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Torts—Vicarious Tort Liability

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subdivision 14 of § 61 Public Service Law "23 Heating: Each omnibus shall be heated when reasonably required for the comfort and safety of passengers." Furthermore, the court stated that it is common knowledge that many people suffer from low blood pressure and poor circulation.

Negligence has been defined as "any conduct, except conduct recklessly disregardful of an interest of others, which falls below the standard established by law for the protection of others against an unreasonable risk of harm."[27] The standard of conduct which an actor is held to is that which an ordinary prudent person would use under the circumstances i. e. reasonable care.[28] As a general proposition, an actor's liability for negligence is based upon the foreseeability of any harm resulting from the careless conduct.[29]

Once the negligent conduct of the defendant is established, it it well settled that an injured person can recover for all the harm actually suffered.[30] Thus a defendant is liable for the consequences of a negligent act, even if those consequences are more severe or aggravated by a delicate condition of health.[31]

While the court merely applied general rules of negligence in reaching the above result, the rationale behind the decision is not very clear. Perhaps the court is arguing that since plaintiff was considered a normal person, defendant's conduct was negligent because it created an unreasonable risk to such an average person.[32] Inasmuch as it is "common knowledge" that many people have poor circulation, the rationale may be that the frequency of the occurrence of the abnormality is high enough to impose a duty of care in regard to it.

Vicarious Tort Liability

The true basis of vicarious liability, where one person is held liable for the acts of another, is said to be one of policy.[33] A deliberate allocation of a risk is involved when the losses caused by a servant are placed upon the master, because he is better able to bear them and to distribute the costs.[34]

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27. RESTATEMENT, TORTS § 282.
28. See Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 88 (1942).
29. *Poplar v. Bourjois Inc.*, 298 N. Y. 62, 67, 80 N. E. 2d 334, 336 (1948).
30. *Poplar v. Bourjois Inc.*, *supra* note 29; See 1 COOLEY, TORTS 140-141 (4th Ed. 1932).
31. *McCahill v. New York Transportation Co.*, 201 N. Y. 221, 94 N. E. 616 (1911); *Tice v. Munn*, 94 N. Y. 621 (1883); See PROSSER, TORTS 344.
32. See note 26 *supra*.
33. PROSSER, TORTS § 62.
34. Laski, *The Basis of Vicarious Liability*, 26 YALE L. J. 106 (1916); Douglas, *Vicarious Liability*, 26 YALE L. J. 106 (1916); Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L. J. 584, 720 (1929).

Vicarious liability applies to acts done within the "scope of the employment."[35] While this is a very vague concept,[36] it has been said that in general, "the servant's conduct is within the scope of his employment if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated at least in part by a purpose to serve the master."[37] However, the master is absolved from liability where the servant steps outside the employment to do some act for himself not connected with the master's business.[38] Furthermore, if the servant has no intention, at least in part, to perform any service for his employer, but only to further a personal end, his act is not within the scope of his employment.[39]

In *Sauter v. New York Tribune Inc.*,[40] a truck, controlled by defendant and operated by its servant, struck plaintiff's bus. When plaintiff asked the driver of the truck for his license, the driver refused and struck him. Later, while plaintiff was attempting to copy the license number of the truck from the tailgate, defendant's servant kicked him in the face, inflicting the injuries complained of.

The majority of the court reasoned that at the time of the second assault, the defendant's servant had abandoned any efforts to exchange license numbers. This second assault therefore constituted a wilful departure from the employer's business as it was not intended to benefit the master and was a refusal to act as impliedly directed by the employer. Since the act of the driver was not within the scope of his employment, the complaint was dismissed.

Judge Dye, who dissented, argued that the exchange of information upon the happening of an accident is an integral part of the operation of a truck.[41] Even though the driver was not hired to commit an assault, he was not authorized to refuse to do a required act. Hence the imperfect performance of the duty to submit credentials should not have absolved the master from liability.

Since no precise rule can be laid down as to when an employee's act is within his employment, each case must be resolved according to its peculiar facts.

35. *Mott v. Consumer's Ice Co.*, 73 N. Y. 543 (1878); *Rounds v. Delaware L. and W. RR. Co.*, 64 N. Y. 129 (1876).
36. See MECHEM, OUTLINES OF AGENCY 246 (1952).
37. RESTATEMENT, AGENCY, § 228 (1933); PROSSER, TORTS 476.
38. *Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853 (1915).
39. *Salomone v. Yellow Taxi Corp.*, 242 N. Y. 251, 151 N. E. 442 (1926); *Benevento v. Poertner Motor Car Co.*, 235 N. Y. 123, 139 N. E. 213 (1923); *Mott v. Consumer's Ice Co., supra* note 35.
40. 305 N. Y. 442, 113 N. E. 2d 790 (1953).
41. N .Y. VEHICLE AND TRAFFIC LAW § 70 (5a).