

ALLEGING AND PROVING VICARIOUS LIABILITY

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Martin J. Siegel earned a B.A., Highest Honors, from The University of Texas at Austin in 1988, and his J.D., *cum laude*, from Harvard Law School in 1991. Following law school, he served as law clerk to the Honorable Irving R. Kaufman on the United States Court of Appeals for the Second Circuit in New York City.

From 1992 to 1994, Siegel was an associate in the Washington, D.C. office of Jenner & Block. At Jenner, he worked on appellate, commercial, intellectual property and environmental matters.

From 1995 to 2000, Siegel served as an Assistant United States Attorney in the Civil Division in the Southern District of New York, where his practice focused on bringing civil rights actions, defending federal statutes from constitutional challenge, and defending federal agencies and officers from suits based on government action. Siegel tried eight cases in federal district court and briefed and argued twelve appeals to the Second Circuit. He received the Department of Justice's Director's Award for Superior Performance as an AUSA in 1999. In a case of first impression, Siegel successfully defended provisions of the 1996 immigration and welfare reform laws invalidating state and local rules against disclosing the immigration status of aliens to federal law enforcement from constitutional attack under the Tenth Amendment.

In 2000-01, Siegel was detailed to serve as Special Counsel on the Senate Judiciary Committee, where his responsibilities included drafting and analyzing legislation on election reform, campaign finance, criminal justice and immigration issues.

From 2001-06, Siegel was a partner at Watts Law Firm in Houston, where he worked on commercial, franchise, product liability, intellectual property, consumer and personal injury litigation.

In 2007, Siegel opened the Law Offices of Martin J. Siegel to focus on appellate advocacy. Recent victories include the Fifth Circuit's grant of rehearing *en banc* to determine standards governing motions to transfer under 28 U.S.C. § 1404(a), Fifth Circuit affirmance of a plaintiff's verdict in a complex toxic exposure case, a favorable decision in a case of first impression in federal district court in San Francisco under the Warsaw Convention regarding a carrier's failure to provide in-flight medical assistance, and Fifth Circuit affirmance of a district court decision enjoining efforts to alter the U.S. Congressional ballot in 2006 as violative of Texas state law and the Constitution's Qualifications Clause.

Siegel has written law review articles, Op-ed pieces, and articles for *Litigation*, the magazine of the ABA's Litigation Section, where he serves on the Editorial Board. He has also served as an adjunct professor at the University of Houston Law Center, as a guest lecturer there and elsewhere, and as a speaker at CLE seminars and workshops. In 2004 and 2007, *Texas Monthly* named Siegel a "Texas Super Lawyer Rising Star," an award given to lawyers under 40 chosen by other lawyers throughout the state.

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ALLEGING AND PROVING VICARIOUS LIABILITY

Introduction

This article discusses the rationale behind vicarious liability, the elements necessary for the plaintiff to establish it, typical cases and fact patterns where the doctrine is likely to be raised, and other related issues.

What is vicarious liability?

“The common law has long recognized that liability for one person’s fault may be imputed to another who is himself entirely without fault solely because of the relationship between them.”

St. Joseph Hospital v. Wolff, 94 S.W.3d 513, 540 (Tex. 2002).

Rationales for Vicarious Liability

“A multitude of very ingenuous reasons have been offered for vicarious liability of a master: he has a more or less fictitious ‘control’ over the behavior of the servant; he has ‘set the whole thing in motion,’ and is therefore responsible for what has happened; he has selected the servant and trusted him, and so should suffer for his wrongs, rather than an innocent stranger who has had no opportunity to protect himself; it is a great concession that any man should be permitted to employ another at all, and there should be a corresponding responsibility as the price to be paid for it – or, more frankly and cynically, ‘In hard fact, the reason for the employers’ liability is the damages are taken from a deep pocket.’ None of these reasons is so self-sufficient as to carry conviction, although they are all in accord with the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss...”

What has emerged as the modern justification for vicarious liability is a rule

of policy, a deliberate allocation of risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer’s enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harms to others through the torts of employees, and sought to profit by it, *it is just* that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.”

Id. at 540-41 (Tex. 2002) (quoting Keeton et al., *Prosser and Keeton on the Law of Torts* § 69, at 499-501 (5th ed 1984) (emphasis in original).

The Test for Vicarious Liability is the Right of Control

1. Vicarious liability hinges on the right of control the defendant exercises over the tortfeasor. *See id.* at 542; *Golden Spread Council, Inc. # 562 of the Boy Scouts of America v. Akins*, 926 S.W.2d 287, 290 (Tex. 1996) (“the right of control remains the ‘supreme test’ for whether the master-servant relationship exists”); *Exxon Corp. v. Quinn*, 726 S.W. 2d 17, 19-20 (Tex. 1987) (premises owner has no liability to employees of independent contractor absent control over on-premises activity by owner); *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 585-88, 592 (Tex. 1964) (“The true test remains the right of control”).
2. The right of control is distinct from the exercise of control: “Certainly, if the right of control of details has a contractual basis, the circumstances that no actual control was exercised will not absolve the master of liability. Conversely, an occasional assertion of control should not destroy a settled relationship agreed to by the

4. What was the purpose of the trip – work-related or purely a personal errand? “
5. Was the car temporarily or permanently on loan from the employer?
6. Were personal friends involved?
7. Were alcohol or drugs involved?

See Arbelaez, Cortez, Mayes, supra.

ii. The employee who loses it... or, what to do about intentional torts

1. Was the employee’s action, though tortious, of the same general nature as that authorized, or incidental to authorized conduct?

Zarzana v. Ashley, 218 S.W.3d 152, 159 (Tex. App. – Houston [14th Dist.] 2007) (Meineke employee’s sale of counterfeit inspection sticker not within scope of employment because Meineke not in the business of selling real or fake inspection stickers: “An employee’s intentional, tortious conduct falls within the scope of employment when the conduct, even if contrary to express orders, is of the same general nature as that authorized or incidental to the conduct authorized”); *GT Management, Inc. v. Gonzalez*, 106 S.W.3d 880, 884 (Tex. App. – Dallas 2003) (“an employer may be vicariously liable for an intentional tort when the act... is committed in the accomplishment of a duty entrusted to the employee, rather than because of personal animosity”);

Hooper v. Pitney Bowes, Inc., 895 S.W.2d 773, 776-77 (Tex. App. – Texarkana 1995, writ denied) (defamation of employee in the course of investigation within the course and scope; “the statements made by [the employees] about [the target of the investigation] were made in their effort to investigate her conduct as their subordinate... All of their activities were the kind that a manager was expected to conduct and were within the scope of their employment”)

2. To what extent was the tort apparently motivated by personal animosity?

“It is not ordinarily within the scope of a servant’s authority to commit an assault on a third person... Usually, assault is the expression of personal animosity and is not for the purpose of carrying on the master’s business.” *Peek v. Equipment Serv.*, 906 S.W.2d 529, 532 (Tex. App. – San Antonio 1995) (employee’s murder of customer during a sales call not within course and scope); *Dieter v. Baker Serv. Tools*, 739 S.W.2d 405, 407 (Tex. App. – Corpus Christi 1987, writ denied) (assault not within course and scope); *but see GT Management*, 106 S.W.3d at 884 (employer of bouncers liable for injuries caused by bouncers: “Here, fights occurred at the club, sometimes three or four per night, and the bouncers duties were to break up the

employer's property, ejecting trespassers, or enforcing rules and regulations promulgated by the employer,... the trier of fact decides whether the officer was acting as a public officer or as a servant of the employer"). *Mansfield*, 37 S.W.3d at 150." *Ogg v. Dillard's, Inc.*, 239 S.W.3d 409, 418 (Tex. App. – Dallas 2007, pet. filed).

"If an off-duty officer observes a crime, as a matter of law, he becomes an on-duty officer for purposes of determining whether or not a private employer is vicariously liable for the officer's actions." *Id.* (quoting *Morgan*, 175 S.W.3d at 417).

iv. Health Care Claims

1. Control of Care is Key:

The caregiver or entity that controls the details of the plaintiff's care is the one that is directly or vicariously liable. See *Wolff*, 94 S.W.3d at 542-43; *Heritage Housing*, 199 S.W.2d at 567; accord, e.g., *Chandler v. Cash*, 20 S.W.3d 69, 72 (Tex. App. – Texarkana 2000, pet. denied) (contract between doctor and hospital obligating doctor to staff hospital emergency room with physicians and "orient them to their duties, direct their activities, and supervise and review their work" insufficient to impose vicarious liability where individual physicians controlled details and methods of work).

2. Course and Scope Can Shift Instantaneously: "At the very moment" neurologist commenced sexual contact

with patient, which occurred during neurological exam, he ceased to act within the course and scope of his employment and clinic ceased to be vicariously liable. See *Buck v. Blum*, 130 S.W.3d 285, 289-90 (Tex. App. – Houston [14th Dist.] 2004).

3. Doctors are Usually Independent Contractors:

"As a general rule, physicians are considered to be independent contractors with regard to the hospitals at which they enjoy staff privileges. It follows that hospitals are not liable for the negligent acts or omissions of independent physicians." *Espalin v. Childrens Med. Ctr. of Dallas*, 27 S.W.3d 675, 684 (Tex. App. – Dallas 2000) (citations omitted); *Baptist Mem. Hosp. System v. Sampson*, 969 S.W.2d 945, 948 (Tex. 1998) ("A hospital is ordinarily not liable for the negligence of a physician who is an independent contractor").

4. Examples of Vicarious Liability:

a. Ostensible agency

"[A] hospital may be vicariously liable for the medical malpractice of independent contractor physicians when plaintiffs can establish the elements of ostensible agency." *Sampson*, 969 S.W.2d at 948. Plaintiff must show that (1) he had a

jointly and severally liable with their members acting in the course and scope)

Ins. Co., 980 S.W.2d 625, 627-28 (Tex. 1998).

v. Insurance-related Claims

1. Did the agent make misrepresentations about coverage?

“An insurance company is generally liable for any misconduct by an agent that is within the actual or apparent scope of the agent’s authority... Celtic does not contend that Harrell’s misrepresentations were so absurd that no reasonable person could have believed Harrell was acting within the scope of his authority. Nor does Celtic assert any other challenge to the jury’s finding that Coats had authority to explain the policy... Celtic cannot escape liability on the basis that it did not authorize particular representations concerning the policy.” *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 99 (Tex. 1994); accord *Royal Globe Ins. Co. v. Bar Consultants*, 577 S.W.2d 688, 693-94 (Tex. 1979).

2. Did insurance company control alleged tortfeasor?

An insurer is not liable for the malpractice of an attorney hired by the insurer to defend the insured; the attorney is an independent contractor with control over the defense of the case, negating vicarious liability. *State Farm Mutual Auto.*

- d. Question is not whether employee obeyed employer’s instructions: “The Supreme Court determined more than a century ago that an employer is liable for the torts of its employees committed while acting within the scope of their employment, ‘although [the employer] may have expressly forbidden the particular act.’ The principle that an employer can be liable for the acts of an employee done in violation of the employer’s policies still obtains.” *Builders Transport, Inc. v. Grice-Smith*, 167 S.W.3d 1, 11-12 (Tex. App. – Waco 2005, op. withdrawn and superseded, 167 S.W.3d 18) (quoting *Intl. & Great N. R.R. v. Anderson*, 17 S.W. 1039, 1040 (1891)).
- e. Joint Masters: “The Whites argue that, although Brantley was clearly under the control of the transportation department when the accident occurred, the summary judgment evidence shows that she was also under the control of the school district. A person may be the servant of two employers at one time as to one act if the service to one does not involve an abandonment of the service to the other. RESTATEMENT (SECOND) OF AGENCY § 226 (1958). If there is evidence of joint control of Brantley by the transportation department and the school district, a finding that Brantley was the employee of the school district when the accident occurred would be proper. *Gulf Oil Corp. v. Williams*, 642 S.W.2d 270, 272 (Tex. App. – Texarkana 1982).” *White*, 880 S.W.2d at 159.
- f. Borrowed Employees: Employers who borrow employees from other employers may have respondeat superior liability to third parties. *See*

their own torts”) (citations omitted); *accord Villacana v. Campbell*, 929 S.W.2d 69, 75 (Tex. App. – Corpus Christi 1996, writ denied) (same concerning adult child living with parents).

ii. Exceptions

1. Reasonable Foreseeability:

“We conclude that a parent’s duty to protect third parties from the acts of a parent’s minor children depends on whether the injury to the third party is reasonably foreseeable under the circumstances as evidenced by the parent’s knowledge, consent, sanction, or participation in the child’s activities.” *Rodriguez*, 902 S.W.2d at 43. “Actual knowledge is not required if the parent should, under the circumstances, reasonably anticipate the consequences of his or her actions.” *Id.* at 42; *accord Cohen v. Hoose*, 2007 WL 3034938 at * 1 (Tex. App. – Beaumont 2007); *Isbell v. Ryan*, 983 S.W.2d 335, 339 (Tex. App. – Houston [14th Dist.] 1998); *Childers v. A.S.*, 909 S.W.2d 282 (Tex. App. – Ft. Worth 1995)

Relevant Foreseeability questions:

- a. Did minor demonstrate propensities to commit torts?
- b. Did parents discipline or otherwise attempt to control minor?
- c. Did tort occur on parents’ premises?
- d. Had third parties previously complained?

See Rodriguez, Cohen, Isbell, Childers, supra.

2. Statutory Liability: Family code provisions require parental restitution when their children commit delinquent behavior and the parents cannot establish that they undertook good faith efforts to prevent the conduct in question. *See Matter of D.M.*, 191 S.W.3d at 388-90.

b. Spousal Liability: Marital status is insufficient to impute liability, though an ordinary joint enterprise may be shown by the specific facts of the case. *See Wilkinson v. Stevison*, 514 S.W.2d 895, 897-98 (Tex. 1974).

3. Independent Contractors

a. General Rule of Non-liability: Parties who hire independent contractors ordinarily are not liable to injured employees of independent contractor or to third parties. *See Central Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *Enserch Corp. v. Parker*, 794 S.W.2d 2, 6 (Tex. 1990); *Heritage Housing*, 199 S.W.2d at 565.

b. Liability based on retained control:

Vicarious liability may be premised on control retained by the contracting party: “One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.” *Lee Lewis*

217, 225-26 (Tex. App. – Houston [1st Dist] 2006, rev. denied) (Civ Prac. & Rem. Code § 81.003, establishing vicarious liability by mental health services provider where employee repeatedly assaults same patient, precludes vicarious liability for other claims under chapter 81).

Indemnity Based on Vicarious Liability

“Common law indemnity survives in Texas...in negligence actions to protect a defendant whose liability is purely vicarious in nature.” *Vecellio Ins. Agency, Inc. v. Vanguard Underwriters Ins. Co.*, 127 S.W.3d 134, 138 (Tex. App. – Houston [1st Dist.] 2003) (citing *Aviation Office of Am., Inc. v. Alexander & Alexander of Tex., Inc.*, 751 S.W.2d 179, 180 (Tex. 1988)). Thus, a defendant found vicariously liable on the basis of an employee’s or agent’s wrongdoing has a claim for indemnity against the agent or employee. *See id.* at 139 (insurance agency has indemnity claim against agent for agent’s misrepresentations to policyholder).

Insurance Coverage of Vicarious Liability

An insured’s provision of notice of claims against physicians to the carrier was not notice of vicarious liability claims against the medical group, such that timely notice of the former could serve as adequate notice of the latter; vicarious liability claims against group were inherently separate and required separate timely notice. *See Professionals Ins. Co.*, 182 S.W.3d at 13-14.