

THE
AMERICAN LAW REGISTER.

OCTOBER 1887.

THE RESPONSIBILITY OF PRINCIPALS FOR THE
MALICIOUS TORTS OF AGENTS.

THIS responsibility of the principal or employer to third persons for the *wrongful* acts of his agent or servant may arise either from the latter's frauds or such unlawful acts of his as are connected with contract; or from his torts, or such unlawful acts as are not connected with contract.

But it is not to be understood that the principal is responsible for *all* the frauds and torts of the agent. His responsibility extends to such only as are connected with the performance of the business for which the agent or servant was appointed. All men are free agents, and it would be highly unreasonable to hold the principal accountable for such acts of the servant as in no wise appertain to the furtherance of his employer's business.

In fixing the dividing line, therefore, between those cases in which an employer is liable for harm which his servant has done, and those in which he is not, it is necessary first to inquire whether the servant's act was in the scope and course of his employment.

To determine this question is, in practice, frequently a matter of considerable difficulty.

Where it is sought to hold the principal liable for the wrongful act of the servant, connected with contract, the question is usually not so perplexing; for whenever the servant or agent is clothed with apparent authority to contract for his principal, and does so contract, the principal is bound thereby, whether the agent acted

bona fide or *mala fide*. The maxim of natural justice here applies with its full force, that he who, without intentional fraud, has enabled any person to do an act, which must be injurious to himself or to another innocent party, shall himself suffer the injury, rather than the innocent party who has placed confidence in him.

The harmful acts of the servant not connected with contract are called his torts, and these may be either negligent or wilful. That the principal is responsible for the negligence or unskilfulness of the servant while engaged in the immediate pursuit of the principal's business is well established by numerous cases, all based upon the assumption that the act of the servant is the act of the master. See *Parsons v. Winchell*, 5 Cush. 592; *Vose v. Grant*, 15 Mass. 505-521; 49 Md. 241; 56 N. Y. 44; 64 N. C. 382; 21 Ohio St. 212; 23 Mich. 298; whether the servant have a character for care and skill or not: *Hayes v. Millar*, 77 Penn. St. 238.

It is in those cases where it is sought to hold the principal liable for the wilful and malicious torts of the agent or servant that the greatest difficulty is encountered. And it is this subdivision of the general subject of liability that is proposed to be discussed in this paper.

The rule has been generally stated to be, that the principal is not responsible for the wilful and malicious torts of his agent.

The rule is thus laid down in Hilliard on Torts, vol. 2, p. 524: "In general a master is liable for the fault or negligence of the servant, but not for his wilful wrong or trespass."

So in *Sharrod v. The London and Northwestern Ry. Co.*, 4 Exch. 580-586, PARKE, B., in delivering the judgment of the court, said: "Our opinion is, that in all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in an action on the case, for a want of skill or care of the agent—no more.

So too in *Roe v. Birkenhead, etc., Ry. Co.*, 7 Exch. 36-40, POLLOCK, C. B., said, "the general rule is that a master is not liable for the tortious act of his servant, unless the act be done by an authority, either express or implied, given him by the master."

McManus v. Crickett, 1 East 106, is, however, the leading case upon the subject, or, at least, for a long period, it was more extensively followed than any other, and is still regarded by many courts and text-writers as containing the correct doctrine. In this case the defendant's driver, after he had set his master down, was return-

ing to the stable with the carriage, and seeing the plaintiff's carriage just ahead, wilfully drove against it, breaking the carriage and throwing the plaintiff out. The plaintiff brought trespass against the driver's master to recover damages for the injury sustained, but the court held that the action would not lie. In the course of his opinion, Lord KENYON said: "Now when a servant quits sight of the object for which he is employed, and without having in view the master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord HOLT, his master will not be answerable for such acts." This dictum, as has just been said, has been extensively followed both in England and America.

It has frequently been applied by American courts. Thus, in *Wright v. Wilcox*, 19 Wend. 345, COWEN, J., in delivering the opinion, says: "If a servant or agent wilfully commit an injury to another, though he be at the time engaged in the business of the principal, yet the principal is not in general liable; as if a servant wilfully drive his master's carriage against another's, or ride or beat a distress taken damage feasant," and cites *McManus v. Crickett*, *supra*; *Middleton v. Fowler*, 1 Salk. 282; 2 Rol. Abr. 553. In the same case the learned judge also says: "The dividing line is the wilfulness of the act." The dictum of Lord KENYON is also approved and applied in the following cases, viz.: *Tuller v. Voght*, 13 Ill. 285; *Brown v. Purviance*, 2 Har. & Gill 316; *Foster v. The Essex Bank*, 17 Mass. 479-510; *Church v. Mansfield*, 20 Conn. 284; *Bard v. John*, 26 Penn. St. 482; *Snodgrass v. Bradley*, 2 Grant (Penn.) 43; *Mali v. Lord*, 39 N. Y. 381; *State v. Morris & Essex Ry. Co.*, 3 Zab. 360; *Ill. Gen. Ry. Co. v. Downey*, 18 Ill. 259.

But, notwithstanding the number of adjudications upon the subject and the many courts that have followed the ruling of Lord KENYON in 1 East, it must not be concluded, that new cases which arise are free from difficulty. Quite the contrary is true. Says Mr. Evans, in his work on Agency, "The cases which have arisen upon this subject have from the earliest times been productive of much astute and interesting discussion in courts of law, and eminent judges have differed widely in their decisions. It has always been a matter of extreme difficulty to apply the law to the ever-varying facts which present themselves." *Ewell Evans on Agency*, Book III., chap. viii., p. 480.

As appears by what has been said, the principal difficulty in most of the cases lies in determining whether the act of the agent which produced the injury to the third person was done in the scope and course of the servant's employment; and those cases which hold that the master is not accountable where the servant acts wilfully, do so upon the ground that when the servant acts wilfully and contrary to the master's orders, he *ipso facto* abandons the master's service. In many recent cases a contrary view is taken.

"We cannot help thinking," says the court, in *Craker v. The Chicago & Northwestern Rd. Co.*, 36 Wis. 657, "that there has been some useless subtlety in the books in the application of the rule *respondeat superior*, and some unnecessary confusion in the liability of principals for the malicious and wilful acts of the agents. This has probably arisen from too broad an application of the dictum of Lord HOLT, that 'the master will not be answerable for the wilful and malicious acts of his servants,' and the court was of the opinion that the wilfulness of the act was no ground for exonerating the master."

Also, in *Weed v. Panama Rd. Co.*, 17 N. Y. 362, where a passenger train on defendant's road was detained several hours at a small station in cold weather, thereby causing great suffering to plaintiff's wife, the detention being caused by the wilfulness of the conductor, the company was held liable. The court said: "Where the act is within the scope of the servant's authority it is immaterial whether it result from negligence or wilfulness."

A view similar to that taken in the foregoing cases was held in *Duggins v. Watson*, 15 Ark. 118-127, where defendant's servant, a ship-master, wilfully ran his vessel against another and sunk it, whereby plaintiff's horses, which were aboard the sunken vessel, were drowned, it was held that the defendant was liable. The court said, "the only safe rule of law is that the master is liable for the tortious act of his servant, engaged in his employment, though done wilfully, without orders, or even against orders. If the servant's disobedience of instructions will exonerate the master, the proof, easily made, virtually does away with the maxim *respondeat superior*, designed for the protection of innocent third persons." In *Toledo, W. & W. Ry. v. Harmon*, 47 Ill. 298, an action was brought to recover damages sustained under the following circumstances: At the instant that the plaintiff was crossing the track in front of a locomotive, standing near the street crossing,

the engineer negligently or maliciously caused the steam to escape from his engine, whereby plaintiff's team was made to run off and the injuries inflicted. It was held that the company was liable.

In the court below the following prayers, among others, were offered by defendant, but refused :

2d Prayer. "If the jury believe the act of the engineer to have been wilful and malicious, and that the act was not authorized by any general or special command, or permission, express or implied, of defendants, defendants are not liable."

5th Prayer. "If they believe the injury to have been caused by the wilful or malicious act of the agent of defendants, they will find for defendants."

Upon appeal, the judgment of the court below was affirmed, WALKER, J., saying: "It can make no difference in its results to appellee, whether the escape of steam was the effect of negligence, or from wanton and wilful purpose. * * * Where servants pervert agencies intrusted to their control to the perpetration of wanton mischief, the master will be liable." See also *C. B. & Q. Rd. v. Dickson*, 63 Ill. 152; *Northwestern Rd. v. Hack*, 66 Id. 238; and *Perkins v. Mo., etc., Rd.*, 55 Mo. 202; also, *Cohen v. Broadway Rd.*, 69 N. Y. 170; *Hewitt v. Swift*, 3 Allen 423; *Ramsden v. Bost. & Alb. Rd.*, 104 Mass. 117; *P. & R. Rd. v. Derby*, 14 How. 295 (498); *Cate v. Schaum*, 51 Md. 308; *Carter v. Howe Sewing Machine Co.*, 51 Md. 290-3; *Evans v. Davidson*, 53 Md. 247. In this last-mentioned case, a servant of defendant, whilst driving a neighbor's cows out of defendant's cornfield, struck and killed one with a stone. Held, that defendant was liable. The court said: "If the servant be acting at the time in the course of his master's service, and for his master's benefit, within the scope of his employment, then his act, though wrongful or negligent, is to be treated as that of the master, although no express command or privity of the master's be shown." And in *Cate v. Schaum*, 51 Md. 299: "Indeed the authorities are numerous," said the court, "to show that a master is liable for the illegal acts of his servant done by force or wantonness while in the performance of an act within the scope and course of his employment."

From the foregoing cases it is evident that there is not unanimity of opinion as to the proper application of the rule *respondeat superior*. In fact, an examination of the books discloses, apparently, nothing but "a wilderness of single instances." Now, Lord MANS-

FIELD has said that "The law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases." The questions, therefore, which present themselves just here, are: 1. What general principle, if any, is illustrated and explained by the cases on this subject? 2. Is there not some alchemy by means of which this principle may be extracted and transmuted into coin for ready use? The answer to the first must be that the rule *respondeat superior* applies wherever the servant acts within the scope of his employment. The second is more difficult. For the rule itself, as laid down, is broad and general, and though, in the abstract, undoubtedly correct, leaves to the judgment of the court or the jury the perplexing duty of determining according to the ever-varying circumstances of particular cases, which acts of the servant are to be regarded as within the scope and course of his employment, and which beyond it.

Several rules have been adopted to assist in determining this question. Thus, as was before remarked, it has been held that the doing of a tortious act designedly was *ipso facto* abandonment of the master's service, and therefore without the scope of his employment. This is the view taken in some older cases: 1 East 106; 19 Wend. *supra*, but denied in later ones: 51 Md. 290-3; 27 Id. 287; 45 Id. 344; 11 Id. 552; 47 Ill. 298. Again, it has been supposed that there must be an authority from the master in order to bring the act within the scope of the servant's employment. But in 14 How. 295 (488), this test was also denied. In this case the court adopted the language of ERSKINE, J., in *Sleath v. Wilson*, 9 C. & P. 607, viz.: "If the act be done in the course of the servant's employment the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved, or forbade it, he is liable, if the act be done in the course of the servant's employment."

Again, it has been said, that if the act is for the master's benefit, it is within the scope of the servant's employment, and the master is responsible for resulting damage. Thus, in *Hall v. Smith*, 2 Bing. 160, the court said: "The maxim *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act that is done by another for him, must answer for an injury which a third person may sustain from it." But the correctness of this test has also been refuted. See Wood's Master and Servant, § 286; Poe's Plead., § 477.

It is evident, therefore, that no satisfactory criterion has yet been adopted. Probably no rule can be devised that will meet the requirements of every case. As said by Mr. Evans, "It is extremely difficult to lay down an exact and absolute line of demarcation between those acts done within the scope of an authority and those beyond it:" Ewell Evans, Book III., Ch. 8.

So we find ourselves no further than the original proposition, that the rule *respondeat superior* applies in all cases, where the servant acts within the scope of his employment—a broad rule, and one that leaves at random the question of employment.

It is the purpose of the writer to extract, if possible, from the numerous cases, a rule that, while not unerring and inflexible, will at least aid in determining the question. And still having in view the general welfare of society, it is believed that no more reliable test or criterion can be adopted than this: that the employer or principal shall be responsible in all cases where the injury to the third person might have resulted from the negligence or unskillfulness of the servant, whilst in the immediate pursuit of his master's business; though in fact it did not, but was occasioned by the wilfulness or maliciousness of the servant whilst so employed.

The rule itself is based upon this equitable principle, that where one of two innocent persons must suffer by the wrong of a third, the loss should fall upon him who has enabled the third person to do the wrong. This has long been a controlling principle in actions for agent's frauds, and it seems to be equally applicable to cases of tort. It is believed that its adoption will, in most cases, fulfil the law, working substantial justice to the individual and practical justice to the public.

The rule may be illustrated by the following cases: Suppose a servant, whilst driving a neighbor's cows out of his master's corn-field, should throw a stone at one, strike and kill it. Here, even if the act were malicious, the master ought to be liable, because the injury might have resulted from carelessness on the part of the servant. And it was so held in *Evans v. Davidson*, 53 Md. 247. If, however, the servant were to throw a stone at neighbors' cows, whilst they were quietly grazing in an adjoining field, and kill one of them, here the injury could not have resulted from the pursuit of the master's business, and the master would not be liable. It was the act of the servant and not of the master.

Again, suppose A. were having a house built in the city, and a

workman employed in the erection of it should purposely knock a pile of brick off the scaffold, and thereby injure a passer-by; here A. should be held liable, for the bricks might have been knocked off by carelessness, and it should be no answer that the act was done intentionally. If, however, the workman were to get into an altercation with a man in the street, and should throw a brick, or whole pile of bricks, at him, and injure him or another; here the master ought not to be liable, for the servant was not pursuing the master's business, and the injury could not have been the result of negligence.

So in a case put by Judge REEVE (Reeve's M. & S., pp. 358-9): Suppose a farrier's apprentice should purposely set a nail, with which he was fastening on a horse-shoe, so as to lame the horse he was shoeing. Here the farrier ought to be liable, for the injury might have resulted from negligence or unskilfulness of the apprentice in setting the nail. If, however, in such case, the apprentice should drive a nail into the middle of the horse's hoof, where it could not have been driven except by design, here the injury could not have resulted from negligence, and the farrier should not be liable.

Again, suppose a large vessel, whilst pursuing its course, should wilfully run into and wreck a smaller one, passing near; here the owner of the larger vessel should be liable, for the injury might have been caused by the negligence of the ship-master. But if the ship-master should go far out of his course for the purpose of damaging another boat, the owner of the vessel doing the damage should not, perhaps, be liable, because the injury could not have resulted from accident. See *Duggins v. Watson*, 15 Ark. 118.

So in *Cohen v. Broadway Rd.*, 69 N. Y. 170 (1877), where the driver of a street car wilfully drove against plaintiff's buggy, the driver of which was unable to quite cross the car-track, owing to a blockade of vehicles in front of him, and upset it, inflicting damage, it was held that the defendant was liable. Here also the rule will apply, because the injury might have been occasioned by the negligence of the carman, and it should be no excuse that he wilfully drove against the buggy.

In *Toledo, etc., Rd. v. Harman*, 47 Ill. 298, the opinion of the court would be supported by this rule; for the steam which escaped from the locomotive might have done so from negligence on the part of the engineer, and that the engineer wantonly caused the

injury, permitting the steam to escape by design, should be no answer. In this case the court said the company was liable whether the injury was caused by the servant's "negligence or wilfulness."

Cases might be multiplied indefinitely, but these will suffice to illustrate the rule. It is not pretended, of course, that it will meet the requirements of every case that might arise on the subject, but it is believed to be applicable to very many. Its adoption, it is true, will perhaps narrow somewhat the rather broad interpretation that has been given to the dictum of Lord HOLT, that the doing of a wrong designedly was an abandonment of the master's service.

Of the dictum itself Judge REEVE has this to say: "Until some late determination, it has been always understood to be law, that when a servant, in the immediate performance of his master's business, should commit a wilful injury, without any authority from the master, that the master was liable; it being supposed more reasonable that when one of two innocent persons is to suffer, that he should be the person who put it into the power of the servant to do the injury by employing him and putting confidence in him, than one who never placed any confidence in him. It was never contended that the master was liable for all the torts of his servant. Those which he committed when he left his master's service, he alone was answerable for. This subject may be illustrated by the following cases: A., the servant of B., is employed by him to drive his wagon. A., whilst driving his wagon, leaves it in the road and commits a battery upon C. In this case B. would not be liable. But if A. had continued driving the wagon, and drove with violence over C., with design to injure him, B. would have been liable. In the first place, A. had abandoned his master's business; in the latter case he was in the immediate pursuit of it, though done in such a manner as to injure another person; or, in other words, in the first case he was not driving his master's wagon, which he was employed to do; in the latter he was. By some recent decisions, the master would not be liable in the latter case. It seems that the court did not intend to impeach the principle before laid down, that the master was liable for injuries committed in the immediate pursuit of his business; but that designedly driving the wagon by A. over C. would be by them considered abandoning the master's service: Reeve's Domestic Relations, 358-9-60. Although this view of Judge REEVE has been denied, *Wright v. Wilcox, supra*, the opinions, in later cases in America, tend towards its ultimate

adoption. See 47 Ill. 298; 63 Id. 152; 55 Mo. 212; 66 N. Y. 129; 36 Wis. 658; 51 Md. 290-3.

To the writer, the rule which holds the dividing line to be the wilfulness of the servant's act, appears to be opposed to public policy, as utterly inconsistent with the well-being of society. What the public demand is security—security of life, of limb, and of property. And it is the business of the law to guarantee this security, so far as is consistent with the rights of the individual. The legal wrong is found in the injury sustained, not in the motive. And whenever the servant is acting in the immediate pursuit of the master's business, the master should be responsible for all injuries incident to his employment, whether occasioned by negligence or wilfulness.

Holding this view, it is believed that in the case put by Judge REEVE, of the carriage-driver's continuing to drive his master's carriage, and while so employed driving with violence against C., with the design to injure him, the master ought to be responsible. In *Sleath v. Wilson*, 9 C. & P. 607, this view is taken by the court. Judge ERSKINE says: "Whenever the master has entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it." Although this doctrine has not been followed extensively in England, it has been adopted as the correct principle in the Supreme Court of the United States, the court saying, Judge ERSKINE had laid down the rule distinctly and correctly; and further, that "any relaxation of the policy and principles of law affecting such cases would be highly detrimental to the public safety:" 14 How. (U. S.) 295; (488).

That the courts are beginning to recognise the importance of holding the master to a somewhat stricter degree of responsibility, is also shown by the case of *Carter v. The Howe Sewing Machine Co.*, 51 Md. 290-3, in which Judge ALVEY says: "And it would seem to be clear, whatever may have been the former state of judicial opinion upon the subject, that corporations (and the rule is the same whether the party be artificial or natural, Judge THOMPSON in 70 Penn. 125), are liable for all acts, whether wilful or malicious, of their agents or servants done in the course of their employment." The reasonableness of this view may be illustrated briefly by the following case: The servant of an omnibus company, employed as driver, is intrusted with the management and control

of one of the company's vehicles. His business requires him to use constantly the thoroughfares of a populous city. These are almost continually crowded with various sorts of vehicles, and with pedestrians, crossing and recrossing. If the driver of the omnibus negligently or carelessly run into a passing vehicle or against a pedestrian, and injury is inflicted, the master of the driver is responsible; but if the driver take the lines in his grasp, he may, according to some decisions, wilfully run into and break as many vehicles and injure as many persons as his wantonness or malice suggests, and no one is responsible.

Certainly such a doctrine is not compatible with the best interests of the community, and does not guarantee to the public the degree of security to which they are entitled. And while it may be contended that it would be unreasonable to hold the master liable for such wilfulness and maliciousness of the servant, it is surely more reasonable and just to hold him who selects the servant, and who can remove him for his misconduct, responsible, than that an innocent third person, who has not the opportunity of selection, or the power of removal, should be prejudiced by such conduct.

The legal wrong is found in the damage done, not in the motive, and if the servant, while acting within the scope of his authority, that is, in the pursuit of his master's business, acts in a wilful or malicious manner, and damage ensues, the master should be responsible: *Perkins v. Mo., Kan., etc., Rd.*, 55 Mo. 201. That is to say, all the acts of the servant that are done in the furtherance and pursuit of the master's business, should be held to be within the scope of his authority, and even where the servant acts maliciously and in express disregard of the master's instructions, if incidental to his employment, the maxim *respondet superior* should apply.

Says Prof. Poe, in that part of his excellent and exhaustive Treatise on the Law of Pleading, devoted to actions *ex delicto*: "The principal is liable to third persons in a civil suit for frauds, deceits, torts and negligences of his agent in the course of his employment, although the principal did not authorize the misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule *respondet superior* applies; and it is founded upon public policy and convenience; for in no other way could there be safety to third persons:" Poe's Plead., § 438.

There must be, of course, a limit to the master's responsibility; and where the servant goes so far out of the proper pursuit of his

master's business, or so far loses sight of the object for which he was employed, that the damage could not have resulted from negligence, the master ought not to be held accountable.

Thus, if a servant, driving a carriage, wantonly strike with his whip the horses of another person, and produce an accident, the master will not be liable; for it was a capricious act, in no way connected with the furtherance of the master's business. So, too, if a servant intrusted with the management of a carriage, or a ship-master with the command of a vessel, should entirely abandon the master's business and go upon some errand of his own, and damage result, the master ought not to be responsible for such damage; for here clearly the injury could not have been the result of negligence while performing the master's business. But a slight deviation ought not to be regarded as an abandonment of the master's service. The amount of deviation that will exonerate the master is a question of degree (37 L. J. C. P. 156), and depends upon the facts of each particular case. But if the injury might have resulted from negligence in doing the master's business in an indirect and roundabout way, the master ought still to be liable; not ordinarily liable, indeed, for excessive or exemplary damages, but for compensatory, and such as will be a sufficient admonition to him to select competent and trustworthy servants. For although wilfulness, where it causes additional bodily or mental suffering, has been held a ground for enhancing damages (114 Mass. 517; 45 Md. 344, etc.), yet it is thought that the purpose of the law will be subserved, if the master is held responsible for the compensatory, merely, which includes, of course, compensation for all the consequences of the servant's act. And whether the wrong be done carelessly or purposely, the master is liable, not so much for having authorized the act, as for having employed an untrustworthy servant, whom he has put in a position to do the injury.

Although the view taken in this paper is somewhat in advance of that held by the majority of the English courts, and by some courts in America, it is believed that the degree of liability here contended for is in accord with the latest and most approved decisions on the subject. Certainly, such liability would conduce to greater vigilance on the part of the principal, greater fidelity in the servant, and greater security to the public.

GLENN H. WORTHINGTON.

Frederick, Md.
