



STATE OF MASSACHUSETTS TRANSPORTATION COMPENDIUM OF LAW

Michael P. Giunta

John W. Moran

LeClairRyan

Two International Place, 16th Floor

Boston, Massachusetts 02110

Tel: (857) 212-8978

Fax: (857) 212-8979

Email: Michael.Guinta@leclairryan.com

John.Moran@leclairryan.com

A. **ELEMENTS OF PROOF FOR THE DERIVATIVE NEGLIGENCE CLAIMS OF RESPONDEAT SUPERIOR, NEGLIGENT ENTRUSTMENT, HIRING/RETENTION AND SUPERVISION**

1. **Respondeat Superior (“Let the Master Answer”)**

a. Common Law Elements Necessary to Establish Respondeat Superior

Under Massachusetts law, an employer is responsible for torts committed by its employees while acting in furtherance of the employer’s business. Clickner v. City of Lowell, 422 Mass. 539, 542 (1996). The initial inquiry is whether there is in fact an employment relationship (also termed a “master-servant” or “principal-agent” relationship) between the negligent individual and the defendant. Dias v. Brigham Medical Associates, 438 Mass. 317, 322 (2002). If there is such a relationship, then the Court will consider three factors to determine if the employee’s tortious conduct occurred *within the scope* of his employment duties. Wang Laboratories, Inc. v. Business Incentives, Inc., 398 Mass. 854, 859 (1986).

(i) *Existence of an Employment Relationship*

The first inquiry, whether there is an employment or “master-servant” relationship, involves consideration of many factors, all of which are oriented toward determining whether an individual’s conduct was subject to the principal’s control or right of control. Peters v. Haymarket Leasing, Inc., 64 Mass. App. Ct. 767, 773-74 (2005) (citing to the list of factors identified in Restatement (Second) of Agency § 220(2)). The label placed by the parties on their own relationship (e.g., a written independent contractor agreement) is not dispositive, because the courts will not countenance subterfuges designed to evade an employment relationship. Id. at 774. Further, the employer’s right to control need not be absolute or pervasive; even a very attenuated right of control may give rise to an employment relationship. See id. at 774 (noting that taxi drivers enjoy a high degree of independence even with a traditional employment relationship); Konik v. Burke, Moore Co., 355 Mass. 463, 467 (1969) (holding employer liable for employee’s accident even though it could not control precise manner and means of employee’s driving).

(ii) *Whether Tortious Conduct Was Within Scope of Employment*

In making this determination, the courts will consider three factors: whether the conduct was of the type the employee was hired to perform; whether the conduct occurred within authorized space and time limits; and whether the conduct was motivated at least in part by a purpose to serve the employer. Wang Laboratories, 398 Mass. at 859. The factors are not

construed restrictively. Clickner v. City of Lowell, 422 Mass. 539, 542 (1996).

An example of the first factor, whether the conduct was of the type the employee was hired to perform, is that generally an employee's travel to and from his home to his place of business is not within the scope of employment. Mosko v. Raytheon Co., 416 Mass. 395, 399 (1993). On the other hand, if the employee's duties specifically require driving, or if the employee does not have a fixed place of employment, then the employee's driving most likely will be deemed within the scope of employment. See Kelly v. Middlesex Corp., 35 Mass. App. Ct. 30, 32 (1993) (explaining that driver may be deemed within scope of employment "when the purpose of travel between the place of residence and place of business is a mission to further the purposes of the employer, such as when an employee is directed to come to a particular company meeting"); Frassa v. Caulfield, 22 Mass. App. Ct. 105, 109-10 (1986) (where driver was lodged at a school where temporarily employed and necessarily had to travel to eat meals, his trip to restaurant was within scope of employment, because the rule which precludes recovery for injuries sustained in travel to and from the place of employment "has no application to employees who have no fixed place of employment").

The second factor, whether the conduct was within authorized space and time limits, is illustrated by a case in which a police officer was deemed not to be acting within the scope of his employment, even though he was driving to work in response to a page from his employer, because he was not within the town where he was authorized to act as a police officer, and his scheduled shift had not yet begun. Clickner, 422 Mass. at 543.

The third factor, whether the conduct was motivated to serve the employer, is applied liberally. Thus, where a driver employed by a trucking company committed an intentional assault on someone who interfered with the driver putting gas in his truck, a jury could properly find the assault within the scope of employment, because it was "in response to the plaintiff's conduct which was presently interfering with the employee's ability to perform his duties successfully." Dwyer v. Hearst, 3 Mass. App. Ct. 76, 79 (1975). Cf. Guiffre v. Transportation Services, Inc., 1994 Mass. Super. LEXIS 76 (Mass. Super. 1994) (where driver for transport company was fleeing from police he was not acting within scope of employment, even though he had client as passenger in car, because he was serving his own purpose rather than his employer's).

b. Statutory Presumption

Massachusetts does not recognize the doctrines of "placard liability" or "logo liability" as such. See Kansallis Fin. v. Fern, 421 Mass. 659, 664 (1996). By

statute, however, the registered owner of a motor vehicle is presumed to be legally responsible for its driver's negligence. Mass. Gen. Laws c. 231, § 85A. This presumption is rebuttable, but statute imposes on the defendant the burden of proving the nonexistence of an employment or agency relationship between owner and operator. Cheek v. Econo-Car Rental System, Inc., 393 Mass. 660, 662 (1985); Thompson v. Auto Credit Rehabilitation Corp., 56 Mass. App. Ct. 1, 5 (2002).

2. **Negligent Entrustment**

a. **Elements of a Negligent Entrustment Claim**

Where negligent entrustment of a motor vehicle is alleged, a plaintiff must first demonstrate that the defendant had control of the vehicle in question. Peters v. Haymarket Leasing, Inc., 64 Mass. App. Ct. 767, 771 (2005). Then, liability "is predicated on the owner's having entrusted a vehicle to a person who was incompetent or unfit to use it properly, whose incompetence or unfitness was the cause of the injury to the plaintiff." Mitchell v. Hastings & Koch Enterprises, Inc., 38 Mass. App. Ct. 271, 276-277 (1995). Generally, to be liable, the entrustor must have had actual knowledge of the unfitness of the driver as contrasted with mere reason to know that the driver was unfit. Id.

b. **Examples**

A claim for negligent entrustment against a taxi leasing company could be established where a jury could reasonably find that the company knew it was leasing a vehicle to a driver who had only received his taxi license three days earlier, and who had a record of two prior accidents and two prior moving violations. Peters, 64 Mass. App. Ct. at 772.

Where a driver's license was suspended, the vehicle owner could be liable for negligent entrustment even without actual knowledge of that fact, because an owner has an affirmative duty to ascertain that another is properly licensed before permitting him to operate a vehicle. Mitchell, 38 Mass. App. Ct. at 277.

3. **Negligent Retention/Hiring**

a. **Elements of a Negligent Retention/Hiring Claim**

Under a theory of negligent hiring, a plaintiff must demonstrate that the employer was aware or should have been aware of the employee's unfitness to deal with the employee's patrons or third parties. Foster v. The Loft, Inc., 26 Mass. App. Ct. 289, 290-91 (1998); Smith v. Law, 1994 Mass. Super. LEXIS 137 (Mass. Super. 1994). Of course, the plaintiff must also demonstrate that the negligence in hiring or retention caused plaintiff's harm. [Name Redacted] v. Edwards, 62 Mass. App. Ct. 475, 483 (2004).

b. Examples

The fact that a snow plow operator was unlicensed and uninsured, in the absence of evidence that he had a history of unsafe automobile or plow operation known to the employer, is insufficient as a matter of law to support a negligent hiring or retention claim. Smith v. Law, 1994 Mass. Super. LEXIS 137 (Mass. Super. 1994).

Evidence that driver had a record of “many violations” including three for driving under the influence of alcohol is sufficient to establish he is an unfit driver. Mitchell, 38 Mass. App. Ct. at 277

4. Negligent Supervision

a. Elements of a Negligent Supervision Claim

To establish the tort of negligent supervision, a plaintiff must prove that (1) the employer knew or should have known of the employee’s proclivity to commit misconduct; (2) the employer failed to take corrective action; and (3) that failure proximately caused actual harm to the plaintiff. Bennett v. Eagle Brook Country Store, Inc., 408 Mass. 355, 358 (1990); Copithorne v. Framingham Union Hospital, 401 Mass. 860, 862 (1988). Even if the purported employee is in fact an independent contractor, the employer may be held liable if it retains some control over the contractor and fails to exercise that control with reasonable care. Cheschi v. Boston Edison Co., 39 Mass. App. Ct. 133, 135-138 (1995).

b. Example

Where a town hired independent contractors to plow its public roads and supervised them in a similar manner as town employees, but allowed them to work excessive hours and plow down the center of two-lane roads, there was sufficient evidence to support a negligent supervision claim. Chiao-Yun Ku v. Town of Framingham, 53 Mass. App. Ct. 727, 730 (2002).

B. DEFENSES

1. Traditional Tort Defenses

Most traditional tort defenses are recognized in Massachusetts including supervening or intervening cause, failure to mitigate damages, etc. The doctrines of contributory negligence and assumption of the risk as complete defenses have been eliminated by statute, and supplanted with a comparative negligence rule set forth in Mass. Gen. Laws c. 231, § 85. Under this statute, a plaintiff’s recovery will be reduced in proportion to her own fault, if any, or barred entirely if her fault exceeds fifty percent.

2. **Statutory Defenses**

Other statutes containing affirmative defenses commonly asserted in transportation cases include Mass. Gen. Laws c. 90, § 34M, which entitles a defendant to an offset for any amount a plaintiff receives in medical (“personal injury protection”) payments under plaintiff’s own automobile policy; and Mass. Gen. Laws 231, § 6D, which bars a plaintiff from recovering for pain and suffering arising from a motor vehicle accident unless he proves that he incurred reasonable and necessary medical expenses in excess of \$2,000, or that his injury involved death, permanent and serious disfigurement, loss of hearing or sight, or a fracture.

C. **PUNITIVE DAMAGES**

1. **Limited Types of Punitive Damages in Massachusetts**

Punitive damages are not generally available under Massachusetts law except where expressly permitted by statute. Among the few statutes allowing for punitive damages which may arise in transportation cases are the Wrongful Death Act; the Consumer Protection Act; and the Worker’s Compensation Act.

(a) **The Wrongful Death Act**

Mass. Gen. Laws c. 229, § 2, provides that punitive damages may be imposed upon a defendant whose gross negligence, or willful, wanton or reckless conduct, causes the death of another. The statute further provides that “a person shall be liable for the negligence or the willful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act.”

(b) **The Consumer Protection Act**

Mass. Gen. Laws c. 93A, § 9 provides that a plaintiff may recover double or triple damages where a defendant knowingly or willfully commits an unfair or deceptive business practice, or refuses to make a fair settlement offer when it has reason to know its conduct was unfair or deceptive. Attorney fees are also available as a remedy for violation of the statute.

(c) **The Worker’s Compensation Act**

Mass. Gen. Laws c. 152, § 28, provides that: “If [an] employee is injured by reason of the serious and wilful misconduct of an employer ... the amounts of compensation hereinafter provided shall be doubled.”

2. Examples

In a wrongful death case, punitive damages were properly awarded against a driver for his gross negligence in operation of a motor vehicle, where evidence showed he drove a car while intoxicated at a high rate of speed and lost control of it, causing an accident. Davis v. Walent, 16 Mass. App. 83 (1983). In the same case, however, gross negligence could not be proven against the owner who entrusted his vehicle to the driver, so a punitive damages verdict against the owner could not be sustained. Id. at 97.

A freight company could not be liable for multiple damages under the Consumer Protection Act, even where it placed “unrealistic demands” on its drivers which may have led to an accident, because “there was nothing unfair or deceptive about [the accident] ... it was a negligent act and no more.” Swenson v. Yellow Transportation, Inc., 317 F. Supp. 2d 51, 55 (D. Mass. 2004), *citing* Dow v. Lifeline Ambulance Service, Inc., 1996 Mass. Super LEXIS 508 (Mass. Super. 1996).