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Respondeat Superior in "Shoplifting" Cases - Safeway Stores v. Barrack

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Respondeat Superior In "Shoplifting" Cases*

Safeway Stores v. Barrack[1]

Plaintiff brought suit against the defendant foodstore and one of its employees to recover damages for malicious prosecution and false imprisonment. The plaintiff had made purchases in other stores, and upon entering defendant's store, he placed these bundles in a pushcart along with various articles he wished to purchase from the defendant. After the plaintiff paid his bill, and while he was in the act of placing his purchases in a box along with the bundles he had when he entered the store, a pound of butter and a small can of pepper fell to the floor. Smith, an employee of the defendant, who was standing near the counter, immediately came up to the plaintiff, showed him a badge, and charged him with trying to avoid payment by placing the butter and the pepper in the parcels which he had when he entered the store. The plaintiff denied Smith's charges, but offered to pay for the items, which offer Smith refused, whereupon he left the store followed by Smith. Smith forced the plaintiff to return to the store, to be taken to a back room where, in the presence of the store manager, the police were called and plaintiff was arrested. Smith testified that it was his job to break up shoplifting; that the retail operations manager had told him, that he, as retail operations manager, wasn't going to stop any means of helping to protect the company's property; that the plaintiff had been nasty about the whole affair; and, finally, that the retail operations manager had told him to use his own discretion if people acted nasty, and to do what he wanted to with them. The store manager testified that he did not interfere with the detention of the plaintiff, since matters of this nature were usually left up to Smith.

The lower court allowed the case to go to the jury, which returned a verdict for the plaintiff for $2,500, which was reduced by remittitur to $1,250. From this verdict the defendant appealed, contending that the evidence was insufficient to support a finding that Smith was acting within the scope of his authority in having the plaintiff arrested, so as to make the defendant store liable for his actions under the doctrine of *respondeat superior*. The Court of

* To illustrate how serious and extensive the problem of shoplifting is, it has been conservatively estimated that goods worth over $300,000,000 are taken from stores by shoplifters annually.

[1] 210 Md. 168, 122 A. 2d 457 (1956).

Appeals affirmed the judgment, on the ground that the evidence warranted findings that Smith was employed for the very purpose of apprehending and prosecuting shoplifters and that his actions were in the regular course of and within the scope of his employment, making the defendant liable. In support of its decision the court cited *McCrory Stores v. Satchell*[2] and *B. C. & A. Ry. Co. v. Ennalls*,[3] following the majority rule that, where in false imprisonment cases, there is conflicting evidence as to the scope of employment of the agent, it is for the jury to decide the scope and the extent of the agent's implied authority in order to determine the principal's liability under *respondeat superior*.[4]

It is interesting to note that, in the development of the law of principals' responsibility for false imprisonment, the Court of Appeals in several early cases had accepted and relied upon the view taken by the New York case of *Mali v. Lord*,[5] which held that liability for false imprisonment by an agent could not be imputed to the principal under the doctrine of *respondeat superior*. The New York case reasoned that the principal should not be held, since an agent could have no implied authority to do an act which the principal could not justify if he were present himself. In the *McCrory* case, relied on in the instant case, the Court of Appeals of Maryland retreated from its earlier position, apparently on the theory that all the New York case decided was that the plaintiff had not introduced evidence as to the agent's scope of authority sufficient to take the case to the jury. The court also explained the earlier case of *Bernheimer v. Becker*,[6] on the ground that the agent in that case was merely an ordinary agent from the scope of whose employment the authority to cause a false

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[2] 148 Md. 279, 129 A. 348 (1925).

[3] 108 Md. 75, 69 A. 638 (1908), where the court held that the determination of whether an alleged false imprisonment of a suspected thief was within the general scope of employment of a special officer hired to protect the property of the Railway Company was for the jury.

[4] West v. F. W. Woolworth Co., 215 N. C. 211, 1 S. E. 2d 546 (1939); Gillis v. Great Atlantic & Pacific Tea Co., 223 N. C. 470, 27 S. E. 2d 283 (1943); Great Atlantic & Pacific Tea Co. v. Dowling, 43 Ga. App. 549, 159 S. E. 609 (1931); Friedman v. Martin, 43 Ga. App. 677, 160 S. E. 126 (1931); Combs v. Kobacker Stores, 114 N. E. 2d 447 (Ohio, 1953); Perkins Bros. Co. v. Anderson, 155 S. W. 556 (Tex. Civ. App., 1913); McCrory Stores v. Satchell, *supra*, n. 2; 1 RESTATEMENT, AGENCY (1933) §245; 2 MECHEM, AGENCY (2d ed., 1914) §1982.

[5] 39 N. Y. 381 (1868). Maryland cases which cited this case, apparently adopting its reasoning, are Carter v. Howe Machine Co., 51 Md. 290, 297 (1879); Central Railway Co. v. Brewer, 78 Md. 394, 407, 28 A. 615 (1894); Bernheimer v. Becker, 102 Md. 250, 255, 62 A. 526 (1905).

[6] *Ibid.*

imprisonment could not be implied so as to make the principal liable.

The *McCrory* case constituted a virtual repudiation by Maryland of the rule of the *Mali* case, yet the court did not expressly reject the rule, seeking to explain the earlier decision. The principal case, by relying on *McCrory v. Satchell,* finally lays to rest the ghost of *Mali v. Lord* in Maryland and brings this state squarely into line with the majority view, holding that the jury can find the principal liable for false imprisonment if the agent's authority for such an act can be implied from the general scope of his employment. The *Mali* case, which expresses the minority view, has been subjected to such severe criticism[7] and has been so drastically limited in later New York cases[8] that it is of questionable vigor today.

The liability of a master for a servant's wrong doing is founded upon the maxim *qui facit per alium, facit per se.*[9] Such liability, though it may involve various tortious acts by the servant, is governed by the principles of master-servant rather than by the principles of tort law, since the liability is imposed on the one who does not commit the wrongful act himself. It is evident that no problem arises where there is express authority granted to the agent to do the act in question, the principal being clearly liable. The area in which the questions arise is the more nebulous one of the extension of liability under the doctrine of implied authority. In ascertaining the agent's implied authority in this particular area, or any area, the character of the position and the duties incidental to it are important elements for consideration.[10] In studying the character of the position of agents who have no express authority to protect the principal's property, the terms "manager" and

[7] See, *e.g.* Field v. Kane, 99 Ill. App. 1 (1901); Staples v. Schmid, 18 R. I. 224, 26 A. 193, 195-6 (1893); J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S. W. 2d 359, 362 (1935); Knowles v. Bullene & Co., 71 Mo. App. 341 (1897).

[8] Palmeri v. Manhattan Ry. Co., 133 N. Y. 261, 30 N. E. 1001 (1892); Dupre v. Childs, 52 App. Div. 306, 65 N. Y. S. 179 (1900). These cases limit the ruling of the *Mali* case to mean that the general employment of a superintendent, who has general management of the business, does not warrant his causing the arrest of a person suspected of stealing the principal's property; 35 A. L. R. 656. However, the *Mali* decision was held controlling in the later New York case of Homeyer v. Yaverbaum, 197 App. Div. 184, 188 N. Y. S. 849 (1921), which involved a store manager and a suspected shoplifter.

[9] 22 AM. JUR. 378, False Imprisonment, §35. "He who acts through another acts himself, [*i.e.*, the acts of an agent are the acts of the principal]." BLACK'S LAW DICTIONARY (4th ed., 1951) 1413.

[10] J. J. Newberry Co. v. Judd, *supra,* n. 7; MECHEM, *op. cit., supra,* n. 4, §1973; 3 COOLEY, TORTS (4th ed., 1932) §396.

"assistant manager" carry an inference that their acts are the acts of the store, inasmuch as they are entrusted with the general management and custody of the entire business. This in turn renders the principal liable when such employees cause the false imprisonment of a customer with intention of protecting the principal's property, such actions being incidental to and consistent with the general scope of such agents' employment.[11] Usually a subordinate agent cannot cause his principal to become liable for false imprisonment since the protection of the principal's property is not normally entrusted to him nor is it his implied duty, in the absence of delegation to so protect the property.[12]

When an agent, regardless of his position, is expressly delegated the duty of protecting the principal's property, there arises an implied authority to do everything reasonable and necessary to protect the property, thus giving rise to liability on the principal for his acts in performance of such a duty.[13] In lieu of entrusting such a duty to inexperienced store employees, professional detectives are sometimes hired, the advantage being that better protection is afforded the store, and the possibility of liability for mistaken arrests is diminished by the experience and judgment of such trained persons.[14]

It is obvious that the principal cannot be held liable for false imprisonment caused by the agent's own malice or personal motives,[15] nor can the principal be held liable where the agent has caused the arrest after the crime has been committed and the only end it can serve is to vindicate public justice. This is true since the act was not committed under any authority from the principal, and bears no rela-

[11] Birmingham News Co. v. Browne, 228 Ala. 395, 153 So. 773 (1934); McCrory Stores v. Satchell, *supra*, n. 2; Gillis v. Great Atlantic & Pacific Tea Co., *supra*, n. 4; Great Atlantic & Pacific Tea Co. v. Dowling, *supra*, n. 4.

[12] Bushardt v. United Inv. Co., 121 S. C. 324, 113 S. E. 637 (1922); Hammond v. Eckerd's of Asheville, 220 N. C. 596, 18 S. E. 2d 151 (1942); Rigby v. Herzfeld-Phillipson Co., 160 Wisc. 228, 151 N. W. 260 (1915); Conover v. Jaffee, 238 App. Div. 147, 263 N. Y. S. 618 (1932).

[13] Long v. Eagle, 5, 10, and 25¢ Store Co., 214 N. C. 146, 198 S. E. 573 (1938); Moseley v. J. G. McCrory Co., 101 W. Va. 480, 133 S. E. 73 (1926); Hurst v. Montgomery Ward & Co., 107 S. W. 2d 183 (Mo., 1937); Newton v. Rhoads Brothers, 24 S. W. 2d 378 (Tex., 1930); Staples v. Schmid, *supra*, n. 7; Knowles v. Bullene & Co., *supra*, n. 7; McCrory v. Stachell, *supra*, n. 2; J. J. Newberry Co. v. Judd, *supra*, n. 7.

[14] Adams v. F. W. Woolworth Co., 144 Misc. 27, 257 N. Y. S. 776 (1932); L. S. Ayres & Co. v. Harmon, 56 Ind. App. 436, 104 N. E. 315 (1914); Perkins Bros. Co. v. Anderson, *supra*, n. 4. Merely because detectives are hired does not give rise to an inference that the store owner has given express authority to arrest suspected thieves, the proper inference being they are hired to protect his property, with the implied authority attendant therewith as is necessary or customary to perform his duty.

[15] Cobb v. Simon, 124 Wisc. 467, 102 N. W. 891 (1905).

tion to the agency purpose of protecting the principal's property.[16] The Court pointed this out in the instant case by distinguishing it from *Nance v. Gall.*[17]

Special instructions to agents entrusted with the custody of the principal's property regarding the arrest of the suspected shoplifter have no effect on the principal's liability, if again the arrest is within the express or implied authority of the agent's general scope of employment.[18] Where the arrest is made by a public officer on the information furnished by a clerk or any agent, the principal can be held liable if furnishing such information is within the express or implied authority of the clerk or agent, since there is no distinction in regard to the master's liability in arresting or causing an arrest.[19] However, when an agent merely assists a public officer in making an arrest he is under the direction of the officer rather than his principal and is without the scope of his express or implied authority.[20]

In the instant case, the Court of Appeals affirms its alignment with the majority rule, eliminating the inconsistency which appeared in earlier cases.[21]

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[16] 35 A. L. R. 654-6; Pruitt v. Watson, 103 W. Va. 627, 138 S. E. 331 (1927); B. C. & A. Ry. Co. v. Ennalls, 108 Md. 75, 69 A. 638 (1908); 1 RESTATEMENT, AGENCY (1933) §245; 2 MECHEM, AGENCY (2d ed., 1914) §§1974-1976.

[17] Nance v. Gall, 187 Md. 656, 50 A. 2d 120, 51 A. 2d 535 (1947). This case involved the scope of employment of a railroad supervisor who caused the arrest of the plaintiff for damage which had already been repaired. The Court felt that the agent's act was to vindicate public justice, rather than protecting the railroad's property.

[18] J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S. W. 2d 359 (1935); Knowles v. Bullene & Co., 71 Mo. App. 341 (1897).

[19] Zinkfein v. W. T. Grant Co., 236 Mass. 228, 128 N. E. 24 (1920).

[20] Geary v. Stevenson, 169 Mass. 23, 47 N. E. 508 (1897); Meyer v. Monnig Dry Goods Co., 189 S. W. 80 (Tex. Civ. App., 1916).

[21] See Norvell v. Safeway Stores, Inc., 212 Md. 14, 128 A. 2d 591 (1956) and Banks v. Montgomery Ward & Co., 212 Md. 31, 128 A. 2d 600 (1956). These recent cases though primarily concerned with malicious prosecution (but not of shoplifters) cite the principal case with approval with the result that the prior inconsistencies in the Maryland case law, arising out of the rule of the *Mali* case, have been resolved.