EMPLOYERS LEGAL RESPONSIBILITY FOR BACKGROUND CHECKS AND BEHAVIOR OF EMPLOYEES

Two final and related common law doctrines are germaine to policies for employers' access to criminal history records.

First, under the common law doctrine of "**RESPONDEAT SUPERIOR**" it is well established that private employers can be found liable for the tortious or criminal acts of their employees when the act occurs on, or arise out of, their jobs. Thus, the common law establishes the paradoxical dilemma that private firms can be held liable for the criminal acts of their employees, but the firms are not permitted access to applicants' criminal history records.

LYON vs. CAREY, is perhaps the most widely cited decision in a long line of cases holding employers liable for the criminal conduct of their employees. In LYON a jury required a trucking company to pay its customer damages after its employee assaulted and raped the customer. The court concluded that the criminal act arose out of the employee's employment because the assault commenced during an argument over payment of the employer's bill.

Cases such as **LYON vs CAREY** give private employers an incentive to check criminal history records and, in effect penalize employers for hiring applicants with criminal records assuming that criminal records are predictive of an applicant's likelihood to commit future job-related crimes.

The second common law theory is sometimes dubbed the "**NEGLIGENT HIRING DOCTRINE**". This doctrine holds that regardless of whether the tortious or criminal acts occurs in the course of the employee's employment, the employer is liable if the employer's failure to exercise care in hiring or supervising the employee made possible the tortious or criminal act. This theory is solely related to the so-called "fellow servant rule" which imposes upon employers the duty to use due care in the selection and retention of employees for the sole benefit, and protection of co-employees. Thus, an employer may be liable to a member of the public or other employees if he negligently hires an employee with a past record of criminal conduct and then puts that employee in a position to commit a similar crime.

The courts have not had too much trouble in deciding that employers have a general duty to exercise due care in hiring and supervising employees. In **FLEMMING vs BRONFIN**, for example, a grocery store owner was held liable to his customer after his delivery man attacked the customer while making a delivery to her home. The court said that the grocer was negligent because a simple investigation would have disclosed that the delivery man was an alcoholic who could not be trusted to make deliveries to customer's homes.

However, the courts have been more than a little reluctant to hold that the duty to exercise due care include a duty to determine whether applicants have criminal history records. A few courts have been willing to go so far as to say that where the employee will be entering the homes of customers the employer has a duty to check the applicant's criminal history background or to supervise the new employee for at least an initial period of time.

In **BLUM vs NATIONAL SERVICES INDUSTRIES**, a Maryland Circuit Court awarded damages against a moving company because an ex-felon employed by the mover entered an apartment adjacent to the apartment of the moving company's customer and killed a woman living there. The moving company, which apparently was aware of the employee's criminal background, was found negligent for failing to investigate that background (an armed robbery conviction) and for failing to supervise the employee.

In **KENDALL v. GORE PROPERTIES**, a landlord hired an individual to paint a young, single woman's apartment without checking the employee's background. The landlord gave the employee a key to the woman's apartment and did not supervise the employee. The landlord was found liable by the Federal Court of Appeals panel after the employee strangled the young woman. While the employee apparently did not have a criminal background, he did have a background of hospitalization for emotional problems. In any event, the opinion indicates that the existence of an actual past record is irrelevant. The basis of the landlord's liability in this case was failure to investigate the employee's background coupled with his failure to supervise the employee.

> "If a reasonable investigation had been made as to Porter's (the employee) background which disclosed the basis for a conclusion of lack of competency, if he had been sufficiently long employed to have established himself as entitled to trust, if the landlord or tenants had had adequate opportunity to scrutinize him and his conduct and had found a basis upon which confidence could be reposed in him, and if, thereafter, he had suddenly gone berserk, a jury, we suppose, would scarcely have deemed the landlord liable."

One other case goes even further in establishing an employer's obligation to investigate applicants' criminal history background. In **BECKER v. MANPOWER, INC**., a Federal Appeals panel held that an employer of day laborers (MANPOWER) may be liable in a suit for negligent hiring for supplying two convicted felons to a customer who arranged with MANPOWER to provide movers for the customer's jewelry store. The movers not only moved the store but stole virtually its entire inventory of jewelry and precious stones. The court faulted MANPOWER for "taking no action to discover if the men had a previous record" and remanded the case for a determination of, among other things, whether MANPOWER was in fact negligent in failing to screen the employees' background.

FROM THE U.S. DEPARTMENT OF JUSTICE; BUREAU OF JUSTICE STATISTICS.

COMMENT: If an employer is confronted with an employee committing a grievous act during employment, and cannot prove due diligence in the hiring process, or in further employee evaluation process, the employer can be held liable for conduct and actions of the employee on the job, or anything arising out of the job.

In Santa Clara, CA. the owners of a 7-Eleven Store and Southland Corp. have agree to pay an $11,000,000.00 settlement to a woman's family as a result of selling beer to a minor just a few hours before his 21st birthday. The owner of the 7-11 was assess a $500,000 judgement. The minor pleaded no contest to Felony drunken driving after the 0ctober 30, 1981, crash, in which he slammed into the rear of another vehicle. The driver of the other vehicle has been in coma since her car was rammed by the young man.

Legal Aspects of Employee Screening

1. **DO FEDERAL OR STATE EQUAL EMPLOYMENT OPPORTUNITY LAWS PROHIBIT PRE-EMPLOYMENT TESTING?**

   NO! In fact, Section 703(h) of Title VII of the Civil Rights Act of 1964 specifically approves the use of employment tests. Moreover, the Equal Employment Opportunity Commission, other Federal EEO enforcement agencies and a number of State Fair Employment Practices agencies have issued guidelines designed to enable employers to use tests to assure that all applicants are guaranteed equal employment opportunity. Also review the Employee Polygraph Protection Act of 1988 for exemptions.

2. **DOES THE SAFEScreen PTSSA SURVEY VIOLATE ANY RULES OR REGULATIONS OF THE EEOC OR OTHER FEDERAL AGENCIES?**

   NO! The guidelines issued by the EEOC require an employer using a pre-employment test to determine whether it has any adverse impact on minorities or females. Adverse impact would result if, for example, more blacks than whites failed a test. Studies conducted show that the test does not have an adverse impact on blacks, Hispanics or women. Moreover, if a test does have an adverse impact on minorities or women, the employer using it is required to show that the test is an accurate measure of the conduct it is designed to measure. Studies conducted prove the SAFEScreen PTSSA survey is an accurate measure of employee’s values.

3. **DOES THE SAFEScreen PTSSA SURVEY VIOLATE ANY STATE LAWS, RULES OR REGULATIONS?**

   NO! Because the test has no adverse impact, it does not violate State laws which might prohibit use of a test which has adverse impact. In addition, the "PTSSA" survey is periodically reviewed to ensure that none of the questions violate state provisions making it unlawful to ask certain questions of job applicants or current employees. No question in the SAFEScreen PTSSA survey violates these State and Federal laws.

4. **DOES THE EEOC OF FEPC ISSUE "CERTIFICATIONS OF VALIDITY" REGARDING TESTS?**

   NO! "the federal enforcement agencies do not recognize any certification of validity or validation." (Federal Register, Vol. 42, No. 14 - 1/21/77.

http://en.wikipedia.org/wiki/Respondeat_superior

Respondeat Superior

When applied to physical torts an employer/employee relationship must be established and the act must be committed within the scope of employment (i.e. substantially within time and geographical limits, job description and at least with partial intent to further employer's business).

Historically, this doctrine was applied in master/servant or employer/employee relationships. If the employee or servant committed a civil wrong against a third party, the master or employer could be liable for the acts of their servant or employee when those acts were committed within the scope of the relationship. The third party could proceed against both the servant/employee and master/employer. The action against the servant/employee would be based upon the direct responsibility of the servant/employee for his conduct. The action against the master/employer is based upon the theory of vicarious liability, by which one party can be held liable for the acts of another.

Employer/employee relationships are the most common area wherein respondeat superior is applied, but often the doctrine is used in the agency relationship. In this, the principal becomes liable for the actions of the agent, even if the principal did not directly commit the act. There are three considerations generally:

1. Was the act committed within the time and space limits of the agency?
2. Was the offense incidental to, or of the same general nature as, the responsibilities the agent is authorized to perform?
3. Was the agent motivated to any degree to benefit the principal by committing the act?

The degree to which these are answered in the affirmative will dictate the degree to which the doctrine can be applied.

Common law distinguishes between civil and criminal forms of respondeat superior.

http://www.uslaw.com/library/article/carel5NegligentHiring.html?area_id=43

Negligent Hiring Doctrine

Employers who fail to take action to control abusive, belligerent, or combative employees often find themselves embroiled in litigation. For example, some injured employees have sued their employer for the negligent hiring or the negligent retention of the alleged employee who caused their injuries. Typically, these suits have alleged that the employer failed to accurately check references, criminal records, or general background information that could have shown the employee's likelihood for criminal or tortious behavior. In other cases, employers have been sued because they failed to dismiss or reassign employees after they found out that the employee was a potentially violent or abusive person. These negligence theories are premised on the unreasonable conduct of an employer in placing a person with certain known propensities for criminal or tortious behavior in an employment position where the individual poses a threat to others.

The negligent hiring and negligent retention theories of liability have been recognized in a number of states. For example, in a decision by an appellate court in Illinois, a supermarket chain was found liable for negligent retention of an employee who attacked a 4-year-old boy outside one of its stores. The employee, a manager for the supermarket chain, stopped by his store while off-duty, allegedly after he had been drinking. He saw an older boy urinating on the side of the building. He chased the boy to a car where he shouted racial insults at the driver, the boy's mother. He then pulled a younger 4-year-old boy out of the car and threw him through the air. The boy was injured, spent four days in the hospital, and required medical attention for a month. The jury awarded the child $150,000.

http://law.jrank.org/pages/6831/Fellow-Servant-Rule.html

The Fellow Servant Rule

This entry contains information applicable to United States law only.

A common-law rule governing job-related injuries that prevents employees from recovering damages from employers if an injury was caused by the negligence of a coworker.

In the mid-nineteenth century, a rise in industrial accidents brought to U.S. law an English idea about responsibility. The fellow-servant rule said simply, workers who are hurt by a coworker — a fellow servant — should blame the responsible coworker, not their employer. After first appearing in a U.S. decision in 1842, the rule had a powerful effect on the law for the next century. Its tough-luck notion of fairness protected employers and doomed injured employees, who often had no other hope for recovering damages after serious accidents. In allowing employers to invoke the defense, courts wanted to help the nation's industries grow at a time of vast expansion, when the dangerous jobs of factory work and railroad building needed bodies that could be injured without repercussions to employers. Only in the early and mid-1900s did lawmakers undermine the rule, through passage of federal and state workers' compensation laws.

The fellow-servant rule broke from general common-law principles of liability. Traditionally, courts had treated cases of job-related accidents under tort law (a tort is a civil wrong that causes harm to a person or property). Specifically, these claims came under the tort of negligence — the failure to do what a reasonable person would do under the same circumstances. Certain suits were seen as acceptable: for example, if a man named John were injured by a negligent worker named Bill, and Bill worked for an employer with whom John had no preexisting relationship, John could readily sue the employer for Bill's negligence. But everything changed if John and Bill worked for the same employer; then, the employer could invoke the fellow-servant rule as his defense, and courts would dismiss the suit.

The fellow-servant rule first appeared in 1837, in Great Britain, in Priestly v. Fowler (150 Eng. Rep. 1030 [1837]). In that case, an overloaded delivery van driven by one employee overturned and fractured the leg of another employee. The injured employee's lawsuit against their common employer succeeded, but it was overturned by the Court of Exchequer. The magistrate, Lord Abinger, scoldingly held that the injured employee "must have known as well as his master, and probably better" about the risks he undertook in van delivery. Moreover, concerns about the public good steeled the magistrate against the plaintiff. If suits such as Fowler were permitted against employers, workers would soon forget about their duty not to hurt themselves.

U.S. law was quick to learn this lesson in employers' immunity to liability. Only five years later, in 1842, the Supreme Judicial Court of Massachusetts announced it in the landmark case Farwell v. Boston & Worcester R.R., 45 Mass. (4 Met.) 49. The nation sat on the verge of its greatest burst in industrial development, led by the expansion of railroads. The transformation of the United States from an agrarian society to an industrial society threw many new problems before the courts. Few state judges appreciated this shift as keenly as the Massachusetts court's chief justice, Lemuel Shaw

(1781-1861). Nearing the end of a remarkable life in law, Shaw grasped economic considerations better than social ones, and his plainspoken opinions were tremendously influential.

Chief Justice Shaw's decision in Farwell had blunt logic. Although a railroad employee had lost his hand through the negligence of a fellow worker, Shaw looked beyond the loss of limb to the dangerous precedent that a finding of employer liability would pose to growing industries at a crucial moment in history. He wanted to encourage this growth. So, he imported the fellow-servant rule, justifying it in purely economic terms. Whereas Lord Abinger had reminded employees of their duty to be cautious, Shaw observed that employee alertness was also compensated: workers in more dangerous jobs would be taken care of by the market, through higher wages. Furthermore, employees entered such jobs voluntarily and therefore chose to put themselves at risk. Thus, a contract of employment existed, and it could not place liability on the employer's shoulders except when the employer was personally responsible — and certainly not when a fellow employee was clearly to blame for the injury.

The reverberations of this decision were felt throughout the rest of the nineteenth century. Shaw was hardly the only judge whose sympathies lay with industry. As more courts adopted the fellow-servant rule, the doctrine had a drastic effect on workers. An 1858 Illinois supreme court decision succinctly echoed Shaw's reasoning: "[E]ach servant, when he engages in a particular service, calculates the hazards incident to it, and contracts accordingly. This we see every day — dangerous service generally receiving higher compensation than a service unattended with danger or any considerable risk of life or limb" (Illinois Central R.R. v. Cox, 21 Ill. 20).

The industrial revolution was not an age of safety: laborious work, long hours, crude training, and rough tools led to accidents involving workers. Injured workers sued their employers because employers arguably bore some responsibility and always had deeper pockets (more money) than fellow workers. But employers needed only to point out that a coworker's negligence was partly or wholly the cause of the injury, and the nation's courts stood ready to uphold the fellow-servant rule.

Injured employees could rarely win these suits. A slight hope existed: if an employer was notified of a careless worker's behavior but failed to take disciplinary or corrective action, the employer became directly liable for mishaps that the careless worker caused. But to prove this in court required testimony. Who would intervene? Worried about losing jobs, few coworkers would testify. Thus, the fellow-servant rule along with two related defenses, contributory negligence and assumption of risk, came to be dubbed "the three wicked sisters of the common law," because together they left the burden on the injured and powerless employee (48 Vand. L. Rev. 1107 [May 1995]).

The twentieth century brought change. Even by the early 1900s, the fellow-servant rule had begun to crumble. Courts had new ideas. The mere existence of a rule safeguarding employers' interests had failed to stop workers from having accidents and bringing compelling cases. To permit certain lawsuits to proceed, courts created exceptions to the fellow-servant defense. Some courts permitted suits where the coworker was a supervisor; others limited the defense to employees working in the same department. As a result, employers could at last be held liable for some on-the-job injuries caused by coworkers.

Through the efforts of the labor movement, two further reactions against the fellow-servant rule sapped it of most of its force. The first was a change in federal law. In 1908, Congress passed the Federal Employers' Liability Act (45 U.S.C.A. § 51 et seq.), designed to protect railroad employees. Its protections were extended to maritime workers with the Jones Act (46 U.S.C.A. § 688). The major development to undermine the fellow-servant rule was the passage of workers' compensation laws in states, which ensured that employees would receive compensation for injury or illness incurred at work. By 1949, every state had passed workers' compensation laws.

By the late twentieth century, the fellow-servant rule was largely dead, although a few loopholes remained in some occupations, chiefly farming. At that point, the rule's rare appearance in court provoked surprise, as in the 1989 case of Pomer v. Schoolman, 875 F.2d 1262, 7th Cir., which moved federal appellate judge Richard A. Posner to remark in his opinion, "[I]t is up to Illinois to plug what to many observers will seem an anachronistic and even cruel gap in the state's law of industrial accidents."