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NOTES AND COMMENTS

AGENCY

COMMANDEERED SERVANT NOT IN THE SCOPE OF EMPLOYMENT

The plaintiff was injured by the defendant's servant while pursuing a traffic violator at the command of a police officer. Held, the servant was not in the scope of his employment.1

The duty to aid in law enforcement when called upon is incumbent upon all persons.2 And such persons may be liable for their negligent acts while so aiding an officer3 although the quantum of care may be less than under ordinary circumstances.4 This duty is obligatory upon corporations.5 However, since a corporation can act only through agents, the question of its liability in the negligent performance of that duty depends on whether the doctrine of respondeat superior includes the activities of employees commandeered to aid in law enforcement.

From analogous authority, at least three arguments can be made for holding the defendant liable. First, workmen's compensation liability6 and the responsibility for acts of agents7 are based on similar principles.8 Thus a taxicab driver injured when commandeered for law enforcement service recovered workmen's compensation for he remained in the scope of his employment.9 If the servant remains in the scope of his employment for the purposes of workmen's compensation, he should also remain for purposes of liability to third persons.10 While workmen's compensation statutes are always liberally construed,11 in

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2 Dougherty v. State, 106 Ala. 63, 17 So. 393 (1895).
5 Babington v. Yellow Taxi Corp., 250 N.Y. 14, 164 N. E. 726 (1928).
8 Two of the more important reasons given for both are: (1) since the carrying on of an industry inevitably results in injuries to employees and to third persons, this burden should be borne by those who receive the immediate benefits of the enterprise; (2) the industry can better distribute the loss.
an action by third persons, any doubt as to scope of employment will be resolved against the employer.\(^{12}\)

Secondly, placing liability on the defendant is in line with the increasing social demand for holding owners of automobiles liable for the negligence of those driving their cars with the owner's consent.\(^{13}\) The duty of the corporation to surrender the truck might well be held to constitute consent within the meaning of these statutes.\(^{14}\) Since there are other possible grounds for holding the defendant liable, the court should give effect to this general legislative policy.\(^{15}\)

Third, many writers suggest that liability should be imposed on the master for all probable and foreseeable acts done by the servant in view of what he was employed to do.\(^{16}\) Since all persons and corporations are subject to the duty to aid in law enforcement when called upon, the possibility of the servant being called on to aid is a risk incidental to the control of the truck and hence a foreseeable result of the driver's employment. It being a foreseeable result, the employer


\(^{12}\) Robards v. Bannon Sewer Pipe Co., 130 Ky. 380, 118 S.W. 429 (1908); Cook v. Michigan Cent. Ry., 189 Mich. 456, 155 N.W. 541 (1915); Nees v. Julian Goldman Stores Inc., 106 W. Va. 502, 146 S. E. 61 (1928). The scope of employment for respondeat superior has had a rapid expansion since the turn of the century, and the tendency today is to continue this expansion. See Seavey, Speculations as to "Respondeat Superior" in HARVARD LEGAL ESSAYS (1934) 433, 451.

\(^{13}\) For a comprehensive discussion of the extent and construction of statutes imposing such liability, see note (1934) 88 A.L.R. 174.

\(^{14}\) In 1937, four years after the accident in the principal case, such a statute was passed for the District of Columbia.

\(^{15}\) See Mr. Judge Rutledge, dissenting in Balinovic v. Evening Star Newspaper Co., 113 F. (2d) 505, 511 (App. D.C. 1940).

\(^{16}\) This argument is in effect an application of the ancient doctrine of "Equity of the Statute" supposedly rejected in the United States. However under the guise of interpretation the result reached is often times the same. Two of the best examples are: (1) the extension of tort liability as a result of a statute imposing criminal liability for a certain act, Annis v. Britton, 232 Mich. 291, 205 N.W. 123 (1925); Abounader v. Stohmeyer and Arpe Co., 243 N.Y. 458, 154 N.E. 309 (1926); Landis, Statutes and the Sources of Law in HARVARD LEGAL ESSAYS (1934) 213, 220; Thayer, Public Wrong and Private Action (1914) 27 Harv. L. Rev. 317; and (2) the liberal construction given the married women's statutes, usually phrased as affecting property rights only, but interpreted so that the old common law doctrines in every field of law—tort, contract and criminal—were modified to fit the general statutory aims, Garret v. State, 109 Ind. 527, 10 N.E. 570 (1886); State v. Renslow, 211 Iowa 642, 230 N.W. 316 (1930); Landis, supra at 222. Such an interpretation is the minority rule, however. Dressler v. State 194 Ind. 8, 141 N.E. 501 (1923); note (1930) 71 A.L.R. 1116.

\(^{17}\) Foreseeability is a limitation of liability after it is found that the conduct of the master's business was a contributing cause of the servant starting the car. See Smith, supra note 6, at 720. Also see Seavey, supra note 11, at 435; Douglas, loc. cit. supra note 6.
is liable for the negligence of his servant in performing the act. The servant is commandeered only because he is in control of the needed equipment, and not in his individual capacity. What is wanted is the entire unit—the truck of the corporation, and the servant because he is the driver or custodian of that truck. This argument seems to distinguish the cases where a servant is commandeered for his physical aid alone.

Only a dry application of classical agency principles supports the majority’s position. It has been held that when a servant is called upon to give only his physical aid in law enforcement he passes from the scope of his employment and the general master is thereby relieved from liability. Thus the municipality, through its police officer, is in the position of a special employer with complete control over the servant and hence the general employer should no longer be held responsible. This is true whether he was commandeered as an individual or as servant in charge of needed equipment. But the application of rules from private agency situations seems unsound. The servant’s duty to assist in law enforcement should not be a shield for his master.

C. J. B.

17 See Babington v. Yellow Taxi Corp., 250 N.Y. 14, 164 N.E. 726 (1928) for the application of the test there. Also see note (1938) 1 Ga. B.J. 60 for the application of the test to Bindert v. Elmhurst Taxi Co., 168 Misc. 892, 6 N.Y.S. (2d) 666 (N.Y. City Ct. 1938).

18 "It (the officer’s order) was directed to him, not merely as an individual or passerby, a man of muscle or marksmanship, but as the custodian and driver of the defendant’s vehicle. Had he not been such, it would not have been given to him.” Rutledge, J. dissenting in Balinovic v. Evening Star Newspaper Co., 113 F. (2d) 505, 508 (App. D.C. 1940).

19 Denton v. Yazoo and M. V. R. R., 284 U.S. 305 (1932); Phelps v. Boone, 67 F. (2d) 574 (App. D.C. 1933). cert. denied, 291 U.S. 677 (1933); Executrix v. Messick, 92 Ind. App. 264, 173 N.E. 238 (1930); RESTATEMENT AGENCY (1934) § 228, comment c. Illinois has an unusual rule holding that the relationship of master and servant does not exist unless the control of the servant includes the power to discharge him. Schluraff v. Shoreline Motor Coach Co., 269 Ill. App. 569 (1933). In this case there is dictum to the effect that the commandeering of a bus driver will not affect the master-servant relationship.


21 In New Omaha Thomson–Houston Elec. Light Co. v. Anderson, 73 Neb. 84, 102 N.W. 89 (1905) the defendant utility company was required by a city ordinance to have a lineman at the scene of all fires in the city for the purpose of removing or warning of dangerous fires that might injure firemen or endanger property. Because of the alleged negligence of the defendant’s lineman the plaintiff’s intestate was killed. Although the lineman was not commandeered because he was in control of needed equipment, he was commandeered because he possessed needed skill and knowledge peculiar to his employment; however the court denied liability, one reason for the decision being that the servant was under the control and direction of the city.