Montana Law Review

Volume 3
Issue 1 *Spring 1942*

Article 9

1942

Agency: The Measure of a Principal's Liability for a Slander by His Agent

Albert C. Angstman

AGENCY: THE MEASURE OF A PRINCIPAL'S LIABILITY FOR A SLANDER BY HIS AGENT

A recent Montana decision, *Keller v. Safeway Stores,*[1] seems, possibly, to be charging the principal for the acts of his agent committed outside the scope of his authority.

The facts of the case are, briefly stated, that Cobb, manager of the Safeway Store, slandered the plaintiff at the home of the plaintiff's mother. The purpose of the visit was to "... straighten out the address, or to obtain payment to make good the no good check." Though the evidence was conflicting, the defense maintained that Cobb had been instructed by his superiors that "anyone taking a personal check would do so on their own responsibility." In approving a judgment for the plaintiff,[2] apparently the Court assumes that the store may have given such an instruction. The language of the case causing the trouble is as follows:[3]

> "At best, under these circumstances, the question whether the manager in accepting a bad check did so on behalf of the store was one for the jury to decide. But even if we assume that he was not the agent acting within the *express* scope of his employment while attempting to collect the check, we still have a question for the jury whether the slander grew out of acts *incidental to the employment.*"
>
> "The jury might have believed that the visit to the home of the plaintiff's mother was so closely intermingled with the employment Cobb was expressly authorized to do, and that the ensuing *slander was a wrong committed, if not in furtherance of his employment, at least as an incident thereto—either would be sufficient to bind the company.*[4]

[1](1940) 111 Mont. 28, 108 P. (2d) 605.

[2]Though the general rule was formerly contra, Montana is following the weight of authority today, that a corporation is liable for a slander uttered by its employee within the course of his employment. Waters-Pierce Oil Co. v. Bridwell (1912) 103 Ark. 345, 147 S. W. 64, Ann. Cas. 1914B, 837; Jordan v. Melville Shoe Corp. (1928) 150 Va. 101, 142 S. E. 387; 13 AM. JUR., *Corporations*, §1127; RESTATEMENT, AGENCY, §247 comment b. Contra: Singer Mfg. Co. v. Taylor (1906) 150 Ala. 574, 43 So. 210, 9 L. R. A. (N. S.) 929, 124 Am. St. Rep. 90.

[3]111 Mont. 28, 40, 108 P. (2d) 605, 612. All italics in this quotation are supplied.

[4]This language is directly contrary to established Agency rules. Acts not done for the purpose of promoting the principal's business are not within the scope of the agent's authority. Neither does an act done in furtherance of the principal's business charge the latter unless it is committed in the execution of an admitted authority. 35 AM. JUR., *Master and Servant*, §552; *Agency*, 2 C. J. p. 853; 2 MECHEM, AGENCY (2d ed. 1914) §1882, p. 1462; RESTATEMENT, AGENCY, §§228, 235, 236. However, this statement by the court must be merely loose language since in another part of the decision they quote the rule on this point as it is stated in Corpus Juris.

> The authority delegated to Cobb did not expressly include the making of defamatory statements, but if their making was *incidental to his employment,* then the principal was liable. The wrong here—the slander—taken at its face value, *can reasonably be said to have been an intended means by which Cobb expected to obtain payment on the no good check. Clearly, had he been attempting to get payment on behalf of the store and in so doing uttered the slanderous words, the store would have been liable.*"

This quotation and particularly the last sentence suggests that, even though it be granted that Cobb and his principal understood that the former had no authority to collect checks on the latter's behalf, nevertheless, the jury might reasonably charge the principal for the slander by finding that it was "incidental to the employment." Neither the generally recognized rules of Agency, nor any special rules that may exist for imposing tort liability on the principal, would support such a rule. So, the purpose of this article is to determine whether the case may be so interpreted as to be brought within the generally recognized Agency doctrines.

Ordinarily, the law treats the question of the ultimate scope of the agent's authority as a question of fact,[5] based on the premise that the law seeks to give effect to that authority actually intended by the principal,[6] as reasonably interpreted objectively, both from his words and from his acts or conduct, in much the same way as is the mutual intent of the parties to a contract generally ascertained. That being true, in the absence of positive evidence of the limits of the authority found in the principal's instructions to the agent, there are certain fairly definite

[5]Ellinghouse v. Ajax Livestock Co. (1915) 51 Mont. 275, 152 P. 481, L. R. A. 1916D, 836; Hoffman v. Roehl (1921) 61 Mont. 290, 203 P. 349, 20 A. L. R. 184; *Master and Servant,* 39 C. J. p. 1362; 2 MECHEM, AGENCY (2d ed. 1914) §1982, p. 1547; RESTATEMENT, AGENCY, §228 comment d.

[6]When the law imposes liability on the principal-agency relationship, notwithstanding that the principal and agent did not intend for there to be such relationship in fact, then the relationship is one raised solely by operation of law, and is no longer a question of fact for the jury. An agency strictly by operation of law however is a rare thing. 1 MECHEM, AGENCY (2d ed. 1914) §§29, 203, pp. 15, 149. But some of the Court's language (principally the last sentence in the part quoted in the body of this article) makes it hard to conclude that the Court intended to find an authority in fact in Cobb to collect the check on behalf of the Safeway Store, but *might* be interpreted as imposing liability by operation of law. Such a possibility indicates that the Court may have had in the back of its mind the doctrine of distribution of risk—advocated by modern writers for placing the burden of risk where it can best be borne. Stevens, *The Test of the Employment Relation,* 38 (Part 1) MICH. L. REV. 188 (1939-40); Douglas, *Vicarious Liability and Administration of Risk,* 38 YALE L. J. 584 (1929).

criteria guiding the jury in ascertaining that intention, which they should be given by careful instructions. Those criteria commonly recognized to ascertain the scope of the agent's authority are:[7]

Express authority: that authority found to be directly and intentionally conferred by the voluntary act of the principal, oral or written;

Incidental or implied authority: that authority found by giving effect to all those acts which are reasonably necessary and proper to carry into effect the main authority;

Customary authority: that authority found by giving effect to those relevant customs and usages which the principal must have anticipated;

Previous course of dealings: that authority found to have been inferred in a present transaction because it existed in previous transactions between the parties;

Authority by necessity: that authority found to be reasonably necessary to protect the principal's interests when an unforeseen emergency has arisen and immediate action is required;

Apparent authority: that authority found to permit the exercise of those powers which the principal has, by his direct act or conduct, caused the person dealing with the agent reasonably to believe that the principal has conferred, and upon which that person has relied.

Much is said in the opinion about the slander being "incidental to the employment."[8] For the moment it is assumed that the word "employment" is equivalent to the word "authority"

[7] 1 MECHEM, AGENCY (2d ed. 1914) §§714-721, pp. 501-510; RESTATEMENT, AGENCY, §§8, 26, 27, 35, 36, 47. Agency by estoppel may be considered an additional criterion but probably it is not a real authority. 1 MECHEM, AGENCY (2d ed. 1914) §§722-726, pp. 510-513; RESTATEMENT, AGENCY, §§31, 159; cf. 2 AM. JUR., *Agency*, §104. Liability by ratification is often treated in this same group but it is really different in kind. 1 MECHEM, AGENCY (2d ed. 1914) §727, p. 513; RESTATEMENT, AGENCY, §82.

[8] The Court should use every possible means to avoid allowing the phrase "incidental to the employment" to be used as a basis for establishing a standard for measuring tort liability generally, resembling in any way the one which seems to have been approved by it in at least some cases (and so roundly criticized today) for measuring the agent's power to make statements against the principal's interest so as to charge the latter therefor. See in this issue comment by Bill Hirst, p. 81. The very real danger of such an unfortunate evolution of the rule governing tort liability is made manifest by the casual language of the Court in Earlywine v. C. I. T. Corporation (1940) 110 Mont. 295, 101 P. (2d) 59, where the phrase "merely an incident of the res gestae" appears. As the phrases "incidental to the employment" and "an incident of the employment" are used in our principal case, just what is the difference in their meaning from that of the phrase "an incident of the res gestae," used in the Earlywine case's headnotes?

as here used. To be incidental to the express authority, so as to be included in the total actual authority, given acts must be such as "usually accompany it, or are reasonably necessary to accomplish it."[9] Therefore, though the collecting of the check might conceivably be incidental in this sense, to an already established authority to accept the check—or perhaps better, to his general managerial authority[10]—the slander itself cannot be incidental in that sense.[11] (Probably it would be better if the term "incidental," as applied to the slander itself, was not used at all.) However, after having established by some one of the above criteria that Cobb was acting for the defendant in collecting the check, it becomes proper then to talk about the defendant being liable because the slander was in an attempted *furtherance of his admitted authority.*

But it may be suggested that the criteria for establishing the "scope of the agent's authority" result in a narrower authority than do those for measuring the "scope of a servant's employment" delimiting his "power" to charge his principal in tort. As indicated in the Restatement of the Law of Agency, generally the principal is chargeable with the torts of the agent provided they are sufficiently "similar to or incidental to the conduct authorized,"[12] and, too, are inspired "at least in part, by a purpose to serve the master."[13] But these sections were formulated with reference to the particular act complained of—here, the slander,—and are pertinent only after first finding that the slander was uttered in the execution of an *admitted* authority. The Restatement points this out explicitly:

> "The manifestations of the master determine what conduct may be within the scope of employment, since it includes only acts of the kind authorized.[14] . . . Proof that the actor was in the general employment of the master does not of itself create an inference that a given act done by him was within the scope of employment. If, however, it is also proved that the act *tended to accomplish an authorized*

[9] RESTATEMENT, AGENCY, §35.

[10] 1 MECHEM, AGENCY (2d ed. 1914) §996, p. 719; RESTATEMENT, AGENCY, §73.

[11] This does not mean that the act directly causing the injury complained of may not be incidental to the admitted authority. That depends on the character of the admitted authority. If the principal tells the agent to recapture the former's chattels from the possession of another, even a *forcible* taking might be so "incidental," thus making the principal liable for the resulting assault. RESTATEMENT, AGENCY, §229 comment b.

[12] RESTATEMENT, AGENCY, §229.

[13] RESTATEMENT, AGENCY, §228.

[14] RESTATEMENT, AGENCY, §228 comment a.

> *purpose*[15] and was done at an authorized place and time, there is an inference that it was within the scope of employment.'"[16]

Thus, it is just as important to determine whether Cobb was authorized to collect the check on behalf of the store for the purpose of deciding tort liability as for any other reason. Whatever may be the differentiations between "scope of authority" and "scope of employment," there is no rule under either of them holding a principal liable for the torts of an agent committed in furtherance of an object not understood by either to be included in the agent's authority.

Granted that for our purposes it is necessary to determine whether Cobb had real authority to collect the check for his principal, one may ask whether the Court does not really base its decision upon the proposition above suggested—that the authority to collect may be found to exist as an incident to the managerial authority.[17] The decision does not seem formally to have recognized the distinction between the authority to accept the check and the authority to collect it, but it must have decided that the jury was justified in finding that Cobb had the authority to accept the check on behalf of the store; and, further, that it was for them to determine what acts were incidental to his managerial authority. Hence the jury might have found that the authority to collect the check followed naturally and ordinarily from the authority to accept it as manager. So, in attempting to collect the check, Cobb was acting within the scope of his employment. The Safeway Store is, therefore, liable for the slander, not because Cobb was attempting to straighten out an address on behalf of the store, since the slander did not result therefrom, but because, although he may have

[15]Italics supplied.

[16]RESTATEMENT, AGENCY, §228 comment b.

[17]The Court states that, even under the defendant's version of the authority of their managers in taking a check for groceries sold, the latter could accept any and all checks, promoting the store's business in any event, but simply being responsible therefor if the check turned out to be bad. This might suggest that there is in the Court's mind the proposition that one cannot enter into what, in substance, is a principal-agency relationship, and then seek to avoid its liabilities by calling it something else—or by adding to the relationship some of the normal incidents of some other relationship. That the defendant cannot "run with the hare or hold with the hounds" is well established. Snelling v. Arbuckle Bros. (1898) 104 Ga. 362, 30 S. E. 863; and see, Arbuckle Bros. v. Kirkpatrick (1897) 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854; Arbuckle Bros. v. Gates and Brown (1898) 95 Va. 802, 30 S. E. 496. But it is very doubtful that the facts of the present case would justify applying the above rule. Neither does the Court appear to intend so to apply it.

been acting partly for his own interests, he was also acting in furtherance of the principal's business and within the scope of his authority in attempting to collect the check.[18]

These conclusions may be supported not only by the fact that the Court treats the problem as a jury question, and too, by the fact that there is no real indication of an intention by the Court to state a new measure of liability, but also by several cases cited in support of its decision. For example, in *Kirk v. Montana Transfer Co.*,[19] an agent was employed to move furniture and collect therefor. Either in completing the job of moving a refrigerator or in attempting to seize it as security for the bill for moving the goods, and while the plaintiff physically resisted the taking, the agent threw it against the plaintiff, injuring her. It was a rule of the defendant company that when drivers were notified that work done by them should be paid for at completion, unless they collected therefor, the amount would be deducted from their wages. The defendant was held liable. Here the agent was expressly authorized to make collections, while in the principal case there is no such express authorization. Therefore, the Court must have ruled that the jury was justified in finding an authority in Cobb to collect the check or the cases would be distinguishable.[20] Also, in both cases the agents would have to stand the loss personally if the collections were not made. Still, in both cases the principals were properly held liable for the assault and slander respectively, because, although the agents may have been acting partly for their own interests, they were also acting in furtherance of their principals' businesses, within the scope of their authority, express or implied.

So the Court in the principal case has reached the proper result. Much of the language is ambiguous and on first reading seems to be contrary to the established rules of Agency; but, if it is interpreted as finding an authority in Cobb to collect the check, the decision can be justified.

—Albert C. Angstman.

[18]cf. RESTATEMENT, AGENCY, §236.
[19](1919) 56 Mont. 292, 184 P. 987.
[20]The following cited cases are similarly analogous: Son v. Hartford Ice Cream Co. (1925) 102 Conn. 696, 129 A. 778; Atlanta Hub Co. v. Jones (1933) 47 Ga. App. 778, 171 S. E. 470; Moffit v. White Sewing Mach. Co. (1921) 214 Mich. 496, 183 N. W. 198; Russell-Locke Super-Service Co. v. Vaughn (1935) 170 Okl. 377, 40 P. (2d) 1090.