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Fowler V. Harper
Indiana University School of Law

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THE BASIS OF THE IMMUNITY OF AN EMPLOYER OF AN INDEPENDENT CONTRACTOR

FOWLER V. HARPER*

Between the specious and often artificial legalistic concepts in which opinions of courts are couched and the plausible rationalizations devised by ingenious law professors, it is often difficult to determine the actual forces which have made the law, at any given time, what we find it to be. Man is a rational creature in one sense, but a thoroughly irrational one in another and by far the more important sense. He is adept in fashioning logical and even practical ratiocinations for his conduct to make it appear proper if not inevitable. But, on the whole, he has not developed the capacity for following a course of planned conduct according to blue prints prepared by the most competent social engineers. Thus, a rule of law is found in the reports to be based upon one or more supposed Blackstonean "reasons". In the juristic literature, the principle is based upon a pyramid of premises and inferences or upon an array of actual or fictitious social and economic considerations which are supposed to furnish an adequate social policy for the principle. It is seldom that a rule is frankly stated to be the law because a complex conjury of popular notions make the principle appropriate. And still less often is such a reason offered as an adequate justification for a rule of law. Nevertheless, these vague and nebulous popular notions variously branded as "public opinion", "common sense", "the general feeling of mankind" and the like are probably responsible for more rules of law than any other single factor and, it is submitted, such a basis for a legal principle is probably the soundest and most adequate that can be found. The fact that such a basis frequently defies accurate analysis because of the impossibility of attributing the exact effect of the myriad of considerations of the experience and heritage of a given generation which constitute the motive power behind social forces, makes it none the less important. By overlooking such forces, we are apt the more easily to be misled in making predictions as to what courts will hold in a given situation. Accordingly, a consideration of the basis for the curious rules and exceptions thereto with respect to the liability of an employer of an independent contractor, must not ignore these variable and illusory factors.

In any discussion of supposed policies involved in the law pertaining to liability for the torts of an independent contractor, it may be worthwhile to recall that, as a matter of legal history, the idea of vicarious responsibility for torts committed in the course of service rendered to one person by another was introduced first, and the general immunity for the misconduct of independent contractors carved out of that principle as a situation to which the principle was inappropriate. Proper emphasis on the problem may thus be obtained by restating it in the following form, "What is the basis for the special insulation of one who employs an independent contractor?" Instead of inquiring what are the reasons for holding liable an employer for the mis-

* Professor of law, Indiana University.

conduct of an independent contractor and his servants, we may posit the question what are the reasons for holding immune from liability one who obtains service through an independent contractor? In other words, if we start from the general rule of vicarious liability for torts committed in the course of service which one has procured from another, the problem is to justify the case of immunity because the service is rendered by an independent contractor.

As a matter of fact, neither the general principle of respondeat superior nor the rule pertaining to independent contractors is of very great antiquity. There are in a very large sense the product of industrialized society. With due regard to the very interesting analogies drawn by Mr. Justice Holmes¹ and the mediaeval material presented by Dean Wigmore,² the origin of the doctrine of respondeat superior as we now have it is not buried in the remote past.³ Of course a master has long been liable for wrongful acts commanded by him, and it is to this situation that the maxim *qui facit per alium facit per se* is applicable. So, too, we must except the case of certain public officers, such as sheriffs, who by early statute were liable for the misconduct of their deputies. It is not until the end of the seventeenth century that we find the actual beginnings of the modern law of respondeat superior. Due to the genius of Lord Holt, the general tone and attitude of the common law judges began to change and by the time of Justice Willes in the next generation, the die is definitely cast.⁴ All this, however, was by no means a natural and inevitable development. The signposts of the struggle may be observed by comparing *Naish v. East India Company* decided in 1721,⁵ with *Bush v. Steinman*, decided in 1799.⁶ Today we can formulate the dogma that, except as to fellow servants, the master is liable for all injuries caused by the tortious conduct of his servants within the scope of his employment.⁷ This includes all conduct of a servant if it is of the general character which the servant was employed to perform, and if the injury is not unreasonably disconnected in time and space from the area of employment, and if the servant is actuated at least in part by a purpose to serve his master.⁸

There was, it seems probable, in Lord Holt's mind a close connection between the early rule of the common law of absolute liability for certain conduct which still survives as liability without fault, and the vicarious liability of an innocent master for unauthorized torts of his servant. We ought not to confuse the legal principles which are involved in the question of tort or no tort, with the principles involved in determining who is to be responsible for an admitted wrong. At the same time, we may recognize that the principles of policy involved are much, if not quite, the same. Speaking quite generally, it is consistent today with general notion of fairness to subject to liability an actor only when his conduct can be branded as morally culpable. In a few exceptional situations, morally commendable and even praiseworthy conduct may subject an actor to liability for harm caused by the accidental miscarriage of his activities. Unlike the early common law rule of liability

¹ See Holmes, *Agency*, 4 Harv. L. Rev. 345.

² See Wigmore, *Responsibility for Tortious Acts*, 7 Harv L. Rev. 315.

³ See Baty, *Vicarious Liability*, Ch. 1.

⁴ See Laski, *The Basis of Vicarious Liability*, 26 Yale L. Jour. 105, 108.

⁵ 2 Com. 461. In the report of this case it is said that "nothing is a more certain and known rule in law, but that if I command a lawful thing, and my servant do it in an unlawful manner, he must be answerable for the trespass or misdemeanor, and not the master." In view of the facts of this case and the context, this proposition was not confined to criminal liability.

⁶ 1 B & P 404, in which an employer was held liable for the misconduct of the servant of an independent contractor.

⁷ See Restatement of Agency, Sec. 49.

⁸ See Restatement of Agency, Sec. 228.

without fault, these situations are justified by considerations of social and economic expediency. Certain types of conduct which involve extraordinary risks to others, either in the seriousness of the threatened harm or in its high degree of probability, are charged with peril to the actor of answering for the harm if it occurs. It is felt that in the case of such activities, the person for whose benefit the risk is created should bear the loss entailed thereby rather than the accidental victim of the activities. Very much the same policy requires the responsibility of an innocent master for the conduct of servants. The fact that the servant is also liable because of his own moral fault is immaterial as respects the liability of the master. The policy which subjects the servant to liability and the policy which subjects the master to liability are totally different. The servant is liable because, being at fault, it is fair for him to bear the loss rather than his innocent victim. The master is liable because it is felt that by employing another to perform service on his behalf and for his advantage, it is better that the master assume the risks of the servant's misconduct than the accidental victim. Nevertheless, it is only by chance that the liability of the master is regarded as vicarious rather than direct. It is perfectly possible and perfectly logical to analyze the master's liability as based on his own tortious, though morally innocent, conduct. Upon such an analysis, the conduct on the part of the master which subjects him to liability would be the mere fact of obtaining services from another. Indeed, as respects injuries to his servants which arise out of and in the course of the employment, this is the situation under the Workmen's Compensation Acts. In so doing, like the man who collects water in a reservoir or who builds a fire or who keeps domestic animals, he acts at the peril of paying for certain types of harm caused by the miscarriage of his activity. In the case of the master-servant relationship, it is true, the master acts at the peril only of paying for harm caused by the misconduct of his servant, whereas the man who maintains a reservoir runs the risk of paying for any harm caused by the escape of the water collected therein although it escape through the fault of no one. The policy is very much the same in each case, namely, to allocate to him for whose benefit certain dangers are created, the loss entailed thereby.

It has been argued persuasively⁹ that the first case on the subject decided by Lord Holt actually turned on the question of liability without fault. This case¹⁰ was on the custom of the realm for damage done by fire escaping from defendant's land. The fire was started by the defendant's servant and the defendant was held liable. It is quite likely that the defendant was held liable, not because his servant wrongfully lit a fire on his land, but because a fire, whether lawfully or wrongfully started on the land, escaped therefrom. Much the same situation existed in a case in the Year Book of 2 Henry IV.¹¹ Both these cases, however, have been regarded as authority for the master's liability for his servant's torts committed within the scope of the employment. It is highly unlikely that men of the legal insight of Lord Holt and Justice Willes who accepted this version of Holt's decision were, as Mr. Baty has argued, the unfortunate victims of a mistake. It is far more likely that in the mind of these judges the policy which at that time required absolute liability for the escape of fires and the policy which requires the master to be responsible for his servant's negligence were regarded as very much the same. In both types of situation the defendant is utterly innocent of any ethical culpability and is held liable solely upon grounds which are entirely immoral.

⁹ See Baty, *op. cit.* page 19, 20.

¹⁰ *Turberville v. Stampe*, 2 *Ld. Raym.* 264.

¹¹ *Beaulieu v. Finglan*, Y. B. 2 Henry IV.

It is to be expected that a principle of law based exclusively on sociological and economic considerations rather than upon deep-rooted moral factors, should not be unanimously approved. Some of the greatest judges of the common law have thought the doctrine of respondeat superior to be wholly unsupportable. Bramwell, speaking extra-judicially, whole-heartedly condemned it, and Brett declared the fellow-servant rule to be a bad exception to a bad rule.¹² When opinions vary so much upon the desirability of a principle of law, exceptions thereto are to be expected. These exceptions, however, were not born with the rule itself. The principle of respondeat superior had become thoroughly accepted as law if not invariably accepted as good policy, before the insulating concept of independent contractor was created. In *Bush v. Steinman*,¹³ decided in 1799, a land owner was held liable for harm resulting to the plaintiff from running against an obstruction placed in the highway by the servant of a sub-contractor of a carpenter who had contracted with the defendant to repair his house. Here was the clearest case of an independent contractor as we now conceive it. Nevertheless, a competent bench, struggling with legal principles, saw fit to deny the defendant immunity. Not until twenty-seven years later were the judges able to devise the rule of the independent contractor's immunity.¹⁴ Then, having established his complete insulation, they required another quarter of a century to begin to make inroads upon it, and not until fifty years had elapsed did the great case of *Bower v. Peat*¹⁵ establish the most fruitful of these exceptions. Since then, the process has gone on apace until comparatively little is left of the generalization that an independent contract relieves an employer from liability for harm tortiously done within the scope of the contract.

The purely doctrinal and legalistic reasons for the rule of respondeat superior have been pretty thoroughly exploded. The "control" that Blackstone supposed the master invariably exercised over his servant's activities is obviously a fictitious control. It may or may not exist in fact. The master's liability is the same even though he specifically contracts with his servant that the latter shall perform the work in his own way and without interference from his employer. So, too, the choice of the master in selecting his servants affords no adequate reason for his liability, for if in the exercise of the utmost care, he unfortunately selects a servant who commits torts, he is liable therefor. Again, the "implied authority" of the servant to commit torts has been properly branded as a "barbarous relic of individualistic interpretation." On the other hand, rather satisfactory social policies have been suggested to justify the principle. The master's normal superior ability to pay damages, his ability to shift the loss by insurance or to distribute it to the public justify his liability. As a matter of sound social planning, we may assume that the principle of vicarious liability as applied to the master is, in general, a salutary one. The fact that, through legislation, the liability of the master to his servant has been extended to cases where there is no fault confirms the vicarious liability without fault to third persons as a proper charge upon the master's enterprise.

When we consider the independent contractor's general immunity, however, the basis is not so apparent. If doctrinal and legalistic reasons fail to justify the rule of respondeat superior, the doctrinal reasons for a different rule in the case of an independent contractor also fail. If the fictitious control of a master over his servant is an inadequate basis for holding the master

¹² See *Baty*, op. cit. 152.

¹³ 1 *Bos. & P.* 404.

¹⁴ *Laugher v. Pointer*, 5 B & C 547 (1826).

¹⁵ (1876) 1 *Q. B.* 321.

liable, it is obvious that the transfer of this fictitious control to an independent contractor will be in sufficient reason for exempting the employer from liability. When we turn to the pragmatic reasons of policy for the rule of immunity of the general employer, we find again insufficient justification. Perhaps the most ambitious attempt in this direction has been that of Professor Douglass.¹⁶ His conclusion, in general, is that while the independent contractor "stands in no better position than the general employer to avoid, shift or distribute the risks, he does seem to occupy the more strategic position to prevent them." The difficulty with this reasoning is that behind it is the assumption that the social policy of the law of Negligence is largely to admonish the defendant, in the hope that he and others will be discouraged from similar conduct in the future. At this point, the law is supposed to perform a prophylactic or preventative function. But this assumption seems hardly consistent with experience. The law of Negligence, it is submitted, is largely an *ex post facto* determination of which of two parties shall bear a loss. The judicial process in Negligence cases is very largely one of distribution of loss already accrued rather than an attempt to establish a standard of conduct to which others are expected to conform. It is a distribution of loss rather than a prevention of risk. There is a wide difference between determining the standard of conduct to govern man's actions, and fixing a standard of conduct to which he must conform at the peril of paying for harm caused by the miscarriage thereof. By tabbing Negligence as "fault," we are apt to lose sight of the fact that unethical conduct is not at all necessarily involved. If liability in Negligence depended upon unethical conduct, we should have exclusively a subjective test therefor. It is true that the jury and the judge are supposed to determine the propriety of a defendant's conduct as of the time of his action, but we cannot escape the fact that this determination takes place after the event and in the light of the consequences thereof. Neither can we become blind to the fact that the actual adjudication of Negligence cases is becoming more and more a matter of compromise as to the distribution of the actual loss involved. Juries, for all their faults, are composed of practical men and the recent disclosures of a very eminent trial judge in Maryland indicate how juries apply what lawyers call the comparative negligence rule and the admiralty rule in allocating loss between two parties, neither of whom has incurred the distinct displeasure of the jurors.¹⁷ In the case of statutory duties, the point is brought out even more emphatically. A violation of a statutory duty brands a actor's conduct as tortious although in many instances it might have been actually improper or at least immaterial, from an ethical point of view, to comply with the statute. So, too, breach of such a duty is equally tortious even though the actor is justifiably ignorant of the statute.

Thus it is that the supposed reasons and justifications for the general immunity of the independent contractor do little more than to establish the proposition that the independent contractor is himself an entrepreneur and as such should be held liable. They do not justify the immunity of his employer. What we might expect in such a case is merely that the independent contractor and his employer should both be liable to a person injured by the misconduct of the enterprise. The general employer is having work done on his behalf quite as much in the case of an independent contractor as in the case of a servant. The work is presumably as much for his advantage in the one case as in the other, and the depth of the employer's purse may very well be as great when he employs an independent contractor as when service is

¹⁶ Vicarious Liability, 38 Yale L. Jour. 584.

¹⁷ See Ulman, *The Judge Takes the Stand*, (1933).

rendered by others. Social policy would seem to afford a justification for the application of the rule of respondeat superior to cases of injuries caused by all independent contractors and their servants. Thus it is 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. Such a rule, however, we do not have nor are we likely to have it immediately.

Such a rule would clearly be out of touch with the general feeling of lawyers and laymen alike. In the words of Lord Tenterden, it would "shock the common sense of all men" for, as Parke has suggested, it would make the purchaser of an article at a shop which he has ordered to be delivered responsible for injury committed by the driver's negligence in delivering the article. Mr. Baty has quoted the incident related by Mr. J. H. Choate of a wealthy New Yorker who, though possessing an excellent carriage and horses, was accustomed to drive in a conveyance hired from a liveryman to avoid the liability of a master. Regardless of the caution of this thrifty gentleman of the Nineties, we can hardly take seriously the suggested obstacle to business and industry in the liability of the employer of an independent contractor. In the case of Mr. Choate's illustration, the additional outlay to ride in a hired vehicle would more than pay for the liability insurance which will give complete protection today.

"Common sense," therefore, seems to be the chief reason why both the general and the special entrepreneur should not be liable. Common sense is a reason which it is extremely difficult to analyze. It is very frequently based upon false assumptions and more frequently upon totally irrational considerations. Why, it may be properly asked, should the gentleman who exercises great care to employ a normally prudent coachman be held liable for the coachman's occasional negligence, while his legally-advised neighbor be immune for injuries caused by a liveryman whom he has employed without any knowledge whatever as to his competency as a driver. If it be suggested that in hiring a taxicab, the passenger pays in the price of his fare for the exclusive assumption of such liability by the contractor, it can be answered that if the law imposes equal responsibility upon the employer with the right to contribution or indemnity, the cost of such liability can be deducted from the fare. "Common sense" is merely another name for notions and presuppositions which for good, bad, or no reason, are popular in the community. Such ideas, like all others, change and vary from time to time. Nevertheless, common sense is quite likely the most potent influence in developing and molding rules of law applied by common law courts. It is not unlikely that the rule of the general immunity of the employer of an independent contractor fits pretty well into the general common sense view of our present society. It is probably quite as true that the established exceptions to the rule are equally acceptable to the public conscience. The task of justifying them by rationalizations which seldom occur to the courts in establishing and applying the rules seems hopeless. While all the cases, even those within the last twenty-five years, cannot be reconciled, it is possible to state with comparative certainty the rules that will be applied today and tomorrow by the courts in these situations. The Restatement of Torts has undertaken to do this and the result has met with the general approval of the profession. It is not, however, possible to state with certainty the rules that will be applied fifty years, or even twenty-five years hence, as "common sense" will undergo a gradual evolution within that space of time. Indeed, it is already doing so. The public is becoming more social-minded. Ability to pay will quite likely be an increasingly important factor in molding "common sense." Society is becoming much more concerned in salvage and

preservation than it is in acquisition and creation. The exploitation of our great national resources by business and industry is probably exhausted, at least for the present, and the immediate problem is one of distribution and preservation of values. Therefore, increased considerations will be given to him who sustains loss. We can thus expect a gradual tendency to increase and multiply the possibilities for compensation to a person injured by the manner in which others conduct their affairs. This suggests a gradual growth of the principle of liability without fault and, as a part thereof, an expansion of the exceptions to the immunity of the employer of an independent contractor, with the possibility that his general immunity may be eventually completely eliminated save as to those relations in which, as Professor Morris has suggested, the probability of harm to others is comparatively negligible.

This tendency is suggested in modern compensation statutes, for example in Massachusetts,¹⁸ in which the distinction between a servant and an independent contractor is eliminated. "Common sense" did not deter the legislature from permitting employees of independent contractors to recover from the general entrepreneur even though at common law such employees would not be regarded as the entrepreneur's servants. In other words, compensation is allowed to the employees of the independent contractor quite as though they were the servants of the general employer. It is here felt that it is proper that the general industry bear the burden of risks arising out of and in the scope of the employment even though such risks are caused by the fault of the employee's master. Here again the policy of liability without fault includes what at common law is regarded as vicarious liability, thus affording a striking manifestation of the identity of the social and economic considerations as well as the common sense view of the general rules of respondeat superior and liability exclusive of fault.

In conclusion, therefore, it is submitted that the legal doctrines involved in the rules governing liability for the torts of an independent contractor are superficial and fictitious, and that the so-called practical considerations of prevention, shifting and distribution of risk are equally remote from facts and experience; that what we actually have is a crystallization of emotional reactions to a loss already occurred which represents a crude, common-sense notion of a fair distribution of the loss. These reactions will quite probably continue to support the rules as we find them, with perhaps a gradual increase in the "exceptions" to the general employer's immunity. These exceptions may be extended—not at all because it is logical, nor because it is scientific, but rather because of vague but widespread popular conviction that even the innocent cause of harm should carry the burden of compensation therefor.

¹⁸ *Sundine's Case*, 218 Mass. 1, 105 N. E. 433. See Brandeis, dissenting in *Crowell v. Benson* (1932) 52 Sp. Ct. 305.

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