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Agency—Vicarious Liability—Imputed Negligence

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AGENCY

Vicarious Liability—Imputed Negligence

In *Sims v. Bergamo*,¹ the Court was concerned with the application of the scope of employment standard in a vicarious liability situation. The plaintiff, a patron in defendant's bar and grill, became involved in a disagreement with the latter's bartender. After an hour's absence, she was invited to return to the bar by the bartender who thereupon assaulted her. The jury found for the plaintiff but the Appellate Division dismissed the complaint. The Court of Appeals, while recognizing that there was little evidence to show a connection between the bartender's action and his employer's business, followed the settled rule that the evidence must be taken in the light most favorable to the plaintiff on review of a dismissal and accordingly held that there was sufficient evidence from which the jury could have found for the plaintiff.²

The primary consideration in determining the defendant's liability in this case was whether the servant was acting in the furtherance of his employer's interests and therefore within the scope of his employment or whether he was merely on an independent excursion at the time of the assault.³ The dissent differed with the majority as to the probable weight of the evidence presented, it being their contention that the evidence could not, as a matter of law, sustain a finding that the servant was acting in the furtherance of his employer's interests.

The concept of vicarious liability and its qualifying standard of scope of employment are somewhat subtle in their application. Various rules and theories have been devised by the courts in an effort to rationalize and at the same time restrict these concepts to the bounds of justice and equity. One such theory is the business cost or "deep pocket" theory which, while seldom expressed, has served to influence a great many prior decisions and very likely the decision in the instant case. The justification for this theory is that a defendant employer will be best able to bear the cost of tort judgments and thus almost insure recovery for injured plaintiffs.⁴

Vicarious Liability—Accident Outside State

In *Selles v. Smith*,⁵ plaintiff was injured when the automobile in which he was a passenger overturned as it was speeding through South Carolina. Plaintiff

1. 3 N.Y.2d 531, 169 N.Y.S.2d 449 (1957).

2. *De Wald v. Seidenberg*, 297 N.Y. 355, 79 N.E.2d 430 (1948).

3. *Bluestein v. Scoparino*, 277 App. Div. 534, 100 N.Y.S.2d 577 (1st Dep't 1950).

4. Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L.J. 584 and 720 (1928).

5. 4 N.Y.2d 412, 176 N.Y.S.2d 267 (1958).