Infants--Liability of Infant under Respondeat Superior

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NOTE

INFANTS—LIABILITY OF INFANT UNDER RESPONDEAT SUPERIOR.—The growing use and ownership of automobiles, and the more common exercise of control over agents and servants by infants of high school age, has made more acute the problem of the infant's liability for his agent's torts under the doctrine of respondeat superior. Should an infant be permitted to own a car or a store building and yet be free from liability for the acts of his agents and servants?

In a recent Illinois case, Johnson v. Turner, an infant owner of a truck directed his employee to drive it. The driver committed a tort and it was held that the infant was not liable. The court said that an infant cannot be held for the tort of another under the doctrine of respondeat superior. A few months earlier a federal

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1Agency is the general, inclusive term covering the principal-agent and master-servant relation. The master-servant relation is the more specific, exclusive term denoting a control over the servant's physical conduct. Respondent superior is founded on this relation. See, Restatement, Agency, (1933) Sec. 1 and Sec. 2.


3"The rule is that as a minor cannot make a contract, he cannot establish the relationship of master-servant or principal-agent, and so cannot be held liable for the tort of another under the doctrine of respondent superior." Johnson v. Turner, (1943) 319 Ill. App. 265, 49 N. E. (2d) 297, 306.
district court in Virginia in the case of *Carroll v. Harrison* was confronted with the same problem. The infant had allowed another to drive his truck. The driver committed a tort. It was held that the infant was liable. The court said that where an infant does through his agent something which he has full legal capacity to do himself, he may be held liable for the torts of that agent within the scope of his authority. It is the purpose of this note to analyze these two rules and to determine which is more logical and which more socially desirable.

Of the cases in point, the majority are in accord with *Johnson v. Turner* and hold the infant not liable for the torts of his agent or servant on the basis of respondeat superior. The American Law Institute refuses to take any stand on the question. The reasoning of the majority is as follows. (a) The doctrine of respondeat superior rests upon the relationship of master-servant or principal-agent which relationship is based upon contract; (b) Since the infant is not bound by his contract, except for necessities, an infant cannot legally appoint an agent or servant because this agency relation has its foundation in contracts and so the agency is void; and (c) Therefore, the infant is not liable for his agents' tortious acts done in prosecution of the agency relation.

This reasoning is fallacious, first, because the second premise is incorrect. Although the earlier cases took the view that the agency relation is purely contractual, the courts today recognize

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6American Law Institute, Restatement, Agency, (1933) Sec. 20 comment (d)

7Burnham v. Seaverns, (1869) 101 Mass. 360, 100 Am. Dec. 123. "The doctrine of respondeat superior rests upon a contractual relation. It is evident that to support the application of such principle it is necessary that there be not only a valid contract of employment, but that the acts of negligence complained of were committed while the servant was engaged in the scope of his employment under the contract." Palmer v. Miller, (1942) 380 Ill. 256, 259, 43 N. E. (2d) 973.

8Williston, Contracts, (1936) Sec. 226.


NOTE

that the agency relation, although it may arise from contract, is not necessarily contractual, and it was not contractual in its early stages.12 Agency is a consensual relation imposing vicarious liability13 This view is adopted by the American Law Institute and the more recent cases.14 Courts have even found an agency relation to exist where there clearly was no contract.15

Secondly, the first premise is also fallacious because tort liability is imposed under the doctrine of respondeat superior without regard to contract.16 The tort liability of a master or principal is vicarious.17 It extends even to the servant's unauthorized acts if these are within the scope of his employment.18 It is the existence of the master-servant relation and the master's right of control at the time that the servant acts on which liability depends. It is not

13Seavey, Rationale of Agency, (1920) 29 Yale L. J. 859, 863. “That the relationship (agency) is consensual there can be no doubt.” 1 Williston, Contracts, (1936) Sec. 274.
14“...while not necessarily contractual, the relation of agency is always consensual, it is vicarious in its nature.” Lohmuller Bldg. Co. v. Gamble, (1931) 160 Md. 534, 154 Atl. 41, 43. Accord. Brothers v. Berg, (1934) 214 Wis. 661, 254 N. W. 384, Lee v. Peoples’ Coop., (1937) 201 Minn. 266, 276 N. W. 214, Columbia Univ. Club v. Heggins, (1938) 23 F Supp. 572; 1 Restatement, Agency, (1933) sec. 20 (b) “Agency is not necessarily the result of a contract; hence it is not necessary for the appointment of an agent that the principal should have capacity to contract. Agency is, however, a consensual relationship, and therefore the principal must have capacity to give a legally operative consent.”
15Quaere, wherein do the courts find even consent in these cases?
(b) Family car doctrine: Kayser v. VanNest, (1941) 125 Minn. 277, 146 N. W 1091, Lewis v. Steele, (1916) 52 Mont. 300, 157 P 575.
(c) Gratuitous agency cases: Berch v. Abercrombie, (1913) 74 Wash. 486, 133 P 1020, 50 L. R. A. (N.S.) 59; Kurtz v. Farrington, (1926) 104 Conn. 57, 132 Atl. 540, 46 A. L. R. 259; Gorton v. Doty, (1937) 57 Idaho 792, 69 P (2d) 136, 140. “It is not essential to the existence of authority that there be a contract between the principal and agent or that the agent promise to act as such, nor is it essential to the relationship of principal and agent that they, or either, receive compensation.” Accord: 1 Restatement, Agency, (1933) sec. 16.
control in fact, but the *right of control*,\(^{19}\) by the principal that is significant.

The doctrine of respondeat superior is grounded in public policy \(^{20}\) The risk is placed upon the one best financially able to bear it or to absorb the loss, the master or principal, not upon the financially irresponsible servant. The business reaps the benefits of the acts, so it must bear the liability. The adult master is always held liable under respondeat superior if the master-servant relation is shown to exist.\(^{21}\) Why should not the infant-master be held financially responsible? Professor Seavey,\(^{22}\) the reporter for the Restatement of Agency, prefers to impose liability upon the infant for his servant's derelictions. He states that the result should not be based upon the capacity of an infant to appoint an agent or servant, as the majority rule holds, but upon whether or not it is socially desirable to free an infant-master or employer from tort liability where the harm has been caused by the servant and it is not the direct consequence of the infant's act. In short, he believes that the policy underlying respondeat superior applies equally to infant-employers or principals.

It is highly significant to note that courts (even courts who free the infant from liability where he is not present) do not hesitate to hold the infant liable where the agent is in the immediate presence of and subject to the direction and control of the infant while doing the tortious act.\(^{23}\) Here the courts think wholly

\(^{19}\)Restatement, Agency, (1933) sec. 220 (1) "A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in his performance of the service, is subject to the other's control or right of control" (italics are ours). Cushman Motor Co. v. Berneck, (1936) 35 Ohio App. 31, 8 N. E. (2d) 446, 448, Skidmore v. Haggard, (1937) 341 Mo. 837, 110 S. W. (2d) 726, 729, "A servant is a person employed by the master to perform services in the latter's affairs under control or subject to the right of control by the master." (Italics ours.)

\(^{20}\)Laski, The Basis of Vicarious Liability, (1916) 26 Yale L. J. 105. Laski stated that the basis of the rule, in fact, is public policy. He gives three reasons for the imposition of vicarious liability upon the master. (a) It provides social distribution of profit and loss. (b) By rendering the master liable for his imprudence the law forces him to be a policeman. (c) Business is a dangerous enterprise and so it must pay its own way.


\(^{23}\)The infant is held liable where the agent is in the immediate presence of the infant. All the following cases involve the situation where cars under the control or right of control of the infant are driven by their "agents," Atchison, T. & F. Ry. Co. v. McNulty (8th C.C.A. 1922) 285 Fed. 97, cert. den. 262 U. S. 746, 43 S. Ct. 521, 67 L. Ed. 1212, McKerral v. St. Louis & S. F. Ry. (Mo. App. 1923) 257 S. W. 165; Wilson v. Moudy, (1939) 22 Tenn. App. 356, 123 S. W. (2d) 838, Haynie v. Jones, (1942) 233 Mo. App. 948, 127 S. W. (2d) 105.
in terms of tort liability and do not confuse the concepts of contract liability and capacity to appoint agents with vicarious tort liability. Without this confusion the result is quite apparent. The principal, even though an infant, is held liable because he is in control of the situation. Even the early courts held the infant liable where it was a "pure tort," i.e., a tort not connected with contract, even though the agent or servant is not within the immediate presence and direction of the infant when he commits the tortious act, ought not the infant still be held liable vicariously as long as the master-servant relation exists and the infant has the right of control?

The real issue, therefore, is whether the public policy which allows an infant to avoid his contracts also demands that the courts refuse to recognize the master-servant relation for purpose of respondeat superior where the master is an infant. In short, is there any reason in logic or policy for freeing an infant from liability for the delictual acts of his servant or agent under his control? We have already seen that the public policy underlying the doctrine of respondeat superior demands that an adult-master be held liable for his servant's acts. Do not these reasons equally demand imposing financial responsibility upon the infant who has an agent or servant?

All courts agree that an infant is liable for the commission of his own torts. When one legally capable of acting consents that another shall act on his behalf and subject to his control, he is deemed to have acted himself. Since an infant can consent that

24It is interesting to note that the Missouri court holds the infant liable when he is present, Hayne v. Jones, (1942) 233 Mo. App. 948, 127 S. W. (2d) 105; yet frees him from liability when he is not, Hodge v. Fenner, (1935) 338 Mo. 268, 90 S. W. (2d) 90, 103 A. L. R. 483, notes p. 487.

25Hall v. Corcoran, (1871) 107 Mass. 251, 9 Am. Rep. 30. "If the tort can be found to be an independent and distinct one, as to which liability can be made out without relying on the existence of the contract, the action will lie," p. 1087 Prosser, Torts, (1940) sec. 108. Also see Wisconsin Loan v. Goodnough, (1930) 201 Wis. 101, 107, 228 N. W. 484.

26Originally infant's contracts were void because it was said an infant was not prudent and needed protection so the law freed him from disadvantageous transactions. Today, they are not void, but merely voidable. 1 Williston, Contracts, (1936) sec. 227A. But the public policy of protecting infants is not the same policy which underlies respondeat superior. The policy of respondeat superior is to hold the financially responsible master to account, regardless of who that master may be.


29Mecham, Agency, (2d ed. 1914) sec. 129.
another shall act on his behalf, he, too, should be bound for such other’s tortious acts to the same extent as though he had acted himself. Therefore, it is submitted upon logic and public policy that the infant be liable for his agent’s and servant’s tortious acts.\textsuperscript{30} The recent writers on the subject also adopt this reasoning.\textsuperscript{31}


There appears language in the cases of Masterson v. Leonard, (1921) 116 Wash. 551, 200 P 320, 322, Ahlstedt v. Smith, (1936) 30 Neb. 372, 264 N. W. 889, 891, Washington & O. D. Ry. v. Zell’s Adm’x, (1916) 118 Va. 755, 88 S. E. 309, 312, each of which holds an infant liable for the driver's negligence when he engages in a joint enterprise with the driver, that indicates the courts' holdings are based on the finding that an agency relationship existed between the infant and the tortfeasor, the agency having arisen from their joint enterprise. The true basis for the courts' holdings, however, is not very clear.