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Independent Contractor-Injury Caused by Contractor Operating Vehicle Under Carrier's Permit

INDEPENDENT CONTRACTOR, LIABILITY FOR ACTS OF—INJURY CAUSED BY CONTRACTOR OPERATING VEHICLE UNDER CARRIER'S PERMIT.*—Action by Mayer, administrator, against defendant corporation for death of motorist in collision caused by truck driver's negligence. The truck causing the injury was owned by the truck driver subject to a mortgage, although defendant's name was on it. Defendant held a permit from the Public Service Commission of Indiana to operate the truck as a common carrier. The trucks were operated on

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4 Thompson v. United States (1894), 155 U. S. 271, 15 S. Ct. 73; United States v. Perez (1824), 22 U. S. 579, 6 L. ed. 165; Dreyer v. People (1900), 188 Ill. 40, 58 N. E. 620, 58 L. R. A. 869; People v. Simos (1931), 345 Ill. 226, 178 N. E. 188.

5 Willis, Constitutional Law, p. 529.

6 Commonwealth v. Cronin (1926), 257 Mass. 535, 15 N. E. 176.

7 But recently Justice Pecora of the New York Supreme Court in the Hines case discharged the jury on the ground of an improper question to a witness by the prosecutor. Certainly in this case Hines could not be said to have been in jeopardy.

8 People v. Simos (1931), 345 Ill. 226, 178 N. E. 188.

9 State v. Slorah (1919), 118 Me. 203, 106 Atl. 768, 4 A. L. R. 1256.

10 United States v. Perez (1824), 22 U. S. 579, 6 L. ed. 165.

* Two cases discussed.

schedule and carried only interstate commerce. The contract between the driver and defendant permitted the driver to receive freight charges, deprived him of authority to transport goods not designated by defendant, and provided he was to be paid a percentage of the freight charges. Held, defense of independent contractor not available. *Bates Motor Transport Lines, Inc. v. Mayer* (Ind. 1938), 14 N. E. (2d) 91.

Personal injury action by passenger against defendant Swallow Coach Lines, which operated a bus line by an agreement with defendant Pennsylvania Greyhound Lines and under a certificate issued to the latter by the Public Service Commission of Indiana. The lease contract between the two defendants was unknown to the plaintiff; it provided that the lessee should receive a percentage of the gross receipts and should indemnify the lessor for damages. Held, Pennsylvania Greyhound Lines' separate demurrer to the complaint properly overruled; rule of Bates case applies although no allegation of irresponsibility in defendant Swallow Coach Lines. *Swallow Coach Lines, Inc. v. Cosgrove* (Ind. 1938), 15 N. E. (2d) 92.

The reasons set forth in the cases for the rule of nonliability of one who employs an independent contractor are numerous.[1] The idea is that the contractor and not the contractee is the entrepreneur in the activity which is the immediate cause of the injury, and for that reason should bear the risk. Such an analysis, i. e., in terms of the administration of the risk, has been shown to be a plausible basis for the general doctrine.[2] However, the language of the courts has continued to be that liability will not be imposed for the wrongful conduct of an enterprise over which the employer has no control. For this reason the relation of master and servant is not held to exist when the employee is under the control of the employer only as to the result and not as to the means of accomplishing it.[3] It is clear, however, that the test is not the actual exercise of the right by interfering with the work, but rather the right to control.[4] The question of the seat of the right to control is one of fact for the jury.[5] This is true although there is no conflict in the evidence,[6] and although there is a written agreement between the parties.[7]

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[1] Douglas, Vicarious Liability and Administration of Risk (1929), 38 Yale L. J. 584.

[2] *Idem.* 594 ff. Professor Douglas' article is no panacea for this difficult problem but it does rebut the criticism of the principle by such writers as Baty. [Baty, Vicarious Liability (1916) 154]. It suggests that considered in terms of "risk avoidance," "risk shifting," "risk distribution," and "risk prevention," the rule is not unsound and that writers of the Baty school were victims of the period in which they wrote.

[3] Mechem, The Law of Agency, 2d ed., Sec. 40; American Law Institute, Restatement of Agency, Sec. 220.

[4] Sargent Paint Co. v. Petrovitsky (1919), 71 Ind. App. 353, 124 N. E. 881, 40 A. L. R. 1416; Pappillo's Admx. v. Prairie (1933), 105 Vt. 193, 164 A. 537; Mechem, The Law of Agency, 2d ed., Sec. 1917.

[5] Tiburne v. Burton (1927), 86 Cal. A. 627, 261 P. 334; Goyette v. P. J. Kennedy & Co. Inc. (1931), 277 Mass. 283, 178 N. E. 528; Bauer v. Calic (1934), 166 Md. 387, 171 A. 713; McKay v. Pacific Bldg. Materials Co. (1937), 156 Ore. 578, 68 P. (2d) 127; Tierney v. Correia (1937), 123 Conn. 146, 193 A. 201.

[6] Lee Moor Contracting Co. v. Blanton (Ariz. 937), 65 P. (2d) 35. The court indicated that reasonable persons might reach different conclusions on the evidence as to who had the control or right to control at the time.

[7] Fleming v. Ambulance Co. (1936), 155 Or. 351, 62 P. (2d) 1331. The meaning of the written agreement was held not perfectly clear.

In cases involving motor vehicles, virtual acceptance of the doctrine that "control of the man behind the wheel is the same as control of the wheel . . ."[8] has caused the other tests of the master-servant relationship to become of little significance. An employee, owning and driving his own vehicle, will be held a servant or an independent contractor, according as the jury finds or does not find a right to control in the employer. The manner of payment of the truck owner is immaterial.[9] An employee has been held an independent contractor although his truck was hauling the employer's semi-trailer upon which were the employer's license plates, and although the employer was a manufacturer of trailers and this one was being transported for completion.[10] An employee hauling sand and being paid according to the amount hauled was an independent contractor although the name of the employer was painted on the truck, the hauling contract was oral, and all of the employer's trucks had been exclusively used for two years to carry out such contract.[11]

The distinction between independent contractor and servant, however, has long been held of no avail in certain situations. The exception to the general rule of the nonliability of one employing an independent contractor involved here is the case of a "nondelegable" duty. Such a duty exists in a carrier by virtue of its charter privileges and franchises. The duty has been held to exist because another view would allow a wrong without a remedy[12] and by placing the employer in the position of a joint tort-feasor.[13] The principal cases, relying heavily on *Cleveland, etc., Ry. Co. v. Simpson* (1915), 182 Ind. 693, 704, 104 N. E. 301, 108 N. E. 9, reason from the idea of the employer as a joint tort-feasor. Courts have very generally, in similar cases, spoken of the duty, the hazard of the enterprise and the element of control. But since in both instant cases there was a franchise from the state, the decisions might well have been solely on the basis of the inability of the carrier to delegate its duty to the public and its passengers. The performance alone, and not the liability for failure to perform the duty, may be delegated, and this is true although the employee is a distinct company incorporated to do the act involved. The instant cases thus establish that in the case of such franchises, an employee of a carrier will be held its agent as between the carrier and the public, despite the fact it might otherwise be an independent contractor.[14]

The instant cases are interesting as examples of the constantly increasing "exceptions" to the present general rule and as support for the suggested

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[8] Heintz v. Iowa Packing Co. (1936), 222 Iowa 517, 268 N. W. 607.

[9] Ellis & Lewis Inc. v. Trimble (1936), 177 Okl. 5, 57 P. (2d) 244; Gulf Coast Motor Express Co. v. Diggs (1936), 174 Miss. 650, 165 So. 292. Mechem, The Law of Agency 2d ed., Sec. 1871.

[10] Fuller v. Palazzolo (Penn., 1938), 197 A. 225.

[11] Riggs v. Haden (1936), 127 Tex. 314, 94 S. W. (2d) 152.

[12] Economy Cabs, Inc. v. Kirkland (1937), 127 Fla. 867, 174 So. 222.

[13] Hough v. Central States Freight Service, Inc. (1936), 222 Iowa 548, 269 N. W. 1. A note discussing this case in 50 Harvard L. Rev. 828 suggests that without evidence that the employer was systematically using independent contractors to evade the statute, it might have been unwarranted to hold him liable on the broad principle that an employer is liable for the torts of an independent contractor if the act contracted for is unlawful.

[14] Cushman Motor Delivery Co. v. Smith (1935), 131 Ohio 68, 1 N. E. (2d) 628; Cotton v. Ship-By-Truck Co. (1935), 337 Mo. 270, 85 S. W. (2d) 80. An extensive annotation in 28 A. L. R. 122 treats thoroughly the delegation of the performance of duties correlative to corporate franchises.

desirable change to liability of the employer of an independent contractor for all tortious acts of the latter and his servants and the confinement of non-liability to a few exceptional situations.[15] W. A. V.

RELATIONSHIP BETWEEN DEPOSITOR OF COMMERCIAL PAPER AND BANK—BANK COLLECTION CODE.—The defendant, a Louisiana manufacturer, drew a draft on a milling company in South Carolina for the purchase price of a shipment of rice. The draft was made payable to a local Louisiana bank and was deposited in that bank under a deposit slip customarily used by it for cash items which contained a provision printed at the top, "In receiving items for deposit or collection, this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits whether returned or not." The evidence was that unconditional credit was immediately given the milling company. The bank received interest, termed a discount, on the amount of the draft for the time that the draft was outstanding. In due course, the draft and attached papers were sent to correspondent bank in South Carolina. The day the draft was collected by the correspondent, the plaintiff attached the proceeds in South Carolina for satisfaction of an unliquidated demand against the defendant depositor. The initial bank intervened on the appeal, claiming to be the owner of the fund. Held, title passed to the initial bank at time of the deposit and therefore the plaintiff could not attach the proceeds. *Campbell v. Noble-Trotter Rice Milling Co.* (S. C. 1938), 198 S. E. 373.

The increase in use of commercial paper in the United States under our great credit system of business has left a multitude of irreconcilable decisions on the circumstances under which a bank, in taking from a customer a check or draft in the usual course of its banking business, will become the owner of such check or draft as distinguished from a mere collecting agent for the customer. It has been generally recognized in regard to bank deposits that where a deposit is made in a bank in the ordinary course of business, the title to the money or to the drafts or checks deposited, in the absence of any special agreement or direction, passes to the bank, and the relation of debtor and creditor arises between the depositor and the bank.[1] Where the facts and circumstances accompanying the deposit indicate an understanding between the parties that the commercial paper is deposited for collection only, the

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[15] Comment, Responsibility for the torts of an independent contractor, 39 Yale L. J. 861 (1930), suggests the possibility and advantages of giving the injured party his election to sue the general employer or the independent contractor, as well as the feasibility of allowing the exceptions to the general rule to supersede the rule itself; Harper, The Law of Tort, Sec. 292; Morris, The Torts of an Independent Contractor, 29 Illinois L. Rev. 339 (1934); Harper, The Basis of the Immunity of an Employer of an Independent Contractor, 10 Indiana L. J. 494 (1935), suggesting that "upon both 'judge's reasoning' and 'law professor's rationalizations' we are entitled to expect a uniform rule of joint liability of the independent contractor and his employer," but that such rule does not exist and will not be immediately forthcoming.

[1] Downey v. National Exchange Bank (1912), 52 Ind. App. 672, 96 N. E. 403; Burton v. U. S. (1905), 196 U. S. 283, 25 S. Ct. 243; Michie on Banks & Banking, Vol. 5, page 9.