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MASTER'S LIABILITY FOR THE WILFUL ASSAULT OF HIS SERVANT

The general rule as to a master's liability to third persons for the tortious acts of his servants has been stated as follows: "Except as to fellow servants, a master is subject to liability for injuries caused by the tortious conduct of his servants within the scope of their employment." This rule has been applied without much difficulty in the case of negligent acts of the servant, but when the act is wilful, a certain difficulty arises in determining whether or not the act is within the scope of employment. It has been said that under the earlier common law, the very fact that the act was wilful prevented it from being within the scope of employment. It is generally recognized now, however, that a wilful act, and more specifically an assault, of a servant may create a liability on the part of the master. The primary difficulty today arises in drawing the dividing line between assaults which are within the scope of employment and assaults which are not. This difficulty is not present in a few exceptional situations, to be mentioned later in this paper, in which the master is liable for wilful assaults of the servant beyond the scope of employment.

There are, of course, cases of express or implied authority to act with force under certain circumstances, and in such cases the master is liable where the assault takes place under the prescribed circumstances. A typical case is that of a watchman who is authorized to use force in the protection of his employer's property. Frequently the master is liable even where there is no authority, express or implied, to commit the assault if the act is done in the furtherance of the master's interest. In one such case, the employee of a detective agency was sent out to find a criminal, and he attacked the plaintiff in an effort to make him confess the crime. Here there was apparently no authority for the act, but the detective agency was held liable because the act was done in the furtherance of its interest. In another case, the defendant's superintendent struck the plaintiff in an effort to make her go back to work for the defendant, and the defendant was held liable for the superintendent's act.

1 RESTATEMENT, AGENCY (1933) Sec. 219(1).
2 MEchem, OUTLINES OF AGENCY (3d ed. 1923) pp. 356-357.
3 Denver and Rio Grande Ry. v. Harris, 122 U. S. 597 (1887); Wade v. Thayer, 40 Cal. 578 (1871) (Reversed on another point); Baker Hotel of Dallas v. Rogers, — Tex. —, 157 S. W. (2d) 940 (1941).
Another factor which may bring the assault within the scope of employment is authority, express or implied, to use a weapon of some sort. In such cases the defendant is liable even where the servant makes imprudent use of the weapon. However, it has been held that where the use of the weapon was not contemplated at the time of employment, as where the employee carries a gun for his own purpose, the use of the gun, even though in the furtherance of the employer's interest, does not make the master liable. This seems to be inconsistent with the earlier statement that sometimes a master is liable for unauthorized acts done in the furtherance of his interest. Perhaps, though, the courts feel that it would work too great a hardship to make the master liable for unauthorized use of a dangerous weapon by the servant.

A situation in which the master is held liable although the act apparently is out of the scope of employment occurs where the servant's assault grows immediately out of his relation with the plaintiff which was within the scope of employment. In such cases the courts do not attempt to draw a line between the acts which were within the scope of employment and those which were not. In one such case, *New Ellerslie Fishing Club v. Stewart* the defendant's employee, who was authorized to protect the defendant's property from trespassers, started to oust the plaintiff, who was rightfully on the property. A personal dispute between the plaintiff and the employee followed, and the employee struck the plaintiff. The defendant employer was held liable. However, in *Moore v. Ford Motor Company*, which was decided by the same court as *New Ellerslie Fishing Club v. Stewart*, supra, the court did not hold the employer liable, even though the circumstances were quite similar. In the *Moore* case, the defendant's employee tried to make the plaintiff, a former employee of the defendant, fill out a form for the defendant concerning termination of employment. The plaintiff refused, an argument followed, and the employee struck the plaintiff. Although it is probably contra to the way most of the courts would hold in such a case, the decision in the *Moore* case seems to be the proper result. The idea of making the master liable even for the

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McBee's Adm'x. v. Indian Head Mining Co., 280 Ky. 82, 132 S. W. (2d) 515 (1939); Davis v. Houghtelin, 33 Neb. 582, 50 N. W. 765 (1891).

Dilli v. Johnson, 107 F. (2d) 669 (1939); *New Ellerslie Fishing Club v. Stewart*, 123 Ky. 8, 93 S. W. 598 (1906); Murrick v. Durham, 181 N. C. 188, 106 S. E. 665 (1921).

123 Ky. 8, 93 S. W. 598 (1906), cited supra note 8.

265 Ky. 575, 97 S. W. (2d) 400 (1936):
negligence of the servant while acting in the scope of his employment is somewhat questionable; but holding the master liable for a wilful act of the servant which is done because of a personal dispute is entirely unjustifiable.

The liability of the master in all of the above cases has been based on the rule of respondeat superior, that is, that the master is liable because the act occurred within the scope of the servant's employment. There are at least four, and perhaps five, situations where the master is held liable for the assault of the servant outside of the scope of employment. The first of these exceptions occurs where the defendant negligently keeps in his employ a person whom he knows or should know to be incapable or unreliable. In such cases, the master is not liable because the act of the servant is imputed to him, but rather he is liable because of his own negligence. In all of the cases cited in support of this rule, it seems probable that the employer owed a special duty to the injured person. It seems that it would not be fair to hold the master liable for all acts of a dangerous servant merely because of the master and servant relation.

A second exception in which the master is liable for the assaults of the servant beyond the scope of employment is that of the carrier for hire. This liability is based on the common law duty of the carrier to the passenger which makes the carrier an insurer of the passenger's safety. In all such cases, the carrier and passenger relation must exist to create this high degree of liability. According to one Kentucky case, this relation continued to exist so as to impose the high degree of duty on the carrier where the carrier's employee assaulted a passenger alighting from a bus in the carrier's terminal and then immediately followed it up with a battery on the passenger on the street.

Another exception, somewhat similar to the carrier exception, is that of the innkeeper. This exception, like that of the carrier, is based on the theory that the innkeeper is an insurer of his patrons' safety. Some earlier cases did not recognize this high degree of liability in the case of an innkeeper, and said the innkeeper was liable only for acts of the servant within the scope of his employ-

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ment. However, the later cases seem to recognize the innkeeper's position as an insurer of his guests' safety.

A possible fourth exception which would make the master liable as an insurer is that of the person who for business purposes holds out to prospective customers that his premises are safe. However, the weight of authority does not seem to recognize such an exception, and holds that such a person is only liable for acts of his servants which are within the scope of the employment.

The final exception which makes the master liable beyond the scope of employment occurs where the master intrusts to the servant a dangerous instrumentality and the servant uses it for his own purposes. These cases are largely confined to railroad companies because of the narrow position which the courts take in determining what things are and what things are not dangerous instrumentalities. Poisons, explosives, spring-guns, railway locomotives, railway torpedoes, and motor driven railway "tricycles" have been treated as dangerous instrumentalities within the meaning of this rule. However, such commonplace things as automobiles, railway handcars, or horse drawn cars are not treated as dangerous instrumentalities so as to impose absolute liability on the employer.

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15 Rahmel v. Lehndorf, 142 Cal. 681, 76 Pac. 659 (1904); Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148 (1886).