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Scope of Employment Test in Relation to Slander Action

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COMMENTS

AGENCY—SCOPE OF EMPLOYMENT TEST IN SLANDER ACTION

In *Slaughter* v. *Valleydale Packers, Inc., of Bristol*,[1] the plaintiff, a businessman of good reputation, brought an action for insulting words and slander. The slanderous statement was to the effect that the plaintiff had been selling inedible meat from animals which had not been butchered and was presently awaiting trial for his fraudulent conduct. The statements were made by the defendant's plant manager and three other employees at a time when only one was actively engaged in the prescribed duties of his employment.

At the trial the defendant admitted that the defamatory statements were slanderous and actionable per se and that the plaintiff suffered damage as a result of the publication of the defamation.[2] The only defense relied upon to negative liability was that the statements on the part of defendant's employees were not made in the ordinary scope and course of their employment. The trial court's charge to the jury on the scope of employment question was that, in the absence of express ratification or authorization, the defendant's manager, J. L. Rogers, at the time that he spoke the defamatory words, must have been acting as defendant's employee " . . . in respect to the very transaction out of which the plaintiff's injury arose." A verdict was rendered and judgment entered in favor of the defendant.[3]

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[1] 198 Va. 339, 94 S.E.2d 260 (1956).

[2] Under the Virginia "Statute of Insulting Words" the common law requirement of publication for a slander is no longer necessary. [Va. Code §8-630, 1950]. See also Davis v. Heflin, 130 Va. 169, 107 S.E. 673 (1921).

[3] In the principal case there was no discussion in the decision as to whether or not the slander " . . . that plaintiff has been selling for human consumption meat from animals which had not been butchered . . . " might not constitute a disparagement of the goods rather than a defamation of the person. The practical difference between the two types of defamation is that in an action for disparagement of goods or slander of of title the complaint does not state a cause of action without an allegation and proof of special damages. Kennedy v. Publishing Co., 41 Hun. 422, 3 N.Y.St.Rep. 139 (1886); Odgers, *Libel and Slander* (6th Ed.) pp. 233-234 (1929). The complaint in the principal case did not allege special damages nor were any special damages subsequently proven. For an excellent discussion of the problem of defamation and

On appeal the plaintiff attacked this instruction as erroneous and tending to mislead the jury. The court sustained the objection saying that if the defamation arose " . . . from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business" it occurred within the scope of employment and the defendant was liable. The failure to include this statement in the charge to the jury at the trial was the principal reason for the reversal of the judgment on appeal.

Although at one time it was thought that a corporation could not be liable for a slander by its servants or agents, since the corporation could not speak the words,[4] it is today well settled that a corporation may be liable for a slander spoken by its servant or agent.[5] The Virginia view, in accord with the overwhelming weight of authority,[6] is that a corporation is liable for a slander uttered by an employee " . . . within the scope of his employment in the course of the corporate business in which he is engaged or employed."[7]

Several tests of scope of employment have been recognized in

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disparagement, see Wham, *Disparagement of Property,* 21 Ill.L.Rev. 26 (1926); Hibschman, *Defamation or Disparagement,* 24 Minn. L.Rev. 625 (1940).

[4] Childs v. Bank of Missouri, 17 Mo. 213 (1852); Eichner v. Bowery Bank, 24 App. Div. 63, 48 N.Y.S. 978 (1897).

[5] In general as to the liability of a master or principal for libelous or slanderous statements made by his servant or agent concerning one other than a servant or agent or a former servant or agent, see 150 A.L.R. 1330 and note on page 1338.

[6] A small minority of jurisdictions follow the rule that a corporation is not liable for the slander of its agent or servant unless the corporation expressly authorizes the slander or ratifies it. This hypothesis is true even though the slander clearly occurred within the scope and course of the agent's or servant's employment. Singer Mfg. Co. v. Taylor, 150 Ala. 574, 43 So. 210, 9 L.R.A. (NS) 929, 124 Am.St.Rep, 90 (1906); Southern R. Co. v. Chambers, 126 Ga. 404, 55 S.E. 37, 7 L.R.A. (NS) 926 (1906); Sinclair Ref. Co. v. Meek, 62 Ga.App. 850, 10 S.E.2d 76 (1940); Duquesne Distilling Corp. v. Greenbaum, 135 Ky. 182, 121 S.W. 1026, 24 L.R.A.(NS) 955, 21 Am. Cas. 486 (1909); Fordham Coal Co. v. Carter, 269 Ky. 805, 108 S.W.2d 1007 (1937).

[7] 13 Am.Jur. 1053-54. And see Hines v. Gravins, 136 Va. 313, 112 S.E. 869, 118 S.E. 114 (1922); Bryan v. Fairfax Forest Mining & Mfg. Co., 89 W.Va. 314, 109 S.E. 323 (stating the rule) (1921); Citizens Gas & E. Co. v. Black, 95 Ohio St. 42, 115 N.E. 495, L.R.A. 1917D559 (1919); Miller v. W. P. Grant Co., 233 Mass. 140, 123 N.E. 618 (1919); Empire Cream Separator v. De Laval Dairy Supply Co., 75 N.J.L. 207, 67 A 711 (1907); Kharos v. Barron G. Collier, Inc., 171 App. Div. 388, 157 N.Y.S. 410 (1916).

Virginia. In *Barnes* v. *Hampton,*[8] the court used a Strict Scope of Employment Test. The defendant's driver at the time of the accident which injured the plaintiff was late for an appointment with the defendant and was far outside of his prescribed route of travel. The court held as a matter of law that the defendant was not liable saying:

> The doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the time and in respect to the very transaction out of which the injury arose.

In addition to the Strict Scope of Employment Test, the Court in *Manuel* v. *Cassada,*[9] a case involving an action brought against a partnership for malicious prosecution, recognized the Furtherance of the Master's Business Test,[10] and the Acts incident to the Course of Employment Test. Speaking of the latter test, the court said:

> But the responsibility of the master is not limited to those acts of the servant which promote the object of the employment. If the act is done during the course of the employment and incident thereto the master may be liable, although the conduct of the servant may be ill-advised or ill-tempered and detrimental to the interest of the master.

In the principal case the court reversed the judgment and remanded the case for a new trial on the failure of the trial court to give a jury charge on impulse or emotion as a correlative test of the scope of employment. The court cited *Davis* v. *Merrill*[11] and *Tri-State Coach Corp.* v. *Walsh*[12] as cases in which the court approved of the inclusion within the scope of employment of those acts arising from an impulse or emotion incident to the performance of the master's business.

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[8] 149 Va. 740, 744, 141 S.E. 836, 837 (1928).

[9] 190 Va. 906, 913, 59 S.E.2d 47, 18 A.L.R.2d 395 (1950).

[10] At page 913 of the official report the court citing *Cooley on Torts,* 4th Ed. Vol 3, Sec. 396, pp. 68, 69, said: "The fact that the act was done during the time of the servant's employment is not conclusive, nor is the motive of the servant so. The question is: Was the act done by virtue of the employment and in furtherance of the master's business?"

[11] 133 Va. 69, 112 S.E. 628 (1922).

[12] 188 Va. 299, 49 S.E.2d 363 (1948).

In the *Davis* case, *supra,* and the *Tri-State Coach Corp.* case, *supra,* the impulse or emotion arose out of an act which was within the scope of employment and the defendant was held liable. In *Cary* v. *Hotel Reuger, Inc.,*[13] the impulse or emotion arose out of an act outside of the scope of employment and the defendant was found not liable.

Thus in Virginia the requirements for a proper charge to the jury on the scope of employment question are as follows: The jury must initially consider whether or not the act of the defendant's servant occurred within the course of the master's business. In determining this fact the jury should be guided by the Strict Scope of Employment Test and the Furtherance of the Master's Business Test. If the jury finds that the act which the defendant's servant was engaged in performing at the time the cause of action arose was not within the scope of his employment, they shall find the defendant not liable. However, if the jury finds that the defendant's servant was acting within the scope of employment, they must then consider whether the impulse or emotion incident to the act upon which the cause of action is predicated, was itself within the scope of employment. If the jury finds that it was, they shall find for the plaintiff; otherwise, their verdict shall be for the defendant.

D. C. R.

CONTRACTS—INTERFERENCE WITH RIGHT OF CONTRACT

The conflicts arising from the interference of free competition with the individual's right to contract has long been a difficult problem to solve within the frame-work of legal principles. Attempts to formulate a concrete doctrine on this subject have induced, in many instances, more confusion than clarification.[1]

The key issue involved in these disputes is the extent to which interference with contractual relations may be privileged as a protection of defendants interests or as a benefit to society.

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[13] 195 Va. 980, 81 S.E.2d 421 (1952).

[1] See Sayre, *Inducing Breach of Contract,* 36 Harv. L., Rev. 663 (1923); Holmes, *Privilege, Malice, and Intent,* 8 Harv. L. Rev. 1 (1894); *Restatement of Torts,* Secs. 762, 766, 767, 771, 772; Note, 9 Va. L. Rev. 212 (1923).