St. Mary's Law Journal

Volume 5 | Number 1 Article 16

3-1-1973

When an Employee Is Loaned, Both the General and Special Employers Are Liable for the Tortious Acts of That Employee on the Basis of the Public Policy Which Places Liability on the Employing Persons or Firms Which Can Best Insure against the Risk, Guard against It, and Which Can Most Accurately Predict the Cost of the Risk and Allocate Such Cost Directly to the Consumer.

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MASTER-SERVANT—BORROWED SERVANT DOCTRINE—ALLOCATION OF RISK—WHEN AN EMPLOYEE IS LOANED, BOTH THE GENERAL AND SPECIAL EMPLOYERS ARE LIABLE FOR THE TORTIOUS ACTS OF THAT EMPLOYEE ON THE BASIS OF THE PUBLIC POLICY WHICH PLACES LIABILITY ON THE EMPLOYING PERSONS OR FIRMS WHICH CAN BEST INSURE AGAINST THE RISK, GUARD AGAINST IT, AND WHICH CAN MOST ACCURATELY PREDICT THE COST OF THE RISK AND ALLOCATE SUCH COST DIRECTLY TO THE CONSUMER. *Strait v. Hale Construction Co.*, 103 Cal. Rptr. 487 (Dist. Ct. App. 1972).

A truck owned by Topham & Sons and a heavy earthmover owned by William E. Young collided on September 6, 1966, and seriously injured the operator of the truck, Oliver Strait. At the time of the accident the earthmover and its operator, Miguel Hurtado, were leased to Hale Construction Company by the owner, Young. As a result of the collision, suit was filed by the owner of the truck and its driver against the operator of the earthmover, its owner and the road contractor. Proceeding on the theory that the right to control is the sole determinant of liability in the borrowed servant situation, the general employer Young and the special employer Hale, sought to avoid liability by establishing lack of control over the acts of the loaned employee, Hurtado. A joint and several judgment was entered against the defendants and they appealed. Held—*Affirmed.* When an employee is loaned, both the general and special employers are liable for the tortious acts of that employee on the basis of the public policy which places liability on the employing persons or firms which can best insure against the risk, guard against it, and which can most accurately predict the cost of the risk and allocate such cost directly to the consumer, thus reflecting in its prices the enterprise's true cost of doing business.

Injured parties have invariably sought indemnity from the employer for the negligent acts of an employee under the established doctrine of respondeat superior. When the employee is loaned to another, this seemingly simple doctrine is susceptible to a host of pitfalls, and a common and perplexing problem arises for the courts.[1] Cognizant of this fact, the courts have sought to provide a just and applicable formula to determine where the liability of the general or regular employer ends and where the special or temporary employer begins. However, "[t]he criteria for determining when a worker becomes a loaned servant are not precise; as a result, the state of the law on this subject is chaotic."[2]

The right of the employer to control the acts of the servant has traditionally been the standard for determining liability in the borrowed servant

1. F. MECHEM, OUTLINE OF THE LAW OF AGENCY § 453, at 309 n.81 (4th ed. 1952).

2. Weaver v. Bennett, 129 S.E.2d 610, 617 (N.C. 1963).

situation.[3] "The theoretical basis for this test is probably the desire to impose the liability upon the employer who was in the best position to prevent the injury."[4] The rudiments of control in the borrowed servant situation appeared early in the 19th century when the court spoke in terms of care, management and government.[5] The concept flourished in the American courts and is presently found in some form in every jurisdiction.[6] Each state accepting this test has formulated different guidelines for determining what constitutes control and thus a myriad of factors are recognized as elements of control.[7] It should be stressed that these elements are viewed with the intent that the mere right to control is sufficient to determine liability rather than if the employer in fact exercises control.[8] It is apparent that

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3. 2 F. HARPER & F. JAMES, LAW OF TORTS § 26.3, at 1366 (1956).

4. Nepstad v. Lambert, 50 N.W.2d 614, 620 (Minn. 1951).

5. *See* Laugher v. Pointer, 108 Eng. Rep. 204, 205 (K.B. 1826); Quarman v. Burnett, 151 Eng. Rep. 509, 512 (Ex. 1840).

6. *See* Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188, 194 (1939); Boswell v. Laird, 8 Cal. 469, 489 (1857): "Something more than the mere right of selection, on the part of the principal, is essential to [the relation of master and servant]. That right must be accompanied with the power of subsequent control, in the execution of the work contracted for. In the present case, that power was wanting, and, of course, the relation to which it was essential did not exist." This case appears to be the first to use the concept of control in the American courts. *See, e.g.*, Helton v. United States, 309 F. Supp. 479 (E.D. Ark. 1969); Brittingham v. American Dredging Co., 262 A.2d 255, 256 (Del. 1970); United States Fidelity & Guar. Co. v. Forrester, 191 S.E.2d 787, 788 (Ga. Ct. App. 1972); Nakagawa v. Apana, 477 P.2d 611, 614 (Hawaii 1970); Commercial Union Ins. Co. v. Bringol, 262 So. 2d 532, 537 (La. Ct. App. 1972); Ledbetter v. M.B. Foster Elec. Co., 260 N.E.2d 174, 175 (Mass. 1970); Nash v. Sears, Roebuck & Co., 174 N.W.2d 818, 820 (Mich. 1970); Mississippi Export R.R. v. Temple, 257 So. 2d 187, 190 (Miss. 1972); Koirtyohann v. Washington Plumbing & Heating Co., 471 S.W.2d 217, 219 (Mo. 1971); Western Cas. & Sur. Co. v. J.R. Adams, Inc., 465 P.2d 794, 796 (Okla. Ct. App. 1970); Walton v. Harold M. Kelly, Inc., 269 A.2d 347, 349 (Pa. Super. 1970), *aff'd*, 293 A.2d 627 (1972); White v. State Farm Mut. Auto. Ins. Co., 443 S.W.2d 661, 666 (Tenn. Ct. App. 1969); Rorie v. Galveston, 471 S.W.2d 789, 792 (Tex. Sup. 1971), *cert. denied*, 405 U.S. 988 (1972).

7. *See* Linstead v. Chesapeake & O. Ry., 276 U.S. 28, 34, 48 S. Ct. 241, 243, 72 L. Ed. 453, 456 (1928) (power to discharge); Standard Oil Co. v. Anderson, 212 U.S. 215, 220, 29 S. Ct. 252, 253, 53 L. Ed. 480, 483 (1909) (right to substitute or discharge); Matonti v. Research-Cottrell, Inc., 202 F. Supp. 527, 534 (E.D. Pa. 1962) (manner of performance); Lowell v. Harris, 74 P.2d 551, 556 (Cal. Dist. Ct. App. 1937) (expensive equipment with operator); Colorado & S. Ry. v. Duffy Storage & Moving Co., 361 P.2d 144, 148 (Colo. 1961) (payment of salary); Brittingham v. American Dredging Co., 262 A.2d 255, 256 (Del. 1970) (expensive equipment with operator); Densby v. Bartlett, 149 N.E. 591, 593 (Ill. 1925) (power to discharge); Girard Trust Corn Exch. Bank v. Philadelphia Transp. Co., 190 A.2d 293, 297 (Pa. 1963) (payment of salary); Simonton v. Morton, 119 A. 732, 734 (Pa. 1923) (approval as to finished result).

8. *See* Edwards v. Rogers, 120 F. Supp. 499, 503 (E.D.S.C. 1954); Commercial Union Ins. Co. v. Bringol, 262 So. 2d 532, 537 (La. Ct. App. 1972); Nepstad v. Lambert, 50 N.W.2d 614, 620 (Minn. 1951); Bonanni v. Weston Hauling, Inc., 140 A.2d 591, 593 (Pa. 1958): "[T]he criterion is not whether the borrowing employer *in fact* exercises control but whether he has the *right* to exercise it." (Court's emphasis.) Rorie v. Galveston, 471 S.W.2d 789, 792 (Tex. Sup. 1971), *cert. denied*,

both employers can possess simultaneous right of control over the employee, but many courts have gone to great lengths to find control and liability on a single employer.[9] With this strict application, it is the distinction of the test to hold only one employer liable.[10]

It is evident that in some situations the mere right to control may be held by two or more employers. Recognizing this the Pennsylvania Supreme Court in *Gordon v. S. M. Byers Motor Car Co.*,[11] held that where both employers have the right to control and each is benefiting from the services of the employee, both are liable for the tortious acts of that employee.[12] Several jurisdictions have rejected the mutually exclusive concept of liability and have recognized that both employers have control and are therefore responsible.[13]

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405 U.S. 988 (1972); Heitkamp v. Krueger, 265 S.W.2d 655, 658 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.): "It is not so much the actual exercise of control which is decisive as the right to exercise such control." In Nepstad v. Lambert, 50 N.W.2d 614, 620 (Minn. 1951) the court stated that "[t]he so-called 'right of control or direction' test assumes to place the responsibility for the servant's negligence upon the employer having the right to control his actions at the time the negligent acts occurs. The theoretical basis for this test is probably the desire to impose the liability upon the employer who was in the best position to prevent the injury. Although this may be considered inconsistent with the liability-without-fault nature of *respondeat superior*, the control test has received widespread approval from the courts." *Id.* at 620. The court implies that if the employer has the right to control and fails to recognize this duty, he is liable.

9. *See, e.g.*, McNamara v. Leipzig, 125 N.E. 244 (N.Y. 1919). The defendant special employer rented a car and hired a chauffeur for a period of 3 months, and during that period the special employer had control over the direction of the chauffeur, when and where to go and when and where to stop. The court found that since the general employer possessed, managed, cared for and supplied the automobile, and selected, employed, and *controlled* the chauffeur, that the general employer was liable for the injury to the plaintiff while in the use of the special employer. The court seems to have looked more to the ownership of the automobile than to the close supervision which the special employer most certainly exerted over the use of the car. It is obvious that there was power to control and in fact actual exertion of control by both employers. In spite of this, the court insisted that only one employer had control and was liable.

10. F. MECHEM, OUTLINE OF THE LAW OF AGENCY § 460, at 313 (4th ed. 1952): "One or the other must, as a mere matter of definition, have the control."

11. 164 A. 334 (Pa. 1932).

12. *Id.* at 336. The facts of the case show that defendant, S.M. Byers Motor Car Company, furnished a gasoline tank truck with driver for the purpose of demonstration and possible sale to the codefendant, Hazlett, for use in his gasoline business. The agreement was to last for one week and at the end of this period Hazlett was to tender the sales price or an amount calculated at $10 per day for the cost of the operation of the truck and driver's wages. While in the process of unloading gasoline, the negligence of the driver caused an explosion resulting in the death of the plaintiff's deceased. The court found that at the time of the negligent act, the loaned employee was under the control of Byers in the demonstration of the truck and likewise under the control of Hazlett in the sale and delivery of gasoline. Accordingly, both defendants were held liable.

13. *See* Dickerson v. American Sugar Refining Co., 211 F.2d 200, 203 (3d Cir. 1954); Vance Trucking Co. v. Canal Ins. Co., 249 F. Supp. 33 (D.S.C. 1966), *aff'd*,

While the control test has been the primary determinant of liability as to a loaned servant, it is not without fault.[14] Attack has been directed at control's various and inconsistent results,[15] which stem from its difficult[16] or total lack of application in some cases.[17] The test is accepted in the majority of the states[18] but in view of these weaknesses, courts in some juris-

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395 F.2d 391 (4th Cir. 1968); Rosander v. Market St. Ry., 265 P. 541, 547 (Cal. Dist. Ct. App. 1928); Colorado & S. Ry. v. Duffy Storage & Moving Co., 361 P.2d 144, 147 (Colo. 1961); Kourik v. English, 100 S.W.2d 901, 905 (Mo. 1937); Siidekum v. Animal Rescue League, 45 A.2d 59, 62 (Pa. 1946); Gaston v. Sharpe, 168 S.W.2d 784, 786 (Tenn. 1943); Heitkamp v. Krueger, 265 S.W.2d 655, 659 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.); Nyman v. MacRae Bros. Constr. Co., 418 P.2d 253, 255 (Wash. 1966); Anderson v. Red & White Constr. Co., 483 P.2d 124, 127 (Wash. Ct. App. 1971); Edwards v. Cutler-Hammer, Inc., 74 N.W.2d 606, 610 (Wis. 1956).

14. *See* Dippel v. Juliano, 137 A. 514, 516 (Md. Ct. App. 1927): "The only difficulty about the rule, and it is a real difficulty, is to determine what is meant by 'control.'" *See* Nepstad v. Lambert, 50 N.W.2d 614, 620 (Minn. 1951). "One danger in using control as a test lies in failing to define sufficiently the scope and the meaning of the term." *See also* Smith, *Scope of the Business: The Borrowed Servant Problem,* 38 MICH. L. REV. 1222, 1228 (1940); Smith, *Frolic and Detour,* 23 COLUM. L. REV. 444, 456 (1923); Comment, *Borrowed Servants and the Theory of Enterprise Liability,* 76 YALE L.J. 807 (1967).

15. Nepstad v. Lambert, 50 N.W.2d 614, 620 (Minn. 1951): "Respectable authority for almost any position can be found, for even within a single jurisdiction the decisions are in conflict." *See* Rhinelander Paper Co. v. Industrial Comm'n, 239 N.W. 412, 413 (Wis. 1931): "We shall not attempt to reconcile the decisions of this and other courts in this field. They are to some extent at least irreconcilable." Smith, *Scope of the Business: The Borrowed Servant Problem,* 38 MICH. L. REV. 1222, 1253 (1940): "On the other hand, one seeking an explanation of the results of the borrowed-servant cases in terms of a weighing of the elements of control is inexorably driven to the expedient of making and accepting 'desperate refinements,' ethereal in substance and revolting in reason, in order to approach any semblance of reconciliation." *Id.* at 1253. "[I]ts [control's] inherent ambiguity makes for confused and contradictory results." *Id.* at 1230.

16. *See* Dickerson v. American Sugar Refining Co., 211 F.2d 200, 202 (3d Cir. 1953); Nepstad v. Lambert, 50 N.W.2d 614, 619 (Minn. 1951): "Though well established, the loaned-servant principle has proved troublesome in its application to individual fact situations."

17. Smith, *Scope of the Business: The Borrowed Servant Problem,* 38 MICH. L. REV. 1222, 1229 (1940): "Does the 'test' [control] for the relationship give us the answer? Obviously not. In both the frolic case and the detour case there is utter lack of control, yet in the one the master is freed, and in the other he is held liable." *See* F. MECHEM, OUTLINE OF THE LAW OF AGENCY § 460, at 313 (4th ed. 1952): "It may be doubted if this is a place where logic and common sense agree. We have seen repeatedly that this much talked of 'control' is ordinarily only putative control. It should also be remembered that the law of Frolic and Detour can apply here." In applying the control test in the area of detour the courts are forced to recognize a fiction as to the employer's control.

18. *See* Helton v. United States, 309 F. Supp. 479 (E.D. Ark. 1969); Brittingham v. American Dredging Co., 262 A.2d 255 (Del. 1970); United States Fidelity & Guar. Co. v. Forrester, 191 S.E.2d 787 (Ga. Ct. App. 1972); Nakagawa v. Apana, 477 P.2d 611 (Hawaii 1970); Commercial Union Ins. Co. v. Bringol, 262 So. 2d 532 (La. Ct. App. 1972); Ledbetter v. M.B. Foster Elec. Co., 260 N.E.2d 174 (Mass. 1970); Nash v. Sears, Roebuck & Co., 174 N.W.2d 818 (Mich. 1970); Mississippi Export R.R. v. Temple, 257 So. 2d 187 (Miss. 1972); Koirtyohann v. Washington Plumbing & Heating Co., 471 S.W.2d 217 (Mo. 1971); Western Cas. & Sur. Co. v. J.R. Adams, Inc.,

dictions have turned to other indicators for establishing liability of the loaned servant.

One alternative to control is the "whose work is being done" concept.[19] This states that as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relationship unless command has been surrendered to the special employer.[20] Therefore, since the employer is deriving a benefit from the acts of the employee, he should be liable.[21] The most common function of "whose work" has been in conjunction with control where the courts examine and evaluate both the work and the right to control.[22] This arrangement has also met with opposition, and one court expressly rejected both control and "whose work."[23]

In a continuing quest for a better determination of liability, Professor Talbot Smith formulated the "scope of the business test."[24] This, to a certain extent resembles "whose work" except that it is based on the theory that business should pay the cost of its passage and presumes the borrowing employer is liable. Once the borrowing employer is identified and it is confirmed that the function is within his normal scope of business, the borrow-

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465 P.2d 794 (Okla. Ct. App. 1970); Walton v. Harold M. Kelly, Inc., 269 A.2d 347 (Pa. Super. 1970), *aff'd*, 293 A.2d 627 (1972); White v. State Farm Mut. Auto. Ins. Co., 443 S.W.2d 661 (Tenn. Ct. App. 1969); Rorie v. City of Galveston, 471 S.W.2d 789 (Tex. Sup. 1971), *cert. denied*, 405 U.S. 988 (1972).

19. *See* Denton v. Yazoo & M.V.R.R., 284 U.S. 305, 52 S. Ct. 141, 76 L. Ed. 310 (1932); Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480 (1909); Jones v. Getty Oil Co., 92 F.2d 255 (10th Cir. 1937); Devaney v. Lawler Corp., 56 P.2d 746 (Mont. 1936); Charles v. Barrett, 135 N.E. 199 (N.Y. 1922).

20. Charles v. Barrett, 135 N.E. 199, 200 (N.Y. 1922).

21. Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1235 (1940).

22. Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 310 (1932); Charles v. Barrett, 135 N.E. 199 (N.Y. 1922).

23. Landis v. McGowan, 165 P.2d 180, 184 (Colo. 1946).

24. Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1248 (1940). Smith's underlying principle is that business must pay the "reasonable cost of its passage" and thus any injury arising out of the normal function of the business should be considered as a cost of doing business. The scope of the business places primary liability on the borrowing employer depending upon the application of three basic questions: 1. Who is the borrowing employer? 2. What is the normal scope of his business? 3. Has a portion of the normal business been delegated to the general employer? The test presumes that the borrowed employee is functioning within the scope of the borrowing employer's business, thus any difficult or borderline cases are resolved relieving the general employer. In the event that the questions to be asked concerning the employment were contrary to the special employer's scope of business, then the employee would be considered as an independent contractor with the general employer liable. Application of the scope of business test to the instant case would render all facts in favor of Hale's liability with the exception of the delegation of his normal scope of business. The requirements of the test prohibit any farming out of inherently dangerous work by the special employer, thus the rejection of the independent contractor relation, and Hale remains liable. *See* 28 OHIO ST. L.J. 550 (1967).

ing employer cannot escape liability unless it is shown that he has delegated some of his business to the general employer, thus creating an independent contractor relationship. Smith justifies his theory by stating the "the results obtained by its use are the results the courts now reach in those cases presenting clear-cut issues, and as to the doubtful cases no test employed could result in greater confusion than now exists."[25] Unfortunately the merits of this concept have not been fully developed as it has enjoyed limited acceptance by the courts.[26]

Experience has demonstrated that the courts have readily adopted viable ideas from one area of law and transplanted them with success in other legal fields. Such is the case with yet another criteria for establishing liability for the loaned servant, *allocation of risk*, which places any loss on the employing enterprise. The use of allocation of risk as the justification for liability under the doctrine of respondeat superior and the principle underlying workmen's compensation statutes share common ground.[27] The rationale of the allocation of risk is to place the burden of losses caused by the torts of the employee on the employer's enterprise. Experience will dictate to the employer the type and frequency of losses and thus allow him to meet those losses by the use of insurance and risk spreading. The cost of the protection will be a proper cost of doing business with the ultimate consumer paying for the insurance in the form of higher prices for the services of the enterprise.[28] *Johnston v. Long*[29] proposed the use of allocation of risk to require

25. Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1248 (1940).

26. The "scope of the business" has enjoyed the least recognition by the courts and yet probably the greatest misapplication. *See* 28 OHIO ST. L.J. 550 (1967); Comment, *Borrowed Servants and the Theory of Enterprise Liability*, 76 YALE L.J. 807 (1967); White v. Bye, 70 N.W.2d 780 (Mich. 1955). The *Bye* court is the only court to apply the policy as intended where the negligent act was found not to be within the normal scope of the borrowing employer's business; therefore he was not liable. Other courts have applied the test in conjunction with the control test. *See* New York Cent. R.R. v. Northern Ind. Pub. Serv., 221 N.E.2d 442 (Ind. 1966); McFarland v. Dixie Mach. & Equip. Co., 153 S.W.2d 67 (Mo. 1941); Wylie-Stewart Mach. Co. v. Thomas, 137 P.2d 556 (Okla. 1943); Hilgenberg v. Elam, 145 Tex. 437, 198 S.W.2d 94 (1946).

27. *See* Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 456 (1923). Smith was one of the first to propose that the justification for the master's liability for his employee is the same as the principle used in workmen's compensation. This policy purports that it is "socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry, than to cast the loss upon a few." *Id.* at 456. The principle has been propounded many times in workmen's compensation suits. *See* Ives v. South Buffalo Ry., 94 N.E. 431, 436 (N.Y. 1911); Kohlman v. Hyland, 210 N.W. 643, 645 (N.D. 1926); Altman v. North Dakota Workmen's Comp. Bureau, 195 N.W. 287, 291 (N.D. 1923); Carroll v. Beard-Laney, Inc., 35 S.E.2d 425, 427 (S.C. 1945).

28. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 69, at 459 (4th ed. 1971).

29. 181 P.2d 645 (Cal. 1947). Justice Traynor delivered the opinion relating to an action against the executor of an estate by Harold R. Johnston who was injured by a defective overhead door at an automobile agency owned by the estate. Defendant

the employer to answer for the torts of the employee, and the trend appears to be the application of this doctrine in all master-servant relations.[30]

Strait v. Hale Construction Co.[31] is the culmination of the allocation of risk concept in the California courts and represents the first real inroad into control as applied to the loaned servant situation. The *Strait* court addressed itself to the faults of control[32] by demonstrating that in very few situations would control be so obvious as to place liability on a single employer. The standard elements used to determine control can result in three different findings: the general employer is liable,[33] the special employer is liable,[34] or both are liable,[35] each result depending on the elements used and their emphasis by the court. If the law cited by the court were strictly applied to the instant case, neither defendant would be liable—a result inconceivable under the given circumstances.[36] With this irreconcilable state

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Long sought to avoid personal liability for the negligence of the automobile agency's employees. Justice Traynor stated that Long, the appointed executor, was liable for the torts of the employees of the estate due to his statutory right to purchase liability insurance out of the funds of the estate to provide protection for losses arising out of the operation of the estate. The court cited Smith, *Frolic and Detour,* 23 COLUM. L. REV. 444, 456 (1923): "The principle justification for the application of the doctrine of *respondeat superior* in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his cost of doing business." Johnston v. Long, 181 P.2d 645, 651 (Cal. 1947).

30. *Johnston* was cited in Ira S. Bushey & Sons, Inc. v. United States, 276 F. Supp. 518 (E.D.N.Y. 1967), *aff'd,* 398 F.2d 167 (2d Cir. 1968), where the intentional torts of a seaman in flooding the drydock caused the destruction of property, and the court held that "[l]iability of an employer is now being recognized as a 'rule of policy, a deliberate allocation of a risk.'" *Id.* at 527. The employer was held liable for the intentional torts of the employee. *See* United States v. Romitti, 363 F.2d 662 (9th Cir. 1966). The employer was held liable for the injury caused by the negligent acts of an employee returning from the job site. *Johnston* was cited as the justification for respondeat superior.

31. 103 Cal. Rptr. 487 (Dist. Ct. App. 1972).

32. *Id.* at 493.

> In the case of a borrowed servant, both the general employer and special employer share control; while the general employer can fire the employee, the special employer can dismiss him from the particular job; while the general employer can direct the borrowed servant in the general use of the instrumentality, the special employer directs him on the particular aspects of the job at hand; control is thus actually *split* and it is a test without meaning. (Court's emphasis.)

See Smith, *Scope of the Business: The Borrowed Servant Problem,* 38 MICH. L. REV. 1222, 1228 (1940); Comment, *Borrowed Servants and the Theory of Enterprise Liability,* 76 YALE L.J. 807 (1967).

33. *See, e.g.,* Billig v. Southern Pac. Co., 209 P. 241 (Cal. 1922). The court found the general employer liable since the special employer did not have the power to discharge the loaned employee.

34. *See, e.g.,* McFarland v. Voorheis-Trindle Co., 343 P.2d 923 (Cal. 1959). To escape liability the general employer need only relinquish full control to the special employer.

35. *See, e.g.,* Rosander v. Market St. Ry., 265 P. 541 (Cal. Dist. Ct. App. 1928). Where both employers exert control, both will be held liable for the torts of the employee.

36. The general employer urged that he had no control over the employee and had

of the law, the court notes that "[i]f the ultimate determination of liability in borrowed servant cases is controlled by the doctrine of *respondeat superior* . . . then the policy considerations underlying *respondeat superior* must also be examined."[37] This decision was inevitable considering the conflicts of prior case law. Noting this, the court recognized the justification for vicarious liability as applied in the sole employer situation propounded in the *Johnston* case. The court stated that "[t]he principle justification for the application of *respondeat superior* in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his cost of doing business."[38] In applying the allocation of risk, the *Strait* court pointed out that *both* the road contractor and Young, even though a farmer, knew of the dangers involved in the operation of heavy equipment and therefore should have insured for such hazards to property and third parties.[39] The opinion further stated that if in loaning the equipment and operator, the general employer was not satisfied that he could exert sufficient control over the employee to avoid the risk, he could have contracted for specific indemnity or obtained the appropriate liability insurance.[40]

The adoption of the allocation of risk and dual liability would relieve the injured party's burden of proof, since the difficult and varying concept of control must no longer be satisfied. It appears that with such a determination, the plaintiff, in order to recover, need only prove the master-servant relationship and that the employee's acts were the proximate cause of the injury. Upon such a finding a joint and several judgment would be entered against *all* defendants, allowing the plaintiff to look to several sources of funds. It appears that with the adoption of the allocation of risk and dual

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not been to the job site. The only instructions given the employee were to follow the directions of Hale, the special employer. It was also his contention that he was not in the heavy equipment business. If these facts were true, then by settled California law, applying the control test, the general employer would be relieved of liability. There is no control where the general employer surrenders complete control to the special employer. The special employer's contention is also a well settled rule of law; where the special employer does not have the right to discharge the employee, there is no control and therefore no liability. *See, e.g.,* McFarland v. Voorheis-Trindle Co., 343 P.2d 923, 927 (Cal. 1959): "It is sufficient if the right to direct the details of the work is present."; Billig v. Southern Pac. Co., 209 P. 241, 244 (Cal. 1922).

37. Strait v. Hale Constr. Co., 103 Cal. Rptr. 487, 492 (Dist. Ct. App. 1972), *quoting* Hinman v. Westinghouse Elec. Co., 471 P.2d 988, 990 (Cal. 1970):

> "Although earlier authorities sought to justify the *respondeat superior* doctrine on such theories as 'control' by the master of the servant, the master's 'privilege' in being permitted to employ another, the third party's innocence in comparison to the master's selection of the servant, or the master's 'deep pocket' to pay for the loss, 'the modern justification' for vicarious liability is a rule of policy, a deliberate allocation of a risk."

38. Johnston v. Long, 181 P.2d 645, 651 (Cal. 1947).

39. Strait v. Hale Constr. Co., 103 Cal. Rptr. 487, 493 (Dist. Ct. App. 1972).

40. *Id.* at 494; Widman v. Rossmoor Sanitation, Inc., 97 Cal. Rptr. 52, 59 (Dist. Ct. App. 1971).

liability, many facets of the plaintiff's position are improved, and accordingly the general public is more adequately protected. This is not true of the defendant employers' position.

When the employer loans an employee to a special employer, and subsequently a third party is injured by the acts of the employee, the employer has placed himself in a position of liability even though the borrowing employer had complete supervision over the employee at the time of the tort. Another disadvantage of allocation of risk and dual liability will be the inevitable litigation between the employers to apportion the judgment.[41] It is inconceivable that an employer would fail to contest the judgment when he is confident that the employee was loaned out and not his responsibility, unless the other employer was hopelessly insolvent and a subsequent suit would be futile. The same result would follow although one or both employers has sufficient insurance, since as a practical matter no insurance company would forego its right of subrogation against the other employer on behalf of the insured. In the subsequent litigation it is hard to visualize a determination of liability without the use of the control test. As such, the control test would still be recognized, although utilized in a subsequent suit between employers rather than in the original suit involving the injured parties and employers. The anticipated multiple suits due to the liability of both employers comes at a time in this nation's judicial history when the court dockets are more congested than ever before and intended reform is being urged from every legal level.[42] The lack of further refinements by the court as to a possible apportionment of the judgment or some other means of avoiding the subsequent suits, could mean the abandonment of the allocation of risk and dual liability, requiring the reinstatement of control as the proper test in the loaned servant cases.

The overall effect of holding both employers liable could force those employers who frequently loan employees, to curtail or abandon such a practice or to take proper precautions in the form of insurance or effective indemnity contracts.[43]

California, by statute, has cured the related problem in workmen's compensation by requiring that the insurance of the general employer is primary, unless it is shown that the injured employee is on the payroll of the special employer and then his insurance is liable for the loss.[44] If this concept is carried over into agency law and used in conjunction with the allocation of risk, the multiple suits could be avoided. However, this statutory

41. Strait v. Hale Constr. Co., 103 Cal. Rptr. 487, 494 (Dist. Ct. App. 1972). The court discusses the subsequent litigation stating that claims between the employers would be settled at that time.

42. *See, e.g.*, Judicial Conference, 40 U.S.L.W. 2284 (Nov. 16, 1971).

43. Strait v. Hale Constr. Co., 103 Cal. Rptr. 487, 494 (Dist. Ct. App. 1972).

44. CAL. INS. CODE ANN. § 11663 (Deering 1963).

determination appears to have deep roots in the control test since one factor recognized in establishing control has been the payment of wages.[45]

Given the range of possibilities for the determination of liability for the loaned servant, control still looms in the background with its only advantage being that of placing liability and apportioning the judgment in a single trial. Obviously a renovation of the present control concept by the courts is not realistic and therefore any return to the use of control would be met with many familiar problems. While *Strait* is the first step in razing a legal structure founded on a century of decisions based on control, it cannot possibly be the last, for as with all newly conceived ideas, the allocation of risk doctrine will require modification. While the Supreme Court of California has yet to sanction the use of allocation of risk to hold both employers liable for the torts of the loaned servant, it is hoped that in doing so, the court will add further refinements which will apportion the judgment and therefore avoid subsequent suits. Only then could *Strait* and its concepts, founded in public policy, be of a merit worthy of adoption.

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45. *See* Colorado & S. Ry. v. Duffy Storage & Moving Co., 361 P.2d 144, 148 (Colo. 1961); Girard Trust Corn Exch. Bank v. Philadelphia Transp. Co., 190 A.2d 293, 297 (Pa. 1963).