# THE IMPORTANCE OF A WORD IN THE *RESPONDEAT SUPERIOR* DOCTRINE

For many years it has been the general understanding and the usual text-book formula for stating the *respondeat superior* rule that employers are responsible for the *torts* of their employees committed in the course of their employment. That is, to make a master liable in tort it was necessary to show that the wrongdoer was his servant, that he had committed a tort and that it had been done in the course of his employment. As Story said,[1] the principal was liable to third persons for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, and Winfield and others still categorically lay down that the master is liable for any *tort* which the servant commits in the course of his employment.[2]

Yet in 1946 Uthwatt J. (as he then was) decided *Twine v. Bean's Express Ltd.*[3] on quite a different understanding of the rule. There the action was brought by the widow of a man who had, contrary to the instructions given by the defendants, been given a lift in a van by one of their employees and who had been killed as a result of that employee's negligence. It was clear that a tort had been committed by the driver; it seemed that the only question to be determined was whether the injury to the deceased had been committed in the course of the driver's employment. But Uthwatt J. did not approach the matter in that way. In his view it was not the torts of the servant that were attributed to the master, but the *acts* of the servant. The mere fact that in a suit for negligence the wrongdoer has broken a duty of care which clearly existed as between him and the person injured does not necessarily in all cases, questions of scope of employment aside, involve liability for the master. It has to be shown that a duty of care was owed by the master to the injured person. If it existed, then the negligent act of the servant, being attributed to the master, was a breach of that duty. If it did not, then the master was not responsible even though the act done was one which the Court would have held to have been within the course of employment. As the learned Judge pointed out, generally speaking the duty exists in the case of both master and servant, but the facts before him presented an instance where it did not, for the reason that vis-a-vis the employers, the dead man was a trespasser and in the circumstances they owed him no duty to take care with respect to the proper driving of the van.

1. Story on *Agency*, sec. 452.
2. *Text Book of the Law of Tort*, 5th Ed. (1950) at 117, and see Batt, *Law of Master and Servant*, 4th Ed. 247, Prosser on *Torts* 470.
3. (1946) 62 T.L.R. 155.

To many people this was a new way of looking at *respondeat superior*. When Twine's Case went on appeal[4] a similar line was taken, though the judgment of Greene M.R. (with which Morton and Tucker L.JJ. agreed) complicated the issue by a ruling that the driver, in giving a lift to the deceased man, was not acting within the scope of his employment and the two things are of course by no means the same. Let us take the simple facts of this case as a basis for discussion. An employee, in driving a vehicle in the course of his ordinary duties, gives a lift to a person, despite express instructions from his employers not to do so. That person is injured through the careless driving of the employee and brings an action against the employers. In Uthwatt J.'s view, the plaintiff was owed no duty of care by the employers because to them he was a trespasser and thereupon the action fails; if, however, we say that a master is responsible for the *torts* of his servant committed within the course of his employment, clearly here is a tort committed by the servant; we are then left with the question whether the injuries were inflicted in the course of employment and in considering that issue it is established that an act prohibited by a master is not necessarily outside it.[5] Accordingly, it is possible, in these circumstances at least, to reach a different result depending upon which avenue of approach is adopted.

The point at issue is important and its importance is illustrated by two recent cases in the Court of Appeal, *Conway v. George Wimpey and Co. Ltd.*[6] and *Young v. Edward Box & Co. Ltd.*[7]. The facts of the former are very similar to those in Twine's Case. Despite express orders to the contrary from his employers, the driver of one of the defendants' lorries gave a lift to the plaintiff who, on alighting, suffered injuries through the carelessness of the driver. The Court of Appeal held that on the findings of the jury the plaintiff was a trespasser on the lorry and that the case was directly covered by *Twine v. Bean's Express*. It is quite clear from the judgment of Asquith L.J. (with which Birkett and Cohen L.JJ. agreed) that the Court was following the reasoning of Uthwatt J., dealing with the issue from the point of view of the plaintiff as a trespasser and not from the scope of employment angle, though that was discussed, the conclusion being reached that it was "unnecessary really to decide whether this second ground is valid or was established".[8]

A sharp contrast with this judgment is that of Denning L. J. in *Young v. Edward Box & Co.* (It is not the only judgment of his that differs from an opinion expressed by Lord Asquith (as he now is).

4. (1946) 62 T.L.R. 458.
5. *Limpus* v. *London General Omnibus Co.* (1862) 1 H. & C. 526, *Bugge* v. *Brown* (1919) 26 C.L.R. 110.
6. [1951] 1 T.L.R. 587.
7. [1951] 1 T.L.R. 789.
8. [1951] 1 T.L.R. at 591.

Most of us have amused recollections of the "timorous souls" indictment in *Candler v. Crane Christmas & Co.*[9]). The plaintiff, on his way home after work on a Sunday, was, with the consent of the foreman and of the driver, given a lift on one of his employers' lorries. Being injured in the course of the journey through the negligence of the driver he sued his employers. In the Court of Appeal Somervell and Singleton L.JJ. held that as the right to give the plaintiff leave to ride on the lorry was within the ostensible authority of the foreman, the plaintiff was a licensee and not a trespasser and he was therefore entitled to succeed. But Denning L.J. was not prepared to accept the proposition that the plaintiff was a licensee; in his view he was a trespasser so far as his employers were concerned. Accordingly, there was presented to him for solution the same problem that arose in *Conway's Case* and his answer brings into sharp relief the wide cleavage of opinion that exists between this outspoken Judge and many of his present day English brethren.

In his view in all cases where it is sought to make a master liable for the conduct of one of his servants the first question is to see whether the servant is liable. If to that question an affirmative answer is given, the next step is to ascertain whether the master should be made responsible for the servant's liability. In the instant case the liability of the master did not depend on whether the plaintiff was a trespasser or not but on whether the driver of the lorry was acting in the course of his employment in giving the plaintiff a lift. In determining that question the fact that permission had not been given by the master or that there had even been express prohibition did not necessarily put the driver's act outside the course of his employment and here in fact the driver was acting within the scope of his employment. Denning L.J. thus arrives at the same answer as his fellow Lords Justices but by a different path and by a path that runs directly counter to that by which Asquith L.J. reached his decision in the earlier case. To the former "the liability of the master does not depend on whether the passenger was a trespasser or not"[10]; for the latter that is the crux of the question. If the passenger is a trespasser vis-a-vis the master-owner, for the *Conway* Court that it is decisive; for Denning L.J. "that is not of itself an answer to the claim."

The conflict in these two cases as authorities is apparent; it stems from opposing views of the nature of the master's responsibilities for the wrongdoings of his servants. This, then, requires further investigation and analysis. Perhaps an inquiry into the history and evolution of the doctrine might throw some light on the problem; to the same end it might be useful to investigate the rationale or the underlying theoretical basis of the rule.

9. [1951] 1 All E.R. 426.

10. [1951] 1 T.L.R. at 794.

For two reasons, however, it is not essential to delve too deeply into the historical aspect of this topic; firstly, it has already been more than amply covered elsewhere[11]; secondly, it does not, in fact, help us a great deal in connection with the present problem. But a few paragraphs will not be amiss, even if only to serve as an *aide-memoire* to those who have read Holmes and Holdsworth and as some kind of background for those who have not. One of the most interesting points that Holmes makes (and it is obvious, once made) is that the master's liability for his servant's wrongdoing is an exception to the general principle of agency, inasmuch as in agency liability for acts done by an agent corresponds with, or is correlative to, the authority conferred on him by his principal, whereas the liability of a master for a servant's acts does not correspond with, but exceeds, the actual authority conferred; yet on the face of it the master-servant relationship is but a particular instance of the more general principal-agent relationship. Why, then, the difference? The answer lies, as with so many apparent anomalies, distinctions, differences and exceptions in English law, in history.

The doctrine of *respondeat superior,* as we know it, is of fairly recent origin; it acquired its present-day form in a series of developments during the late seventeenth and early eighteenth centuries. Its ancestral ties, however, can be traced back to medieval times in the rule which made householders liable for damage by fire caused by their servants[12] and in the rule imposing liability on sheriffs and bailiffs and other officers of the Crown for the wrongful acts of their subordinates.[13] But in general the position from the Middle Ages until the late seventeenth century was that the master in the absence of special authority to do the particular act was not liable for his servant's wrongdoing.[14] In other words, the general agency rule applied.

It was mainly the work of Holt C.J. which introduced and firmly established the new idea that a master should be made responsible for implied commands and thus introduced the notion that he could be held liable for wrongdoing in the course of the servant's employment though the act causing harm was not one which the master had specifically commanded or authorised. As Holdsworth points out,[15] the seventeenth century was a century of great expansion and extensive changes in all branches of commerce and industry, factors which called for alterations in the old principles which governed this branch of the

11. See Holmes, *Agency,* 4 Harv. L.R. 345, 5 Harv. L.R. 12 and Holdsworth, *History of English Law,* Vol. VIII, 472.
12. *Beaulieu* v. *Finglam* Y.B. 2 H. iv 18, pl. 6; *Tuberville* v. *Stampe* 1 Ld. Raym. 264.
13. See *Boson* v. *Sandford* 3 Mod. 323-4.
14. For a late example see *Kingston* v. *Booth* (1685) Skinner 228.
15. *H.E.L.* Vol. VIII at 473.

law. In a series of cases Holt expounded the new doctrine. In *Boson v. Sandford*[16] he gave judgment against a master on the principle that "whoever employs another is answerable for him and undertakes for his care to all that make use of him." In *Tuberville v. Stampe*[17] in 1698 he laid down that "if my servant doth anything prejudicial to another, it shall bind me, when it may be presumed that he acts by my authority, being about my business."[18] From the outset the new liability was limited to cases where the servant was about the master's business, as appears clearly from the judgment of Holt C.J. in *Middleton v. Fowler*[19] in which he said: "No master is chargeable with the acts of his servant but when he acts in execution of the authority given by his master and then the act of the servant is the act of the master". The last sentence is interesting from the present point of view. It says, it will be noticed, "and then the act of the servant is the act of the master," not that the tort of the servant is the tort of the master. Similar words appear in the judgment of Littledale J. in *Laugher v. Pointer*[20]: "Such servants represent the master himself and their acts stand upon the same footing as his own".

Isolated sentences such as these are the only clues, if such they can be called, which the cases of this formative period provide for the solution of the puzzle which has just recently presented itself. Digging into the past does not help us very much with this controversy though what little assistance can be gained would seem to range itself on the side of those who take the view expounded by Asquith L.J. and not on the side of those who agree with Denning L.J.

Nor is much more to be gained from an inquiry into the rationale of the doctrine. Many reasons have been put forward to justify this exception to the general principles of agency. Most of them are discussed, only to be dismissed, by Holdsworth[21] — that the master by implication undertakes to answer for his servant's wrongdoing; that the servant has implied authority so to act; that a master who chooses a careless servant is liable for making a careless choice and so on. The true reason, and Holt C.J. was quick to recognise and expound it, was public policy. In *Hern v. Nichols*[22] and in *Wayland's Case*[23] he based his ruling on the principle that if someone was to lose as a result of a servant's wrongdoing it was more reasonable that the master should suffer than a stranger. These words are echoed by Isaacs J. in *Bugge v. Brown*[24] and by other Judges elsewhere and it is now generally agreed that notions of policy and justice are the only acceptable basis upon which the doctrine can rest. That being so,

16. 3 Mod. 323.
17. Comb. 459.
18. See also *Hern* v. *Nichols* 1 Salk. 289; *Jones* v. *Hart* 2 Salk. 441; *Sir Robert Wayland's Case* 3 Salk. 234.
19. (1699) 1 Salk. 282.
20. 5 B. & C. 547, 553.
21. *H.E.L.* Vol. VIII 477
22. 1 Salk. 289.
23. 3 Salk. 234.
24. (1919) 26 C.L.R. 110, 117

what help does it give us in our present inquiry? In the specific field in which the recent cases have lain, perhaps quite a lot, if the cases leave the matter open. In England, where accident insurance is nation-wide and nation-controlled, there no longer exist to the same extent the social necessities and requirements of justice which gave birth to the doctrine and therefore a narrowing of the rule might well be justifiable; in Australia, on the other hand, with no such universal scheme of insurance it would seem that the reverse is true and that the burden should still fall as between two innocent persons upon him who employed the wrongdoer. To some it might appear just and necessary that that burden should include responsibility for injury even to a trespasser, that it is socially desirable that the operators of vehicles should be responsible for injuries negligently inflicted upon even uninvited passengers and that the cost to industry, easily covered by insurance and generally passed on in the price of its product, would not be too heavy to bear.

But is it open to decide such an issue upon policy considerations? What of the cases? *Twine v. Bean's Express, Conway v. George Wimpey* & *Co.* and *Young v. Edward Box* & *Co.*, all recent authorities, have already been discussed. Other cases are not entirely lacking. In the judgment of Bramwell B., delivered on behalf of the Court in *Degg v. Midland Railway*,[25] there is a relevant dictum: "If a servant is driving his master in a carriage and a person gets up behind and the servant, knowing it, drives carelessly and injures that person, the servant may be liable but why the master? The law for reasons of supposed convenience, more than on principle, makes the master liable in certain cases for the acts of his servants . . . This is a responsibility that law has put upon them; there is a duty on them to take care that their servants do no harm to others by negligence in their work for their master . . . The public interest may require this for the public benefit but why should a wrongdoer (a trespasser) have power to create such a . . . duty".[26] The case of *Houghton v. Pilkington*[27] goes even further, for there the plaintiff was actually invited on to the defendant's milk cart by one of his drivers who had no express instructions forbidding such an action and yet it was held that in the absence of implied authority to give lifts, *no duty* was imposed on the defendant. A similar conclusion was reached by Angas Parsons J. in *Kohler v. Howson*[28] in much the same circumstances. He said: "The driver was guilty of a breach of duty . . . and it is contended that this negligence was in the course of his employment because it was the driver's duty to drive. It seems to me that

25. (1857) 1 H. & N. 773.
26. At 781.
27. [1912] 3 K.B. 308.
28. [1922] S.A.S.R. 341.

this is a confusion of the matter. *No duty was imposed on the defendant* because the plaintiff was given a ride . . . *I am unable to see that the defendant owed any duty to the plaintiff*".[29]

There appears to be very little other authority; that which has been discussed supports the view of Asquith L.J. and not that of Denning L.J. If the former opinion is established it certainly solves the difficulties which have been found with cases such as *Smith v. Moss*.[30] For example, the editor of Salmond, in criticising the decision of Charles J. in that action, takes the hitherto orthodox view of the *respondeat superior* doctrine that it is the tort of the servant for which the master is responsible. The facts were that the plantiff was injured owing to the negligent driving of her husband who, at the time, was driving as the agent of his mother, against whom the action was brought. The wife could not bring an action against her husband owing to the fact that under the Married Women's Property Act of 1882 a wife could not sue her husband in tort for personal injuries. The argument in Salmond[31] is that as the husband in such circumstances had committed no tort his mother could not be vicariously liable. But now even if it be assumed that there was no tort as between husband and wife and that the effect of the Married Women's Property Act is not just to make a right of action for personal injury to a wife unenforceable against the husband, the argument no longer holds water because the question whether the servant has committed a tort is irrelevant. The defendant was liable for his own breach of duty committed through the act of her son who on this occasion was acting as her servant or agent. The same reasoning applies to *Waugh v. Waugh*[32] in which the facts were essentially the same as in *Smith v. Moss*.

But assuming the content of the *respondeat superior* principle to be that which Uthwatt J. put forward in *Twine's Case,* it surely does not necessarily mean that in no case will an injured trespasser be able to rely on it. The decision of the House of Lords in *Excelsior Wire Rope Co. v. Callin,*[33] as explained by the Court of Appeal in *Mourton v. Poulter*[34] and as supported by the remarks of Lord Atkin in *Hillen v. I.C.I.*[35] indicates that at least in relation to land vicarious liability can be imposed on a master for negligent injuries inflicted upon a trespasser by his servants. To what extent, if any, this as yet hesitant principle can be applied to trespassers on vehicles remains to be seen. Logically there seems no ground for any differentiation but the recent cases indicate a conflict, and although the Uthwatt understanding of

29. At 344. My italics in both cases.
30. [1940] 1 K.B. 424.
31. See 10th Edition at 66.
32. [1950] S.R. N.S.W. 210.
33. [1930] A.C. 404.
34. [1930] 2 K.B. 183.
35. [1936] A.C. 65, 70. See, too, the Canadian case of *Hiatt* v. *Zien* [1939] 2 D.L.R. 530.

*respondeat superior* is possibly correct, it may well be that Uthwatt J. and Asquith L.J. in applying it to the case of trespassers on vehicles assumed too hastily (for their judgments are silent on the point) that the master could owe them no duty of care.[36]

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36. See *Lynch* v. *Nurdin* 113 E.R. 1041; *Davies* v. *Swan Motor Co.* [1949] 2 K.B. 291, 327; Glanville Williams, *Joint Torts and Contributory Negligence*, 204 n.8

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