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## *Employer's Duty to Know Deficiencies of Employees*

Martin R. Loftus\*

**I**N THE CASE OF *Kendall v. Gore Properties Inc.*<sup>1</sup> an employer was held liable for the willful and malicious (criminal) acts of his employee. The employee, a janitor in an apartment house, had murdered a tenant. The employer was held liable on the ground that he, the landlord, had been recklessly ignorant in the selection of the employee. The case illustrates the modern doctrine of allocating to the employer liability for the harm caused by the servant's tortious behavior, based on his negligent selection of the employee, even though the criminal nature of the servant's act is far beyond that which might reasonably be foreseen and seems to be clearly beyond the "course and scope of the employment." It also poses a question regarding to what lengths an employer must go in ascertaining the deficiencies of his employees.

Another theory which held an employer vicariously liable for the losses caused by torts of his servants had its basis in the idea that the employer was the one who ought to bear and distribute the loss.<sup>2</sup> In support of this theory, it was also reasoned that an employer who was held strictly liable for the conduct of his employees would be stimulated to use great care in the selection and supervision of his employees.<sup>3</sup> Thus his duty to know their deficiencies has several bases.

### *Employer's Duty At Common Law*

At common law certain classes of employers had to use greater care than others in ascertaining their employees' deficiencies, and even though they exercised such care, they have been held to be vicariously liable for their employees' *intentional* torts. Thus in the case of *carriers*,<sup>4</sup> *innkeepers*,<sup>5</sup> and *hospitals*,<sup>6</sup>

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<sup>1</sup> 236 F. 2d 673 (D. C. Cir. 1956); 45 Georgetown L. J. 310 (Winter '56-57).

<sup>2</sup> Laski, *The Basis of Vicarious Liability*, 26 Yale L. J. 105 (1916); Douglas, *Vicarious Liability and Administration of Risk*, 38 Yale L. J. 584, 720 (1929); Miller, *The Master-Servant Concept and Judge-Made Law*, 1 Loyola L. Rev. 25 (1941); Ferson, *Bases for Master's Liability and for Principal's Liability to Third Persons*, 4 Vand. L. Rev. 260 (1951), cited in Prosser, *Law of Torts*, 471 (3d ed. 1964).

<sup>3</sup> Mechem, *Outline of the Law of Agency* § 214 (4th ed. 1952).

<sup>4</sup> *Southern Ry. v. Beaty*, 212 Ala. 608, 103 So. 658 (1925); *Korner v. Cosgrove*, 108 Ohio St. 484, 141 N.E. 267, 31 A. L. R. 1193 (1923).

(Continued on next page)

employers have been held liable for their servants' personal attacks when the attacks are made on the employer's premises. The employer's liability was based upon the fiduciary relation which existed between the employer and passengers, guests, or patients.<sup>7</sup>

In the absence of a duty relation which requires a very high degree of care in the selection of employees<sup>8</sup> it seems clear that an employer who has used ordinary care in selecting or retaining an employee who subsequently commits an intentional tort, may still be held liable on the theory that the employee's conduct was reasonably connected with his employer's business,<sup>9</sup> and it is therefore within the scope of his employment.<sup>10</sup> However, in the absence of a duty relation requiring the employer to use a high degree of care in ascertaining his employee's deficiencies, he was not held liable for the *willful and malicious* torts of his employees. Thus, in *Park Transfer Co. v. Lumbermens Mut. Casualty Co.*<sup>11</sup> where an employee assaulted and killed the plaintiff's insured, the court said:

Unless an assault, or other tort, is activated in part at least by a purpose to serve a principal, the principal is not liable.

A third situation exists where an employee's conduct is not so malicious or willful as to constitute a departure from the scope of his employment,<sup>12</sup> and thus the employer will not be liable, unless there is evidence to show that the employee was so careless that his employer ought to have foreseen the danger to his customers as a result of his characteristics.<sup>13</sup>

The employer may however, still be held liable if there is evidence to show he failed to use ordinary care in the selection<sup>14</sup> or retention<sup>15</sup> of such an employee. An employer must

<sup>5</sup> *Beilke v. Carroll*, 51 Wash. 395, 98 P. 1119 (1909); *Clancy v. Barker*, 71 Neb. 83, 98 N.W. 440 (1904).

<sup>6</sup> *Vannah v. Hart Private Hospital*, 228 Mass. 132, 117 N.E. 328 (1917).

<sup>7</sup> *Prosser*, *op. cit. supra*, n. 2 at 477.

<sup>8</sup> Such as that owed by innkeepers to their guests—see: *Mayo Hotel Co. v. Danciger*, 143 Okla. 196, 288 P. 309 (1930).

<sup>9</sup> *Palmeri v. Manhattan Ry.*, 133 N. Y. 261, 30 N. E. 1001 (1892); *Johnson v. Monson*, 183 Cal. 149, 190 P. 635 (1920); *Rice v. Marler*, 107 Colo. 57, 108 P. 2d 868 (1940).

<sup>10</sup> *Seavey*, *Speculations as to "Respondeat Superior," Harvard Legal Essays*, 433, 453 (1934); Note, 45 Harv. L. Rev. 348 (1932); cited in *Prosser*, *op. cit. supra* n. 2 at 476.

<sup>11</sup> 79 App. D. C. 48, 142 F. 2d 100 (1944); see *Grimes v. B. F. Saul Co.*, 60 App. D. C. 47, 47 F. 2d 409 (1931).

<sup>12</sup> *Creamer v. Kroger Grocery and Baking Co.*, 260 Ky. 544, 86 S.W. 2d 288 (1935).

<sup>13</sup> *Priest v. F. W. Woolworth Five and Ten Cent Store*, 228 Mo. App. 23, 62 S.W. 2d 926 (1933).

<sup>14</sup> *Kiser v. Skelly Oil Co.*, 136 Kan. 812, 18 P. 2d 181 (1933).

<sup>15</sup> *Duckworth v. Appostalis*, 208 F. 936 (E. D. Tenn. 1913).

reasonably ascertain if an independent contractor possesses the necessary skill and is suited for the type of work to be performed,<sup>16</sup> and is competent and careful.<sup>17</sup> If it can be shown that the employer was not negligent in the selection of the independent contractor, the employer will not be held liable for the contractor's negligence.<sup>18</sup>

If an agency relation exists and the principal does not exercise due care in the selection of his agent, thereby employing a vicious person to perform duties which will bring him into contact with others while in the performance of his duties, the principal will be liable for harm which may occur because of the agent's vicious propensities.<sup>19</sup>

At common law the employer had a duty to select suitable and competent employees<sup>20</sup> possessing the mental, moral and physical qualifications to enable them to perform their duties without endangering fellow employees.<sup>21</sup> The duty of the employer to know his employee's deficiencies in regard to the fellow servant doctrine was stated in *Country Club of Jackson v. Turner*,<sup>22</sup> where the court said:

Compliance with the duty to use reasonable care to maintain working conditions that are reasonably safe involves the duty to use such care in avoiding the employment or retention of a servant who is known to be dangerous or vicious where such propensities are calculated to expose co-employees to greater dangers than the work necessarily entails. This principle no longer needs cited authority.

Until recently the most common theory for proceeding against an employer who knew his employee was a dangerous person was the doctrine of *respondeat superior*.<sup>23</sup> This doctrine bases on the ideas of "ability to spread the cost" and the social value of requiring supervision of employees.<sup>24</sup> The more recent cases ignore the doctrine of *respondeat superior* and proceed on the theory that where the employer is negligent in hiring and retaining an employee with known deficiencies and in permitting such an employee to engage in the master's business, the employer's liability results from his negligence in selection and

<sup>16</sup> *Connors v. Hennessey*, 112 Mass. 96 (1873).

<sup>17</sup> *Ozan Lumber Co. v. McNeely*, 214 Ark. 657, 217 S.W. 2d 341 (1949); 8 A. L. R. 2d 261 (1949).

<sup>18</sup> *Parker v. Taylor*, 295 Mass. 51, 3 N.E. 2d 25 (1936); *Rasimas v. Swan*, 320 Mass. 60, 67 N.E. 2d 662 (1946).

<sup>19</sup> *Restatement, Agency* § 213 pp. 465-466 (1933).

<sup>20</sup> *Wyman v. Lehigh Valley Ry.*, 158 F. 957 (2d Cir. 1908).

<sup>21</sup> *McCarty v. Mitchell*, 169 Miss. 82, 151 So. 567 (1934).

<sup>22</sup> 192 Miss. 510, 4 So. 2d 718, 719 (1941).

<sup>23</sup> *Hall v. Smathers*, 240 N. Y. 486, 148 N.E. 654 (1925).

<sup>24</sup> See, 1 *Encyc. of Negligence* § 232 (1962).

retention of such an employee.<sup>25</sup> Thus, in *Fleming v. Bronfin*, the employer was held liable for the negligent selection and retention of a grocery deliveryman who criminally assaulted a housewife in her home while delivering groceries.<sup>26</sup> If an unreliable employee departs from the scope of his employment and his employer should have foreseen such a departure, the employer will be liable for the employee's torts committed during that departure.<sup>27</sup>

#### *Evidence Required To Show Employer's Common Law Duty*

The common law duty of an employer toward third persons and the consequent liability in cases of breach of this duty seem to be clear and well recognized. The question remains as to whether or not the investigation by the employer was adequate to relieve him of liability for his employee's conduct.<sup>28</sup> If the plaintiff can prove that the employer knew or should have known about the bad proclivities of an employee, the employer may be held liable for the selection or retention of such incompetent employee.<sup>29</sup>

A general question asked of an employer as to whether or not he had knowledge or belief of his employee's incompetence was held to be not admissible in showing the employer's negligent retention of an employee.<sup>30</sup> Nor is the fact that a workman has been given derogatory nicknames sufficient to show his employer's knowledge of incompetency.<sup>31</sup> Competent and relevant evidence of a prior suit against a defendant, showing that a physician employed by him was lacking in skill, has been held admissible to show that the defendant was negligent in retaining the physician as his employee.<sup>32</sup> Similarly it has been held that where there is competent and relevant evidence of an employer's knowledge of an employee's recklessness, it is admissible to show that the employer was negligent in his retention of the employee.<sup>33</sup> As tending to show the employer's knowledge of his employee's conduct, prior acts of insubordination and willful disobedience may be shown.<sup>34</sup>

<sup>25</sup> *Murray v. Modoc State Bank*, 181 Kan. 642, 313 P. 2d 304 (1957).

<sup>26</sup> 80 A. 2d 915 (D. C. Munic. Ct. App. 1951).

<sup>27</sup> *Boland v. Love*, 222 F. 2d 27 (D. C. Cir. 1955).

<sup>28</sup> *Bradley v. Stevens*, 329 Mich. 556, 46 N.W. 2d 382 (1951).

<sup>29</sup> *Statham v. Blaine*, 234 Miss. 649, 107 So. 2d 93 (1958).

<sup>30</sup> *Pfudl v. F. J. Romer Sons*, 107 Minn. 353, 120 N.W. 302, at 303 (1909).

<sup>31</sup> *St. Louis A. & T. H. R.R. v. Corgan*, 49 Ill. App. 229 (1891).

<sup>32</sup> *McMahan v. Carolina Spruce Co.*, 180 N. C. 636, 105 S.E. 439 (1920).

<sup>33</sup> *D. H. Dalton Const. Co. v. Huskey*, 186 Ark. 934, 56 S.W. 2d 1018 (1933); *Weddle v. Loges*, 52 Cal. App. 2d 115, 125 P. 2d 914 (1942).

<sup>34</sup> *Robbins v. Lewiston, A. & W. St. Ry.*, 107 Me. 42, 77 A. 537 (1910); *Montgomery First Nat. Bank v. Chandler*, 144 Ala. 286, 39 So. 822 (1905).

Evidence may be admitted to show that an employer has selected or retained an employee who was habitually careless,<sup>35</sup> forgetful,<sup>36</sup> intoxicated,<sup>37</sup> inattentive,<sup>38</sup> reckless<sup>39</sup> and malicious<sup>40</sup> either before or after he employed him;<sup>41</sup> and he would therefore be liable for injuries which the employee might cause. However, if it can be shown that the employer took all reasonable precautions, no liability will result.<sup>42</sup>

If the plaintiff can show that the employer did not investigate, or investigated the employee's background inadequately, it provides good evidence for the jury on the issue of negligence and also shows a causal connection between the defendant's conduct and the harm. But if his proof does not show that a reasonable investigation would have given notice of the danger, he has failed to demonstrate clearly that there is a causal connection between the employer's negligence and the harm.<sup>43</sup>

A recent case illustrates that an employer need not exercise great diligence in investigating his employees. In *Lee v. Swan*<sup>44</sup> an automobile owner, who knew that his employee had drinking and domestic problems and had lost his previous job, was held not liable for injuries caused to a third party. The employer had asked the employee if he had a chauffeur's license and had received an affirmative reply. The employer did not check official sources. He was not liable because the plaintiff could not prove circumstances that would show that the employer's denial of knowledge of his employee's incompetency was untrue.

#### *Statutory Duty To Know Employee's Deficiencies*

Most states have adopted workmen's compensation laws which are based upon strict liability of the employer for the

<sup>35</sup> *Houston & T. C. Ry. v. Patton*, 9 S. W. 175 (Tex. 1888); *Johansen v. Pioneer Min. Co.*, 77 Wash. 421, 137 P. 1019 (1914).

<sup>36</sup> *Ledwidge v. Hathaway*, 170 Mass. 348, 49 N.E. 656 (1898).

<sup>37</sup> *Layzell v. J. H. Sommers Coal Co.*, 156 Mich. 268, 117 N.W. 179 (1908), adhered to on rehearing, 156 Mich. 268, 120 N.W. 996 (1909).

<sup>38</sup> *Yazoo & M. V. Ry. v. Hare*, 104 Miss. 564, 61 So. 648 (1913); *Walters v. Durham Lumber Co.*, 163 N. C. 536, 80 S.E. 49 (1913).

<sup>39</sup> *Rosenstiel v. Pittsburgh Ry.*, 230 Pa. 273, 79 A. 556 (1911); *Serdan v. Falk Co.*, 153 Wis. 169, 140 N.W. 1035 (1913).

<sup>40</sup> *Svacek v. Shelley*, 359 P.2d 127 (Alaska 1961); *Kelly v. Oregon Shipbuilding Corp.*, 183 Or. 1, 189 P.2d 105 (1948).

<sup>41</sup> *Furlong v. New York, N. H. & H. Ry.*, 83 Conn. 568, 78 A. 489 (1910); *Brown v. Levy*, 108 Ky. 165, 55 S.W. 1079 (1900); *Norfolk & W. Ry. v. Hoover*, 79 Md. 253, 29 A. 994 (1894).

<sup>42</sup> *The Elton*, 142 F. 367 (3rd Cir. 1906); *Roblin v. Kansas City St. J. & C. B. Ry.*, 119 Mo. 467, 24 S.W. 1011 (1894); *Bradley v. Stevens*, 329 Mich. 556, 46 N.W. 2d 382 (1951) (Investigation held adequate as a matter of law).

<sup>43</sup> *Schulz v. Pennsylvania R.R.*, 350 U. S. 523 (1956).

<sup>44</sup> 111 Ga. App. 88, 140 S.E. 2d 562 (1965).

risks of the employment.<sup>45</sup> There are many injuries which are still not covered by these acts, and most of the statutes are limited to injuries which occur because of and in the course of employment. In many instances, however, recovery is allowed for injuries sustained through conduct which is independent of and unconnected with the employment because the employer was negligent in allowing such conduct to continue.<sup>46</sup> Liability under workmen's compensation acts is not based on negligence of the employer in failing to stop such conduct. His knowledge is material only as to whether the injury arose out of the course of employment. If the employer could reasonably expect, with his knowledge of the situation, that injury might occur from the conduct, such conduct is deemed to have arisen out of the employment.<sup>47</sup>

Proof of custom or accepted conduct of the employee is essential in allowing recovery.<sup>48</sup> Actual or constructive knowledge of the deficient conduct has been deemed sufficient to allow recovery.<sup>49</sup> In *Industrial Com'r. v. McCarthy*,<sup>50</sup> a New York court allowed a recovery of double the normal amount awarded for death benefits because the employer had permitted the underage employee to labor in violation of the statute. Recent authority indicates that recovery is allowed without knowledge being a prerequisite.<sup>51</sup>

Cases under the Federal Employer's Liability Act<sup>52</sup> have rejected the duty of an employer to provide safe employees on the ground that the employer's duty is fulfilled by hiring employees who are capable of doing the specific work for which they were hired.<sup>53</sup> Thus, in *Young v. New York Central Railroad Co.*,<sup>54</sup> an employer was held not liable for an assault by one of its employees upon another, even though the employer knew of previous assaults committed by the same employee.

<sup>45</sup> Prosser, *op. cit. supra* n. 2 at 555.

<sup>46</sup> *Hayes Freight Lines, Inc. v. Burns*, 290 S.W. 2d 836 (Ky. 1956). See annot., 159 A. L. R. 319 at 337 (1945); Larson, *Workmen's Compensation Law*, §§ 23-41 (1965).

<sup>47</sup> *Socha v. Cudahy Packing Co.*, 105 Neb. 691, 181 N.W. 706 (1921); 58 Am. Jur., *Workmen's Compensation Sec.* 268 (1948).

<sup>48</sup> *Ognibene v. Rochester Mfg. Co.*, 298 N. Y. 85, 80 N.E. 2d 749 (1948) (dissenting opinion).

<sup>49</sup> *Lang v. Franklin Ry. Supply Co.*, 272 App. Div. 988, 73 N. Y. S. 2d 1 (1947).

<sup>50</sup> 295 N. Y. 443, 68 N.E.2d 434 (1946).

<sup>51</sup> *Piatek v. Plymouth Rock Provision Co.*, 15 App. Div. 2d 405, 224 N. Y. S. 2d 634 (1962).

<sup>52</sup> 53 Stat. 1404 (1939), 45 U. S. C. A. sec. 51 (1954).

<sup>53</sup> *Roebuck v. Atchison, T. & S. F. Ry.*, 99 Kan. 544, 162 P. 1153 (1917); *Hines v. Cole*, 123 Miss. 254, 85 So. 199 (1920).

<sup>54</sup> 88 Ohio App. 352, 88 N.E.2d 220 (1949), cert. denied, 339 U. S. 986, 70 S. Ct. 1008 (1950).

The leading case<sup>55</sup> denying recovery under the F.E.L.A. for the employer's negligent employment of a dangerous employee, has undoubtedly been modified by the statutory amendment<sup>56</sup> to the F.E.L.A., which abolished the doctrine of "Assumed Risk," thereby shifting the risk from the employee to the employer.

A relatively recent case confirms the employer's liability where he was negligent in retaining an employee with known dangerous proclivities which resulted in injuries to a fellow employee.<sup>57</sup> The Jones Act<sup>58</sup> extends the provisions of the F.E.L.A. to injured seamen on the basis of an employer's negligent hiring of a vicious assailant.<sup>59</sup>

### *Conclusion*

Modern social and economic forces continue to exert pressure on the remaining common law defenses of the employer. Recent cases involving tortious conduct of employees, whether decided at common law or on statute, indicate that an employer will be charged with liability for the willful torts of his employees on the basis of his negligence in ascertaining those deficiencies which should have led him to foresee the possibility of tortious conduct.

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<sup>55</sup> *Davis v. Green*, 260 U. S. 349 (1922).

<sup>56</sup> 53 Stat. 1404 (1939); 45 U. S. C. A., sec. 54 (1954).

<sup>57</sup> *Tatham v. Wabash Ry.*, 412 Ill. 568, 107 N.E.2d 735 (1952).

<sup>58</sup> Jones Act, 41 Stat. 1007 (1920); 46 U. S. C. A. sec. 688 (1958).

<sup>59</sup> *Kyriakos v. Goulandris*, 151 F. 2d 132 (2d Cir. 1945); *Koehler v. Presque-Isle Transp. Co.*, 141 F. 2d 490 (2d Cir. 1944).