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# Agency -- Intentional Torts -- Liability of the Master

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## NOTES AND COMMENTS

### Agency—Intentional Torts—Liability of the Master

Although there are early cases to the contrary,[1] it is now well settled that the master may be held liable for the intentional torts of his servant.[2] The liability of the master for such tortious conduct is said to

[1] MECHEM, LAW OF AGENCY §499 (3d ed. 1923); 57 C. J. S., MASTER AND SERVANT §572 (1936).

[2] Gillis v. Great Atlantic & Pacific Tea Co., 223 N. C. 470, 27 S. E. 2d 283 (1943); Hammond v. Eckerd's, 220 N. C. 596, 18 S. E. 2d 151 (1942); Long v. Eagle Co., 214 N. C. 146, 198 S. E. 573 (1938); Dickerson v. Atlantic Refining Co., 201 N. C. 90, 159 S. E. 446 (1931).

depend upon whether the servant was acting within the scope of his employment.[3] This rule is based on the theory that the master's work is being performed and that the master is in a better position to minimize the loss by preventing or spreading it.[4]

In the case of *Charles Stores Co. v. O'Quinn*,[5] the plaintiff was criminally prosecuted on a charge of stealing a blouse which he had found in his car and attempted to exchange. After being acquitted the plaintiff brought an action in the federal district court against the defendant company for malicious prosecution on the ground that the prosecution was instituted by the manager of the defendant's store. The district court found that since the title to the blouse was in doubt, the manager possessed the implied authority to recover the defendant's blouse by the criminal suit.[6] On appeal, the circuit court, reversing the lower court, declared that the title to the blouse was never in question and therefore the manager did not act within the scope of his authority in instigating the action. The latter court stated,[7] "It is too clear for argument that the recovery of stolen property, that had been in undisputed possession of the store manager for nearly a month before the arrest, was not the purpose of the prosecution." Since the cause of action arose in North Carolina, both courts applied the North Carolina law under the *Erie* doctrine.

Ordinarily it is held to be outside the scope of an employee's authority to prosecute an offender even where the offense is committed against the employer's property, unless the prosecution was previously authorized or subsequently ratified. Authority for the prosecution, however, may be implied when the action is brought by an employee who is intrusted with the custody of property for the purpose of protecting, preserving, or recovering such property.[8] Where the action is brought merely for the purpose of vindicating justice or punishing the offender no liability rests upon the master.[9]

The North Carolina courts have experienced great difficulty in determining what circumstances make the question of implied authority one for the jury. Thus, a carrier was held not liable as a matter of law

[3] RESTATEMENT, AGENCY §219(1) (1936).
[4] Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L. J. 584 (1929).
[5] 178 F. 2d 372 (4th Cir. 1949).
[6] O'Quinn v. Charles Stores Co., 86 F. Supp. 240 (M. D. N. C. 1949).
[7] Charles Stores Co. v. O'Quinn, 178 F. 2d 372, 376 (4th Cir. 1949).
[8] Hammond v. Eckerd's, 220 N. C. 596, 18 S. E. 2d 151 (1942).
[9] In Daniel v. Atlantic C. L. R. R., 136 N. C. 517, 522, 48 S. E. 816, 818 (1904) where a passenger was arrested in a hotel room and charged with larceny of the company's money at the instigation of the company's agent, the court dismissed the case, saying: "A servant intrusted with his master's goods may do what is necessary to preserve and protect them, because his authority to do so is clearly implied by the nature of the service, but when the property has been taken from his custody, or stolen, and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation and protection."

where its dispatcher prosecuted a passenger who refused to abide by the carrier's segregation regulations;[10] but an earlier case allowed the jury to determine whether a carrier was liable where its driver wrongfully accused and prosecuted a passenger who refused to pay his fare.[11] In the former case, it might well be argued that the dispatcher's action was for the purpose of enforcing the master's regulations and not for the object of punishing the offender, thereby presenting a proper question for the jury.

In another case where a customer was prosecuted by an employee for uttering a supposedly worthless check, the jury was allowed to find the master liable since the action was commenced to collect the master's debt;[12] but where a manager was expressly forbidden, except at his own risk, to accept checks, and the agent prosecuted a party for supposedly issuing a bad check, the court held the act unauthorized.[13] It seems that in the latter case there was evidence of implied authority to prosecute inasmuch as the manager, though assuming personal responsibility for the checks, was permitted to vest the title in the principal by daily depositing them to the principal's bank account. Thus, the manager was at least partially serving the master's business.[14]

Cited in the principal case are several false arrest cases which follow the same general pattern as those of malicious prosecution. To hold the master liable for a false arrest instigated by his servant, the act must be done for the purpose of protecting his master's property or of furthering the master's business. So where the defendant's foreman had plaintiff arrested to get him "out of the way" so that the foreman could string telephone lines across the objecting plaintiff's land, the jury was allowed to find the defendant company liable.[15] Similarly, an employer has been held liable where his manager arrested a salesman suspected of embezzlement.[16]

In *Hammond v. Eckerd's of Asheville*,[17] cited in the instant case, a cigar clerk followed a customer out of a drug store, accused him of

[10] Pridgen v. Carolina Coach Co., 229 N. C. 46, 47 S. E. 2d 609 (1948).

[11] Kelly v. Durham Traction Co., 132 N. C. 368, 43 S. E. 923, *rehearing denied*, 133 N. C. 418, 45 S. E. 826 (1903).

[12] Dickerson v. Atlantic Refining Co., 201 N. C. 90, 159 S. E. 446 (1931), 10 N. C. L. REV. 90.

[13] Lamm v. Charles Stores Co., 201 N. C. 134, 159 S. E. 444 (1931), 9 N. Y. U. L. Q. REV. 238.

[14] Nelson Business College v. Lloyd, 60 Ohio St. 448, 54 N. E. 471 (1894) (janitor pushed electrician off table so janitor could finish cleaning).

[15] Jackson v. Am. Tel. & Tel. Co., 139 N. C. 347, 51 S. E. 1015 (1905).

[16] Kelly v. Newark Shoe Store Co., 190 N. C. 406, 130 S. E. 32 (1925). *Cf.* West v. Messick Grocery Co., 138 N. C. 166, 50 S. E. 565 (1905) (client not liable for attorney's arrest of debtor); Lovick v. Atlantic C. L. R. R., 129 N. C. 247, 40 S. E. 191 (1901) (client not liable for attorney's arrest of witness leaving court's jurisdiction). *But cf.* Parrish v. Boysell Mfg. Co., 211 N. C. 7, 188 S. E. 817 (1936) (employer not liable, master's property not being recovered).

[17] 220 N. C. 596, 18 S. E. 2d 151 (1942), 11 FORDHAM L. REV. 314 (criticizing the holding).

stealing cigars, and caused him to be searched. A divided court dismissed the customer's action for false arrest on the ground that the clerk's act was not done to protect the master's property, but merely to vindicate justice since the cigars had already been stolen. It was aptly pointed out in the dissenting opinion that the cigar clerk was in hot pursuit of the offender with the avowed purpose of recovering his master's property and that the question of authority should have been determined by the jury. In *Long v. Eagle Co.*,[18] a case almost identical on its facts, the court reached a result opposite to the holding in the *Hammond* case. A possible distinguishing feature is that in the *Eagle* case the arrest was instigated by an assistant manager rather than a clerk.

In the principal case the court seemed to rely in part on an express provision in the employment contract forbidding the manager to arrest or prosecute an offender. Like provisions have received little consideration by the court in many of the intentional tort cases. Thus, in a case concerning defamation,[19] an employer was held liable where a manager followed a customer to a parking lot and there accused her of stealing a package from the store. The court held that there was sufficient evidence to warrant the submission of the case to the jury in spite of the fact that such acts were violative of direct and positive instructions to the contrary. This result seems sound. If it were otherwise, an employer could rid himself completely of vicarious liability by the simple expedient of instructing his employees to commit no torts.

Analogous to the holding in the instant case are those cases involving assaults by servants. The master is generally held liable if the assault is actuated at least in part by a purpose to serve the master or protect his property. Under this rule a master has been held liable where he authorized some force, and excessive or improper force was used,[20] or where an assault occurred during a foreman's inspection of an em-

[18] Long v. Eagle Co., 214 N. C. 146, 198 S. E. 573 (1938). In Kelly v. Newark Shoe Store Co., 190 N. C. 406, 409, 130 S. E. 32 34 (1925), the court stated: "The term 'manager' applied to an officer or representative of a corporation, implies the idea that the management of the affairs of the company has been committed to him with respect to the property and business under his charge. Consequently his acts in and about the corporation's business, so committed to him, is within the scope of his authority. . . . The term 'general manager' may imply still greater authority, and although limited to the branch store at Wilmington, it still may imply authority to act in emergencies, or generally, as the principal officer of the corporation in reference to the ordinary business and purposes of the company in the conduct of such store."

[19] Gillis v. Great Atlantic & Pacific Tea Co., 223 N. C. 470, 27 S. E. 2d 283 (1943). *Cf.* West v. Woolworth Co., 215 N. C. 211, 1 S. E. 2d 546 (1939) (employer liable for employee's slander of customer); Sawyer v. Norfolk & S. Ry., 142 N. C. 1, 54 S. E. 793 (1906) (employer liable for employee's slander of former employee); Strickland v. Kress & Co., 183 N. C. 534, 112 S. E. 30 (1922) (employer not liable for employee's slander of former employee).

[20] Snow v. De Butts, 212 N. C. 120, 193 S. E. 224 (1937). *Cf.* Wilson v. Singer Sewing Machine Co., 184 N. C. 40, 113 S. E. 508 (1922).

ployee's machine;[21] but where an assault was committed in spite or hate, or to carry out an independent purpose of the servant, the master was not liable.[22]

The result reached in the principal case seems to be in line with many of the North Carolina cases in which intentional torts are involved. But the court appears to be particularly harsh in denying the plaintiff recovery because the prosecution was instigated for a crime already committed against the master's property instead of for the purpose of recovering such property. This distinction made by the court seems more apparent than real. Although the immediate object of the manager's action might well have been to vindicate the law and punish the offender, yet it cannot be denied that such prosecutions do tend to discourage future criminal acts and thereby indirectly serve the master's interests. This deterrent effect appears especially pertinent here in view of the fact that the manager had been previously bothered by shoplifters. This would seem to be sufficient evidence of an intention to further the master's business and to protect his property so as to leave the question for the determination of the jury.

In conclusion it might be pointed out that the North Carolina courts have been more willing to submit to the jury cases involving negligent torts of the servant as distinguished from willful torts. Perhaps this action on their part has not been deliberate.[23] Theoretically, however, such a distinction has no basis and it is to be hoped that in the future, where doubt exists as to the purpose for which a servant acted, such doubt will be resolved by the jury whether his act be classified as negligent or intentional.

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## Associations—Injunctive Relief Against Violation of Its Rules by Members

It appears well settled that the constitution, rules, regulations and by-laws[1] of a voluntary association constitute a contract between the

[21] Fleming v. Tarboro Knitting Mills, 161 N. C. 436, 27 S. E. 309 (1913).

[22] In Snow v. De Butts, 212 N. C. 120, 193 S. E. 224 (1937), where a manager assaulted the plaintiff who had opposed the defendant employer's petition to the Corporation Commission, the defendant was held not liable although the act was committed with an intent to benefit the master. A later case refused to let the jury consider the master's liability where an employee assaulted a person outside the master's premises as a result of an argument arising inside the store. Robinson v. Sears, Roebuck & Co., 216 N. C. 322, 4 S. E. 2d 889 (1939), 18 N. C. L. REV. 163 (1940).

[23] It seems that as a practical solution to the tendencies of juries to find the "deeper pocketed" employer liable, the courts, particularly in the field of agency law, have frequently exercised judicial restraints in an effort to mete out justice as they see it in the individual cases.

[1] So long as the issue is the enforceability of the constitution, rules, regulations, charter or by-laws, no distinction is necessary between them, and for purposes of this note they are used synonymously.