

William and Mary Review of Virginia Law

Volume 1 (1949-1953)
Issue 1

Article 4

May 1949

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Sidney Schwartz

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Sidney Schwartz, *Agency - Liability of Employer for Willful Torts of his Employee*, 1 Wm. & Mary Rev. Va. L. 16 (1949), <https://scholarship.law.wm.edu/wmrval/vol1/iss1/4>

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AGENCY—LIABILITY OF EMPLOYER FOR WILLFUL TORTS OF HIS EMPLOYEE

Employee of defendant, driving defendant's bus, attempted to negotiate a right turn so as to continue on his route, but was blocked by plaintiff's auto. Employee engaged plaintiff in an argument about their respective rights on the road, and then struck plaintiff in the face causing momentary unconsciousness. Plaintiff's automobile (in gear and out of control) proceeded into a building and was damaged. The lower court found that employee committed the tort in asserting his rights on the road in order to expedite the performance of duties for which he was employed. On appeal, *held*, affirmed. If employee's willful torts are committed within the scope of and in furtherance of his employment, the employer is liable. *Tri-State Coach Corp. et al. v. Walsh*, 188 Va. 299, 49 S. E. 2d 363 (1948).

While formerly it was regarded that a wilful and malicious act of an employee was beyond the scope of authority,¹ the majority and trend of modern decisions makes the test of liability, not the motive of employee, but whether the tort was committed within scope of employment.² This follows even if in disobedience of orders.³ Nor does the employee's malice excuse the employer from liability if the tortious act was intended to further the employer's interest.⁴

No liability attaches to the employer, however, where the employee has departed from the business of the employer and is on a venture of his own.⁵ Also, where the employee's tort is motivated by the desire to injure the employer, most courts hold there is no liability on the part of the latter because the act was not done for his benefit.⁶

Although "scope of employment" may be a question for the court to decide where deviation from duties is markedly evident,⁷ it is ordinarily a jury question to be determined from each factual situation. In the principal case the result was determined by the fact that the tort was committed while employee *was in the process* of negotiating the turn. In a similar case where the tort occurred *after* the turn was made, it was held that the assault was not within scope of employment.⁸ It is submitted that this seems, at best, a distinction far too subtle to be susceptible of a practical application.

SIDNEY SCHWARTZ

FOOTNOTES

1. *Vanderbilt & Richmond Turnpike Co.*, 2 N. Y. 479, 51 Am. Dec. 315 (1849); *cf.* 5 Munf. 483 (Va. 1817); *Davidson v. Chinese*

- Republic Restaurant Co., 201 Mich. 389, 167 N. Y. 967 (1918).
2. E. g., Davis, Director Gen. of Railroads v. Merrill, 133 Va. 69, 112 S. E. 628 (1922); Fields v. Sanders et al., 29 Cal. 2d 834, 180 Pac. 2d 684 (1947); Plotkin v. Northland Transp. Co., 204 Minn. 422, 283 N. W. 758 (1939); RESTATEMENT, AGENCY §§231, 245 (1933).
 3. Redding v. South Carolina R. Co., 3 S. C. 1, 16 Am Rep. 681 (1871).
 4. Davis, Director Gen. of Railroads v. Merrill, 133 Va. 69, 112 S. E. 628 (1922); Fields v. Sanders et al., 29 Cal. 2d 834, 180 Pac. 2d 684, (1947).
 5. E. g. Master Auto Service Corp. v. Bowden, 179 Va. 507, 19 S. E. 2d 679 (1942); Plotkin v. Northland Transp. Co., 204 Minn. 422, 283 N. W. 758 (1939); Ferguson v. Rex Spinning Co., 196 N. C. 614, 146 S. E. 597 (1929); see Annotation, 62, A. L. R. 1433.
 6. Archuleta v. Florsheim Merchantile Co., 25 N. M. 632, 187 Pac. 272, (1920). **But cf.** Stranahan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634 (1896).
 7. Fields v. Sanders et al., 29 Cal. 2d 834, 180 Pac. 2d 684 (1947); see Ferguson v. Rex Spinning Co., 196 N. C. 614, 146 S. E. 597 (1929).
 8. Plotkin v. Northland Transp. Co., 204 Minn. 422, 283 N. W. 758 (1939).