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COMMENT

LIABILITY OF OIL COMPANIES FOR THE TORTS OF SERVICE STATION OPERATORS*

The purpose of this comment is to examine the tests used by courts in determining when a nonnegligent oil company is liable for the torts of its service station operators.[1] When suing an oil company, the plaintiff usually claims that the service station operator is the company's servant[2] or that the company is estopped from denying that the operator is its servant.[3] This comment will discuss the test used by the courts to distinguish between servants and independent contractors and the test used to determine if the company is estopped. Using Professor Guido Calabresi's suggested goals of a system of tort law,[4] an attempt will be made to show that the courts' tests are not sound bases for decision and that they often lead to the wrong outcome. Finally, suggestions will be made in regard to the manner in which these cases might be approached in order to accomplish these goals and policies.

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* The author acknowledges the helpful criticisms of this paper made by Dr. James Pikl, Head of the Department of Economics at the University of Wyoming.

1. Other articles which have dealt with various aspects of this problem include: Annot., 83 A.L.R.2d 1282 (1962); Annot., 116 A.L.R. 457 (1938); Comment, *Master and Servant—The Filling Station Operator as Independent Contractor*, 38 MICH. L. REV. 1063 (1940); Comment, *Agency—Liability of National Oil Companies for Acts of Service Station Operators*, 43 KY. L.J. 543 (1955); Comment, *Liability of a Franchisor for Acts of the Franchisee*, 41 S. CAL. L. REV. 143 (1968); Comment, *Torts—Liability of Lessor—Lease of a "Company" Filling Station*, 20 TEXAS L. REV. 385 (1942); Comment, *Liability of Oil Company for Its Lessees Torts*, 1965 U. ILL. L.F. 915 (1965); Comment, *A Franchisor's Liability for the Torts of his Franchisee*, 5 U. SAN FRANCISCO L. REV. 118 (1970); Comment, *Dealer Franchising in the Gasoline Industry: Current Developments*, 4 U. SAN FRANCISCO L. REV. 65 (1969); Comment, *Tort Liability of Oil Companies for Acts of Service Station Operators*, 3 VAND. L. REV. 597 (1950); Comment, *Vicarious Liability of Filling Station Oil Companies Under Respondeat Superior*, 3 WASHBURN L.J. 88 (1964).
2. *See, e.g.*, Becker v. Aschen, 344 Mo. 1107, 131 S.W.2d 533 (1939); Clark v. Texaco, Inc., 382 S.W.2d 953 (Tex. Civ. App. 1964); Humble Oil & Refining Co. v. Martin, 148 Tex. 175, 222 S.W.2d 995 (1949).
3. *See, e.g.*, Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971); Standard Oil Co. v. Gentry, 241 Ala. 62, 1 So. 2d 29 (1941); Cawthon v. Phillips Petroleum Co., 124 So. 2d 517 (Fla. 1960); Reynolds v. Skelly Oil Co., 227 Iowa 163, 287 N.W. 823 (1939).
4. CALABRESI, THE COSTS OF ACCIDENTS 24-33 (1970).

SERVANT—INDEPENDENT CONTRACTOR

The courts have generally approached this problem by deciding whether the service station operator is the company's servant acting within the scope of his employment or an independent contractor.[5] When the operator is classified as a servant, the company is held liable.[6] When he is classified as an independent contractor, the company is not held.[7] As a basis of classification, the courts have adopted the control test.[8] If the oil company controls the details of the operation of the station or the physical conduct of the operator in performing his duties, the operator is classified as a servant.[9] If the company cannot control the means and methods of operating the station and cannot control the operator's physical conduct, the operator is classified as an independent contractor,[10] and the company is not liable for his torts.

5. Other theories of liability have been pressed. These include: Premises liability of the lessor, Hayes v. Richfield Oil Corp., 38 Cal. 2d 375, 240 P.2d 580 (1952); Drum v. Pure Oil Co., 184 So. 2d 196 (Fla. 1966); Elkins v. Husky Oil Co., 153 Mont. 159, 455 P.2d 329 (1969); and the nondelegable duty and inherently dangerous activities exceptions to the rule of nonliability for the torts of independent contractors, Coe v. Esau, 377 P.2d 815 (Okla. 1963); Lollis v. Humble Oil & Refining Co., 285 S.W.2d 249 (Tex. Civ. App. 1955). The problem of whether the operator's act was within the scope of his employment has been raised in only a few cases, Monetti v. Standard Oil Co., 195 So. 89 (La. 1940); Becker v. Aschen, 344 Mo. 1107, 131 S.W.2d 533 (1939); Buck v. Standard Oil Co. of N.Y., 224 App. Div. 299, 230 N.Y.S. 192 (1928); Magnolia Petroleum Co. v. Guffey, 129 Tex. 293, 102 S.W.2d 408 (1937).

6. Brenner v. Socony Vacuum Oil Co., 236 Mo. App. 524, 158 S.W.2d 171 (1942); Becker v. Aschen, 344 Mo. 1107, 131 S.W.2d 533 (1939); Coffman v. Shell Petroleum, 228 Mo. App. 727, 71 S.W.2d 97 (1934); Greene v. Spinning, 48 S.W.2d 51 (Mo. Ct. App. 1931); Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939); Clark v. Texaco, Inc., 382 S.W.2d 953 (Tex. Civ. App. 1964); Humble Oil & Refining Co. v. Martin, 148 Tex. 175, 222 S.W.2d 995 (1949); Texas Co. v. Freer, 151 S.W.2d 907 (Tex. Civ. App. 1941).

7. Smith v. Cities Service Oil Co., 346 F.2d 349 (7th Cir. 1965); Apple v. Standard Oil, Division of American Oil Co., 307 F. Supp. 107 (N.D. Calif. 1969); Ark. Fuel Oil Co. v. Scaletta, 200 Ark. 645, 140 S.W.2d 684 (1940); Hoover v. Sun Oil Co., 212 A.2d 214 (Del. 1965); Reynolds v. Skelly Oil Co., 227 Iowa 163, 287 N.W. 823 (1939); Grieving v. La Plante, 156 Kan. 196, 131 P.2d 898 (1942); Donovan v. Standard Oil Co., 197 So. 320 (La. 1940); Brown v. Standard Oil Co., 309 Mich. 101, 14 N.W.2d 797 (1944); Shell Petroleum v. Linham, 163 So. 839 (Miss. 1935); Elkins v. Husky Oil Co., 153 Mont. 159, 455 P.2d 329 (1969); Hudson v. Gulf Oil Co., 215 N.C. 422, 2 S.E.2d 26 (1939); Coe v. Esau, 377 P.2d 815 (Okla. 1963); Green v. Independent Oil Co., 414 Pa. 477, 201 A.2d 207 (1964); Westre v. Debuhr, 82 S.D. 276, 144 N.W.2d 734 (1966); Texas Co. v. Wheat, 140 Tex. 468, 168 S.W.2d 632 (1943).

8. *See supra* notes 6 and 7.

9. *See, e.g.*, Brenner v. Socony Vacuum Oil Co., 236 Mo. App. 524, 158 S.W.2d 171 (1942); Texas Co. v. Freer, 151 S.W.2d 907 (Tex. Civ. App. 1941).

10. *See, e.g.*, Ark. Fuel Oil Co. v. Scaletta, 200 Ark. 645, 140 S.W.2d 684 (1940); Hoover v. Sun Oil Co., 212 A.2d 214 (Del. 1965).

The relationships between the oil companies and the service station operators fall into three categories:[11]

1. Company operated stations—the oil company owns or leases the station, and the station is operated by employees who are paid on a salary basis. In these cases, the master-servant relationship is not denied, and the oil company is liable for the torts of the operators. These stations accounted for only 2% of the national total in 1957,[12] and they are now used primarily for training operators, testing merchandising methods, and promotional purposes.[13]
2. Dealer operated stations—the company owns or leases the station and rents it along with the necessary equipment to the dealer. This arrangement usually involves a lease, equipment rental agreement, and a supply contract.[14]
3. "Contractor" stations—the station operator owns or leases the facilities and simply has a supply contract and possibly an equipment rental agreement with the oil company.[15]

These last two categories are the areas in which the problem of the oil company's liability arises. The courts generally look to the terms of these different agreements to discover whether the necessary control exists. These agreements usually provide that:[16]

1. The lease or supply agreement is for one year initially and thereafter from year to year subject to cancella-

11. McLEAN AND HAIGH, THE GROWTH OF INTEGRATED OIL COMPANIES 476-8 (1954).
12. CHAZEAU AND KAHN, INTEGRATION AND COMPETITION IN THE PETROLEUM INDUSTRY 426 (1959).
13. McLEAN AND HAIGH, *supra* note 11, at 492.
14. *Id.* at 477.
15. *Id.* at 478.
16. The sources for these standard leases and dealer agreements are:
Conoco—ROSENFIELD, THE LAW OF FRANCHISING 329-42 (1970) (hereinafter referred to as "Conoco Lease" and "Conoco Motor Fuels Agreement").
Sinclair—*Hearings on the Use of Games of Chance in Gasoline Marketing and Their Impact upon Small Business before the Subcommittee on Activities of Regulatory Agencies of the House Select Committee on Small Business*, 90th Cong., 2d Sess., 41-3 (1968) (hereafter referred to as "Sinclair Lease").
Texaco—*Hearings on the Use of Games of Chance in Gasoline Marketing and Their Impact upon Small Business before the Subcommittee on Activities of Regulatory Agencies of the House Select Committee on Small Business*, 90th Cong., 2d Sess., 41-3 (1968) (hereafter referred to as "Texaco Lease").
American Oil Co.—*Hearings on Gasoline Marketing Practices before Subcommittee Number Four on Distribution Problems of the House Select Committee on Small Business*, 89th Cong., 1st Sess., 1179-84 (1965) (hereafter referred to as "Amoco Lease" and "Amoco Dealer Agreement").

tion by written notice given ten to sixty days prior to the date of termination.[17]

2. The operator will diligently promote the sale of the company's products.[18]
3. The operator will keep the premises clean and attractive.[19]
4. The operator will use the premises for service station purposes and not conduct additional business thereon without company consent.[20]
5. The operator will pay all licenses, taxes, and operating expenses.[21]
6. The operator will pay as rent a certain number of cents per gallon; however, a certain maximum and minimum amount of rent is usually set.[22]
7. The operator may only sell the oil company's product under its trademark, and, if he ceases to buy the company's products, he must remove all company signs and trademarks.[23]
8. The oil company will not be liable for any injuries arising from the operation of the station, and the operator agrees to indemnify the company for any amount it may be required to pay.[24]
9. The operator agrees to buy a certain amount of the company's product.[25]
10. The operator is an independent businessman, and the oil company has no right of control over the business or operation of the station.[26]
11. The lease or sales agreement may be cancelled if:[27]
    a. The operator fails to carry out all of his covenants.
    b. The operator fails to pay rent in any period.

17. Conoco Lease § 7; Texaco Lease § 2; Amoco Lease, first para.
18. Sinclair Lease § 3; Conoco Lease § 3D.
19. Conoco Lease §§ 3A, 6; Sinclair Lease §§ 4, 8; Texaco Lease § 5; Amoco Lease § 2.
20. Conoco Lease § 3E; Texaco Lease § 4; Amoco Lease § 4.
21. Conoco Lease § 6; Sinclair Lease § 9; Texaco Lease §§ 6, 9; Amoco Lease § 2.
22. Conoco Lease § 4; Sinclair Lease § 6; Texaco Lease § 3; Amoco Lease, first para.
23. Conoco Lease § 5; Amoco Dealer Agreement § 7.
24. Conoco Lease § 8; Sinclair Lease §§ 10-11; Amoco Lease § 3.
25. Conoco Motor Fuels Agreement § 1; Texaco Agreement of Sale § 7; Amoco Dealer Agreement § 1.
26. Conoco Lease § 8; Amoco Lease § 7.
27. Conoco Lease § 7B; Sinclair Lease § 23; Texaco Lease § 10; Amoco Lease § 9.

c. The station is abandoned for two or three days.
d. The operator becomes insolvent or bankrupt.

12. The operator will honor company credit cards.[28]
13. The company has the right to inspect the premises and equipment.[29]

In the search for the necessary control, the courts then consider the terms of the franchise's agreement, factors such as advertising and telephone listings, and whether the company has actual control over the operations or just the right of control.[30] The courts work through lists of various sizes and enumerate the facts which they believe show the presence or absence of control.

Interestingly, the presence or absence of no one fact or combination of facts necessarily means that the operator will be classified as an independent contractor rather than a servant. The following facts are often discussed in the cases:

1. indemnity provisions,[31]
2. agreements to honor company credit cards,[32]
3. inspections of the station and operational suggestions made by company representatives,[33]

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28. Conoco Lease § 3F.
29. Amoco Dealer Agreement § 7.
30. Schrader, *Agency—Liability of National Oil Companies for Acts of Service Station Operators*, 43 KY. L.J. 543 (1955).
31. Held to be servant: Brenner v. Socony Vacuum Oil Co., 236 Mo. App. 524, 158 S.W.2d 171 (1942); Coffman v. Shell Petroleum, 228 Mo. App. 727, 71 S.W.2d 97 (1934). Held to be independent contractor: Ark. Fuel Oil Co. v. Scaletta, 200 Ark. 645, 140 S.W.2d 684 (1940); Westre v. Debuhr, 82 S.D. 276, 144 N.W.2d 734 (1966).
32. Held to be servant: Brenner v. Socony Vacuum Oil Co., 236 Mo. App. 524, 158 S.W.2d 171 (1942); Becker v. Aschen, 344 Mo. 1107, 131 S.W.2d 533 (1939); Greene v. Spinning, 48 S.W.2d 51 (Mo. Ct. App. 1931); Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939); Texas Co. v. Freer, 151 S.W.2d 907 (Tex. Civ. App. 1941); Gulf Refining Co. v. Rogers, 57 S.W.2d 183 (Tex. Civ. App. 1933). Held to be independent contractor: Smith v. Cities Service Oil Co., 346 F.2d 349 (7th Cir. 1965); Miller v. Sinclair Refining Co., 268 F.2d 114 (5th Cir. 1959); Apple v. Standard Oil, Division of American Oil Co., 307 F. Supp. 107 (N.D. Calif. 1969); Ark. Fuel Oil Co. v. Scaletta, 200 Ark. 645, 140 S.W.2d 684 (1940); Hudson v. Gulf Oil Co., 215 N.C. 422, 2 S.E.2d 26 (1939); Coe v. Esau, 377 P.2d 815 (Okla. 1963).
33. Held to be servant: Brenner v. Socony Vacuum Oil Co., 236 Mo. App. 524, 158 S.W.2d 171 (1942); Texas Co. v. Freer, 151 S.W.2d 907 (Tex. Civ. App. 1941); Gulf Refining Co. v. Rogers, 57 S.W.2d 183 (Tex. Civ. App. 1933). Held to be independent contractor: Smith v. Cities Service Oil Co., 346 F.2d 349 (7th Cir. 1965); Miller v. Sinclair Refining Co., 268 F.2d 114 (5th Cir. 1959); Apple v. Standard Oil, Division of American Oil Co., 307 F. Supp. 107 (N.D. Calif. 1969). Hayes v. Richfield Oil Corp., 38 Cal. 2d 375, 240 P.2d 580 (1952); Reynolds v. Skelly Oil Co., 227 Iowa 163, 287 N.W. 823 (1939); Coe v. Esau, 377 P.2d 815 (Okla. 1963); Texas Co. v. Wheat, 140 Tex. 468, 168 S.W.2d 632 (1943).

4. provisions requiring the operators to hire their own employees and set their own hours of operation,[34]
5. provisions allowing termination at will or with 10 days notice,[35]
6. exclusive sale of the company's products, either by agreement or practice,[36]
7. price recommendations made by the company.[37]

As an examination of footnotes 31 to 37 will indicate, none of these facts is determinative of the company's liability or non-liability. For example, an agreement to indemnify is as likely to be found where the operator is held to be a servant as it is where he is held to be an independent contractor.[38]

It also appears that there is no basis for distinguishing the cases on the grounds that the plaintiff was probably relying on the oil company rather than the operator when he decided to deal with the particular station. These plaintiffs, who have been allowed to recover even though they probably did not rely on the fact that the oil company was operating the station, include those who were injured when walking by the station and the operator's employees who were injured in

34. Held to be a servant: Monetti v. Standard Oil Co., 195 So. 89 (La. 1940); Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939). Held to be independent contractor: Smith v. Cities Service Oil Co., 346 F.2d 349 (7th Cir. 1965); Drum v. Pure Oil Co., 184 So. 2d 196 (Fla. 1966); Donovan v. Standard Oil Co., 197 So. 320 (La. 1940); Brown v. Standard Oil Co., 309 Mich. 101, 14 N.W.2d 797 (1944); Rothrock v. Roberson, 214 N.C. 26, 197 S.E. 568 (1938); Green v. Independent Oil Co., 414 Pa. 477, 201 A.2d 207 (1964); Westre v. Debuhr, 82 S.D. 276, 144 N.W.2d 734 (1966).
35. Held to be servant: Becker v. Aschen, 344 Mo. 1107, 131 S.W.2d 533 (1939); Texas Co. v. Freer, 151 S.W.2d 907 (Tex. Civ. App. 1941); Gulf Refining Co. v. Rogers, 57 S.W.2d 183 (Tex. Civ. App. 1933). Held to be independent contractor: Ark. Fuel Oil Co. v. Scaletta, 200 Ark. 645, 140 S.W.2d 684 (1940); Shell Petroleum v. Linham, 163 So. 839 (Miss. 1935); Rothrock v. Roberson, 214 N.C. 26, 197 S.E. 568 (1938).
36. Held to be servant: Brenner v. Socony Vacuum Oil Co., 236 Mo. App. 524, 158 S.W.2d 171 (1942); Coffman v. Shell Petroleum, 228 Mo. App. 727, 71 S.W.2d 97 (1934); Cooper v. Graham, 231 S.C. 404, 98 S.E.2d 843 (1957); Texas Co. v. Freer, 151 S.W.2d 907 (Tex. Civ. App. 1941); Gulf Refining Co. v. Rogers, 57 S.W.2d 183 (Tex. Civ. App. 1933). Held to be independent contractor: Smith v. Cities Service Oil Co., 346 F.2d 349 (7th Cir. 1965); Donovan v. Standard Oil Co., 197 So. 320 (La. 1940); Shell Petroleum v. Linham, 163 So. 839 (Miss. 1935); Elkins v. Husky Oil Co., 153 Mont. 159, 455 P.2d 329 (1969); Hudson v. Gulf Oil Co., 215 N.C. 422, 2 S.E.2d 26 (1939); Green v. Independent Oil Co., 414 Pa. 477, 201 A.2d 207 (1964).
37. Held to be servant: Becker v. Aschen, 344 Mo. 1107, 131 S.W.2d 533 (1939); Coffman v. Shell Petroleum, 228 Mo. App. 727, 71 S.W.2d 97 (1934); Cooper v. Graham, 231 S.C. 404, 98 S.E.2d 843 (1957); Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939); Clark v. Texaco, Inc., 382 S.W.2d 953 (Tex. Civ. App. 1964). Held to be independent operator: Elkins v. Husky Oil Co., 153 Mont. 159, 455 P.2d 329 (1969).
38. *See supra* note 31.

their work.[39] Similar plaintiffs have, however, been denied recovery.[40] Where reliance on the company would be likely, as for example where the plaintiff was from out of state or out of town, the company is held liable in some cases[41] and in other cases it is not.[42]

The courts may, of course, differ on the application of principles of law to the same facts; however, the almost complete lack of any correspondence between sets of facts and the results of these cases indicates that this is not just an occasional instance of disagreement. Rather, it seems that control is not the determinative factor in these cases.

Mechem suggests that the courts stress the control factor according to their predilection for or against allowing recovery.[43] If so, the search should be for the source of these predilections. The courts, however, have not been helpful in this regard, for they almost universally fail to articulate any policy basis for their decisions. The most extensive policy explanation encountered in these cases was in *Levine v. Standard Oil Co., Inc., in Kentucky*.[44] The court held that the operator was an independent contractor and said, "A contrary ruling would upset without any sound reason the foundations of innumerable business relationships."[45]

The courts appear to be getting bogged down in esoteric discussions of control. The control test, however, does not appear to help in answering the question of why the courts should take money from the oil company and give it to the plaintiff.

39. Cooper v. Graham, 231 S.C. 404, 98 S.E.2d 843 (1957); Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939); Humble Oil & Refining Co. v. Martin, 148 Tex. 175, 222 S.W.2d 995 (1949).

40. Ark. Fuel Oil Co. v. Scaletta, 200 Ark. 645, 140 S.W.2d 684 (1940); Hayes v. Richfield Oil Corp., 38 Cal. 2d 375, 240 P.2d 580 (1952); Brown v. Standard Oil Co., 309 Mich. 101, 14 N.W.2d 797 (1944); Shell Petroleum v. Linham, 163 So. 839 (Miss. 1935).

41. Clark v. Texaco, Inc., 382 S.W.2d 953 (Tex. Civ. App. 1964); Texas Co. v. Freer, 151 S.W.2d 907 (Tex. Civ. App. 1941).

42. Smith v. Cities Service Oil Co., 346 F.2d 349 (7th Cir. 1965); Miller v. Sinclair Refining Co., 268 F.2d 114 (5th Cir. 1959); Apple v. Standard Oil, Division of American Oil Co., 307 F. Supp. 107 (N.D. Cal. 1969); Elkins v. Husky Oil Co., 153 Mont. 159, 455 P.2d 329 (1969).

43. MECHEM, OUTLINES OF THE LAW OF AGENCY § 441 (1952).

44. 249 Miss. 651, 163 So. 2d 750 (1964).

45. *Id.* at 752.

ESTOPPEL

Most courts, which have decided cases dealing with the oil companies' liability for service station operators' torts, have not found the necessary control and have held the operator to be an independent contractor.[46] In response to this plaintiffs have begun to rely on theories of agency by estoppel and apparent authority. While the *Restatement of Agency* recognizes a distinction between these two concepts,[47] the courts tend to blend them into one test. Essentially the courts look for the following: the "principal" manifests to a third person that another is his servant; the third person reasonably relies on this manifestation; and the manifestation causes him to deal with the "servant" whereupon he is injured by the "servant's" tortious conduct.[48]

A division of authority appears to be developing in these paralleling the courts' division over the application of the control test. The plaintiff usually claims that he was induced to deal with the service station operator because of the presence of company signs, trademarks, uniforms, and nationwide advertising.[49] One line of cases holds that the company is estopped because as a matter of law the court cannot say that it is unreasonable for the plaintiff to rely on these signs as representations that the operator is the oil companys' servant.[50] A larger number of courts have held as a matter of law that it is unreasonable for the plaintiff to rely on these signs as indicia of a master-servant relationship because it is a "matter of common knowledge" that these signs are displayed by independent dealers and that they only indicate that the oil company's products are sold at the station.[51]

46. *See* Annot., 83 A.L.R.2d 1282 (1962); Annot., 116 A.L.R. 457 (1938).

47. RESTATEMENT (SECOND) OF AGENCY § 8 at 32 (1958).

48. Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971).

49. The RESTATEMENT OF AGENCY recognizes that the manifestation may be made to the community by signs and advertising. RESTATEMENT (SECOND) OF AGENCY § 8 at 31 (1958).

50. *See, e.g.,* Gizzi v. Texaco, Inc., *supra* note 48; Standard Oil Co. v. Gentry, 241 Ala. 62, 1 So. 2d 29 (1941).

51. Miller v. Sinclair Refining Co., 268 F.2d 114 (5th Cir. 1959); Apple v. Standard Oil, Division of American Oil Co., 307 F. Supp. 107 (N.D. Cal. 1969); Drum v. Pure Oil Co., 184 So. 2d 196 (Fla. 1966); Reynolds v. Skelly Oil Co., 227 Iowa 163, 287 N.W. 823 (1939); Elkins v. Husky Oil Co., 153 Mont. 159, 455 P.2d 329 (1969); Westre v. Debuhr, 82 S.D. 276, 144 N.W.2d 734 (1966).

Previously most courts were saying, "Reasonable men could not possibly find that there was control." Now most of them are saying, "Reasonable men could not possibly differ on the conclusion that this reliance is unreasonable." Again, it appears that the courts' test does not explain why the courts should not take money from the oil companies.

PUBLIC POLICY

As the courts check through their list of facts which indicate whether there is or is not control, and as they declare what is or is not a matter of common knowledge, one gets the impression that they are ignoring the fact that by their decisions they either take money from the oil companies or they leave the plaintiffs to bear their losses. In either case, the courts are performing the function of loss allocation,[52] although they apparently do not choose explicitly to recognize this function.

Justice Blume stated in *Blessing v. Pitman*[53] that *respondeat superior* is applied "as a matter of public policy and economic requirements."[54] If there are policy and economic reasons for not taking money from the oil company in order to compensate the injured plaintiff, these reasons are not very well explained by simply stating that there was no control or that reliance was unreasonable. If the courts would look to the policy implications of their decisions and acknowledge that they are allocating losses, their holdings would be understandable and their assumptions and predilections would be available for analysis and criticism.

In performing their function of loss allocation the courts should consider what impact their decision will have on different goals and public policies, for each time they decide whether or not to pay an injured person for his loss they will be promoting or crippling some public policy.

The courts' decisions in the area will be analyzed in terms of Professor Calabresi's framework of goals which a system

52. PROSSER, TORTS § 2, at 6 (3d ed. 1964).
53. 70 Wyo. 416, 251 P.2d 243 (1952).
54. *Id.* at 246.

of tort law should seek to accomplish.[55] He suggests that the goals of a system of accident law should be:

1. *Justice.*[56] Calabresi recognizes the ambiguous nature of this goal; however, he treats it primarily as a restraint on the accomplishment of his second goal of the reduction of accident costs by requiring consistency and nonviolation of the moral framework of the society.

2. *Reduction of Accident Costs.*[57] There are some activities, for example driving, which are so socially desirable that we will not give them up simply because they cause injuries. At some point the societal costs of avoiding accidents, *e.g.,* by giving up driving and all the benefits dependent upon it, exceed the societal costs of the injuries themselves. In a sense we actually decide *for* injuries when the point is reached where the societal benefits of continuing the activity which causes the injuries outweigh the societal costs of the injuries.[58] To reach this point of an optimum level of injuries, three subgoals may have to be achieved:

    a. *Primary Accident Cost Reduction.*[59] This requires a reduction in the number and severity of accidents. This may be done in two ways:

        1) Specific Deterrence—costs may be reduced by forbidding specific acts thought to cause accidents.

        2) General Deterrence—cost may be reduced by making activities which cause accidents more expensive and thereby less attractive to those who wish to engage in them.

    b. *Secondary Accident Cost Reduction.*[60] This subgoal aims at reducing the societal costs of accidents by:

55. CALABRESI, THE COSTS OF ACCIDENTS 24-33 (1970).
56. *Id.* at 24, 292.
57. *Id.* at 26-27.
58. *Id.* at 213.
59. *Id.* at 26.
60. *Id.* at 39-40.

1) Loss Spreading—societal cost may be reduced by distributing the loss widely rather than leaving it on the individual. This is based on the idea that taking a large sum from one person is more likely to result in economic dislocation and, therefore, avoidable social costs than is distributing the loss widely.

2) Deep Pocket Method—societal costs can be reduced by placing the losses on those who are least likely to suffer economic dislocation as a result of bearing them.

c. *Tertiary Cost Reduction.*[61] Societal costs may be reduced by reducing the cost of administering our treatment of accidents.

The courts' decisions in cases involving suits by an injured person against a nonnegligent oil company should serve to accomplish these goals. The goal of reducing the costs of accidents and its three subgoals will be considered and, using these goals as a framework, an attempt will be made to determine whether the injured plaintiff, the oil company, or the service station operator should bear the loss. The goal of justice will be treated, as Calabresi suggests, as a restraint on the achievement of these other goals.

PRIMARY ACCIDENT COST REDUCTION

In order to achieve a reduction in the number and severity of these accidents through general deterrence, the costs of these accidents must be internalized, that is, the cost of engaging in the injury-causing activity must reflect the cost of the accidents.[62] If this is done, those who wish to engage in the activity must evaluate this cost and either decide not to engage in the activity, decide to try to reduce the cost by preventing the injury, or decide simply that it can economically absorb the cost. If the activity causing the accident can externalize the cost, that is, force some other activity to pay this cost, the cost of engaging in the injury-causing activity

61. *Id* at 28.
62. *Id.* at 144.

will not reflect the accident costs. Thus people in choosing to engage in the activity will not have to consider the costs of these accidents, and they will not be deterred from entering the market, and the number and severity of accidents would not be decreased by the market's mechanism.

If the cost of the injury is placed on the injured person, the activity of dealing with service stations and buying petroleum products will reflect this cost. It seems, however, that this cost would probably be externalized by the injured person. In order to account for the costs, the injured person must have some way of foreseeing and evaluating the risks involved in the activity.[63] The injured person is better aware than the oil company or the service station operator of the impact an accident would have on his particular economic position, but he probably has inadequate knowledge to be able to accurately evaluate the risks involved in dealing with service stations, and he does not have easy access to such information. Since he cannot accurately evaluate these risks and costs, he will not properly account for them in determining whether to enter the market. Since the injured persons cannot properly evaluate these risks and costs, they will not secure the necessary funds to compensate themselves for their injuries. This leads to externalization by transfer.[64] The cost is then passed on to the taxpayers through various welfare and social insurance programs. The market mechanism will, therefore, not operate to reduce the number and severity of these accidents.

If the oil company is held liable, it cannot externalize the costs. First, there would be no externalization through inadequate knowledge. The oil companies are able to evaluate the risks of their business and accurately determine what the costs will be. Secondly, unlike the injured person without insurance, the oil companies do have money which the courts can take away. If they are held liable, they stand to lose money, and they will take steps to minimize that loss. By allocating the costs to the oil companies, the courts will force the companies to decide whether it will cost the companies less to take steps to reduce injuries by tightening inspection procedures

63. *Id.* at 148.
64. *Id.* at 147.

and company operating standards, to eliminate the franchise system of marketing completely, to insure against these injuries with a private insurer, to self-insure by raising prices, or to drop out of the market. At the present time the companies are often allowed to externalize these costs because they are not held liable. Therefore, they do not have to enter into these considerations as to how they might reduce the costs of accidents. If the courts hold them liable, they must internalize these costs.

The very existence of cases where the injured person is suing the oil company indicates that some service station operators do not have to consider the costs of these injuries, for they are probably judgment proof. The operator who does not have sufficient funds to cover the injury externalizes the cost of the injury and does not have to account for them in deciding whether to enter the market as a service station operator. The operator, simply because he is constantly in the environment of the station, would not externalize the costs as a result of inadequate knowledge of and inability to evaluate the risks of his situation. The operator can externalize the cost only if he is insolvent.

From the point of view of general deterrence, the oil company is superior to the injured person and the potentially insolvent service station operator as a loss bearer because it must internalize these costs and decide how to deal with them. If the service station operator is solvent, it becomes more difficult to choose between the oil company and the operator as far as general deterrence is concerned. Both are able to evaluate the risks of selling petroleum products, and both would have to figure out how to deal with these costs most economically.

If the loss is placed on the operators, they will probably account for the costs of these accidents by insuring. Their operating costs will be increased by this amount. This will tend to force the careless operators out of the market, for their operating costs will exceed those of the more careful operators who will have to pay less to insure. By imposing this cost on the operators, they will have to decide if it is economically feasible to take steps to prevent injuries or if it is only economically feasible to drop out of the market.

The careless operators might also be eliminated by placing the loss on the oil company. Since the companies' insurance premiums will also increase according to the number and severity of the accidents which occur at their stations, the companies will either fire those especially careless operators or revoke their franchising agreement.[65] Whether the costs are imposed upon the oil companies or the operators, the subgoal of general deterrence would be achieved.

From the standpoint of reducing the number and severity of accidents, it appears that the solvent service station operator is superior to the oil company. The company can, of course, set certain standards for operating the station and make inspections. The operator, however, is in a position to go beyond minimum standards and adopt practises which will lead to maximum safety. The operator is also constantly around the station and so can evaluate the risks of his business probably better than the oil company can by periodic inspections. Once the operator obtains insurance, he has internalized the costs of these accidents, and the market mechanism will operate to reduce the number of careless operators, and general deterrence will be accomplished.

Specific deterrence involves a collective or political decision to limit or restrict a particular activity, which, it is judged, causes the injuries. It takes the choice of whether or not to engage in the activity from the individual or company and out of the market economy. Specific deterrence may play a role in this area through a statute requiring gas to be sold only in certain containers or a statute requiring service station operators to have insurance before operating a station in the state. The specific deterrence approach does not answer the question of who would be the better risk bearer.

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65. Professor Morris notes that the employer can fire an independent contractor and thus discourage these injuries while a suit against a judgment proof contractor would not accomplish this goal. MORRIS, STUDIES IN THE LAW OF TORTS 278 (1952).

SECONDARY ACCIDENT COST REDUCTION

There are primarily two methods of reducing societal costs resulting from accidents, loss distribution and the deep pocket method. If the cost of the accident is left on the injured person, there would be no distribution of the loss unless the injured person has insurance. There may be unnecessary societal costs resulting from a requirement that the injured person insure because he is not able, as is the oil company, adequately to evaluate the risks of being harmed in the operation of the station. He may, therefore, purchase unnecessary insurance. In addition, the administrative costs of insuring that such a large number of people have insurance and of providing that insurance may be prohibitive. It seems then that forcing the individual to bear the loss would produce the social and economic disruption which this second goals seeks to avoid. The individual is also more likely to suffer economic dislocation as a result of bearing these losses than is an oil company with the deep pocket.

The oil company can avoid these unnecessary societal costs, caused by economic dislocation, by distributing most of the costs.[66] It may do so by purchasing insurance, in which case the cost of the insurance would be passed on to the consumer, or by self-insurance in which the oil company raises the prices of its products to the operators and consumers. Under the deep pocket method, placing the loss on the oil company is unlikely to cause the economic dislocations which would result from leaving the losses on many injured individuals.

The service station operator theoretically can also insure and raise his prices so as to distribute the loss. Because he is more familiar with his station, the operator may be able to evaluate the risks of his station better than the oil company and thus avoid procuring unneeded insurance. This is counter-

66. The demand for gasoline is fairly inelastic. The elasticity coefficient has been estimated at about .5. An elasticity coefficient of 1.0 would mean that the costs of these accidents would be shared equally between the oil company and the consumers, *i.e.*, the oil company could only pass along to the consumers one-half of these costs by raising the price of gasoline. A coefficient of .5 would mean that approximately three-fourths of the costs could be passed on to the consumer. HAMILTON, COMPETITION IN OIL 30 (1958); MCALLISTER, THE ELASTICITY OF DEMAND FOR GASOLINE IN THE STATE OF WASHINGTON (1956).

balanced by the oil company's ability to inspect and set certain rules for the operation of the station. The oil company may also be able to insure more cheaply because it has the economic power, which the operator lacks, to negotiate with insurance companies for lower rates. Because it can offer a larger volume of business to the insurance companies, the oil company need not settle for the adhesive contracts and fixed rate schedules facing the individual operator. It appears that the oil company, because of its countervailing power, probably can insure more cheaply than the operator. This eliminates a false cost of the activity of selling petroleum products at service stations—the excess costs of insuring—from the prices of the service station's products and services.[67] A reduction in the societal costs of accidents thereby results.

A careless operator probably cannot either spread the loss through an increase in prices or insurance without being forced out of business. This is exactly what is desired under the goal of general deterrence. The more careless operator will probably have more accidents, and his insurance will cost him more. He will evenutally be forced out of the market if he cannot reduce these costs. From the point of view of general deterrence, this is desirable for it eliminates the careless operators. There appears, however, to be a conflict here between general deterrence and the avoidance of social costs, for squeezing the operator out of the market may result in serious economic dislocations. In 1970 there was an annual turnover of 25% of all gasoline station dealers, and 50% of the dealers earned only $6,000 a year while working in excess of 75 hours a week.[68] The imposition of any additional cost is likely to increase the rate of turnover. These figures also indicate that the service station operator often does not have a deep pocket. Unlike the oil company he is subject to economic dislocation by being forced to bear these added costs for the individual operator would be destroyed by one uninsured loss.

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67. CALABRESI, *supra* note 55, at 164.

68. *Hearings on the Impact of Franchising on Small Business before the Subcommittee on Urban and Rural Economic Development of the Senate Select Committee on Small Business*, 91st Cong., 2d Sess., 3 (1970).

It seems that for the purpose of secondary accident cost reduction, the oil company would be the superior loss bearer. Its economic power would enable it to eliminate any excess insurance costs, and its deep pocket would prevent serious economic dislocations. The counterweight, however, involves the service station operator's potentially superior ability to evaluate the risks of his station and to thus purchase only the minimum necessary insurance.

TERTIARY ACCIDENT COST REDUCTION

Administration costs will probably be reduced from the present by consistently placing the loss on any one of the three possible loss bearers. If the injured person is forced to bear the loss, he will not sue. If the oil company knows that it will be held liable, it will settle. If only the station operator will be held liable, the injured person will sue only if the operator is solvent and in that case the operator would probably settle.

Presently, however, injured persons are encouraged to instigate litigation, and the oil companies are encouraged not to settle because of the indefiniteness of the courts' tests of control and estoppel. The present system of decision-making encourages litigation and increases administrative costs.

THE BETTER LOSS BEARER

This analysis suggests that the oil company is a better loss bearer than the injured person and that by leaving this loss on the individual a majority of the courts have wrongly decided these cases. The goals of reducing the number and severity of accidents and of reducing their societal costs will not be accomplished by leaving the loss on the injured person. These goals will, however, be served by holding the oil company liable. A potentially insolvent service station operator will not be a good loss bearer because he will externalize the costs of accidents and because he may defeat secondary accident cost reduction by simply dropping out of business when sued.

It may be that if the operator had insurance, he would be a better loss bearer from the point of view of general deterrence than the oil company. As will be shown below, however, it appears that holding the company liable will eventually lead to the accompishment of the goal of reducing accident costs, even if the solvent operator is the better loss bearer.

Errors may be made in allocating accident costs so that the best loss bearer will not initially bear the loss. This may be corrected by the market if the loss is allocated to what Calabresi calls "the best briber."[69] The best briber is the person or organization that can find the best loss bearer and influence him by bribes to bear these costs. He is also the one who can enter into these bribery transactions most cheaply.[70] If the service station operator is in fact the better loss bearer, the oil company can induce him to insure and bear the loss by perhaps offering reductions in rent and the prices of petroleum products.

Holding the oil company liable will probably ultimately lead to a determination of whether the oil company or the station operator is the better loss bearer. If the oil company is held liable, they might choose to handle the cost by insuring and by simply raising the prices of their products. They might also rely on the indemnity clauses in their franchise agreements with the operators. Since a mere promise to indemnify is worthless if the promiser is judgment-proof, the company would probably move to make sure that the operator will have a fund to make this promise meaningful. Presently, the oil company franchising agreements generally do not provide for any type of insurance. These clauses seem to be designed to provide additional evidence to the courts that the operator is an independent contractor and that, therefore, the company should not be held liable. If the company knew that they would have to bear this loss, they would probably move to make this indemnity clause meaningful.

The companies would be attempting to transfer these costs by this method. They cannot, however, externalize them for, in demanding that the operators insure, the companies will account for these because their contracts will be more expensive for and less attractive to the operators. The com-

69. CALABRESI, *supra* note 55, at 150.
70. *Id.*

panies will have more difficulty securing operators, and, if this additional cost repels enough operators, the franchise system of distributing petroleum products would become unworkable. This would be an indication that the operators are not the best loss bearers. If, however, the operators do insure, this indicates that it is economically feasible for them to continue in the franchise system. From a policy standpoint, forcing the operators to insure would also prevent the least desirable outcome of leaving the loss on the injured person.

JUSTICE

It does not seem that holding the oil companies liable in these cases, because such a result serves the goal of reducing accident costs, is somehow unfair. The oil companies derive many benefits from these franchise arrangements. This system has largely insulated them from tort liability which would have been imposed upon them if they had run their own stations. It has provided the oil companies with the desired degree of control over business without full investment responsibility, with credit card systems, and with a necessary outlet for their products, which they must have to insure profits in other branches of the industry.[71] It seems that requiring the oil companies to return some of these savings to those harmed by the process of obtaining these benefits is not particularly unfair or immoral. The courts' willingness to impose liability without fault in other fields, such as products liability and the master-servant relationship in general, indicates that such liability is not against the moral structure of society.

SOME SUGGESTIONS

If the courts are unwilling to adopt this policy analysis as a basis for decision, oil company liability might be increased by convincing the courts to adopt Professor Leidy's "independent calling" test in distinguishing between servants and independent contractors.[72] This test would result in the liability of the employer to the injured person except when

71. Gamble, *Tort Liability of Oil Companies for Acts of Service Station Operators*, 3 VAND. L. REV. 597 (1950).
72. Leidy, *Salesmen as Independent Contractors*, 28 MICH. L. REV. 635, 370-1 (1930).

the person employed is engaged in a business which is different from that of the employer. In this instance, the station operator is engaged in selling the oil company's products, and this is also the business of the oil company; therefore, the company will usually be liable.

If the injury occurred when the operator was engaged in a business different from that of the oil company, for example selling cars,[73] then the policy reasons for holding the company would not be as strong. First, primary accident cost reductions would be more difficult because there would be some externalization of costs resulting from inadequate knowledge of the risks on the part of the oil companies. They would not be in as good a position as the operator to evaluate the risks of this different business, and, therefore, they would probably improperly account for these costs. General deterrence would thus be defeated. While the oil company would still have the deep pocket, secondary accident cost reduction would also not be as efficiently accomplished. Again the inability of the oil company to evaluate the risks of this different business will lead to unnecessary costs in insuring.

The control test, however, remains resilient and tenacious, and one may have to work within that test. If so, plaintiff's attorney might do well to note the approach used in *Federal Trade Commission v. Texaco, Inc.*,[74] an anti-trust decision. The United States Supreme Court stated that Texaco holds dominant economic power over their dealers and indicated that such power is "inherent in the structure and economics of the petroleum distribution system."[75] This power derives essentially from the short term leases and supply agreements, which the companies may also terminate because of the violation of any number of "housekeeping" provisions.[76] In 1965, the twenty major oil companies owned or leased 160,000 of the 227,000 service station properties.[77] It has been asserted that the economic power resulting from the ownership of the

73. Gizzi v. Texaco, Inc., *supra* note 48. This case involved this type of situation, but the oil company was held liable.
74. 393 U.S. 223 (1968).
75. *Id.* at 226.
76. *Id.* at 227.
77. *Hearings on Gasoline Marketing Practices before Subcommittee Number Four on Distribution Problems of the House Select Committee on Small Business*, 89th Cong., 1st Sess., 1558 (1965).

retailing facilities is used to compel dealer submission to company policies as a condition for allowing him to continue in business.[78] In addition, there are virtually no multi-brand service stations in the United States today, although in 1925 such stations were the majority.[79] This means that the refusal by an oil company to renew a supply contract may lead to economic disaster for the operator. The courts may be moved from their fixation at the stage of the agreements in other ways. Harold Brown, author of *Franchising: Trap for the Trusting,*[80] contends that the trend is to eliminate all restrictions in the franchise contract. Instead, the company can rely on the inherent power of the termination clauses to control the service station operators.[81] He indicates that in the oil industry this result is accomplished through annual subleases whereby the dealer is constantly subject to the oil companies' economic power.[82] This approach may then show the courts that there is control inherent in this system of franchising.

OTHER FRANCHISES

The cases involving the liability of oil companies for the torts of service station operators appear to constitute nearly all of the case law which concerns the liability of a franchisor for the torts of a franchisee. It would seem that someone must have been injured by a fall on a slippery floor in a Mr. Donut shop or a Kentucky Fried Chicken outlet, yet cases in which franchisors, other than oil companies, have been sued are virtually nonexistent. In the area of liability for the negligent operation of motor vehicles by automobile salesmen apparently only one case has involved a suit against the automobile company itself.[83] In California the franchisors of dance studios have been held liable for damages resulting from breach of contract and from violations of the California Dance Act

78. *Id.* at 1561.

79. *Id.* at 1558.

80. BROWN, FRANCHISING: TRAP FOR THE TRUSTING (1969).

81. *Hearings on the Impact of Franchising on Small Business before the Subcommittee on Urban and Rural Economic Development of the Senate Select Committee on Small Business,* 91st Cong., 2d Sess., 4 (1970).

82. *Id.*

83. Barton v. Studebaker Corp. of America, 46 Cal. App. 707, 189 P. 1025 (1920). *See* Annot., 53 A.L.R.2d 631 (1957).

by their franchisees.[84] Generally, the law of the liability of a franchisor for the torts of his franchisee is the law of the liability of oil companies for the torts of their service station operators.

An examination of various franchisors' contracts, such as, Mr. Donut of America, Inc.,[85] Edie Adams' Cut and Curl Salon and Wig Boutique,[86] and Johnny's American Inn, Inc.,[87] reveals contractual terms which give the franchisor the ability to control the details of the operation of the franchise. The Chevrolet *Dealer Selling Agreement*[88] provides, among other things, that the franchisee must maintain customary business hours, adopt a uniform accounting system, provide records of sales and services, allow Chevrolet representatives to examine these records, treat purchasers according to guidelines set down by Chevrolet, perform car service and repair according to Chevrolet specifications, and use certain signs of the company.[89] The agreement also contains termination provisions and disclaimers of agency similar to the oil companies' agreements.[90] With all of these provisions, the battles over control and estoppel which rage in the area of the oil companies are noticeably absent in these other fields.

It seems that there is no tort litigation involving these other types of franchisors because the franchisors have taken steps to protect themselves from liability by providing financially responsible franchisees. It is a recommended practice for the franchisors to require that before the franchisee can commence business, he must acquire liability insurance for

84. Holland v. Nelson, 5 Cal. App. 3d 308, 85 Cal. Rptr. 117 (Dist. Ct. App. 1970); Nichols v. Arthur Murray, Inc., 248 Cal. App. 2d 610, 56 Cal. Rptr. 728 (Dist. Ct. App. 1967); Beck v. Arthur Murray, Inc., 245 Cal. App. 2d 976, 54 Cal. Rptr. 328 (Dist. Ct. App. 1966).

85. *Hearings on the Impact of Franchising on Small Business before the Subcommittee on Urban and Rural Economic Development of the Senate Select Committee on Small Business*, 91st Cong., 2d Sess., 245 (1970).

86. *Id.* at 616.

87. *Id.* at 631.

88. *Id.* at 820. *See also* Dodge Direct Dealer Agreement, *id.*, at 862-82.

89. *Id.* at 836-41.

90. *Id.* at 843-844, 854.

personal injuries and property damage.[91] This appears to be the general practice, and the minimum amounts of insurance required seem to be high enough to satisfy most claims.[92] For example, Johnny's American Inn, Inc. requires minimum public liability insurance of $250,000 per person and $500,000 per loss.[93] The automobile companies may achieve the same result through contractual provisions requiring that their dealers maintain a certain minimum amount of net working capital and net worth necessary for the dealer to carry on his business.[94] An injured person, therefore, has no reason to sue the franchisor for he usually has a convenient and financially responsible defendant in the franchisee.

The franchisors in attempting to insulate themselves from liability have provided this financially responsible defendant. As has been suggested, if the oil companies are held liable, they too would probably resort to similar provisions. As it is, they benefit by having financially irresponsible operators.[95] If the operator does not have to account for these accident costs because he does not have to insure, he will be able to pay a higher rent and higher prices for oil company products. In order to accept the franchise agreement the operator would not have to demand lower prices or more services from the oil company as he would if he had to account for these costs. Thus only the oil company benefits under the present system. They can charge higher prices to their operators, and under the control and estoppel tests in most courts they have a good opportunity to defeat an injured person's claim.

CONCLUSION

The tests of control and estoppel which the courts use to solve the problems of oil company liability ignore the function of loss allocation, which the courts perform, and in a majority of cases have led the courts to the wrong result from the policy standpoint.

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91. *Id.* at 282.
92. *Id.* at 245 (Mr. Donut), 616 (Edie Adams'); Nichols v. Arthur Murray, Inc., 248 Cal. App. 2d 610, 56 Cal. Rptr. 728 (Dist. Ct. App. 1967).
93. *Id.* at 631.
94. *Id.* at 836 (Chevrolet Dealer Selling Agreement § 7); 869 (Dodge Direct Dealer Agreement § 7).
95. MORRIS, *supra* note 65.

An analysis of this problem in terms of Calabresi's suggested goals of a system of accident law indicates that the least desirable result is leaving the loss on the injured person. By holding the oil company liable, however, these goals will be accomplished. Presently, many of the service station operators are potentially insolvent, and these goals will not be served by placing the loss on them. A comparison of the oil company and solvent service station operators indicates that the goal of reducing the number and severity of accidents would be served by placing the loss on either one. In the area of reduction of social costs, the oil company appears to be the better loss bearer because it may use its economic power to negotiate with insurance companies for insurance at minimum cost. It is difficult to determine in the light of this factor and the companies' ability to inspect and set operating standards whether the station operator's constant contact with his specific station enable him to be able significantly to better evaluate the risk so as to be better able to insure at a lower cost than the oil company.

It appears, however, that a market determination of which party is the better loss bearer will result from placing this loss on the oil companies. If they follow the practice of other franchisors, in order to protect themselves they would force the operator to be financially responsible. If this leads to a breakdown in this type of products distribution system, then it would indicate that the operators are not the better loss bearers. The oil company would then have to decide if the benefits which they derive from the present marketing system outweigh the costs of these accidents. If so, they will bear the costs and continue the franchise system.

Finally, short of the courts adopting this type of policy analysis, a test which seems to lead to the proper results would be the "independent calling" test. This test would define the limits of the oil companies' liability, and if used by the courts to distinguish between servants and independent contractors, it would result in the oil companies' liability in most cases. Given the unanimity in applying the control and estoppel tests, however, it appears that it might be necessary to emphasize the control "inherent in the structure and economics of the petroleum distribution system"[96] and the discrepancies which exist between the oil companies and other types of franchisors.

THOMAS TONER

96. FTC v. Texaco, Inc., *supra* note 75.