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MASTER AND SERVANT EMPLOYER'S LIABILITY FOR SERVANT'S NEGLIGENT PEDESTRIANISM

A messenger boy, engaged in behalf of the Postal Telegraph Company, appellee, in the delivery of a telegram, negligently collided with the appellant on a public sidewalk. Both parties to the accident were pedestrians. In the appellant's action for personal injuries the trial court sustained the appellee's demurrer on the grounds that the messenger boy used his legs and the public sidewalk in his own right, which right was not and could not be delegated to him by the appellee, and that the doctrine of "respondeat superior" had no application to such a state of facts. Held, reversed. The applicability of "respondeat superior" is tested by a determination of whether, at the time of the injury, the employee is performing some duty within the scope of his authority.¹

By the doctrine of "respondeat superior"² a master is liable for negligent acts³ committed by his agents or servants acting in the course of employment⁴ or the line of duty.⁵ Realizing that the great

three dissenting judges in this case and Justice Rutledge (who was of the opinion of the Court in this case), and Justice Reed (who did not consider this case) held that labor disputes among insurance workers are subject to regulation by the National Labor Relations Board because of the affect on interstate commerce. Three judges concurring in the Polish Alliance case did so because they believed insurance to be interstate commerce, and that the regulation was justifiable because of this. However, the harm to existing regulation had already been done in the South-Eastern Underwriters case.

1. *Anna L. Annis v. Postal Telegraph Co.*, — Ind. App. —, 52 N.E. (2d) 373 (1944).
2. Literally translated, "Let the principal answer."
3. It is often said that the master is liable whether the act of the servant be negligent or willful and wanton. See *Alabama Power Co. v. Bodine*, 213 Ala. 627, 105 So. 869, 870 (1925).
4. See Restatement, "Agency" (1933) § 228, where it is said that the conduct of a servant is within the scope of employment, if (a) it is the kind he is employed to perform, (b) it occurs substantially within the authorized time and space limits and (c) it is actuated, at least in part, by a purpose to serve the master. See also Note (1943) 4 Ga. B. J. 45. However, it should be noted that the exact meaning of an "act within the scope of employment" has always been a mooted question.
5. This is the usual statement of the rule of "respondeat superior." See *Illinois Central R.R. et al. v. Hawkins, Administratrix*, 66 Ind. App. 312, 317, 318, 115 N.E. 613, 614 (1917). The Kentucky Supreme Court aptly states the reason for the doctrine as one of public policy and necessity for holding a responsible person liable for acts done by others in the prosecution of his business, as well as for placing on employers an incentive to hire only careful employees. *Johnson et al. v. Brewer*, 266 Ky. 314, 317, 98 S.W. (2d) 889, 891 (1936). See *William F. Barker v. Chicago, Peoria, & St. Louis Ry.*, 243 Ill. 482, 488, 90 N.E. 1057, 1059, 26 L.R.A. (N.S.) 1058 (1909); *Hantke v. Harris Ice Mach. Works*, 152 Ore. 564, 54 P. (2d) 293, 295 (1936). See also Note (1942) 6 Md. L. Rev. 248, 249.

bulk of modern business is transacted through agency channels, it is immediately obvious that innumerable fact situations fall within the ambit of this general rule.⁶ The breadth of the rule is such that many limitations and variations in its application are unavoidable.⁷ In the principal case the appellees seek to impose another limitation: i.e., that the cause of action must be predicated upon the agent's negligent management of some instrumentality and that no liability adheres to the principal as a result of its agent's pedestrian negligence.⁸

Two American decisions, both Missouri cases, directly support the appellee's contention.⁹ The Pennsylvania Supreme Court, by certain dicta, has indicated that it would approve of the Missouri opinions.¹⁰ The first of the Missouri decisions, *Phillips v. Western Union Telegraph Company*,¹¹ was decided upon facts substantially identical with those of the principal case.¹² The Missouri Supreme Court¹³ concluded that a master was liable only for those acts of its agents that could be performed by the use of its powers and under its direction; that the messenger was traveling upon a public street in the exercise of a public right which was not subject to control by the defendant, and being under no duty to regulate the gait of its messengers the defendant was not liable.¹⁴ In the second of the Missouri cases,¹⁵ decided fourteen years later, the Kansas City Court of Appeals, although implying

6. See Mechem, "Outlines of Agency" (3d ed. 1923) § 529.

7. See Neuner, "Respondeat Superior In The Light Of Comparative Law" (1941) 4 La. L. Rev. 1, 36, 37, who, for example, proclaims that the "scope of employment" limitation is unreasonable and that the test should be whether or not the tort was connected with the work. See also (1938) 32 Ill. L. Rev. 1001.

8. *Anna L. Annis v. Postal Telegraph Co.*, — Ind. App. —, 52 N.E. (2d) 373, 374 (1944), cited supra note 1.

9. *Ritchey v. Western Union Telegraph Co.*, 227 Mo. App. 754, 41 S. W. (2d) 628 (1931), and *Phillips v. Western Union Telegraph Co. et al.*, 270 Mo. 676, 195 S. W. 711 (1917).

10. *John Wesolowski et al v. Hancock Mutual Life Insurance Co.*, 308 Pa. 117, 162 Atl. 166, 87 A.L.R. 783 (1932).

11. *Phillips v. Western Union Telegraph Co. et al.*, 270 Mo. 676, 195 S.W. 711 (1917), cited supra note 9.

12. The facts of the Phillips Case were that the plaintiff was standing on a street corner waiting for an auto to pass; one of the defendants messengers snatched a newspaper from a news vendor and while fleeing from the newsboy negligently collided with the plaintiff, knocking her into the street and seriously injuring her; at the time of the accident the messenger was delivering a telegram for the defendant.

13. The court sat in banc with Justice Woodson dissenting upon the grounds that at the time of the accident the messenger was pursuing the business of the master and therefore, ". . . the negligence in the one is identical with that in the other. . . ." *Phillips v. Western Union Telegraph Co., et al.*, 270 Mo. 676, 684, 195 S.W. 711, 714 (1917), cited supra note 11.

14. *Id.* at 680, 195 S.W. at 712, 713.

15. *Ritchey v. Western Union Telegraph Co.*, 227 Mo. App. 754, 41 S.W. (2d) 628 (1931), cited supra note 9.

doubt as to the logic of the Phillips case,¹⁶ cited it as controlling in Missouri. The Pennsylvania decision¹⁷ held the defendant insurance company not liable for injuries resulting from the negligent operation of an automobile by one of the defendant's collection agents upon the grounds that responsibility was commensurate with actual or inferable control of the instrumentality causing the injury.¹⁸ As illustrative of their reasoning the court said, "If Adams [the collection agent] had chosen to walk from person to person with whom he had his employer's business to transact, and in walking he had negligently knocked over and injured another pedestrian, it could not reasonably be contended that his employer should respond in damages. . . . So to hold would be to construe the phrase 'respondeat superior' beyond its fundamental meaning and to carry its principle to absurd lengths and to consequences forbidden by every sound consideration of public policy."¹⁹ These three cases stand alone as a minority rule.²⁰

The decision in the principal case aligns Indiana with the majority doctrine but again there is a noted paucity of authority.²¹ Two California opinions²² and a recent Washington decision²³ give apt expres-

16. *Id.* at 629, where the court said, "Whether the doctrine of the Phillips Case is sound or unsound is not for this court; it is controlling, notwithstanding holdings in other jurisdictions to the contrary." *Contra: Phillips v. Western Union Telegraph Co.*, 194 Mo. App. 458, 184 S.W. 958 (1916), where, upon the facts of the Phillips case cited in note 11 *supra*, the husband recovered for the loss of his wife's services. See *Salmons v. Dunn & Bradstreet*, 349 Mo. 498, 508, 162 S. W. (2d) 245, 250 (1942).
17. *John Wesolowski et al. v. Hancock Mutual Life Insurance Co.*, 308 Pa. 117, 162 Atl. 166 (1932), cited *supra* note 10.
18. *Id.* at 168.
19. *Id.* at 167.
20. See *Salmons v. Dunn & Bradstreet*, 349 Mo. 498, 508, 162 S.W. (2d) 245, 250 (1942), where the Missouri Supreme Court said, "Our research does not support the notion that the Phillips case had been overruled by implication, but it does reveal that the case stands alone, except for *Ritchey v. Western Union*." In the principal case counsel for the appellee's have cited *Railway Express Agency, Inc. v. Bonnell*, 218 Ind. 607, 611, 33 N.E. (2d) 980, 981 (1941), for the proposition that an employer is not liable for the injurious consequences of the acts of the servant if by reasonable prudence the employer could not have foreseen or prevented the act causing the injury. However, in the *Bonnell* case, the court said that there was no evidence to support an inference that the employee was acting within the scope of his employment, while in the principal case it was not contended that the messenger was acting outside the scope of his employment. Upon these facts the cases seem clearly distinguishable.
21. See 47 L. R. A. (N.S.) 143 (1914), where it is suggested that a probable reason for the sparsity of this type of case is that the injury is usually so slight that there is no effort to recover, or the contact is of such a character that the third person bases his action upon an assault wilful in its character rather than upon negligence.
22. *Schediwy v. McDermott et al.*, 113 Cal. App. 218, 298 Pac. 107 (1931); *Tighe v. Ad Chong et al.*, 44 Cal. App. (2d) 164, 112 P. (2d) 20 (1941).
23. *Hobba et ux. v. Postal Telegraph Co.*, — Wash. —, 141 P. (2d) 648 (1943).

sion to this view.²⁴ Five other cases give support to the majority.²⁵

"Respondeat superior" is commonly said to be founded upon the policy, ". . . that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it."²⁶ It is submitted that it is difficult to see why the absence of an instrumentality should delimit this policy.²⁷ The logic of the case seems undisputable.

MASTER AND SERVANT

"PORTAL TO PORTAL" TIME CONSTITUTES WORK UNDER THE FAIR LABOR STANDARDS ACT.

Plaintiff iron ore company brought action against the defendant miners' union for a declaratory judgment that miners' travel time, (a) in the shafts, (b) getting to and from the actual face of the iron ore, and (c) time spent at the surface in obtaining and returning tools, checking in and out etc., should not be counted in the work week as

24. In *Tighe v. Ad Chong et al.*, 44 Cal. App. (2d) 164, 112 P. (2d) 20 (1941), cited supra note 22, where a delivery boy negligently bumped into and injured the plaintiff, the California Supreme Court, in disavowing the principle of the Missouri cases and following the *Schediwy* case, held that the negligent operation of some instrumentality was not essential in invoking "respondeat superior." "Quite to the contrary, the law is well settled that in determining the question of respondeat superior the real test to be applied is whether at the time the employee commits the negligent act resulting in the injuries to the third person, he is engaged in performing some duty within the scope of his employment." *Id.* at 22. However, it should be noted that the court attempts to distinguish the Missouri cases upon the grounds that in those cases the injury was the result of "rollicking" by the servant. In *Hobba et ux. v. Postal Telegraph Co.*, — Wash. —, 141 P. (2d) 648 (1943), cited supra note 23, where the facts were very similar to those of the *Phillips* case, the Washington Supreme Court said that you would probably feel that you should make some distinction between those cases where the employee uses some instrumentality and where the employee travels on foot. However, the court continued by saying, "If the employer chooses to have the work done by another, he must be held responsible to others for the negligent conduct of his employee while doing the work, or else he should do the work himself. We think that if we try to draw a distinction between the different methods of locomotion that might result in injury to others, we not only misapply the doctrine of respondeat superior, but also forsake it entirely." *Id.* at 651.
25. See *Cook v. Sanger*, 110 Cal. App. 293, 293 Pac. 794, 800 (1930); *Phillip Ryan v. Patrick F. Keane*, 211 Mass. 543, 98 N. E. 590 (1912); *Phillips v. Western Union Telegraph Co.*, 194 Mo. App. 458, 184 S. W. 958 (1916); *Price v. Simon*, 62 N.J.L. 151, 40 Atl. 689 (1898); *Missouri, K. & T. Ry. v. Edwards*, 22 Tex. Civ. App. 184, 67 S. W. 891 (1902). See also (1944) 32 Geo. L. J. 308.
26. *Nicholas Farwell v. Boston & Worcester R. R.*, 4 Metc. 49, 55, 56 (Mass. 1842).
27. See (1944) 32 Geo. L. J. 308.