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The Development of the Fellow Servant Doctrine

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THESIS PRESENTED BY

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In order to have a comprehensive and adequate view of the subject of fellow servant or co-employee liability it is essential at the outset to examine the law applicable to the relation of master and servant in the different stages of its development: and in such an examination one needs not a microscope but a field glass and a commanding height.

In looking at the annals of the early Roman Law one must necessarily be impressed by the logic and brevity of its maxims. Evidence of their clearness and conciseness is seen in the fact that they have withstood the wavering changes of over fifteen centuries and we still find many of them embodied in the works of modern text writers and in the decisions of our courts.

Perhaps the most striking of the maxims found in the early Roman jurisprudence is the maxim "Respondeat Superior", while closely analagous and apparently but a broader statement of the same principle is the maxim "Qui facit per alium facit per se."

The maxim "Respondeat Superior" according to Kent originated in the early stages of the Roman civilization, and

dates back to that period in the Roman law when all servants were slaves, for whom the pater-familias was responsible as a part of his general responsibility for the family which he represented and governed. This maxim was introduced into the English law about the time of Charles II.

The relation of master and servant arises out of contract either express or implied and is analogous and similar to that of principal and agent; the difference between the two consisting only in the nature of the employment, and the extent of the authority. Every servant acting in the exercise of the master's business, and within the scope of his employment represents the master himself, and his acts are, in contemplation of law, the acts of the master.

It seems however that a wrong impression has at times more or less obtained, and still exists to a certain extent; that the same legal principles as to the master's liability ought to apply to cases of injuries by a servant to a servant, and to cases of injuries by a servant to a stranger, or to the public. Due reflection will show however that the two relations are entirely different, and the rules of law regarding the employee's liability to one servant for the default of a co-servant, not only are, but for the last fifty years

have been different from those relating to the master's liability to those not in his employment, for the acts of his servants.

According to the weight of the American and English authorities; "The master is liable to persons not in his service, not only for his own wrongful acts and omissions , but also for the wrongful acts and omissions of his servants while acting in the scope and course of their employment as such, even though the particular acts or omissions were not only unauthorized but even forbidden; and resulted in loss and damage to him irrespective of the claims of the person injured." But in as far as this rule imposes on the master an imputed liability, that is, a liability beyond his authorized acts, and defaults or a liability for faults and omissions he did not approve, authorize, or direct; but even forbid; it is one of manifest severity, is not based on natural justice and is to be held justifiable only on the grounds of public policy or of social duty.

The reasons for the master's liability for the acts of his servants to the public, or to strangers, can be based upon either one of two grounds; one of which is that the master is bound to guarantee third persons from all harm or

damage arising from the negligence of himself, or those acting under his authority, or in the course of his business; but it seems the better rule to waive the reasoning of such a constructive guarranty, and adopt the better conclusion that he who puts into operation an agency which he controls while he receives its emoluments, must be held responsible for the injuries which it incidentally inflicts. The business of the masetr is as respects the public, conducted for his own advantage and convenience, the public have no concern in it, are not consulted about it.and have no control over it or its methods; and if the business is a lawful one as for example a railroad built and operated under legislative authority, the master although he is not bound to guarrantee the public against accidents or damages, is still bound to take reasonable care either by himself or through those who represent him, to prevent accidents and damages and he is liable for his servant's negligence, not simply because they are his servants, but because as respects the public he is bound to conduct his business with due care and caution so as not to injure or damage the rights of others; because having for his own convenience, pleasure, or profit, exposed the public to risk of damages, if damages result either through his fault

or through the fault of his servants, the master will be held liable.

The ancient rule of "Respondeat Superior" was applied without exception from its origin in the early Roman law until the year 1841. But with the rapid growth of manufacturing, mining, and railroad enterprises; came increasing liability and responsibility for accidents arising from the bad management of officers and agents, the insufficiency and incompetency of workmen, and the methods of doing business; the liabilities involved in the employment of thousands of employees in large manufacturing centers, and on lines of great railway companies, exposed at all times to manifold risks and dangers gave rise to the feeling in the courts that it operated unjustly to the large industrial enterprises, and that the relation of master and servant in its true sense was inapplicable to the situation; for between employer and employee it became more and more difficult to apply the ordinary common law principles governing the relation of master and servant, to the more complicated methods of business enterprise.

In the year 1837 the case of Priestly v Fowler, 3 M. & W.1. arose in the English courts, it being the first recorded

exception to the ancient rule of "Respondeat Superior", and the general principles of the law governing the relation os master and servant. Beach in his work on "Contributory Negligence" says of it; "The decision of this case constitutes a clear exception from which has flowed in a copious flood all the modern law as to follow servants and common employment, and it is not extravagant to say that the decision in its influenct upon subsequent jurisprudence is second to no adjudication to be found in the reports; no other reported case has changed the current of decision more radically then this, and subsequent reports and text books contain limitations and refinements on the doctrine here for the first time announced."

The facts of the case were as follows; a butcher sent one of his servants to deliver meat in a wagon which had been overloaded by another servant, the wagon broke down and the man received severe injuries. The court decided that the butcher was not liable to the servant for the injuries so received. This case however does not plainly show exactly whose negligence was the cause of the injury; that is whether it was due directly to the overloading, or was due to some material defect in the wagon itself. The decision however seems to have been based for the most part on the ground that

the non-application of such a rule would be to carry out the principle of the master's liability to an alarming extent.

Lord Abinger giving the opinion of the court says; "If the master is to be held liable in this action the principle of that liability will be found to carry us to an alarming extent. If the owner of a carriage is responsible for the deficiency of the carriage to his servants he is responsible for the negligence of his coach-maker, his harness-maker and his coachman. The master would thereby also be liable to the servant for the negligence of the chambermaid in puting him into a damp bed or for the negligence of the cook in not properly cleaning the etensils of the kitchen; but the inconvenience not to say the absurdity of these consequences is obvious." Again in the opinion Lord Abinger says, "The master is only bound to provide for his servants to the best of his judgment, information, and belief; while the servant on the other hand is not bound to risk his safety in the employment of his master but may if he sees fit decline any service in which he reasonably apprehends injury." The case decides that a servant upon entering into the employment of his master assumes the risks of such employment.

A few years later in the year 1850 the case of Hutchin-

son v The New York, New Castle and Berwic R.R. Co. 5 Ex. 343 arose in England. This case arising upon a clearer statement of facts and more definitely stating the law, has been held, although a later case than Priestly v Fowler to be the leading English case upon the subject. In this case a fireman was injured through the negligence of an engineer and Baron Alderson said in the opinion given by the court, "Where several servants are employed by the same master and injury results to one of them from the negligence of another, in such a case we are of the opinion that the master is not generally liable where he has selected persons of reasonable care and skill." and again in his opinion he states the principle as follows, "A servant when he undertakes to serve a master undertakes as between himself and his master to run all the ordinary risks of the employment, including the risk of negligence on the part of a fellow servant whenever he is acting in the discharge of his duty as servant of him who is the common master of both. This case in the principle which it enunciates has been followed again and again in the numerous cases which have since arisen under the English law.

The first reported case upon this continent arose in North Carolina in 1841 three years after Priestly v Fowler had

been decided by the English courts. It is also apparent, strange though it seems, that the North Carolina court did not have the case of Priestly v Fowler before them nor does the record show that they had ever heard of it, and so we find this doctrine enunciated by the judicial authorities of both England and America, at or about the same time and each decided independently of the other.

The North Carolina case Murray v South Carolina R.R. Co. is reported in 2 Mc Milliams reports. In this case upon a locomotive owned and operated by the defendent corporation, while in the performance of his duties, the plaintiff was injured owing to the carelessness and negligence of the engineer in refusing to stop after his attention had been called to an obstacle upon the track. Judge Evans delivering the opinion of the court in this case in substance says, "It is by no means incident to the contract of service that the company should guarantee its servants against the negligence of co-servants.

It is admitted that the servant takes upon himself the ordinary risks of his employment. Why not the extraordinary ones ? Neither are within the contract and I can see no reason for adding the already known and acknowledged liability

of a common carrier to the facts of this case without a single authority or decision to sustain such a holding."

The counsel for the plaintiff sought to hold the company on the ground that the fireman was a passenger, Judge in Evans in conclusion remarks; "Each servant in his department represents his principal, the successful result of their labors comes from the fact that each performs his several duties. And it seems to me that it is on the part of the several agents a joint undertaking, where each one stipulates for the performance of his several part. They are not liable to the company for the misconduct of each other, nor is the company liable to one for the misconduct of another; and as a general rule I would say that where there is no fault on the part of the master he would be liable to the servants only for their wages."

But in the next year 1842 there arose in the Supreme Court of Massachusetts the celebrated case of Farwelll v B. & W. R.R.Co., 4 Metcalf 49. The learning and logic of the opinion delivered by Chief Justice Shaw in this case has made it as has been justly said the fountain-head for all subsequent decisions upon this point. It has been found again and again, and cited with approval by both the English and

American courts ever it was first announced. The facts of this case were as follows, an engineer was injured through the negligence of a switchman who left the switch open so that the engine ran off the track and injured the plaintiff. It was shown that the switchman was a carefull and trustworthy servant; the engineer Farwell sued the railroad company and it was held that he could not recover. In this case no actual negligence was alleged against the company, but the basis of the claim was a supposed implied contract by the master to pay one servant for the damages caused to him through the negligence of another. The court however holding that no such implied contract existed. Chief Justice Shaw in delivering the opinion of the court said; "The general rule resulting from considerations of justice as well as policy is that he who engages in the employment of another, for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of sych services, and in legal presumption the compensation is adjusted accordingly; and we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils about which

the servant is as likely to know, and against which he can as effectually guard as the master, they are perils incident to the service and which can be as distinctly forseen and provided for in the rate of compensation as any others."

Further in the opinion Chief Justice Shaw says; " Besides it appears to us that the argument rests upon an assumed principle of responsibility which does not in fact exist, the master is not exempt from liability because the servant has better means of providing for his own safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract does not extend to indemnify the servant against the negligence of anyone but the master himself. The exemption therefore of the master from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant."

Since these early and leading cases were decided, the

doctrine that a master whether a corporation or a private individual, where no negligence is attributable is not liable to a servant for the injuries or damages caused by the negligence or carelessness of a fellow servant has been decided by the courts both of the American and English continents till it can be said to be a practically undisputed principle of the law. But the fact as to what constotutes fellow service or co-employment; and who are fellow servants or co-employees, is still one regarding which the courts are widely and irreconcilably at variance; consequently we have to the general fellow servant rule as adopted by the courts of the different states various exceptions.

The first, and what is probably the most important of the exceptions to the general rule is what is known as the superior servant or the superior officer doctrine. This limitation or doctrine is based upon the theory that there is a distinction between servants exercising no supervision over others engaged with them in the same employment, and those who are clothed with the control and management of a distinct department, in which their duty is that of direction and superintendence. This doctrine deals altogether with the station or position which the two employees occupy, and over-

looks the character of the act out of the negligence performance or non-performance of which the injury arose. Beach in his work on "Contributory Negligence" defines this limitation as follows: "Where the negligent servant is in his grade of employment suprior to the injured servant, or where one servant is placed by the employee in a position of subordination and subject to the orders and control of another, in such a way and to such an extent that the servant so placed in control may reasonably be regarded as representing the master, as his alter ego, when such inferior servant without fault and while in the discharge of his duty is injured by the negligence of the superior servant, the master is liable in damages for the injury.

This doctrine arose in an early Ohio case, the Little Maima R.R.Co. v Stevens, from the opinion in which case the above quotation from Beach seems to have been taken.

In considering this limitation Judge Shaw in the early Farwell case said: "To say that the master shall be liable because the damage is caused by his agents is assuming the very point to be proved: they are his agents to some extent and for some purposes,but whether he is responsible in a particular case for their negligence is not decided by the fact

that they are for some purposes his agents." This limitation although followed in a few.of the southern and western states is far outweighed by the weight of authority against it. A case decided in the United States Supreme Court in 1884 known as the Ross case 112 U.S. 377, where an engineer was injured through the negligence of a conductor the court held the railroad company liable following the superior servant limitation. But a few years later in the Baugh case reported in 129 U.S. where a fireman was injured through the negligence of an engineer who under the special rules of the company, in the absence of a regular conductor,was acting as conductor; in this case the court held the railway company not liable; and the court in its decision although attempting to distinguish the Ross case which it seemed practically impossible to do on any grounds,from the facts of this case;but in the reasoning of the court as given in the opinion of Chief Justice Fuller there was a strong inclination to break away from the superior servant rule as laid down in the Ross case; as the following quotations from the opinion will show will show; "It is true" the court says "that the fact that one servant is given control over another does not destroy the relation of fellow servants, as the inquiry in such cases

must always be directed to the real powers and duties of the official and not simply to the name given to the office." Again in the course of the opinion Justice Fuller says: "Prima facie all who enter into the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarcation than that of mere control must exist to destroy the relation of fellow servants." It will be seen from these quotations that if the Ross case was distinguished, and not clearly overruled; it was distinguished in such a manner that it will not again be followed in that tribunal. The superior servant limitation at present is followed only in the following states, Ohio, Kentuckey, Georgia, Missouri, Nebraska, North Carolina, Tennessee and Virginia.

The second limitation upon the general fellow servant doctrine is what is known as the department or consociation doctrine. This doctrine arises from the fact that in many large enterprises the necessities of industry have led to a division of labor into different departments. Thus the rule has sprung up in a few of the states of this country that in order to constitute servants of the same master, fellow servants, it is essential that they should be either actually

cooperating at the time of the injury, in the particular business at hand, or that their usual duties should bring them into habitual consociation so that proper care would be likely to result. Respecting this doctrine Chief Justice Shaw in the early Farwell case said; "When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their compensation and authority from the same source; it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case; if it were made to depend upon the nearness or remoteness of the persons from each other, the question would immediately arise,how near or how distant must they be and yet be in the same department. In a blacksmith shop persons working in the same building at different fires may be quite independent of each other, though only a few feet distant. In the construction of a rope walk several may be at work on the same piece of cording at the same time, many hundred feet distant from each other and beyond the reach of sight and voice yet acting together." The language of Chief Justice Shaw in this case lucidly states the objection to this doctrine.

It is obviously impracticable to try and guage the liability of an employer in a complex business by the independence of its different branches, or the inter-communication of those employed, for not only would it be almost impossible in many cases to separate the work into distinct departments, and to discern their dividing lines, but incidental duties changing the relation of the workmen to each other would also vary the master's liability. He would thus be liable for the negligence of the servant at one time and place and not at another, so that without a personal supervision of all his servants in all their work, he could not know when he was responsible and when he was not. It is plain that such a distinction must manifestly result in endless confusion, as is illustrated by the situation of the law in a few states which have adopted this doctrine. This doctrine now exists in Indiana to a limited extent, and in the states of Illinois, Georgia, Kentuckey, and Tennessee. The courts of Tennessee have applied this doctrine in its strictest and fullest sense.

The third doctrine if it can be called a distinct doctrine is what is known as the vice principal doctrine, which is but a limited application of the superior officer doctrine. This doctrine is based upon the fact that the master owes to

his servants certain positive duties which may be stated as follows:

1st The master is bound to furnish all his servants with a safe and suitable place in which to work.

2nd. The master is bound to use due care and diligence in the selection and retention of sufficient and competent servants.

3rd. The master is bound to supply his employees with safe and suitable machinery, tools, and appliances, and also to keep such machinery in a safe and serviceable condition, and to this end he must make all needed inspection.

4th. It is also the duty of the master to make and publish such regulations, and provisions for the safety of employees as will afford them reasonable protection against the damages incident to the performance of the performance of their respective duties.

These are the certain defined personal duties which the master owes to his servants and if the master deligates any one of these so-called personal duties, the person to whom they are so delegated is known as a <u>vice principal</u> and for his negligent or careless acts the master is held liable. This seems to be the true rule and criterion of fellow service,

To be sure, under this rule it is absolutely essential that the injured employee and the employee whose negligence caused the injury should be servants of the same master. By this rule we have in every case a crucial test, and a determining criterion from which to judge.

The true test under this rule as to whether an employee occupies the position of a fellow servant to another employee or is the representitive of the master is to be found not in the grade or rank of the offending or injured servant, but must in every case be determined by the character of the act being performed by the offending servant by which the other employee is injured; that is, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master; if so then he is but the agent of the master for that purpose and the rules of principal and agent apply.

This doctrine has been announced and followed by many of the most able courts of this country. In the state of New York this has been considered the proper test. In Flike v Boston R.R.Co., 53 N.Y. 594, Judge Church said, "The true rule I apprehend is to hold the corporation liable for negligence in respect to such acts and duties as it is required

to perform as master, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation and the latter is liable for the manner in which they are performed".

And later in Crispin v Babbit, 81 N.Y. 516, Judge Rapallo stated the rule as follows, "The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants he is responsible to them for the manner of its performance."

Thus it would seem that under the justice of this rule the master's liability is precisely commensurate with the master's personal duties towards his servants, and as to the servant who in the performance of these duties represents the master he can only be a vice principal for whose acts and neglects the master is liable; beyond this the employer is liable only for his own personal negligence.

This is a plain, sound, safe, and practical line of distinction; one can easily find it and define it; it begins and ends with the personal duties of the master, and any attempt to refine it based upon the notion of grades in the service

or what is much the same thing distinct departments in the service will only bring about the confusion of the Ohio, Tennessee, and Kentuckey experiments; whose courts have constructed a labyrinth in which the judges who made it seem to be able "to find no end in the wandering mazes lost".

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