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VICARIOUS LIABILITY FOR TORTIOUS ACTS*

It is a well-established doctrine of our law that a master is, under certain conditions, liable for injuries to third persons caused by his servant. What those conditions are is equally the subject of a number of settled rules. But here clarity ends. Why there should be any such doctrine or, granting its wisdom, why the rules should be in the form they are, are matters about which there is no agreement.¹ No other branch of the law, I venture to suggest, suffers from a greater lack of a clear and accepted theory on which to ground judicial and legislative action. The courts have rarely concerned themselves with the problem of underlying principle; and, even when they have, there has been the utmost diversity of opinion. The modern law owes its origin to Holt C.J.'s appreciation of contemporary needs;² but his statement in *Hern v. Nichols*³—"seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger"—gives us little indication of his reasons for holding the master liable in the cases which came before him where there was no element of deceit. Lord Brougham's reason, that the master is liable as the person who has "set the whole thing in motion"⁴ would, without qualification, place no limits on the price the enterprising have to pay for their activity, which result scarcely accords with current notions of progress. Willes J. came closer to reality. "It is well known," he said, "that there is virtually no remedy against the driver of an omnibus and therefore the master

* An address delivered at the Twenty-First Annual Meeting of the Canadian Bar Association at Halifax, August, 1936.

¹ See the brilliant article by Professor Laski, *The Basis of Vicarious Liability* in (1916), 26 Yale L.J. 105.

² HOLDSWORTH, HISTORY OF ENGLISH LAW, Vol. VIII, p. 474.

³ 1 Salk. 289.

⁴ *Duncan v. Findlater* (1839), 6 C. & F. 894 at p. 910.

should be responsible for there ought to be a remedy against some person capable of paying damages to those injured by improper driving",⁵ the liability attaching when the servant has done a wrongful act of a *class* he was employed to do rightfully.⁶ At other times, it has been said that the master is responsible because he "controls" the servant's actions, or because he has the "faculty of choice" of his servants; while more often than not the maxim *qui facit per alium facit per se* has been a refuge for the despairing.⁷

The conditions surrounding the origin and growth of the doctrine account for much of this confusion. Up to the beginning of the 18th century the law knew nothing of vicarious liability; the master was responsible only for acts which he had either commanded or ratified.⁸ The growth of commerce made a change necessary and the courts drew on several sources to bring this about. Their decisions are indifferently reported and the exact facts cannot be discovered, but it is beyond doubt that a reason frequently assigned for the master's liability was that the servant had an *implied authority* to act in the manner he did. "If my servant," Holt C.J. is reported to have said in 1697, "doth anything prejudicial to another, it shall bind me, when it may be *presumed* that he acts by my authority, being about my business";⁹ and in the next year he ruled that "no master is chargeable with the acts of his servant, but when he acts in execution of the *authority* given by his master, and then the act of the servant is the act of the master".¹⁰ Blackstone repeated the fiction along with a number of other reasons for the new law,¹¹ but it appears not to have attained its present stature as a dominating idea until towards the middle of the 19th century when the courts set about extending the doctrine of vicarious liability to intentional torts.¹² As late as 1800 the Court of King's Bench had ruled that a master could not be sued for a trespass which he had not authorized, it being categorically stated that no action would lie against a master

⁵ *Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526.

⁶ See *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259 at p. 265.

⁷ Dean Wigmore's article, *Responsibility for Tortious Acts: Its History* in (1894), 7 Harv. L.R. 315 has revealed the barrenness of this maxim as an explanation of the master's liability.

⁸ Wigmore, *op. cit.*; POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, Vol. II, 528.

⁹ *Tubervil v Stamp* (1697), Comb. 459.

¹⁰ *Middleton v. Fowler*, 1 Salk. 282.

¹¹ COMMENTARIES, I, 417-420.

¹² The fullest treatment of this matter is to be found in BATY, VICARIOUS LIABILITY (Oxford, 1916).

in respect of a wilful as distinct from a negligent act.¹³ This decision could only be circumvented in the later cases by implying an authority of the servant so to act.¹⁴ It became, therefore, the orthodox approach to define the scope of a servant's employment in terms of authority.

Such definitions will not, however, usually bear close scrutiny. Where guidance is most needed, the implication of authority frequently involves a wide departure from reality. Even when the case is one of a servant's negligent performance of an authorized act, this is often so; in the normal instance of an employer entrusting a vehicle to a servant, the employer's keen desire is that there shall be no reckless driving if only because of the risk of damage to his own property. Again, where the servant does a forbidden act, the implication can be made only by the use of considerable casuistry. It has to be said that the general authority to conduct the master's business is of such a nature that the particular instructions not to do certain harmful acts are immaterial. This is really to abandon the concept altogether, for the question of what instructions are material and what immaterial has to be related objectively to the nature of the work which the servant was employed to do. This was the ruling in the leading case of *Limpus v. London General Omnibus Co.*¹⁵ As was said by Willes J., the act of the servant in driving across the other omnibus in that instance—

was an act done in the course of his employment. He was employed not only to drive the omnibus. . . . but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did is not inconsistent with his employment, *when explained by his desire to get before the other omnibus.*¹⁶

The reason the learned judge gives for disregarding the fact that the master has issued contrary orders is conclusive. "The law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability."¹⁷ Because, however, the law leaned so heavily on the fiction of implied command in its formative stages, this caveat is often overlooked and undue weight given to the circumstance that a servant has acted against orders. What real relevance, for example, is it that the driver of a truck who has allowed another

¹³ *McManus v. Crickett*, 1 East. 106.

¹⁴ See *Seymour v. Greenwood* (1861), 6 H. & N. 359: s.c., 7 H. & N. 355; *Limpus v. London General Omnibus Co.*, *supra*.

¹⁵ *Supra*.

¹⁶ 1 H. & C. at pp. 539-40.

¹⁷ *Ibid.*

to drive for him is acting contrary to instructions? The gravity of his act ought plainly, as the Supreme Court indicated last year,¹⁸ to be judged by other considerations.

Nor is the matter advanced by making the test whether the servant acted for his master's benefit or for his own. It is not true that every act that a servant does to promote his master's interests is one which the master is likely to have sanctioned. No business organization which authorized a manager to commit a fraud in order to provide funds by which a customer could discharge an improvent loan could long expect to retain its good will. Yet the assumption of this happening is a necessary step in the reasoning that, because an act was done for the master's benefit, he may be taken to have impliedly authorized it. The case becomes quite insoluble if the fact is that the loan has been made by the manager and his fraudulent act is done to avoid a reprimand or perhaps a dismissal and therefore as much for his own as for his employer's benefit. The case of the insurance agent who makes fraudulent misrepresentations in order to effect a sale and gain a commission is analogous. These situations and the related one where a master conducts his business in such a manner that the servant is enabled to defraud the public, emphasize the limitations of so mechanical a test. Its strict application leads to such "absolutely shocking" results (to use Lord Macnaghten's expression)¹⁹ that the courts have given it up, at least in cases where an agent has been held out to the public as a person in whom they can place full confidence. Whether, however, the benefit test does or does not apply to cases where no circumstances of holding out exist is still an open question.²⁰

The complications are increased when the question is the vicarious liability of corporations. The difficulty about founding liability on a basis of implied authority is that companies are creatures of the law having the capacity only to pursue lawful objects. They cannot expressly authorize the doing of an act which they are not able themselves to do, and hence it is, in logic, impossible to imply an authority to do unlawful acts. This reasoning has been used more than once to deny recovery against them for the torts of their servants. It was considered by

¹⁸ *Gillespie Grain Co. v. Kuproski*, [1935] S.C.R. 13. Cf. *Croton v. Leonard and Johns* (1931), 66 O.L.R. 566.

¹⁹ *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716 at p. 738.

²⁰ See SALMOND, *TORTS*, 8th ed., p. 101; *Joseph Rand, Ltd. v. Craig*, [1919] 1 Ch. 1; Duff J. in *National Union Fire Insurance Co. v. Martin*, [1924] S.C.R. 348 at p. 356. See also, C. A. Wright, *Restatement of Contracts and Agency* (1935), 1 U. of Tor. L.J. 17, note 1, at pp. 50-51.

Lord Bramwell to apply with particular force in situations where it was sought to hold a company liable for a tort of which the essential element was a specific intent to do wrong, such as malicious prosecution. His words were :

I am of opinion that no action for a malicious prosecution will lie against a corporation; and I think the reasoning is demonstrative. It must be shewn that there was an absence of reasonable and probable cause and that there was malice or some indirect and illegitimate motive in the prosecutor. A corporation is incapable of malice or of motive. If the directors were maliciously to order a prosecution, no action would lie against the corporation, because the act on the part of the directors would be *ultra vires*: they would have no authority to do it. They are only agents of the company.²¹

The law has finally been settled against Lord Bramwell's view,²² but his observations illustrate the confusion which attended its development.

A similar confusion has occurred in the "wrongful arrest" cases. In *Poulton v. The London and South Western Railway Co.*,²³ the plaintiff had been arrested by a station master under the erroneous supposition that he had failed to pay for the carriage of his horse. The Railway Clauses Act gave a power to arrest only for non-payment of fare. In holding the company not liable, Blackburn J. said :

In the present case an act was done by the station master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. Having no power themselves they cannot give the station master any power, to do the act.²⁴

The words are not free from ambiguity but they are clearly capable of the interpretation which has frequently been put on them that where the master is a corporation the scope of the servant's employment is to be measured not by the usual tests, but by the extent of the corporation's powers. This is hardly a satisfactory position in a day when the bulk of economic activity is carried on by corporate enterprise, and yet judicial opinion as late as 1917 lends support to that conclusion. In *Ormiston v. Great Western Railway Company*,²⁵ the issue being similar to the one in the *Poulton Case*, the court denied recovery

²¹ *Abrath v. N.E. Ry. Co.* (1886), 11 App. Cas. 247 at p. 251.

²² *Citizens' Life Assurance Co. v. Brown*, [1904] A.C. 423.

²³ (1867), L.R. 2 Q.B. 534.

²⁴ At p. 540.

²⁵ [1917] 1 K.B. 593.

on the ground that the company "are not to be held to have impliedly given authority to their servants to do something which it would be unlawful for them to do themselves". But surely a principal justification for the doctrine of *ultra vires* is that a person entering into contractual relations with a company has the protection which public registration of the company's constitution affords, and to intrude the doctrine into the law of torts in this fashion is to make it do service in a field where it has no application.²⁶

The rule that no remedy can be had from the Crown in respect of the torts of its servants likewise largely owes its origin to the fictional approach. This subject has already engaged the attention of the meeting and it is not necessary to do more than refer to it briefly. Perhaps, however, I may without impertinence add this to what Dr. Morse has so well said.²⁷ On the premise that liability depended on authority, the conclusion followed logically enough. The King can do no wrong, and therefore he cannot authorize wrong.²⁸ The words of Cockburn C.J. in *Feather v. Regina* are :²⁹

..... from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorized it to be done. As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests on such a foundation falls at once to the ground.

The rule has become so well settled that a change can only be made by legislative action, but the case for reform seems, with respect, clear.

In truth, the conditions of modern life require a closer approximation of our traditional legal concepts to reality. The formal requirements of the fictions by which the doctrine of vicarious liability has at times been supported ought not to be allowed to hamper its extension to situations where it is needed. It seems clear that considerations of practical con-

²⁶ See SALMOND, *TORTS*, 8th ed., p. 59; MAITLAND, *INTRODUCTION TO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE*, p. xxxix. For a contrary view, see Goodhart, *Corporate Liability in Tort and the Doctrine of Ultra Vires*, 2 Camb. L.J. 350.

²⁷ See Proceedings of the Canadian Bar Association, 1936; and the Report of the Committee on Comparative Provincial Legislation and Law Reform, 1936, *ante.*, 606.

²⁸ See HOLDSWORTH, *HISTORY*, Vol. IX, p. 42; and for an outline of the situation in the United States, Borchard, *Tort Liability of the State*, 12 Journal of Comp. Legis. 1.

²⁹ (1865), 6 B. & S. 257 at pp. 295-96.

venience accounted for its origin and those conditions are no less operative today. Activity is our way of life and the inevitable result, especially in an age of machinery, is that injury should be done to persons and property and loss thus occur. The problem is, on whom should this loss be cast?

We may, as Willes J. observed,³⁰ rule out at once the likelihood of it being borne by the servant. The cases are rare where a servant has the means to answer for the wrong he has been enabled to do. The motor vehicle cases are clear instances; the damage done is usually so extensive that it is quite beyond the power of a truck driver or chauffeur to make amends. In practical terms, therefore, the choice lies between the injured party and the master. There have been those who claim that the loss should be left in all cases on the shoulders of the injured party. Mr. Baty for instance, says "the modern doctrine of vicarious responsibility for the acts of others cannot but operate to check enterprise and to penalize commerce. The extension of joint stock enterprise with limited liability alone makes the consequences of the doctrine tolerable."³¹ But is it unfair, or out of harmony with current ideas, that a business should assume its own hazards? "This rule," Shaw C.J. said,³² "is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself, or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it The maxim *respondeat superior* is adopted from general considerations of policy and security."

This places the matter in a proper light. He who engages in a business runs a risk; accidents and mistakes are bound to occur and to the extent that they are related to the business, the resulting damage ought to constitute a loss of the same nature as any business loss. The point may be developed, as it has been with signal success in recent American studies³³—that the shifting of losses within these limits causes no hardship since the owner of a business has at hand a ready means of distributing them. His knowledge that they will probably arise enables him, as a matter of regular business practice, to make provision against them either by building up reserves or by insuring, the

³⁰ *Supra*, n. 5.

³¹ *Vicarious Liability*, p. 7.

³² *Farwell v. Boston & Worcester Ry.* (1842), 4 Met. 49.

³³ The contributions of Professor Smith, *Frolic and Detour* (1923), 23 Col. L.R. 444, 716, and of Professor Douglas, *Vicarious Liability and Administration of Risk* (1929), 38 Yale L.J. 584, 720 are outstanding.

expense of either expedient being charged to the costs of production and passed ultimately in the form of increased prices to the whole body of consumers. The question of the limits to be placed on the liability of an employer comes to be determined, therefore, by economic considerations. It would not appear sound to burden a business with loss due to the acts of its servants of an extraordinary nature: to do so would be to require provision against the risk of the improbable. Perhaps it can be said that at this point the capacity of the master to distribute the loss ceases to be any greater than that of the injured party and there is, therefore, no reason for shifting the loss from where it falls.

This approach to the problem yields acceptable results in cases which are exceedingly difficult, if not impossible, of solution by the orthodox methods. The cases of theft by servants are of this kind. Crime is, generally speaking, an unlikely event. As has been said so often, "every one has a right to suppose that a crime will not be committed, and to act on that belief."³⁴ Under ordinary circumstances, therefore, it is not a legitimate risk to assign to the conduct of a business. It is, for example, most unusual that the driver of a carriage would take advantage of the temporary absence of the hirer to steal his goods. The restraints of the criminal law afford protection equally to the hirer as to the master and the risk of the restraints failing in a situation where the certainty of detection and punishment is so great is scarcely one to be contemplated.³⁵ The case, however, is quite different where the master, as in *Lloyd v. Grace, Smith & Co.*,³⁶ places a clerk so completely in charge of his business that the latter can steal with little fear of detection. The theft is a not improbable result of conducting business in that manner and the master, who had the direction of the matter, must be taken to have assumed the consequent risk. This seems the significance of making the master responsible on the ground of "holding out". From this point of view the servant's act is much like embezzlement, against which contingency employers make a practice regularly to insure. The case where a night attendant of a garage, who has been left without supervision, drives off on an errand of his own with a customer's car and damages it by negligent driving is, in the view suggested, similarly

³⁴ Per Bramwell L. J. in *Baxendale v. Bennett*, 3 Q.B.D. 525 at p. 530.

³⁵ See *Cheshire v. Bailey*, [1905] 1 K.B. 237, as to which case see Wright, *Restatement of Contracts and Agency* (1935), 1 U. of Tor. L.J. 17, note 2, at p. 51.

³⁶ [1912] A.C. 716.

distinguishable from the ordinary case of theft. Such an act is, in the circumstances, to be expected. It is not to the point to say that the servant's act was done solely with the motive of benefitting himself and therefore caused him to lose his character as servant. The motive is largely immaterial; the significant fact is that the act was exactly one which he was free to do and one—i.e., taking the car only temporarily—which he was likely to do. Lord Cullen in a recent Scots case where this issue was raised, put the point in these words :

An honest master does not employ or authorise his servant to commit crimes of dishonesty towards third parties; but nevertheless he may incur liability for a crime of dishonesty committed by the servant if it was committed by him within the field of activities which the employment assigned to him, and that although the crime was committed by the servant solely in pursuance of his own private advantage. The servant is a bad servant who has not faithfully served but has betrayed his master; still *quoad* the third party injured, his dishonest act may fall to be regarded as an ill way of executing the work which has been assigned to him, and which he has been left with power to do well or ill.³⁷

It is generally agreed that in such situations the master should be liable; but if the case is approached as one of authority or its lack, this result can only be reached by resorting to a fiction. It is necessary to say that there is a contractual duty to prevent such an occurrence owed by the master to the third party which he cannot escape by delegating its performance to a servant. But in point of fact there has been no such contract; during the negotiations the parties did not address themselves to the contingency and it is not one of those necessary and incidental terms which can, according to the usual rule, be spelt out from the surrounding circumstances.³⁸

The cases of detour and frolic are susceptible of like treatment.³⁹ Hitherto the courts have largely relied on mechanical tests to determine when a servant may be said to be "on a frolic of his own" and when not. The easy-going assumption that, although a master would not approve of a "long" detour, he would not object to a "small" one and that such a one can therefore be taken to have been impliedly authorized, has no place in the legal reasoning of an age which makes efficiency

³⁷ *General Motors Ltd. v. Cessnock Garage and Motor Co.*, [1925] S.C. 796 at p. 802.

³⁸ The difficulties which the courts are under in deciding cases of this type on ordinary agency principles are illustrated clearly by the diversity of judicial opinion in the Ontario case of *Van Geel v. Warrington* (1928), 63 O.L.R. 143.

³⁹ For a much fuller treatment, see Smith, *op. cit.*

the first rule of business practice. The habit of servants of making private errands in the course of a journey is common, not because employers tolerate it, but because in the nature of things it cannot be stopped. Another test sometimes advanced is that the question of liability turns on the servant's motive. It is urged that if the accident occurs after he had decided to go on a "frolic", the master is not liable. This rule may fit the situation where the servant turns to the right or left of his direct route; but it ceases to be an acceptable guide in cases where the servant is driving along the direct route at the time of the accident but for reasons of his own has formed the intention of proceeding beyond his authorized destination.^{39A}

Similar difficulties are encountered in applying the test of motive when a servant who is on a frolic turns to resume his journey. To say that he re-enters his employment at that moment because his wrongful motive then ceases is clearly not satisfactory,⁴⁰ while the alternative solution that the original motive colours the nature of the whole expedition and that he returns to his service only when he has regained his authorized route gives an inconsistent result in the comparable case of the driver who travels to his ultimate destination without retracing his steps to the point of deviation.

Such perplexities show the problem not to be one which can be solved by making motive the determinant factor. The exercise of an independent act of volition by the servant is not unrelated to the nature of his employment; a servant placed in charge of a vehicle is able so to indulge himself, as indeed servants of that class frequently do. It would, therefore, seem sounder to base liability on the objective fact of common practice. To send a servant out on a journey involves, as a matter of probability, injury to persons and property within a certain area. There is, to use the current phrase, a "zone of risk", the limits of which can be calculated with tolerable certainty since the extent of the deviation usual in such circumstances is well known. Hence the master can anticipate the losses which the conduct of his business is likely to entail and make the necessary adjustments for their absorption. It does not follow that the servant's motive is immaterial: on the contrary, it bears on the question of probability since from fear of detection and dismissal the deviations which servants commonly make are confined to certain limits. Their facility of travel enables them to journey a certain

^{39A} See *Jarvis v. Southard Motors Ltd.*, [1932] 2 D.L.R. 218.

⁴⁰ *Battistoni v. Thomas*, [1932] S.C.R. 144.

distance out of their way and still arrive at their destination on time. It is errands of this sort which can properly be attributed to the nature of their employment.

That this approach to the problem is not out of keeping with current ideas is shown by the trend of recent legislation. As Dean Pound has observed :

There is a strong and growing tendency, where there is no blame on either side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence to shift the loss by creating liability where there has been no fault.⁴¹

The legislation concerning workmen's compensation finds its justification in this principle. The very recent legislation making the owner of an automobile liable for the damage caused by its negligent operation by members of his family and persons to whom he has entrusted it may also be cited.⁴² The reasons behind this legislation are clear. The persons to whom a car is entrusted, especially members of the family, are usually without the means to pay for the damage they cause, and the practical effect of the law before the statutory change was that the injured party had to bear the loss. The general public, however, is not able usually to provide against this loss; the cost of accident insurance being, if not out of the reach of the great majority, at least not generally assumed. The remedy adopted therefore has been to shift the burden to owners and to make the expense of insuring against it an item of the cost of running a car.

An emphasis on the function which the courts are really performing in shifting losses seems the best way of clarifying our subject. We thus free the law from the fictions which envelop it and bring into view the end which it is designed to serve. It is not a matter of ethics but of utility, and no amount of effort can subsume our doctrine under the rule, "no liability without fault".⁴³ Where the master is at fault in the sense that term has acquired in our legal terminology, the master is liable independently of the rules of vicarious liability. If, for instance, it can be shown that he has knowingly

⁴¹ *The End of Law as Developed in Legal Rules and Doctrines* (1914), 27 Harv. L.R. 195, 233.

⁴² Motor Vehicles Act, Statutes of Nova Scotia 1932, c. 6, as amended by Statutes of Nova Scotia, 1936, c. 44, s. 1. Legislation of this type is becoming general in the Canadian Provinces. For an excellent review of the situation in the United States see Note, 45 Harv. L.R. 171. An examination of the whole problem is made in a symposium by Professor Smith and others, *Compensation for Automobile Accidents*, 32 Col. L.R. 785.

⁴³ See Seavey, *Speculations as to "Respondeat Superior,"* Harvard Legal Essays, p. 433

put an incompetent driver in charge of a vehicle and damage ensues, the case can be decided on ordinary principles of negligence and causation. The master's carelessness was, in the circumstances, negligence which caused the injury. The converse is equally true. Where injury has been done by a servant acting within the scope of his employment, the master cannot excuse himself by showing that he chose a thoroughly competent driver.

Nor does the "control" concept enable us to ascribe vicarious liability to fault. A necessary step in such reasoning would be that the master failed to exercise a real, physical control over the servant's actions and that this failure caused the injury. But all that the courts mean when they speak of "control" is the *right* to control as an element necessary to create the relationship of master and servant. So far from holding a master liable because he controlled the servant's actions, the frequent case they deal with is where the servant is beyond control. It is not a question of effective supervision or the lack of it—indeed the defence that he has taken all practicable steps is not open to the master—but of loss which he, as the entrepreneur, must absorb as one arising out of the nature of his business. The frolic and detour cases illustrate this point. As a learned writer observes :

Certainly the argument that the master should be liable because he has control neither explains nor justifies the distinction between frolic and detour since obviously the master has as much control, or to be more accurate, as little control in the one case as in the other.⁴⁴

This is not to deny that a powerful reason for placing the burden of certain losses on the master is that by so doing the courts help to guarantee that industry will be carried on safely.⁴⁵ The master has the direction of the business and is likely to take every precaution to avoid injuring others when he knows he may have to face heavy judgments if he does not. He will use every check he can to see that his servants are not careless or disobedient. This is a matter of discipline and the virtue of putting the responsibility on the employer is surely that he has the best means of seeing that his servants conduct themselves properly. He can hold out a premium for work well and skilfully done in the form of increased pay or promotion, and, on the other hand, he possesses what perhaps is the ultimate sanction—the right of dismissal. The average servant is of that class of men "from whom," as the old phrase went, "no right can be

⁴⁴ Smith, *op. cit.*, p. 455.

⁴⁵ Professor Seavey puts particular stress on this aspect of the matter. *op. cit.*, p. 447.

had", and the threat of losing his job operates, we may speculate, with much greater force on his mind than the fear of an unlikely lawsuit. We may assume, too, that our doctrine restrains employers from organizing their undertakings in such a way as to create risks which can be avoided. This is especially so with such an enterprise as a motor bus or truck company. There is a lack of accurate data but it seems clear—at least in connection with these heavy vehicles—that there is a direct relation between high speeds and the number of accidents caused. It is certainly true that the practice—unhappily still too common—of making drivers undertake very long and tiring journeys increases the danger of negligent operation. A law which discourages employers from imposing such schedules on their drivers as to require excessive speeds or dangerous journeys is, therefore, entirely salutary. It is also a fact that the prospect of liability has led to the widespread use of mechanical safety devices, such as guarded machinery, and has stimulated inventive skill along these lines. The public is entitled to this protection and were not the common law to assure it, we may be certain that the legislature would intervene as it has done in the related instance of injuries to workmen, perhaps even to the extent of withdrawing the matter from the realm of the judicial process altogether.

It is, with respect, offered by way of conclusion, therefore, that the true basis of vicarious liability is public policy and that the application of the law ought consciously to be informed by an appreciation of social needs. The day is past when the problem can be looked upon merely as a conflict of individual interests; whether we like it or not, the claims of the community intrude themselves and a process of legal development which does not take account of them faces sterility and extinction. A recognition of this fact is implicit, not only in modern legislation, but also in recent judicial opinion. Within a generation defamation has, for reasons, it is ventured, not unconnected with modern publishing practices, passed from the category of wrongs actionable only on proof of a specific intent to do harm to one where liability is absolute.⁴⁶ A similar recognition is, it is submitted, called for in the law governing vicarious liability.

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⁴⁶ Contrast the *dictum* of Brett L.J. in *Capital and Counties Bank v. Henty* (1880), 5 C.P.D. at p. 539 with *Hulton & Co. v. Jones*, [1910] A.C. 20, and *Cassidy v. Daily Mirror Newspapers*, [1929] 2 K.B. 331.