Buffalo Law Review

Volume 8 | Number 1 Article 16

10-1-1958

Agency—Vicarious Liability—Accident Outside State

Buffalo Law Review

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).

brought an action claiming negligence on the part of his wife who was driving. The defendant, who was the owner of the vehicle, was also a passenger at the time of the accident. The plaintiff recovered a verdict which was reversed on the law in the Appellate Division. That court held the defendant was not liable for the driver's negligent operation since there was no proof the driver was an agent of the owner or of a master-servant relationship.[6]

The Court held that since the accident occurred in South Carolina, the law of that jurisdiction is controlling. Absent a showing of the law of that state, however, it is presumed to be the same as the common law of New York. The Court held that, under the common law of New York, developed prior to the enactment of §59 of the Vehicle and Traffic Law, there was sufficient evidence presented to raise a question of defendant's liability. Therefore, it was error for the Appellate Division to reverse the judgment of the Trial Term and dismiss the complaint. In a normal case, such verdict as was rendered for the plaintiff would be reinstated. However, since the Court found error in the instructions presented to the jury, a new trial was required.

The instruction to the jury was erroneous in that it was to the effect that in order to hold defendant liable for the driver's negligence, it must appear only that she was operating the vehicle with his consent; more than mere consent is required to make defendant liable.

Under the New York common law the owner is not liable for the driver's negligence if the accident occurs while the vehicle is being used for the business or pleasure of the borrower.[7] However, liability will attach if the car is being operated at the owner's express or implied request for his benefit and under his direction. No strict relationship of master-servant need be present, and compensation need not be paid to the driver by the owner.[8] Thus, while no liability will adhere to the owner if the borrower has taken the car for his own use, if there is some requested benefit which accrues to the owner from the operation of the vehicle, and the driver is directed as to route, operation or destination in some manner, it will be enough to form a basis for defendant's liability for any ensuing negligence. The Court pointed out that these requisite elements could be more readily found in the present case in view of the fact that defendant was present in the car and had the right to direct its operation. It held that there was sufficient evidence for the jury to find that the operation was at his request and for his benefit. "It was respondent's car, he was present and had the legal right to control its operation, and the negligent conduct of the driver was imputable to him."[9]

6. 5 A.D.2d 617, 168 N.Y.S.2d 363 (2d Dep't 1957).
7. Goche v. Wagner, 257 N.Y. 344, 178 N.E. 553 (1931).
8. Nalli v. Peters, 241 N.Y. 177, 149 N.E. 343 (1925).
9. *Supra*, note 3 at 346, 178 N.E. at 554.