93. 158 So.2d 417, 418 (La. App. 3d Cir. 1963).

94. LA. CIV. CODE art. 2320.

95. *Id.*

96. 256 So.2d 358 (La. App. 1st Cir. 1971).

ming pool. Plaintiff maintained that the homeowner's mother, who had given the youth permission to swim in the pool, was the servant of the homeowner and liability was imputable to the homeowner under a master-servant relationship. The First Circuit decided the mother was a *non-servant* agent of the homeowner, empowered only to maintain the property, and thus no liability was imputable to either her son or his insurer. It is submitted that such a result is correct and an examination of the relationship involved will yield a proper result in every case embracing the doctrine of respondeat superior.

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### DECLARATORY JUDGMENTS IN LOUISIANA

The Declaratory Judgments Act<sup>1</sup> has been the source of considerable confusion for both the courts and the practicing bar. This apparently has stemmed from a misunderstanding of the basic nature of declaratory relief, the nature of the action.<sup>2</sup>

Basically, a declaratory judgment declares the rights, status or legal relations of the parties.<sup>3</sup> It gives a party a remedy that supplements the remedies heretofore available, and differs from a conventional remedy in that while a conventional remedy is accompanied by a granting of damages or other relief, the declaratory judgment stands alone:<sup>4</sup>

"The conventional type of judgment embodies two elements: (1) an ascertainment or declaration of the rights of the parties (usually implied); and (2) a specific award of relief. The declaratory judgment embodies only the first element which, of course, is always express."<sup>5</sup>

Thus, declaratory relief can be viewed as a lesser form of relief

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1. LA. CODE CIV. P. arts. 1871-83. This legislation is modeled on the Uniform Declaratory Judgments Act and bears a close resemblance to the federal declaratory judgments statutes as well as the legislation in other states based on the uniform act.

2. This Comment does not purport to examine all phases of the Declaratory Judgments Act. It attempts to deal with some of the basic concepts underlying declaratory judgments so as to aid the practitioner in utilizing them.

3. Succession of Rickerfor, 120 So.2d 320 (La. App. Orl. Cir. 1960).

4. E. BORCHARD, DECLARATORY JUDGMENTS 25 (1941); Succession of Rickerfor, 120 So.2d 320 (La. App. Orl. Cir. 1960).

5. LA. CODE CIV. P. art. 1871, comment.