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Responsibility of Principal for Negligently Inflicted Injuries Caused by Agents Use of Unauthorized Instrumentality

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matter how clearly erroneous a judge's opinion may be, he still has the right to comment on the disputed facts.[13] Moreover, very strong expressions of opinion on the facts are tolerated; indeed, sometimes, they may be necessary.[14] For instance, it has been held that the statement in the charge to the jury, "In the opinion of the court, the defendant is guilty", did not constitute error prejudicial to the defendant.[15] Only the case of a very plain error on the part of the trial judge will cause the supreme court to reverse on account of his comments on the balance of the testimony.[16]

It is respectfully submitted that Pennsylvania's stand in the matter is the better one. The jury should be aided by the trial court in cases of difficulty, and inspired with confidence in cases of doubt. The Pennsylvania rule supplies the available medium to effect those ends. No more cogent reason for the rule can be advanced to counteract the minimized possibilities of abuse of the power under discussion.

Regis Francis Mahady

RESPONSIBILITY OF PRINCIPAL FOR NEGLIGENTLY INFLICTED INJURIES CAUSED BY AGENTS USE OF UNAUTHORIZED INSTRUMENTALITY

To settle an hitherto undecided point in the law of master and servant in Pennsylvania was the task of Justice Maxey of the Supreme Court in the case of *Wesolowski v. John Hancock Life Insurance Company*.[1] The facts of the case are briefly these: The defendant, an insurance com-

[13]Long v. Ramsay, 1 S. & R. 72; Oyster v. Longnecker, 16 Pa. 269.

[14]Leibig v. Steiner, 94 Pa. 466; Bitner v. Bitner, 65 Pa. 347.

[15]Com. v. Clymer, 1 Leh. L. J. 311. See also McCain v. Comm., 110 Pa. 263; Winther v. Second St. Pass. Ry. Co., 159 Pa. 628.

[16]Supplee v. Timothy, 124 Pa. 375; 23 W. N. C. 386.

[1]162 Atl. 166 (1932).

pany, employed Adams to solicit life insurance business and to make weekly collections of insurance. His territory was less than a square mile in Philadelphia. The defendant did not require him to use a car, though its superintendent when informed that Adams had a car, said, "If you have one, you might as well use it." Adams maintained and operated the car at his own expense. While he was on his way to make collections in his car he negligently struck the plaintiff who was thereby seriously and permanently injured. The plaintiff was given a verdict against the defendant but the latter's motion for judgment n. o. v. was granted by the court on the ground that the doctrine of "respondeat superior" was not applicable to the case. On appeal the judgment was affirmed. The lower court's opinion was quoted by the Supreme Court in these words, "While the general rule of law is that a principal is liable for the negligence of his agent, while in performance of the agent's duty, and the reason for the application of this rule is that the agent, during the performance of his duty, is presumably under the direction and control of the employer, where, as here, the instrumentality used by the agent or employee is not furnished at the direction of the employer, or subject to the employer's direction or control, the employer should not be held responsible." This statement is elaborated upon by Justice Maxey when he says: "To hold a master legally responsible for the act of a servant who is engaged in furthering his master's business, and who while doing so negligently uses some instrumentality that carries him from place to place, it must either be proved that the master exercises actual or potential control over that instrumentality or the use of the instrumentality at the time and place of the act complained of must be of such character and vital importance in furthering the business of the master that the latter's actual or potential control of it at the time and place may be reasonably inferred." The test which the court gives of the master's responsibility in cases of this sort, is the authority to control the servant's use of the

instrumentality with which the injury is inflicted. Since the defendant had no control over Adam's car no liability existed.

In view of the fact that this is a novel question in Pennsylvania and that no authorities are cited by the court in support of its holding an examination of the decisions in other jurisdictions on similar facts might prove valuable and interesting. A Maryland case is strikingly similar in its facts.[2] The defendant was engaged in the "house furnishing and clothing business" and employed Talbot as a solicitor and collector whose activities as such were confined to a particular locality. The car fare necessary between the place of business and the territory to be solicited was paid by the defendant. Talbot owned a car and in mentioning this fact to the defendant the latter said, "Well, I would not use it for quite a while—for a couple of weeks or so." Talbot testified that the defendant "never made any objection, and he never approved" in regard to the use of the car. The plaintiff was injured by the alleged negligence of Talbot in the operation of his car and suit was brought against the defendant. In reversing the lower court's judgment for the plaintiff the upper court said; "This evidence is so indefinite, uncertain, and lacking in probative force that it is not, we think, legally sufficient to go to the jury as tending to show that the use of the automobile by Talbot was authorized by the defendant, either expressly or impliedly." The automobile was used for the convenience of Talbot and was not at all necessary in the performance of his duty under his employment by the defendant, nor was its use in any way beneficial to the defendant. This too might be said of the *Wesolowski* case. There is also nothing in the evidence tending to show that Talbot was authorized, either expressly or impliedly, to use the automobile in the service of the defendant at the time the accident occurred. If the test given in the Pennsylvania case were applied to the facts here it would ap-

[2]Goldsmith v. Chesebrough, 113 Atl. 285 (1921).

pear that the result in the Maryland case is correct for surely it cannot be said that the defendant had any control of the servant's use of the instrumentality with which the injury was inflicted. The test laid down by the Maryland court is based on whether the servant's use of the instrumentality was or was not authorized, expressly or impliedly, by the master. Applying this test to the *Wesolowski* case the question arises, was the remark of the superintendent to Adams evidence of an implied authorization to use the car? Evidently not, for the court said, "The employer was indifferent as to whether Adams walked, rode a bicycle or operated a motor car to reach the people with whom he transacted business."

The followers of the *Wesolowski* ruling will be heartened by the decision of an Arkansas case.[3] The defendant, a railroad, employed a boy, whose duty it was to call different train crews. These crews all lived within less than a mile and it was easily possible to give notice to them by walking to their residences. However, with the knowledge of the railroad's agents the boy used a bicycle with which while making a call, he negligently struck the plaintiff. The plaintiff contended that the boy was impliedly authorized to use the bicycle because he was directed to make the call and the agent directing him knew that he was using the instrumentality in the performance of his duty. The appellate court in reversing the trial court said, "The mere fact that the agents of the railway company knew that the call boy was using the instrumentality in the performance of his service was not an implied authorization of the use thereof by the master nor sufficient evidence of the necessity therefor." The court, as in the Maryland case, makes the test of the master's liability the authorization, express or implied, of the servant's use of the instrumentality. It is evident that defendant through its agent in the Pennsylvania case knew that Adams was using a car in his work, but this fact alone according to the

[3]St. Louis, I. M. and S. Ry. Co. v. Robinson, 173 S. W. 822 (1915).

Arkansas ruling, is not enough to set up an implied authorization of the use thereof nor sufficient evidence of the necessity therefor. Under the "authorization test" then, the *Wesolowski* decision seems to be correct.

When a servant owns an automobile and it is habitually used in the defendant's business with the knowledge and assent of the defendant's agents and the defendant furnishes gasoline and oil and does repair work on the car, an inference arises that the defendant impliedly authorizes the use of the car. An express agreement for the use of the car is not necessary.[4] None of these facts appeared in the *Wesolowski* case. A Missouri court denied recovery to the plaintiff in a case of the type under discussion because, "In the present case there was no evidence adduced that Emmet Liese's contract of employment did embrace the use of an automobile. Neither is there anything in the evidence tending to show that it was within the contemplation of the parties that an automobile was to be used by Liese for the purpose of transacting the defendant's business; nor is there evidence that the use of an automobile was necessary or beneficial to the defendant in the performance of Liese's duties under his said employment."[5] This statement might without strain be applied to the facts in the Pennsylvania case.

A Tennessee court in an exhaustive opinion on the general subject held that where an employer neither owned, used, nor had any need for an automobile in connection with its business and did not authorize an employee to use his individual car in connection with his duties, and had no actual knowledge that he was so using it the employer was not liable under the doctrine of "respondeat superior."[6] The court approves the "authorization test" mentioned in the case above. An Oregon court approaches the doctrine of our Pennsylvania case in the matter of the

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[4]Gordiner v. St. Louis Screw Co., 210 S. W. 930 (1919).

[5]McCaughen v. Missouri Pacific R. Co., 274 S. W. 97 (1925).

[6]Kennedy v. Union Charcoal and Chemical Co., 4 S. W. (2nd) 354 (1928).

control which a master should exercise over the servant's instrumentality, when it held that where evidence showed that an agent was hired to solicit orders, but the company employing him retained no authority as to where or how he should travel the company will not be liable for injuries resulting from the negligent driving of a car by the agent.[7] Of course the defendant in the *Wesolowski* case did retain authority to direct Adams where to travel but certainly not how to travel. On this phase of the question the Oregon case supports the Pennsylvania doctrine.

An Iowa court deciding the question for the first time approves the doctrine given in the Maryland case as well as in the Missouri, Tennessee and Arkansas cases cited above.[8] The issue was, where a messenger is provided with no instrumentality for carrying on his work, but usually uses a bicycle for that purpose, whether he may without the knowledge or consent of the master, either express or implied, borrow an automobile for such purpose. The question was answered in the negative, the court referring to public policy as a consideration in the arrival at such a conclusion.

It will be seen that all of the cases considered except the Oregon case make the test of the master's liability the authorization, either express or implied, of the servant's use of the instrumentality. This would seem to be a logical method of determining liability, for why should a master be liable for the negligent operation of his servant's car when the use thereof was not authorized, expressly or impliedly? Justice Maxey makes the test one of the master's control over the servant's car, but how can a master control his servant's use of a car unless the use thereof was authorized? When a master gives authority, control is the result thereof. Control should be inferred from authorization and not authorization from control. Control is an incident of authorization. While it is our

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[7]Ramp v. Osborne, 239 Pac. 112 (1925).

[8]Hughes v. Western Union Telegraph Corp., 236 N. W. 8 (1931).

opinion that the "authorization test" is the better and more logical one, it seems that the result reached by the Pennsylvania court is correct. It is doubtful whether Adams was impliedly authorized to use his car by the statement of the superintendent. If this is true, then under the "authorization test" the master cannot be liable for the negligent conduct of his servant when said servant uses an instrumentality without the authorization of said master. *A fortiori* if the statement may be construed as implied authorization, then under the "test" the master would be liable for the servant's negligent use of the instrumentality.

Henry V. Scheirer

PLEAS OF DOUBLE JEOPARDY AND AUTREFOIS CONVICT OR ACQUIT

Although the purpose of the criminal law is to prevent and punish offenses against the people, it also does much to secure just treatment for the accused. Just as the civil law protects a person from continuous persecution by one who has an alleged claim against him, so the criminal law provides that the state cannot repeatedly try a man for the same offense. The weapons furnished to the accused in the latter field of law are the pleas of double jeopardy and of autrefois convict or autrefois acquit. In a general way these pleas have much in common, but several distinct differences exist in their origin and application.

The plea of double jeopardy arises from Article I, section 10 of the Pennsylvania Constitution of 1874. It is there stated, "No person shall, for the same offense, be twice put in jeopardy of life or limb." This provision has remained the same throughout the various constitutions of the state, and constructions thereof by the cases are equally applicable regardless of the year in which they were decided.