Land & Water Law Review

Volume 12
Issue 2 *Symposium on the Federal Rules of Evidence*

Article 8

1977

Civil Rights - Action for Damages - Vicarious Liability of a Federal Official - Kite v. Kelley

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CASE NOTES

CIVIL RIGHTS—ACTION FOR DAMAGES—Vicarious Liability of a Federal Official. Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976).

Kite, a former student radical from Oregon, moved to Denver, Colorado, in 1971, and began employment with Samsonite Corporation. The Denver office of the Federal Bureau of Investigation began an investigation of Kite's activities in Colorado, pursuant to a request by another regional office, and obtained information regarding the employment from Samsonite.

In 1972 Samsonite requested information about Kite from the Denver office. In violation of Bureau regulations, special agent Adsit told Samsonite that Kite had been arrested in Oregon. Shortly thereafter Kite was discharged for false statements made on his employment application. Kite's complaint[1] alleged "that the FBI harassed, investigated, and intimidated him in violation of rights guaranteed by the First, Fourth, Fifth and Ninth Amendments."[2]

Joined as defendants were Lewis Giovanetti and James Newpher, special-agents-in-charge of the Denver office at the time of the investigation, Clarence M. Kelley, the Director of the Federal Bureau of Investigation, and William Saxbe, the Attorney General of the United States. Special Agent Adsit, who released the unauthorized information, was not joined as a defendant. The district court directed a verdict in favor of the defendants, and the only issue on appeal was "whether a federal officer may be held monetarily liable for the acts of his subordinates resulting in the deprivation of constitutional rights."[3] The Court of Appeals for the Tenth Circuit held that the doctrine of vicarious liability has no application in a civil rights action for damages against a federal official.

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1. Jurisdiction was based on 28 U.S.C. § 1331 (1970):
   (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.
2. Kite v. Kelley, 546 F.2d 334, 336 (10th Cir. 1976).
3. *Id.* at 9.

BACKGROUND OF THE LAW

The doctrine of vicarious liability provides that by reason of the relationship between two parties, usually that of master and servant, one will be held liable for the torts of the other. A servant is traditionally defined as "a person employed to perform services in the affairs of another, whose physical conduct in the performance of the service is controlled, or is subject to a right of control by the other."[4] The *Restatement (Second) of Agency* lists a number of factors to be considered in determining whether a person is the servant of another.[5] The element of control is the essential factor.[6]

Although the origin of the doctrine of vicarious liability has never been definitively isolated,[7] several theories have been advanced in its justification. Most are based on a concept of administration of risk, *i.e.* a determination of who

4. PROSSER, LAW OF TORTS 460 (4th ed. 1971). *See also* RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958).

5. RESTATEMENT (SECOND) OF AGENCY § 220 (1958):
(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind if occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

6. Matcovich v. Anglim, 134 F.2d 834, 837 (9th Cir. 1943); James, *Vicarious Liability*, 28 TULANE L. REV. 161, 165 (1954); Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188, 189 (1939).

7. "From whence came the rule and a complete exposition of its pedigree are problems as yet unanswered." Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L. J. 584 (1929). *See also* James, *supra* note 6, at 164. Seavey suggests that the rule may have originated from the fiction of an "implied command," or an idea that the person who starts a chain of events ought to be responsible for all resulting harm. Seavey, *Speculation as to 'Respondeat Superior'*, HARVARD LEGAL ESSAYS 443 (1934).

ought to pay for the harm done to the plaintiff, considering all factors involved.[8]

The most common justification of the doctrine is the search for a "deep pocket."[9] In 1862 Judge Willes declared that "there ought to be a remedy against some person capable of paying damages to those injured."[10] In a business relationship the master has greater resources from which to pay a judgment. He is also in a better position to absorb the losses through higher prices or liability insurance. The losses become part of the cost of doing business.[11] Furthermore, if the financial responsibility fell solely on the servant the result would often be that either the injured party would not recover from a judgment-proof defendant, or the servant and his family would be ruined financially because of the damage claim.[12]

Another consideration is that liability should be imposed where it will most effectively provide an incentive to prevent future harm. It is generally agreed that putting this responsibility on the master is the most effective method of encouraging safety measures and checking abuses of power.[13]

The doctrine of vicarious liability is not based on any concept of fault, but is a "deliberate allocation of risk" based upon the relationship of the parties involved.[14] If we agree with Holmes that "common sense is opposed to making one man pay for another man's wrong unless he brought the

8. "Compensation for an injured party comes first, but that cannot be considered separately from the capacities of the parties, to whom the loss is allocated, to bear it. Only when those capacities are measured, can the scope of the rights of the injured party be intelligently determined." Douglas, *supra* note 7, at 585.

9. BATY, VICARIOUS LIABILITY 154 (1961).

10. Limpus v. London General Omnibus Co., 158 Eng. Rep. 993, 998 (Ex. 1862).

11. SEAVEY, LAW OF AGENCY 141 (1964); Schirott and Drew, *The Vicarious Liability of Public Officials under the Civil Rights Act*, 8 AKRON L. REV. 69, 70 (1974).

12. James, *supra* note 6, at 163.

13. "Pressure of legal liability on the employer . . . will often encourage the use of devices or techniques which would not have occurred to the reasonably prudent man had he not been bidden to use his Yankee ingenuity to 'achieve the impossible.'" *Id.* at 168.

14. PROSSER, *supra* note 4, at 459.

wrong to pass,"[15] we may wonder at the continued expansion of the doctrine. Perhaps its vitality is "evidence that it does not greatly depart from the common feeling of justice which it is the primary function of the law to satisfy."[16] The question here is whether the doctrine has any place in a civil rights action against a public official. The various justifications for the rule must be remembered as the issues are considered.

Civil rights actions fit in a peculiar area of the law. The basic rules which have evolved in the field of tort law are not always applicable in civil rights actions.[17] Constitutional guidelines are not particularly applicable since the action is usually one for damages or injunctive relief. Professor Shapo describes this type of action as a "constitutional tort,"[18] involving both private injuries and constitutional guarantees. The scope of substantive rights in this area will not be found through blind adherence to judicial concepts which are not precisely in point. A new theory of vicarious liability should be developed in the area of constitutional torts.

Most of the case law on the subject involves actions against state officials under section 1983 of the Civil Rights Act of 1871.[19] Many of the cases simply hold that vicarious liability is not available in civil rights actions because the

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15. Holmes, *Agency*, 5 HARVARD L. REV. 1, 14 (1891).

16. Seavey, *Speculation as to 'Respondeat Superior'*, *supra* note 7, at 434.

17. *See* Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970) [allegations of negligence are not sufficient under Section 1983]; Dykes v. Camp, 333 F. Supp. 923 (E.D.Mo. 1971) [no joint tortfeasors in a civil rights action]; Meyer v. New York, 344 F. Supp. 1377 (S.D.N.Y. 1971), *aff'd* 463 F.2d 424 (2d Cir. 1972); Valley v. Maule, 297 F. Supp. 958 (D.Conn. 1968) [the latter two cases holding that notice pleading is not sufficient in a civil rights action].

18. Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 6 NW. L. REV. 227, 323-24 (1965). *See also* Kates, *Vicarious and Negligence Liability of Police Superiors in Section 1983 Suits*, 7 CLEARINGHOUSE REV. 415, 416 (1973).

19. 42 U.S.C. § 1983 (1970).
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

statute presumes personal involvement of the defendant.[20] Other decisions have turned on the fact that the defendant did not have the power to correct the situation that led to the deprivation of constitutional rights,[21] or that he had no duty, opportunity or ability to intervene.[22]

Judicial restraint is apparent in the cases under section 1983. One court stated that the doctrine of vicarious liability "is a product of the common-law, created by the courts operating in a legislative vacuum. It has no application . . . where the right of action was created by statute and the legislature itself delimited the scope of liability."[23]

The most persuasive opinions refusing to impose vicarious liability on a public official reason that government officers are not in a master-servant relationship. The superior officer is merely an intermediate supervisor.[24] A more accurate description of the relationship would characterize the officers as "fellow-servants" of the state employer.[25]

Although the general rule appears to be that vicarious liability is not available in a civil rights action, various exceptions have been made. The most common is that liability will be imposed where state law so provides.[26] Other exceptions involve extraordinary illegal conduct,[27] instances in

20. Adams v. Pate, 445 F.2d 105 (7th Cir. 1971); Dunham v. Crosby, 435 F.2d 1177 (1st Cir. 1970); Armstrong v. McCracken, 387 F. Supp. 289 (E.D. Okla. 1974); Fowler v. Anderson, 386 F. Supp. 307 (E.D. Okla. 1974); Lanthan v. Oswald, 359 F. Supp. 85 (S.D.N.Y. 1973).

21. Tucker v. Cities of Montgomery Board of Comm'rs, 410 F. Supp. 494, 512 (M.D.Ala. 1976); Koehler v. Ogilvie, 53 F.R.D. 98, 101-102 (N.D.Ill. 1971) *aff'd*, 405 U.S. 906 (1972).

22. Jennings v. Davis, 476 F.2d 1271, 1274-75 (8th Cir. 1973).

23. Nugent v. Sheppard, 318 F. Supp. 314, 315 (N.D.Ind. 1970). *But see*, Hill v. Toll, 320 F. Supp 185, 188-89 (E.D.Pa. 1970), which held that remedial statutes are to be given a liberal construction and that Section 1983 should not be construed in derogation of the common law.

24. Delaney v. Dias, 415 F. Supp. 1351, 1354-55 (D.Mass. 1976).

25. Shirott and Drew, *supra* note 11, at 73.

26. Hanson v. May, 502 F.2d 728, 730 (9th Cir. 1974); Scott v. Vandiver, 476 F.2d 238, 240-41 (4th Cir. 1973); Tuley v. Heyd, 482 F.2d 590, 594-95 (5th Cir. 1973); Hesselgesser v. Reilly, 440 F.2d 901, 903-04 (9th Cir. 1971); Keker v. Procunier, 398 F. Supp. 756, 766 (E.D.Cal. 1975).

27. *Compare* Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1973) [diabetic jailed for drunkenness was not given medical treatment and suffered a stroke and brain damage as a result of diabetic coma] *and* Collum v. Yurkovich, 409 F. Supp. 557 (N.D. Ill. 1975) [plaintiff beaten by police while in custody].

which the superior officer had a responsibility to act,[28] or instances in which an allegation of negligent supervision or training, which suggests that the officer was at fault for the conduct which caused the injury.[29] Knowledge or constructive knowledge of the alleged misconduct may be sufficient to hold a superior officer vicariously liable in a civil rights action.[30] Courts have also found liability in special circumstances, such as where a temporary law enforcement officer commits an assault while acting under a sheriff.[31]

THE COURT'S REASONING IN *Kite v. Kelley*

The court in *Kite v. Kelley* recognized the wide divergence of opinion on the issue of vicarious liability in a civil rights action, then based its decision on one recent United States Supreme Court case, *Rizzo v. Goode.*[32]

Rizzo v. Goode was a class action brought under section 1983 alleging a "pervasive pattern of illegal and unconstitutional mistreatment by police officers."[33] The district court found that although only a small percentage of the police force was guilty of misconduct, the violations could not be dismissed as rare or isolated. Although the court found no policy on the part of the police department to violate citizens' constitutional rights, it did find that there was a "tendency to discourage the filing of citizen complaints and to minimize the consequences of police misconduct."[34]

Recognizing that the plaintiffs had no constitutional right to improved police procedures, the district court nevertheless ordered defendants to submit a comprehensive pro-

28. Shifrin v. Wilson, 412 F. Supp. 1282 (D.D.C. 1976).
29. Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1970), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1971). *But see* Wilkerson v. Mock, 403 F. Supp. 971 (E.D.Pa. 1975).
30. Wright v. McMann, 460 F.2d 126 (2d Cir. 1972), *cert. denied,* 409 U.S. 885 (1972); Delaney v. Dias, *supra* note 24; Matthews v. Brown. 362 F. Supp. 622 (E.D. Va. 1973).
31. Scott v. Vandiver, *supra* note 26.
32. Rizzo v. Goode, 423 U.S. 362 (1976).
33. *Id.* at 366
34. COPAR v. Rizzo, 357 F. Supp. 1289, 1318 (E.D.Pa. 1973).

gram for improving the handling of complaints alleging police misconduct for the court's approval.[35]

On certiorari, the United States Supreme Court found the mandatory injunctive relief awarded by the district court to be an unwarranted intrusion by the federal judiciary into an area of local concern. The only justification of such an intrusion is the showing of an "*affirmative link* between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [defendants]—express or otherwise—showing their authorization or approval of such misconduct."[36]

The United States Court of Appeals for the Tenth Circuit declared in *Kite v. Kelley* that the Supreme Court's affirmative link requirement means "that before a superior may be held for acts of an inferior, the superior, expressly or otherwise, must have participated or acquiesced in the constitutional deprivation of which complaint is made."[37]

EVALUATION OF THE DECISION

In *Rizzo v. Goode* the significant fact on appeal was that mandatory injunctive relief was granted which significantly interfered with police practice and procedure, an area traditionally left to the discertion of state and local government. The district court's guidelines would have imposed no substantial burden on the police since the guidelines were consistent with generally recognized minimum standards.[38] However, the Supreme Court felt the guidelines were an unwarranted intrustion into an area of peculiarly local concern.

Despite the apparent narrow holding in *Rizzo v. Goode*[39] the *Kite* decision seems to have transformed the Supreme Court's decision into a sweeping rejection of vicarious lia-

35. *Id.* at 1321.
36. Rizzo v. Goode, *supra* note 32, at 371 (emphasis added).
37. Kite v. Kelley, *supra* note 2, at 7-8.
38. Rizzo v. Goode, *supra* note 32, at 370.
39. *Rizzo*, properly read, is limited to the facts of the case. Shifrin v. Wilson, *supra* note 23, at 1302.

bility in a civil rights action where the affirmative link is not established.

Decisions regarding section 1983 actions need not bind a federal court in an action directly under the Constitution based on section 1331. Although some considerations may be identical, there are major differences between the two types of actions which may call for different results under similar fact situations.

The determinative consideration in *Rizzo v. Goode* was the problem of separation of powers.[40] The lawsuit was characterized by Mr. Justice Rehnquist as:

> an attempt by the federal judiciary to resolve a "controversy" between the entire citizenry of Philadelphia and the petitioning elected and appointed officials over what steps might, in the Court of Appeal's words, "[appear] to have the potential for prevention of future police misconduct."[41]

This problem was not before the court in *Kite v. Kelley.* Granting relief in the form of damages against a superior official of the Federal Bureau of Investigation or the United States Government would not offend any principles of federalism.

The conclusion of many federal courts that section 1983 contemplates personal involvement of the defendant in an action against state officials has no application to the problem in *Kite v. Kelley.* Legislative intent for section 1983 is irrelevant to an action against federal officials based on Section 1331.[42]

The most persuasive argument against imposing vicarious liability in a civil rights action is that the defendant public official is not a master within the meaning of the doctrine.[43] Since he is not in business for himself he is not

40. Rizzo v. Goode, *supra* note 32, at 379.
41. *Id.* at 371.
42. Williams v. Brown, 398 F. Supp. 155, 159 (N.D.Ill. 1975).
43. Schirott and Drew, *supra* note 11, at 70.

able to absorb, distribute or shift the loss by charging higher prices for his products or services. To conclude from this that the rule has no place in a civil rights action, however, is to ignore the other reasons behind the doctrine.

Although the usual attributes of the master-servant relationship are not present in the relationship between public officials, there remains a number of compelling reasons for extending vicarious liability to a civil rights action. For instance, the hierarchy of government agencies is such that those who have the most extensive contact with the public and the greatest opportunity to deprive citizens of their constitutional rights are those most likely to be toward the bottom of the pay scale in the organization. An injured plaintiff may be without an effective remedy where he is not permitted to sue the superior officers. It is reasonable to infer that this was the reason that special agent Adsit, who gave out the unauthorized information on plaintiff Kite, was not joined in the lawsuit. In 1974 the entrance salary for special agents was $13,379.[44] Most are married and have children,[45] so that while their salary puts them solidly in the middle class, it is clear that they could not pay a substantial judgment for damages.

The effect of the Tenth Circuit's rejection of vicarious liability in *Kite* is that the plaintiff is without a remedy and similarly injured parties in the future will have no incentive to seek relief. If one of the purposes of administration of risk through vicarious liability is to apply pressure where it will be most effective to prevent future harm, that goal has been frustrated by denying recovery in *Kite*.

An adequate remedy in constitional tort is perhaps the best means of achieving control over this type of official misconduct. Enforcement of constitutional guarantees will be most effective when it is in the hands of injured parties who have a direct interest in the prosecution of the action.[46]

44. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 183 (1976-77).
45. UNGAR, FBI 326 (1975).
46. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 515-16 (1955).

Without an adequate private remedy the public must rely on the government officials to police themselves at their discretion.

This does not mean that all public officials should be responsible for any harm caused by a subordinate. Legal principles applicable to a business relationship are not pertinent to an action against a public official. A new theory is needed to define the limits of liability for constitutional torts. Although federal courts should proceed with caution when creating new remedies directly under the Constitution,[47] it is the responsibility of the judiciary to "assure the vindication of constitutional interests."[48]

Since the relationship between public officials differs from that of the traditional master and servant, the scope of vicarious liability for constitutional torts should be appropriately limited. The law should attempt to satisfy the goals of providing adequate remedies for plaintiffs and incentives for the prevention of future harm without imposing undue burdens on superior officials or disrupting the operations of the agency involved.[49]

A rule of absolute liability for any conceivable harm inflicted by a subordinate official would be too burdensome on the government agency in general and the superior official in particular. Vicarious liability should extend only to

47. Gresham v. Chicago, 405 F. Supp. 410, 412 (N.D.Ill. 1975).
48. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 407 (1971) (Harlan, J., concurring).
49. Vertical responsibility is already a part of FBI procedure:

> Even in late 1974, for example, the special-agent-in-charge of a desirable field office, Sacramento, was demoted to one of the Bureau's smallest offices, El Paso, after it was discovered that an agent under his command had borrowed money from an informant and ended up in trouble with local loan sharks who were under investigation by the Bureau. *The assumption seemed to be that the SAC should have had better control over his staff or should have exerted enough moral influence to prevent such an incident from happening.*

UNGAR, FBI 167 (1975) (emphasis added).

Local police bureaucracies may present different problems. Police officers are often characterized by fraternal loyalty and isolation from their supervisors. The result is that superior officers experience difficulty in attempting to gain firm control over the department. *See* Hahn, *A Profile of Urban Police*, 36 LAW AND CONTEMPORARY PROBLEMS 449 (1971); Milner, *Supreme Court Effectiveness and the Police Organization*, 36 LAW AND CONTEMPORARY PROBLEMS 467 (1971).

situations where a specific constitutional mandate has been violated. This would give injured persons an adequate remedy while recognizing that public officials do not have the opportunity to distribute the losses as part of the cost of doing business.

The goal of preventing future harm can be fulfilled by imposing liability on superior officials who are in a position to control the conduct which caused the injury. Extending liability beyond this point would serve no legitimate purpose. Under this approach, assuming that there was a violation of a specific constitutional guarantee, the action in *Kite v. Kelley* would be dismissed as against Clarence Kelley and William Saxbe because their relationship to wrongdoer Adsit is too remote. Lewis Giovanetti and James Newpher, as special-agents-in-charge would be proper defendants.[50]

CONCLUSION

The Tenth Circuit should not have dismissed the possibility of vicarious liability in *Kite v. Kelley*. The "affirmative link" requirement is necessary only in the unique factual situation of *Rizzo v. Goode*. The result of the decision is that there will be no adequate remedy for future injured parties and the public will be deprived of what is perhaps the most effective means of holding public officials accountable for unconstitutional misconduct.

A better approach would be to redefine the scope of vicarious liability in the area of constitutional torts. To satisfy the objectives of the doctrine without imposing undue burdens on public officials, liability should extend only to situations where a specific constitutional mandate has been violated and the superior official was in a position to control the conduct which caused the harm.

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50. A special-agent-in-charge has as much control over his subordinates as he wishes to exercise.

> The SAC is a ruler in his own realm. . . . He may choose to be a tyrant or a teacher, frightening his agents into submission and efficiency or training them to perform intelligently, or some of each, but the choice is largely his.

UNGAR, FBI 199 (1975).