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AGENCY-LIABILITY OF EMPLOYER FOR EMPLOYEE'S INTENTIONAL TORTS

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RECENT DECISIONS

AGENCY—LIABILITY OF EMPLOYER FOR EMPLOYEE'S INTENTIONAL TORTS—Plaintiff, a spectator occupying a front seat at a hockey game, was struck and injured by one of the players who was attempting to strike an opponent. Beyond the fact that a hockey game was in progress, there was nothing to indicate the player's motive. Plaintiff recovered judgment against appellant, the corporation that employed the player who had struck her.[1] The lower court instructed the jury that the player who had struck the plaintiff was as a matter of law acting as a servant, agent, or employee and within the scope of his employment at the time the plaintiff was injured. On appeal, *held,* reversed. The question of whether or not the blow was struck within the scope of the player's employment should have been submitted to the jury. *M. J. Uline Co. v. Cashdan,* (App. D.C. 1948) 171 F. (2d) 132.

At early common law it was the view of most courts that an employer was not liable for the intentional torts of his employee,[2] but it has since been firmly established than an employer may be liable for such torts if they are committed within the scope of the employment.[3] The following rules have been advanced by the American Law Institute for determining whether particular conduct is within the scope of employment: (1) the conduct must be of the same general nature as that authorized, (2) it must occur substantially within the authorized time and space limit and (3) it must be actuated, at least in part, by a purpose to serve the employer.[4] The facts of the principal case clearly satisfy the first two requirements. It seems questionable whether motive determined subjectively should be the controlling test as the principal case and the third requirement of the American Law Institute indicate.[5] It is arguable that an employee in committing a tort seldom if ever is actuated by a purpose to further the cause of his employer, though in fact he may do so. Furthermore, a subjective test as to the

[1] If a person intends an assault or battery upon another but instead strikes a third, the latter may recover as though the act were intended to affect him. PROSSER, TORTS 47 (1941).

[2] PROSSER, TORTS 479 (1941); 35 AM. JUR., Master and Servant, §560 (1941).

[3] AGENCY RESTATEMENT, §219 (1933); 37 MICH. L. REV. 497 (1939); PROSSER, TORTS 479 (1941); 2 MECHEM, AGENCY, §§1926-1997 (1914).

[4] AGENCY RESTATEMENT, §228 (1933). See PROSSER, TORTS 477 (1941); Palmeri v. Manhattan Ry. Co., 133 N.Y. 261, 30 N.E. 1001 (1892); Park Transfer Co. v. Lumbermens Mut. Casualty Co., (App. D.C., 1944) 142 F. (2d) 100. But see 45 HARV. L. REV. 342 (1931) citing cases where the employer has been held liable for his employee's torts though motive was purely personal.

Also see 53 HARV. L. REV. 365 (1940) and 38 YALE L. J. 584 (1929) wherein it is suggested the problem of employer's liability for the employee's torts might be resolved on a theory of ability to pay damages rather than on a determination that the acts of employee are within the scope of employment.

[5] 3 COOLEY, TORTS, 4th ed., §393 (1932).

motive of the employee tort-feasor would be most difficult to apply.[6] An employer has been held liable where the employee is authorized to use some degree of force legally but uses excessive or illegal force to carry out his duties.[7] Clearly this test does not require a subjective determination of motive. It is submitted that since some force could legally be used in carrying out the player's purpose and in fact excessive or illegal force is contemplated because of the nature of a hockey game, the employee's act could reasonably be said on that basis to be within the scope of employment.

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[6] Dilli v. Johnson (App. D.C., 1939) 107 F. (2d) 669.

[7] Sturgis v. Kansas City Rys. Co., (Mo. App.) 228 S.W. 861 (1921) (assault by servant employed to handle a large crowd); Curran v. Dorchester Theatre Co., 308 Mass. 469, 32 N.E. (2d) 690 (1941) (assault by usher in ejecting a patron); 19 ORE. L. REV. 184 at 185 (1940); 15 IND. L. J. 323 at 325 (1940). However, this does not mean an employer is always liable where the employee uses excessive or illegal force. Wiersma v. Long Beach, 41 Cal. App. (2d) 8, 106 P. (2d) 45 (1940) (action against manager of wrestler who left the ring and assaulted a "heckler"). Also see 2 MECHEM, AGENCY, §1978 (1914).