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CORPORATIONS—TORT LIABILITY OF INDEPENDENT TAXI OWNERS' ASSOCIATIONS—(a) In order to meet the competition of the large taxicab companies a number of taxi drivers owning their own cabs join together to advertise under a common name, establish a more efficient phone service, and secure the benefits of large-scale garage service. For this purpose a non-profit-sharing corporation is organized, to the expenses of which each driver contributes initiation fees and dues. (b) In order to avoid the liabilities which attend the ownership of cars one of the large taxi companies sells its cabs to the drivers. The drivers now pay the company a certain compensation in "dues" for the privilege of using the company name, color scheme, and advertising, and for the phone and garage service furnished.

An organization similar in all respects might easily result from each of the above situations. If the driver and owner of one of these taxis injures a passenger or a pedestrian, must the corporation respond in damages to either one of them? Because of the wide use and apparently growing popularity of such organizations this question becomes one of much practical importance.[1] The answer to this question must be the same whether the motive behind the formation of the corporation is as in (a), as in (b), or a combination of the two, as is probably usually the case. But that there are two possible motives should be kept in mind.

It is most convenient to approach this problem from the point of view of the plaintiff. Under what theories might the corporation be held liable? At least three theories have been suggested: (1) agency, (2) joint adventure, (3) estoppel. One court has also thrown out the suggestion that this might be a proper place to look through the corporate fiction and hold the individuals behind the corporation personally liable.[2] This of course would have no bearing on whether or not the corporation itself is responsible.

[1] Some typical organizations: the Checker Cab Co. of Detroit was composed of 190 cab owners, paying initiation fees of $150 and dues of $15 per month; the Diamond Cab Co. of Washington included 1200 cabs, had initiation fees ranging from $50 to $1000 and dues of $15 per month; the Stamford Transit Co. had 27 cabs, the drivers of which received 75% of the receipts each month.

[2] Callas v. Independent Taxi Owners' Ass'n, (App. D. C. 1933) 66 F. (2d) 192.

Which of the above theories might fit a given situation depends upon the actual relation between the parties. This in turn is primarily a question of fact.

1. *Agency*

Do the facts show an agency relation? The general agency test applied by the courts is whether at the time of the accident the corporation had control over the owner of the taxi.[3] If such control exists, the corporation as the principal is liable for its agent's torts. So it has been held that the right of the corporation to "hire and fire" the taxi owners established sufficient control to make the corporation liable as principal for the torts of the drivers.[4] As a corollary to this it has been decided in analogous situations that the owner and driver of a delivery truck who took no instructions from the company hiring him except the address of delivery was not an agent, but an independent contractor.[5]

If, as is generally the case, the fact question is left to the jury, it will be given to them with instructions emphasizing this element of control. However, as the defendant in the cases under consideration happens to be a corporation it becomes of much practical importance to determine what facts are deemed sufficient to permit the question of agency to go to the jury. It is clear that many courts would hold that the mere presence of the trade name of the corporation on the taxicab in question would take the case to the jury.[6] These courts hold that the use of the name raises a legal presumption of agency and that only the jury can say that other evidence has overcome this presumption. However, where presumptions are not given weight as evidence and the plaintiff has offered nothing else as evidence, the courts are inclined to direct a verdict for the defendant if there is any evidence at

[3] Glover v. Richardson & Elmer Co., 64 Wash. 403, 116 Pac. 861 (1911); Higham v. T. W. Waterman Co., 32 R. I. 578, 80 Atl. 178 (1911); Baldwin v. Abraham, 57 App. Div. 67, 67 N. Y. S. 1079 (1901); 1 MECHEM, AGENCY, 2d ed., sec. 40 (1914).

[4] Lassen v. Stamford Transit Co., 102 Conn. 76, 128 Atl. 117 (1925).

[5] Peer v. Babcock, 230 N. Y. 106, 129 N. E. 224 (1920); Burns v. Michigan Paint Co., 152 Mich. 613, 116 N. W. 182 (1908).

[6] ". . . the charter of the company was in evidence showing its authority to operate taxicabs; the car was operating as a taxicab at the time of the accident, bearing the peculiar colors and trade-name of the defendant company; and consequently was legally presumed to be in the custody and on the business of the person whose name it bore." Callas v. Independent Taxi Owners' Ass'n, (App. D. C. 1933) 66 F. (2d) 192 at 194, certiorari denied, (U. S. 1933) 54 Sup. Ct. 89, 78 L. ed. 84. Seaman v. Koehler, 122 N. Y. 646, 25 N. E. 353 (1890) (name on truck); Barz v. Fleischmann Yeast Co., 308 Mo. 288, 271 S. W. 361 (1925) (name on delivery wagon); Holzheimer v. Lit Bros., 262 Pa. 150, 105 Atl. 73 (1918) (name on truck).

all to rebut the presumption.[7] It is submitted that this is the better rule of evidence even irrespective of the unlegal assumption that the jury will be prejudiced against the taxi company.

2. Joint Adventure and Partnership

Although there is no control in the master-servant sense, it is still possible that there may be in fact a relationship creating partnership liability. Yet if the only payments by the driver to the corporation are fixed dues and initiation fees it would be most difficult for any court to say that a partnership exists. Even if the payment made was a per cent of the driver's profits, courts would still be more than likely to deny that such a relation was created. It could easily be said that this sum was paid for the use of the name and for the phone service, and was not a sharing of profits in the proprietary sense.[8]

Yet in some courts it might be possible to establish a partnership relation. Immediately, however, we run into the well established doctrine that it is *ultra vires* for a corporation to form a partnership. Apparently to meet such an objection counsel in *Callas v. Independent Taxi Owners' Association*[9] attempted to establish a joint adventure, and this attempt was approved by the court. For it is quite generally admitted that corporations can engage in joint adventures.[10] If it would be difficult in fact to set up a partnership relation it would be practically impossible to establish a joint adventure. Although that concept is still of rather vague content, the one element usually noted as distinguishing it from a partnership, singleness of purpose, is lacking in the types of situations under consideration.[11]

Although it is *ultra vires* for a corporation to form a partnership, should this be a defense to a tort action when it has actually done so? If it can be established that the acts forming the partnership were authorized corporate acts, the rule that *ultra vires* is no defense to a tort should apply as in the case of mere agency. This rule has been applied to cases of contracts and where there were elements of estoppel present.[12] There seems to be no reason which should confine it to such cases.[13]

[7] Burns v. Michigan Paint Co., 152 Mich. 613, 116 N. W. 182 (1908) (name on wagon); 5 WIGMORE, EVIDENCE, 2d ed., sec. 2487 (1923).

[8] MECHEM, PARTNERSHIP, 2d. ed., sec. 79 (1920).

[9] (App. D. C. 1933) 66 F. (2d) 192.

[10] 6 FLETCHER, PRIVATE CORPORATIONS, perm. ed., sec. 2520 (1931).

[11] Frank L. MECHEM, "The Law of Joint Adventures," 15 MINN. L. REV. 644 (1931).

[12] Cleveland Paper Co. v. Courier Co., 67 Mich. 152, 34 N. W. 556 (1887); Mervyn Investment Co. v. Biber, 184 Cal. 637, 194 Pac. 1037 (1921) (dictum); Breinig v. Sparrow, 39 Ind. App. 455, 80 N. E. 37 (1907); ROWLEY, PARTNERSHIP, sec. 196 (1916).

[13] Cassutt v. Geo. W. Miller Co., 103 Wash. 222, 174 Pac. 433 (1918).

3. *Estoppel*

If no one of these three relations—agency, partnership, or joint adventure—can be established in fact, there is the final possibility of holding the corporation estopped to deny that one or more exist. Although it was at one time questioned whether the doctrine of estoppel applies to torts, the "department store cases" have definitely established that it does.[14] There is certainly no reason for not employing estoppel in tort if all the elements are present. Merely placing the corporate name on cabs which the corporation does not own is probably sufficient misrepresentation. There are usually advertising and phone service in the name of the company as well. Although it may be difficult to discover a direct representation to the plaintiff, it is now generally considered that an intent that the public in general shall reply on the misrepresentations is adequate.[15]

Clearly, however, there has been no reliance by an injured pedestrian; estoppel would not avail him. Yet there should be no great difficulty in establishing reliance and the right to rely on the part of a passenger in one of the cabs. It was on this ground that liability was imposed on the corporation in the recent case of *Rhone v. Try Me Cab Co.*[16]

Cutting across all these questions is the doctrine of *ultra vires*. Its effect on the liability of the corporation as a partner has already been referred to. Of course an act is not *ultra vires* because it is tortious. Moreover, by the great weight of authority in this country *ultra vires* is no defense at all in case of tort.[17] Although this is also the rule in Michigan, there is an odd case in the Michigan reports which holds that a cab-calling company organized as a corporation not for profit is not liable in tort because the company could not use the "dues" paid by the drivers to satisfy a judgment.[18] The court does not mention the doctrine of *ultra vires*, but that must be behind the decision. Yet even charitable corporations, though of course not organized for profit, are liable for torts in Michigan.[19] Certainly the same rule should apply to

[14] These cases hold that a department store is liable for the torts of a dentist or beauty expert practicing in the store and whom the store has held out as its agent. Hannon v. Siegel-Cooper, 167 N. Y. 244, 60 N. E. 597 (1901); Augusta Friedman's Shop v. Yeates, 216 Ala. 434, 113 So. 299 (1927); Fields v. Evans, 36 Ohio App. 153, 172 N. E. 702 (1929). See also Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp., (C. C. A. 10th, 1931) 49 F. (2d) 146; 29 MICH. L. REV. 640 (1931).

[15] 2 COOLEY, TORTS, 4th ed., sec. 358 (1932).

[16] (App. D. C. 1933) 65 F. (2d) 834.

[17] 10 FLETCHER, PRIVATE CORPORATIONS, perm. ed., sec. 4902 (1931).

[18] Flueling v. Goeringer, 240 Mich. 372, 215 N. W. 294 (1927).

[19] Bruce v. Central M. E. Church, 147 Mich. 230, 110 N. W. 951 (1907).

non-charitable corporations, although also not for profit. The only other possible basis for this Michigan decision is the physical impossibility of collecting from the corporation; that should be for the plaintiff to worry about after obtaining judgment.

The fact that a taxi company was "non profit sharing" did not prevent the District of Columbia court from holding it liable in tort in the *Rhone* case.[20] Most cases would undoubtedly follow this later decision.

To sum up: (1) If the corporation controls the driver it is liable on agency principles. (2) Almost any evidence of agency will usually get the case to the jury. (3) Probably no joint adventure or partnership relation exists in fact. (4) The company may be liable to a passenger, but not to a pedestrian on the doctrine of apparent authority. (5) *Ultra vires* should have no bearing on the case.

C. S. R.

[20] Rhone v. Try Me Cab Co., (App. D. C. 1933) 65 F. (2d) 834.