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Agency--The Course of Employment--Tort of Auto Salesman

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RECENT CASE COMMENTS

AGENCY — THE COURSE OF EMPLOYMENT — TORT OF AUTO SALESMAN. — An agent was employed to demonstrate and solicit sales of used cars for his principal, a garage owner in Fairmont. The only definite restriction on the agent was that he return any car he was demonstrating to the principal's garage each evening. The agent could solicit wherever he wished; he could pick up his friends. On January 31, 1928 the agent went out of Fairmont to solicit a sale in one of his principal's machines, after which he went to his home, before coming back to Fairmont, and picked up some friends, intending to bring one of them to a doctor in Fairmont and then to take them all back home again. None of the passengers were prospects for a sale. On this trip to the doctor, the agent struck the plaintiff, who sued the principal. The West Virginia Supreme Courts of Appeals decided that at the time of the accident the agent was acting within the course of his employment and affirmed the action of the lower court in setting aside a verdict for the defendant because of instructions given to the jury on this point. *Cochran v. Michaels*.¹

An early English case predicated the liability of the principal for the negligence of his agent in using the principal's carriage on the ground that the principal had placed it within the agent's power to mismanage.² This case was soon overruled.³ Courts have since consistently held that there is a limit to the liability of the principal for the negligence of his agent, determined by what lies within "the course of the agent's employment".⁴ Today, this term of limitation is confessedly insusceptible to exact definition.⁵ The tendency of the courts to stretch the doctrine beyond the dictionary definition of the term has led to hopeless confusion.⁶

The motivation-deviation test has been suggested as a gauge for determining whether a given act lies within the course of employment; that is, was the agent in part motivated by the princi-

¹ 157 S. E. 173 (W. Va. 1931).

² *Sleath v. Wilson*, 9 C. & P. 607 (1839).

³ *Story v. Ashton*, L. R. 4 Q. B. 476 (1869).

⁴ *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 S. Ct. 252 (1909); *Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853 (1915); *Eggleston v. Tanner*, 86 W. Va. 385, 103 S. E. 113 (1920).

⁵ *Robards v. P. Bannon Sewer Pipe Co.*, 130 Ky. 380, 113 S. W. 429 (1908); *Riley v. Standard Oil Co.*, 231 N. Y. 301, 132 N. E. 97 (1921); *MECHEM, AGENCY* (2d Ed.) § 1879.

⁶ *Young B. Smith, Frolic and Detour* (1923) 23 COL. L. REV. 444.

pal's business, and was the act no extreme deviation from the normal course of the employee's route?" This rule has been followed inarticulately by various courts.⁷ The language of the court in *Cochran v. Michaels* apparently brings it within this test;⁸ but factually it is submitted that there is no motivation at all, and hence the test must fail.

It has also been suggested that the test be whether the act of the agent occurs within the "zone of risk"; that is, the principal is liable for the acts of the agent within a certain area covering the authorized route of the agent.⁹ *Cochran v. Michaels* might fall within this test; but the author of the test infers that intent to resume the principal's business when re-entering the "zone" is necessary.¹¹ Hence that test would not achieve the result of the principal case.

Generally it is said that where the agent takes his principal's car and starts on a journey in no way connected with the work that he was employed to do, the principal is not liable for injuries caused by the agent on such a journey.¹² Furthermore it makes no difference that the principal permitted the agent to use the car for his own purposes.¹³ It seems also settled that the term "course of employment" is in no way synonymous with the "period covered by the hours of employment".¹⁴

The West Virginia Court in the principal case decided that the mental attitude of the agent was not controlling.¹⁵ However, the writer submits that in this case the mental attitude happens to be of paramount importance. For inasmuch as the course that the agent was pursuing at the time he hit the plaintiff, while

⁷ *TIFFANY, AGENCY* (2d ed. Powell, 1924), c. 5, par. 38, p. 105.

⁸ *Hardeman v. Williams*, 150 Ala. 415, 43 So. 726 (1907); *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038 (1901); *Hoffman v. Roehl*, 61 Mont. 290, 203 Pac. 349 (1921); *Scoccia v. Streeter*, 121 Wash. 21, 207 Pac. 1044 (1922); *Fireman's Fund Ins. Co. v. Schreiber*, 150 Wis. 42, 135 N. W. 507 (1912).

⁹ *Supra* n. 1 at 175.

¹⁰ *Dockweiler v. American Piano Co.*, 160 N. Y. Supp. 270, 94 Misc. 712 (1916); *Young B. Smith, op. cit. supra* n. 6, at 727.

¹¹ *Smith, op. cit. supra* n. 6, at 728, footnote 47.

¹² *Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618 (1913); *Clark v. Wisconsin Central E. E. Co.*, 261 Ill. 407, 103 N. E. 1041 (1914); *Harnett v. Gryzmish*, 218 Mass. 258, 105 N. E. 988 (1914); *Riley v. Roach*, 168 Mich. 294, 134 N. W. 14 (1912); *Fallon v. Swackhamer*, 226 N. Y. 444, 123 N. E. 737 (1919).

¹³ *Adomatis v. Hopkins*, 95 Conn. 239, 111 Atl. 178 (1920); *Fisher v. Fletcher*, 191 Ind. 529, 133 N. E. 834 (1922); *Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853 (1915); *Menton v. Patterson Mercantile Co.*, 145 Minn. 310, 176 N. W. 133 (1920).

¹⁴ *Riley v. Roach, supra* n. 12; *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133 (1906).

¹⁵ *Supra* n. 1, at 175.

taking the sick friend to the doctor, was identical with that he should have taken in pursuing his principal's business, the character of the trip was equivocal, until the purpose of the agent definitely indicated that the trip was a departure from the master's business; that, hence, the act was outside the course of the agent's employment.

It is the writer's opinion that the act of the agent for which the principal is to be held liable should bear some relation to the principal's business, factually and not merely fictionally.²⁶ It is by putting such a broad interpretation upon the term "course of employment", as the court has in *Cochran v. Michaels*, that all the meaning is taken out of it. The tendency of the decision approaches that of the early English case of *Sleath v. Wilson*.²⁷ And, in short, a little further extension of such a decision will make the principal an insurer to any third party against the torts of his agent, incurred by the agent in the operation of any instrumentality of the principal. The writer is not prepared to say definitely that this result would be wholly undesirable, but should not such a stride be taken legislatively, rather than judicially?²⁸

—HENRY P. SNYDER.

EQUITY—SUBJECTING CORPORATE STOCKS TO AN EQUITABLE SERVITUDE.—F & Co. exchanged with G 4000 shares of H & Co. and a check for \$17,000 for 3000 shares of P & Co. Inc., agreeing that the respective stocks would not be sold until they reached the prices of \$32 and \$45, or the equivalent of that price in the event of recapitalization. This agreement was to remain in effect for two years and be binding upon any person or persons in whose name either of the above stocks might be registered. Subsequently 3000 shares of C Corp. were substituted for the stock of P & Co. Pending an executory agreement to rescind, G transferred for valuable consideration to C Corp., of which he was president, his 4000 shares of H Co. F & Co. now seeks to make the C Corp. trustee of the stock in question by virtue of G's restrictive

²⁶ The court in *Cochran v. Michaels*, *supra* n. 1, at page 175: "a friend picked up became an eager informant as well as a partisan of the driver, and the interest of the defendant was thus promoted."

²⁷ *Supra* n. 2.

²⁸ See Judge Poffenbarger's dissent against the extension of an agency doctrine in another instance: "New laws should be made by the legislatures, not the courts." *Jones v. Cook*, 90 W. Va. 710, 719, 11 S. E. 828 (1922). See also, *Kidd v. Dewitt*, 128 Va. 438, 443, 105 S. E. 124, 125 (1920).