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# NOTES AND COMMENTS

## **RODEBUSH: FINDING THE ROAD TO STRICT LIABILITY FOR THE INTENTIONAL TORTS OF EMPLOYEES**

### I. INTRODUCTION

Respondeat superior, commonly known as “imputed negligence”<sup>1</sup> or “vicarious liability,”<sup>2</sup> literally means “let the master answer.”<sup>3</sup> Despite its English beginnings,<sup>4</sup> the doctrine has been widely accepted across the United States,<sup>5</sup> including Oklahoma.<sup>6</sup> In the recent decision of *Rodebush v. Oklahoma Nursing Homes, Ltd.*,<sup>7</sup> the Oklahoma Supreme Court had the opportunity to revisit the doctrine as it applies to employees’ intentional torts. In *Rodebush*, an employee’s battery upon a third party was held to be within the scope of

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1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69 (5th ed. 1984).

2. *Id.*

3. BLACK’S LAW DICTIONARY 1311 (6th ed. 1990).

4. Ralph L. Brill, *The Liability of an Employer for the Willful Torts of His Servants*, 45 CHI.-KENT L. REV. 1, 2 n.5 (1968) (citing dicta in the famous English decision of *Jones v. Hart*, 2 Salk. 441 (K.B. 1698)). In dicta, the *Jones* decision provided the first judicial recognition of respondeat superior.

5. WARREN A. SEAVEY, *Speculations as to “Respondeat Superior,”* in STUDIES IN AGENCY 249-61 (1949).

6. *Ada-Konawa Bridge Co. v. Cargo*, 21 P.2d 1, 7 (Okla. 1933).

7. 867 P.2d 1241 (Okla. 1993).

employment<sup>8</sup> and incidental to the occupation,<sup>9</sup> thus, the employer was liable for the tortious conduct.<sup>10</sup>

In its analysis, the court reiterated prior holdings which recognized that an employee's conduct is within the scope of employment if it is

“fairly and naturally incident to the business”, [sic] and is done “while the servant was engaged upon the master's business and be done, although mistakenly or ill advisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business.”<sup>11</sup>

Though the court reviewed precedent, it failed to plausibly analyze the reasonably foreseeable expectations of the employer or the nature of the employment at issue. By avoiding these issues, the *Rodebush* decision extends respondeat superior to more closely resemble strict liability for an employee's intentionally tortious conduct.

To avoid such a consequence, when examining an employer's liability for an employee's intentional torts, the court should determine:

- 1) whether the conduct occurred within the scope of employment;
- 2) whether the conduct was incidental to the employee's duties; and
- 3) whether the conduct was reasonably foreseeable by the employer within the nature of the employment.

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8. *Id.* at 1246. See also *Brayton v. Carter*, 163 P.2d 960, 962 (Okla. 1945) (finding that a seventy-five mile deviation from course of employment could be within the scope of employment); *Russell-Locke Super Serv., Inc. v. Vaughn*, 40 P.2d 1090, 1094 (Okla. 1935) (finding that employee's assault on third party was clearly within the scope of employment, where the employee battered a third party while attempting to repossess employer's property); *Cargo*, 21 P.2d at 1, 7 (finding toll gate keeper was acting within the scope of employment when he fired gunshots at passerby who refused to pay toll); cf. *Tulsa Gen. Drivers Union, Local No. 523 v. Conley*, 288 P.2d 750, 753 (Okla. 1955) (finding that employee's assault on a third party was outside the scope of employment even though it occurred during time and place of employment); *Hill v. McQueen*, 230 P.2d 483, 486 (Okla. 1951) (finding that employee's assault on a third party at a social meeting was not within the scope of employment).

9. *Rodebush*, 867 P.2d at 1243. See also *Patsy Oil & Gas Co. v. Odom*, 96 P.2d 302, 307 (Okla. 1939) (finding tortfeasor's possession and storage of explosives which were used in the ordinary course of business could be incidental to and in furtherance of employment); cf. *Hill*, 230 P.2d at 486.

10. *Rodebush*, 867 P.2d at 1243.

11. *Id.* at 1245 (citing *Vaughn*, 40 P.2d at 1094; *Cargo*, 21 P.2d at 7).

Otherwise, the court's current analysis will ultimately hold employers strictly liable for an employee's intentionally tortious act.<sup>12</sup> Accordingly, *Rodebush* should be reconsidered and reversed unless the employee's tortious conduct could have been reasonably foreseen by the employer within the nature of the occupation.

## II. STATEMENT OF THE CASE

### A. Facts

Glenn Rodebush was an elderly Alzheimer's patient who lived at New Horizon Nursing Home.<sup>13</sup> Due to the effects of his disease, Rodebush was known to be occasionally combative.<sup>14</sup> While giving Rodebush his morning bath, a male nurse's aide delivered several blows across Rodebush's face.<sup>15</sup> As a result, Rodebush's face soon grew red and swollen with large welts.<sup>16</sup> When questioned about Rodebush's appearance, the aide excused the blemishes as a "rash."<sup>17</sup> Notwithstanding the aide's excuse, Rodebush's wife, who arrived later, sought a medical determination of the cause of the red marks.<sup>18</sup>

A physician determined that the blemishes were delivered by force of hand. The aide caring for Rodebush was in fact a former felon convicted of assault and battery with intent to kill. Unfortunately for Mr. Rodebush, the aide had "partied" all night and took a break only to come to work.<sup>19</sup> Adding to the misfortune, the staff supervisor, who oversaw and monitored the work of the aides, arrived at work over thirty minutes late.<sup>20</sup> Otherwise, the nurse's aide, who smelled of liquor, probably would not have tended to Mr. Rodebush.<sup>21</sup> Ultimately, Mrs. Rodebush filed suit, basing her theory of recovery on the doctrine of respondeat superior, and successfully held the nursing home liable for the aide's intentional battery upon Mr. Rodebush.<sup>22</sup>

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12. Although respondeat superior should be determined on a case by case basis, see *Empire Oil & Ref. Co. v. Fields*, 73 P.2d 164, 167 (Okla. 1937), there appears to be no limit on employer liability. Based on the liberal interpretation of case law in the *Rodebush* analysis, the doctrine is becoming a "catch-all" indemnification fund.

13. *Rodebush*, 867 P.2d at 1243.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Rodebush*, 867 P.2d at 1243.

18. *Id.*

19. *Id.* at 1244.

20. *Id.* at 1243.

21. *Rodebush*, 867 P.2d at 1244. The aide was promptly sent home after the supervisor smelled liquor on him. *Id.*

22. *Id.* at 1243, 1252.

### B. *The Rodebush Decision*

*Rodebush* arrived at the Oklahoma Supreme Court after certiorari was granted from the Oklahoma Court of Appeals, which had affirmed a district court decision holding the defendant vicariously liable for the aide's intentionally tortious conduct.

On appeal, the nursing home conceded that the nurse's aide had acted as alleged.<sup>23</sup> The defendant only disputed whether the aide's tortious actions were actually within the scope of employment.<sup>24</sup> Taking a fairly common sense approach, the defendant claimed that the aide was acting of his own volition when he struck *Rodebush* and, therefore, his actions were beyond the scope of employment.<sup>25</sup> Further, since it was an intentional tort, the employer had no way to anticipate that the attack would occur. The defendant simply had no reason to suspect the aide would slap *Rodebush*. Since tortious behavior was strictly against any policy or training<sup>26</sup> the aide received from the nursing home, the defendant argued that it should not be liable for the employee's tortious conduct.<sup>27</sup>

The plaintiff, on the other hand, asserted that the nursing home was liable because the aide was acting only "to further the business . . . assigned to him by the employer."<sup>28</sup> Therefore, upon striking *Rodebush*, the aide was fulfilling his employment capacity—although in a tortious manner. The plaintiff emphasized the location (upon the defendant's premises) and timing (in the regular course of the defendant's business) of the incident.<sup>29</sup> The time and place of the incident, according to the plaintiff, evidenced that the aide was acting for the nursing home's gain and performing a task assigned by his employer.<sup>30</sup>

The Oklahoma Supreme Court affirmed the trial court decision, which the Court of Appeals had also upheld, finding the nursing home

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23. *Id.* at 1245.

24. *Id.*

25. *Rodebush*, 867 P.2d at 1245.

26. Although it was not determinative, there was some dispute as to the extent of actual training the aide received. No record existed which showed conclusively that the aide had been given training. However, the aide's supervisor "was positive" that the aide received training, since all aides received the same type and degree of training before they were fully employed. *Id.* at 1244.

Thus, the defendant relied on its procedurally consistent, disciplined approach in training all of its nursing aides. However, this argument was undermined by the bizarre facts of the case, which weakened the nursing home's credibility. Undoubtedly, the jury's perception of possibly improper training procedures and regulations influenced the large punitive damages award.

27. *Id.* at 1245.

28. *Id.*

29. *Rodebush*, 867 P.2d at 1245.

30. *Id.*

liable on the respondeat superior claim, while awarding the plaintiff \$50,000 in actual damages and \$1.2 million in punitive damages.<sup>31</sup> The court specifically found the actions of the nurse's aide well within the scope of employment and justified the punitive damages based on the willful and wanton nature of the tortious conduct.<sup>32</sup> In finding a sufficient nexus for its respondeat superior analysis, the court relied on *Mistletoe Express Service v. Culp*<sup>33</sup> and *Russell-Locke Super Service, Inc. v. Vaughn*.<sup>34</sup>

In *Culp*, the court considered whether a freight carrier was liable for an assault by its agent on a customer. The agent was returning a television to a customer who had filed a claim because the product was damaged.<sup>35</sup> The carrier's management "was expecting bad feelings about its return of the tube; and . . . knowing this deliberately sent" an agent who was known as "Slugger" because of his fighting skills.<sup>36</sup> The agent was not only a handy pugilist, he also had a reputation for being "quarrelsome, hot-tempered and antagonistic."<sup>37</sup>

In light of these facts, the court found that the carrier intentionally sent Slugger into circumstances that were "almost certain to trigger his [Slugger's] temper and cause the very kind of result" which occurred.<sup>38</sup> Thus, there was a direct nexus between the employer's action and the employee's assault. The assault was a means of carrying out the job assigned by the employer to the employee; therefore, the assault was within the scope of employment.<sup>39</sup>

An analogous fact pattern arose in the *Vaughn* decision. The defendant, the manager of a company which sold and serviced automobile storage batteries, believed that the plaintiff had taken a battery without paying for it.<sup>40</sup> Consequently, the employer ordered an employee to either repossess the battery or to exact full payment from the plaintiff.<sup>41</sup> With those orders, the employee arrived at the plaintiff's place of business and immediately began removing the battery

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31. *Id.* at 1244-45.

32. *Id.* at 1246, 1252.

33. *Rodebush*, 867 P.2d at 1245 (citing *Culp*, 353 P.2d 9 (Okla. 1959)).

34. *Id.* at 1246 (citing *Vaughn*, 40 P.2d 1090 (Okla. 1935)).

35. *Culp*, 353 P.2d at 14.

36. *Id.* at 15.

37. *Id.* at 13.

38. *Id.* at 15.

39. *Id.* at 16.

40. *Russell-Locke Super Serv., Inc. v. Vaughn*, 40 P.2d 1090, 1091 (Okla. 1935).

41. *Id.* at 1091.

from the plaintiff's car.<sup>42</sup> When the plaintiff resisted the employee's efforts, a fight ensued.

Although the employee was successful in repossessing the battery, he soon returned it because the defendant "did not know whether it was their battery or not."<sup>43</sup> In finding the employee's actions well within the scope of employment, the court stated that it was "unable to conceive of a case in which a servant could be more completely engaged in the carrying out of the master's instructions."<sup>44</sup>

In *Rodebush*, the court mystifyingly likened the aide's attack on Mr. Rodebush to the assaults which occurred in *Culp* and *Vaughn*. Thus, from its base of precedent, the court leaped to its conclusion in *Rodebush*. By so doing, it stretched the rule of vicarious liability to more closely resemble strict liability.

### III. THE DOCTRINE OF RESPONDEAT SUPERIOR

#### A. *Early Beginnings and Justifications*

From a purely theoretical standpoint, the doctrine of respondeat superior appears to be quite simple.<sup>45</sup>

- 1) employee *X* performs an act for or at the behest of employer *Y*;
- 2) *X*, in acting for *Y* and in the line of employment, accidentally injures *Z*;
- 3) therefore, the law charges *Y* with the damages or liabilities of *Z* which were caused by *X*.<sup>46</sup>

Put more plainly, the law holds the employer responsible for an employee's act which accidentally harms a third party.<sup>47</sup>

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42. *Id.*

43. *Id.* at 1091-92.

44. *Id.* at 1094.

45. Nevertheless, Justice Holmes found that "common sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass." Oliver Wendell Holmes, *Agency*, 5 HARV. L. REV. 1, 14 (1891).

46. See KEETON et al., *supra* note 1, § 69.

47. Brill, *supra* note 4, at 1 (explaining that "[t]he employer's liability is merely substituted for the servant's, whose wrongful act caused the injury, and it is not dependent in any way upon the fault of the master").

Respondeat superior was originally rooted in primitive superstition.<sup>48</sup> In its infancy, the doctrine held the “master”<sup>49</sup> of the household liable for the intentionally or negligently tortious acts of his wife, servants, slaves, animals, or children.<sup>50</sup> As the doctrine evolved in the early common law, it was justified on a theory of control or representation.<sup>51</sup> The control or representation theory was a legal fiction which held the employer liable for the employee’s tortious conduct based on the employer’s “authority” over the employee.<sup>52</sup> This approach is best explained by Lord Brougham: “[B]y employing him, I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it.”<sup>53</sup> Beyond control and representation, respondeat superior soon became rooted in another legal fiction known as “implied command.”<sup>54</sup> The implied command approach rationalized

48. John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 317 (1894). *But see* Holmes, *supra* note 45, at 2 (asserting that the doctrine arose primarily from Roman laws which held the master liable for the tortious acts of agents on public policy grounds). Furthermore, Roman laws limited liability to innkeepers and shopowners. Wigmore, 7 HARV. L. REV., at 350; *see also* OLIVER WENDELL HOLMES, *THE COMMON LAW* 15-16 (1881).

49. In the context of a patriarchal society, this term refers to the male head of the household.

50. Wigmore, *supra* note 48, at 317; *see also* KEETON et al., *supra* note 1, § 69.

51. KEETON et al., *supra* note 1, § 69. Although there are several grounds upon which the doctrine of respondeat superior has been established, no one theory is completely persuasive. Nevertheless, when all of the approaches are considered together, the argument becomes greater than the sum of its parts and it is quite compelling.

In justifying respondeat superior, Seavey observed:

[i]t is difficult to believe, however, that a principle opposed to common sense should have existed so long and still be so vigorous. . . . [I]t may be noted that basic concepts are the most difficult to express, and that lack of power of expression often leads to specious reasons for sound results. The fact that the supposed victims of the rule, the employing class, usually powerful and vocal in the protection of their interests, have not been militant in demanding a change, and that the rule is constantly expanding without meeting substantial opposition during a time of searching analysis and self-revelation, is some evidence that it does not greatly depart from the common feeling of justice which it is the primary function of the law to satisfy.

SEAVEY, *supra* note 5, at 130-31.

52. It is clear that no person may order or authorize tortious conduct against another, regardless of employment status. *See Hill v. McQueen*, 230 P.2d 483, 485 (Okla. 1951) (quoting *Dixon v. Northern Pac. Ry. Co.*, 79 P. 943, 944 (Wash. 1905)). However, the control rationale is persuasive if one accepts the premise that the person who is best able to exercise authority over the situation should do so.

53. Brill, *supra* note 4, at 2 (citing *Duncan v. Finlater*, Cl. & F. 894, 910 (1839)). However, the doctrine is not without its critics. Justice Holmes, for example, questioned the logic of the respondeat superior analysis. *See* Holmes, *supra* note 45, at 7.

54. Blackstone best exemplified this perspective when he stated that “[t]he master is answerable for the act of his servant if done by his command either expressly given or implied.” WARREN A. SEAVEY, *Explanatory Notes to the Restatement of Agency - Tentative Draft No. 5*, in *STUDIES IN AGENCY* 220, 250 (1949) (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* 429 (1827)).



employer liability on the concept that the employer had impliedly authorized or commanded the tortious conduct through his agent.<sup>55</sup> Thus, vicarious liability evolved from the employer's control over the employee to the employer's approval of the employee's tortious actions. Clearly, judges were searching for some rationale for holding an individual responsible for tortious acts he did not cause or commit.

Not surprisingly, the modern version of respondeat superior has moved away from the control and implied command justifications<sup>56</sup> to what may be viewed as an allocation of risk doctrine.<sup>57</sup> Under this approach, respondeat superior is justified because of the employer's resources to indemnify the injured party and distribute the associated loss to his customers as part of the cost of doing business.<sup>58</sup> Thus, the injured party is made whole, the employer is recompensed by the community, and the employee avoids carrying the full financial burden of liability.

Though it is true that an employer is more likely to be in a better position to recoup his losses than an employee,<sup>59</sup> there are additional public policy considerations for placing the liability on the employer. In the hiring process, for example, an employer is likely to be more careful in determining who will act on his behalf, if he is ultimately responsible for the employee's conduct.<sup>60</sup> Similarly, in order to maintain a positive image, corporations will take extra precautions in their policies dealing with the public.

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55. Brill, *supra* note 4, at 2; see also KEETON et al., *supra* note 1, § 70; *Fruit v. Schreiner*, 502 P.2d 133 (Alaska 1972).

56. Regardless of the designation, the law has consistently used the employer's power over the employee as the ultimate justification for liability. As a result, a common complaint of the logic underlying respondeat superior lies in the concept of "control." Taken to an extreme, the employer will be compelled to dictate, or otherwise be responsible for, the employee's conduct in all situations at all times.

57. Marc C. Carter, *Getting to the Deep Pocket: An Analysis of Employer and Third Party Liability Under Yellow Cab Co. v. Phillips*, 17 T. MARSHALL L. REV. 445, 447 (1992) (reporting that some authorities justify respondeat superior on the grounds that the business enterprise is in a better position than the employee to guard against the risk of loss); see also Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 567 (1988) (arguing that societal loss, if borne by the individual and not the employer or business, would skew the market for the employer, because he would likely "expand production beyond the socially optimum level . . .").

58. Carter, *supra* note 57, at 447.

59. Carter, *supra* note 57, at 447.

60. SEAVEY, *supra* note 5, at 148. Further, Seavey suggests that "[b]ecause of this financial liability, it appears safe to assume that an employer can and does bring a pressure to bear upon his employees which has a greater effect upon them than would the chance of their being made defendants in suits, which, if action were permitted only against them, ordinarily would not be brought." *Id.*

As a result, society receives several benefits by holding the employer liable for the employee's tortious act. Ultimately, however, the justification for employer liability is best expressed by the observation that "[i]n hard fact, the reason for employers' liability is the damages are taken from a deep pocket."<sup>61</sup>

### B. *Intentional Torts by Employees*

Under the early common law, prior to the development of legal fictions involving control and implied command, employers were not held liable for their employees' intentional torts.<sup>62</sup> The case of *Wright v. Wilcox*<sup>63</sup> firmly established that employers were not liable for willful or malicious acts by their employees against third parties.<sup>64</sup>

In *Wright*, an ice wagon driver stirred his horses into a trot upon seeing a boy trying to climb onto his wagon. Unfortunately, the boy was thrown underneath the wagon and crushed.<sup>65</sup> The court noted the intentional nature of the act, and held that unless the employer specifically directed the act to be done or knowingly approved the act, he could not be held liable.<sup>66</sup> Thus, the wagon driver's employer was exculpated.<sup>67</sup> Therefore, early American law held the employer liable only where the employee negligently injured a third party.<sup>68</sup>

The early common law approach of separating negligent and intentional behavior has, however, long been supplanted by the modern alternative which asks only whether the employee was acting within the "scope of employment" when he committed the tort.<sup>69</sup> The growth of the scope of employment analysis is, in large measure, supported by the public policy justification for the risk allocation doctrine.<sup>70</sup> As the theory of respondeat superior developed within our

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61. THOMAS BATY, VICARIOUS LIABILITY 154 (1916).

62. SEAVEY, *supra* note 5, at 250-51; *see also* 2 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 1926 (2d ed. 1914).

63. 19 Wend. 343, 345 (N.Y. Sup. Ct. 1838). The *Wright* opinion cited *M'Manus v. Crickett*, 1 East 106, 102 Eng. Rep. 43 (1800), where the court held an employee liable for intentionally driving his employer's chariot into the plaintiff's chaise. Due to the willful nature of the employee's action, the court did not hold the employer liable. Seavey describes *Wright* as the "leading American case." SEAVEY, *supra* note 5, at 251.

64. *Wright*, 19 Wend. at 345, 347-48.

65. *Id.* at 343-44.

66. *Id.* at 345, 347.

67. *Id.* at 345-46.

68. *Id.* at 346.

69. *See Miller-Brent Lumber v. Stewart*, 51 So. 943, 944 (Ala. 1909); *Alsever v. Minneapolis & St. L. R.R. Co.*, 88 N.W. 841, 843 (Iowa 1902); *King v. Magaw*, 150 N.E.2d 91, 93 (Ohio Ct. App. 1957); *Korner v. Cosgrove*, 141 N.E. 267, 268 (Ohio 1923).

70. *See Sykes, supra* note 57, at 565.

expanding commercial and industrial society, the justifications of agency and representation principles were incorporated, tested, and expanded. As a result, the employer's responsibility for the employee's intentional torts became widely accepted, as long as the employee was acting within the scope of the employer's business.<sup>71</sup>

### C. *Scope of Employment*

Determining the scope of employment is the key to establishing an employer's liability for an employee's acts. However, defining or quantifying the "scope of employment" is no easy task.<sup>72</sup> The term is patently ambiguous. The Restatement (Second) of Agency, for example, has several guidelines for determining when conduct is<sup>73</sup> or is not<sup>74</sup> within the scope of employment. However, this formulation has

71. See 3 THOMAS M. COOLEY & D. AVERY HAGGARD, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT §§ 392, 393 (4th ed. 1932); KEETON et al., *supra* note 1, §§ 69-70; SEAVEY, *supra* note 5, at 245.

In fact, the "scope of employment" was soon legislatively approved. Louisiana, for example, codified that employers must accept responsibility for their employees' intentional torts occurring within the scope of employment. *Chaney v. Frigidaire Corp.*, 31 F.2d 977, 978 (5th Cir. 1929).

72. RESTATEMENT (SECOND) OF AGENCY § 228 cmt. a (1958), suggests that the phrase "means the extent of this subject matter and denotes the field of action within which one is a servant."

73.

- (1) Conduct of a servant is within the scope of employment if, but only if:
  - (a) it is of the kind he is employed to perform;
  - (b) it occurs substantially within the authorized time and space limits;
  - (c) it is actuated, at least in part, by a purpose to serve the master; and
  - (d) if force is intentionally used by the servant against another, the use of force is *not* *unexpectedable by the master*.

RESTATEMENT (SECOND) OF AGENCY § 228 (1958) (emphasis added).

Section 228(1)(d) is especially relevant to the *Rodebush* decision. Is it reasonable for the employer of a nursing home to expect an employee to use the level of force that rises to a tortious battery? Nursing care for the elderly is not an inherently dangerous occupation in which violence or danger are reasonably foreseeable within the scope of employment. The use of force could not have been expected by the nursing home.

In addition, the aide was not employed for the purpose of physically or forcefully handling elderly patients. He was hired to care for them. It is also questionable whether the aide's conduct was "actuated" toward serving his employer's benefit. If so, the aide's purpose was certainly not to benefit the nursing home. It seems more likely that the aide showed up at work only to prevent being fired.

74. "Conduct of a servant is *not* within the scope of employment if it is *different in kind* from that authorized, far beyond the authorized time or space limits, or *too little actuated by a purpose* to serve the master." RESTATEMENT (SECOND) OF AGENCY § 228(2) (1958) (emphasis added).

Based on the analysis in note 73 *supra*, the aide's actions were quite arguably encompassed by Section 2 of the Restatement.

not been accepted without criticism or without problems in its application.<sup>75</sup>

Beyond the Restatement approach, several prominent scholars define the scope of employment as an employee's action, regardless of how improper, done for the purpose of furthering the employer's business.<sup>76</sup> There is another view which holds an employee within the scope of employment when his actions are reasonably deemed to be a "natural, direct and logical result" of his employment.<sup>77</sup> These approaches, however, have not been widely accepted. Therefore, seeking consistency and stability in their analysis, several courts treat the question of when an act is "within the scope" as one of fact<sup>78</sup> and allow the jury to decide.<sup>79</sup>

#### D. *Oklahoma Application of Respondeat Superior for Intentional Torts*

The seminal Oklahoma case regarding employer liability for an employee's intentionally tortious conduct is *Ada-Konawa Bridge Co. v. Cargo*.<sup>80</sup> In *Cargo*, a bridge company employee allowed his son to collect toll fares from travellers.<sup>81</sup> When the plaintiff failed to pay the fare and proceeded across the bridge, the employee's son retrieved a gun and fired, wounding the plaintiff's elbow.<sup>82</sup> The plaintiff successfully sued the bridge company on the grounds of vicarious liability.<sup>83</sup>

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75. See *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 346-47 (Alaska 1990) (noting the difficulty of defining the scope of employment, even using the Restatement formulation, and suggesting other factors which should also be considered).

76. KEETON et al., *supra* note 1, § 70. Although this approach rephrases the issue, defining exactly what is in furtherance of the employer's business is a slippery proposition. What if an individual is incidentally furthering the purpose of the employer, but that is not his primary purpose? How broadly should the employer's purpose be construed? If this analysis requires delving into the employee's motives, then it may be more problematic than the scope of employment test. Further, at what point does his motive supersede the action he was pursuing for his employer? See COOLEY & HAGGARD, *supra* note 71, § 393.

77. 2 MECHAM, *supra* note 62, § 1875. This standard assumes employer liability where violence or tortious conduct inheres in the employment. Accordingly, under this standard, Oklahoma Nursing Homes, Ltd., probably would not have been held liable for the aide's battery, because nursing care for the elderly is not an inherently violent occupation.

78. See *Fruit v. Schreiner*, 502 P.2d 133, 141 (Alaska 1972) (observing that no categorical statement can encompass the meaning of "scope of employment" which will be determined primarily on findings of fact in each case); *Empire Oil & Ref. Co. v. Fields*, 73 P.2d 164, 167 (Okla. 1937) (noting that the scope of employment is a question for determination by the jury).

79. See *Empire Oil*, 73 P.2d at 167.

80. 21 P.2d 1 (Okla. 1932).

81. *Id.* at 5.

82. *Id.* at 3.

83. *Id.* at 8.

The court surveyed and considered how other jurisdictions defined and quantified the scope of employment. In its discussion, one pivotal phrase repeatedly surfaced and influenced the development of Oklahoma's vicarious liability doctrine. As a result, the court specifically defined the scope of employment to include the employee's conduct if the "acts are incidental to and in furtherance of"<sup>84</sup> the business of the employer. To this day, the court has consistently followed this language and perspective.<sup>85</sup>

#### IV. THE EFFECT OF *RODEBUSH* ON OKLAHOMA'S RESPONDEAT SUPERIOR DOCTRINE

To properly analyze *Rodebush*, one must closely examine the nature of the employment at issue. In its analysis, the court did not address this determinative factor. As a result, the court clearly failed to distinguish between risk-related and risk-averse employment activities. The former inherently involve conflict and are more likely to involve tortious conduct than risk-averse occupations which are unlikely to involve conflict or tortious conduct. The nature of the occupation should be considered when determining employer liability for those activities within the full scope of employment. Since determining the scope of employment is a fact-based inquiry, it is absurd to measure an employee's actions without considering the context within which they are performed.

Like the employee's actions, the employer's ability to foresee the employee's tortious conduct should also be weighed. An employer should only be liable for those actions he should reasonably expect to occur within the job performance.

Unfortunately for employers, by failing to properly consider the nature of the employment issue and the employer's ability to foresee

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84. *Id.* at 7.

85. See *Rodebush v. Oklahoma Nursing Homes, Ltd.*, 867 P.2d 1241, 1245 (Okla. 1993); *Haco Drilling Co. v. Burchette*, 364 P.2d 674, 677 (Okla. 1961); *Roring v. Hoggard*, 326 P.2d 812, 814 (Okla. 1958); *Brayton v. Carter*, 163 P.2d 960, 962 (Okla. 1945); *Patsy Oil & Gas v. Odom*, 96 P.2d 302, 307 (Okla. 1939). The court's acknowledged standard holds an employee's act within the scope of employment if:

(1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill advisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.

*Cargo*, 21 P.2d at 7 (citing 2 *MECHEM*, *supra* note 62, § 1960).

the tortious conduct, the *Rodebush* analysis propels Oklahoma law closer to strict liability for an employee's intentional torts.

### A. *The Nature of Employment at Issue*

On one hand, an employer generally is liable for an employee's intentionally tortious conduct committed against a third party within the scope of employment.<sup>86</sup> On the other hand, an employer generally is not liable for an employee's tortious conduct which is purely personal and unrelated to the employment activities.<sup>87</sup> One factor which often arises when courts apply these rules is the type of employment at issue and if it is likely to require the employee to use force.<sup>88</sup>

Traditionally, the use of force is contemplated where the employee is hired to protect property or persons from theft or abuse.<sup>89</sup> Consider, for example, an employee who recovers items possessed by another.<sup>90</sup> An attempt to retake the property may cause a conflict between the possessor and the reposessor.<sup>91</sup> In fact, the employee may need to resort to physical violence in order to protect himself.

Accordingly, even if the employee is instructed not to use force, the possibility that he must certainly exist, if only for self-defense

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86. *Cargo*, 21 P.2d at 7.

87. *Western Union Tel. Co. v. Hill*, 67 F.2d 487, 488 (5th Cir. 1933). This is, of course, tempered by the problematic issue of the scope of employment and results in a question of fact.

88. COOLEY & HAGGARD, *supra* note 71, § 393 (discussing an employer's liability in relation to the nature of the employment); SEAVEY, *supra* note 5, at 245 (noting several cases which hold the employer liable for an employee's unprivileged use of force in accomplishing the employer's purpose if the employee is regularly required to use force).

89. RESTATEMENT (SECOND) OF AGENCY § 245 cmt. a (1958) notes:

These [situations] occur when the servant: (a) acts in the protection of or recaption of his master's property, or (b) in excess of zeal in competition, or (c) engages in a fight arising out of a dispute connected with his work for his employer. In all of these situations the liability of the principal depends fundamentally upon the likelihood of a battery or other tort in view of the kind of result to be accomplished, the customs of the enterprise and the nature of the persons normally employed for doing the work.

90. "[O]ne who is sent to recapture property is likely to come into contact with a possessor unwilling to surrender it, and persons sent to recapture goods are frequently of the kind who would be not unlikely to attempt force" if it should appear in the least bit necessary. *Id.*

Based on this view of the "likely tortfeasor," is a nurse's aide in a home for the elderly typically "not unlikely to attempt force?" Surely the occupational natures of a nurse's aide and a repossession artist could not be more different.

91. Brill, *supra* note 4, at 6. "An employee sent to recapture chattels may frequently have to overcome resistance from the buyer [or possessor] of the article being repossessed." *Id.* Thus, the resistance of the possessor, added to the character of the reposessor, equates in a likely use of force, and possibly injury. Tortious contact is, at least, foreseeable.

purposes.<sup>92</sup> Therefore, due to the nature of the occupation, it is arguably within the scope of employment, and reasonably foreseeable to the employer, that the employee may have to physically defend or protect himself. Such an employment obligation could result in the commission of tortious violence against another while specifically acting for the employer.

There are similar examples concerning other professions or occupations. Consider, for instance, a bartender or "bouncer" at a bar or tavern who must eject an intoxicated patron. Similarly, private security is an occupation where tortious contact with third parties inheres in the nature of the occupation. Where the violent conduct is inherent in the job due to the nature of the work, the employer should be vicariously liable for the employee's tortious acts. Where the nature and expectations of the employment are weighed and considered, then employer liability is more justifiably and persuasively rooted in public policy.<sup>93</sup>

When the nature of employment is discussed in the context of a "bouncer" at a tavern or a security guard at a local mall, the employer's liability for the employee's intentional tortious violence is reasonable and practical. The nature of the occupation demands it. However, in the case of an aide at a nursing home, employer liability is not reasonable.

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92. See generally *Novick v. Gouldsberry*, 173 F.2d 496, 500-01 (9th Cir. 1949); *Dilli v. Johnson*, 107 F.2d 669, 670 (D.C. Cir. 1939); *McChristian v. Popkin*, 171 P.2d 85, 89 (Cal. Dist. Ct. App. 1946); *Johnson v. Monson*, 190 P. 635 (Cal. 1920).

93. It would: 1) encourage and foster careful employee screening by the employer; 2) increase the incentive for the employer to buy insurance in order to protect the injured party; and 3) allow the employer to pass the costs on to the consumer. Consider also the RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1958), which states:

[t]he conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant. From this, the idea of responsibility for the harm done by the servant's activities followed naturally. . . . [W]ith the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit.

See also *Carter*, *supra* note 57, at 447 (discussing the economic validity of the allocation of resources, as well as the ability and likelihood that an employer will obtain insurance); *Sykes*, *supra* note 57, at 565-70 (analyzing the choice between a rule of personal liability for an employee's actions and a rule of vicarious liability which holds both the employee and the employer liable).

The very nature of the nursing home industry, especially in the context of the elderly, lies in taking care of others.<sup>94</sup> The basic employment activities are feeding, bathing, and caretaking for those unable to do so for themselves; it is highly unlikely that the use of violent force would be required by an employee. It simply does not inhere in the nature of the job.<sup>95</sup> Therefore, to hold an employer liable for conduct he did not expect, or had no reason to foresee, is not only unreasonable—it is unfair.

The Oklahoma Supreme Court has recognized that in certain types of employment, “[s]uccessful performance involve[s] immediate action of some kind in opposition to the will of the other and therefore [should] be anticipated by the employer.”<sup>96</sup> In these situations, tortious contact is foreseeable because it inheres in the very nature of the work. If, however, the employment does not require the use of force because it is not confrontational in nature, then “[n]o such action can properly be contemplated as an incident to the exercise of ordinary authority . . . . And, in absence of some additional authority contemplating extraordinary action, there exists no basis for holding such extraordinary action to be within the scope of the servant’s authority.”<sup>97</sup> As a result, until *Rodebush*, Oklahoma law would not characterize an employee’s tortious act as within the scope of employment unless it was reasonably foreseeable to the employer.

Using this standard, a more reasonable interpretation of the events in *Rodebush* is that the aide’s tortious act was not done with any intention to further the nursing home’s business. The aide’s actions were not taken to further his employer’s financial gain. The battery was not directed or authorized by the employer and it certainly did not inhere in the nature of the job. In short, the nurse’s aide did not batter Mr. Rodebush for any reason related to his job. It is more

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94. Consider the occupational use of force as contemplated by the RESTATEMENT (SECOND) OF AGENCY § 245 (1958): “A master is subject to liability for the intended tortious harm by a servant to the person or things of another by an act done in connection with the servant’s employment, although the act was unauthorized, if the act was not unexpected in view of the duties of the servant.”

This rule directly applies to *Rodebush*. At no time could the employer have expected the aide’s tortious conduct—it was too far removed from any normal or predictable employment activity associated with his employment. It is ludicrous to equate caretaking for the elderly with an occupation based on the use of force.

95. As Cooley eloquently observed, “[t]he test of the master’s responsibility is not the motive of the servant, but whether that which he did was something his employment contemplated, and something which, if he should do it lawfully, he might do in the employer’s name.” COOLEY & HAGGARD, *supra* note 71, § 393.

96. Hill v. McQueen, 230 P.2d 483, 485 (Okla. 1951).

97. *Id.*



likely that the aide battered Mr. Rodebush because he was drunk, tired, or frustrated.<sup>98</sup> Therefore, the court should recognize that the aide's act "was unlawful and wrong, [it] was not done in performance of any duty imposed upon him by his employment, nor done within the scope of his employment, nor in the furtherance of his principal's business, and therefore the [employer] . . . cannot be held responsible for such act."<sup>99</sup> While battering Mr. Rodebush, the aide's only connection with his employer may have involved attributing blame for Mr. Rodebush's facial marks on a rash.<sup>100</sup>

In the final analysis, the nature of the employment is a weighty consideration that the court in *Rodebush* simply chose not to evaluate.<sup>101</sup> The court viewed the employee's actions without examining the context in which they were performed. However, neither the employee nor the occupation exist in a vacuum. Further, the nature of the job defines the reasonable parameters of employee conduct. From this perspective, the defendant should not be liable for the aide's independent act. In the words of the court, "[m]aster[s] and employers may be held to answer for damages occasioned by their servants in the exercise of the functions in which they are employed. However, in reason, they cannot be held responsible generally for all wrongful conduct of which they may be guilty outside of such functions."<sup>102</sup>

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98. Assuming the events occurred in this manner, an oft-quoted passage may be applicable: "If the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable." COOLEY & HAGGARD, *supra* note 71, § 393 (citing *Howe v. Newmarch*, 12 Allen (Mass.) 49, 57 (1925)). In this light, the court failed to address the aide's conduct as his own.

99. *Tulsa Gen. Drivers Union, Local No. 523 v. Conley*, 288 P.2d 750, 754 (Okla. 1955).

100. Case law has clearly established that an employee will be solely responsible if he tortiously injures a third party while acting overzealously for his employer. This is particularly true where the employee's use of force is not necessary to the occupation. From this perspective, the nurse's aide was drunk and tired. The aide did not act for his employer, but out of fear of reprimand if he did not finish the job. In his efforts, the drunken aide went too far in personally discharging his duties until he went beyond the scope of employment. *But see Brill, supra* note 4, at 8-9 (citing *M.J. Uline Co. v. Cadshaw*, 171 F.2d 132 (D.C. Cir. 1948); *Frances v. Barbazon*, 134 So. 789 (La. 1931)).

101. It is surprising that the court would avoid this issue. Seavey, for instance, suggests that the nature of the employment should be a significant consideration in determining employer liability. SEAVEY, *supra* note 5, at 260 (noting the value of force involved in the job when seeking to place liability on the employer). Similarly, Brill observes that the court's ability to place liability on the employer where the employment does not involve force is highly suspect and usually stretches the traditional doctrine. Brill, *supra* note 4, at 7-9.

102. *Conley*, 288 P.2d at 754.

B. *The Employer's Ability to Foresee the Employee's Tortious Conduct*

"[N]o defendant should ever be held liable for consequences which no reasonable person would expect to follow from the conduct."<sup>103</sup> Consequently, liability should be limited to the reasonably foreseeable consequences of an individual's actions, so that he is not strictly liable for accidents causally unrelated to his behavior.<sup>104</sup> Therefore, the question to ascertain is whether the employee's intentional battery was reasonably foreseeable by the employer in view of the aide's employment duties.<sup>105</sup> The issue should be viewed from the perspective of an average reasonable person.<sup>106</sup>

If the nursing home could not have reasonably foreseen the aide's intentional battery on Mr. Rodebush, then it should not be vicariously liable for his conduct. By measuring the employer's liability with a reasonableness test, liability is restricted to some fairly measurable criteria.<sup>107</sup> As a probable result, the reasonableness standard would provide employers with advance warning of the type of behavior which will not be tolerated.<sup>108</sup>

Although reasonableness may not always be simply discerned, the test would add some substance to clarifying which activities are within the scope of employment. In essence, if an employer should

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103. KEETON et al., *supra* note 1, § 43. Although the quotation herein measures the limitation of liability of risk for an individual's negligence, it applies equally well in the context of the employer's ability to foresee the employee's conduct.

104. The test is determined by the foreseeable consequences and liability is restricted to those consequences. An interesting view is found in the oft-quoted explanation by Judge Griffith:

[t]he area within which liability is imposed is that which is within the circle of reasonable foreseeability, using the original point at which the negligent act was committed or became operative, and thence looking in every direction as the semi-diameters of the circle; and those injuries which from this point could or should have been reasonably foreseen, as something likely to happen, are within the field of liability, while those which, although foreseeable, were foreseeable only as remote possibilities, those only slightly probable, are beyond and not within the circle—in all of which time, place and circumstance play their respective and important parts.

KEETON et al., *supra* note 1, § 43. As the passage indicates, the reasonable person standard is limited to conduct and consequences which are reasonably foreseeable.

105. See KEETON et al., *supra* note 1, § 43.

106. Note that this discussion does not address the issue of negligent hiring. For an enlightening work discussing the growing acceptance of the tort of negligent hiring, see Michael F. Wais, Note, *Negligent Hiring—Holding Employers Liable When Their Employees' Intentional Torts Occur Outside the Scope of Employment*, 37 WAYNE L. REV. 237 (1990) (discussing the employer's duty to use reasonable care in investigating a prospective employee's background as the proximate cause of the third party's injury).

107. See KEETON et al., *supra* note 1, § 43.

108. The reasonableness standard is a familiar concept at common law, and could easily be adapted to each case, because of the fact-specific nature of the respondeat superior doctrine.

have reasonably foreseen an employee's tortious acts within his occupational role, that conduct is likely to fall within the scope of employment. A reasonableness standard would also allow the jury to more clearly weigh the employee's duties, the nature of the employment, and the expectations of the parties.

In many cases, custom or trade usage could also be considered. This would provide a standard which is more particularized to the industry in question. By weighing all the factors, rather than just a facial glance at the time and scope of the employee's tortious conduct, the court would strike a more equitable balance for all parties.

If, however, the court continues along the analytical path established in *Rodebush*, then Oklahoma approaches an almost limitless liability upon employers for their employee's intentional torts.<sup>109</sup> The scope of employment, in measuring the intentional torts of the employee, grows wider and broader until the employer is engulfed in insuring its employees' actions—regardless of how unreasonable those actions may be. Ultimately, the employer simply becomes the insurer of the employee and faces liability without fault.

Although there are several economic principles and arguments<sup>110</sup> that suggest liability is best borne by the employer, the employer is not always able to pass on the costs to the public. Furthermore, passing along the cost is a questionable policy from a consumer-oriented perspective. It is not a bargain if consumers do not gain safety from the extra costs. In reality, consumers would gain only some assurance that they will have a third party to collect from in case of injury. As a predictable result, this perspective fosters an increase in lawsuits, not safety.

By forcing the employer to insure against an employee's unforeseeable, intentionally tortious conduct, Oklahoma threatens those industries which deal with the public. The *Rodebush* analysis is problematic, because the employer had no reasonable expectation that the employee would tortiously injure Mr. Rodebush, especially given the nature of the occupation. The chilling effect on all business,

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109. The rather cavalier tone of the opinion and the court's failure to address issues critical to the defendant's case do not bode well for employers. The chilling effect on enterprising employers and businesses was, apparently, discounted by the court.

110. These arguments are expounded by several authors who generally use some method of an allocation of the risk formulation. See generally Carter, *supra* note 57 (asserting that it is conducive to an industrial society to hold an enterprise liable for the torts of its employees); Sykes, *supra* note 57 (stating that the allocation of risk, although it may not serve the market most efficiently, serves the market more efficiently than placing liability on the employee).

and nursing homes in particular, is unavoidable. Nevertheless, in Oklahoma, *Rodebush's* reasoning would hold the employer liable.

A nursing home is especially problematic. There is no question that the aging "baby-boomer generation" is now reaching middle age and will eventually join the ranks of the elderly. The social policies now in place for dealing with the elderly will have resounding ramifications in the future. To that end, this case sets unfortunate precedent. A chilling effect that freezes the expansion of enterprise and employment in a field like nursing home care would be extremely unfortunate. From the aspect of public policy, the Oklahoma Supreme Court, by extending employer liability beyond any reasonable measure, has chosen short term gain for one injured party instead of long-term, lasting benefits for all.

#### V. CONCLUSION

In *Rodebush*, the Oklahoma Supreme Court moved from liability based on the probable foreseeability of an employee's actions, to liability based primarily on the time and place of the incident. As a result, Oklahoma's vicarious liability more closely resembles strict liability. As precedent, *Rodebush* simply failed to advance a plausible analysis which considers either the employer's reasonably foreseeable expectations or the nature of the employment at issue. As a result, the court measures the employee's act in a context completely unrelated to his employment. Further, the court places liability on an employer for the uncontrollable and unforeseeable actions of an employee.

Therefore, when examining an employee's intentional torts, the court should determine whether the employee's intentional conduct was reasonably foreseeable by the employer within the nature of the employment. This is especially critical for the fact-specific inquiry of the respondeat superior doctrine. Otherwise, the court's current analysis will ultimately hold employers strictly liable for their employees' intentional torts.

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