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Liability Of Principal For Automobile Accident Of Agent On Personal Business

*Mider v. United States*¹

Defendant's agent, a motor pool sergeant, was left in charge of an Air Force motor pool in the absence of his superiors. While in charge, he authorized and executed a dispatch voucher, assigning the vehicle in question to himself. Several hours later, after partaking of intoxicants, the sergeant collided with the vehicle of the plaintiff, fifty five miles from the base. At the time of the accident the agent was a passenger; another enlisted man was driving. The plaintiff instituted this action under the Federal Tort Claims Act² to recover for damages caused by a collision with the automobile of the defendant. The court, finding it unnecessary to decide the relationship of the parties at the time of the accident,³ found the defendant, United States, to be negligent in the dispatch of the vehicle⁴ under the circumstances prevailing, and thus liable for the damages resulting from the accident which, the court said, were foreseeable.

Why they so ruled is unclear. This holding could have been the result of: (1) charging the United States with the negligence of the agent or driver at the time of the accident by the doctrine of *respondeat superior* or (2) finding the defendant primarily negligent in placing this particular agent in a position to control the dispatching of the car.

The Court stated that the sergeant was "vested with apparent authority to dispatch vehicles under the existing conditions. . . ."⁵ It is difficult to see that apparent au-

¹ 201 F. Supp. 844 (S.D. Ohio 1961).

² 28 U.S.C., §§ 1346(b), 2671 (1958). § 1346(b) states in part:

"[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

³ "[T]his situation squarely raises a factual question as to whether the operator of its [defendant's] vehicle was acting within the scope of defendant's employment, and if not, whether the defendant has been otherwise guilty of negligence through its servants, which cause it to be liable. In our view of the case, it is unnecessary to here decide whether the driver was acting within the scope of employment at the time of the accident because we feel that the case can be disposed of on the basis of the circumstances of the dispatching of the vehicle." 201 F. Supp. 844, 845 (S.D. Ohio 1961).

⁴ *Ibid.*

⁵ *Ibid.*

thority has any relevance to the problem. A determination of liability under the doctrine of apparent authority requires: (1) a showing that a principal has allowed another to appear to be his agent; (2) that a third party has reasonably relied on the supposed authority of the agent; and (3) that a party has suffered a loss as a result of this reliance.⁶ In the dispatch of the vehicle in question, the agent dealt exclusively with himself as a third party. In order to satisfy the above criterion of apparent authority⁷ under the facts of this case one must find some relevant manifestation of authority by the defendant. Certainly the plaintiff in no sense relied on manifestations of the United States. The court could hardly treat the motor pool sergeant in his capacity as the *transferee* of the car as relying justifiably and in good faith upon the supposed authority of himself as *transferror*. At any rate, the sergeant suffered no harm as a result of any reliance that might have been present.

The application of the doctrine of apparent authority was originally believed possible only where the liability was based on a contract made by the agent.⁸ The application of this theory to the tort area was announced in *Hannon v. Seigel-Cooper Co.*⁹ In that case, the defendant department store advertised that it had available dental services at its store. In a suit to recover damages for injuries sustained from these services the defendant was estopped from denying liability for the conduct of one whom they held out as their agent,¹⁰ despite the fact that the dentist was an independent contractor. In *Santise v. Martins, Inc.*,¹¹ a customer sued a department store, which had an independently operated shoe department, for injury received from a nail protruding from the sole of a shoe tried on by the plaintiff. It was held that the holding out of control and ownership by the defendant, could, upon an adequate showing of reliance, support recovery. There are many other illustrations of tort liability of the principal for the negligence of the agent under this apparent authority rationale.¹² In all cases, the manifestation of au-

⁶ *Abuc Trading & Sales Corp. v. Jennings*, 151 Md. 392, 411, 135 A. 166 (1926); 2 AM. JUR. 82-85, Agency, §§ 101-103; RESTATEMENT, AGENCY (2d ed. 1958) § 265, p. 575.

⁷ *Ibid.*

⁸ *Timmins v. F. N. Joslin Co.*, 303 Mass. 540, 22 N.E. 2d 76 (1939).

⁹ 167 N.Y. 244, 60 N.E. 597 (1901).

¹⁰ For purpose of clarity and continuity within this note the terminology of the RESTATEMENT, AGENCY, 2d will be used throughout.

¹¹ 17 N.Y.S. 2d 741 (1940).

¹² *Manning v. Leavitt Co.*, 90 N.H. 167, 5 A. 2d 667 (1939); *Combs v. Kobacker Stores, Inc.*, 114 N.E. 2d 447 (Ohio 1953); *Augusta Friedman's Shop, Inc. v. Yeates*, 216 Ala. 434, 113 So. 299 (1927).

thority, justifiably relied upon by the plaintiff with the injury incurring as a direct result thereof, is the basis for the action.¹³ The Restatement of Agency¹⁴ adopts the view that the master is not subject to liability for the torts of his servant when committed outside the scope of employment except where the servant purported to act on behalf of the master and the injured party justifiably relied on the apparent authority. The effect of the agent's acting within the scope of his employment or his apparent authority is of no consequence if the third person has not in some way justifiably relied upon the agency relationship.¹⁵ To illustrate this point the Restatement uses the following example:

"P permits A to appear as his servant and A is generally known as such. While A is driving upon his own affairs but ostensibly upon P's affair, he negligently runs over T, who believes A to be P's servant. P is not thereby liable to T."¹⁶

Certainly in the *Mider* case, the plaintiff in no way relied on any manifestations of agency; indeed, the plaintiff could not have been aware of the principal-agent relationship at the time of the accident, and this would seem to preclude any recourse to the apparent authority recovery.

As a further finding of fact, the Court stated that the agent "was acting within the scope of his employment"¹⁷ in ordering the dispatch in question. Conduct of a servant is within the scope of his employment if it is the type of duty he is employed to perform and if it is actuated, at least in part, by a purpose to serve the master.¹⁸ The substantive intent of the servant is controlling, his external manifestations being only of evidentiary value.¹⁹

The dispatch of the vehicle in question was apparently for personal purposes and not in any way connected with serving the defendant.²⁰

¹³ RESTATEMENT, AGENCY 2d § 267, p. 578.

¹⁴ *Id.*, § 219.

¹⁵ *Id.*, § 265(2).

¹⁶ *Id.*, § 265, Illustration 3.

¹⁷ 28 U.S.C. § 2671 (1958):

"'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in the line of duty."

¹⁸ RESTATEMENT, AGENCY 2d § 228(1).

¹⁹ *Id.*, § 235, comment a.

²⁰ The evidence disclosed a visit to a private residence, and partaking of intoxicants by both driver and passenger. The collision occurred some 55 miles from the base. *Supra*, n. 1, 845.

Comment d to Section 241 of the Restatement of Agency, 2d Ed. states:

"If the servant surrenders custody of an instrumentality in order that a private purpose of his own or of the one to whom he gives the custody can be accomplished by its use, the master is not liable for subsequent injuries. . . ." ²¹

The need to establish that the servant was, in fact, acting in the furtherance of his master's business would seem to rest upon the policy behind the doctrine of *respondet superior*, i.e., the control, exercisable by the master over the servant while doing his work, and an allocation to business of the risks normally attendant thereto.²² The conduct of the servant when not acting for the master is not an incident of the business risks of the master, and indeed, the servant is as much a stranger to the master as he is to the third person.²³ This result is justified by the fact that there is no element of control exercised by the master over the servant during this time.

In *Penas v. Chicago, M & St. P.R. Co.*,²⁴ the court recognized the fact that the language of the law of master and servant is burdened with artificiality, equivocation, contradiction, misnomers and widespread confusion. The inter-relation of the issues and theories herein seems to be an example.

The car in question, at the time of the accident, was being operated in such a manner that personal liability on the part of the operator was readily apparent; indeed it was stipulated.²⁵

The question of liability of the United States which is based on the negligence of the sergeant or the driver should have been decided in favor of the United States. The agent was in no way acting for the principal, nor was he holding himself out as an agent to the plaintiff, and no reliance on the part of the plaintiff at the time of the accident was found.

²¹ RESTATEMENT, AGENCY 2d § 241 reads:

"A master who has entrusted a servant with an instrumentality is subject to liability for harm caused by its negligent management by one to whom the servant entrusts its custody to do the work the servant was employed to perform, if the servant should realize that there is an undue risk that such person will harm others by its management."

²² MECHEM, OUTLINES OF THE LAW OF AGENCY, § 359, p. 242 (4th ed. 1952).

²³ *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 54 N.E. 471 (1899).

²⁴ 112 Minn. 203, 127 N.W. 926 (1910).

²⁵ 201 F. Supp. 844, 845 (1961).

The primary negligence on the part of the master, the second probable ground for the holding in this case, might be based upon the theory that the master was negligent in placing this agent in a position where he could directly control the car in question. However, in *Bradley v. Stevens*,²⁶ where an employee of the defendant assaulted the plaintiff, the court held that the defendant had not been negligent in failing to learn the character and reputation of the employee. It found that unless the employee is acting within the scope of his master's business the master will not be responsible for the tort of the servant, and the only recourse available to the plaintiff is to prove the master negligent in the hiring of the servant.²⁷

The master may be deemed negligent where he is put on notice of the likelihood of misconduct of the servant by either personal observation or facts within the company records.²⁸ There is no indication in the *Mider* opinion of prior misconduct of the servant, nor of any reason why the master should have been put on notice of the past history of the servant.

The standard of care to be exercised by the defendant in his choice of servant must be determined from the nature of his duties and the character of the instrumentalities within his control.²⁹ Unless the instrumentality is in some way inherently dangerous, the degree of care to which the master will be held is that of reasonable care.³⁰ Since the defendant, under the circumstances, appears to have acted reasonably in placing the sergeant in this position, and the Court's opinion said nothing to the contrary, it seems the Court did not base its holding upon this reasoning.

In *Joel v. Morrison*,³¹ the correct rule was announced that if the servant is on a "frolic" of his own, without being at all on his master's business, unless there is some justifiable reliance on the part of the third person dealing with the servant on the agency relationship, there will be no imputing of the negligence of the servant to the master. If the master is to be held on the ground that he is primarily negligent, the correct rule requires a violation of his duty of care to those dealing with the servant must be shown.³² Neither rule is satisfied in the instant case.

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²⁶ 329 Mich. 556, 46 N.W. 2d 382 (1951).

²⁷ *Id.*, 384.

²⁸ *Davis v. Merrill*, 133 Va. 69, 112 S.E. 628 (1922).

²⁹ *MECHEM, AGENCY* (2d ed. 1954), p. 1512.

³⁰ *Ibid.*

³¹ 6 C. & P. 501 [1834].

³² *Supra*, n. 24.