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Agency -- Independent Contractors -- Newsboys

Gerald N. Capps

division D[29] of section 344-a and said, " . . . upon that subject we think it appropriate to suggest that the information the defendants seek may be the objective of a corrective motion . . . or a bill of particulars . . . ," but its absence will not result in dismissal for failure to state a cause of action.[30]

In the instant case, the court followed the rule set down in the *Arams* case, but refused to adopt the theory that the tort law involved was rudimentary. In the latter context the court can not be criticized, since the action was for non-fault liability, a doctrine dependent upon master-servant relationships which are not universally recognized. The federal court—which was bound to apply New York law as it is, not as the court thinks it ought to be,[31] or thinks it *will* be—made no mention of the opinion expressed in the *Pfleuger* case by the New York high court. The plaintiff was a stranger to Saudi Arabia; the defendant corporation conducted extensive business there and could in all probability have easily assisted the court in judicially learning the Saudi-Arabian law with savings in time and cost. Perhaps this was the type of adverse consideration the court had in mind in the *Pfleuger* case in its *general* discussion concerning the statute and *matters specified therein*. However, since that decision concerned the law of a sister state, the court could not properly follow it as precedent in the instant case and reluctantly permitted an apparent injustice to occur.

With the ever increasing rate of international intercourse, an increase in the number of actions involving the law of foreign countries is inevitable. The international traveler will need available means of establishing claims and defenses based on foreign law. The majority of such actions will undoubtedly be tried in the larger cities where necessary facilities, such as a panel of experts and foreign law libraries, *could* be annexed to the courts. It is submitted that a two-fold purpose would be served by equipping the courts to judicially notice the law of foreign countries: economies would be effected in valuable courtroom time, and a better form of justice would be available to the traveler of modest means.

WILLIAM A. KOLODGY

AGENCY — INDEPENDENT CONTRACTORS — NEWSBOYS

A newspaper carrier, while making his deliveries on a motorcycle, negligently struck and injured the plaintiff. *Held*, plaintiff could not recover from newspaper company, as carrier was an independent contractor and not an employee. *Miami Herald Pub. Co. v. Kendall*, 88 So.2d 276 (Fla. 1956).

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29. See note 2 *supra*.
30. Pfleuger v. Pfleuger, *supra* at 152, 106 N.E.2d at 497.
31. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

The principal test applied by the courts in determining if the relationship of the parties is that of employer and servant or hirer-independent contractor lies in the right to control the manner in which the work is to be performed.[1] However, numerous other tests for determining the relationship of the parties have been propounded by the Restatement.[2] At least one court has held that the right to hire and fire should be given consideration,[3] while another court has held that this power *conclusively* indicated a master-servant relationship.[4] It would appear that no one test or circumstance has been found which, in itself, conclusively indicates the relationship of the parties. Each individual case must be resolved upon its own particular facts and circumstances.[5]

Whether newspaper companies are vicariously liable under the doctrine of respondeat superior for the torts committed by their carriers has been the subject of much litigation. In cases where the company has been held not liable,[6] the contract of employment usually provided that the carrier was an independent contractor and the company was to exercise no control over the manner in which the papers were to be delivered. However, in cases involving the same contract terms courts have held otherwise.[7] In the former group of cases, the courts looked no further than to the contract itself,[8] while in the latter group, the courts not only considered the contract, but also looked to the actual conduct of the parties.[9]

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1. Bohanon v. McClatchy Pub. Co., 16 Cal. App.2d 188, 60 P.2d 510 (1936); Gulf Refining Co. v. Wilkinson, 94 Fla. 664, 114 So. 503 (1927); Morris v. Constitution Pub. Co., 84 Ga. App. 816, 67 S.E.2d 407 (1951); Bell v. Sawyer, 313 Mass. 250, 47 N.E.2d 1 (1943); Call v. Detroit Journal Co., 191 Mich. 405, 158 N.E. 36 (1916); Galler v. Slursberg, 22 N.J. Super. 477, 92 A.2d 89 (1952).

2. RESTATEMENT, AGENCY § 220 (2) (1933). The following tests are therein provided; "(a) extent of control which, by agreement, the master may exercise over the details . . . ; (b) whether . . . distinct occupation or business; (c) the kind of occupation . . . ; (d) the skill required . . . ; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work . . . ; (f) the length of time for which the person is employed; (g) the method of payment . . . ; (h) whether or not the work is a part of the regular business of the employer; and (i) whether or not the parties believe they are creating the relationship of master and servant."

3. Matter of Scatalo, 257 App. Div. 471, 14 N.Y.S.2d 45 (1939), *aff'd*, 282 N.Y. 689, 26 N.E.2d 815 (1940).

4. Lassiter v. Cline, 222 N.C. 271, 22 S.E.2d 558 (1942).

5. Schaller v. Industrial Acc. Comm'n., 11 Cal. App.2d 46, 77 P.2d 836 (1938).

6. Morris v. Constitution Pub. Co., 84 Ga. App. 816, 67 S.E.2d 407 (1951); Oklahoma Pub. Co. v. Greenlee, 150 Okla. 69, 300 Pac. 684 (1931); Moore v. Burriss, 132 W. Va. 757, 54 S.E.2d 23 (1949).

7. Elder v. Aetna Cas. Co., 149 Tex. 620, 236 S.W.2d 611 (1951); Salt Lake Tribune Pub. Co. v. Industrial Comm'n, 99 Utah 259, 102 P.2d 307 (1940); Femling v. Star Pub. Co., 195 Wash. 395, 81 P.2d 293 (1938), *set aside on other grounds*, 195 Wash. 395, 84 P.2d 1008 (1938).

8. Rathburn v. Payne, 21 Cal. App.2d 49, 68 P.2d 291 (1937); Bass v. Kansas City Journal Post Co., 347 Mo. 681, 148 S.W.2d 548 (1941); Greening v. Gazette Printing Co., 108 Mont. 158, 88 P.2d 862 (1939).

9. Scorpion v. American-Republican, 131 Conn. 42, 37 A.2d 802 (1944) (The contracts alone are not determinative of the question of agency and upon all the evidence the jury might have properly found that the carrier was the agent of the defendant.); Elder v. Aetna Cas. Co., 149 Tex. 620, 236 S.W.2d 611 (1951) (Regardless

The question must be considered in the light of how far the courts, as well as the legislatures, will go in applying the doctrine of vicarious liability. In determining the status of the newsboy for the purposes of Workmen's Compensation and labor legislation the courts have been more liberal in holding the newsboy to be an employee. However, these cases indicate that the courts are reluctant to extend this liberality for the purpose of determining the tort liability of the companies.[10] Nevertheless, in the face of this reluctance on the part of the courts, some states have become conscious of the necessity of extending the doctrine of vicarious liability in order to provide a means of placing responsibility on the person who is financially able to compensate the injured party. This has been accomplished through legislative enactments,[11] and in at least one state, by judicial decision.[12] Perhaps financial responsibility was not the sole reason for extension of the doctrine, but it cannot be denied that the result is in accord with the mandate of modern society not to allow an injured party to suffer a wrong without recompense.

Although the decision in the instant case is in accord with the numerical weight of authority, the court disregarded the actual conduct of the parties,[13] and looked no further than the contract itself. If the surrounding circumstances had been taken into consideration, the only logical conclusion that could have been reached would have been incompatible with the legal concept of hirer-independent contractor. In determining the relationship of the parties, their extra-contractual deportment should also be scrutinized, for to hold otherwise would be to invite employers to elude liability by simply signing a contract which does not manifest the true

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of what the contract purported, the determining question is, did the company *actually* exercise the right to control.)

10. Press Pub. Co. v. Industrial Acc. Comm'n, 190 Cal. 114, 210 Pac. 820 (1922); Laurel Daily Leader, Inc. v. James, 224 Miss. 654, 80 So.2d 770 (1955); ("We have repeatedly held the rule is more liberal in compensation cases. We are not concerned with a rule of liability of appellant if appellee had struck some one with his motor-bike and inflicted an injury upon a third person . . ."). Hann v. Times Dispatch Pub. Co., 166 Va. 102, 184 S.E. 183 (1936).

11. CAL. VEHICLE CODE ANN. § 402 (Supp. 1955), IDAHO CODE ANN. § 49-1004 (1948), IOWA CODE ANN. c. 321, § 321.493 (Supp. 1956), N.Y. VEHICLE AND TRAFFIC LAW § 59. Typical of these is New York's:

> Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to the person or property resulting from negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or *otherwise*, by any person legally using or operating the same with the permission, express or implied, of such owner. (Emphasis added).

12. May v. Palm Beach Chemical Co., 77 So.2d 468 (Fla. 1955); Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920). (The owner of a motor vehicle who intrusts it to another to operate is liable for injury caused to others by the negligence of the person to whom it is intrusted.)

13. Miami Herald Pub. Co. v. Kendall, 88 So.2d 276 (Fla. 1956) (The supervision by the company as to the hours of work, the complaints regarding service, or as to subscriptions, collections, or prices of papers did not vitiate the provisions in the contract.)

relationship of the parties.[14] If the employer is allowed to exculpate himself from all liability by designating his *employees* as independent contractors, the court's decision is not in conformity with social policy.

GERALD N. CAPPS

TORTS — NEGLIGENCE — CAR KEY STATUTES

The defendant automobile owner, in violation of a statute,[1] left his car unattended with the key in the ignition. The car was stolen and the thief, driving recklessly, injured the plaintiff. *Held*, the thief's driving at a reckless rate of speed was an intervening cause which superseded the original act of negligence of the defendant automobile owner.[2] *Permenter v. Milner Chevrolet Co.*, 91 So.2d 243 (Miss. 1956).

Since the turn of the century the courts have been confronted with the problem of imposing liability on an automobile owner to compensate an injured third party when an unauthorized driver is at fault.[3] In those jurisdictions that have decided claims arising through violation of so called "car key legislation,"[4] the majority have denied recovery *as a matter of law* on the rationale that the violation of a penal statute is not intended to result in civil liability;[5] some of these jurisdictions further conclude that even assuming the violation of the statute[6] is negligence per se, that the negligence of the thief and not the violation is the proximate cause of

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14. W. P. Brown & Sons Lumber Co. v. Crosley, 230 Ala. 403, 161 So. 536 (1935); Scorpion v. American-Republican, 131 Conn. 42, 37 A.2d 802 (1944); Howe Fire Apparatus Co. v. Humphrey, 113 Ind. App. 167, 46 N.E.2d 259 (1943); Goetschel v. Glassell-Wilson Co., 13 La. App. 424, 127 So. 81 (1930); Dagley v. National Suit & Cloak Co., 224 Mo. App. 61, 22 S.W.2d 892 (1929); Ottinger v. Morris, 187 Okla. 517, 104 P.2d 254 (1939).

1. MISS. CODE § 8219 (1942) provides: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key. . . . . Other "car key" statutes are: ALA. CODE tit. 36 § 27 (Supp. 1953): ARK. STAT. ANN. § 75-651 (1947); COLO. REV. STAT. c. 13-4-76 (1953); TRAFFIC AND MOTOR VEHICLE REGULATIONS FOR THE DISTRICT OF COLUMBIA § 58; IDAHO CODE ANN. § 49-560.1 (Supp. 1953); ILL. REV. STAT. c. 95½, § 189 (1953); IND. ANN. STAT. § 47-2124 (1952); KY. REV. STAT. § 189.430 (1953); MD. ANN. CODE GEN. LAWS art. 66½, § 212 (1951); N.M. STAT. ANN. c. 64-6-105 (1953); S.C. CODE ANN. § 46-491 (1952); WYO. COMP. STAT. ANN. § 60-530 (1945).

2. Three justices dissented.

3. Berman v. Schultz, 84 N.Y. Supp. 292 (1903); Martin v. Herzog, 228 N.Y. 164, 126 N.E. 14 (1920); Schell v. DuBois, 94 Ohio St. 93, 113 N. E. 664 (1916).

4. See note 1 *supra*.

5. Richards v. Stanley, 43 Cal. App. 2d 58, 271 P.2d 23 (1954); Sullivan v. Griffin, 318 Mass. 358, 61 N.E.2d 330 (1945).

6. In the absence of statute the owner is *not* liable for the negligent operation of the vehicle by a thief. Midkiff v. Watkins, 126 La. 449, 52 So.2d 573 (1951); Saracco v. Lyttle, 11 N.J. Super. 254, 78 A.2d 288 (App. Div. 1951). *Contra*, Shaff v. Claxton, 144 F.2d 532 (D.C. Cir. 1944).