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VICARIOUS LIABILITY OF AN EMPLOYER FOR AN ASSAULT BY HIS SERVANT: A SURVEY OF TEXAS CASES REEXAMINING THE "RULE OF FORCE"

CHARLES E. CANTU*

INTRODUCTION

The doctrine of respondeat superior has long been entrenched in Anglo-American jurisprudence[1] and has even been traced by some to ancient Greek and Roman laws.[2] It is a rule of law which did not evolve over a long period of time, giving and bending so as to conform with the social and economic needs of different eras, but instead appeared on the scene in full bloom.[3] It is under this doctrine that principals, masters and employers throughout the years have been held liable for the wrongs of those individuals working under them who acted within the scope of their employment. The doctrine has been applied to all injury producing acts of the employee, whether negligent or intentional.[4] The present conflict in Texas concerning an employer's liability for the intentional torts of his employee is the subject of this article.

EARLY TEXAS CASES

The idea than an employer is liable for the intentional torts of his employee appears so well settled in our legal system that some may question the need for a law review article on the subject. Indeed, the principle has been followed in Texas courts for so long that in many of our earliest cases it was merely a question of fact for the jury to determine if the particular servant was acting pursuant to his employer's orders, express or implied, or in furtherance of the master's business so as to encumber the employer with the responsibility of the act in question. In most of these cases, the master could escape liability only by showing that the employee was satisfying his own vindictive interests and therefore acting outside the scope of his employment. Several of

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1 Brill, *The Liability of an Employer for the Willful Torts of His Servant*, 45 CHI.-KENT L. REV. 1 (1968).

2 O. W. HOLMES, JR., THE COMMON LAW LECTURE 1 (1881).

3 A. CONARD AND R. KNAUSS, CASES AND MATERIALS ON THE LAW OF BUSINESS ORGANIZATIONS (3d ed. 1965).

4 Galveston, H. & S.A. Ry. v. Zantzinger, 93 Tex. 64, 53 S.W. 379 (1899).

these early authorities were cited in a Texas case decided some forty years ago in which the rule was stated:

> [T]he master will not be held responsible if it appears that the act which occasioned the injury was done by the servant solely because of resentment of an insult or bad feeling and not done in the doing of what the servant was employed to do.[5]

The court, however, further stated:

> [A] tort of the servant is deemed to be within the scope of his employment, and imputable to the master, when the servant makes an assault upon the aggrieved party as the result of a quarrel which immediately grew out of the performance of the duties the servant was employed to do.[6]

Vicarious liability was to be imposed if the servant was in some way furthering his master's business, but not if the employee was acting on his own. Which sphere the actor was occupying at the time of the conduct in question was left for the jury's determination.

The rule reached its apex in 1948, when the Texas Supreme Court decided the case of *Houston Transit Co. v. Felder.*[7] Plaintiff's car collided with the rear of the defendant's bus driven by Goodson. Pursuant to express instructions Goodson left the bus in order to obtain plaintiff's name and license number. After an exchange of words, Goodson struck the plaintiff in the face with his changebox. The trial court awarded plaintiff $1,000 damages but, on appeal, the supreme court held that the plaintiff could not recover if Goodson struck plaintiff solely because of personal resentment. In effect the court held that plaintiff could recover only by showing that Goodson was acting within the scope of his employment in committing the act in question. Whether he was placating his own emotions or was furthering his master's interests was to be left to the jury.[8]

Hagenloh AND THE "RULE OF FORCE"

The confusion and difficulty which gave impetus for this article arose some four years later when the supreme court decided *Texas & P. Ry. v. Hagenloh.*[9] The court greatly restricted the rule that had been in

5 Gulf, C. & S.F. Ry. v. Cobb, 45 S.W.2d 323, 326 (Tex. Civ. App.—Austin 1931, writ dism'd).
6 *Id.* at 326.
7 146 Tex. 428, 208 S.W.2d 880 (1948).
8 *Id.* at 431, 208 S.W.2d at 882. "What motivated Goodson in striking Felder was for the jury to appraise."
9 151 Tex. 191, 247 S.W.2d 236 (1952).

force for years by employing the "rule of force" and holding that before an employer could be vicariously liable for the assault and battery of his servant, he must have authorized the act either expressly or impliedly by placing the individual in a position which involved the use of physical force.

Plaintiff, Hagenloh, was employed as a baggageman by the defendant railroad and defendant, Houghland, was employed to investigate claims for the same railroad. The incident in question arose after a passenger had reported certain pieces of jewelry missing from her luggage. Houghland was assigned to the case and while questioning plaintiff an argument ensued. Plaintiff called Houghland a liar and Houghland countered by striking plaintiff. The plaintiff brought suit against the railroad and the trial court awarded him $7,400 in damages. The court of civil appeals affirmed and the case was appealed to the supreme court where the principal question to be decided was whether Houghland was acting within the scope of his employment, thereby imposing vicarious liability upon the defendant when he struck plaintiff.

In denying recovery the court noted that as a general rule an assault and battery committed by an employee upon a third person is usually an expression of personal animosity and not done for the purpose of furthering the employer's business. In order to hold a master liable under these circumstances it must be shown that he authorized the act by placing the individual in a position which required the use of force.[10] The court explained:

> The nature of the employment may be such as necessarily to involve at times the use of force, as where the employee's duty is to guard the employer's property and to protect it from trespassers, so that the act of using force may be in furtherance of the employer's business, making him liable even when greater force is used than is necessary.[11]

The majority of the court reasoned that plaintiff, by not showing that Houghland's position was one contemplating the use of force, failed to prove a fact essential to his recovery.

> He [Houghland] was investigating for the purpose of finding property missing from baggage. His duties in that respect were not of such nature as to involve the use of force, and there is no evidence in the record tending to prove that he was authorized to use force in the performance of those duties. *And so it seems that in this*

[10] *Id.* at 197, 247 S.W.2d at 239.
[11] *Id.* at 197, 247 S.W.2d at 239.

> *respect respondent failed to prove a fact essential to recovery by him against petitioner.*
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> . . . when we look to all of the evidence bearing upon Houghland's conduct in relation to respondent, what was done and what was said, we believe the only reasonable conclusion is that in accosting and striking [Hagenloh] Houghland was not acting in furtherance of petitioner's business, but was carrying on an enmity that had developed between him and respondent, provoking a quarrel with respondent to gratify personal animosity, and that his acts were not for his employer, but were personal to him.[12]

The effect of this case was to greatly restrict the rule which imposed vicarious liability upon the employer for the assault of his employee. Plaintiffs now had to allege and prove that the servant's position was one that permitted the use of force. If not, there was no recovery.[13] The dissent noted that the court had departed from the previous rule citing *Houston Transit Co. v. Felder*,[14] "the most impressive negation of the idea that there must be some authority to use force before an assault and battery can be within the scope of authority."[15]

It appears the Supreme Court of Texas took the scope of employment test of *Felder* and attached a restriction to it to the effect that the use of force had to be incidental to the individual's employment before vicarious liability could be imposed upon a defendant employer. Accordingly, not only did an employee have to be acting within the scope of his employment, *i.e.*, in some way furthering his master's business, when he struck plaintiff, his position also had to be one which contemplated the use of physical force. If these two requirements for recovery were not alleged and proved by plaintiff the defendant employer would escape liability.

It would seem that, notwithstanding this restriction, the rule was clear and firmly established as precedent for all future cases involving the issue of an employee's assault. This however has not been true. There has been a conflict in our Texas cases since the *Hagenloh* decision which has resulted from the fact that some cases have cited *Hagenloh* and followed its "rule of force" to the letter while others have

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12 *Id.* at 198, 247 S.W.2d at 240 (emphasis added).

13 This was expressly pointed out in the dissent of the *Hagenloh* case when Justice Smith said: "We understand the majority opinion to say, in effect, that an employer can never be liable for an assault and battery committed by his employee unless the employee acts pursuant to an authority, general or limited, which permits the use of physical force to some degree." Texas & P. Ry. v. Hagenloh, 151 Tex. 191, 203, 247 S.W.2d 236, 243 (1952) (dissenting opinion).

14 146 Tex. 428, 208 S.W.2d 880 (1948).

15 Texas & P. Ry. v. Hagenloh, 151 Tex. 191, 203, 247 S.W.2d 236, 243 (1952) (dissenting opinion).

cited *Hagenloh* but appear to have applied the scope of employment rule as stated in *Felder*. Some cases have not cited *Hagenloh* at all. A discussion of these various lines of cases should be enlightening upon the present status of the law.

CASES CITING *Hagenloh* THAT FOLLOWED ITS "RULE OF FORCE"

The first case to cite *Hagenloh* and follow its "rule of force" was *McCord v. Southern Distributing Co.*[16] decided in 1962. The defendant distributing company, dealer for Falstaff beer in Travis County, hired Schmidt as its "good will man." His duties were to create good will by visiting taverns and buying Falstaff beer for patrons, and by placing advertisements in package stores. The plaintiff was the owner of a liquor store in Austin. He was acquainted with Schmidt and at one time had had a Falstaff advertisement in his window but had removed it. Schmidt called upon plaintiff and raised the possibility of replacing the Falstaff sign. When the plaintiff refused, a discussion ensued which resulted in the plaintiff being physically assaulted by Schmidt. The trial court awarded plaintiff $7,000 in damages from Schmidt but held the employer not liable. The court of civil appeals affirmed, citing *Hagenloh*. The court reasoned the defendant company could not be vicariously liable because Schmidt's employment did not contemplate the use of force.

> Our decision is based solely on the ground that Schmidt in the performance of his duties as appellee's employee was not authorized to use any degree of force in their performance. *This, the use of force, we understand to be an essential requirement of liability of an employer for an assault by an employee, even though the employee at the time of the assault was engaged in furthering the business of his employer.*[17]

The court concluded there was no evidence that Schmidt was authorized to use force in the performance of his duties as good will man for appellees; even his title refuted the idea. In reaching its decision, the court stated: "We follow Hagenloh and its 'rule of force.' "[18]

Four years later another court of civil appeals in *Dart v. Yellow Cab, Inc.*[19] denied the plaintiff recovery from an employer for an assault and battery committed by an employee. In this case the plaintiff, while

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16 356 S.W.2d 350 (Tex. Civ. App.—Austin 1962, no writ).
17 *Id.* at 352 (emphasis added).
18 *Id.* at 353.
19 401 S.W.2d 874 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.).

intoxicated, boarded one of the defendant's cabs and was driven to his home by the defendant's employee. The plaintiff did not pay because he had no money, and as a result of the argument that followed the driver hit the plaintiff in the head with a flashlight and left the scene. The court cited *Hagenloh* and held that to establish vicarious liability for an intentional tort the plaintiff must prove that the particular employment contemplated the use of force and that the employee was furthering his master's business at the time of the assault.[20]

Applying this test the court denied plaintiff's recovery, stating:

> It is undisputed that neither Lester nor any cab driver of the defendant company was authorized to use force to collect fares. . . . Obviously, the use of force is directly contrary to the successful operation of such a business. . . . Even though one of his duties was to collect fares, the assault was not part of this authorized duty. In committing the assault, Lester was not carrying out his employer's business. The assault was the act of the employee and cannot be said to be the act of his employer.[21]

In following the precedent established by *Hagenloh*, these two cases make clear that in order for an individual to recover from an employer for the assault of one of his servants, the plaintiff must establish that the employee's position was one which contemplated the use of force and that the employee at the time of the assault was furthering his master's business. Other cases, however, have clouded the clarity of this rule.

Cases Citing *Hagenloh* But Applying the Scope of Employment Rule of *Felder*

Five cases have cited *Hagenloh* yet applied the scope of employment rule of *Felder*. In *Norris v. China Clipper Cafe*,[22] the court of civil appeals reversed the trial court and held the employer not liable. Plaintiff's wedding party was celebrating at defendant's cafe when a dispute arose between plaintiff and one of the defendant's waitresses. The plaintiff proceeded to call the waitress some derogatory names and a fight erupted between the two women which resulted in plaintiff's injuries. The court of civil appeals cited *Hagenloh* and *Felder* but proceeded to base their decision on a much earlier case which reiterated

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20 *Id.* at 877.
21 *Id.* at 877.
22 256 S.W.2d 664 (Tex. Civ. App.—Galveston 1953, writ ref'd n.r.e.).

the old scope of employment rule.[23] This earlier case cited *Central Motor Co. v. Gallo*[24] as authority for the following rule:

> *The real test of the master's liability is not whether the servant's employment contemplated the use of force* . . . but whether the act complained of arose directly out of and was done in the prosecution of the business that the servant was employed to do.[25]

Four years after the *Norris* case, the Texas Supreme Court decided *Smith v. M System Food Stores.*[26] In this case the defendant, M System Food Stores, had employed James, a regular member of the San Angelo police force, on a part-time basis to protect its property from theft by shoplifters. During business hours James detected a Mrs. Johnson in the act of shoplifting. He followed her out into the street, placed her under arrest and escorted her to the manager's office. The woman confessed to the offense and returned the stolen goods. At this point plaintiff, his wife, and Mrs. Johnson's husband came into the office protesting her arrest. Words between the plaintiff and James ended when James struck plaintiff on the head with his pistol, placed him under arrest and had him transported to the city jail. The court of civil appeals reversed the trial court's judgment for the plaintiff.[27] The supreme court affirmed, reasoning that at the time of the assault James was not doing an act which he was employed to do but instead acted out of personal resentment.

> The conclusion is quite obvious that the officer, James, struck the petitioner, Smith, because he resented that statement and possibly the tone of voice and manner in which the statement was made. As inexcusable and uncalled for as this assault would seem to be, we see no connection between the assault upon petitioner or his arrest and the purpose of James' employment by the M System Store.[28]

The supreme court cited *Hagenloh* but never mentioned its "rule of force" and based its decision on *Home Telephone & Electric Co. v.*

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[23] *Id.* at 667. The case on which they based their opinion was Greathouse v. Texas Pub. Util. Corp., 217 S.W.2d 190 (Tex. Civ. App.—Eastland 1948, writ ref'd n.r.e.).

[24] 94 S.W.2d 821, 822 (Tex. Civ. App.—Waco 1936, no writ).

[25] Greathouse v. Texas Pub. Util. Corp., 217 S.W.2d 190, 192 (Tex. Civ. App.—Eastland 1948, writ ref'd n.r.e.) (emphasis added).

[26] 156 Tex. 484, 297 S.W.2d 112 (1957).

[27] M System Food Stores v. Smith, 293 S.W.2d 215, 218 (Tex. Civ. App.—Austin 1956), *aff'd*, 156 Tex. 484, 297 S.W.2d 112 (1957).

[28] Smith v. M System Food Stores, 156 Tex. 484, 486, 297 S.W.2d 112, 113 (1957).

Branton[29] which was decided twenty-four years before *Hagenloh*. There the court had stated:

> [W]here the act of the servant is not in the furtherance of the master's business, or for the accomplishment of the object for which he was employed, but is performed as a resentment of insults, or in furtherance of personal animosities of the servant, the master is not liable.[30]

The *Smith* case was followed by *Humbert v. Adams*.[31] The plaintiff an inspector employed by the Texas Highway Department, inspected some materials to be used by the defendant and complained to the defendant construction firm that they were not suitable. An argument ensued between one of the defendant's employees and plaintiff which resulted in the assault. In denying recovery the court specifically cited *Hagenloh* but applied the scope of employment rule in *Felder*. The court said:

> [W]e must hold that . . . Sears at the time of the assault on Humbert was not acting within the scope of his employment with defendant Adams.
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> . . . .
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> The assault arose out of a personal resentment on Sears' [defendant's employee] part against Humbert [plaintiff]. Sears was not in the course of his employment with Adams [defendant] when the assault was committed. If there was any connection at all between the assault and the alleged failure of some materials not "passing the specifications," that connection . . . was too remote to be considered a part of the assault.[32]

Once again the plaintiff was denied recovery not because the occupation was one which did not contemplate the "use of force" but on the basis that the employee at the time was not acting within the scope of his employment; he was furthering his own interests.

Six years later the same court decided *Sheffield v. Central Freight Lines*.[33] The plaintiff, a truck driver employed by Red Arrow Freight Lines, was in the process of backing up to a loading dock when he hit one of the defendant's trucks. After an argument the defendant's driver, Jarvis, assaulted plaintiff. The court of civil appeals affirmed, citing

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29 7 S.W.2d 627 (Tex. Civ. App.—Eastland 1928), *aff'd on other grounds*, 23 S.W.2d 294 (Tex. Comm'n App. 1930, jdgmt adopted).

30 *Id.* at 629.

31 361 S.W.2d 458 (Tex. Civ. App.—Dallas 1962, no writ).

32 *Id.* at 460.

33 435 S.W.2d 954 (Tex. Civ. App.—Dallas 1968, no writ).

Home Telephone & Electric Co. v. Branton[34] as authority, reasoning that the argument between plaintiff and Jarvis was the result of personal animosities between the parties. Thus the individuals involved were not furthering their master's business and were not within the scope of their employment.

> [T]he acts of the participants were motivated, not by any sense of duty to their respective employers, not by any desire to promote or further their employer's business or property interests, but wholly by their personal animosities.[35]

The court cited *Hagenloh* but nothing was said of its "rule of force."

The last case in this category is *Bradford v. Fort Worth Transit Co.*[36] decided in 1970. In this case defendant's bus driver, upon being attacked by a group of boys, pulled out a gun and killed plaintiff's son. The court of civil appeals, citing *Greathouse v. Texas Public Utilities Corp.*,[37] affirmed for the defendant. The case cited was decided before *Hagenloh* and states the following proposition:

> It is very clear . . . that to hold the master liable for the tort of his servant, certain things must appear: (a) The tortious act must have arisen in the performance of a duty of the servant under the authority conferred upon him; (b) it must have been in the furtherance of the master's business; (c) and negatively, the servant must not have stepped aside from his master's business to engage in a mission of his own.[38]

The court in *Bradford* cited *Hagenloh*, not for its rule of force, but for the proposition that when a servant steps outside the scope of his employment the duration of such a mission is not a determining factor in establishing the employer's vicarious liability.

The above discussion illustrates two aspects of the conflict in our Texas cases. *Hagenloh* made it reasonably clear that in order to impose vicarious liability on an employer for an assault and battery by his employee it must be shown that the employment in question was one which reasonably contemplated the use of force. This "rule of force" was followed in two decisions, but five subsequent cases, including one decided by the Supreme Court of Texas, paid only lip service to the *Hagenloh* decision. Although they all cited it as authority, the courts

34 7 S.W.2d 627 (Tex. Civ. App.—Eastland 1928), *aff'd on other grounds*, 23 S.W.2d 294 (Tex. Comm'n App. 1930, jdgmt adopted).

35 Sheffield v. Central Freight Lines, 435 S.W.2d 954, 956 (Tex. Civ. App.—Dallas 1968, no writ).

36 450 S.W.2d 919 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.).

37 217 S.W.2d 190 (Tex. Civ. App.—Eastland 1948, writ ref'd n.r.e.).

38 *Id.* at 197.

continued to base their decisions on the scope of employment rule espoused in *Felder*. The conflict is made more ambiguous because two cases involving the vicarious liability of a master for the assault of his employee have been decided since *Hagenloh* without citing it at all.

CASES NOT CITING *Hagenloh*

H. T. Cab Co. v. Ginns[39] was decided by the Galveston Court of Civil Appeals in 1955, three years after the *Hagenloh* decision. The plaintiff's decedent, Ginns, was a passenger in one of defendant's cabs, driven by Jones. Upon arrival at his destination, Ginns gave the driver an amount of money which was fifteen cents short of the fare. The driver became so infuriated that he pulled out a gun and shot Ginns, causing his death. Affirming the judgment for the plaintiff, the Galveston court stated:

> [The driver] was . . . acting in the course and scope of his employment in undertaking to collect a fare from Ginns, and during the existence of the carrier-passenger relationship. We do not question that in shooting Ginns, [he] was humoring his own spite. That does not change the fact that the trouble arose out of collecting a fare, and during the carrier-passenger relationship.[40]

The court made no reference to *Hagenloh* or its "rule of force." The supreme court found no reversible error, causing Justice Hughes of the Austin Court of Civil Appeals to remark:

> We do not know upon what ground the Supreme Court approved the judgment in that case. Maybe the cab driver had the right to use force in collecting his fares.[41]

In light of *Dart v. Yellow Cab, Inc.*[42] and *Bradford v. Fort Worth Transit Co.*,[43] *H. T. Cab Co.* cannot be distinguished on the basis that a carrier-passenger relationship was involved. It is merely an instance in which the court did not follow the precedent established by the supreme court in *Hagenloh*.

Adami v. Dobie[44] was decided in 1969 by the San Antonio Court of Civil Appeals. Plaintiff brought suit against the father and mother of

39 280 S.W.2d 360 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.).
40 *Id.* at 365.
41 McCord v. Southern Distrib. Co., 356 S.W.2d 350, 353 (Tex. Civ. App.—Austin 1962, no writ).
42 401 S.W.2d 874 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.).
43 450 S.W.2d 919 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.).
44 440 S.W.2d 330 (Tex. Civ. App.—San Antonio 1969, writ dism'd).

Kenneth Adami who had shot plaintiff's husband while he was on defendants' ranch. Kenneth had been instructed to look after the land and see that the gates were kept closed. Plaintiff's husband drove his truck through the Adami ranch and left a gate open. Kenneth followed him to get the license number for the purpose of identification. A confrontation ensued; Kenneth approached the truck and shot the decedent. The court failed to cite either *Felder* or *Hagenloh*, holding for the defendants on the ground that Kenneth was not within the scope of his employment at the time he did the act in question.

> While it is true that a master may be liable for a wilful wrong committed by his servant, such liability attaches only when the servant, in the commission of such wilful wrong was acting within the scope of his employment for the benefit of the master (citation omitted). A master not liable for unauthorized intended tortious conduct of his servant, even when the act was done in connection with the servant's employment, where the wrongful act was unexpectable, in view of the duties of the servant (citation omitted). The commission of a deadly assault is not a customary way of performing a duty which involves seeing "about gates being closed."
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> In this case, the act of the servant was performed some two miles from the place where it was his duty to see that gates were closed; the use of force was not expectable by the master; the act of following people for the purpose of taking down license numbers was not an act of the kind Kenneth was employed to perform; the testimony shows that Kenneth was acting out of purely personal motives. . . . Under these circumstances, it cannot be said that Kenneth's conduct was of the same general nature as that authorized, or incidental to the conduct authorized.[45]

Again the court chose not to follow *Hagenloh* and its "rule of force," but elected instead to base its decision on whether or not the employee was acting within the scope of his employment at the time of the assault.

CONCLUSION

The above case analyses point out that Texas courts have applied two conflicting tests in determining the liability of an employer for an assault committed by his employee. It was thought that the supreme court had finally settled the issue with the determination of *Hagenloh* and its "rule of force." However, the majority of post-*Hagenloh* cases,

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[45] *Id.* at 333.

including the only supreme court decision in the field, have merely paid *Hagenloh* lip service and followed the scope of employment test of *Felder* and other pre-*Hagenloh* cases. These cases have diluted the efficacy of the "rule of force" test and it appears that Texas courts will continue the trend of the most recent cases and follow the older scope of employment test.