

# Master's Liability for the Torts of his Servant

by Harvey J. Garod

**T**he law holds a master accountable for the torts of his servant under several rules of law.<sup>1</sup> Respondeat superior is the most common. It requires the servant's actions to be within the general scope of employment and in furtherance of the employer's interests. An action performed outside the scope of employment still may be binding on a principal if ratified by him. A direct cause of action may impose liability for negligent hiring, supervision or training of an agent. And in certain circumstances, the master may be held absolutely liable based upon breach of express or implied contract.

This article will discuss existing Florida case law establishing principles of direct and vicarious liability. Although most general principles are well established, their application has not produced consistent results. Furthermore, the rule of absolute liability has not been recognized to the extent that Florida courts consider it a distinct cause of action.

## Vicarious Liability

If a servant performs an act within the real or apparent scope of his master's business, respondeat superior holds the master liable for compensatory damages.<sup>2</sup> Also, the actions must be done to further the interest of the principal, not the personal concern of the agent.<sup>3</sup>

To determine the extent of the scope of

employment, it is necessary to examine the nature of delegated authority. When the master grants broad, general authority, he will be responsible for his servant's excess zeal in carrying out instructions.<sup>4</sup>

*Fouts v. Household Finance Corp.*<sup>5</sup> is a good illustration of blanket authority. The defendant vigorously ordered his employee to use whatever means required to collect a debt. The agent enthusiastically complied by breaking into the plaintiff's home and defaming her. When the plaintiff brought suit, the defendant sought to disown its employee by arguing he had exceeded the scope of his authority. The trial court agreed and rendered summary judgment against the plaintiff.

On appeal, the Supreme Court reviewed the particular instructions given to the employee:

I don't care what you do, go back and get her to the phone and if you can't do this job, you should be a carpenter. . . .

. . . you go back there and don't tell me she wouldn't go. You go back there and get her to the telephone. I want her. It was our money. . . . *I don't care what you do* but get her to the telephone.<sup>6</sup>

The court found these orders sufficiently broad<sup>7</sup> to create an issue of fact to be resolved by the jury. Summary judgment was reversed.

Articulated authority as in *Fouts* is rare. Most often instructions to the agent are

vague or even nonexistent. The determinative test becomes whether the servant's acts are something the employment contemplated.<sup>8</sup> If the conduct is reasonably foreseeable, the principal will be responsible for it.<sup>9</sup> Benefit to the master is not dispositive,<sup>10</sup> and the rule is the same even if the particular action is unauthorized or expressly forbidden.<sup>11</sup> In most cases, the court determines the issue as a matter of law.<sup>12</sup>

The question of the employee's authority to use a subagent is illustrative. To establish such implied authority, it must be shown that there existed a "general practice and custom of using helpers."<sup>13</sup> This was demonstrated in *Jacobi v. Claude Nolan, Inc.*<sup>14</sup> The defendant was a car dealership that had sold an automobile to Charett. The salesman in charge was Sanuta. A Pinkerton was frequently present during the negotiations. When Charett called Sanuta concerning warranty repair work, Pinkerton arrived to pick up the car. He left a "loaner" owned by the defendant and drove Charett's automobile to defendant's premises. Sanuta later instructed Pinkerton not to return the car to Charett. Pinkerton disregarded Sanuta's orders and was involved in an accident with the plaintiff while returning Charett's automobile.

The defendant denied Pinkerton was its employee, and Sanuta testified Pinkerton

was not his helper. The evidence did show that the defendant's employees would on rare occasions pick up customers' cars and return them after repairs were completed. The trial court granted summary judgment for defendant.

The district court of appeal reversed, finding material issues of fact regarding whether Sanuta had implied authority to use Pinkerton, and whether Pinkerton was acting as a subagent at the time of the accident. The court noted:

[W]e think . . . that under the customs and usages of the business assistance by subservants was sanctioned by the Corporation; and that Pinkerton occupied such a position not only for the purpose of picking up cars in need of repairs but for a variety of other purposes as well.<sup>15</sup>

*Castlewood International Corp. v. Whitman*<sup>16</sup> also is instructive. The defendant owned a tavern and employed a bouncer to watch the door. The bouncer occasionally allowed a patron to replace him for short periods of time. The bartender gave tacit approval of this temporary substitution. A ruckus ensued while the patron was on duty, and he called to a friend for help. The friend went berserk and shot two people. The plaintiffs brought suit against the tavern owner on the theories of respondeat superior and direct negligence, and apparently received a general verdict in their favor.

The Fourth District Court of Appeal analyzed the relationship between the principal, its agent, the subagent and the alleged subagent's agent. The question of foreseeability was critical to the court's analysis. The helper's actions were so unexpected that they could not be imposed vicariously upon the tavern owner. The court stated:

There is no doubt that the bartender was a servant of the tavern owners. There is no doubt

that the permanent bouncer was also. It is further arguable that the occasional volunteer temporary door watcher was an agent of the bar. At that point in the chain, however, we believe any agency stopped, under the facts of this case.<sup>17</sup>

The case was remanded for a new trial on the issue of direct negligence of the tavern owner.

Another approach to determine responsibility of the master is to decide whether the servant's conduct promoted the master's interests. The law will not impose liability if the agent acted to serve his own purpose.<sup>18</sup> While some deviation from the master's purposes is permissible, a departure amounting to abandonment absolves the principal of responsibility.<sup>19</sup>

The general rule is clear, but its application often difficult. The courts will evaluate each case on its facts.<sup>20</sup> Some cases clearly are issues of law: unauthorized early morning molestations<sup>21</sup> or theft<sup>22</sup> serve only the agent's personal interest. And liability may be limited in situations involving restricted agency or special assignment.<sup>23</sup> In cases requiring factual resolution, factors including motivation, the nature of employment and reference to time and place may be used to evaluate the nature of the employee's actions.<sup>24</sup>

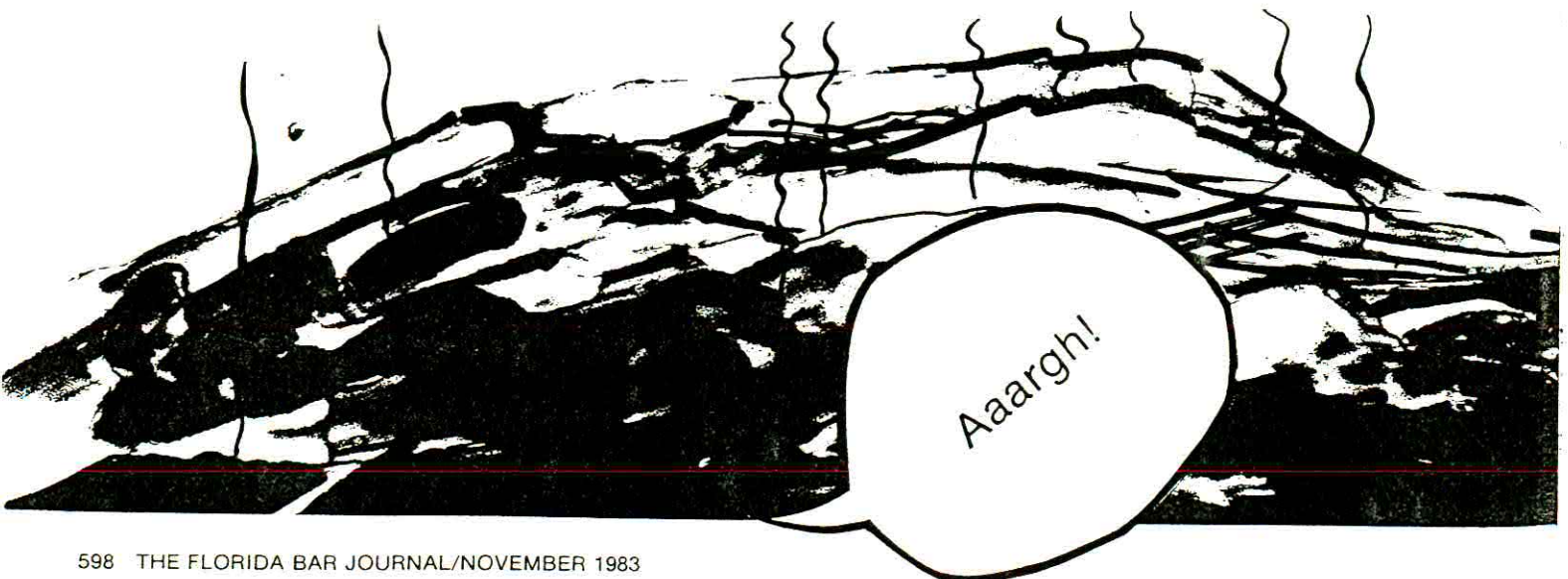
The following cases show the difficulty involved in making the proper determination. Both cases had similar fact situations and were decided by the Third District Court of Appeal at approximately the same time. One case was decided as a matter of law, while the other, submitted to the jury on disputed issues of fact, resulted in an opposite ruling.

In *Forster v. Red Top Sedan Services, Inc.*,<sup>25</sup> the defendant's limousine driver ran the plaintiff's vehicle off the road and

accosted the plaintiff and his wife. The defendant's driver voiced displeasure at the plaintiff's driving habits and indicated that the plaintiff had been impeding his progress to Miami Beach. The trial court granted a directed verdict in favor of the defendant, finding that the driver had acted for personal motives only. The district court of appeal reversed. In a terse opinion, the court held that the plaintiff had established sufficient facts to put the nature of the agent's actions at issue.

*Forster* should be compared with *Reina v. Metropolitan Dade County*,<sup>26</sup> in which the plaintiff was assaulted by a bus driver. The participants exchanged initial unpleasanties over the amount of the fare. After the plaintiff had departed from the bus, he made an obscene gesture at the driver. The driver then stopped the vehicle, chased down the plaintiff and assaulted him. As in *Forster*, the trial court granted a directed verdict for the defendant. This time the district court of appeal affirmed, simply holding that the driver had abandoned his employment and pursued the plaintiff for personal reasons only.<sup>27</sup>

Close analysis shows no material facts distinguishing *Forster* from *Reina*. Both assaults flowed directly from the servant's employment and were motivated in part by spite or revenge. The concern of the limousine driver about running behind schedule may have been commendable, but it is difficult to see how taking additional time off to assail the plaintiff expedited his progress to Miami Beach. On the other hand, the bus driver owed a higher degree of care to his passenger than did the limousine driver to another motorist.<sup>28</sup> The initial verbal altercation between the bus driver and his passenger concerned the amount of the fare, something clearly in



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the employer's interest. Both cases were sufficient to have been submitted to the jury,<sup>29</sup> and the plaintiff in *Reina* was unjustly denied his day in court.

### Dangerous Instrumentalities

The owner of a dangerous instrumentality entrusted to another is accountable for injuries resulting from its negligent use or operation.<sup>30</sup> The law implies an agency relationship between the owner and operator.<sup>31</sup> Dangerous instrumentalities by their nature are reasonably certain to place life and limb in peril if negligently constructed or operated.<sup>32</sup> These include airplanes,<sup>33</sup> automobiles,<sup>34</sup> electricity,<sup>35</sup> and fire-works<sup>36</sup> among others.<sup>37</sup>

Limitations exist on this type of vicarious liability. An owner is not responsible for the negligence of a repairman to whom the instrumentality was entrusted. This exception covers service related testing or transportation of the owner's vehicle, so long as the owner assumes no control or supervision.<sup>38</sup> The rule is not applicable to the state, its agencies or subdivision.<sup>39</sup> Liability for misuse of firearms has been restricted to negligent entrustment<sup>40</sup> or supervision.<sup>41</sup>

### Ratification

If the principal ratifies his agent's actions, he will be accountable even if the actions were performed outside the scope of employment.<sup>42</sup> The principal must act in a manner that gives the appearance of approval of the agent's prior nonbinding conduct,<sup>43</sup> electing to treat it as authorized and being bound by its consequences.<sup>44</sup>

Ratification rarely occurs. The general rule is that a master cannot ratify a criminal act committed outside the scope of employment.<sup>45</sup> Failure to discharge the errant employee, or provision of a legal defense will not constitute ratification.<sup>46</sup> However, civil liability will attach when the principal retains the fruit of the unlawful act.<sup>47</sup> In this respect, it may be said that the principal was fully informed and approved of his agent's conduct,<sup>48</sup> thus being bound by it.

### Direct Negligence

An employer may be held directly liable for negligent hiring, training or retention of his servant.<sup>49</sup> To impose liability on the theory of negligent hiring or retention,<sup>50</sup>

the master must have notice of a particular dangerous trait or propensity.<sup>51</sup> However, failure to discover the danger may constitute negligence.<sup>52</sup> The master's negligence must pass the test of causation in fact, while that of his servant must be the proximate cause of the plaintiff's injuries.<sup>53</sup> If the agent's tort causes no injury, the principal's negligence is not actionable.<sup>54</sup>

The master's direct duty to the plaintiff is not absolute. The duty is relative and reasonable, as shown in *Williams v. Feather Sound, Inc.*<sup>55</sup> The defendant was a real estate developer and manager of condominiums and residential homesites. The defendant's agent hired Carter to perform lawn maintenance. The defendant gave the agent no instructions on how to conduct job interviews, and the employment form did not request a history of criminal or psychiatric experiences. The agent also neglected to contact any former employers or references given. The defendant transferred Carter to do interior maintenance after three weeks on the job and gave Carter the tools to perform his new task. Carter entered the unit where the plaintiff was residing and attacked her. Later investigation revealed Carter had been convicted of breaking and entering, assault with intent to commit murder and night prowling. He also had received psychiatric care.

On the above facts, the trial court granted summary judgment in favor of the defendant. The plaintiff appealed. The Second District Court of Appeal admitted that the law on an employer's duty of inquiry was not clear. Analysis had to focus on the length of employment, the type to be performed, and the possibility of intimate contact with the tenants. The court explained:

If an employer wishes to give an employee the indicia of authority to enter into the living quarters of others, it has the responsibility of first making some inquiry with respect to whether it is safe to do so. Feather Sound did not carry out this responsibility. It made no effort to contact prior employers, and it did not seek advice from Carter's references. (footnote omitted) Therefore, the court should not have granted a summary judgment in its favor. (footnote omitted)<sup>56</sup>

The duty of inquiry varies with the nature of employment. The more sensitive the position, the greater the duty. The discovery of past improprieties may or may

not be sufficient to preclude employment. It is doubtful that Feather Sound would have breached its duty owed to the plaintiff had Carter remained doing outside maintenance. Also, had Carter been convicted of petty, nonviolent offenses, the knowledge might not have put the employer on notice that it was hiring a dangerous servant.<sup>57</sup>

### Absolute Liability

There exists a theory of law imposing absolute liability upon a principal for the torts of his servant. This rule originally arose from a contractual relationship in certain limited, confidential situations.<sup>58</sup> Absolute liability is rarely pursued, and some courts have voiced concern about its continued existence.<sup>59</sup>

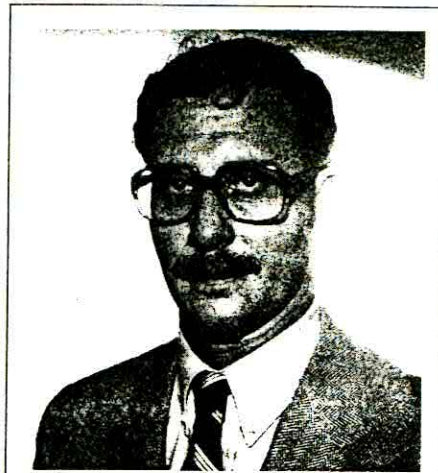
Whether Florida recognizes the theory of absolute liability is uncertain. No cases can be found specifically approving its application. But there exists tantalizing dicta in *Martin v. United Security Services, Inc.*<sup>60</sup> that indicates a willingness to entertain the rule under given circumstances. The facts were simple, and the case litigated on traditional tort principles previously discussed. The defendant was a security guard service whose employee had raped and murdered the plaintiff's decedent. The trial court granted summary judgment for the security service on the grounds the agent was outside the scope of employment at the time of the attack. The First District Court of Appeal affirmed. In a special concurring opinion, Judge Ervin commented:

Aside from the pleaded issue of respondeat superior, an issue which was not pleaded is whether an implied contractual relationship exists between the employer and the person assaulted, which may result in tort liability to the employer. Such a theory has been permitted in other jurisdictions under particular circumstances. (citations omitted) The question is of course not decided by our opinion and in my view remains an open one.<sup>61</sup>

### Conclusion

Several theories exist under Florida law to hold a principal responsible for the torts of his agent. Some impose liability vicariously, while others permit direct action. Although the courts have clearly enunciated several general rules of law governing this area, it is difficult to reconcile the application of some rules of law to varying fact situations. The law needs

clarification. Furthermore, at this time it is unknown if Florida would recognize the doctrine of absolute liability. This cause of action, generally ignored, might be utilized in conjunction with more established theories to hold the master accountable for the torts of his servants. <sup>11</sup>



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<sup>1</sup>For the purposes of this article, "master" and "servant," "principal" and "agent," and "employer" and "employee" will be used interchangeably. The concepts do not necessarily coincide all the time. See PROSSER, LAW OF TORTS §70, 460-67 (4th ed. 1970) [hereinafter referred to as PROSSER].

<sup>2</sup>See e.g., *City of Miami v. Simpson*, 172 So.2d 435 (Fla. 1965); *Saudi Arabian Airlines Corp. v. Dunn*, 395 So.2d 1295 (Fla. 1st D.C.A. 1981). It should be noted that employer fault is not required. *Makris v. Williams*, 426 So.2d 1186 (Fla. 4th D.C.A. 1983). To impose vicarious punitive damages, however, the master must be guilty of "some fault." *Life Ins. Co. of North America v. Del Aguila*, 417 So.2d 651, 653 (Fla. 1982); *Geary v. Starr*, 418 So.2d 1135 (Fla. 4th D.C.A. 1982).

<sup>3</sup>*St. Petersburg Coca-Cola Bottling Co. v. Cuccinello*, 44 So.2d 670, 675 (Fla. 1950).

<sup>4</sup>See e.g., *C.I.T. Corp. v. Brewer*, 146 Fla. 247, 200 So. 910 (1941) (repossession of chattel: trespass, assault and battery); *Jax Liquors, Inc. v. Hall*, 44 So.2d 478, 479 (Fla. 1st D.C.A. 1959), *cert. denied*, 348 So.2d 948 (Fla. 1977) (assault and battery).

<sup>5</sup>75 So.2d 772 (Fla. 1954).

<sup>6</sup>*Id.*, at 773 (emphasis in original).

<sup>7</sup>See also, *Lockhart v. Friendly Finance Co.*, 110 So.2d 478, 479 (Fla. 1st D.C.A. 1959), *cert. denied*, 114 So.2d 5 (Fla. 1959) (repossession: "I told him [agent] to go to the residence and get it.")

<sup>8</sup>*Weiss v. Jacobson*, 62 So.2d 904, 906 (Fla. 1953).

<sup>9</sup>*Dieas v. Associates Loan Co.*, 99 So.2d 279, 281-82 (Fla. 1957).

<sup>10</sup>*Douglas v. Railway Express Agency, Inc.*, 75 So.2d 802 (Fla. 1954).

<sup>11</sup>*Sands v. Ivy Liquors, Inc.*, 192 So.2d 775 (Fla. 3d D.C.A. 1966).

<sup>12</sup>See e.g., *Friedman v. Mut. Broadcasting System*, 380 So.2d 1313 (Fla. 3d D.C.A. 1980), *cert. denied*, 388 So.2d 1112 (Fla. 1980); *Burleson v. Stark*, 357 So.2d 1038 (Fla. 4th D.C.A. 1978).

<sup>13</sup>*Higgins v. Investors Acceptance Co.*, of Miami, 287 So.2d 724, 726 (Fla. 3d D.C.A. 1974).

<sup>14</sup>122 So.2d 783 (Fla. 1st D.C.A. 1960).

<sup>15</sup>*Id.*, at 788.

<sup>16</sup>359 So.2d 5 (Fla. 4th D.C.A. 1978), *rev'd on other grounds*, 383 So.2d 618 (Fla. 1980).

<sup>17</sup>*Id.*, at 6.

<sup>18</sup>*Weiss v. Jacobson*, 62 So.2d 904, 905 (Fla. 1953).

<sup>19</sup>*Gallahad Associates v. Rose*, 392 So.2d 44 (Fla. 4th D.C.A. 1980).

<sup>20</sup>*Sands v. Ivy Liquors, Inc.*, 192 So.2d 775 (Fla. 3d D.C.A. 1966); *Columbia by the Sea, Inc. v. Petty*, 157 So.2d 190 (Fla. 2d D.C.A. 1963).

<sup>21</sup>*Burleson v. Stark*, 357 So.2d 1038 (Fla. 4th D.C.A. 1978).

<sup>22</sup>*Belmar, Inc. v. Dixie Building Maintenance, Inc.*, 226 So.2d 280 (Fla. 3d D.C.A. 1969).

<sup>23</sup>*Jones v. City of Hialeah*, 368 So.2d 398 (Fla. 3d D.C.A. 1979), *cert. denied*, 378 So.2d 346 (Fla. 1979).

<sup>24</sup>*Columbia by the Sea v. Petty*, 157 So.2d 190, 192-93 (Fla. 2d D.C.A. 1963).

<sup>25</sup>257 So.2d 95 (Fla. 3d D.C.A. 1972).

<sup>26</sup>285 So.2d 648 (Fla. 3d D.C.A. 1973), *cert. disch.*, 304 So.2d 101 (Fla. 1974).

<sup>27</sup>"The facts of the instant case are just the opposite [of *Forster*]. The passenger had alighted the bus and was across the street when he was attacked. His conduct could not have impeded the progress of the bus as it continued on its route." *Id.*, at 649.

<sup>28</sup>*Werndli v. Greyhound Corp.*, 365 So.2d 177 (Fla. 2d D.C.A. 1978); *c.f.* *Commodore Cruise Line, Ltd. v. Kormendi*, 344 So.2d 896 (Fla. 3d D.C.A. 1977), *cert. denied*, 352 So.2d 172 (Fla. 1977).

<sup>29</sup>See *Parsons v. Weinstein Enterprises, Inc.*, 387 So.2d 1044 (Fla. 3d D.C.A. 1980) (off-premises attack); *Columbia by the Sea, Inc. v. Petty*, 157 So.2d 190 (Fla. 2d D.C.A. 1963) (same).

<sup>30</sup>*Orefice v. Albert*, 237 So.2d 142 (Fla. 1970).

<sup>31</sup>*Id.*, at 144.

<sup>32</sup>*Id.*, at 143.

<sup>33</sup>*Ft. Myers Airways, Inc. v. American States Ins. Co.*, 411 So.2d 883 (Fla. 2d D.C.A. 1982), *pet. for rev. denied*, 418 So.2d 1278 (Fla. 1982).

<sup>34</sup>*Reid v. Associated Engineering Of Osceola, Inc.*, 295 So.2d 125 (Fla. 4th D.C.A. 1974).

<sup>35</sup>*Florida Power and Light Co. v. Price*, 170 So.2d 293 (Fla. 1964).

<sup>36</sup>*Brien v. 18925 Collins Ave. Corp.*, 233 So.2d 847 (Fla. 3d D.C.A. 1970).

<sup>37</sup>See PROSSER, *supra* note 1, §71, 73.

<sup>38</sup>*Castillo v. Bickley*, 363 So.2d 792 (Fla. 1978).

<sup>39</sup>*Rabideau v. State*, 391 So.2d 283 (Fla. 1st D.C.A. 1980), *aff'd*, 409 So.2d 1045 (Fla. 1982).

<sup>40</sup>*Mercier v. Meade*, 384 So.2d 262 (Fla. 4th

D.C.A. 1980); *Brien v. 18925 Collins Ave. Corp.*, 233 So.2d 847 (Fla. 3d D.C.A. 1970); *but see, Sands v. Ivy Liquors, Inc.*, 192 So.2d 775, 776 (Fla. 3d D.C.A. 1966) (*dicta*).

<sup>41</sup>*Williams v. Wometco Enterprises, Inc.*, 287 So.2d 353 (Fla. 3d D.C.A. 1973), *cert. denied*, 294 So.2d 93 (Fla. 1974); *Garner v. Sanders*, 281 So.2d 392 (Fla. 2d D.C.A. 1973).

<sup>42</sup>*Reece v. Ebersbach*, 152 Fla. 763, 9 So.2d 805 (1942).

<sup>43</sup>RESTATEMENT (SECOND) OF AGENCY §82 (1957).

<sup>44</sup>*Id.*, §83.

<sup>45</sup>*Riddle v. Aero Mayflower Transit Co.*, 73 So.2d 71 (Fla. 1954).

<sup>46</sup>*Id.*; *Malloy v. O'Neil*, 69 So.2d 313 (Fla. 1954).

<sup>47</sup>*Lockhart v. Friendly Finance Co.*, 110 So.2d 478 (Fla. 1st D.C.A. 1959), *cert. disch.*, 114 So.2d 5 (Fla. 1959). See also, *Weiss v. Jacobson*, 62 So.2d 904 (Fla. 1953), in which defendant's sales clerk was charged with negligently manhandling a customer and causing her to fall to the floor. The case was litigated on the issue of respondeat superior. It may be assumed no sale took place. Had there been, plaintiff could have argued the employer ratified its clerk's actions by retaining the proceeds of the transaction.

<sup>48</sup>*Pedro Realty, Inc. v. Silva*, 399 So.2d 367, 369 (Fla. 3d D.C.A. 1981), *aff'd*, 411 So.2d 872 (Fla. 1982); *C.Q. Farms, Inc. v. Cargill, Inc.*, 363 So.2d 379 (Fla. 1st D.C.A. 1978).

<sup>49</sup>See e.g., *Petrik v. New Hampshire Ins. Co.*, 379 So.2d 1287 (Fla. 1st D.C.A. 1979), *pet. for rev. denied*, 400 So.2d 8 (Fla. 1981); *Texas Skaggs, Inc. v. Joannides*, 372 So.2d 985 (Fla. 2d D.C.A. 1979), *cert. denied*, 381 So.2d 767 (Fla. 1980).

<sup>50</sup>See e.g., *Willis v. Dade County School Bd.*, 411 So.2d 245 (Fla. 3d D.C.A. 1982); *DeJesus v. Jefferson Stores, Inc.*, 383 So.2d 274 (Fla. 3d D.C.A. 1980).

<sup>51</sup>As opposed to the existence of a potentially dangerous condition within the scope of employment. *Cardounel v. Shell Oil Co.*, 397 So.2d 328 (Fla. 3d D.C.A. 1981) (firearm merely located at place of employment).

<sup>52</sup>*Williams v. Feather Sound, Inc.*, 386 So.2d 1238 (Fla. 2d D.C.A. 1980), *pet. for rev. denied*, 392 So.2d 1374 (Fla. 1981).

<sup>53</sup>*Horn v. I.B.I. Security Service of Florida, Inc.*, 317 So.2d 444 (Fla. 4th D.C.A. 1975), *cert. denied*, 333 So.2d 463 (Fla. 1976).

<sup>54</sup>*Gmuier v. Garner*, 426 So.2d 972 (Fla. 2d D.C.A. 1982); *Texas Skaggs, Inc. v. Joannides*, 372 So.2d 985 (Fla. 2d D.C.A. 1979), *cert. denied*, 381 So.2d 767 (Fla. 1980).

<sup>55</sup>386 So.2d 1238 (Fla. 2d D.C.A. 1980), *pet. for rev. denied*, 392 So.2d 1374 (Fla. 1981).

<sup>56</sup>*Id.*, at 1240-41.

<sup>57</sup>*Id.*, at 1241.

<sup>58</sup>*Crawford v. Hotel Essex Boston Corp.*, 143 F.Supp. 172 (D. Mass. 1956); see *Cornell v. State*, 46 N.Y. 2d 1032, 389 N.E.2d 1064 (1979); PROSSER, *supra* note 1, §70, at 465.

<sup>59</sup>*Tobin v. Slutsky*, 506 F.2d 1097 (2d Cir. 1974). The New York Court of Appeals subsequently ratified the existence of the doctrine as part of New York substantive law. *Cornell v. State*, 46 N.Y.2d 1032, 389 N.E.2d 1064 (1979).

<sup>60</sup>373 So.2d 720, 721 (Fla. 1st D.C.A. 1979) (Ervin, J., concurring specially).

<sup>61</sup>*Id.*