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The Borrowed Servant - Keitz v. National Paving and Contracting Company

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The Borrowed Servant

Keitz v. National Paving and Contracting Company[1]

Lloyd Ogle was driving a dump truck on Pimlico Road when he negligently drove across the center line and struck a bus, seriously injuring the driver. A suit was instituted against the servant Ogle, and against Elizabeth May Sudbrook and The National Paving Company, who were, respectively, his general and special employers.[2] The lower court directed a verdict in favor of the special employer, and the jury found against the other two defendants. The plaintiff appealed, seeking to hold the special employer also. The Court of Appeals awarded plaintiff a new trial against National. In deciding that the jury could reasonably find that National had such a relationship to Ogle's acts that it, as well as Sudbrook, could be held liable, the Court pointed out that it is essential that a master who is to be held have the right to control, but not that he actually exercise it.

Under the usual test, when the servant causes injury by doing an act in a negligent manner, that master is held

[1] 214 Md. 479, 134 A. 2d 296 (1957). Reargued on different points, 214 Md. 496, 136 A. 2d 299.

[2] The general employer is that individual with whom the servant is regularly employed and who was the master before the servant was borrowed or hired and who will continue as such after the service to the special employer has terminated. The special employer is that individual who has borrowed or hired the servant from the general employer. There is generally a contractual relationship between the general and special employers under which the servant is lent or hired to the special employer. For an illustration of this definition see: MECHEM, AGENCY (4th ed. 1952) §453.

who had the predominant right to control the *manner* in which the act was done. This right is ordinarily held to remain with the general employer unless the facts show otherwise.[3] In the subject case, National instructed Ogle to proceed out Pimlico Road and pick up a load of filler dust, but did National have the right to control the *manner* in which the truck was driven?

In two similar cases the Maryland Court seems to have thought that the right to control had not shifted to the special employer. In the recent Maryland case of *Baltimore Transit Co. v. State,*[4] the jury was held to have properly found that the responsibility for the servant's negligence did not shift from the general employer, even though the rental of her trucks was over a long period of time and the special employer gave instructions to the drivers as to safe and careful driving.[5] The Maryland Court in *Bentley, Shriver & Co. v. Edwards,*[6] a case involving the application of the fellow servant rule rather than the master's tort liability to a third person, held that when the special employer could tell the driver where and when to go, but could not direct the manner in which he drove, the special employer was not the master. That case was similar to the subject case, in that the general employer hired out his truck and servant to carry goods at the direction of the special employer.

Although these two cases seem to be in conflict with the decision reached in the subject case, it should be indicated that in cases of this nature no one factor is controlling.[7] Control may be based on the right of hire and

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[3] RESTATEMENT, AGENCY, Maryland Annotations (1936) 127-130; 5 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE (Perm. ed. 1954) §§2981, 2984. For a definition of the manner of control doctrine see W. S. Quinby Co. v. Estey, 221 Mass. 56, 108 N. E. 908 (1915), where the court said:

> "When a servant or agent in the general employ of one person is sent to work for another, he does not become the servant of the one to whom he is sent merely because the latter directs what work is to be done, or in what way it is to be done. The original master remains liable and the employee remains his agent, unless the authority to direct and control the servant in all the details of the transaction is surrendered to some other person, so that the business in which the servant is engaged is no longer the business of his general employer, but is in all respects the business of the person to whom he is sent. If the servant remains subject to the general orders of the man who hires and pays him he is still his servant, although specific directions may be given him by another person, from time to time as to the details of the work and the manner of doing it."

[4] 184 Md. 250, 40 A. 2d 678 (1945).

[5] *Ibid.*, 264.

[6] 100 Md. 652, 60 A. 283 (1905).

[7] 1 RESTATEMENT, AGENCY (1933) §220.

discharge.[8] Cases have also turned on the question of ownership of the vehicle, on the theory that an owner of an expensive machine is more likely to be interested in keeping it out of the hands of an incompetent or careless operator.[9] These factors would tend to support a finding that liability remained in Sudbrook. It was she who owned the trucks, paid the drivers, had the right to hire and fire them and insured and cared for the trucks. Some of the facts, on the other hand, point to a shift in control; the rental to National was over a long period;[10] Ogle worked side by side with National's employees,[11] went where National sent him and was under some general control by the special employer. Also, the fact that the name of the special employer appeared on the side of the truck might be held to raise a weak presumption of a master-servant relationship with the National Company.[12]

The Restatement of Agency discussed the following considerations, among others, to be weighed in determining whether liability has shifted:

1. "If the servant is expected only to give results called for by the temporary employer [hauling the filler dust from one point to another] and to use the instrumentality as the servant would expect his general employer would desire, the original service continues."

2. "[T]he fact that the general employer is in the business of renting machines and men is relevant, since in such a case there is more likely to be an intent to retain control over the instrumentality."[13]

Other factors have also been given importance.[14]

[8] 56 C. J. S., Master and Servant, §§1, 2e, 57 C. J. S. 276, Master and Servant, §563b; Standard Oil Co. v. Parkinson, 152 F. 681 (8th Cir. 1907).

[9] The Standard Oil Co. v. Anderson, 212 U. S. 215 (1909); Thatcher v. Pierce, 281 Pa. 16, 125 A. 302 (1924). For a note on a similar English case see: 9 Cam. L. J. 382 (1947).

[10] 1 RESTATEMENT, AGENCY (1933) §220(2)(f).

[11] H. E. Wolfe Const. Co. v. Fersner, 58 F. 2d 27 (4th Cir. 1932). This case seemed to turn upon the fact that the lessor's trucks and drivers operated side by side with the lessee's trucks and held the lessee even though the lessor had the right to hire and fire his own drivers.

[12] Ross v. St. Louis Dairy Co., 339 Mo. 982, 98 S. W. 2d 717 (1936); Ashley v. Safeway Stores, 100 Mont. 312, 47 P. 2d 53 (1935); Constitution Pub. Co. v. Dale, 164 F. 2d 210 (5th Cir., 1947).

[13] 1 RESTATEMENT, AGENCY (1933) §227, comment c.

[14] In previous Maryland cases, a distinction was often made as to *loaned* and hired servants and the reports indicate that the courts had a greater inclination to relieve the general employer where he has loaned his servant, on the theory that he is not receiving any pecuniary recompense for the

The Restatement points out that in the absence of an obvious shift, there is a presumption that the general employer continues as master.[15] Several illustrations are given which are fairly similar to the subject case but tend to produce an opposite result:

1. "P, a taxicab company, rents a cab and driver to B for a day, upon the understanding that the driver is . . . to obey all reasonable commands of B. In the absence of evidence that B is to control the details as to the management of the cab, A is P's servant while driving the car."[16]

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servant's industry. For example, the Court in Salowitch v. Kres, 147 Md. 23, 31, 127 A. 643 (1925) said:

"There is nothing in the cases of *Sacker v. Waddell* and *Sugar Refining Co. v. Gilbert*, which is in conflict with the opinion in the case of *Bentley, Shriver & Co. v. Edwards*, 100 Md. 653. In that case the owner of the automobile truck, Burnmeister, was engaged in the business of hiring trucks, accompanied by drivers, to various parties who needed such service. The particular truck was at the time of the accident being driven by Edwards, the plaintiff in that case, and was engaged in hauling articles of merchandise for Bentley, Shriver & Co., that company indicating to the plaintiff what merchandise he was to haul and where he was to place same. The accident occurred while the plaintiff was unloading the truck in front of the defendant's place of business, and was occasioned by the negligence of a general servant of the defendant. It was contended by the defendant that the plaintiff was a fellow servant of the defendant and therefore could not recover against the common master. This contention was overruled by this Court, for the reason that the evidence conclusively showed that when Edwards was hauling merchandise for the defendant he was engaged directly in the business of Burnmeister, his general master, and his acts were in furtherance of that master's business in furnishing trucks and drivers for *hire. This decision was in accord with the great weight of authority* in respect to the *hiring* of vehicles and drivers by livery-stable keepers or garage-men, in which, although the passenger, or one who hires, has the authority to direct the driver when and where to drive, it has been *practically universally held* that the owner is liable for an accident occurring during the period for which the vehicle and driver are used by the passenger. The class of cases represented by *Bentley, Shriver & Co. v. Edwards* is totally different from the present case, and the principles therein laid down have no application, because in that case the truck belonged to, and the driver was in the general employ of a master whose business it was to hire trucks and drivers to the general public, . . .; while here, . . ., we have a case of a man loaning, without recompense, a truck and driver . . ." (Italics supplied.)

Other notable "Loaned Servant" cases include: Sacker v. Waddell, 98 Md. 43, 56 A. 399 (1903); Sugar Refining Co. v. Gilbert, 145 Md. 251, 125 A. 692 (1924). Notable "Hired Servant" cases: Bentley, Shriver & Co. v. Edwards, 100 Md. 652, 60 A. 283 (1905); Hilton Quarries, Inc. v. Hall, 161 Md. 518, 158 A. 19 (1932); Baur v. Calic, 166 Md. 387, 171 A. 713 (1934); Balto. Trans. Co. v. State, 184 Md. 250, 40 A. 2d 678 (1945). For an excellent discussion of the difference between the "Loaned" and "Hired Servant" cases compare: 42 A. L. R. 1446 with 42 A. L. R. 1416. See also 17 A. L. R. 2d 1388, which is a review of the hiring cases in America.

[15] 1 RESTATEMENT, AGENCY (1933), §227, comment b.

[16] *Ibid.*, illus. 1.

2. "During the loading of P's ship by B, a stevedore, the steam winch upon the ship operated by A, a member of the crew, is used to hoist goods from the dock to the hold. For this service B is to pay P. The servants of B direct A when to start and when to stop the winch. The inference is that in the management of the winch A acts as P's servant."[17]

3. "P, who operates a trucking business, rents to B, an express company, a truck and driver to deliver goods and to do such incidental work as the express company may require in its transportation, for which B is to pay P at the rate of two dollars an hour. B specifies that, if available, A, an employee of P, is to be sent. A is sent. While driving the truck, the inference is that A remains in P's employment, and in the absence of further facts A is P's servant during such time. If loading and unloading is part of the service which P agreed to render, A remains in P's employment, unless B assumes control over the manner of loading and A submits thereto."[18]

The only cases in which this section would hold both the general and special employer would be where the special employer directs the *manner* of performance of the specific act which was the proximate cause of the injury. In the illustration given,[19] the special employer directed the driver to operate the vehicle at a high rate of speed, and this resulted in an accident. Thus it would seem that the result in the subject case is at least a slight departure from the Restatement position. Perhaps the majority of the jurisdictions and the Restatement[20] would agree that both employers could be liable in an extraordinary case. Such a possibility has been discussed by Mechem[21] in his work on Agency, but few cases can be found where the courts have so decided.[22] It is possible that

[17] *Ibid.*, illus. 4.

[18] *Ibid.*, illus. 5.

[19] *Ibid.*, illus. 8; Malisfski v. Indemnity Ins. Co. of North America, 135 F. 2d 910, 914 (4th Cir. 1943).

[20] 1 RESTATEMENT, AGENCY (1933) §226.

[21] MECHEM, AGENCY (4th ed. 1952) §458.

[22] RESTATEMENT, AGENCY, Maryland Annotations (1936) §226; RESTATEMENT IN THE COURTS, AGENCY (Perm. ed. 1945) §226, p. 171; RESTATEMENT IN THE COURTS, AGENCY (1954 Supp. Vol. 1) §226, p. 63; *op. cit. supra*, n. 21, §460; 17 A. L. R. 2d 1388, 1408. This is an excellent annotation which reviews the hiring cases and lists those which have held the special employer, which are comparatively few in number. This annotation also supersedes 42 A. L. R. 1416 mentioned above in n. 14, *supra;* 5 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE (Perm. ed. 1954) §2947.

in the future, Maryland will adopt the minority view, as laid down in many Pennsylvania cases,[23] that both employers are liable because both have benefited from the servant's service.

The effect of the decision reached in the subject case is to hold both masters. From the standpoint of the plaintiff, this makes it easier for him to collect his judgment. But it would seem that the injured party is already adequately protected in that he can hold the servant and at least one master. Another effect of this decision is to make both masters contribute to the judgment, thereby lessening the burden on each. Whether or not this is just depends upon which doctrine one bases his conclusion. The courts generally rest their decisions on two theories, both based on public policy. Under the right to control theory[24] it would seem that in an ordinary situation, only one master would be held since usually only one would have control over the specific act which caused injury. Under this theory it would not seem fair to make that master contribute to the claim who had no control over the servant as to the specific act involved. The second theory is based on the doctrine that since both masters are benefiting from the industry of the servant, both should be made to pay for his negligence.[25] If this theory were adopted, both masters would ordinarily be held, in the absence of a loan of the servant by one master to the other. The Maryland Court in the subject case seems to be verbally adopting the first theory[26] and applying the second. The Court, however, may have felt that Sudbrook was a mere puppet in supplying trucks to National in view of the fact that for over a period of years National accounted for eighty percent of Sudbrook's business, as well as the fact that there was no written contract between the two companies. If this were so, then the right to control test could be applied to hold National, because in reality, National would be the sole employer.

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[23] *Loc. cit., supra*, n. 21.
[24] MECHEM, AGENCY (4th ed. 1952) §460.
[25] *Ibid.*, §458.
[26] 214 Md. 479, 134 A. 2d 296 (1957).