

# Michigan Law Review

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Volume 37 | Issue 3

---

1939

## MASTER AND SERVANT - LIABILITY FOR TORTS OF SERVANT - SCOPE OF EMPLOYMENT

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### Recommended Citation

Robert E. Sipes, *MASTER AND SERVANT - LIABILITY FOR TORTS OF SERVANT - SCOPE OF EMPLOYMENT*, 37 MICH. L. REV. (1939).

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MASTER AND SERVANT — LIABILITY FOR TORTS OF SERVANT — SCOPE OF EMPLOYMENT — Defendant corporation was an owner and operator of taxicabs. One of its cabs was hailed by another taxicab driver to pursue the latter's taxicab which had just been stolen from him. During the pursuit defendant's taxicab struck plaintiff's car. Plaintiff seeks to recover from defendant for the damage to his car. *Held*, the driver of the cab was not acting in the

scope of his employment so defendant cannot be held. *Bindert v. Elmhurst Taxi Corp.*, (N. Y. Mun. Ct. 1938) 6 N. Y. S. (2d) 666.

A master may ordinarily be charged for the torts of his servant only when they occur while the servant is acting in the scope of his employment.<sup>1</sup> Tortious injuries inflicted during temporary deviations from the scope of employment are not chargeable to the master.<sup>2</sup> The pursuing of a thief at the request of a non-paying passenger seems clearly to be beyond the scope of employment of a taxicab driver.<sup>3</sup> The plaintiff in the instant case sought to draw an analogy to the case of *Babington v. Yellow Taxi Corporation*.<sup>4</sup> It was there held that the owner was liable under the New York Workman's Compensation Act to the driver for an injury suffered by him while driving the cab under orders of a policeman who commandeered it to pursue a fleeing criminal.<sup>5</sup> That the taxicab and its driver might be commandeered was "foreseeable if not foreseen," so the injury to the driver while driving the commandeered cab arose out of and in the course of his employment.<sup>6</sup> But Chief Justice Cardozo, who wrote the majority opinion, left open the question of the owner's liability to a third person who was injured by the driver's negligence during the pursuit. It is submitted that the owner should not be held liable in such a situation. He has neither control nor the right to control the driver during the pursuit.<sup>7</sup> Nor has the pursuit any relation to the purpose of the employment. Such a result is not inconsistent with the *Babington* case. While it has been suggested<sup>8</sup> that the reason for liability of the master for tortious acts of his servant is the same as for his liability under workman's compensation acts, i.e., a broad social policy to spread the loss<sup>9</sup> more widely, the courts have generally been more willing to find that an act was within the course of employment in the latter situation than in the former.

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<sup>1</sup> 1 AGENCY RESTATEMENT, § 219 (1933); 27 L. R. A. 164 (1895).

<sup>2</sup> 2 MECHEM, AGENCY, 2d ed., § 1898 et seq. (1914).

<sup>3</sup> Even if the stolen taxicab belonged to the defendant, an attempt of another of defendant's drivers to recover it might in a case like the principal one be held to be beyond the scope of the driver's employment. See, *Natchez, C. & M. Ry. v. Boyd*, 141 Miss. 593, 107 So. 1 (1926).

<sup>4</sup> 250 N. Y. 14, 164 N. E. 726, 61 A. L. R. 1354 at 1358 (1928).

<sup>5</sup> N. Y. Penal Code, 39 Consol. Stat. (McKinney, 1938), § 1848, provides that any person refusing to aid an officer in arresting a person or executing a legal process, after being commandeered to do so, shall be guilty of a misdemeanor.

<sup>6</sup> See *Kennelly v. Stearns Salt & Lumber Co.*, 190 Mich. 628, 157 N. W. 378 (1916).

<sup>7</sup> "Hence, there is no liability for the conduct of one who, although a servant in performing other service, is doing work as to which there is no control or right to control by the master." 1 AGENCY RESTATEMENT, § 228, comment c (1933). And where an owner of a vessel must take a pilot and surrender full control of the vessel to him, the owner is not liable for the torts of the pilot. *Ramsdell Transportation Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406, 21 S. Ct. 831 (1900).

<sup>8</sup> Smith, "Frolic and Detour," 23 COL. L. REV. 444. 716 (1923).

<sup>9</sup> HARPER, TORTS, § 207 (1933).