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THE RESPONSIBILITY OF EMPLOYERS FOR THE ACTIONS OF THEIR EMPLOYEES: THE NEGLIGENT HIRING THEORY OF LIABILITY

Employers may be liable for the wrongful acts of their employees under the respondeat superior doctrine or under the negligent hiring theory of tort liability. The doctrine of respondeat superior has received much attention[1] but there has been little analysis of the negligent hiring theory.[2] The cases in which the theory has been discussed have not attempted to clarify its boundaries.[3] The theory is important for it may allow a person injured by a wrongful act of an employee to recover from the wrongdoer's employer. The focus under the theory is on the negligence of the employer in hiring or retaining the wrongdoer and therefore the theory may impose liability where the respondeat superior doctrine will not.

Although not articulated, in the cases that have found a duty on an employer under the negligent hiring theory, there have been common elements which ensure that a close connection is established between the plaintiff and the employment relationship. This note will briefly compare when the negligent hiring theory and the respondeat superior doctrine are available to an injured party to illustrate the distinction between the two. It will then examine the development of the negligent hiring theory, the elements that are common to the cases where a duty has been found and the employer's duty under the theory. It will conclude with an analysis of the proper limits of the theory.

THE RESPONDEAT SUPERIOR DOCTRINE AND THE NEGLIGENT HIRING THEORY

Under both the negligent hiring theory and the respondeat superior doctrine an employer may be held liable for the damages caused by the wrongful acts of an employee. However, they are distinct bases for enforcing liability and have different requirements. A pair of hypotheticals may be useful to illustrate the two approaches.

> *A* is employed by *D* as a bus driver. While on his route *A* almost collides with an auto driven by *P*. *P*, irate at *A*'s driving, complains to him and demands to see *A*'s license. *A*, desiring to continue on his route, attacks *P* causing serious injury and continues on his route.

1. *See, e.g.*, Brill, *The Liability of an Employer for the Wilful Torts of His Servants*, 45 CHI.-KENT L. REV. 1 (1968) [hereinafter cited as Brill].
2. *But see* Note 16 CLEV.-MAR. L. REV. 143 (1967); 52 ORE. L. REV. 296 (1973).
3. *But see* Lange v. B & P Motor Express, Inc., 257 F. Supp. 319 (N.D. Ind. 1966).

In the above factual pattern *P* has two possible means of obtaining redress for the wrong committed. *P* could make a claim against *A* for the injuries suffered or he could make a claim against *D*, *A*'s employer, under the doctrine of respondeat superior.[4] The respondeat superior doctrine holds that employers may be held liable for the wrongs committed by their employees. Many different theories have been advanced for the recognition of the doctrine[5] but the prevalent theory advanced today centers on the desired social policy of using the doctrine as a risk-spreading device to hold employers accountable for the actions of their employees.[6]

The doctrine has a limited application. For an employer to be held liable under the doctrine, the employee must have been acting either within the scope of the employment[7] or in furtherance of the employer's interests.[8] The employer could also be held liable by subsequently ratifying the act.[9] In the above fact pattern the action of the employee in striking *P* could be viewed as *A* seeking to further *D*'s interests because of the employee's desire to continue on his route[10] or the attack could be viewed as being "inextricably intertwined" with the employment[11] thereby bringing it within the scope of employment. In either case, liability on the employer would be established. The doctrine will not be applicable if the plaintiff cannot establish that the employee's act fit into the above stated requirements.[12]

Assume another hypothetical:

> *A* is employed by *D*, a grocer, to make deliveries for him. *P* purchases groceries and instructs *D* to have them delivered to her. *A* makes the delivery and while in *P*'s apartment sexually attacks her. *P* later discovers that *D* hired *A* knowing that he had previously attacked women.

In this fact pattern the respondeat superior doctrine would be unavailable to *P* because the attack was not within the scope of the employee's duties, the

4. Fields v. Sanders, 29 Cal. 2d 834, 180 P.2d 684 (1947); tri-State Coach Corp. v. Walsh, 188 Va. 299, 49 S.E.2d 363 (1948).

5. *See* Brill, *supra* note 1, at 2. Early theories advanced to justify the respondeat superior doctrine included the supposed control employers had over their employees and the view that the employee, when committing the wrong, was following an implied command of the employer.

6. *E.g.*, Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 A. 107 (1930); Brill, *supra* note 1, at 2-3.

7. *E.g.*, Pacific Tel. & Tel. Co. v. White, 104 F.2d 923 (9th Cir. 1939); Hubbard v. Lock Joint Pipe Co., 70 F. Supp. 589 (E.D. Mo. 1947); Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 A. 107 (1930); Brill, *supra* note 1, at 10.

8. *E.g.*, McFatridge v. Harlem Globe Trotters, 69 N.M. 271, 365 P.2d 918 (1961); Tri-State Coach Corp. v. Walsh, 188 Va. 299, 49 S.E.2d 363 (1948).

9. *E.g.*, Dempsey v. Chambers, 154 Mass. 330, 28 N.E. 279 (1891).

10. Tri-State Coach Corp. v. Walsh, 188 Va. 299, 49 S.E.2d 363 (1948).

11. Fields v. Sanders, 29 Cal. 2d 834, 180 P.2d 684 (1947).

12. Henderson v. Laclede Radio, Inc., 506 S.W.2d 434 (Mo. 1974); Master Auto Serv. Corp. v. Bowden, 179 Va. 507, 19 S.E.2d 679 (1942).

employee was not seeking to further the employer's interests and there was no ratification.[13] However, the employer may have been negligent in hiring *A* and sending him out to conduct the employer's business.

Thus, there is an alternative theory available to impose liability upon the employer in such situations. The negligent hiring theory of tort liability may be applicable to enforce liability upon the employer where the doctrine of respondeat superior will not.[14] The theory, recognized in most jurisdictions,[15] places a duty on employers to use reasonable care in the selection and retention of employees.[16] Therefore, in the second fact pattern, liability may be imposed because the employer's negligence in hiring *A* caused the plaintiff to be injured.[17] The negligence under the theory is the employer's own and not the imputed negligence of the employee. The plaintiff must prove all of the elements of the negligence action but the duty owed is by the employer to hire safe and competent employees.

THE DEVELOPMENT OF THE THEORY

The negligent hiring theory was slow in developing because of the difficulty in imposing liability on employers for acts of employees committed outside of the scope of employment.[18] As long as implied control over employees was stated as the rationale for holding employers liable under the respondeat superior doctrine,[19] liability could not be extended to acts which the employee committed outside of the scope of employment.

The negligent hiring theory, however, did not develop as an extension of the respondeat superior doctrine but rather as an extension of the fellow servant rule. At common law employers owed their employees a duty to provide a safe place in which to work.[20] This duty was gradually extended to providing safe employees because a dangerous fellow employee was seen as being equally as dangerous as a defective machine.[21] The courts, however, were reluctant to extend the duty of employers and consequently the expansion of the duty came gradually in a number of steps. In *Ballards' Adminis-*

13. Fleming v. Bronfin, 80 A.2d 915 (D.C. Mun. Ct. App. 1951).

14. Indiana has taken the position that the two theories are mutually exclusive. Lange v. B & P Motor Express, Inc., 257 F. Supp. 319 (N.D. Ind. 1966); Tindall v. Enderle, 320 N.E.2d 764 (Ind. Ct. App. 1974). Other jurisdictions have not taken this position. *See, e.g.*, Sixty-Six, Inc. v. Finley, 224 So.2d 381 (Fla. Ct. App. 1969).

15. It appears that only Kentucky rejects the theory. *See* Central Truckaway Sys. Inc. v. Moore, 304 Ky. 553, 201 S.W.2d 725 (1947).

16. *See* text accompanying notes 64-79 *infra*.

17. *See* Fleming v. Bronfin, 80 A.2d 915 (D.C. Mun. Ct. App. 1951).

18. The purpose of this section is to provide a brief historical analysis to establish a framework for understanding the modern use of the theory. It is not intended to be a comprehensive history of the theory.

19. Brill, *supra* note 1, at 2.

20. *E.g.*, Missouri, K. & T. Ry. Co. of Tex. v. Day, 104 Tex. 237, 136 S.W. 435 (1911).

21. Najera v. Southern Pac. Co., 13 Cal. Rptr. 146, 191 Cal. App. 2d 634 (Dist. Ct. App. 1961).

tratrix v. Louisville & N. R. Co.[22] an employee was killed by a blast of steam shot by another employee during a prank. The court held that the employer could be held liable for negligently hiring the fellow employee only if the act which caused the injury was within the employee's scope of employment. This, of course, is nothing more than an application of the respondeat superior doctrine.

In *Missouri, K. & T. Ry. Co. of Texas v. Day*[23] the fellow servant rule was extended to acts committed outside of the scope of the employment if the employer failed to use care in the hiring of employees. In *Day* a fellow employee attacked the plaintiff while on the job with a knife. The court, emphasizing the duty of railroads to hire safe employees, held that if the employer knew of the possibility of an attack by the employee, the employer had breached its duty to use reasonable care in the selection of workers.

As the duty received increasing recognition, it was extended to others to whom the employer was perceived as owing a duty because of a special relationship.[24] In *Priest v. F. W. Woolworth Five & Ten Cent Stores*,[25] the plaintiff was injured while shopping in the defendant's store when an employee pushed her over a counter. Liability under the respondeat superior doctrine could not be enforced because the employee was acting outside of the scope of his duties. The court rejected extending the same duty that railroads owed in hiring employees but held that since the plaintiff was a business invitee the defendant owed her a duty to use ordinary care in the selection of employees.[26]

In *Mallory v. O'Neil*[27] the defendant was a landlord who had hired an employee to maintain his apartment building. The employee shot the plaintiff while the plaintiff was on the premises. The court reversed the trial court's dismissal of the complaint and recognized the negligent hiring theory. The availability of the theory was limited, however, to those who were legally on the premises of the defendant, which indicates that the duty was owed only to invitees or licensees while they were on the premises.[28]

In *Fleming v. Bronfin*[29] the plaintiff was attacked in her apartment by the defendant's delivery man. Liability could not be imposed under the respondeat superior doctrine because the act was outside of the employee's

22. 128 Ky. 826, 110 S.W. 296 (1908).
23. 104 Tex. 237, 136 S.W. 435 (1911).
24. Fleming v. Bronfin, 80 A.2d 915 (D.C. Mun. Ct. App. 1951); Mallory v. O'Neil, 69 So.2d 313 (Fla. 1954); Priest v. F.W. Woolworth Five & Ten Cent Stores, 228 Mo. App. 23, 62 S.W.2d 926 (1933).
25. 228 Mo. App. 23, 62 S.W.2d 926 (1933).
26. *Id.* at 26-27, 62 S.W.2d at 927-28.
27. 69 So.2d 313 (Fla. 1954).
28. *Id.* at 315.
29. 80 A.2d 915 (D.C. Mun. Ct. App. 1951).

duties. The court reasoned, however, that since the employer knew the employee was to deal with the public and enter customers' homes, the employer should be held to the duty of hiring only safe and competent employees.[30]

Therefore, the negligent hiring theory developed as an extension of the fellow servant rule. First it was held that employers could be liable to their employees for the failure to use care in the selection of co-employees.[31] Later, the duty was extended to third parties if they stood in some special relation to the employer. This special relation included licensees, invitees or customers of the employer. Thus, the courts were looking for some connection between the plaintiff and the employment of the wrongdoer. The scope of employment test of the respondeat superior doctrine did not apply because the employee in committing the act complained of was acting outside of the scope of his duties. The connection between the employment and the plaintiff is the critical factor in establishing a case using the negligent hiring theory and it must, therefore, be examined in detail to determine under what circumstances the theory will be applied.

THE REQUIRED CONNECTION BETWEEN THE PLAINTIFF AND THE EMPLOYMENT

There have been two basic factual situations where the courts have found a sufficient connection between the employment relationship and the plaintiff to find a duty on the employer. These two situations are: (1) where an employee of a landlord commits a wrong against a tenant[32] or a person legally on the premises;[33] and (2) where an employee commits a wrong against a customer of the employer while the customer is attempting to do business with the employer.[34]

30. *Id.* at 917-18.

31. The duty also exists as to the retention of employees. *See* text accompanying notes 77-78 *supra*.

32. Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956); Argonne Apartment House Co. v. Garrison, 42 F.2d 605 (D.C. Cir. 1930); Svacek v. Shelley, 359 P.2d 127 (Alas. 1961); Zerder v. Friman Holding Co., 153 Misc. 225, 274 N.Y.S. 588 (Sup. Ct. 1934); LaLone v. Smith, 39 Wash. 2d 167, 234 P.2d 893 (1951).

33. Mallory v. O'Neil, 69 So.2d 313 (Fla. 1954).

34. Fleming v. Bronfin, 80 A.2d 915 (D.C. Mun. Ct. App. 1951); Monty v. Orlandi, 169 Cal. App. 2d 620, 337 P.2d 861 (1959); Sixty-Six Inc. v. Finley, 224 So.2d 381 (Fla. Ct. App. 1969); Stricklin v. Parsons Stockyard Co., 192 Kan. 360, 388 P.2d 824 (1964); Murray v. Modoc State Bank, 181 Kan. 642, 313 P.2d 304 (1957); Hersh v. Kentfield Builders Inc., 385 Mich. 410, 189 N.W.2d 286 (1971), *rev'g* 19 Mich. App. 43, 172 N.W.2d 56 (1969); Bradley v. Stevens, 329 Mich. 556, 46 N.W.2d 382 (1951); Tyus v. Booth, 64 Mich. App. 88, 235 N.W.2d 69 (1975); Dean v. St. Paul Union Depot Co., 41 Minn. 360, 43 N.W. 54 (1889); Priest v. F.W. Woolworth Five & Ten Cent Store, 228 Mo. Ct. App. 23, 62 S.W.2d 926 (1933); Stevens v. Lankard, 31 App. Div. 2d 602, 297 N.Y.S.2d 686 (1968), *aff'd*, 25 N.Y.2d 640, 254 N.E.2d 339, 306 N.Y.S.2d 257 (1969); Vanderhule v. Berinstein, 285 App. Div. 290, 136 N.Y.S.2d 95 (1954), *modified*, 284 App. Div. 1089, 136 N.Y.S.2d 349 (1954); Weiss v. Furniture in the Raw, 62 Misc. 2d 283, 306 N.Y.S.2d 253 (N.Y. City Ct. 1969); Wegner v. Delly-Land Delicatessen Inc., 270 N.C. 62, 153

In *La Lone v. Smith*[35] the defendant landlord's employee attacked the plaintiff who was a tenant while the plaintiff was on the premises. The court stated that whether an employer has a duty to a third party is dependent upon the circumstances and held that where the injured party was a tenant, there was a sufficient connection between the plaintiff and the employment to impose a duty on the landlord.[36] In *Zerder v. Friman Holding Co.*,[37] the landlord defendant hired painters to work on his building and the painters stole from a tenant while working in the building. The court denied the defendant's motion for dismissal and held that a sufficient connection exists between a landlord and a tenant to impose a duty on the landlord to hire honest employees.[38] The duty has not been limited to tenants. In *Mallory v. O'Neil*[39] the court held that the duty to hire safe and competent employees extended to anyone who was legally on the premises. These cases show that landlords have a duty to tenants and to those people who are properly on the premises to use reasonable care in the selection of employees. Thus, if the landlord fails to use care and the employee injures a tenant or another legally on the premises, the courts have imposed liability on the landlord employer.

The other situation which has been found sufficient to establish a duty is where the plaintiff is a customer of the defendant and comes into contact with an employee.[40] The connection has been considered sufficient where the employee commits a wrongful act against the plaintiff while on the employer's premises. In *Hersh v. Kentfield Builders Inc.*,[41] the plaintiff came to the defendant's building site in an attempt to sell goods to the defendant and an employee of the defendant attacked the plaintiff. In *Stricklin v. Parsons Stockyard Co.*,[42] the plaintiff was a buyer who was on the defendant's premises to purchase livestock. An employee of the defendant, possessing a dubious sense of humor, lifted the plaintiff's legs while he was sitting on a fence and caused the plaintiff to fall. The courts in both *Hersh* and *Stricklin* emphasized the need to protect the welfare of the community and held that the defendant owed the plaintiff a duty to hire safe employees under those circumstances.[43] In *Vanderhule v. Berinstein*,[44] the

S.E.2d 804 (1967); Mistletoe Express v. Culp, 353 P.2d 9 (Okla. 1959); Stone v. Hurst Lumber Co., 15 Utah 2d 49, 386 P.2d 910 (1963).

35. 39 Wash. 2d 167, 234 P.2d 893 (1951).

36. *Accord*, Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956); Svacek v. Shelley, 359 P.2d 127 (Alas. 1961).

37. 153 Misc. 225, 274 N.Y.S. 588 (Sup. Ct. 1934).

38. *Accord*, Argonne Apartment House Co. v. Garrison, 42 F.2d 605 (D.C. Cir. 1930).

39. 69 So.2d 313 (Fla. 1954).

40. *See* cases cited at note 33 *supra*.

41. 385 Mich. 410, 189 N.W.2d 286 (1971), *rev'g* 19 Mich. App. 43, 172 N.W.2d 56 (1969).

42. 192 Kan. 360, 388 P.2d 824 (1964).

43. *Accord*, Priest v. Woolworth Five & Ten Cent Store, 228 Mo. Ct. App. 23, 62 S.W.2d 926 (1933); *see* Stevens v. Lankard, 31 App. Div. 2d 602, 297 N.Y.S.2d 686 (1968), *aff'd*, 25

plaintiff, while bowling in the defendant's bowling alley, was attacked by an employee. There the court, emphasizing the danger customers face from dangerous employees, also imposed a duty on the defendant to hire safe help.[45] These cases illustrate that if the plaintiff is on the defendant's premises with a legitimate reason for being there, a duty is owed whether the plaintiff seeks to make a sale to the defendant, make a purchase from the defendant or is using the defendant's facilities.

The duty has not been limited only to situations in which the plaintiff is on the employer's premises. In *Stone v. Hurst Lumber Co.*,[46] an employee while delivering lumber to a building site where the plaintiff worked attacked the plaintiff. In *Murray v. Modoc State Bank*,[47] the defendant's employee went to the plaintiff's home on banking business and while there attacked the plaintiff. The courts in both *Murray* and *Stone* emphasized the danger customers faced if unfit employees are hired and held the connection between the employments and the plaintiffs were sufficient to raise a duty on the employers to hire safe help.[48] Similarly, in *Weiss v. Furniture in the Raw*,[49] the defendant's employee was delivering furniture to the plaintiff's apartment and while in the apartment stole the plaintiff's wallet. A duty to use care in hiring employees was imposed on the employer in that case. These cases indicate that when an employee meets a third party as a result of making a delivery for the employer, the employer will be held to the duty of providing safe help. The duty will arise if the delivery is to where the plaintiff works or to the plaintiff's residence.

Two cases which do not fit into the landlord or customer categories have imposed a duty on employers under the negligent hiring theory.[50] In *Colwell v. Oatman*,[51] the theory was used to impose a duty on an employer to provide capable help. In *Colwell* the defendant employer offered day laborers for hire. The defendant sent a laborer to the plaintiff's employer to work with the plaintiff on a loading dock. Because of his intoxicated condition, the laborer could not physically perform the work and dropped a

N.Y.2d 640, 254 N.E.2d 339, 306 N.Y.S.2d 257 (1969); Wegner v. Delly-Land Delicatessen Inc., 270 N.C. 62, 153 S.E.2d 804 (1959).

44. 285 App. Div. 290, 136 N.Y.S.2d 95 (1954), *modified*, 284 App. Div. 1089, 136 N.Y.S.2d 349 (1954).

45. *Accord*, Sixty-Six Inc. v. Finley, 224 So.2d 381 (Fla. Ct. App. 1969); Dean v. St. Paul Union Depot Co., 41 Minn. 360, 43 N.W. 54 (1889).

46. 15 Utah 2d 49, 386 P.2d 910 (1963).

47. 181 Kan. 642, 313 P.2d 304 (1957).

48. *Accord*, Fleming v. Bronfin, 80 A.2d 915 (D.C. Mun. Ct. App. 1951); Mistletoe Express v. Culp, 353 P.2d 9 (Okla. 1959).

49. 62 Misc. 2d 283, 306 N.Y.S.2d 253 (N.Y. City Ct. 1969).

50. Watsontown Brick Co. v. Hercules Powder Co., 265 F. Supp. 268 (M.D. Pa. 1967); Colwell v. Oatman, 32 Colo. App. 171, 510 P.2d 464 (1973).

51. 32 Colo. App. 171, 510 P.2d 464 (1973).

refrigerator on the plaintiff. The court held that the defendant had breached its duty by hiring an employee who could not physically perform the work.[52]

In *Watsontown Brick Co. v. Hercules Powder Co.*,[53] the theory was used to impose a duty on the defendant blasting company which had provided an incompetent employee to do blasting work for the plaintiff. The court reasoned that the plaintiff's damages were caused by the negligence of the company in providing an inexperienced blaster and held the employer liable.[54] These cases indicate that the potential scope of the theory is broad and is not limited only to tenants and to customers but may be applicable whenever the employee meets the plaintiff as a direct result of the employment.

Common elements, therefore, can be found in the cases where courts have imposed a duty on an employer to hire safe and competent employees. These elements are: (1) the employee and the plaintiff have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff met the employee as a direct result of the employment; and (3) the employer would receive some benefit, even if only a potential or indirect benefit, from the meeting of the employee and the plaintiff had the wrongful act not occurred. The benefit need not be direct. Landlords receive an indirect benefit from having employees on the premises because there is a representative of the landlord available who may be able to help the tenant if the tenant has a complaint. This would make the premises more attractive to tenants. If the plaintiff is a customer, the benefit to the employer is clear.

Where any one of the above elements has not been present, the courts have refused to impose a duty on the employer. In *Hansen v. Cohen*,[55] the plaintiff parked his car in the defendant's lot. Upon returning to his car the plaintiff played a game of craps with an employee of the defendant for the parking fee. The employee attacked the plaintiff after a dispute arose concerning the game. The court held that since the plaintiff was illegally using the premises there was no duty owed.[56] In *Parry v. Davison-Paxon Co.*,[57] two deliverymen employed by the defendant broke into the plaintiff's residence causing her to suffer emotional injury. The two had forged a delivery ticket in the plaintiff's name in an apparent effort to justify their

52. *Id.* at 176-77, 510 P.2d at 466-67.
53. 265 F. Supp. 268 (M.D. Pa. 1967).
54. *Id.* at 273.
55. 203 Or. 157, 276 P.2d 391 (1954), *rehearing denied*, 203 Or. 157, 278 P.2d 898 (1955).
56. *Accord*, Belmar v. Dixie Bldg. Maintenance, 226 So.2d 280 (Fla. Ct. App. 1969). In *Belmar* the defendant was employed to clean one-half of a building. The plaintiff occupied the other half and caught employees of the defendant stealing from his part of the building. The court held that the connection between the employment and the plaintiff was not sufficient to raise a duty in the defendant.
57. 87 Ga. App. 51, 73 S.E.2d 59 (1952).

presence if they were caught. The court held that since the employees were acting entirely on their own and had no legitimate reason for being in the plaintiff's house no duty was owed by the employer to the plaintiff. The court reasoned that the employees had not used the employment to gain entrance to the home and the same act would have resulted had the wrongdoers not been employed by the defendant.[58] These cases indicate that if the plaintiff, as in *Hansen*, or the employee, as in *Parry*, are in a place where either does not have a right to be, the duty will not be imposed upon the employer.

The duty will not be imposed if the employee does not meet the plaintiff as a direct result of the employment. In *Insurance Co. of North America v. Hewitt-Robbins Inc.*,[59] the defendant's employee borrowed a car from the defendant for his personal use. While driving the vehicle the employee collided with the plaintiff's vehicle. The court held that the employee's use of the car for personal business was not connected to the employment and refused to impose a duty on the defendant.[60] In *Olson v. Staggs-Bilt Homes Inc.*,[61] a guard employed by the defendant accidentally shot the plaintiff while having a company car serviced. Since the employee was hired only to patrol the premises and was not to become involved in any trouble which arose but was only to summon help, the court held that the connection between the employment and the plaintiff was insufficient to impose a duty on the employer.[62] *Hewitt-Robbins* and *Olson* illustrate the need for the plaintiff and the employee to have met as a direct result of the employment before a duty will be found. If the employee met the plaintiff as a result of something other than the employment, a duty will not be imposed on the employer.

A duty will also not be imposed if the employer is not in a position to receive some sort of benefit as a result of the employee meeting the plaintiff. In *Linden v. City Car Co.*,[63] an employee of the defendant, a cab driver, attacked the plaintiff, who was a red-cap, after the plaintiff had directed a passenger to another cab. The court rejected the plaintiff's claim noting that if the plaintiff were a customer it would have faced a different question.[64] The plaintiff argued in *Linden* that the employer was receiving a benefit because the cab driver was seeking to have the red-caps direct more business to his cab. The court rejected this, however, because it believed that the

58. *Id.* at 56, 73 S.E.2d at 62.
59. 13 Ill. App. 3d 534, 301 N.E.2d 78 (1973).
60. *Id.* at 536, 301 N.E.2d at 80.
61. 23 Ariz. App. 574, 534 P.2d 1073 (1975).
62. *Id.* at 577, 534 P.2d at 1076.
63. 239 Wis. 236, 300 N.W. 925 (1941).
64. *Id.* at 240, 300 N.W. at 927.

benefit was not sufficient to raise a duty.[65] *Linden*, therefore, illustrates the need to show a potential benefit arising from the meeting of the employee and the plaintiff. The employer must be in a position to receive some benefit from the meeting before a duty will be imposed.

The cases which have been discussed illustrate that for an employer to be found to have a duty under the negligent hiring theory, it must be shown that the employee and the plaintiff were in places where each had a right to be, the plaintiff met the employee as a direct result of the employment and the employer had the potential to receive some sort of benefit from the meeting had the employee not acted wrongfully. When these elements are present a duty is owed but if any one of the elements are lacking, the employer does not owe a duty to the injured party. When the plaintiff has shown these elements and consequently has established a duty, only the first part of the prima facie case has been proven. The plaintiff will still be required to prove a breach of duty, causation and damages.

THE EMPLOYER'S DUTY

The employer's duty is to use reasonable care in hiring employees.[66] This has been interpreted to require the employer to conduct some kind of a minimal investigation of an applicant's background prior to hiring.[67] In *Weiss v. Furniture in the Raw*,[68] the defendant hired an employee to make a delivery to the plaintiff without conducting any investigation or inquiries into the employee's background and failed even to obtain the employee's address. The court held the failure to use any standards in hiring was a breach of the duty owed.[69]

The duty has never been held to require an in-depth investigation of an employee's background. In *Stevens v. Lankard*,[70] the defendant hired a store clerk who had been previously convicted of sodomy. The employee subsequently committed an act of sodomy on a thirteen year old customer. The court held that the duty had not been breached because a routine investigation would not have revealed the sodomy conviction and to require employers to conduct a more extensive investigation would place an unfair burden on the business community.[71]

65. *Id.* at 239, 300 N.W. at 926.

66. *E.g.*, Fleming v. Bronfin, 80 A.2d 915 (D.C. Mun. Ct. App. 1951).

67. Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956); Weiss v. Furniture in the Raw, 62 Misc. 2d 283, 306 N.Y.S.2d 253 (N.Y. City Ct. 1969); *See also* Dantos v. Community Theater Co., 90 Ga. App. 195, 82 S.E.2d 260 (1954).

68. 62 Misc. 2d 283, 306 N.Y.S.2d 253 (N.Y. City Ct. 1969).

69. *Id.* at 255, 62 Misc. 2d at 285.

70. 31 App. Div. 2d 602, 297 N.Y.S.2d 686 (1968), *aff'd*, 25 N.Y.2d 640, 254 N.E.2d 339, 306 N.Y.S.2d 257 (1969).

71. *Accord*, Tyus v. Booth, 64 Mich. App. 88, 235 N.W.2d 69 (1975).

The standard of care required is always that of a reasonable person but the amount of care can vary. In *C. K. Security Systems, Inc. v. Hartford Accident & Indemnity Co.*,[72] the defendant was employed to provide guards for the plaintiff's premises. The guards stole blank checks from the plaintiff and later forged and cashed them. The court held that the amount of care required was of a very high degree because of the possibility of injury inherent with the job.[73]

For the duty to be breached there must be a connection between the information available and the type of harm suffered by the plaintiff. In *Argonne Apartment House Co. v. Garrison*,[74] a landlord hired an employee to work in the plaintiff's apartment. The employee, who had been previously convicted for being intoxicated, stole jewelry from the plaintiff's apartment. The court held that the conviction for being under the influence of alcohol did not indicate that the employee was unfit for this employment and consequently there was no breach of the duty owed.[75]

If the information which would make the employee unfit for employment would not be uncovered in a routine background check, there is no breach.[76] In *Stone v. Hurst Lumber Co.*,[77] the court held that the defendant could not have discovered in a background investigation the vicious tendencies of an employee which caused him to attack the plaintiff because there was no record of these tendencies. Therefore, there was no breach of duty.[78]

Employees' right to privacy may prevent an employer from discovering unfit characteristics of employees. Although this precise issue has not yet been addressed by a court under the negligent hiring theory of liability, the right of employees to privacy would clearly be a defense available to employers. If information which would make the employee unfit for employment was not available to the employer because it was protected, there would be no breach of the duty owed by the employer because a reasonable investigation would not have discovered the information.

The duty of the employer does not end once the employee is hired. The employer also has a duty to retain only safe and competent help. In *Vanderhule v. Berinstein*,[79] an employee made bizarre statements to his employer and the employer observed the employee acting strangely. The employee later attacked a customer who was in the defendant's place of

72 137 Ga. App. 159, 223 S.E.2d 453 (1976).
73. *Id.*
74. 42 F.2d 605 (D.C. Cir. 1930).
75. *Id.* at 608.
76. Fleming v. Bronfin, 80 A.2d 915 (D.C. Mun. Ct. App. 1951).
77. 15 Utah 2d 49, 386 P.2d 910 (1963).
78. *Accord*, Stevens v. Lankard, 31 App. Div. 2d 602, 297 N.Y.S.2d 686 (1968), *aff'd*, 25 N.Y.2d 640, 254 N.E.2d 339, 306 N.Y.S.2d 257 (1969).
79. 285 App. Div. 290, 136 N.Y.S.2d 95 (1954), *modified*, 284 App. Div. 1089, 136 N.Y.S.2d 349 (1954).

business. The court held that the employer should have investigated the employee after observing the employee's erratic behavior and the failure to do so was a breach of the duty owed to the plaintiff.[80]

Employers, therefore, have the duty to make some inquiry into an applicant's background even though an in-depth investigation is not required. The courts have not adequately addressed the question of what is required of employers. It appears, however, that an interview with an applicant where pertinent background information such as address and work experience is obtained is sufficient.[81] If the employer has notice of any characteristic which may make the employee unfit, the duty would require the employer to make further investigations. Employers would be protected, of course, by seeking to obtain as much information as is possible on the applicant. The duty continues after the employee has been hired and the employer has the duty to retain only safe and competent help in his employ.

THE PUBLIC'S, EMPLOYER'S AND EMPLOYEE'S INTERESTS

The negligent hiring theory is clearly useful for it provides a remedy for a wrong where no other may be available. The injured party could, of course, institute a claim against the employee who committed the wrongful act but the wrong under the negligent hiring theory is the lack of care exercised by the employer. The employee's wrongful act causes the damage which the plaintiff suffers. The duty on employers is not burdensome because it requires only minimal inquiries of applicants which employers would probably desire anyway as a good business practice to ensure that their employees are competent and able to perform their job. The theory should not be expanded to cases where the three elements[82] establishing a connection between the employment and the plaintiff are not present. The following discussion of *Becken v. Manpower, Inc.*,[83] will further explain this contention.

In *Becken* the plaintiff hired the defendant to provide laborers to help him move his jewelry store and the defendant provided two felons recently paroled from penitentiaries. After seeing the contents of the boxes they were moving, the employees returned to the plaintiff's business later that night and stole the jewels. The trial court granted the defendant's motion for summary judgment because it did not believe that the applicable state law

80. *Id.* at 295, 136 N.Y.S.2d at 101.

81. *See* Argonne Apartment House Co. v. Garrison, 42 F.2d 605 (D.C. Cir. 1930); Weiss v. Furniture in the Raw, 62 Misc. 2d 283, 306 N.Y.S.2d 253 (N.Y. City Ct. 1969).

82. The three elements being: (1) the employee and the plaintiff were in a place where each had a right to be when the wrongful act occurred; (2) the plaintiff met the employee as a direct result of the employment; and, (3) the employer would have received some benefit from the meeting had the wrongful act not occurred.

83. 532 F.2d 56 (7th Cir. 1976).

had recognized the negligent hiring theory.[84] The court in *Becken* reversed this holding and remanded the case for trial.[85]

In *Becken* the defendant's employees clearly were in an improper place when the wrong was committed. The only connection between the wrong and the employment was the employees' earlier contact with the plaintiff as a result of the employment. The employer was receiving no benefit from the employees meeting the plaintiff. Consequently, of the three elements which have been present in the cases where the theory has been adopted, only the second element, the employee having met the plaintiff as a direct result of the employment, is present in *Becken*.

The theory should not be extended to create a duty on an employer under the facts presented in *Becken*.[86] Few courts have considered the interests to be balanced under this theory[87] but it is clear that society, employers and employees have interests which must be balanced. People have a right to be secure in their transactions with businesses. When people deal with employees, they should be able to feel confident that the employer has hired competent and safe employees. Employers have an interest in promoting and conducting their businesses through their employees. They should, therefore, accept responsibility for the acts of their employees when the act is sufficiently connected with the employment. Employers, however, also have an interest in not being held accountable for the acts of their employees when the employee is acting outside of the scope of the employment and there is no substantial connection between the employment and the plaintiff. Employees also have an interest here which cannot be overlooked. If the theory is made unduly broad, employees with unfavorable backgrounds may find it difficult to find employment because employers, fearful of being found negligent, will not hire them. Punishment for a crime must end when the sentence has been served. The law of negligence is designed to deal with an occasional failure to use ordinary care. It is meant only to hold the wrongdoer liable for the damages resulting from each lack of care.[88] If

84. *Id.* at 59. The case was to be tried under Illinois law and Illinois has never expressly accepted the negligent hiring theory. Two cases, Pascoe v. Meadowmoor Dairies, 41 Ill. App.2d 52, 190 N.E.2d 156 (1963) and Insurance Co. of N. America v. Hewitt-Robbins, Inc., 13 Ill. App. 3d 534, 301 N.E.2d 78 (1973), appear to have rejected the theory.

85. The court relied on Tatham v. Wabash Ry. Co., 412 Ill. 568, 107 N.E.2d 735 (1952) in determining that Illinois would recognize the theory. However, *Tatham* was weak precedent because it concerned an action under the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 (1970).

86. The holding in *Becken* was very narrow and the case was remanded for trial. *Becken* is only used here for its factual basis to illustrate the need to ensure that a connection is established between the employment and the plaintiff before a duty is imposed on the employer.

87. Lange v. B & P Motor Express Inc., 257 F. Supp. 319 (N.D. Ind. 1966); Svacek v. Shelley, 359 P.2d 127 (Alas. 1961); Hersh v. Kentfield Builders Inc., 385 Mich. 410, 189 N.W.2d 286 (1971), *rev'g* 19 Mich. App. 43, 172 N.W.2d 56 (1969).

88. Lange v. B & P Motor Express Inc., 257 F. Supp. 319 (N.D. Ind. 1966).

the negligent hiring theory is given too broad a scope, employees may be unfairly punished for their past indiscretions by being unable to obtain employment.

A balance must be struck among these interests. The three elements necessary to impose a duty on an employer to hire safe and competent employees serve to balance these interests. Employers' interests are protected by all of the elements because each serves to ensure that a close relationship exists between the employment and the plaintiff before a duty will be imposed.[89] Employees' interests are also protected. Employers can hire employees with unfavorable backgrounds and then place the employee in a job where there will not be any contact with third persons who are in places where they have a right to be or as a direct result of the employment. By placing the employee in such a job, the employer would not be liable should the employee commit a wrong because the employee or the injured party would have been in an improper place, the employee and the injured party would not have met as a direct result of the employment and there would be no benefit to the employer from the the meeting. Employers, therefore, could hire employees despite any past indiscretions. Society's interest is also protected because a duty will be owed when a person meets an employee while in a place each has a right to be, as a direct result of dealing with the employer and with the employer receiving some potential benefit. The three elements serve, therefore, to balance the interests of all of the parties and should be present before a duty is found.

CONCLUSION

The negligent hiring theory offers a remedy to persons injured by an employee when no other theory may be available to impose liability on the wrongdoer's employer. The cases have not stated what connection is required between the employment and the plaintiff for a duty to be imposed on the employer, but in all of the cases where the duty has been found three elements have been present: (1) the employee and the plaintiff have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff met the employee as a direct result of the employment; and (3) the employer would receive some benefit from the meeting had the wrongful act not occurred. These elements serve to balance the interests of all parties and the courts should expressly require proof of these elements before an employer is held to owe a duty to a third party injured by an employee.

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89. The duty, which is fairly easy to meet, also protects the employer's interests. *See* text accompanying notes 64-79 *supra*.