

4-1950

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Recommended Citation

William T. Gamble, Tort Liability of Oil Companies for Acts of Service Station Operators, 3 *Vanderbilt Law Review* 597 (1950)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol3/iss3/35>

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TORT LIABILITY OF OIL COMPANIES FOR ACTS OF SERVICE STATION OPERATORS

Since the advent of the automobile, travel by motor vehicle has been ever-increasingly prevalent, and consumption of gasoline in the large amounts so required¹ has necessitated the existence of a great number of retail service stations.² For various reasons the major producers of petroleum products have thought it desirable to retain some connection with the distribution of their products until those products pass to the hands of consumers,³ and consequently nearly all such major producers have established extensive systems of retail outlets⁴ which sell only that producer's products and under its exclusive tradenames.⁵ Because of the great number of these stations and the nature of activity there conducted it is only natural that many injuries to third parties⁶ occur as a result of tortious conduct on the part of operators of

1. In 1948 there were 41,151,326 registered motor vehicles and the consumption of motor fuel in highway use was 30,460,641,000 gallons. THE WORLD ALMANAC AND BOOK OF FACTS 647 (1950).

2. There were 241,858 retail service stations in 1939. STATISTICAL ABSTRACT OF THE UNITED STATES 907 (70th ed. 1949). The number is probably considerably larger at the present time since gasoline consumption is now about 50% greater. See AUTOMOBILE FACTS AND FIGURES 62 (28th ed. 1948).

3. No doubt the chief benefit to be derived is that connection with the retail market affords a necessary outlet for their products which they must have to insure profits in other branches of the industry. See COOK, CONTROL OF THE PETROLEUM INDUSTRY BY MAJOR OIL COMPANIES 50 (TNEC Monograph 39, 1941). Other benefits are: advantages of national advertising, price control, credit card systems and stabilized demand. For enumeration of some benefits of chain store distribution see Fox v. Standard Oil Co., 294 U.S. 87, 98, 55 Sup. Ct. 333, 79 L. Ed. 780 (1935).

4. These producers also maintain extensive systems of wholesale stations which deliver the products to the retail outlets. Cases involving injuries resulting from wrongful acts of employees of those bulk stations, usually resulting from collisions of trucks engaged in transporting the company's products, raise legal problems much the same as those involved in the cases which are the subject of this discussion. See cases collected in Note, 116 A.L.R. 457, 462-69 (1938).

5. For discussion of the marketing system employed by the major producers see COOK, CONTROL OF THE PETROLEUM INDUSTRY BY MAJOR OIL COMPANIES 41-52 (TNEC Monograph 39, 1941). The general practice is to lease service stations to operators on a gallonage basis. *Id.* at 46. These leases are usually cancellable on short notice and by this means operators can be coerced into following the company's direction. *Id.* at 47. This plan achieves the same results as those previously obtained by company ownership and employment of salaried operators but has the advantages of shifting social security taxes and placing the effect of retail price wars on the operators. *Id.* at 52. Operation by "independent contractors" also shifts the burden of tort liability under respondeat superior and avoids the incidence of other types of taxation. Note, 38 MICH. L. REV. 1063 (1940). Despite the relatively small percentage of stations operated for the company by salaried employees, only 1.6% of the retail outlets in seven western states sold the gasoline of more than one company in 1948. See Standard Oil Co. of California v. United States, 337 U.S. 293, 295, 69 S. Ct. 1051 (1949), 3 VAND. L. REV. 156. The "requirements" contracts used in this scheme have recently been declared violative of the Clayton Act and one company has been enjoined from enforcing them. *Ibid.* Justice Douglas, in dissenting, expressed the belief that the holding will force the company to buy out and operate the stations. 337 U.S. at 320.

6. Injuries also frequently occur to employees of retail stations and workmen's compensation is often sought. These cases, too, necessitate a determination of the nature of the relationship between the company and the operator of the service station since workmen's compensation laws are interpreted to mean by the term "employees" only "servants" under a master-servant relationship, thus not extending the remedy to

those stations or their employees.⁷ And in view of the obvious fact that some connection exists between the producer and the operator, and the fact that the producer usually has a deeper pocket, it is not surprising that many attempts have been made to hold the producer liable for injuries so resulting. These attempts, usually based on a theory of the existence of a master-and-servant relationship⁸ calling into play the doctrine of respondeat superior, have met with varied success.⁹

No doubt the variance of results in cases in which attempts were made to establish the existence of a master-servant relationship is partially due to differences in the operative facts; but, even allowing for this, there seem to be marked differences of attitude among the courts as to what must be shown to prove the existence of the relationship. For this reason it is desirable to review the general rules to be applied in determining the nature of employment relationships before attempting to decide the proper legal effect of particular facts.

When one person, wishing to accomplish a given result without doing the work himself, hires another to do the work for him and reserves either control or the right of control over the employee's actions in accomplishing that result, the relationship is said to be that of master and servant.¹⁰ And the master is liable, under the doctrine of respondeat superior, for injuries to third persons occasioned by tortious acts of the servant done within the scope of the employment.¹¹ On the other hand, if the employer, having no

independent contractors. HOROVITZ, WORKMEN'S COMPENSATION 195 (1944); 1 SCHNEIDER, WORKMEN'S COMPENSATION LAWS 178 (1932). For this reason workmen's compensation cases will be cited herein, along with those involving injuries to third parties, on points relating to the existence of a master-servant relationship.

7. If the company would be liable for a tort committed by the operator, the company is liable for that tort if committed by an attendant hired by the operator with the consent of the company; and consent may be implied if the nature of the employment indicates the necessity of hiring others. *Monetti v. Standard Oil Co.*, 195 So. 89 (La. App. 1940).

8. Liability may be imposed on the company as lessor if the premises are leased in dangerous condition. *Tauraso v. Texas Co.*, 79 N.Y.S.2d 812 (Sup. Ct. 1948); accord, *Texas Co. v. Freer*, 151 S.W.2d 907 (Tex. Civ. App. 1941) (alternative ground). *But cf. Brittain v. Atlantic Refining Co.*, 126 N.J.L. 528, 19 A.2d 793 (1941).

9. See Steffen, *Independent Contractor and the Good Life*, 2 U. OF CHI. L. REV. 501, 520 (1935); Note, 116 A.L.R. 457 (1938); 1 OKLA. L. REV. 277 (1948); 20 TEXAS L. REV. 385 (1942).

10. PROSSER, TORTS 473 (1941); RESTATEMENT, AGENCY § 2(2) (1933). The distinction between the relationships of "master and servant" and "principal and agent" is of fundamental importance and trouble frequently results from confusion of the two under one classification of "principal and agent." It may be briefly stated that an agent performs juristic acts—those acts done for the purpose of effecting a change in the principal's legal relation with a third person. A servant does only non juristic acts—those done for the purpose of achieving some result other than a change in legal relations. For detailed explanation of this distinction see Ferson, *THE RATIONAL BASIS OF CONTRACTS* 227-42 (1949); Ferson, *Agency to Make Representations*, 2 VAND. L. REV. 1, 2-7 (1948). The distinction is vital in that it eliminates any false impression that the two relationships are inherently coexistent. They are not. For instance, an operator of a filling station might be an agent of the company in so far as having the ability to transfer title to products sold and yet not be a servant so as to impose liability in tort upon the company under the doctrine of respondeat superior.

11. PROSSER, TORTS 475 (1941); RESTATEMENT, AGENCY § 219 (1933). Many

interest in the manner in which the desired result is to be reached, hires another to merely produce the desired result and retains neither control nor right of control over the employee's actions in achieving the desired result, the relationship is said to be that of employer and independent contractor,¹² and the doctrine of respondeat superior does not apply,¹³ although liability of the employer may sometimes be predicated on other bases.¹⁴ The test, then, of the applicability of the doctrine of respondeat superior is whether the employer has reserved control or right of control over the employee's physical conduct in the performance of the service bargained for.¹⁵

These rules are well settled as law, but difficulty often arises in determining, under the facts of a given case, whether or not such control has been reserved by the employer. Most courts agree that the existence of a master-and-servant relationship is to be determined from all the circumstances,¹⁶ and not just from express agreements between the parties,¹⁷ but courts seem to disagree on the weight to be given to various facts which are somewhat indicative of the true relationship.¹⁸

That this is true in the cases now to be considered is well illustrated by two decisions in the same case¹⁹ handed down by courts of different levels.²⁰

reasons have been offered as possible bases for vicarious liability of a master. See BATY, VICARIOUS LIABILITY c. 8 (1916). But the rule has been generally thought desirable on broad grounds of policy. Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L. J. 584, 720 (1929); Laski, *The Basis of Vicarious Liability*, 26 YALE L. J. 105 (1916); Seavey, *Speculations as to "Respondeat Superior,"* in HARVARD LEGAL ESSAYS 433 (1934); Smith, *Frolic and Detour*, 23 COL. L. REV. 444, 456 (1923).

12. 1 MECHEM, LAW OF AGENCY § 40 (2d ed. 1914); PROSSER, TORTS 473 (1941); RESTATEMENT, AGENCY § 2(3) (1933); Ferson, *Liability of Employers for Misrepresentations Made by "Independent Contractors,"* 3 VAND. L. REV. 1 (1949).

13. For discussion and criticism of the rule whereby an employer is not vicariously liable for the torts of an independent contractor see Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 IND. L. J. 494 (1935); Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1934). The rule need not here be defended or criticized; it is merely accepted as a settled legal doctrine.

14. Chapman, *Liability for the Negligence of Independent Contractors*, 50 L.Q. REV. 71 (1934); Ferson, *Liability of Employers for Misrepresentations Made by "Independent Contractors,"* 3 VAND. L. REV. 1 (1949); Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1934); Steffen, *Independent Contractor and the Good Life*, 2 U. OF CHI. L. REV. 501 (1935); Note, 39 YALE L.J. 861 (1930).

15. HARPER, TORTS § 292 (1933); HUFFCUT, AGENCY 9 (2d ed. 1901); 1 MECHEM, LAW OF AGENCY § 40 (2d ed. 1914); PROSSER, TORTS 473 (1941); RESTATEMENT, AGENCY § 2 (1933). The test has been criticized by some as being too indefinite. Leidy, *Salesmen as Independent Contractors*, 28 MICH. L. REV. 365 (1930); Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188, 199 (1939); Teple, *The Employer-Employee Relationship*, 10 OHIO ST. L.J. 153, 176 (1949); Note, 38 MICH. L. REV. 1063, 1066 (1940).

16. See *Gulf Refining Co. v. Brown*, 93 F.2d 870, 873, 116 A.L.R. 449 (4th Cir. 1938); *Brenner v. Socony Vacuum Oil Co.*, 236 Mo. App. 525, 158 S.W.2d 171, 175 (1942).

17. "[W]hile the contract may be of importance in determining what is the relationship, it is not the determining factor. . . ." *Monetti v. Standard Oil Co.*, 195 So. 89, 93 (La. App. 1940).

18. Note, 38 MICH. L. REV. 1063, 1072 (1940).

19. *Texas Co. v. Wheat*, 140 Tex. 468, 168 S.W.2d 632 (1943), reversing 159 S.W.2d 238 (Tex. Civ. App. 1942).

20. Consideration of two decisions in the same case is appropriate because of the comparison which can be made between attitudes shown by two courts faced with exactly the same fact situation.

The facts, while naturally not identical with those of other cases, are representative of those usually present.

In *Texas Co. v. Wheat*²¹ the following facts were presented. Plaintiff slipped on some oil on the pavement in front of a service station and suffered injuries as a result of the fall. In contending that the operator was a servant of defendant oil company, plaintiff showed that defendant leased the station and equipment to the operator under an arrangement whereby the defendant could in effect terminate the lease at will.²² The lease also required the operator to keep the station repaired and in a clean, safe and healthful condition. A contract further provided that the operator was to purchase his requirements of petroleum products from defendant,²³ and that he could use defendant's trademarks and trade names in advertising. The station was similar in appearance to other stations selling defendant's products, being painted in defendant's colors and equipped with large signs bearing defendant's trade name, and also having a sign relating to a "Texaco Registered Rest Room," a feature which was nationally advertised. The station attendants wore defendant's uniforms. The operator testified that he sold at defendant's "suggested" retail prices, that defendant had painted the station several times and had made some repairs, that defendant's representatives inspected the premises from time to time and made "suggestions" as to keeping it clean, that he voluntarily attended meetings conducted by defendant at which times he was instructed as to proper operating methods and in particular as to how to keep oil and similar substances off the pavement, and that he honored defendant's credit cards. The contracts between the parties made no mention of these things, and the operator testified that he complied with "suggestions" and "instructions" voluntarily.

The Court of Civil Appeals²⁴ reasoned that although the nature of the relationship is determined by agreements of the parties, their acts within the relationship might indicate implied or express agreements in addition to, or contrary to, the written contract between them; and if those acts indicated that the employer had in fact retained the right to control the employee a jury might find the existence of a master-and-servant relationship not expressly created by the written agreement between them.²⁵ Although the court

21. 140 Tex. 468, 168 S.W.2d 632 (1943), *reversing* 159 S.W.2d 238 (Tex. Civ. App. 1942).

22. The lease provided for rent which, if charged, was so high as to prohibit profitable operation of the station. This rent was reduced to a reasonable amount by a "temporary" agreement which could be revoked by the company at any time.

23. This result may be reached through several devices. For instance, the operator may be required not to deal in competitive products, to buy all his requirements from the company, or to agree to buy a monthly or yearly volume in excess of any reasonable expectancy of volume to be sold. COOK, CONTROL OF THE PETROLEUM INDUSTRY BY MAJOR OIL COMPANIES 47 (TNEC Monograph 39, 1941). These "requirements" contracts have recently been held to violate the Clayton Act. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 69 Sup. Ct. 1051 (1949), 3 VAND. L. REV. 156.

24. 159 S.W.2d 238 (Tex. Civ. App. 1942).

25. 159 S.W.2d at 242.

implied that other factors present also suggested the existence of a master-servant relationship, particular emphasis was given to the fact that the defendant made "suggestions" with respect to the operation of the station and that these suggestions were complied with by the operator. The court said that the jury might find from this, when considered in light of the fact that defendant's power to terminate the lease at will was an effective means of compelling obedience, that there existed an agreement between defendant and the operator that defendant was to have the right to control the operator in the details of operating the station.²⁶ Thus this court held that the contract between the parties was only evidence of the true relationship which was to be considered in light of what was actually done under the contract.

The Supreme Court of Texas reversed this holding,²⁷ saying that there was no evidence on which a jury might properly find a master-servant relationship. In reaching this conclusion the court gave greater weight to the contract between the parties and less weight to the inferences which might be raised by the acts of the parties and other circumstances.²⁸ Although the court conceded that the defendant could, and did, compel the operator to comply with its suggestions as to the condition in which the station should be kept, it held that so long as defendant did not dictate the specific methods by which the conditions were to be met it had not assumed such control as to create a master-servant relationship.²⁹ This reasoning overlooks the fact that the circumstances might indicate an agreement that the defendant was to exercise such control if it wished, and that defendant could in fact exercise whatever control it desired. Mere failure to exercise complete control, if the right is present, does not negative the existence of a master-servant relationship.³⁰

The facts of the *Wheat* case are essentially the same as those of most

26. "[C]ertainly the jury was entitled to consider the possible and contractual permissible effect of the rent reduction letter in conjunction with the terms of the written lease. It is apparent that The Texas Company, in effect, retained the right to terminate Gossen's tenancy at will by the simple expedient of withdrawing the letter, and thus place in effect a prohibitive rental rate. This circumstance in turn has a material bearing upon the nature of the 'suggestion' or 'instruction' which Gossen from time to time received from representatives of The Texas Company. From the facts and circumstances of this case, as disclosed by the records, we are of the opinion that a jury might have properly concluded that there existed between The Texas Company and Gossen an agreement or understanding, expressed or implied, oral or written, or partly oral and partly written, whereby The Texas Company retained the right to prescribe the material details of the means and methods employed in the operation of the service station involved." 159 S.W.2d at 242-43.

27. 140 Tex. 468, 168 S.W.2d 632 (1943).

28. 168 S.W.2d at 635.

29. "But the company, as lessor, was interested in maintaining the good reputation of the station, and it had a right, as a condition precedent to the leasing of the station, to demand maintenance of such standards. It could enforce compliance with the contract in the maintenance of these standards without creating the relation of master and servant so long as it did not undertake to direct the details by which the results were to be accomplished." 168 S.W.2d at 635.

30. See *Joiner v. Sinclair Refining Co.*, 48 Ga. App. 365, 172 S.E. 754, 755 (1934).

other cases raising the point,³¹ and the two opinions fairly represent the difference of attitudes among the courts. A number of courts faced with similar fact situations have decided in accord with the realistic attitude of the lower court.³² Other courts, like the Texas Supreme Court, have been more impressed with what the expressed intention of the parties was with regard to the relationship to be created.³³ Some of these latter courts, however, were presented with little or no evidence bearing on the nature of the relationship other than the written agreements between the parties.

It is true that no rules of automatic application can be set down as determinative of the true nature of the relationship between an employer and an employee. However, besides evidence of actual exercise of control there are other factors which are considered to be especially indicative of the nature of the relationship,³⁴ and consideration of some of these factors is particularly pertinent in the cases now under discussion.

31. For a group of facts compiled to represent the typical fact situation in these cases see Note, 38 MICH. L. REV. 1063 (1940). The facts of *Texas Co. v. Wheat* closely parallel those selected by that author as typical.

32. *Bieluczyk v. Crown Petroleum Corp.*, 134 Conn. 461, 58 A.2d 380 (1948); *Joiner v. Sinclair Refining Co.*, 48 Ga. App. 365, 172 S.E. 754 (1934); *Becker v. Aschen*, 344 Mo. 1107, 131 S.W.2d 533 (1939); *Brenner v. Socony Vacuum Oil Co.*, 236 Mo. App. 525, 158 S.W.2d 171 (1942); *Coffman v. Shell Petroleum Corp.*, 228 Mo. App. 727, 71 S.W.2d 97 (1934); *Garnant v. Shell Petroleum Corp.*, 228 Mo. App. 256, 65 S.W.2d 1052 (1933); *Greene v. Spinning*, 48 S.W.2d 51 (Mo. App. 1931); *Eason Oil Co. v. Runyan*, 158 Okla. 241, 13 P.2d 118 (1932); *Gulf Refining Co. v. Rogers*, 57 S.W.2d 183 (Tex. Civ. App. 1933); *Crowder v. State Compensation Comm'r*, 115 W. Va. 12, 174 S.E. 480 (1934); *accord*, *Buck v. Standard Oil Co. of New York*, 224 App. Div. 299, 230 N.Y. Supp. 192 (3d Dep't 1928) (a few aspects of the relationship set out in the opinion); *Texas Co. v. Freer*, 151 S.W.2d 907 (Tex. Civ. App. 1941), 20 TEXAS L. REV. 385 (1942) (holding on alternative ground—that lessor is liable because premises leased in a defective condition).

33. *Arkansas Fuel Oil Co. v. Scaletta*, 200 Ark. 645, 140 S.W.2d 684 (1940); *Greiving v. La Plante*, 156 Kan. 196, 131 P.2d 898 (1942); *Brown v. Standard Oil Co.*, 309 Mich. 101, 14 N.W.2d 797 (1944); *Shell Petroleum Corp. v. Linham*, 163 So. 839 (Miss. 1935); *Rothrock v. Roberson*, 214 N.C. 26, 197 S.E. 568 (1938); *Cities Service Oil Co. v. Kindt*, 200 Okla. 64, 190 P.2d 1007 (1948), 1 OKLA. L. REV. 277 (1948); *Texas Co. v. Wheat*, 140 Tex. 468, 168 S.W.2d 632 (1943), *reversing* 159 S.W.2d 238 (Tex. Civ. App. 1942). *See Reynolds v. Skelly Oil Co.*, 227 Iowa 163, 287 N.W. 823 (1939) (no negligence shown); *Hudson v. Gulf Oil Co.*, 215 N.C. 422, 2 S.E.2d 26 (1939) (no negligence shown). *Cf. Standard Oil Co. of N.J. v. Naramore*, Tenn. App., M.S., Jan. 8, 1949 (unreported) (injury resulting from retail sale by bulk sales operator).

34. "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 of 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; and

"(i) whether or not the parties believe they are creating the relationship of master and servant." RESTATEMENT, AGENCY § 220(2) (1933). See Notes, 19 A.L.R. 226 (1922), 20 A.L.R. 684 (1922), 61 A.L.R. 223 (1929).

One group of such factors relates to the custom of the community as to the control ordinarily exercised in a particular occupation. As a general rule unskilled labor is performed under the control and supervision of the employer,³⁵ while those engaged in an occupation requiring great skill and knowledge less frequently subject themselves to the right to control of an employer.³⁶ While operating a filling station is not as strictly a nonskilled occupation as others, it is not so skilled that an employer would seldom reserve the right to control the operator's actions. Especially is this true since the employer in these cases has a vital interest in the details of operation. National advertising of a chain of stations tends to cause the public to associate the conduct of one station (especially as to cleanliness, safety and courtesy) with that to be expected of all others in the chain, and since retail sales are such a regular and vital part of the company's business³⁷ it would ordinarily be extremely reluctant to relinquish all right to control the details of operation.

Another factor of some import is whether the employer supplies the equipment³⁸ and place of work for the employee.³⁹ It is a legitimate inference that one who supplies tools and instrumentalities of substantial value would not likely give up all control of the employee's actions in using them,⁴⁰ and one who is unable to supply his own equipment would be more likely to submit to control of an employer. Certainly such considerations do not lend support to the existence of the relationship of employer and independent contractor when, as is normally the case with filling station operation, the employer supplies both the equipment and the premises.

35. "The statute, by the term 'independent contractor,' means to indicate a person who . . . is independent of the service of the person who employs him. In thought, in speech, and in matters of contract there is instinctively dissociated from such person the usual cleaners and caretakers of public or private buildings. . . . [I]t would be quite unfortunate to lift a janitress to the position of an independent contractor. . . ." *Curry v. Addoms*, 166 App. Div. 433, 151 N.Y. Supp. 1017, 1018 (2d Dep't. 1915); see *Chicago, R.I. & P.Ry. v. Bennett*, 36 Okla. 358, 128 Pac. 705, 707 (1912). See RESTATEMENT, AGENCY § 220, comment *e* (1933); Note, 20 A.L.R. 684, 745-50 (1922). Many courts have spoken in terms of a test of an "Independent Calling." Note, 19 A.L.R. 226, 241-47 (1922). And this test has been suggested by some writers as preferable to the "right to control" test. Leidy, *Salesmen as Independent Contractors*, 28 MICH. L. REV. 365, 378 (1930); Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COL. L. REV. 1015, 1035 (1941).

36. Cf., e.g., *Kueckel v. Ryder*, 54 App. Div. 252, 66 N.Y. Supp. 522, 523 (1st Dep't 1900), *aff'd*, 170 N.Y. 562, 62 N.E. 1096 (1902); *Ziebell v. Eclipse Lumber Co.*, 33 Wash. 591, 74 Pac. 680 (1903).

37. Whether the work is a regular part of the employer's business is also a factor to be considered. See *Texas Co. v. Mills*, 171 Miss. 231, 156 So. 866, 869 (1934); *McFarland v. Dixie Machinery & Equip. Co.*, 348 Mo. 341, 153 S.W.2d 67, 71, 136 A.L.R. 516 (1941); *Walters v. Kaufmann Department Stores*, 334 Pa. 233, 5 A.2d 559, 561 (1939); RESTATEMENT, AGENCY § 220(2)(h) (1933).

38. See *Storm v. Thompson*, 185 Iowa 309, 170 N.W. 403, 404, 20 A.L.R. 658 (1919); RESTATEMENT, AGENCY § 220(2)(h) (1933). For numerous cases giving weight to the fact that the employer furnished the appliance necessary to the work as indicative of a master and servant relationship see Note, 20 A.L.R. 684, 778-81 (1922).

39. See *Texas Co. v. Mills*, 171 Miss. 231, 156 So. 866, 869 (1934). Cf. *Standard Oil Co. of N.J. v. Naramore*, Tenn. App., M.S., Jan. 8, 1949 (unreported) p. 12.

40. See *Mallinger v. Webster City Oil Co.*, 211 Iowa 847, 234 N.W. 254, 257 (1931); *Kelley's Dependents v. Hoosac Lumber Co.*, 95 Vt. 50, 113 Atl. 818, 821 (1921); RESTATEMENT, AGENCY § 220 comment *g* (1933).

Also of importance is the length of time for which the person is employed.⁴¹ Not only may it be said that a worker is less likely to subject himself to the control of another as to the details of the work where the job is to take only a short time,⁴² but also that an employer is less likely to relinquish his right to control the activities of one employed by him for a job of long duration. The normal inference in the filling station cases, which usually involve prospectively continuous employment and exclusive devotion to the employer's service, would seem to be that services were contracted for rather than results—that the employer in such circumstances would normally reserve the right to control.

A factor which is perhaps conceded greater importance in indicating the true nature of the relationship than those previously enumerated is the right of the employer to terminate the relationship at will or upon short notice.⁴³ Its importance derives from the fact that it constitutes a power to control even in the minutest detail, which can be exercised at any time;⁴⁴ and the reservation of such a power is strongly indicative of an intention to retain the right to control. Some courts have gone so far as to regard the existence of such a right to terminate as conclusive⁴⁵ but this does not seem to be the general rule.⁴⁶ Certainly this factor should be given great weight in the filling station cases.⁴⁷

On the other hand, such factors as wage payments on a commission basis⁴⁸ and the expressed intention, ordinarily present, that the employer is to have no right to control the employee's activities tend to indicate a relationship of employer and independent contractor. However, this method of payment is not inconsistent with the relationship of master and servant;⁴⁹

41. See *Standard Oil Co. v. Parkinson*, 152 Fed. 681, 683 (8th Cir. 1907); *Murray's Case*, 130 Me. 181, 154 Atl. 352, 354, 75 A.L.R. 720 (1931); RESTATEMENT, AGENCY § 220(2)(g) (1933).

42. RESTATEMENT, AGENCY § 220, comment f (1933).

43. See *Industrial Comm. v. Hammond*, 77 Colo. 414, 236 Pac. 1006, 1008 (1925); *Densby v. Bartlett*, 318 Ill. 616, 149 N.E. 591, 593, 42 A.L.R. 1406 (1925); *Messmer v. Bell*, 133 Ky. 19, 117 S.W. 346, 348, 19 Ann. Cas. 1 (1909); *Cockran v. Rice*, 26 S.D. 393, 128 N.W. 583, 585, Ann. Cas. 1913B, 570 (1910). See Note, 20 A.L.R. 684, 761-65 (1922).

44. See *Murray's Case*, 130 Me. 181, 154 Atl. 352, 355, 75 A.L.R. 720 (1931), citing *Franklin Coal & Coke Co. v. Ind. Comm.*, 296 Ill. 329, 129 N.E. 811 (1921).

45. See *Bowen v. Gradison Construction Co.*, 236 Ky. 270, 32 S.W.2d 1014, 1017 (1930); *Evans v. Dare Lumber Co.*, 174 N.C. 31, 93 S.E. 430, 431 (1917).

46. Note, 20 A.L.R. 684, 762 (1922).

47. Cf. *Bieluczyk v. Crown Petroleum Corp.*, 134 Conn. 461, 58 A.2d 380, 383 (1948); *Eason Oil Co. v. Runyan*, 158 Okla. 241, 13 P.2d 118, 119 (1932); *Gulf Refining Co. v. Rogers*, 57 S.W.2d 183, 186 (Tex. Civ. App. 1933).

48. Cf. *Barton v. Studebaker Corp.*, 46 Cal. App. 707, 189 Pac. 1025, 1028 (1920); *Potchasky v. Marshall*, 211 App. Div. 236, 207 N.Y. Supp. 562 (3d Dep't 1925); *James v. Tobin-Sutton Co.*, 182 Wis. 36, 195 N.W. 848, 849, 29 A.L.R. 457 (1923). Cf. RESTATEMENT, AGENCY § 220(2)(g) (1933).

49. See *Riggs v. Standard Oil Co.*, 130 Fed. 199, 201 (C.C.D. Minn. 1904); *Natchez Coca-Cola Bottling Co. v. Watson*, 160 Miss. 173, 133 So. 677, 680 (1931); *Becker v. Aschen*, 344 Mo. 1107, 131 S.W.2d 533, 539 (1939); *Dumbaden v. Castles Ice Cream Co.*, 103 N.J.L. 427, 135 Atl. 886, 888 (1927); Note, 61 A.L.R. 223 (1929).

and the expression of intention in the contract may be a mere sham,⁵⁰ having no effect upon the actual arrangement between the parties, and being placed in the contract only in an attempt to avoid the application of the doctrine of respondeat superior.⁵¹

Another factor which has been urged as indicative of the true relationship in these cases is a clause frequently inserted in the contract of employment which provides that the employee will indemnify the employer for any loss, damage or liability resulting from operation of the station.⁵² Such clauses have been given little, if any, effect in determining the nature of the true relationship when the rights of third parties are involved. On one hand it has been held that such a clause is not binding on a third party is so far as it purports to relieve the employer of liability if he is otherwise liable because he has in fact reserved the right to control.⁵³ Other courts have held that such a clause does not indicate that the employer realized himself to be a master and thus inserted the clause.⁵⁴

As previously stated, no hard and fast rule of automatic application can be set down as determinative of the existence of such right of control in an employer as to call into play the doctrine of respondeat superior. However, there are certain factors which should be realistically considered by a court attempting to determine the nature of the relationship between an oil company and an operator of its retail filling station. Some of these are: (1) the fact that a right to control may arise by means other than express written agreements between the parties, (2) the fact that the company has much incentive for retaining the right of control, and (3) the fact that the company usually has the actual power to compel compliance with any desired exercise of control.

Even if no relationship of master and servant is found between the company and the operator, the company under some circumstances may nevertheless be liable. These possibilities of liability in general fall into two broad categories: liability under the doctrine of apparent employment;⁵⁵ and

50. Several cases have referred to these contracts as "shams" or "subterfuges." See *Greene v. Spinning*, 48 S.W.2d 51, 58 (Mo. App. 1931); *Gulf Refining Co. v. Rogers*, 57 S.W.2d 183, 185 (Tex. Civ. App. 1933).

51. See *Eason Oil Co. v. Runyan*, 158 Okla. 241, 13 P.2d 118, 119 (1932); *Gulf Refining Co. v. Rogers*, 57 S.W.2d 183, 185 (Tex. Civ. App. 1933).

52. Because the employer can, at least in cases of an extended employment, relieve himself of ultimate liability by the use of agreements such as this, it has been argued that an employer of an independent contractor should be held liable to an injured third party if he selects a financially irresponsible contractor, just as he would be if he did not use due care to select a competent contractor. Morris, *The Tort of an Independent Contractor*, 29 ILL. L. REV. 339, 344 (1934).

53. *Garnant v. Shell Petroleum Corp.*, 228 Mo. App. 256, 65 S.W.2d 1052 (1933); *Buck v. Standard Oil Co.*, 224 App. Div. 299, 230 N.Y. Supp. 192 (3d Dep't 1928).

54. See *Arkansas Fuel Oil Co. v. Scaletta*, 200 Ark. 645, 140 S.W.2d 684, 689 (1940).

55. This concept is also frequently denominated "agency by estoppel" or "apparent authority," but neither of these terms is believed to be as accurate and descriptive as "apparent employment" since both "agency" and "authority" are terms more appro-

liability based on the existence of some other relationship such as employer and independent contractor.

When one person represents that another is his servant and thus causes a third person reasonably to rely upon the care or skill of the apparent servant, the person representing that a master-servant relationship exists is estopped to deny, in an action for an injury resulting from the reliance, that such a relationship in fact exists.⁵⁶ This doctrine of apparent employment has been utilized in several types of cases to impose liability, by application of the doctrine of respondeat superior, upon one who has employed an independent contractor.⁵⁷ All that need be shown, by the better view,⁵⁸ is a representation of employment, reliance upon that representation, and injury resulting from that reliance.⁵⁹ It is surprising that this theory has not been urged upon courts in filling station cases.⁶⁰ Certainly the display of company signs on and around stations, when considered in the light of national advertising and extension of company credit cards which can be used in any station selling the company's products, amounts to representations of employment and control. And reliance upon the type of service and safety furnished by a company's stations, which is exactly the result that companies spend millions of dollars to achieve, is no doubt sometimes present.⁶¹ It would seem, then, that this theory should be available to one injured as a result of his reliance.

As previously indicated, an employer may sometimes be held liable for the torts of his independent contractor.⁶² This rule has often been described

privately applied to a relationship looking to the doing of juristic acts—a relationship distinctly different from that to which this doctrine applies. Cf. Ferson, *Agency to Make Representations*, 2 VAND. L. REV. 1, 2-6 (1948).

56. Rhone v. Try Me Cab Co., 65 F.2d 834 (D.C. Cir. 1933), 47 HARV. L. REV. 344, 12 N.C.L. REV. 49; Rubbo v. Hughes Provision Co., 138 Ohio St. 178, 34 N.E.2d 202 (1941), 22 OHIO OP. 221 (1942); RESTATEMENT, AGENCY § 267 (1933).

57. The doctrine has been applied in a number of cases where the owner of a building or department store leased space to an independent contractor. For discussion and collection of cases see 47 HARV. L. REV. 344 (1933); 12 N.C.L. REV. 49 (1933); 22 OHIO OP. 221 (1942).

58. Some courts seem to consider it essential that a contractual relationship result before the doctrine applies. See *Friedman's Shop v. Yeater*, 216 Ala. 434, 113 So. 299 (1927). But this would not seem to be the better rule. Any relationship between the parties which entitled the injured party to rely upon the representation is sufficient foundation for estoppel. *Santise v. Martins, Inc.*, 258 App. Div. 663, 17 N.Y.S.2d 741, 742 (Sup. Ct. 1940); *Getlar v. Rubinstein*, 171 Misc. 40, 11 N.Y.S.2d 943 (Sup. Ct. 1939); 47 HARV. L. REV. 344 (1933); 22 OHIO OP. 221, 224 (1942). Cf. RESTATEMENT, AGENCY § 267 (1933).

59. RESTATEMENT, AGENCY § 267 (1933).

60. In *Gulf Refining Co. v. Rogers*, 57 S.W.2d 183 (Tex. Civ. App. 1933) plaintiff alleged that he went to that particular station because he thought it was a Gulf Refining Co. station in order to receive the service usually supplied by stations owned and operated by that company, but the court found an actual master-servant relationship and the theory of apparent employment was not discussed in the opinion.

61. The chief difficulty in invoking this doctrine lies in proving reliance, but the difficulty would seem to be no greater here than in other types of cases in which the doctrine has been applied. See cases collected in 22 OHIO OP. 221 (1942).

62. HARPER, TORTS § 292 (1933); PROSSER, TORTS § 64 (1941); Chapman, *Liability for the Negligence of Independent Contractors*, 50 L.Q. REV. 71 (1934); Ferson, *Liability of Employers for Misrepresentations Made by "Independent Contractors,"* 3 VAND. L. REV. 1 (1949); Morris, *The Torts of an Independent Contractor*, 29 ILL. L.

as an exception to the rule that the doctrine of respondeat superior does not apply to independent contractors,⁶³ but it has recently been urged that liability so imposed has a basis separate and distinct from that of the doctrine of respondeat superior.⁶⁴ Suffice it to say that under some circumstances the employer may be held liable. It remains to be discussed, however, whether circumstances such as are already recognized by the courts as imposing liability may be present in the filling station cases.

One group of cases where liability has been imposed involve negligence on the part of the employer in connection with the work.⁶⁵ Thus the employer is held if he does not use due care to select a competent contractor⁶⁶ or specifies defective and dangerous plans⁶⁷ to be used by the contractor in reaching the result bargained for. While no filling station case has been discovered which predicated liability on this theory it is not difficult to imagine situations which might easily arise to which this theory might apply.⁶⁸

Another group of cases bases liability upon the existence of a "non-delegable duty" on the employer so that he is negligent if he relies upon another to discharge that duty and an injury results.⁶⁹ The number of such "nondelegable duties" is large and in view of a tendency of courts to broaden the category⁷⁰ it is difficult to determine just what duties fall within the rule. However, one duty which is well recognized as "nondelegable" is the duty of a landlord to keep premises reasonably safe for business visitors.⁷¹

REV. 339 (1934); Steffen, *Independent Contractor and the Good Life*, 2 U. OF CHI. L. REV. 501 (1935); Note, 39 YALE L.J. 861 (1930).

63. Cf. HARPER, TORTS § 292 (1933); PROSSER, TORTS § 64 (1941); Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1934); Steffen, *Independent Contractor and the Good Life*, 2 U. OF CHI. L. REV. 501, 503 (1935).

64. Ferson, *Liability of Employers for Misrepresentations Made by "Independent Contractors"*, 3 VAND. L. REV. 1, 5-7 (1949). That author asserts that the rational basis for imposing liability upon an employer for the acts of an independent contractor is that when one bargains for the creation of an obvious and particular risk he should be liable when the foreseeable injury occurs. *Id.* at 7. Also see Chapman, *Liability for the Negligence of Independent Contractors*, 50 L.Q. REV. 71, 77 (1934).

65. HARPER, TORTS 645 (1933); PROSSER, TORTS 485 (1941).

66. *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32 (1893); *Baker v. Scott County Milling Co.*, 323 Mo. 1089, 20 S.W.2d 494 (1929); *Kuhn v. P. J. Carlin Const. Co.*, 154 Misc. 892, 278 N.Y. Supp. 635 (Sup. Ct. 1935); *Hamblen v. Mohr*, 171 S.W.2d 168 (Tex. Civ. App. 1943). It has been argued that in many cases there should also be a duty to select a financially responsible contractor. Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 344 (1934).

67. *Starr v. Stanard-Tilton Milling Co.*, 183 Ill. App. 454 (1913); *Burke v. Ireland*, 26 App. Div. 487, 50 N.Y. Supp. 369 (Sup. Ct. 1898); *Hamblen v. Mohr*, 171 S.W.2d 168 (Tex. Civ. App. 1943).

68. Those courts which allow the company to retain substantial control without creating the relationship of master and servant might well impose liability upon the company if it allowed the operator to maintain the station in an unsafe condition.

69. HARPER, TORTS 647 (1933); PROSSER, TORTS 486 (1941); Note, 39 YALE L.J. 861, 867 (1930).

70. PROSSER, TORTS 486 (1941). For cases involving many types of "nondelegable" duties see Note, 23 A.L.R. 984 (1923).

71. *Aluminum Ore Co. v. George*, 208 Ark. 419, 186 S.W.2d 656 (1945); *Cannon v. S.S. Kresge Co.*, 233 Mo. App. 173, 116 S.W.2d 559 (1938); *Besner v. Central Trust Co. of New York*, 230 N.Y. 357, 130 N.E. 577, 23 A.L.R. 1081 (1921). See 31 YALE L.J. 99 (1921).

This rule has had some application in filling station cases. In *Texas Co. v. Freer*⁷² it was held that liability might be imposed on the company because of a defective driveway which allowed gasoline to accumulate and resulted in an explosion which injured plaintiff.

Another concept, closely related to that of "nondelegable duties," is that involving "inherently dangerous" activities.⁷³ This doctrine has not been limited to cases involving activities which would be dangerous in spite of all reasonable care and which would have imposed strict liability upon the employer had he engaged in the activity himself,⁷⁴ but has been extended to include any work in which there is a high degree of risk or some specific danger.⁷⁵ Thus in one filling station case liability was imposed on an oil company for the death of a pedestrian who was struck by an automobile driven by the operator of the station as he walked down the sidewalk in front of the station.⁷⁶ The court reasoned that operation of the station in that particular place was inherently dangerous to pedestrians since normal operation required frequent driving of automobiles across the sidewalk.

The discussion has been concerned primarily with the various bases on which liability might be imposed on the oil company. Some consideration now needs to be given to the various defenses and safeguards which are available to the company.

Of course, a company can avoid liability for injuries resulting from retail sales activities by having no part in risk creation in that area. This would necessitate severance of connections with the retail sales section of the industry, however, and may be considered undesirable by the company.

72. 151 S.W.2d 907 (Tex. Civ. App. 1941), 20 TEXAS L. REV. 385 (1942). *But cf.* *Brittain v. Atlantic Refining Co.*, 126 N.J.L. 528, 19 A.2d 793 (1941).

73. HARPER, TORTS 648 (1933); PROSSER, TORTS 487 (1941); Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 348 (1934); Steffen, *Independent Contractor and the Good Life*, 2 U. OF CHI. L. REV. 501, 503 (1935); Note, 39 YALE L.J. 861, 865 (1930). For collection of cases see Notes, 23 A.L.R. 984, 1005 (1923); 21 A.L.R. 1229, 1243, 1265 (1922).

74. *J.C. Carland & Co. v. Burke*, 197 Ala. 435, 73 So. 10 (1916); *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 28 Atl. 32 (1893); *City of Chicago v. Murdoch*, 212 Ill. 9, 72 N.E. 46, 103 Am. St. Rep. 221 (1904); *Austin v. Bridges*, 3 Tenn. Civ. App. 151 (1912). The leading English case on this point is *Bower v. Peate*, 1 Q.B.D. 321 (1876).

75. *E.g.*, *S.A. Gerrard Co. v. Fricker*, 42 Ariz. 503, 27 P.2d 678 (1933) (dusting a field with poisonous insecticide); *Vinton Petroleum Co. v. L. Seiss Oil Syndicate*, 19 La. App. 179, 139 So. 543 (1932) (removing a decayed oil derrick). For other cases see Note, 23 A.L.R. 1016, 1084 (1923). A number of cases have held an employer liable for misrepresentation made by independent contractors hired to make representations. These cases have recently been explained on a basis similar to these "inherently dangerous" cases. It is reasoned that when one hires another to make representations in his behalf he creates an obvious and special danger that those representations will be falsely or inaccurately made and the employer is liable if the foreseeable result occurs. Ferson, *Liability of Employers for Misrepresentations Made by "Independent Contractor"*, 3 VAND. L. REV. 1 (1949). This theory might find some application in filling station cases. For instance, if the operator sold a fluid, representing it to be kerosene, and an explosion resulted because the fluid contained a high percentage of gasoline, the company might be liable for injuries resulting.

76. *Tauraso v. Texas Co.*, 79 N.Y.S.2d 812 (Sup. Ct. 1948).

Even if a company chooses to retain some connection with retail sales and thus to create risks in that area, the law allows it certain safeguards if it wishes to accept them. It can avoid the application of respondeat superior by actually relinquishing control or right of control over the details of service station operation and by making no representation of having that right.

Besides the safeguards available by choice the law also extends the company other protection. In any event the burden is on the plaintiff to make out his case and to prove negligence, causation and other elements necessary to the particular theory of recovery. If the relationship created by the company is that of master and servant the company is liable only for injuries resulting from acts done by the servant within the scope of employment.⁷⁷ If the relationship is that of employer and independent contractor, the company is liable only for foreseeable injuries resulting from a particular and obvious risk inherent in the proposed activity; and even if such a risk is created the company is liable only for negligence within the inherent risk, and not for collateral negligence.⁷⁸

All of these are valuable safeguards of the company's interests, but in addition to them there is available another bulwark against ultimate liability which is of even greater value. It is the right to require indemnity bonds of all those who operate company service stations. In view of all these factors no rational complaint can be made if courts take a liberal attitude in protecting the interests of plaintiffs who have no other protection than legal processes.

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77. HARPER, TORTS 639 (1933); PROSSER, TORTS § 63 (1941); RESTATEMENT, AGENCY § 219 (1933).

78. PROSSER, TORTS 488 (1941); RESTATEMENT, AGENCY § 426 (1933). This doctrine of collateral negligence performs in the employer-independent contractor field a function similar to that of the "scope of employment" doctrine in the master-servant field. Smith, *Collateral Negligence*, 25 MINN. L. REV. 399, 431 (1941).