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Insurance Salesman - Independent Contractors or Servants

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the attempts to clarify both the quality and the extent of liability or radio defamation have shown a lack of uniformity.[24]

The growing tendency to view defamation by radio as constituting libel rather than slander might indicate a result more favorable to the plaintiff, and to that end the instant case has contributed to a more desirable result. It remains to be seen whether courts will sweep away established doctrines which are at the present inadequate to cover the problems of defamation arising under radio communication.

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INSURANCE SALESMEN—INDEPENDENT CONTRACTORS OR SERVANTS

James A Rainwater was an insurance salesman for defendant. He was to collect premiums for industrial policies in a prescribed area called a debit, and was free to sell ordinary life insurance anywhere in the State of Georgia. He had called on a prospect outside his debit, and was returning to the home office to pick up papers necessary for his work in the debit, when he negligently struck and killed plaintiff's husband. A verdict for plaintiff resulted in a judgment of $7,000.00. *Held,* affirmed. There was sufficient evidence for the jury to find that the defendant company exercised such control over Rainwater's employment as to be liable for his torts. *Gulf Life Ins. Co. v. McDaniel,* 43 S.E. (2d) 784 (Ga. Err. & App. 1947).

The dissent entered by Judge Felton points up a problem of growing importance due to modern insurance methods. The majority had agreed that Rainwater may have been only an independent contractor while outside his debit, but held that he had re-entered the role of a servant at the time of the accident. Judge Felton felt that he had not as yet re-entered; that his going to the office was but preparation to engage in debit business.

In considering the liability of insurance companies for the torts of their insurance salesmen, the courts have found or denied liability on the basis of the salesmen being either servants or independent contractors.

Control as to movements, methods, and freedom to discharge have been the most widely used criteria to establish the master-servant relationship.[1]

An independent contractor has been defined as one representing another only as to result of work, and not as to means whereby it is to be accomplished.[2]

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24. Oreg. Comp. Laws, Ann. sec. 23-437 (1940); Wash. Rev. Stat. Ann. sec. 2424 (Remington, 1932). (Washington and Oregon have attached penalties to the quality of the wrong and so have brought it within the field of criminal libel); Mont. Rev. Codes, sec. 5694.1 (Darlington, Supp. 1939). (Montana restricts the liability of the owner or lessee of the radio station in the absence of actual malice); Iowa Code, sec. 659.5 1946) (Iowa uses the due care test to determine the liability of a station owner or lessee.)

1. See cases collected in 116 A. L. R. 1391.

2. American Savings Life Ins. Co. v. Riplinger, 249 Ky. 8, 60 S. W. (2d) 115 (1933).

In a Wyoming case, *Stockwell v. Morris*,[3] the employee sold washing machines instead of insurance, but the case is quite analagous on principle. The court stated a preference for the use of the terms, servant and agent rather than servant and independent contractor, defining a servant as one who performs personal services for another who controls the servant's physical movements, and an agent as one who represents the employer in contractual negotiations or similar transactions. The court stated, also, that an employee may act in both relationships, and may act in both simultaneously, but if the employer is to be liable, the employee must be acting as a servant in regard to the act which occasioned the injury. Applying this rule, the court held that the driving of an automobile was only incidental to the employment, although necessary, and since the employer had no control over this portion of the work, the employer was not liable for the employee's negligent operation of the automobile, yet it was this minor factor which was the cause of the injury.[4]

Most courts have held that insurance salesmen are independent contractors;[5] others have held them to be servants;[6] but many have been confronted with the problem of a dual relationship.[7]

When it is found that an employee may be in one relationship for certain pursuits, and in the other for other aspects of his duties, it is at once apparent that the question of liability of the employer cannot be answered until it is found in which relationship the employee stood at the time of his wrongdoing.

The courts have usually held that the employer is responsible only when the employee is acting as a servant at the very time of the injury and in respect of the very transaction out of which the injury arose.[8]

The change of the employee from his role as a servant to that of an independent contractor and back again must be considered in the light of decisions concerning servants who deviate or depart from their employment to satisfy their own purposes. It has been held that the deviation must be substantial enough to amount to an entire departure.[9]

The courts have used control as a basis for determining the point and time of departure or re-entry from or into the role of a servant.[10] The employee has been, in most cases, considered to have resumed the relationship of a servant where, after

3. 46 Wyo. 1, 22 P. (2d) 189 (1933).
4. The Texas Supreme Court in American Nat. Ins. Co. v. Denke, 128 Tex. 229, 95 S.W. (2d) 370 (1936) held the opinion written by Justice Blume in Stockwell v. Morris in great respect. It considers the opinion as the final answer to the problem and quotes from it at very great length.
5. Vert v. Metropolitan Life Ins. Co., 342 No. 629, 117 S.W. (2d) 252 (1938); American Nat. Ins. Co. v. Denke, 128 Tex. 229, 95 S.W. (2d) 370 (1936); Wesolowski v. John Hancock Mut. Life Ins. Co., 308 Pa. 117, 162 Atl. 166 (1932).
6. Gulf Life Ins. Co. v. McDaniel, 43 S.E. (2d) 784 (Ga. Err. & App. 1947); Hall v. Sera, 112 Conn. 291, 152 Atl. 148 (1930).
7. Vert v. Metropolitan Life Ins. Co., 342 Mo. 629, 117 S.W. (2d) 252 (1938); American Nat. Ins. Co. v. Denke, 128 Tex. 229, 95 S.W. (2d) 370 (1936).
8. Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141 (1880); Stockwell v. Morris, 46 Wyo. 1, 22 P. (2d) 189 (1933).
9. Loper v. Morrison, 57 Cal. App. 812, 134 P. (2d) 311 (1943).
10. Gulf Life Ins. Co. v. McDaniel, 43 S.E. (2d) 784 (Ga. Err. & App. 1947); Parks v. Maryland Casualty Co., 69 Ga. App. 720, 26 S.E. (2d) 562 (1943); Macon Dairies, Inc. v. Duhart, 69 Ga. App. 91, 24 S.E. (2d) 732 (1943).

the fulfiillment of his duties as an independent contractor, he is returning to resume his duties as a servant.[11] It is not necessary for him to have reached the zone of his employment or debit.

It is generally agreed that it is a question for the jury whether the employee was a servant or independent contractor at the time of the wrongdoing if there is sufficient evidence to support either finding.[12] Where employment appears, the burden is on the employer to establish an independent contractor relationship.[13] Control again is the determinant factor. The right of discharge is a circumstance of much importance.[14]

In reviewing the cases, it appears that in the majority, the insurance salesmen have been found to be independent contractors, and even where they occupy the dual relationship of the principal case, they have been found to be independent contractors when the accident occurred. This is not a result of a set rule of law that insurance salesmen are independent contractors per se, but rather, results from the facts in each case, indicating that the salesman was acting in that capacity.

ALLYN E. HENDERSON

APPLICATION OF F. L. S. A. TO OIL WELL DRILLERS

Plaintiff, an oil well driller, was employed at local wage rates to drill a well for defendant. Oil had been discovered in the hole but not in commercial quantities.[1] While so engaged, plaintiff requested that he be paid overtime wages pursuant to the Fair Labor Standards Act.[2] The defendant refused the request and ceased operations, stating that he could not afford to pay wages at the rate required by the Act. Oil was never produced in commercial quantities. In an action against the employer to recover overtime for the drilling already performed, an equal amount as liquidated damages, and attorney's fees, plaintiff sought to show that if any oil had been produced in paying quantities, it normally would have been shipped to Utah for refining. *Held,* that because oil was not produced in commercial quantities, the driller was not engaged in the "production of goods for commerce"[3] and hence plaintiff was not within the coverage of the Fair Labor Standards Act. *Atwater v. Gaylord* (Wyo. 1947) 184 P. (2d) 437.

11. 39 C. J. 1298, Sec. 1495; Whimster v. Homes, 177 Mo. App. 130, 164 S.W. 236 (1914); Barmore v. Vicksburg, S. & P. Ry., 85 Miss. 426, 38 So. 210 (1905); Glass v. Wise & McAlpin, 155 La. 170, 99 So. 409 (1923).
12. Standard Oil Co. v. Parkinson, 152 Fed. 681 (C. C. A. 8th 1907).
13. Income Life Ins. Co. v. Mitchell, 168 Tenn. 471, 79 S.W. (2d) 572 (1935).
14. Ibid.

1. Masterson v. Amarillo Oil Co., 253 S.W. 908 (Tex. C. A. 1923). The court defined "commercial quantities" as meaning "That the quantity discovered must be sufficient to pay the lessee a profit, though small, over operating expenses, although it may never repay the cost of the well and its operation, and the whole may result in a loss to the lessee."
2. 52 Stat. 1060 (1938), 29 U. S. C. A. sec. 201 (1942).
3. 52 Stat. 1060 (1938) 29 U. S. C. A. sec. 201 (1942).