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William H. Buckles

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LIABILITY OF MASTER FOR WANTON AND MALICIOUS ACTS OF SERVANT

The well settled principle which binds a master for his servant's negligent acts is not in all instances and phases applicable to cases of wanton and malicious acts of servants.

The earlier rule in both England and in the majority of the United States tended to exonerate the master from claims arising from injured third persons caused by wanton or wilful acts of servants. The case of *Pittsburg Passenger Co. v. Donahue*,\(^1\) as an example, held that the defendant company, as master, was not liable for injury suffered by the plaintiff as a result of its servant's wantonly striking the plaintiff and causing him to fall under a car, thus causing his injuries.

The rule has been gradually extended. The general tendency, since the extension, is illustrated by a Missouri case, which holds the master liable for the act of a servant in maliciously turning a rail, causing it to strike a third person, the act being committed while in the employ of the defendant.\(^2\)

This change has so completely taken place both in England and in this country, except in a few jurisdictions, that a conservative rule may be laid down, such as, "The master is liable for malicious and wanton acts of his servants committed in the course of his employment and within its scope."\(^3\) Even in excess of this general doctrine, the master is often held liable for an employee's acts, though they be beyond the authority given by the master.\(^4\)

Let us discuss the words "wilful" and "wanton." It is well to say concerning the former that the most logical interpretation of its application in this particular sense, is, "An act committed with implication of evil intent or legal malice, or with absence of reasonable ground for believing the act in question to be lawful."\(^5\) In regard to the latter, a suitable definition is,

\(^1\) *70 Pa. 119 (1871).*
\(^2\) *Hellriegel v. Dunham, 179 S. W. (Mo.) 763.*
\(^3\) *Mechem on Agency, sec. 1960 (2nd Ed.).*
\(^4\) *Postal Telegraph Co. v. Brantley, 107 Ala. 633, 18 So. 321 (1895); Barden v. Felch, 109 Mass. 154 (1871).*
\(^5\) *Mechem on Agency, Sec. 1926 (2nd Ed.)*.
"An act committed in a reckless manner without respect to the rights of others, though without any settled malice." Where an act is committed wantonly, a master is excused where the servant deserts his employer's interests to prosecute his own personal desires. Acts done in the course of employment and within the scope of authority do not, by reason of improper performance, exonerate the master from injuries caused to a third person. Such performance is considered as wanton and reckless. If, however, the servant takes advantage of existing circumstances to prosecute a personal spite against the third person, and does carry out such selfish desire, the master's interests are presumed deserted though the servant still is engaged in the execution of his employer's business, and the master will not be liable for injury suffered by the third person. The Kentucky court holds, however, that the fact that the malicious act was beyond or without authority of the master does not relieve the master's duty to select servants that will not commit such acts.

The last example brings in the importance of the "motive" in determining whether or not the master shall be held; but the question of motive is linked closely with the question: "whose business and interests are being furthered or executed at the time of the commission of the act from which the complaint arises?" An excellent test or "dividing line" is drawn in the case of Wallace v. Casey. The answer is given in this form, "Whether or not liability rests with the master is dependent upon whether the act was prosecuted in furtherance of the master's interests or in pursuit of interests other than the master's."

There are several classes of master-servant relationships which necessitate a variance from the generally applied rules or doctrines. These are roughly divisible into three groups.

The first is where by the very nature of the master's business a special duty is owed to the public, and where through the dangerousness of the business, misconduct of the servant may endanger the person and property of many individuals. In such

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*Bouvier's Law Dictionary.
*L. & N. R. R. Co. v. Routt, 76 S. W. (Ky.) 513 (1903).
*L. & N. R. R. Co. v. Routt, 76 S. W. (Ky.) 513 (1903).
cases the law necessarily places a greater burden upon the master, regardless of wantonness or wilfulness of the employee, or whether or not the particular injurious act was toward a furtherance of the employer's business. The common-carrier is an excellent example of this classification. A Kentucky case\textsuperscript{11} emphatically supports this variance by holding the railroad company liable for abuse and assault of a passenger by its conductor. The fact that the servant was insane was no defense, the law placing a duty upon the master to use such diligence in the selection of his servants as to extend to the public that special duty owed by the employer. New York courts\textsuperscript{12} uphold this rule by deciding that a merchant was liable for his servant's wilful misconduct toward a customer, there being an implied invitation for the public to enter the store thereby placing upon the owner a higher degree of responsibility for his safety.

A second class of exceptions or variances are instances in which the master confides a dangerous instrumentality to his servant. The early tendency in such cases is to hold the master to a high degree of liability because of his having placed an object of such a nature as to be likely to cause damage or injury to third persons in the hands of his servants.\textsuperscript{13} One of such cases was \textit{Woolfolk v. Columbus Railroad Co.},\textsuperscript{14} in which the defendant's engineer maliciously blew his whistle with intent to scare the plaintiff's horses.

In connection with such cases, imputed notice might be mentioned as treated in the case of \textit{Brice v. Bauer}.\textsuperscript{15} This case held that where a servant is entrusted with a vicious or dangerous animal or chattel, and the servant had knowledge of its dangerousness, such knowledge was thereby imputed to the master and he was held liable for damages caused by such dangerous instrumentality.

The third class is one of instances where a master entrusts a task to his servant, the performance of which involves the use of force. In such instances the master is held liable for damages caused thereby, though the servant employs force in excess of that necessary to accomplish the purpose of his master. A lead-

\textsuperscript{11} \textit{C. & O. R. R. Co. v. Francisco}, 149 Ky. 307, 148 S. W. 46.
\textsuperscript{12} \textit{Swinarton v. Boutillier}, 28 N. Y. S. 53 (1894).
\textsuperscript{13} \textit{Sleath v. Wilson}, 9 C. & P. 607.
\textsuperscript{14} 128 Ga. 631, 58 S. E. 152 (1907).
\textsuperscript{15} 108 N. Y. 428, 15 N. E. 695 (1888).
ing case in point deals with the employment of a servant to pre-
vent unprivileged persons from fishing on the premises of the
employer. In the course of ousting such a trespasser, an alter-
cation arose and the servant assaulted the plaintiff with a knife,
causing bodily injury. The master was held liable, although the
force used by the servant was in excess of that necessary to com-
plete his master’s business. In such cases proof by the master
that the servant did not act in compliance with the master’s in-
structions is no defense.

There are also circumstances which make it convenient for
the servant, with little or no deviation from his master’s business,
to so modify the existing circumstances as to be able to pro-
secute a selfish desire to bring injury to a third person. In the
case of Copelin v. Berlin Dye Works, a master was held liable
for goods stolen by a servant from clothing to be cleaned in his
master’s establishment, although there was no special duty upon
the master, as a cleaner of clothing, to use other than slight care
in searching for articles left in the clothing by his customers.

It is evident from the circumstances and cases previously
discussed, that the question arises as to whether “the scope of
the servant’s employment” exceeds the “motive” or vice versa,
in deciding the master’s liability. The scope of employment is
usually considered more important; although a number of juris-
dictions consider the motive of the servant to be the deciding
factor. The question as to whether or not a servant is acting
in the course of his employment is one of fact unless only one
inference can logically be drawn, whereby the court may de-
cide the question. In all such cases careful instructions as
to applicable law must be given to the jury by the court.

In all these tort actions, there arises the question of the
master’s liability for damages complained of by the plaintiff
as an injured party. The majority rule is to assess damages as
though the master had caused the injury and committed the tort
himself.

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16 New Ellerslie Fishing Club v. Stewart, 123 Ky. 8, 93 S. W. 598
(1906).
17 Tillar v. Reynolds, 96 Ark. 358, 131 S. W. 969 (1910).
18 168 Calif. 715, 144 Pac. 961 (1914).
20 Collins v. Butler, 179 N. Y. 156, 71 N. E. 748 (1904).
There is a conflict of authorities in regard to the assessment of punitive damages, but there is a tendency to relieve the master where he has neither by expression nor implication authorized or ratified the act of the servant.\textsuperscript{22} There are jurisdictions which refuse such exemptions where the defendant is a corporation, the reason being that inasmuch as corporations can act only through servants, they should not be wholly exempt from punitive and exemplary damages on that account.\textsuperscript{23}

Where the evidence shows that the master has authorized or ratified the servant’s wilful and malicious acts, the master cannot be relieved from such liability as would rest upon him had he committed the wrongs complained of personally. Usually the retaining of a servant in the employ of the same master is not a ratification of the servant’s previous acts, but failure of a master to restrain his employee’s continuous wrongful acts, such acts being in the employer’s knowledge, has been held equivalent to ratification and the master has been held liable for injury resulting from such acts.\textsuperscript{24}

With the brief treatment of various examples and circumstances above, it is well to draw, in conclusion, a general rule for determining a master’s liability for his servant’s malicious and wanton acts. It seems that the following rule is widely applicable: A master is liable for the malicious and wilful acts of his servant committed in the course of his employment and within its scope, although such acts were not expressly authorized or ratified by the master, or even if such acts were beyond the authority given to the servant or in disobedience of the master’s instructions, the servant’s motive or intention being immaterial. Such acts are imputed to the master by the doctrine of \textit{respondeat superior} in accordance with the general rules of agency. If, however, by the nature of the act, it is doubtful whether or not the act is within the scope of the servant’s employment, the nature of the act itself is to be taken into consideration.

\textbf{William H. Buckles.}

\textsuperscript{22} Warner v. Southern Pacific Co., 113 Calif. 105, 45 Pac. 187 (1896).
\textsuperscript{23} Everingham v. Chicago, etc. R. Co., 127 N. W. (Ia.) 1009 (1910).
\textsuperscript{24} Hogle v. Franklin Mfg. Co., 112 N. Y. S. 881 (1908).