RECENT CASES

AGENCY

SCOPE OF EMPLOYMENT EXTENDED TO SPONSORED RECREATION

The Allis Chalmers Company entered athletic teams in city-wide industrial leagues. Through its Supervisor of Athletics, the company recruited players from among the plant employees, provided them with the appropriate uniforms and equipment, and paid other incidental expenses. No employee received wages for playing and none were compelled to participate in the games. Haas, while playing on the company golf team, drove a ball without calling "Fore," the game's customary warning signal. The ball struck Rogers, a golfer on an adjacent fairway, who sued the company to recover for his injury. The court directed a verdict for the company at the conclusion of the plaintiff's opening statement on the ground that Haas had not been acting within the scope of his employment at the time the injury occurred. On appeal, the ruling was affirmed. *Rogers v. Allis Chalmers Mfg. Co.*, 88 N. E.2d 234 (Ohio App. 1949).

Company sponsorship of industrial recreation has become commonplace in the last two decades.[1] The problem of when an employer will be held liable to a third person injured by an employee engaged in company-sponsored recreational activity will arise with increasing frequency.[2] To approach uniformity and certainty in the application of respondeat superior to this situation, it is essential to understand the rationale behind ever holding an employer liable for the torts of his employee. The underlying reasons for the doctrine will determine the limitations of its application. Rationales

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1. With the acceptance of the 40 hour-5 day week, the question of whether the company should concern itself with the employees' free time was thrust to the fore. The answer has been summarily stated: "Foolish, indeed, is the employer who does not recognize that absenteeism can be minimized, loyalty engendered, production increased, fabulously in some instances, by proper provision of a chance for the employees to live vitally, richly, fully in their cherished off-the-job time." ROMNEY, OFF THE JOB LIVING 163 (1945). A survey of 2700 companies conducted in 1939 showed that 44.6% of them sponsored athletic teams and that 37.4% of them sponsored picnics and outings. NATIONAL CONFERENCE BOARD REPORT No. 20, STUDIES IN PERSONNEL POLICY 14 (1940). Expansion was shown by a study made in 1945 showing 56% of the reporting companies to be sponsoring programs, 75% of them spending in excess of $2000 yearly on the program, and 49% of the companies providing full or part-time leadership. WILLIAMS, CRITERIA FOR THE ORGANIZATION AND DEVELOPMENT OF INDUSTRIAL RECREATION PROGRAMS 9 (unpublished thesis in the Indiana University Business School Library, 1948).

2. Industry has increasingly accepted responsibility for injuries to employees during recreational activity. In 1940, a survey showed that 40% of the companies which sponsored recreation also provided accident insurance covering the activity. In 1945, 48% of the companies were carrying such insurance. WILLIAMS, CRITERIA FOR THE ORGANIZATION AND DEVELOPMENT OF INDUSTRIAL RECREATION PROGRAMS 41, 45 (unpublished thesis in the Indiana University Business School Library, 1948).

offered by the authorities are: the master controls the servant, profits from his activity, selects him; the servant is the master's alter ego; the employer has the deeper pocket.[3] Other authorities rely on theories of evidence, indulgence, danger, and revenge.[4] Of the multiple rationales advanced, some are obviously fictions while others would extend liability beyond accepted limits.[5] None of these views is a satisfactory explanation of respondeat superior.[6]

The rationale widely accepted by recent writers is that, as between the industry and the injured party, society is least harmed by imposing upon industry the cost of inevitable injuries.[7] They reason that since the employee who commits the tort is often judgment proof, the injured person has no effective remedy if he must look only to the employee for redress. On the other hand, if the employer is held responsible, he may shift the loss by means of insurance, and pass its cost on to the consumer through increased prices. The employer is thereby induced to promote greater caution by issuing accident-prevention instructions and by enforcing punitive measures against negligent employees.[8]

Accepting this rationale in answer to why the employer should be held liable,[9] the greater problem remains of when respondeat superior should be applied. All proponents of the foregoing rationale agree that some limitations are necessary.[10] These limitations have been expressed in terms of

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3. All these rationales are exhaustively discussed in BATY, VICARIOUS LIABILITY 148 *et seq.* (1916).

4. *Ibid.*

5. *E.g.*, the employer receives the profits from the work performed by his independent contractors as well as by his agents, however, the employer is not held liable for the torts of his independent contractor. Tortorici v. Sharp Moosop, Inc., 107 Conn. 143, 139 Atl. 642 (1927); Charles v. Barrett, 233 N. Y. 127, 135 N. E. 199 (1922).

6. Mr. Justice Holmes in Guy v. Donald, 203 U. S. 399, 406-407 (1906); BATY, VICARIOUS LIABILITY 146 *et seq.* (1916); PROSSER, TORTS 472 (1941); Laski, *The Basis of Vicarious Liability*, 26 YALE L. J. 105-111 (1916).

7. PROSSER, TORTS 472-473 (1941); Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L. J. 584, 586 (1929); Laski, *The Basis of Vicarious Liability*, 26 YALE L. J. 105, 111-115 (1916); Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 340-341 (1934); Smith, *Frolic and Detour*, 23 COL. L. REV. 444, 456-457 (1923).

8. "The effect of being required to pay for an act of negligence by an employee has the same effect as has the certainty of paying compensation for death or fire upon insurance companies. . . . The history of the Employers' Liability Acts and of the Workmen's Compensation Acts, showing a decreasing mortality in an increasingly dangerous environment, indicates that the proper place to apply pressure is on the employer." Seavey, *Speculations as to "Respondeat Superior"* in HARVARD LEGAL ESSAYS 433, 448 (1934).

9. Accetance of this rationale is evident in Adams v. American President Lines, 140 F.2d 476 (1943); Hubbard v. Lock Joint Pipe Co., 70 F. Supp. 589 (1947); Herr v. Simplex Paper Box Co., 330 Pa. 129, 147, 198 Atl. 309, 319 (1938) (dissenting opinion).

10. There is undoubtedly a limit beyond which the business can no longer shift nor absorb the loss. Nor, economically, should costs totally unconnected with producing a product be charged to the consumer of that product. Further, power to promote the non-happening of employee torts is lost outside the area connected with the employment. Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L. J. 584, 593-594 (1929); Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 341 (1934).

scope of employment.[11] In deciding whether given acts are within the scope of the employment, the courts have emphasized different tests for the various types of activities.[12]

There have been few respondeat superior cases arising out of recreational injuries, and none of these have developed adequate tests.[13] Though tests to delimit course of employment have been formulated in Workmen's Compensation cases involving recreational injuries, courts have not regarded these cases as persuasive in respondeat superior suits. The Ohio court refused to consider them in the principal case.[14] However, the tests drawn in compensation cases to delimit course of employment are logically applicable in a respondeat superior suit.[15] In each case the primary issue is whether the activity is so related to the employer's business as to be within the ambit of business activity. The purpose for which that determination is made is identical since the reasoning behind both Workmen's Compensation Acts and respondeat superior is to shift the cost of inevitable injuries in industry to consumers.[16] Compensation cases, of course, are not controlling on the issue of

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11. Joel v. Morison, 6 C. & P. 501, 172 Eng. Rep. 1338 (1834). The constant expansion of the concept, scope of employment, has made all but recent cases of doubtful authority in this field. "In the detour cases, the tendency is more and more to find that even a very extended detour is within the scope of the employment, and in many jurisdictions, at least, the servant reenters his employment, although far from his sphere of action, as soon as he decides so to do. . . . Further, the cases now tend to hold that the master is liable for such personal assaults . . . as are reasonably closely connected with (the employment) in time and space. . . . There is likewise the spreading 'dangerous instrumentality' doctrine . . ." Seavey, *Speculations as to "Respondeat Superior"* in HARVARD LEGAL ESSAYS 433, 453 (1934).

12. *E.g.*, in frolic and detour cases, courts have established a "zone of risk" test which operates to hold certain deviations of the employee within the scope of the employment if they fall within certain time and place limitations. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590 (1939); Fiocco v. Carver, 234 N. Y. 219, 137 N. E. 309 (1922).

13. Ackerson v. Jennings Co., 107 Conn. 393, 140 Atl. 760 (1928); Easler v. Downie Amusement Co., 125 Me. 334, 133 Atl. 905 (1926); Stenzler v. Standard Gaslight Co., 179 App. Div. 774, 167 N. Y. Supp. 282 (1st Dep't 1917).

The court in Ackerson v. Jennings, *supra*, uses a test of "promoting the employer's business." This standard is too general to be helpful prospectively in finding whether given activity is within the scope of the employment.

14. The court purported to distinguish the Compensation cases by saying, "a mere causal connection is held to be sufficient to satisfy the statutory requirement that the injury be received in the course of and arise out of the employment." Rogers v. Allis Chalmers Mfg. Co., 88 N. E.2d 234, 236 (Ohio App. 1949).

15. To recover in a respondeat superior suit, the agent must have been acting within the scope of his employment, while under the Compensation Acts, an injury must "arise out of and in the course of the employment" to be compensable. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 154 (1944).

16. "Once the courts have recognized this fact, much of the mist which now surrounds respondeat superior will disappear." Smith, *Frolic and Detour*, 23 COL. L. REV. 444, 716, 731 (1923). A comprehensive statement of the reasons behind the adoption of Compensation Acts appears in Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 286-287, 94 N. E. 431, 436 (1911).

ultimate liability because of other differences in the two actions not material to the issue here involved.[17]

The courts in the Compensation cases have been faced with opposing arguments. One view is that to hold recreational activity within the course of the employment would penalize and impede the efforts of the employer to increase the happiness of his employee.[18] The opposing view is that if the expenditure is not *ultra vires,* the recreational activity necessarily comes within the course of the employment.[19] The Compensation cases have emphasized several factors in drawing the tests between these positions. Compulsion brings the recreation within the course of business activity.[20] The recreational activity is held to be within the course of the employment if the employee must participate to receive wages,[21] or participates in response to a forceful request of a superior.[22] If the activity occurs on the premises during a rest period and is acquiesced in by the employer long enough to become a settled practice, the activity has been held within the course of the employment.[23]

17. Under Workmen's Compensation, the employer is responsible for accidental injuries without negligence on his part, while in a respondeat superior case the employee's fault must be established to gain recovery. Compensation Acts have abolished the common law defenses of contributory negligence, assumption of risk, and the fellow-servant rule which are available in a respondeat superior suit. The determination of the facts is by an administrative board in the one instance and by a jury in the other.

18. Industrial Commission v. Murphy, 102 Colo. 59, 62, 76 P.2d 741, 742, (1938).

19. Judge Conway, dissenting in Matter of Wilson v. General Motors Corp., 298 N. Y. 468, 481, 84 N. E.2d 781, 788 (1949).

20. Matter of Huber v. Eagle Stationery Corp., 254 App. Div. 788, 4 N. Y. S.2d 272 (3d Dep't 1938); Salt Lake City v. Industrial Commission, 104 Utah 436, 140 P.2d 644 (1943). *But see* Stout v. Sterling Aluminum Products Co., 213 S. W.2d 244 (Mo. App. 1948); Fick v. American Mutual Liability Ins. Co., 58 A.2d 854 (N. J. Workmen's Compensation Bureau 1948); Matter of Dearing v. Union Free School, Tonawanda, 297 N. Y. 886, 79 N. E.2d 280 (1948).

21. Stakonis v. United Advertising Co., 110 Conn. 384, 148 Atl. 334 (1930); Becker Roofing Co. v. Industrial Commission, 333 Ill. 340, 164 N. E. 668 (1929).

22. Miller v. Keystone Appliances, Inc., 133 Pa. Super. 354, 2 A.2d 508 (1938). Judge Conway, dissenting in Matter of Wilson v. General Motors Corp., 298 N. Y. 468, 479, 84 N. E.2d 781, 787 (1949): "This moral suasion exerted by the employer is a very real factor in any employment and cannot be ignored by the board or the courts in cases like the one at bar. Thus, where an activity—different from the employee's regular duties and even recreational in nature—is encouraged, promoted or subsidized by the employer, there is a strong compulsion upon the employee to participate in the outside activity."

23. Thomas v. Proctor & Gamble Co., 104 Kan. 432, 179 Pac. 372 (1919); Conklin v. Kansas City Public Service Co., 226 Mo. App. 309, 41 S. W.2d 608 (1931); Geary v. Anaconda Copper Mining Co., 188 P.2d 185 (Mont. 1947); Matter of Brown v. United Services for Air, Inc., 298 N. Y. 901, 84 N. E. 2d 781 (1949); Dowen v. Saratoga Springs Comm'n, 267 App. Div. 928, 46 N. Y. S.2d 822 (3d Dep't 1944); Matter of Piusinski v. Transit Valley Country Club, 259 App. Div. 765, 18 N. Y. S.2d 316 (3d Dep't 1940), *aff'd,* 283 N. Y. 674, 28 N. E.2d 401 (1940); Kingsport Silk Mills v. Cox, 161 Tenn. 470, 33 S. W.2d 90 (1930). *Contra*: Lutheran v. Ford Motor Co., 313 Mich. 487, 21 N. W.2d 825 (1946); Clark v. Chrysler Corp., 276 Mich. 24, 267 N. W. 589 (1936); Dunnaway v. Stone & Webster Engineering Co., 227 Mo. App. 1211, 61 S. W.2d 398 (1933); Stevens v. Essex Fells Country Club, 136 N. J. L. 656, 57 A.2d 469 (1948); Theberge v. Public Service Electric & Gas Co., 51 A.2d 248 (N. J. Workmen's Compensation Bureau 1947); Porowski v. American Can Co., 191 Atl. 296 (N. J. Workmen's Compensation Bureau 1937); Ryan v. Industrial Comm'n., 128 Okla. 25, 261 Pac. 181 (1927).

Power to control, which in application has been equated to power of supervision, has been emphasized only to find the activity to be outside the course of the employment.[24] In applying these tests to the present case, obviously the employee should not recover.

The most widely accepted test is that company-sponsored recreation is within the course of the employment if the employer receives a benefit therefrom. A benefit which has been held controlling is direct receipt of money from the games.[25] However, when the gate receipts are insufficient to pay the team's expenses, such income is not considered a benefit.[26] If the activity is a reward to the employee for winning a sales contest, such recreation is held to be within the course of the employment.[27] When the employer receives a direct advertising benefit from the company team, the activity will be held within the course of the employment.[28] Mere indentification of the team by lettered uniforms, however, is not held to be a direct advertising benefit.[29] Hence recovery would not follow in the principal case on any of the above facets of the benefit test.

A benefit frequently advanced by the claimant is that the employer gains from the improved employee morale resulting from the activity. It would not be desirable to impose liability on the employer in all instances where employee morale is heightened by company-sponsored recreation. Since liability would always accompany sponsorship under such a rule, many employers would cease contributing, thus depriving their employees of recrea-

24. Stout v. Sterling Aluminum Products Co., 213 S. W.2d 244, 248 (Mo. App. 1948); Pate v. Plymouth Mfg. Co., 198 S. C. 159, 162, 17 S. E.2d 146, 148 (1941); Auerbach Co. v. Industrial Commission, 195 P.2d 245, 246 (Utah 1948).

25. Holst v. New York Stock Exchange, 252 App. Div. 233, 299 N. Y. Supp. 255 (3d Dep't. 1937); Matter of Chadwick v. New York Stock Exchange, 252 App. Div. 714, 299 N. Y. Supp. 256 (3d Dep't. 1937).

26. Industrial Commission v. Murphy, 102 Colo. 59, 76 P.2d 741 (1938); Auerbach Co. v. Industrial Commission, 195 P.2d 245 (Utah 1948).

27. Linderman v. Cownie Furs, 234 Iowa 708, 13 N. W.2d 677 (1944); *cf.* Matter of Kenny v. Lord & Taylor, Inc., 254 N. Y. 532, 173 N. E. 853 (1930); Fagen v. Albany Evening Union Co., 261 App. Div. 861, 24 N. Y. S.2d 779 (3d Dep't 1941).

28. Matter of Huber v. Eagle Stationery Corp., 254 App. Div. 788, 4 N. Y. S. 2d 272 (3d Dep't. 1938); Ott v. Industrial Commission, 83 Ohio App. 13, 82 N. E.2d 137 (1948). *Compare* Le Bar v. Ewald Brothers Dairy, 217 Minn. 16, 13 N. W.2d 729 (1944) (recovery granted on facts very close to those in the principal case) *with* Leventhal v. Wright Aeronautical Corp., 51 A.2d 237 (N. J. Workmen's Compensation Bureau 1946) (recovery denied). *Compare* Federal Mutual Liability Ins. Co. v. Industrial Accident Commission, 90 Cal. App. 357, 265 Pac. 858 (1928) *with* Auerbach Co. v. Industrial Commission, 195 P.2d 245 (Utah 1948); Matter of Wilson v. General Motors Corp., 298 N. Y. 468, 84 N. E.2d 781 (1949).

29. Tom Joyce 7 Up Co. v. Layman, 112 Ind. App. 369, 44 N. E.2d 998 (1942); Leventhal v. Wright Aeronautical Corp., 51 A.2d 237 (N. J. Workmen's Compensation Bureau 1946).

tional opportunities.[30] However, a line can be drawn between instances where the boosted morale results in a planned business benefit and where it is the incidental result of philanthropy.[31] Where the expenditure is made not as a charitable contribution but in expectation of gaining increased production, greater harmony, and other benefits, the recreation should be regarded within the scope of the employment.[32] Adopting this view, Compensation Boards have twice based recovery on this morale factor alone, only to be reversed by the courts.[33] Although no court has relied solely on this ground, some cases have combined the morale factor with the nominal advertising on the uniforms, the two being sufficient benefit to place the activity within the course of the employment.[34]

That Allis Chalmers anticipated a business benefit from increased morale may be concluded from the allegations that they provided a Supervisor of Athletics, publicized the teams' accomplishments, and gave the members a banquet and prizes. This benefit, coupled with the nominal advertising alleged was sufficient to bring the activity within the scope of the employment; at the very least the question should have been left for a jury's determination.[35]

30. Of the nearly 5,000,000 employees of the reporting companies in a 1939 survey, 66.1% participated on athletic teams while 56.1% participated in company picnics. NATIONAL CONFERENCE BOARD REPORT No. 20, STUDIES IN PERSONNEL POLICY 14 (1940). One may only speculate as to how many companies would cease sponsorship if liability necessarily attached. It may be assumed that, especially among the small companies, some sponsorship would be withdrawn. *See* Industrial Commission v. Murphy, 102 Colo. 59, 62, 76 P.2d 741, 742 (1938).

31. In a respondeat superior suit similar to the principal case, the court set aside a directed verdict on the ground that the jury could have found that "increasing the harmony, co-operation, and good will among the employees" was a sufficient business benefit to justify a jury's finding the activity to be within the scope of the employment. Ackerson v. Jennings, 107 Conn. 393, 140 Atl. 760, 762 (1928). *But see* Matter of Wilson v. General Motors Corp., 298 N. Y. 468, 473, 84 N. E.2d 781, 784 (1949) wherein the court said, "Too tenuous and ephemeral is the possibility that such participation might perhaps indirectly benefit the employer by improving the worker's morale or health or by fostering employee good will."

32. There are good reasons why an employer should sponsor recreation as an incident of his business even though he must accept, or insure against, liability for injuries therein. There is no easier way to minimize absenteeism, engender loyalty, and increase production than by well-supervised recreation. ROMNEY, OFF THE JOB LIVING 163 (1945). See note 2 *supra*.

33. Matter of Wilson v. General Motors Corp., 298 N. Y. 468, 84 N. E.2d 781 (1949); State Young Men's Christian Association v. Industrial Commission, 235 Wis. 161, 292 N. W. 324 (1940).

34. In Federal Mutual Liability Ins. Co. v. Industrial Accident Commission, 90 Cal. App. 357, 265 Pac. 858 (1929) the company sponsored an employee team and provided the members with lettered uniforms and equipment. The court held on these facts alone that an injury during a game was compensable, saying that increased morale plus the advertising of the employer's name and business was sufficient to bring the recreation within the course of the employment. On this authority, the recreation in the *Allis Chalmers* case would be within the scope of the employment. *Cf.* Ewald v. LeBar Brothers Dairy, 217 Minn. 16, 13 N. W.2d 729 (1944); Ott v. Industrial Commission, 83 Ohio App. 13, 82 N. E.2d 137 (1948).

35. Whether an activity is within the scope of the employment is usually a jury question. Grant v. Knepper, 245 N. Y. 158, 156 N. E. 650 (1927); Miller v. Metropolitan Life Ins. Co., 134 Ohio St. 289, 16 N. E.2d 447 (1938).