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MASTER'S LIABILITY FOR THE TORT OF HIS SERVANT'S ASSISTANT *

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During the 1951-52 term, the Supreme Court of Colorado handed down two decisions—*Whiteside v. Harvey* [1] and *Cooley v. Eskridge* [2]—which are inconsistent.

In the Whiteside case, the master instructed his servant to drive the master's truck from Denver to Greeley. The servant took his father along. The servant turned the truck over to his father. Such act was against the express will of his employer. The son then fell asleep. In Brighton, the father negligently crashed the truck through plaintiff's plate glass window. The plaintiff brought an action against the master for the damage done. The supreme court, speaking through Justice Holland, affirmed a judgment for the plaintiff.

In the Cooley case, the master engaged plaintiff to do certain grading and filling in accordance with certain specifications. Plaintiff's men and equipment were utilized in the work. The master's servant was instructed to see that specifications were met and to act as time-keeper. The assistant, an employee of an independent contractor, was also engaged in the work. Plaintiff at one time told the servant he wished to complete the work and asked if the servant would work over-time. There was a conflict of the testimony upon the matter of who (or whom?) was to pay the servant for such over-time—the master or the plaintiff. One morning plaintiff's men did not show up for work. The servant tried to contact plaintiff, but could not reach him. The servant asked the assistant to take plaintiff's tractor up a steep hill, so that it would be ready to go when the men came to work. The servant went along with the assistant. Because of the assistant's negligence, the tractor rolled down the hill and was damaged. The plaintiff brought an action against the master for the damage done. The supreme court, speaking through Justice Alter, reversed the judgment below and instructed the trial court to enter judgment for the master.

The principle involved in these cases is that of the master's liability for the tort of his servant's assistant. It might be wise to discuss, first, the origin of the master's liability for the tort of his servant.

Let us take a common illustration: The driver of a grocer's truck negligently runs over another in the street, the person in-

* It is not the province of this note to deal with the servant's implied authority to seek an assistant in cases of emergency or necessity.

[1] 124 Colo. 561, 239 P. 2d 989 (1951).

[2] .....Colo....., 241 P. 2d 851, 1951-52 C.B.A. Adv. Sh. No. 12. p. 173 (1952).

jured being without fault. The grocer is liable for the negligence of his servant, the driver. But why, or upon what principle? It is sometimes said that the reason for the master's liability in such cases is his negligence in employing and unskillful servant. If this were really the true reason, the logical result would be that, if the master was guilty of no negligence in employing the servant, he would not be liable. We know, however, that it is no defense that the master used the greatest care in employing his servant. Again, suppose an engineer or servant of a railroad company wilfully ran a train of cars over another person, we know that the company is liable for the wrongful act of its servant, and it is no excuse for the company to say it did not authorize the act, or that it was done without the knowledge or consent of the company, or against its express will or order.

It is difficult to understand this principle of liability unless we approach it from the side of history. It is, in reality, a survival of the ancient doctrine that the master or owner was liable for the act of his slave, and for injuries committed by animals in his possession. The ancient idea was that the family of the master, including his slaves, his animals, and all other property, was a unit, that the personality of the master affected all of his property, and that, as he was entitled to all the benefits of ownership, he must accept the consequences flowing from injuries caused by his property. He might buy off the vengeance of the injured person, or he might appease it by surrendering the offending property to the person aggrieved.

In ancient times the masses were slaves; in modern times the masses are freemen. When slaves became freemen, the master was shorn of his power to surrender the delinquent, but he still continues to be liable for the acts of his servant done in the line of the employment. It may be said that, as the master has ceased to have any property in his servants, and as he is shorn of his power to surrender a delinquent, the reason for the rule fails. This then would result in exonerating the master from all liability in all such cases

It is true that the power of surrendering the delinquent has ceased, but it is not true that the personality of the master has ceased to affect his servants. The will of the master dominates any given enterprise. He calls to his aid servants and appliances. The servant surrenders his time, and in a measure permits the will of the master to dominate and control his actions. He is the instrument of his master in accomplishing certain ends. The servant is placed in the position and given the opportunity to commit the wrong by the will of the master.

Anciently, the liability of the master was not limited by the duties imposed upon his slave. When a servant became a freeman, he was no longer a member of the master's family, and he could not properly be said to be the representative of his master, except in the line of the employment. There is still substantial and just

grounds for the principle that the master is liable for the wrongful acts of his servant.

The principle of the master's liability for the tort of his servant's assistant seems to have extended the doctrine of master and servant. But such a principle is still limited to the acts done within the scope of the servant's employment and in the furtherance of the master's business.

In the "truck" case, the court said:[3]

> The responsibility of the owner for the driver's negligence has been affirmed times without number. Had this accident occurred through the carelessness or negligence of the son, the employee driver, under the undisputed facts, as here, liability of the owner of the truck could not successfully be disputed. When this employee driver, without being confronted with any kind of an emergency, turned over the operation of the truck to his father, and remained in the presence of his father while he was driving, the acts of father became the acts of the employee for which the employer is liable. The father, as driver, here became an instrumentality in the hands of his son, and, further, the truck here involved was on a mission in furtherance of defendant's business.

Although Justice Holland mentions that the employee was negligent in letting his father drive the truck, he bases his decision on the master's liability for the tort of his servant's assistant. For he further states that the " . . . defendant's liability will here rest upon the negligence of the father imputed to the careless and negligent son . . . "[4]

In the "tractor" case, the court went upon the theory that the defendant is only liable for the acts of his servant and his servant only while in the scope of his employment. Therefore, it must be shown that the servant had the express or implied authority to hire the assistant and that the act of the assistant was within the scope of his employment. Justice Alter said.[5]

> The burden of proof was on plaintiff to establish . . . that [the servant] had express or implied authority to employ [the assistant] before any liability whatsoever could be attached to [the master] as a result of [the assistant's] negligence. In the absence of express or implied authority, [the servant] could not create the relationship of master and servant between [the master] and [the assistant] so as to make [the master] liable to plaintiff for damages resulting from [the assistant's] negligence.

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[3] Whiteside v. Harvey, *supra*, p. 564.
[4] *ibid.* p. 564-65.
[5] Cooley v. Eskridge, *supra*, p. 854.

The court then went on to say that express authority did not exist, nor was there a ratification of the act by the master. The court answered the remaining problem of implied authority to hire the assistant by saying "in no event will the agent be deemed by implication to possess powers that the principal could not himself exercise if he were acting personally."[6] Climbing on the tractor "amounted to a wilful trespass and [was] unlawful; and . . . [the master] is not liable therefor in the absence of express authorization"[7] for the master himself could not lawfully do such an act.

The court, in conclusion, said:[8]

> [The servant's] actions . . . arose by reason of his arrangement with plaintiff for the payment of his overtime wages or as the result of a trespass and an unlawful act. If the former, [the master] is not liable therefor; if the latter, it having been done without [the master's] express authority and not within the scope of his employment, the same result obtains.

DEVELOPMENT OF THE DOCTRINE

An English case, *Booth v. Mister*,[9] probably inaugurated the doctrine. In that case a servant of the master, named Usher, whose duty it was to have charge of the cart, was riding in the cart at the time when the accident occurred, but another person, who was not in the master's service, was driving the cart, Usher having given him the reins. Lord Abinger, C. B., in holding the master liable said:[10]

> As the defendant's servant was in the cart, I think that the reins being held by another man, makes no difference. It was the same as if the servant had held them himself.

In a New York case, *Althorf v. Wolfe*,[11] the master set his servant to shoveling snow and ice off from the roof of his house along the street. The servant procured another person to assist him, and while they were thus engaged, they threw ice upon a passer-by and killed him. It did not appear whether the servant or the assistant threw the ice that produced the injury, and the court held that it was a matter of no importance, as the master would be liable in either event. In the court's opinion, Wright, J. said:[12]

> It is not absolutely necessary that the technical relation of master and servant, as between the defendant

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[6] *ibid.* p. 856 citing 2 C.J.S., Sec. 99(a), p. 1227.
[7] *ibid. p.* 857.
[8] *ibid.* p. 857.
[9] 7 C & P 66, 173 Eng. Rep. 30 (1835).
[10] *ibid.* p. 30.
[11] 22 N. Y. 355 (1860).
[12] *ibid.* p. 364.

> and [the assistant] should exist, or that [the assistant] should be able to recover of the defendant for his services, to make the defendant liable to a third person. If the injury was the result, substantially, of the negligent act of [the servant], in the course of his employment in clearing the roof, or if [the assistant] was allowed to be on the premises by the owner, shoveling snow from the roof in so negligent a way that a person in the street is injured, or if the defendant had not taken due and proper care to prevent a negligent or improper person from being about his premises, and in consequence of this an injury happened to a third person, he is liable.

In a concurring opinion, Denio, J. had the following to say:[13]

> If we keep in mind that the defendant is responsible for the acts of [the servant], and that [the servant] enabled the [assistant] to do the mischief, it is difficult to discover any principle which will shield the defendant from responsibility. It is not necessary to consider [the assistant] as the defendant's servant. He was, rather, the instrument by which [the servant], for whose conduct the defendant was undeniably responsible, did the wrong.

The above two cases gave rise to the doctrine of the master's liability for the tort of his servant's assistant. Over a span of 100 years the courts have adopted one of three explanations for holding the master liable. For the purposes of this note, they are as follows: (1) the servant is negligent in not controlling the assistant, (2) The assistant is the alter-ego of the servant, and (3) The assistant is an instrumentality in the hands of the servant.

The Servant Is Negligence in Not Controlling the Assistant

In a California case, [14] the servant frequently engaged the assistant to aid him in sending and receiving messages, but the assistant was never employed by the master. One day while the servant was not there the assistant sent a message to the plaintiff to send money which the assistant absconded with. Judgment was against the master. The decision was on the grounds that the proximate cause of plaintiff's loss was the negligence of the servant. It was part of his duty to keep any unauthorized person from using the defendant's wires.

> He failed to discharge this duty and the [master] is equally responsible whether the placing of [the assistant] in charge was a wrongful act committed as part of the transaction of the business, or was mere negligence. [15]

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[13] *ibid.* p. 365-66.
[14] Bank of California v. Western Union Telegraph Co., 52 Calif. 280 (1877).
[15] *ibid.* p. 291-92.

In *Thyssen v. Davenport Ice & Cold Storage Co.*,[16] the Iowa court said in a dictum:

> . . . the one safe and logical ground upon which to rest the liability of a master for the negligence of a volunteer assistant of his servant is the negligence of the servant in inviting or permitting a stranger to perform, or assist in the performance of, the work which was intrusted to his own hand. Where such negligence is shown with injury proximately resulting therefrom to a third person, who is himself without fault, the master is liable under the familiar rule which imputes to him the negligence of the employee in the course of his employment.

In *Englehart v. Farrant*,[17] the master instructed his servants X and Y (a boy of 17) to go in a wagon and deliver packages. X was instructed to drive and not to leave the cart unattended. X left the cart to get oil for his lamp. Y drove the wagon to plaintiff's injury. The court held that it was negligent for X to leave the cart as it was forseeable that Y should drive it to the injury of plaintiff and that this was the proximate cause of the injury.

In *Copp v. Paradis*,[18] the master's truck-driver, Tancread, while engaged in his master's business, permitted a friend, Carpenter, to ride with him and drive the truck, without the authority of the master. Due to the negligence of Carpanter, who was a competent driver, the truck struck the plaintiff's car and injured him. The Maine Court held that Carpenter, although negligent, was not the servant of the master and that Tancread was not negligent, or if he were his negligence was not the proximate cause of the accident.

The Tennessee Court,[19] reasoned as follows:

> . . . should the jury find that young Potter's death was due to the negligent operation of the truck, that Potter was not guilty of contributory negligence, and that [the servant] was guilty of negligence in permitting [the assistant] to drive the truck, then the grocery company would be liable. Or if the jury should find that [the servant] was not guilty of negligence in permitting [the assistant] to drive the truck, *but that [the servant] was supervising his conduct, and in so doing was guilty of negligence, then in that event the grocery company would be liable.* [Italics added.]

In *Gates v. Daley.* [20] the master was the owner of a truck and

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[16] 134 Iowa 749, 112 N. W. 177, 178 (1907).

[17] 1 Q. B. 240 (1897).

[18] 130 Me. 464, 157 Atl. 228 (1931).

[19] Potter v. Golden Rule Grocery Co., 169 Tenn. 240, 84 S. W. 2d 364, 366 (1935) see Conway v. Pickering, 111 N. J. L. 15, 166 Atl. 76 (1933).

[20] 54 Calif. A. 654, 202 P. 467 (1921), see Johnson v. Steele, 154 Or. 137, 59 P. 2d 237 (1936) and Keen v. Clarkson, 56 Ari. 437, 108 P. 2d 573 (1940).

had employed the servant to drive it. In the regular course of his employment, the servant, accompanied by his wife, went on a long trip in the vehicle. At a point on the journey the servant became fatigued, and, in order temporarily to rest himself, allowed his wife to operate the truck. While she was at the wheel, an accident occurred in which the plaintiff was hurt. The court, in awarding judgment for the plaintiff, said that the servant had no authority from the master to engage a substitute or assistant to drive the truck, but that his wife's negligence was imputed to him, and from him to the master.

In a Wisconsin case,[21] the servant was a ticket agent of the master. The servant's brother, while acting as agent, struck plaintiff. It was said that as the person who did the injury was in the ticket office performing the duties of ticket agent with the consent and under the direction of the person employed in that capacity, his act must be regarded as an act of the master's servant.

Although it appears that the servant must be present at the time of the act, some courts have gone further. In *Emison v. Wylam Ice Cream Co.*,[22] the Alabama court said:

> . . . when the servant has been intrusted with an instrumentality which he is instructed to use in the prosecution of the master's business, we think it is sound, both in principle and in policy, to hold the master responsible for the servant's injurious use of that instrumentality in the performance of his authorized service, even though the servant has intrusted the particular service to the hands of a third person, who was acting for him and under his direction; and, in such a case, we can recognize no valid distinction between a case where the servant was present with his assistant at the time and place of the accident and a case where the servant was elsewhere. In each case the servant uses the instrumentality for the purpose intended and authorized, and in each case the directed act of the assistant is equally the act of the servant.

The Assistant in an Instrumentality in the Hands of the Servant

In *Hill v. Sheehan*,[23] the master instructed his servant to take two horses to a certain place. The servant sought help from the assistant, against the express will of the master. The assistant's negligence in handling the horse caused plaintiff's injury. The court in holding the master liable said:[24]

> It is insisted that [the assistant] was in no sense defendant's servant, and consequently he cannot be made

[21] Fisk v. Chicago & Northwestern Ry. Co., 68 Wisc. 469, 32 N. W. 527 (1887).
[22] 215 Ala. 504, 111 So. 216, 218 (1927).
[23] 20 N. Y. S. 529 (1892), see Compbell v. Tremble, 75 Tex. 270, 12 S. W. 863 (1889).
[24] *ibid.* p. 530.

> liable for his acts. This over-looks the fact that by the act of the servant who was in charge, an instrument i.e. [the assistant], was used for the prosecution of the master's business, and that such instrument inflicted the injury. It is not essential, under such circumstances, that the relation of master and servant should exist, in order to fasten responsibility. It is sufficient when it appears that the master's business is being prosecuted by the instrument used.

In *Bluminfeld v. Meyer-Schmid Grocer Co.*,[25] the Missouri court said:

> The courts have frequently placed the liability of the the master upon the ground that a stranger, to whom the servant has delegated his duties, is a mere instrumentality by which the servant performs such duties, and that therefore the stranger's negligence is that of the servant. This doctrine appears to be sound enough when applied to a case where the servant does not delegate his duties in the entirety, but remains present and the duties performed by the stranger are preformed under the eye and the immediate supervision of the servant . . .

COURTS AND CASES THAT REFUSE TO APPLY THE DOCTRINE

In *Butler v. Mechanic's Iron Foundry Co.*,[26] the servant allowed his assistant to ride on the truck and drive it in violation of the master's instructions. The assistant drove on the wrong side of the road and in consequence thereof collided with the plaintiff's car. Judgment was for the master. The court, in essence, said that the servant could not delegate his duties, and, therefore, his permission to his assistant to ride on the truck and drive it, was without the scope of his authority.

In *Haluptozk v. Great Northern Ry.*,[27] the court said:

> Under the doctrine of respondeat superior, a master, however careful in the selection of his servants, is responsible to strangers for their negligence committed in the course of their employment. The doctrine is at best somewhat severe, and, if a man is to be held liable for the acts of his servants, he certainly should have the exclusive right to determine who they shall be. Hence, we think, in every well-considered case where a person has been held liable, under the doctrine referred to, for the negligence of another, that other was engaged in his service either by the defendant personally, or by others by his authority, express or implied.

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[25] 206 Mo. A. 509, 203 S. W. 132, 137 (1921).

[26] 259 Mass. 560, 156 N. E. 720 (1927).

[27] 55 Minn. 446, 57 N. W. 144, 145 (1893), but see Geiss v. Twin City Taxicab Co., 120 Minn. 368, 139 N. W. 611 (1913).

In *Long v. Richmond,* [28] the New York court said:

> We conceive of no rule of law or of equity which will permit a servant, in violation of his master's instruction and without his knowledge or consent, to allow other persons to do his work which he is employed to do, without any necessity therefor, and thus make the master liable for the negligent acts of such other persons.

COLORADO CASES

In the "truck" case, the facts state that the defendant expressly told his servant not to let any other person drive the truck. The facts also state that the son fell asleep and was not actually directing or controlling the father. Therefore, in essence, the supreme court has extended the rule to the point that the master is liable for all acts of the servant's assistant committed while in the servant's scope of employment, and the mere fact that the master instructs the servant not to seek help or the servant leaves the scene is not enough to take such without the scope of his employment.

In the "tractor" case, the supreme court refused to base their decision upon the doctrine laid down in the "truck" case, but discussed the problem of whether the servant had the implied authority to hire the assistant for the master and, therefore, make the assistant a servant of the master. It is submitted that the facts would fall under the above doctrine much more readily than the facts of the "truck" case.

Assuming that the servant was such of the master,[29] the servant engaged an assistant to drive the tractor to the top of a hill. The servant walked to the top of the hill along side the tractor. The servant started to get the tractor ready for work when the mishap occurred. At all times the servant was instructing the assistant and was the guiding hand of the assistant. The master had not expressly told the servant not to seek assistance. Therefore, all the requirements for the above doctrine are met except for one. Was the assistant acting within the scope of the servant's employment at the time of the mishap? The supreme court said no, for both the assistant and the servant were committing a wilful trespass and an unlawful act, which takes them out of the scope of the servant's employment.

Justice Alter cites as his authority *Sager v. Nuckolls.*[30] In

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[28] 68 N. Y. App. Div. 466, 73 N. Y. S. 912, Aff. 175 N. Y. 495. It might be of interest to point out that New York cases will fit into all categories of this note. See Althorf v. Wolfe, *supra.* Simons, v. Monier, 29 Barb. 417 (1859), William v. Miner, 19 Misc. 644, 44 N. Y. S. 417 (1897) and Hill v. Sheehan, *supra.*

[29] The problem as to whether the servant was such of the defendant or of the plaintiff will not be discussed as it would be purely a jury question.

[30] Colo. A. 95, 32 P. 187 (1893), see Denver & Rio Grande Railroad v. Ryan, 17 Colo. 98, 28 P. 79 (1891), and Denver Omnibus & Cab Co. v. Mills, 21 Colo. A. 582, 122 P. 798 (1912).

that case a wife brought an action against the master for the wrongful death of her husband caused by the servant. The servant "way-laid" the victim and shot him to death. The court asked the question, Was this act "in the line of [the servant's] duty and in the furtherance of the master's business?"[31] The court ruled as a matter of law that the servant was not within the scope of his employment, but was on a frolic of his own and that the malice was all his and not that of the master. It is submitted that there is a difference between the "unlawful" act of murder, and the "unlawful" act of trespass, if it is such. If all "unlawful" acts take the servant out of the scope of his employment, the master would never be liable for the tort of his servant if such tort was committed while speeding, driving carelessly, running a stop-light, or cutting the wrong trees. Is not running through a plate glass window a trespass and an "unlawful" act? Suppose the father in the "truck" case did not have a chauffeur's license, would this relieve the master of liability? The act of letting the father drive under those circumstances was something that the master could not lawfully do.

The two cases are inconsistent.

CONCLUSION

The doctrine of the master's liability for the tort of his servant's assistant does not extend the already severe rule of the master's liability for the tort of the servant. It is still limited to the worn out maxim: The master is liable for the torts committed within the scope of the servant's employment. The acts by the servant of seeking assistance, going against the express will of the master, committing unlawful acts and many others are only facts for the jury to consider in deciding whether the servant was within the scope of his employment. If an assistant is selected by a servant to do an act within the scope of the servant's employment and in the furtherance of the master's business and while such assistant is doing such, commits a tort, the master is liable whether you label it the servant is negligent in not controlling the assistant; or the assistant is the alter-ego of the servant; or the assistant is an instrumentality in the hands of the servant.

TAX NOTE FOR LAWYERS

In a decision handed down on April 14, 1953, the U. S. Circuit Court of Appeals for the second circuit held that an attorney may deduct the expenses of a postgraduate law course for federal income tax purposes. The test case was taken to the court of appeals by George C. Coughlin of Binghampton, New York, who incurred $305 of expenses in attending a tax course at New York University in 1946. The New York State Bar Association and the American Medical Association intervened in the case as *amicis curiae.*

[31] *ibid.* p. 103.