William and Mary Review of Virginia Law

Volume I (1948)
Issue 1

Article 3

December 1948

Agency - Assault in the Course of Employment (Baskett v. Banks, 1947)

Ira B. Dworkin

AGENCY - ASSAULT IN COURSE OF EMPLOYMENT

A very interesting fact situation in the Law of Agency is presented in Baskett v. Banks (1), which was decided by the Supreme Court of Appeals on November 26, 1947. In an able but very involved opinion, Mr. Justice Staples reversed and remanded for a new trial a truly unique case, the facts of which occurred in Norfolk on August 21, 1946.

In this case, P purchased a ticket at a motion picture theatre at 4495 Hampton Boulevard, Norfolk (owned by D), and while seated inside in an apparently intoxicated condition was ejected bodily by the theatre manager and a fellow employee, after (D's version: having first been asked politely to go outside and get some air) (P's version: having wilfully, maliciously, and without cause, been assaulted by the manager and a fellow employee, who hit P over the head several times with a flashlight, then catapulted P out the door onto the sidewalk). P, after having been ejected from the theatre, was in a highly excited condition and remained in front of the theatre haranguing would-be patrons and calling the manager vile names. P finally moved up the street about 50 feet from the theatre when the manager, who was then on his way home, passed him. P again applied the same vile epithets to the manager, who then struck P a violent blow with his fist, knocking him into the street. P was rendered unconscious from this blow and was carried home in a police ambulance, called by the ticket-seller at the mananger's direction. P was subsequently hospitalized. P sought damages of $10,000, and the jury returned a verdict of $500 in his favor. P's motion to have the verdict set aside as contrary to the law and evidence and for inadequate damages was disallowed by the trial court. P appealed.

The trial court submitted to the jury the question whether the second assault was so closely related to the first that the manager would be deemed to be still acting as the agent of D when it occurred, or whether it was an entirely separate and independent act, unrelated to his official duties or employment, for which D, his employer, would not be liable. The appellate court held the granting of this instruction constituted reversible error, because it could not be determined in the state of the record whether the jury found D liable for both assaults or only one, nor did the evidence satisfactorily show the extent of the damages sustained in each. D's requested instruction that the manager was outside the scope of his employment because he failed to revoke P's license before ejecting him was also granted by the trial court. This was held to be prejudicial error, because D had not placed sufficient evidence before the jury to show revocation of P's license (by returning to P the admission price) before ejecting him, the theory of D's pleadings being rather that the alleged misconduct of P in the theatre constituted justification for P's expulsion without the necessity of first revoking P's license.

In asking for a jury verdict on each separate assault, Mr. Justice Staples is in effect demanding a special verdict (2), and it seems to the present writer that that is the only way the present case can be adequately resolved. In remanding, Mr. Justice Staples also stated that the jury should be instructed upon the question of whether or not the second assault grew out of and was the proximate result of the first attack, and held that the second assault would have been within the scope of the manager's

employment (making D liable) if its purpose was to stop P's statements to prospective patrons. Justice Staples further cautioned that such an instruction should not place on P the burden of proving absolutely and precisely the extent of injuries resulting from each attack, but that the jury should be left free to form their own judgment from the evidence introduced.

Justice Staples' analysis of this case is clearly in accord with modern law on the point. The Restatement of Agency (3) states: "An act may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person". In Davis v. Merrill (4), the Supreme Court of Appeals announced the doctrine that both corporations and individuals should be required to answer in damages for wanton and malicious assaults inflicted upon others by their servants, while acting within the scope of the servants' employment and duty, stating: "It matters not whether the act of the servant is due to a lack of judgment, infirmity of temper, or the influence of passion, or that the servant goes beyond (italics mine) his strict line of duty and authority in inflicting such injury". (5) However, if a plaintiff seeks punitive damages, it must be shown that the principal in some way ordered or ratified those acts of the servant. (6)

At first blush, the Virginia court in the instant case has rejected the "going and coming" rule followed in many jurisdictions. In Mc Lamb v. Beasley (7), the North Carolina Surpeme Court stated the rule as follows: "In determining the liability of a master on the theory of respondeat superior for a tort of the servant, the servant is generally not in the course of his employment while going to and returning from his work". The present case is not necessarily inconsistent with this rule, however, since it is highly arguable that the second assault was the proximate result of the first.

Two recent cases have been found which are almost "on all fours" with the present case. In the California case of Haworth v. Elliott (8), bartenders in charge of a barroom during the barkeeper's absence were authorized to maintain order and protect their employer's property. In doing so, the bartenders ejected a patron for allegedly creating a disturbance and broke his finger, nose, and caused him other bodily injuries. They were held to be acting within the scope of their employment and the employer was held liable for their use of excessive force causing injuries to the patron, regardless of whether the alleged blows were struck by them before they emerged from the barroom or thereafter on the sidewalk (italics mine). This case is distinguishable on its facts from the present case, however, because here there was no lapse of time between the successive assaults.

In the Louisiana case of Healey v. Playland Amusement Co. (9), a patron of an amusement concession was struck by employees of the concession who were seeking to prevent vandalism. In the ensuing struggle, the patron in turn struck one of the employees before he was overpowered and taken to a storeroom. Here the patron was again struck while seated in a chair. It was held that the owner of the amusement concession could not escape liability (italics mine) for assault on the ground that the blows struck by his employees while in the storeroom were in retaliation for the blow received from the patron and not in discharge of any duty in connection with their employment.

(1) BASKETT v. BANKS, 186 Va. 1022, 45 S.E.2d 173 (1947).

(2) See Burks Pleading and Practice, 3rd Edition, sec. 292. Special verdicts are not mandatory with the jury, although the court may request them.

(3) Restatement of Agency, sec. 236.

(4) Davis v. Merrill, 133 Va. 69, 112 S.E. 628 (1922).

(5) Ibid., p. 630 (S.E. Reporter).

(6) See Norfolk-Sourthern Railway Co. v. Tomlinson, 116 Va. 153, 81 S.E. 89 (1914); Virginia Railway & Power Co. v. House, 148 Va. 879, 139 S.E. 480 (1927); and Virginia Railway & Power Co. v. Deaton, 147 Va. 576, 137 S.E. 500 (1927).

(7) Mc Lamb v. Beasley, 218 N.C. 303, 11 S.E. 2d 283 (1941).

(8) Haworth v. Elliott, ____ Cal. App.____, 153 Pac 2d 804 (1945).

(9) Healey v. Playland Amusement Co., _____ La. App._____, 199 So. 682 (1941).