

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672

2093 SCOMM 78: SENATE SPEC. COMM. ON OIL & GAS, 1991-1992



Questions and Answers: Marine Spill Response Corporation

MSRC: Organization and Implementation

Q: What is the Marine Spill Response Corporation (MSRC)? What is the Marine Preservation Association (MPA)?

A: MSRC is an independent, non-profit corporation dedicated to providing a best-effort response to help cleanup large spills of persistent oil in United States offshore and tidal waters, including bays, harbors, and the mouths of rivers. It will also respond to spills further up river when oil has been spilled from ocean-going tankers heading up river. The U.S. Coast Guard will direct MSRC to respond to a spill if it is too big for local response organizations to handle.

MSRC succeeds Petroleum Industry Response Organization Implementation, Inc. (PIRO Implementation), which was incorporated in September 1989 to plan and organize an oil spill response program. The president of PIRO Implementation, retired U.S. Coast Guard Vice Admiral John D. Costello, is now president of MSRC. MSRC is an independent corporation with a self-perpetuating board of directors.

MPA is a non-profit corporation, whose members—oil companies, shippers, receivers of oil and others—will pay dues based on the amount of oil they transport. The dues will finance MSRC and MPA. However, MPA will have no management involvement with MSRC.

MSRC will use the funds to pay for personnel, equipment, vessels and other facilities needed to be prepared to clean up oil spills. In the event of a spill,

the spiller—not MSRC—will pay for the actual cleanup.

MSRC will have nearly 400 full-time employees, most of whom will be located at the organization's five regional response centers. MSRC's estimated cost for its first five years is about \$500 million. MSRC will be supported by hundreds of subcontractor workers in its response to big spills.

Q: When will MSRC be ready to clean up oil spills?

A: MSRC must be fully operational within 30 months of enactment of the Oil Pollution Act of 1990. That's when the act will require shippers and others responsible for oil transported on offshore and tidal waters to show that they can contain and clean up a worst-case oil spill they might cause.

This timetable is dictated by the myriad steps that must be taken to move a complex, large, wholly new organization from the drawing board to reality. A detailed plan has been developed for MSRC, but most of the plan still must be implemented. Equipment and vessels must be constructed or purchased. Personnel—including subcontractors who will actually do much of the work of transporting equipment to spill sites as well as operating it—must be hired and trained. Land and buildings for regional centers and equipment prelagging areas must be purchased or leased. Insurance must be procured. A \$35 million, five-year research and development program must be launched.

Q: Why didn't PIRO Implementation implement a spill response program sooner?

A: PIRO Implementation has been carefully planning how this response organization would work before

¹ Persistent oil—for example, crude oil—lingers in the environment. Products like gasoline are not persistent because they evaporate or degrade quickly.

taking any action to implement one. As this planning was progressing, Congress was considering the Oil Pollution Act of 1990. Several key provisions in this legislation needed to be resolved before operational planning and corporate organization could be fully developed.

For example, PIRO implementation needed to be sure that a duplicative federal response capability was not going to be included in the legislation. If the federal government had created such a capability, there would have been no need for MSRC.

Also, it was important that a single agency be clearly designated as the federal decisionmaker in oil spills.

Finally, PIRO implementation needed to be sure that the new law would recognize the unique risks faced in responding to spills. The new federal law does this by limiting responder liability damage owing to its own gross negligence or willful misconduct. MSRC will have to make difficult, quick decisions at a spill under chaotic conditions. If the law did not recognize the extra risks involved in spill response, it might have been impossible for MSRC to go forward.

The provisions of the bill, which became law in August 1990, satisfactorily resolve each of these concerns.

Q: How many oil companies have joined MPA?

A: As of today, 20 companies have joined MPA, the funding corporation. The volumes of oil these firms transport represent the large bulk of the oil transported into and out of American waters. There are other firms who have shown interest in joining, including utility and pipeline companies. We believe that as the regulations for submitting contingency plans are promulgated, additional companies will need MSRC services and that our clientele will grow accordingly.

Q: Will the MSRC organizational structure function efficiently? Won't control by MPA member companies still be present since they control MSRC's budget?

A: We believe the MSRC organizational structure will prove to be highly efficient. It provides for an independent board of directors, which insures that companies that pay dues to MPA do not manage MSRC.

MSRC: Response Capability

Q: Where and how fast will MSRC be able to respond to a spill—and to what size spill will it respond?

A: MSRC is designed to respond to large, catastrophic oil spills but will respond whenever a spill of any size exceeds the local capability to clean it up.

MSRC will immediately respond to catastrophic spills in U.S. tidal waters out to the limits of our 200-mile Exclusive Economic Zone. The quickest possible response will be made under whatever circumstances. Prepositioning equipment in warehouses at strategically placed prestaging areas and using equipment that can be flown in will reduce response times.

Each of five regional centers will be able to provide a best-effort response to contain and clean up an oil spill totaling 216,000 barrels—in other words, one about the size of the Valdez spill in Alaska in 1989. Combining the resources of more than one regional center will enable combatting even larger spills. Such a capability will exist nowhere else in the world.

Q: The Alyeska Corporation wasn't ready for the Valdez spill. How do we know MSRC will be ready for spills that may occur in the future?

A: MSRC will be ready because it will have sufficient quantities of the best available equipment and well-trained spill response personnel. MSRC will regularly maintain its spill cleanup equipment and will conduct frequent training for its spill response workers including simulation exercises. The new federal legislation requires periodic readiness exercises. On top of this, a rigorous operational audit program will be part of MSRC's normal way of doing business. Frequent announced and unannounced drills will be held to ensure maximum response and cleanup readiness.

Moreover, MSRC will operate in a completely open environment. It will have an independent, self-perpetuating board of directors to answer to, directors who are not affiliated with the petroleum industry. MSRC will operate with many different subcontractors around the nation. It will be impossible to keep MSRC activities—or lack thereof—from public scrutiny.

Q: Will MSRC have all the equipment it needs?

A: Yes. MSRC will buy approximately \$300 million worth of equipment—including vessels and barges, trucks, skimmers, booms, dispersants, wildlife and shoreline rehabilitation equipment, and lightering equipment (to remove oil from disabled vessels). This will provide a best-effort response capability with state-of-the-art equipment.

MSRC believes, however, that current oil spill containment and cleanup equipment needs to be vastly improved—as could methods for protecting and rehabilitating shorelines and wildlife. That is why it will conduct an extensive research program to explore new technologies and approaches. The program will research improvements in booms, dispersants, skimmers, the burning of oil, bioremediation, debris and waste disposal, and spill tracking and surveillance. It will look at techniques for rehabilitating wildlife and shoreline. And it will examine how oil affects environments over the long-term.

MSRC: Regional Centers and Coverage

Q: Where will the regional centers and prestaging areas be located?

A: The regional centers will be (1) in the New York-New Jersey metropolitan area (Northeast region), (2) in Port Everglades in South Florida, north of Miami (Southeast region), (3) in Lake Charles, Louisiana, near the Texas border (Gulf region), (4) in the Port Hueneme area of California, north of Los Angeles (Southwest region), and (5) in Seattle, Washington (Northwest region).

Each regional center will have four to six prestaging areas (a total of 23 for all five regions) where equipment and sometimes vessels and personnel will be located. The prestaging areas have been tentatively selected to enable an initial quick response to a large spill wherever it might occur along the Pacific, Gulf and Atlantic coasts or in Hawaii, Alaska, Puerto Rico and the Virgin Islands. Each location will have to be surveyed to ensure that specific sites meeting MSRC operational requirements actually are available. The general locations of prestaging areas for each region are:

□ Northeast Region:

Portland, Maine; Boston, Massachusetts; Narragansett Bay, Rhode Island; Chesapeake Bay, Maryland; Delaware Bay; Norfolk, Virginia.

□ Southeast Region:

Wilmington, North Carolina; Savannah, Georgia; Jacksonville, Florida; Tampa, Florida; U.S. Virgin Islands.

□ Gulf Region:

Mobile, Alabama; Venice, Louisiana; Galveston, Texas; Corpus Christi, Texas.

□ Southwest Region:

San Diego, California; Los Angeles/Long Beach, California; San Francisco, California; Oahu, Hawaii.

□ Northwest Region:

Astoria, Oregon; Bellingham, Washington; Port Angeles, Washington; Alaska.

MSRC plans to have an appropriate response and cleanup role in Alaska. That role is not yet defined. It must consider already existing or planned primary response capabilities before settling on what other may be required. Discussions with industry and Alaskan state officials have not yet arrived at a point that allow complete description of the corporation's role.

Q: A year ago, a petroleum industry task force said regional centers would be in Norfolk and New Orleans. Now Norfolk is just the site of a prestaging area and there is nothing specifically in New Orleans. Why?

A: The task force made many assumptions about where regional centers and prestaging areas needed to be to ensure quick response. The task force's report stated that locations were tentative and would be subject to further analysis. Subsequent analysis identified a more effective mix of centers and prestaging areas. The changes take into account the volumes of oil that are shipped in various areas and the logistical problems of moving equipment from particular locations to a spill. Location of highways, airports, piers and open water figured into the decisions.

Q: Are all of the regional centers the same size?

A: Almost. Any differences reflect differences in the transportation patterns in each region. Also, the capability of the existing oil spill response infrastructure has been factored into the equation. Despite

differences in size, the regional centers will possess equivalent response capabilities.

Q: Why won't MSRC respond to spills in the Great Lakes and in Alaskan waters?

A: The nature of tanker traffic in the Great Lakes and other non-tidal waters is different from the coast-line traffic that MSRC is being created to deal with. Spills are likely to be smaller and to involve "non-persistent" oil (that is, petroleum products that are more volatile than crude oil and that largely evaporate before they can be cleaned up). Therefore, MSRC's charter does not envision operations in such waters.

However, that does not mean that a spill in the Great Lakes would not be quickly contained and cleaned up. Once enacted, the Oil Pollution Act of 1990 will require oil shippers on the Great Lakes to show how they could contain and clean up a worst-case spill. The result of this requirement is that some other private oil spill cleanup organization will be responsible for dealing with such spills.

The petroleum industry and Alaska are currently discussing how to provide an adequate spill response capability for the state. Meanwhile, Alyeska's existing spill response capability is being expanded so that it will be bigger than one of the MSRC regional centers.

MSRC: Liability, Research and Cost

Q: Doesn't the law in some states still allow Good Samaritan oil spill responders to be held responsible for damage caused by their simple judgment mistakes during a spill cleanup?

A: Yes, that is correct. MSRC is now discussing the issue of limited responder immunity with several states. MSRC hopes that these states will recognize the importance and fairness of establishing the same limited liability standard (gross negligence or willful misconduct) the federal government will apply to responders nationwide.

Q: The original five-year cost estimate for PIRO was \$275 million. Why have costs increased so much?

A: The original costs were an approximation of capital, operating and research and development

costs. As we gathered more detailed program data and refined it, additional requirements were identified. Costs have increased threefold because we have recognized additional capital requirements—principally ships and barges. We have also included additional prestaging sites to ensure adequate response coverage.

Q: Federal legislation has authorized a substantial government R&D program. Will MSRC reduce its program as a result?

A: We have no plans to reduce the size of the program. However, because a substantial increase in oil spill research by government has been authorized in the new law, we will need to monitor our program carefully to insure no duplication.

Q: Why are the results of MSRC's research program to be contributed to the public domain?

A: This arrangement is entirely in keeping with the not-for-profit nature of the corporation which has been created. From the outset, MSRC was never intended to be money-making. It was created because the petroleum industry found a void in the capability of both government and industry to protect the marine environment from catastrophic oil spills.

Q: Will MSRC really earn no profits and simply serve the public welfare?

A: Yes. MSRC will not have a profit line on its balance sheets. It will only recover its costs. Moreover, MSRC's charter requires that all discoveries and inventions from its R&D programs to improve cleanup technology be made available to anyone interested at no cost.

For more information, contact:
Steve Duca, Vice President
Readiness and External Affairs
Marine Spill Response Corp.
1220 L Street, N.W., 6th Floor
Washington, D.C. 20005
(202) 682-8674

3



Marine Spill Response Corporation: A New Weapon for Cleaning Up Oil Spills

On September 8, 1990, PIRO (Petroleum Industry Response Organization) Implementation Inc., an oil-spill response planning group created after the 1989 spill in Prince William Sound in Alaska, announced the formation of the Marine Spill Response Corporation (MSRC). When it is fully operational, MSRC will have a response capability larger than any other response organization in the world. The MSRC will be funded by oil companies and others involved in the shipment or receipt of oil by tanker through another newly created organization, the Marine Preservation Association (MPA). However, MSRC will operate completely independently of the MPA and its members. The MSRC will consist of a Washington, D.C., headquarters and five response regions with regional centers located in the New York-New Jersey metropolitan area (Northeast region), Port Everglades in South Florida (Southeast region), Lake Charles, Louisiana (Gulf region), Port Hueneme, California (Southwest region), and Seattle, Washington (Northwest region).

Background on the New Spill Response Organization

On March 24, 1989, an oil tanker struck a reef in Alaska's Prince William Sound and caused the largest oil spill in U.S. history. Up to 10,000 workers, scores of vessels

and aircraft and tons of equipment were employed in cleanup efforts through the spring and summer, until the onset of prohibitive weather conditions. Those efforts were resumed in the spring of 1990. Within several weeks of the spill, eight major oil companies, under the auspices of the American Petroleum Institute, created a task force to examine questions and issues raised by such catastrophic tanker spills. The task force studied and evaluated existing prevention and response programs. It concluded that neither the government nor the industry had the equipment or personnel ready to deal with catastrophic spills. It also identified a need for further spill prevention efforts.

Consequently, in June 1989 the task force recommended that the industry undertake a broad new program to expand its ability to prevent, contain and clean up major oil spills. The task force recommended that a response program be operated by a new, independent organization, originally called the Petroleum Industry Response Organization (PIRO), which would be funded voluntarily by participating oil companies.

PIRO was envisioned as a response company capable of providing a best-effort response to a catastrophic spill from a tanker in, or posing a threat to, U.S. coastal waters (out to the 200-mile Exclusive

Economic Zone), harbors and river mouths. Since the seriousness of a spill depends on the type of oil spilled, the specific environmental risks involved and the prevailing weather and tidal conditions—in addition to the actual amount of oil spilled—the task force defined "catastrophic spill" simply as one beyond the capability of local response resources, as determined by the U.S. Coast Guard.

The task force recommended that PIRO have five regional response centers on the East, West and Gulf Coasts, each with several permanent staging areas along its coastline. Each region was to be capable of responding to a spill of up to 218,000 barrels. It envisioned the use of personnel, equipment and supplies from more than one region to respond to larger spills.

The task force also proposed new spill prevention initiatives and improvements in existing tanker safeguards and operating procedures. It also recommended broad-based research and development (R&D) and readiness auditing roles for PIRO.

The task force estimated PIRO's five-year operating, capital and R&D costs at \$275 million.

One month later, in July, 1989 the original eight companies that joined in the task force's initial effort were

joined by a dozen more in forming a PIRO implementation group and steering committee to begin examining in detail what would be required to fulfill the task force's goals and recommendations.

Retired Vice Admiral John D. Costello, former commander of the U.S. Coast Guard's Pacific Area, was named to direct these efforts.

The detailed work of the steering committee was reflected in the names of its eight working subcommittees: finance and procurement, communications, operations, staff activities, facilities acquisition, legal, insurance and research. Some 75 executives from participating companies looked into the many conceptual, procedural, legal and organizational questions that had to be addressed in the actual formation of the new response organization.

As their detailed study and planning progressed, the original five-year cost estimates were revised upward substantially—initially to \$400 million for the first five years and, most recently, to about \$800 million.

As work proceeded, additional companies became interested in affiliating with PIRO, including non-oil companies such as shippers and facilities that handle oil. Ultimately, this broader interest led to renaming of the new oil spill response organization to the Marine Spill Response Corporation (MSRC).

Legislative Developments

Planning and development of MSRC were influenced by the oil spill legislation that evolved in Congress through the fall and winter of 1989 and the spring and summer of 1990—and was signed into law by President Bush on August 18, 1990.

This legislation contains several provisions of critical importance to

MSRC. To ensure the most prompt and effective response, the legislation provides limited immunity for oil spill responders—but not for spillers. This national immunity standard ensures that responders will not delay response and cleanup actions while having to wait for advice about the liability exposure they might face. It also protects them from post-spill lawsuits by parties alleging damages, unless the responder acted with gross negligence or willful misconduct. Liability on a simple negligence basis would be assumed in cases of personal injury or wrongful death.

However, the legislation allows states to preempt federal law in this regard. This means that an uneven playing field may face the responder—on one side of a state line he may have reasonable limited immunity, while on the other side he may face possible uninsurable risks. This may pose serious problems in the future.

An additional provision of this legislation makes the President, through the U.S. Coast Guard, responsible for seeing that a spill is promptly cleaned up. Recent history has demonstrated that large-scale operations to clean up oil spills require a single decision-maker to resolve issues expeditiously. The legislation, while clearly putting the responsibility for cleanup on the spiller, also clearly makes the private sector the main source for the nation's cleanup capability, under the watchful, supervising eye of the Coast Guard.

Organization of MSRC

To assure the independence of MSRC, a second non-profit corporation was created—the Marine Preservation Association (MPA). The companies that participated in PIRO and in the development of MSRC are members of this associa-

tion. MSRC has neither members nor shareholders. Its board of directors is self-perpetuating and wholly independent of MPA or its member companies. MPA will not be involved in the management of MSRC.

Initial capital contributions and dues paid to MPA are based on the quantities of oil handled in the waters in which MSRC will operate. MPA contributions and fees are being used to finance creation of MSRC and to fund its ongoing operations. However, they will not be used to cover expenses that MSRC incurs in responding to spills.

MSRC will maintain a contractual relationship with the members of MPA, obligating MSRC to make its services, manpower and equipment available in the event of a major spill involving a member's vessel or facility. The expenses incurred by MSRC in responding to a spill will be recovered directly from either the member-spiller or his insurer. If costs exceed this compensation, or if a spiller cannot be identified, then cleanup costs will be borne by the newly established Federal Oil Spill Compensation Fund.

All MPA members must meet the spill response capability certification requirements of the new federal law. These requirements could be satisfied by a member's contractual relationship with MSRC.

MSRC's Response Role

Spills to Which MSRC Will Respond.

MSRC is designed primarily to provide a best-effort response to catastrophic spills of persistent oil in United States offshore and tidal waters, including bays, harbors, and the mouths of rivers. (Persistent oil—for example, crude oil—lingers in the environment. Non-persistent oil

Products like gasoline tend to evaporate or degrade quickly.)

Each of MSRC's five regional response centers (and its associated prepositioned equipment sites within the region) is being designed to manage a spill of up to 216,000 barrels, as originally proposed. If the resources of all five MSRC regions were combined, its capability would be nearly 1.1 million. MSRC is being designed primarily for catastrophic spills of the size of the accident at Prince William Sound, but it will respond to smaller spills when they are beyond the capability of the local spill response infrastructure. The Coast Guard will judge when local response efforts are not sufficient to satisfactorily contain and cleanup the spill.

MSRC Headquarters, Regional Centers and Prestaging Areas.

MSRC headquarters will be located in Washington, D.C. and is expected to have 43 employees when fully staffed. These personnel will establish operating policy and provide normal staff support. In addition, the corporation's operational audit and R&D programs will be directed from headquarters.

The regional centers will be in (1) the New York-New Jersey metropolitan area (Northeast region), (2) Port Everglades in South Florida (Southeast region), (3) Lake Charles, Louisiana, near the Texas border (Gulf region), (4) Port Hueneme, California, north of Los Angeles and (5) Seattle, Washington (Northwest region).

The regional centers will be nearly equal in size. Variations will reflect differences in the territory each regional center will be responsible for and in the amount and location of oil tanker traffic and lighting.

Despite small differences in size, the regional centers will possess equivalent response capabilities. Together, they will have approximately 350 employees.

Each regional center will have four to six prestaging areas (a total of 23 for all five regions) where equipment and sometimes vessels and personnel will be located.

The general locations of prestaging areas for each region are:

□ Northeast Region: Portland, Maine; Boston, Massachusetts; Narragansett Bay, Rhode Island; Delaware Bay; Chesapeake Bay, Maryland; and Norfolk, Virginia.

□ Southeast Region: Wilmington, North Carolina; Savannah, Georgia; Jacksonville, Florida; Tampa, Florida; and in the U.S. Virgin Islands.

□ Gulf Region: Mobile, Alabama; Venice, Louisiana; Galveston, Texas; and Corpus Christi, Texas.

□ Southwest Region: San Diego, Los Angeles/Long Beach, California; San Francisco, California; and Oahu, Hawaii.

□ Northwest Region: Astoria, Oregon; Bellingham, Washington; Port Angeles, Washington; and Alaska.

The locations of the regional response centers and prestaging areas were selected to ensure the quickest, most effective response to possible spills, taking into account the volumes of oil that are shipped in various areas and the logistical problems of moving equipment from regional centers to a spill. Location of highways, airports, piers, navigable waterways and the availability of office and warehouse space were all factors considered in site-selection.

tion. Each location will have to be surveyed to assure that specific sites meeting MSRC operational requirements actually are available.

According to the API task force report, MSRC should play an appropriate response and cleanup role in Alaska. The definition of this role is not yet resolved. Primary response capabilities already in existence must be evaluated before it can be determined what else might be required. Discussions with industry and the state have not yet proceeded to the point where MSRC's role can be completely described.

The MSRC will not operate in the Great Lakes and other non-tidal waters. Historically, spills in the Great Lakes have been comparatively smaller and have involved "non-persistent" oil. The Oil Pollution Act of 1990 will require oil shippers on the Great Lakes to show how they could contain and cleanup a worst-case spill, most often through reliance on existing cooperatives and subcontractors.

Relationship of MSRC with Existing Co-ops and Subcontractors.

MSRC will coordinate its efforts with an estimated 150 existing oil-spill cooperatives and subcontractors. Over the years, such cooperatives and subcontractors have compiled a solid record of handling non-catastrophic, inshore spills—which account for some 99.9 percent of all spills. MSRC is designed to complement this existing capability—that is, to handle the infrequent, yet potentially devastating, catastrophic spills. Existing cooperatives and subcontractors would continue to handle smaller spills, except in instances in which MSRC's assistance might be required or when the Coast Guard requests MSRC's aid.

MSRC will employ about 350 people in the five regions. Existing cooperatives and subcontractors will also be called on or retained to provide additional manpower and equipment needed to deal with spills.

Identifying qualified subcontractors, arranging contractual agreements, reviewing contractor capabilities and training will be an ongoing function of MSRC's permanent staff.

The synergistic relationship between MSRC and existing, smaller responders is expected to result in joint training exercises, coordinated research, development and sharing of new oil spill response techniques and equipment and frequent exchanges of information and ideas.

MSRC Equipment.

MSRC will buy approximately \$300 million worth of equipment. All MSRC equipment will be prepackaged to permit easy movement by air, truck, vessel or rail. This equipment will include vessels and barges, trucks, skimmers, booms, communications equipment, dispersants, wildlife and shoreline rehabilitation equipment and lightering equipment to remove oil from disabled vessels.

Booms are floating mechanical barriers that extend above and below the water surface to contain spilled oil for recovery and to move spilled oil into areas where recovery is easier. Since booms do not work well if currents are too swift and waves too high, deployment in rough weather can be a problem.

Skimmers are vessels that collect spilled oil from the surface of the water. Like booms, skimmers have trouble operating where currents are swift and waves high.

Chemical dispersants sprayed on oil can break it into small droplets, accelerating the removal of volatile hydrocarbons, facilitating the natural "decay" of the oil's components, and minimizing movement of the oil to shorelines. Dispersants can be rapidly and broadly applied by air over large areas and volumes of oil, even in adverse sea conditions.

MSRC's Research Program.

MSRC will conduct a five-year, \$35 million research and development program to improve oil spill response technology. This program will be a key element in attempting to improve the corporation's effective future response to oil spills. Proposed research will cover techniques for minimizing oil losses in the event of a spill and keeping them close to the vessel; recovering and treating oil after it begins to spread but before it reaches shore; preventing and reducing shoreline impact, which includes studies on bioremediation; the fate and effects of oil in the environment; reducing the impact of a spill on wildlife; and investigating the health and safety of persons exposed to spills.

Timetable for MSRC to Become Operational.

MSRC must be fully operational within 30 months of enactment of the

Oil Pollution Act of 1990, when the act will require shippers and others responsible for oil transportation and handling on offshore and tidal waters to show that they can contain and clean up an oil spill they might cause.

This federal timetable fits MSRC's schedule for implementation. There are myriad steps that must be taken to make a complex, large, wholly new organization operational. A detailed plan has been developed for MSRC, but most of the plan still must be implemented.

Equipment and vessels must be constructed and purchased. Personnel—including (subcontractors) who will actually do much of the work transporting equipment to spill sites, as well as operating it—must be hired and trained. Land and buildings must be purchased or leased to create the regional centers and equipment prestaging areas. Insurance must be procured.

*For more information, contact:
Steve Duca, Vice President
Readiness and External Affairs
Marine Spill Response Corp.
1220 L Street, N.W., 8th Floor
Washington, D.C. 20005
(202) 682-8574*

4

Statement of Vice Admiral John D. Costello, USCG (Ret)
President, Marine Spill Response Corporation
September 6, 1990

Good morning. I take great pleasure today in announcing the formation of the Marine Spill Response Corporation and the Marine Preservation Association.

Marine Spill Response Corporation is the new name for the Petroleum Industry Response Organization (PIRO) -- an oil spill cleanup organization that we have been working to create since June of last year, when plans for it were first announced. Funding for this corporation will be provided by the Marine Preservation Association, which is a separate organization of owners, shippers and receivers of oil. Both companies are not-for-profit entities. Each is independent of the other.

We have changed the name of the response corporation to reflect the expansion of its clientele, which now extends well beyond the conventional understanding of the term "oil industry." MSRC will serve others including independent tanker operators, public utilities -- in fact, any company that handles petroleum and petroleum products over coastal waters is now a prospective client. We have not, however changed the original objectives. MSRC will provide America:

- o A best-effort response capability to catastrophic offshore spills in coastal and tidal waters -- which consists of on-water as well as beach cleanup capability;
- o A program to audit, on an ongoing basis, the readiness of our spill response forces to meet their mission; and
- o A robust research and development program, intended to improve basic information about spills and the technology of oil spill response and cleanup.

Each of the corporation's five regional response centers is designed to manage a spill as large as the 1989 accident in Prince William Sound. They are to be located in the New York/New Jersey metropolitan area; Fort Lauderdale, north of Miami; Lake Charles, Louisiana, near the Texas border; the Port of Los Angeles area, north of Los Angeles; and Seattle. By combining the resources of different centers, we will have the capacity to respond to even larger spills.

We will put the response centers and their associated equipment pre-staging areas in optimum locations for spill response. These locations reflect several critical factors, including oil transportation patterns, the volumes of oil being moved, sensitivity to the environment and ready access to highways and airports. That means we'll be able to promptly get the people and equipment to spills wherever they occur -- in the Atlantic, in the Gulf and in the

-2-

Pacific. Heightened protection will also be given to the waters around Hawaii, Puerto Rico and the U.S. Virgin Islands.

As the original API task force report indicated, we intend to have an appropriate response and cleanup role in Alaska. The roles of industry, state government and the federal government have not yet been sufficiently defined at this time to permit NSRC to adopt an appropriate role. This notwithstanding, it should be noted that great improvements have already been made in Prince William Sound. The spill response capability there will be greater than the capability to be found in one of NSRC's regional response centers. A dialogue with appropriate industry, state and federal officials will be held to resolve NSRC's role in Alaska.

We're excited by the prospect of creating the world's largest, best equipped and best trained oil spill cleanup organization. I know of no other occasion when an industry has reacted on such a massive scale to help meet an urgent national need. What is being announced today is truly precedent-setting.

We estimate that the total spending over five years for the new response corporation will amount to over \$800 million, including capital, operational expenses and research and development funding. We think the organization is worth every dollar of that huge sum, which, I must underline, is three times the figure that was estimated a year ago.

The increase is the result of months of honing and refining the concept. The revised estimates include the staff, materials and equipment we feel will be necessary to do the job.

Even so, we recognize that present spill recovery and cleanup technology is inefficient. There can be weather and sea conditions that make response or cleanup operations impossible or too dangerous. Oil spill responders need better equipment and techniques. So the response corporation will support a significant expansion of research and development on oil spills. Neither the new response corporation nor any of the companies that join the funding association will benefit financially from any patents emerging from the research program. All will be donated to the public domain -- a measure intended to guarantee that any new inventions result in maximum protection of the marine environment.

The recently enacted Oil Pollution Act of 1990 recognizes that those who spill oil have the primary responsibility for cleaning up spills. But it gives a single government agency -- the U.S. Coast Guard -- the responsibility for initiating and directing action on spill cleanups. The law also grants "Good Samaritan" recognition to spill responders. Responders like NSRC are not responsible for spills. But they are essential to their cleanup. The new federal law insures recognition of the unique risks faced by these responders.

However, the new federal law also allows states to enact responder liability standards different from the federal standard. In some

-3-

states, existing standards could make responders hesitant to act and inadvertently deter the prompt aggressive action needed in oil spill catastrophes. As a result, NSRC will be working hard with states to get them to adopt the federal responder liability standard. Much remains to be done in this area.

Companies who join the funding company -- the Marine Preservation Association -- will have the right to report the response corporation as their designated cleanup organization. Dues will be paid to the association based on a per barrel fee for oil that is transported during the year. These fees will fund the buildup and day-to-day operations of the response corporation. However, when the NSRC responds to a spill, the spiller will have to pay for actual cleanup expenses incurred, whether or not it is a dues paying member.

NSRC should be fully operational in early 1993 -- as the new law requires -- but will be capable of providing some limited response before then.

The challenge of creating this urgently needed national capability is not taken lightly. We look forward to it eagerly but realistically. The NSRC team is confident that we will meet the challenge and are pleased to be a part of the solution to a national need.

At this time, we'll be happy to respond to any questions you have.

5

AS 46.03.823(a) is amended to read:

(a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance other than oil whose acts or omissions are not contrary to a response plan or order by a state or federal agency having jurisdiction over the release or threatened release is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

AS 46.03 is amended by adding a new section to read:

Sec. 46.03.825. OIL SPILL RESPONSE ACTION CONTRACTORS. (a)

A person who is a response action contractor with respect to a release or threatened release of oil is not liable for injuries, costs, damages, expenses or other liability that results from the release or threatened release, or from the response action contractor's acts or omissions in response to the release or threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that:

(1) the response action contractor would have been liable for the release or threatened release under state or federal law even if that contractor had not carried out a response action with respect to the release or threatened release; or

(2) the response action contractor acted with gross negligence or intentional misconduct.

(b) The liability limitation of (a) of this section does not apply to an action for personal injury or death.

(c) As used in this section:

(1) "gross negligence" means criminal negligence as defined in AS 11.81.900(a)(4);

(2) "response action contractor" has the same meaning as in AS 46.03.823(g)(2); and

(3) "response action contractor" has the same meaning as in AS 46.03.823(g)(3).

Alaska State Legislature

Senate Committee on Oil and Gas

Senator Sam Cotten, Chairman
Senator Drue Pearce, Vice-Chairman
Senator Bettye Fahrenkamp
Senator Lyman F. Hoffman
Senator Dick Shultz



P. O. Box V, State Capital
Juneau, AK 99811
(907) 465-3711

February 8, 1991

Mary Nordale
Robertson, Monagle & Estaugh
Court Plaza Building, Suite 800
240 Main Street
Juneau, Alaska 99802

Dear Mary,

I've had a chance to explore a little bit further the legislative proposal submitted by Tesoro to raise the standard of negligence that would apply to response contractors from simple negligence to gross negligence. I appreciate your taking the time to review the proposal and give me your comments.

The financial responsibility requirements for tankers under state law are based on capacity. Has Alyeska explored basing its financial responsibility requirements on either the capacity of the tankers loading or on the amount of oil an owner loads on a monthly basis? It would seem that a "scaling" of your requirements tailored to the actual risk presented by a company might obviate the perceived need for a legislative solution.

Thanks for taking the time to review this.

Sincerely,

A handwritten signature in dark ink, appearing to read "Sam Cotten".

Sam Cotten
Chair

cc: Gene Burden, Tesoro

January 3, 1991

Senator-Elect Sam Cotten
11940 Business Blvd
Eagle River, Alaska 99577

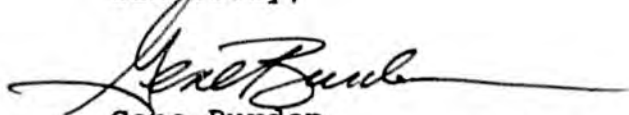
Dear Mr. Cotten:

Mike Navarre requested that I send the enclosed materials to you for your review. The Summary and supporting materials describe Tesoro's primary legislative objective for the coming session. We seek a modification of Alaska law on liability of spill response contractors to one similar to that contained in the Federal Oil Spill Bill of 1990. Such a change would remove the prospect of strict liability and liability for simple negligence for a response action contractor for its actions in response to a spill clean-up.

Tesoro's Kenai refinery has been in business since 1969 and was modified in the mid-80's to handle ANS crude oil. Our supply is shipped from Valdez to Kenai. In order for our ship to operate in Prince William Sound it must have spill response coverage which is currently only available through Alyeska. The current liability exposure to the response contractor has contributed to Alyeska imposing a requirement for \$1 Billion in financial security for these services in a format that we cannot meet. We have a short term agreement for Alyeska coverage and believe passage of the proposed legislation would substantially reduce the financial responsibility requirements and contribute to a long term solution to this problem.

We appreciate your review of these materials and will be available at your convenience to discuss any questions you have, as well as suggestions regarding the successful introduction and passage of this bill.

Sincerely,



Gene Burden
Vice President - Administration
& Government Relations

cc: Rep. Mike Navarre

W. Gene Burden
Vice President
Administration & Government Relations

February 22, 1991

Members of the Senate Oil & Gas Committee

Senators:

Sam Cotten, Chair
Drue Pearce, Vice-Chairman
Bettye M. Fahrenkamp
Lyman Hoffman
Dick Shultz

Dear Senators:

The enclosed draft legislation concerning the liability of innocent oil spill clean up contractors is Tesoro Alaska's principal legislative priority this year. Tesoro Alaska respectfully requests that the legislation be introduced as a Senate Oil and Gas Committee bill, and considered by the committee at its very earliest convenience. Enactment of this legislation is critical for two reasons:

1. Alaska's current liability laws threaten to embroil oil spill cleanup contractors in litigation arising from an oil spill, even though that contractor had no involvement in the spill itself. This creates a strong disincentive for businesses to enter the oil spill cleanup business. Compounding Alaska's problem in attracting new cleanup capability is the fact that the United States Congress and the legislatures of numerous coastal states, have already enacted legislation curing this liability problem; and

2. Alaska's unreasonable liability laws have caused Tesoro and others particular problems arising from the difficulties in obtaining standby oil spill cleanup services under terms that Tesoro and others can meet. Unless this legislation is enacted this session, the liability issue may affect Tesoro's ability to obtain ANS crude oil from Prince William Sound, and interrupt its ability to provide supply of refined products to Alaska.

The threat of becoming embroiled in prolonged and costly litigation is a major concern and impediment to marshalling all the organizations we would like to see available to assist in response to a major spill. This is true whether the organization is large (like the Marine Spill Response Corporation), small (co-ops, subcontractors and suppliers) or new (i.e., the recently-formed Cook Inlet Spill Prevention and Response, Inc. ("CISPRI")). Existing Alaska cleanup organizations presently face the prospect

of delays in response time caused by the inordinate time and resources lost in obtaining legal advice and clearances from state and federal authorities before responding to even minor spills.

The proposed legislation is similar to that now found in Florida, Virginia, Hawaii, and in the Federal Oil Pollution Act of 1990. California's 1990 legislation is similar, providing a limitation of liability for 60, and in some cases 90 days after a spill. In the past week, the State of Delaware enacted similar legislation, and the Senates of Georgia and Mississippi unanimously passed similar bills. Under these laws, the responder is not liable for damages arising from their cleanup actions unless they act with gross negligence or willful misconduct, or cause personal injury or death. The proposed Alaska legislation expressly confers liability to the responsible parties for any damages resulting from the oil spill cleanup efforts that are not subject to liability to the response action contractor. And like these other laws, limited liability would attach only to contractors that had no involvement in the spill itself.

The public policy reasons for granting such limited immunity are similar to those that prompted other good samaritan immunity for organizations like fire and police departments, medical personnel, and others. There is a need to insure that highly trained personnel remain willing to respond without hesitation despite adverse, or even dangerous circumstances and that they promptly make the difficult decisions such a response demands.

The importance of this legislation also directly relates to Tesoro's ability to maintain response action contractor services in Prince William Sound and uninterrupted manufacturing operations at our Kenai refinery. Tesoro manufactures a full range of petroleum products and relies almost exclusively on ANS as a feed stock (approximately 85-90% of our crude oil is ANS). There are no known viable crude oil supply options available to Tesoro at this time should we no longer be able to transport ANS to our refinery.

Alyeska is the only entity with the spill response capabilities necessary for our tanker to maintain the required contingency plan for operation in Prince William Sound. However, because of Alyeska's potential liability for a spill from an unrelated Tesoro-chartered tanker, Alyeska proposes to make cleanup services available only under terms that Tesoro cannot meet. Alyeska is requiring \$1 billion in "direct action" financial responsibility as a condition for a term agreement that provides these services. The direct action requirement means that the financial responsibility provided must be of a nature that would enable Alyeska to seek reimbursement directly from the source of the financial responsibility without having to initiate a claim, or action against Tesoro.

Tesoro has a net worth of approximately \$200 million. Although we have put together \$1 billion of insurance in coordination with our vessel's operator, the insurance is comprised of Protection & Indemnity Club (P & I Club) insurance that does not extend direct action to a potential claimant. There is no such "direct action" insurance to be found at these levels, and we are unable to otherwise meet Alyeska's condition. We have obtained an agreement good until June 30, 1991 with Alyeska for response services and are seeking a means to resolve this problem before that date.

If the proposed legislation is enacted, we believe we will be able to achieve a negotiated arrangement for spill response services that Alyeska and Tesoro can accept. If we do not obtain such an agreement, or if we fail to obtain legislative action on this matter, we face, at best, long and expensive litigation with Alyeska over their requirements with uncertain results, and at worst an interruption of our ability to operate the Kenai Refinery.

Tesoro appreciates your review of the proposed bill and encourages you to introduce the legislation as a Senate Oil and Gas Committee bill. We will make personnel and counsel available at your convenience to discuss any issues or questions.

Thank you,



Gene Burden
Vice President - Administration
& Government Affairs

Enclosures

EXISTING OIL SPILL LIABILITIES AND PROPOSED LEGISLATION

H.B. _____

"An act relating to civil liability for the good faith response actions of a response action contractor for oil spills that were not caused by the contractor..."

1. Does proposed bill relieve a response action contractor from liabilities associated with its obligations contained in its contingency plan?

NO. See AS 46.04.030(g)

"Failure of a holder of an approved or modified contingency plan to comply with the plan, or to have access to the quality or quantity of resources identified in the plan or to respond with those resources within the shortest possible time in the event of a spill is a violation of this chapter for purposes of AS 46.03.760(a), 46.03.765, 46.03.790, and any other applicable law. If the holder of an approved or modified contingency plan fails to respond to and conduct cleanup operations of an unpermitted discharge of crude oil with the quality and quantity of resources identified in the plan and in a manner required under the plan, the holder is strictly liable, jointly and severally, for the civil penalty assessed under AS 46.03.758, 46.03.759, or 46.03.760 against any other person for that discharge."

2. Does proposed bill relieve a response action contractor for liabilities associated with its own spill?

NO. See AS 46.03.823(b)(1)

"...does not apply to a response action contractor who would otherwise be liable for the release or threatened release under state or federal law even if that person had not carried out a response action with respect to the release or threatened release;"

3. Does the proposed bill affect the oil owner's or transporters liabilities for a spill?

NO. The owner and operator are still subject to joint and several liability for all damages resulting from a spill. AS 46.03.822 is unaffected and extends strict liability for release of hazardous substances to:

"(1) the owner of, and the person having control over, the hazardous substance at the time of the release or threatened release; this paragraph does not apply to a consumer product in consumer use;

(2) the owner and the operator of a vessel or facility, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(3) any person who at the time of disposal of any hazardous substance owned or operated any facility or vessel at which the hazardous substances were disposed of, from which there is a release, or a threatened release that causes the incurrence of response costs, or a hazardous substance;

(4) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by the person, other than domestic sewage, or by any other party or entity, at any facility or vessel owned or operated by another party or entity and containing hazardous substances, from which there is a release, or a threatened release that causes the incurrence of response costs, or a hazardous substance;

(5) any person who accepts or accepted any hazardous substances, other than refined oil, for transport to disposal or treatment facilities, vessels or sites selected by the person, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance."

IN THE HOUSE

BY

HOUSE BILL NO. ____

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An act relating to civil liability for the good faith response actions of a response action contractor for oil spills that were not caused by that contractor, and providing an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 46.03.823(a) is amended to read:

(a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance other than oil whose acts or omissions are not contrary to a response plan or order by a state or federal agency having jurisdiction over the release or threatened release is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

* Sec. 2. AS 46.03 is amended by adding a new section to read:

Sec. AS 46.03.825. OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person who is a response action contractor with respect to a release or threatened release of oil is not liable for injuries, costs, damages, expenses or other liability that results from the release or threatened release, or from the response action contractor's acts or omissions in response to the release or

threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that:

(1) the response action contractor would have been liable for the release or threatened release under state or federal law even if that contractor had not carried out a response action with respect to the release or threatened release; or

(2) the response action contractor acted with gross negligence or intentional misconduct.

(b) The liability limitation of (a) of this section does not apply to an action for personal injury or death.

(c) As used in this section:

(1) "gross negligence" means criminal negligence as defined in AS 11.81.900(a)(4);

(2) "response action contract" has the same meaning as in AS 46.03.823(g)(2);
and

(3) "response action contractor" has the same meaning as in AS 46.03.823(g)(3).

* Sec. 3. This Act taken effect immediately in accordance with AS 01.10.070(a).

IN THE HOUSE

BY

HOUSE BILL NO. ____

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An act relating to civil liability for the good faith response actions of a response action contractor for oil spills that were not caused by that contractor, and providing an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 46.03.822(a) is amended to read:

Sec. 46.03.822. STRICT LIABILITY FOR THE RELEASE OF HAZARDOUS SUBSTANCES. (a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section and the exception set out in (i) of this section, the following persons are strictly liable, jointly and severally, for damages to persons or property, whether public or private, including damage to the natural resources of the state or a municipality[,] damage caused by a response action contractor for which the response action contractor is not liable under AS 46.03.823 or AS 46.03.825; and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

(1) the owner of, and the person having control over, the hazardous substance at the time of the release or threatened release; this paragraph does not apply to a consumer product in consumer use;

(2) the owner and the operator of a vessel or facility, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(3) any person who at the time of disposal of any hazardous substance owned or operated any facility or vessel at which the hazardous substances were disposed of, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(4) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by the person, other than domestic sewage, or by any other party or entity, at any facility or vessel owned or operated by another party or entity and containing hazardous substances, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(5) any person who accepts or accepted any hazardous substances, other than refined oil, for transport to disposal or treatment facilities, vessels or sites selected by the person, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance.

* Section 2. AS 46.03.823(a) is amended to read:

(a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance other than oil whose acts or omissions are not contrary to a response plan or order by a state or federal agency having jurisdiction over the release or threatened release is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

*** Sec. 3. AS 46.03 is amended by adding a new section to read:**

Sec. AS 46.03.825. OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person who is a response action contractor with respect to a release or threatened release of oil is not liable for injuries, costs, damages, expenses or other liability that results from the release or threatened release, or from the response action contractor's acts or omissions in response to the release or threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that:

(1) the response action contractor would have been liable for the release or threatened release under state or federal law even if that contractor had not carried out a response action with respect to the release or threatened release; or

(2) the response action contractor acted with gross negligence or intentional misconduct.

(b) The liability limitation of (a) of this section does not apply to an action for personal injury or death.

(c) As used in this section:

(1) "response action contract" has the same meaning as in AS 46.03.823(g)(2);
and

(2) "response action contractor" has the same meaning as in AS 46.03.823(g)(3).

*** Sec. 3. This Act taken effect immediately in accordance with AS 01.10.070(a).**

¹IN THE HOUSE

BY

HOUSE BILL NO. ____

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

For an Act entitled:

"AN ACT RELATING TO CIVIL LIABILITY FOR THE GOOD FAITH RESPONSE ACTIONS OF A RESPONSE ACTION CONTRACTOR FOR OIL SPILLS THAT WERE NOT CAUSED BY THAT CONTRACTOR, AND PROVIDING AN EFFECTIVE DATE"

SECTIONAL ANALYSIS

Introduction:

This legislation will provide limited immunity to "response action contractors" for damages arising from their response activities, unless they act with gross negligence or willful misconduct, or cause personal injury or death. The legislation expressly makes the spiller liable for the response action contractor's acts or omissions exempted under the law.

Section 1:

A.S. 46.03.822 is amended to expressly clarify that the persons designated as strictly liable, jointly and severally, for damages resulting from the release of hazardous substances, the costs of response, containment, removal, and remediation are also liable for any "...damages caused by a response action contractor for which the response action contractor is not liable under A.S. 46.03.823 or A.S. 46.03.825..."[Sections 2 and 3 of this Bill].

Section 2:

A.S. 46.03.823(a) currently describes the liability of response action contractors engaged in any type of hazardous substance clean up including land based clean up. The proposed legislation does not seek modification of the standard of liability of non-oil clean up. The non oil clean ups are expected to be land based where the response action contractors are not faced with the same critical, time-sensitive decisions that must often be made in response to an oil spill where adverse weather conditions, fast moving currents, high seas, and with less than ideal information are confronted. The proposed modification removes oil from the requirements of A.S. 46.03.823(a) in favor of the requirements of a new section A.S. 46.03.825 described below in Section 3.

Section 3:

A.S. 46.03 is amended by adding a new section (A.S. 46.03.825) which grants a limitation to liability to a response action

contractor unless the response action contractor:

1) would have been liable for the release even if it had not carried out a response action with respect to the release. This means that if a response action contractor would be otherwise liable for the release under State or Federal law that the limitation provided under the proposed legislation would not serve to enable the contractor to avoid that liability, or

2) acted with gross negligence or intentional misconduct.

The limitation does not extend to any action for personal injury or death as specified in A.S. 46.03.825 (b). The proposed legislation does not modify the existing definitions of "response action contract" or "response action contractor."

Section 4:

The proposed Act would become effective immediately in accordance with A.S. 01.10.070(a).

Draft Sectional
February 11, 1991

**SPILL RESPONSE CONTRACTOR
LIMITED LIABILITY PROPOSAL**

RESPONSE ACTION CONTRACTOR CURRENT LIABILITY EXPOSURE	PROPOSED LEGISLATION EFFECT
--	--

GROSS NEGLIGENCE

INTENTIONAL ACTS

SIMPLE NEGLIGENCE

PERSONAL INJURY

DEATH

REMOVES:

SIMPLE NEGLIGENCE

And clarifies
that the spiller
is **STRICTLY LIABLE**
for damages that
are the result of
the limited immunity
granted the
response action
contractor

SCOMM

78:52

Alaska State Legislature

Legislative Research Agency



P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 463-3351

February 26, 1991

MEMORANDUM

TO: Representative Bill Hudson

FROM: Glenn T. Gray ^{GTG}
Legislative Analyst

RE: Oil Spill Response Contractor Liability Laws in Other States
Research Request 91.144

You asked about liability laws in other states concerning oil spill response contractors. Specifically, you requested information about states which have limited liability for contractors and their reasons for doing it. You also asked about states that have considered but rejected such legislation.

We contacted staff attorneys, resource agency officials or legislative staff in 16 states to obtain the information for this memorandum. An attempt was made to contact more than one person from each state to confirm information. For some states it was difficult to locate anyone who had a thorough understanding of the implications of response contractor liability statutes. We also contacted staff from several national organizations: the Coastal States Organization, the National Conference of State Legislatures, and the Marine Spill Response Corporation (MSRC).

This memorandum begins with background information about the effort to limit the liability of response action contractors. A brief description of how various states have dealt with contractor liability follows. The memorandum concludes with a summary of national trends regarding liability regimes for oil spill clean up contractors.

Background

Since the federal Oil Pollution Act of 1990 passed in August, many states report that the Marine Spill Response Corporation (formerly the Petroleum Institute Response Organization) and oil spill response contractors have lobbied them to limit the liability of response action contractors. The federal law limits liability for persons who respond to an oil spill in federal waters as long as they act consistently with the National Contingency Plan [33 U.S.C. 1321 (c)(4)]. Responders are still liable, however, for personal injury and wrongful death, and if they are grossly negligent or engage in wilful

misconduct. The act does not preempt states from enacting more stringent liability regimes [33 U.S.C. 1321(o)(2)].¹

Laws which limit liability for persons who respond to spills of oil or hazardous materials are commonly referred to as good samaritan laws. While ~~some states exempt only people who are not compensated~~, other states have changed their laws to be consistent with federal law. Rather than holding contractors strictly liable, or liable for simple negligence, such states limit contractor liability to gross negligence, wilful misconduct, personal injury or wrongful death. Definitions of these different standards of liability may be found in Attachment A.

The federal Oil Pollution Act of 1990 requires that owners or operators of tank vessels and oil facilities develop response plans. These plans must show that owners or operators have personnel and equipment to "remove to the maximum extent practicable a worst case discharge . . ." [33 USC 321(j)(5)]. For many facilities and tankers, the MSRC provides the only feasible means to comply with this provision. The MSRC is a nonprofit organization funded by the Marine Preservation Association (MPA), a group of oil industry companies. According to David Larkin, director of government affairs for the MSRC, the organization operates independently from the MPA. The MSRC plans to have five regional response centers and 23 pre-staging areas where equipment will be stored. Mr. Larkin says that because an oil spill can spread across the jurisdictions of many states, it is important to have consistent liability standards. Otherwise, in the event of a spill, contractors would have to respond to different rules in each state. Mr. Larkin also says that insurance costs for unlimited liability are prohibitive, and if a state does not have adequate immunity for the responders, the MSRC will have to consider what its role will be in that state.

The MSRC's involvement in Alaska is unclear. According to Mr. Larkin, the MSRC has no plans to locate a pre-staging area in Alaska, ~~and current liability standards do not provide an incentive to consider this option~~. The MSRC document in Attachment B does, however, refer to a planned pre-staging area in Alaska. Alyeska Pipeline Service Company currently provides spill response assistance for tankers transporting oil from the TransAlaska Pipeline. According to Gene Burden, a vice-president for Tesoro, Alyeska requires Tesoro to obtain one billion dollars of direct action insurance for it to transport oil in Prince William Sound. Such insurance is difficult, if not impossible to obtain (see Attachment C, Legislative Research Memorandum 90.200). Mr. Burden says that coverage through a Protection and Indemnity (P&I) club would

¹After an oil spill, state and federal authorities may bring separate actions against a contractor based on their individual standards.

not provide direct action and would be cost prohibitive for Tesoro.² Mr. Burden believes that insurance requirements would be reduced if Alaska limits the liability for response action contractors. He also says that frivolous litigation would be reduced by changing the current law.

Arkansas

Simple
According to Steve Weaver, chief legal council for the Department of Pollution Control and Ecology, Arkansas holds oil spill response contractors responsible for simple negligence. He says that in 1985 legislation was passed that held contractors responsible for gross negligence, but that the oil industry supported a law passed in 1989 making contractors liable for simple negligence. Mr. Weaver said that Arkansas wants to keep response contractors to as high a standard as possible.

California

Gross: 60-days
The California General Assembly passed a bill last year that includes a provision to limit liability for people who respond to oil spills (other than for gross negligence, wilful misconduct, personal injury, or wrongful death). The law limits liability for people who act in good faith and in accordance with the National Contingency Plan, the state oil spill contingency plan, or at the direction of the on-site coordinator or the United States Coast Guard. The act restricts the limitation of liability for response action contractors for 60 days after they begin cleanup with a possible extension of 30 days.

According to Dr. Jim Rote, principal consultant for the California General Assembly Office of Research, the provision limiting a response contractor's liability to 60 days resulted from a compromise between lobbying efforts of the California trial lawyers and response contractors. Dr. Rote believes that the limitation of liability for response contractors is justified because they respond to emergencies and may be compared to other emergency responders such as ambulance drivers and fire fighters. The 60-day limit encourages contractors not to become careless.

Connecticut

Simple
According to Charles Zieminski, principal emergency response coordinator for the Department of Environmental Protection, Connecticut has no cap on liability for negligence. Other than during a few oil spills in the early 1970s, Connecticut has not had much recent experience with response contractors. Mr.

²Direct action means that a claimant could recover costs directly from the insurer without going through Tesoro.

Representative Hudson
February 26, 1991
Page 4

Zieminski says that he is not aware of efforts to change current liability laws for oil spill clean up contractors.

~~Delaware~~

*Volunteer
non-profit
Paid: Gross
unless ...*

The Delaware General Assembly recently passed legislation consistent with federal law concerning liability of response contractors. The legislation is awaiting the governor's signature. According to Shari Wilson, staff attorney for the Attorney General's Office, contractors may be liable for simple negligence if they significantly increase the damage resulting from an oil spill. Contractors may get around this provision if they subcontract with a party who does not receive compensation for spill clean up, such as the MSRC.

~~Florida~~

Legislation passed last year by the Florida legislature limits the liability of persons responding to an oil spill as long as they are not grossly negligent (FS 376.09). This provision appears to include response action contractors, although a separate provision (FS 376.319) provides indemnification for response contractors for simple negligence if they have a written contract with the state. Several state officials with whom we spoke were unable to explain why the state would need to indemnify a contractor for simple negligence if the contractor were only liable for gross negligence and wilful misconduct.

~~Hawaii~~

The Hawaii legislature passed legislation during 1990 that apparently limits the liability of response action contractors. The law states that no person shall be liable "as a result of actions taken or omitted in the course of rendering care, assistance or advice in accordance with this chapter or at the direction of an on-scene coordinator," unless the actions resulted from gross negligence or intentional misconduct. There is a question whether the legislature intended to limit the liability of contractors because the language modifies section 107(d) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) instead of section 119 of that act (section 119 exempts response action contractors from strict liability for the clean up of hazardous substances).

~~Louisiana~~

Louisiana law currently holds response contractors strictly liable for their clean up efforts. MSRC has reportedly said that if Louisiana does not limit liability for response action contractors, the MSRC would reconsider its plans to locate one of its five regional centers in Louisiana.

Maine

Volunteers = 8000
Maine's good samaritan law currently limits the liability of people who respond to oil spills as long as they do not receive compensation. Response contractors receiving payment are liable for simple negligence. According to Barbara Foster of the National Conference of State Legislatures, the MSRC said that it would not provide an office in Maine if liability for response action contractors was not limited. The legislature is currently considering a bill to limit liability to gross negligence. Perry Cogburn, an oil and hazardous materials specialist for the Maine Department of Environmental Protection, says that there has not been a problem with response contractors and if the laws are too strict contractors may not respond to spills.

Maryland

Maryland currently does not limit the liability of response action contractors. The legislature is expected to consider a bill this session that has provisions similar to those of the federal government.

Last week during a regional response team drill in Chesapeake Bay, contractors refused to respond to the spill because of Maryland's liability regime.³ The drill proceeded under the assumption that an oil tanker had collided with a container ship carrying hazardous waste. The United States Coast Guard (USCG) took control of the "spill" but could not convince the contractors to respond. The USCG received verbal approval from the Governor of Maryland and written approval from the state's director of the Department of Environment to exempt contractors from liability during the drill. There were, however, concerns about the legality of such an exemption. According to Lt. Commander Shultz, coordinator for the National Response Team, the USCG considered towing the boats into Virginia waters much to the alarm of Virginia authorities. The drill will continue on March 12, with the beginning of the second day of the imaginary spill.

Mississippi

Mr. Charles Chism, director of the Office of Pollution Control, says that Mississippi does not limit the liability for response action contractors. A bill currently being considered by the state legislature would limit contractor liability. Mr Chism says he does not object to such a liability limitation.

³Although there was actually no accident or oil spill, authorities proceeded throughout the drill as if it was real.

New York

Sherry Chrimes, assistant counsel for the Department of Environmental Conservation, says that New York has resisted attempts by the oil industry to limit the liability of response action contractors. The current law holds contractors liable for simple negligence. Ms. Chrimes said that the state often uses response contractors and that the current law is adequate. She says that response contractors should be held to the same standard of liability as other contractors.

North Carolina

Ed Gavin, of the Office of General Council for the Department of Natural Resources and Community Development, says that North Carolina has no limitation for liability for contractors who clean up oil spills. He says that there has not been much effort to change the current law, and that North Carolina has only a few oil terminals, a pipeline and a small oil refinery.

Oregon

Contractors responding to an oil spill currently have unlimited liability. The legislature, however, is considering limiting the liability of response contractors. Bruce Southerland, of the Department of Environmental Quality, said that because Oregon borders the Columbia River with Washington, the states usually try to have compatible oil spill legislation. (Washington currently limits the liability of contractors.)

Pennsylvania

Fred Osman, director of Environmental Emergency Response, says that the Pennsylvania legislature passed an act during November 1990 limiting response action contractor liability to wilful misconduct or gross negligence. He thinks that simple negligence is not a good standard for response action contractors because they respond to emergencies in an effort to prevent damage to the environment and property.

Virginia

David Orms, an environmental program manager for the Department of Environment, says that Virginia has patterned its contractor liability law after the federal Oil Pollution Act of 1990. He does not think that limiting contractor liability to gross negligence poses a problem.

Mr. Orms says that during a regional response team drill he attended last week in Chesapeake Bay, response action contractors refused to respond to the oil

spill in Maryland waters because that state does not limit liability for contractors. The contractors, however, said they would respond to the imaginary spill when it reached Virginia waters.

Washington

Washington limits the liability of response action contractors to a standard of gross negligence and wilful misconduct. The state is currently developing contractor standards for uncompleted work. According to Don Reif of the Department of Ecology, contractors will have to prove that they have a certain amount of insurance to pay for clean up work that they have not completed. Harry Reinart, legislative counsel for the House Environment Committee, says that ~~because spillers have strict liability, it is not necessary to hold contractors to such a high standard.~~ Mr. Reinart believes that it may be difficult to obtain contractors if they are held to too high of a standard.

Conclusion

Opinions differ concerning the extent a response contractor should be held liable for damage resulting from its actions. Some officials from other states believe that contractors should be held accountable for their actions during an oil spill clean up. They are concerned that a contractor may use cheaper, less efficient equipment if their liability is limited. They also express concern that a contractor may not be as careful when their liability is limited. One state official thought that in cases where the identity of a spiller cannot be determined or if a spiller were to go bankrupt, there would be no way to recover costs for damages resulting from the actions of a contractor if that contractor, was not liable and insured for simple negligence.

Several states have passed legislation that resembles liability standards found in the Oil Pollution Act of 1990, and additional state legislatures are considering such legislation. Some states have modified the federal legislation to require contractors to comply with state oil spill contingency plans or the direction of an on-scene coordinator. California limits the liability of contractors for 60 days with a possible 30-day extension while providing no time limit for volunteers. Officials from these states feel that response contracts should have limited liability similar to other emergency response personnel such as policemen and fire fighters. Many of these officials express concern that contractors would not be available if liability standards were too rigid.⁴ The high cost of insurance for simple negligence

⁴ Lt. Commander Shultz, coordinator for the National Response Team, is not aware of any instances where contractors have refused to respond to a spill other than the regional response drill which occurred in Maryland waters last week.

Representative Hudson
February 26, 1991
Page 8

was also cited as a reason for limited liability. The MSRC supports state legislation resembling federal law so that there will be consistency during oil spills that reach the waters of more than one state.

The Federal Oil Pollution Act of 1990, however, permits states to require higher standards. David Slade, general council for the Coastal States Organization, says that while his organization does not recommend how states should respond to the liability question, one option available would be to keep the simple negligence liability standard but to place a cap on the amount of liability. This option would reduce the liability of response action contractors and give them some incentive to operate carefully. The Coastal States Organization expects to release a white paper next month about how states have responded to a number of issues relating to the Federal Oil Pollution Control Act of 1990. A copy of this paper will be forwarded to your office as soon as we receive it.

I hope this information is helpful. Please contact this office if we may be of additional assistance.

Attachments

"(iii) into or on the waters of the exclusive economic zone; or

"(iv) that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

"(B) In carrying out this paragraph, the President may—

"(i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;

"(ii) direct or monitor all Federal, State, and private actions to remove a discharge; and

"(iii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

"(2) DISCHARGE POSING SUBSTANTIAL THREAT TO PUBLIC HEALTH OR WELFARE.—(A) If a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the President shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge.

"(B) In carrying out this paragraph, the President may, without regard to any other provision of law governing contracting procedures or employment of personnel by the Federal Government—

"(i) remove or arrange for the removal of the discharge, or mitigate or prevent the substantial threat of the discharge; and

"(ii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

"(3) ACTIONS IN ACCORDANCE WITH NATIONAL CONTINGENCY PLAN.—(A) Each Federal agency, State, owner or operator, or other person participating in efforts under this subsection shall act in accordance with the National Contingency Plan or as directed by the President.

"(B) An owner or operator participating in efforts under this subsection shall act in accordance with the National Contingency Plan and the applicable response plan required under subsection (j), or as directed by the President.

"(4) EXEMPTION FROM LIABILITY.—(A) A person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President.

"(B) Subparagraph (A) does not apply—

"(i) to a responsible party;

"(ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

"(iii) with respect to personal injury or wrongful death; or

"(iv) if the person is grossly negligent or engages in willful misconduct.

"(C) A responsible party is liable for any removal costs and damages that another person is relieved of under subparagraph (A).

"(5) OBLIGATION AND LIABILITY OF OWNER OR OPERATOR NOT AFFECTED.—Nothing in this subsection affects—

"(A) the obligation of an owner or operator to respond immediately to a discharge, or the threat of a discharge, of oil; or

"(B) the liability of a responsible party under the Oil Pollution Act of 1990.

"(6) RESPONSIBLE PARTY DEFINED.—For purposes of this subsection, the term 'responsible party' has the meaning given that term under section 1001 of the Oil Pollution Act of 1990."

(b) NATIONAL CONTINGENCY PLAN.—Subsection (d) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321(d)) is amended to read as follows:

"(d) NATIONAL CONTINGENCY PLAN.—

"(1) PREPARATION BY PRESIDENT.—The President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances pursuant to this section.

"(2) CONTENTS.—The National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to, the following:

"(A) Assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies and port authorities including, but not limited to, water pollution control and conservation and trusteeship of natural resources (including conservation of fish and wildlife).

"(B) Identification, procurement, maintenance, and storage of equipment and supplies.

"(C) Establishment or designation of Coast Guard strike teams, consisting of—

"(i) personnel who shall be trained, prepared, and available to provide necessary services to carry out the National Contingency Plan;

"(ii) adequate oil and hazardous substance pollution control equipment and material; and

"(iii) a detailed oil and hazardous substance pollution and prevention plan, including measures to protect fisheries and wildlife.

"(D) A system of surveillance and notice designed to safeguard against as well as ensure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies.

"(E) Establishment of a national center to provide coordination and direction for operations in carrying out the Plan.

"(F) Procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances.

"(G) A schedule, prepared in cooperation with the States, identifying—

September 1990

THE ROLE OF THE STATES
UNDER THE FEDERAL OIL SPILL LAW

American Petroleum Institute
Office of General Counsel

insurance, surety bonds, guarantees, letters of credit, and self-insurance.

These federal financial responsibility requirements are extremely high and the sanctions for non-compliance are strict and punitive. The States should find that the federal requirements for financial responsibility provide a satisfactory guarantee of compensation for the states, their citizens, and natural resources. The States should aggressively undertake the enforcement prerogatives regarding financial responsibility which are offered the under the new federal law.

IV. GOOD SAMARITAN PROTECTION FOR OIL SPILL RESPONDERS

With the emergence of a new federal oil spill liability law, and recent costs for oil spill damages reaching the multi-billion dollar level, the viability and effectiveness of organizations designed to respond to oil spills is threatened. Such organizations, many of which are non-profit, simply can not afford exposure to the "brave new world" of oil spill liabilities -- and why should they?

The law must recognize the significant differences between the spill response organizations and the original spillers of oil -- allocating their respective liability risks accordingly. Specifically, federal and state laws should extend to spill response cooperatives and contractors the protection from liability -- except in cases of gross negligence or willful misconduct -- which is afforded other emergency entities in our society,

including ambulance services and firefighters. In the case of damages allegedly caused by the negligence of oil spill responders, it is the original spiller of oil, whose conduct necessitates the response, who should pay those damages.

The new federal law therefore contains a provision which extends such limited immunity protection for oil spill response organizations -- but only for the liabilities they face under the federal law. This provision will not succeed if spill responders continue to face duplicate, (and in some case unlimited), liabilities under individual state laws. At present, the majority of existing Good Samaritan state laws applicable to oil spill responders contain a host of impractical and unrealistic condition on the immunity. For example, under many of these state laws, an oil spill responder loses its immunity if it charges any fee for its services. Such conditions on liability exposure only undermine the goal of ensuring emergency response capability. The States should instead legislate for the promotion of the best possible response to spill emergencies by enacting straightforward limited responder immunity provisions such as the new national standard.

V. FEDERAL PRIMACY IN SPILL RESPONSE AND CONTINGENCY PLANNING.

A. Response Chain of Command

A most important lesson learned from recent, publicized spill incidents is that immediate and decisive response to oil spills is essential to a successful containment and cleanup. The new federal law fundamentally amends the Clean Water Act's provisions in this



SPONSOR: Sen. Minner, Rep. Carey,
Sen. Vaughn, Rep. D. Ennis

DELAWARE STATE SENATE

136TH GENERAL ASSEMBLY

SENATE BILL NO. 6

JAN 9 1991

AN ACT TO AMEND TITLE 10, DELAWARE CODE, RELATING TO LIMITATION OF LIABILITY FOR OIL AND HAZARDOUS MATERIAL DISCHARGE CLEANUP.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Chapter 81, Title 10 of the Delaware Code by adding thereto a new Section to read as follows:

"§8135. Limitation on Liability of Third Parties Rendering Assistance in Oil or Hazardous Material Discharge Cleanup.

(a) The provisions of any law, rule or regulation to the contrary notwithstanding, the liability of any person rendering care, assistance, or advice to prevent, minimize or mitigate oil or hazardous material discharge for any removal costs and damage caused by or related to such care, assistance or advice shall be limited to acts or omissions of such person which can be shown to have been the result of gross negligence, reckless, wilful, wanton and/or intentional acts of misconduct on the part of such person.

(b) The limit of liability as set forth in Subsection (a) of this Section shall not apply to the actions of any person responsible for the initial discharge.

(c) Any person responsible for the initial discharge is liable for any removal costs and damages that another person is relieved of under Subsection (a) of this Section.

(d) This Section shall not be construed to limit any liability of any person for personal injuries or wrongful death as a result of the acts or omissions of such person."

Section 2. Amend Chapter 81, Title 10 of the Delaware Code by striking §8134 in its entirety.

This bill is proposed by the Delaware River and Bay Oversight Committee. The bill would limit liability for removal costs and damages (other than personal injury or wrongful death) of a third party who renders assistance in a cleanup operation to those acts which amount to gross negligence or reckless, wilful, wanton, or intentional misconduct.

Author - Sen. Minner

Prasser on Torts

70. SERVANTS

The traditional definition of a servant is that he is a person employed to perform services in the affairs of another, whose physical conduct in the performance of the service is controlled, or is subject to a right of control, by the other.¹²

This is, however, a great oversimplification of a complex matter. In determining the existence of "control" or the right to it, many factors are to be taken into account and balanced against one another—the extent to which, by agreement, the employer may determine the details of the work; the kind of occupation and the customs of the community as to whether the work usually is supervised by the employer; whether the one employed is engaged in a distinct business or occupation, and the skill required of him; who supplies the place and instrumentalities of the work; the length of time the employment is to last; the method of payment, and many others.¹³ Consideration of

the extensive and detailed ramification of this must be left to other texts; but it is probably no very inaccurate summary of the whole matter to say that the person employed is a servant when, in the eyes of the community, he would be regarded as a part of the employer's own working staff, and not otherwise.

Once it is determined that the man at work is a servant, the master becomes subject to vicarious liability for his torts. He may, of course, be liable on the basis of any negligence of his own in selecting or dealing with the servant, or for the latter's acts which he has authorized or ratified,¹⁴ upon familiar principles of agency law. But his vicarious liability, for conduct which is in no way his own, extends to any and all tortious conduct of the servant which is within the "scope of the employment."¹⁵ This highly indefinite phrase, which sometimes is varied with "in the course of the employment," is so devoid of meaning in itself that its very vagueness has been of value in permitting a desirable degree of flexibility in decisions. It is obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not. It refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones,

12. Second Restatement of Agency, § 220(1); *Newspapers, Inc. v. Love*, Tex.1964, 380 S.W.2d 582; *Chicago, R. I. & P. R. Co. v. Bennett*, 1912, 39 Okl. 358, 128 P. 705; *Nichols v. Harvey Hubbell, Inc.*, 1918, 92 Conn. 611, 103 A. 835; *Stewart v. California Imp. Co.*, 1900, 131 Cal. 125, 63 P. 177; cf. *Turner v. Lewis*, Ky.1955, 282 S.W.2d 624; *Globe Indemnity Co. v. Victill Corp.*, 1956, 208 Md. 573, 119 A.2d 423.

13. See Second Restatement of Agency, § 220(2); *Stevens, The Test of the Employment Relation*, 1939, 38 Mich.L.Rev. 188; Note, 1964, 6 Ariz.L.Rev. 150. As to the "borrowed servant," lent by one employer to another, see *Smith, Scope of the Business: The Borrowed Servant Problem*, 1940, 38 Mich.L.Rev. 1222; Notes, 1962, 29 Tenn.L.Rev. 448; 1967, 28 Ohio St.L.Rev. 550.

The problem is not limited to vicarious tort liability, and arises in workmen's compensation cases, as well as in connection with social security and other forms of social legislation. See *Wolfe, Determination of Employer-Employee Relationships in Social Legislation*, 1941, 41 Col.L.Rev. 1015; *Jacobs, Are "Independent Contractors" Really Independent?* 1953, 3 De Paul L.Rev. 23.

A signed agreement as to the status of the employee is evidence, but not necessarily conclusive. *Texaco, Inc. v. Layton*, Okl.1964, 395 P.2d 393; *Gulf Refining Co. v. Brown*, 4 Cir. 1938, 93 F.2d 870; *Humble*

Oil & Ref. Co. v. Martin, 1949, 148 Tex. 175, 222 S.W.2d 995; *Scorpion v. American-Republican*, 1944, 131 Conn. 42, 37 A.2d 802.

14. Second Restatement of Agency, §§ 212-218. As to ratification, see *Dempsey v. Chambers*, 1891, 154 Mass. 330, 28 N.E. 279; *Crotty v. Horn*, 1914, 186 Ill.App. 74; *Kirk v. Montana Transfer Co.*, 1919, 56 Mont. 292, 184 P. 987; and cf. *State ex rel. Kansas City Public Service Co. v. Shain*, 1939, 345 Mo. 543, 134 S.W.2d 58.

15. See *Smith, Scope of the Business: The Borrowed Servant Problem*, 1940, 38 Mich.L.Rev. 1222; Notes, 1936, 21 Corn.L.Q. 294; 1957, 24 Tenn.L.Rev. 241.

§ 79

of carrying out the objectives of the employment.

As in the case of the existence of the relation itself, many factors enter into the question: ¹⁶ the time, place and purpose of the act, and its similarity to what is authorized; whether it is one commonly done by such servants; the extent of departure from normal methods; the previous relations between the parties; whether the master had reason to expect that such an act would be done; and many other considerations, as to which the reader must be referred to texts dealing with the subject at length.¹⁷ It has been said ¹⁸ that in general the servant's conduct is within the scope of his employment if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master.

The fact that the servant's act is expressly forbidden by the master, or is done in a manner which he has prohibited, is to be considered in determining what the servant has been hired to do,¹⁹ but it is usually not conclusive, and does not in itself prevent the act from being within the scope of employment. A master cannot escape liability merely by ordering his servant to act care-

fully. If he could, no doubt few employers would ever be held liable. Thus instructions to a sales clerk never to load a gun while exhibiting it will not prevent liability when the clerk does so, in an effort to sell the gun.²⁰ If the other factors involved indicate that the forbidden conduct is merely the servant's own way of accomplishing an authorized purpose, the master cannot escape responsibility no matter how specific, detailed and emphatic his orders may have been to the contrary.²¹ This has been clear since the leading English case ²² in which an omnibus company was held liable notwithstanding definite orders to its driver not to obstruct other vehicles. It is still the master's enterprise, and the policy which places the risk of the servant's misconduct upon him requires that he shall not be permitted to avoid it by such instructions.

Frolic and Detour

In 1834 Baron Parke ²³ uttered the classic phrase, that a master is not liable for the torts of his servant who is not at all on his master's business, but is "going on a frolic of his own." If the servant steps outside of his employment to do some act for himself, not connected with the master's business, there is no more responsibility for what he does than for the acts of any stranger.²⁴ If he

¹⁶ Second Restatement of Agency, § 229; *Great A. & P. Tea Co. v. Noppenberger*, 1937, 171 Md. 378, 189 A. 434; *De Pareq v. Liggett & Myers Tobacco Co.*, 8 Cir. 1936, 81 F.2d 777, cert. denied 298 U.S. 680; *Loper v. Yazoo & M. V. R. Co.*, 1933, 166 Miss. 79, 145 So. 743; *Poundstone v. Whitney*, 1937, 189 Wash. 494, 65 P.2d 1261.

¹⁷ See 6 Labatt, *Master and Servant*, 1913, ch. 92-105; 2 Mechem *Agency*, 1914, ch. 5.

¹⁸ Second Restatement of Agency, § 228; *White v. Pacific Tel. & Tel. Co.*, D.Or.1938, 24 F.Supp. 871; *Hubbard v. Lock Joint Pipe Co.*, E.D.Mo.1947, 70 F.Supp. 589; *Hall Grocery Co. v. Wall*, 1930, 13 Tenn.App. 203.

¹⁹ Thus in *Gurley v. Southern Power Co.*, 1916, 172 K.C. 600, 90 S.E. 943, a custodian of a private swimming pool was instructed not to admit unauthorized swimmers. He did so, and rented them suits. It was held that the orders were conclusive that this was beyond the scope of his employment.

²⁰ *Garretzen v. Duencel*, 1872, 50 Mo. 104. Accord: *Mautino v. Piercedale Supply Co.*, 1940, 338 Pa. 435, 13 A.2d 51 (selling cartridges to minor); *Central Truckaway System v. Moore*, 1947, 304 Ky. 533, 201 S.W.2d 725 (intoxication on the job); *Carroll v. Beard-Laney, Inc.*, 1945, 207 S.C. 339, 35 S.E.2d 425 (same).

²¹ *Cosgrove v. Ogden*, 1872, 49 N.Y. 255; *Barrett v. Minneapolis, St. P. & S. M. R. Co.*, 1908, 106 Minn. 51, 117 N.W. 1047; *Great A. & P. Tea Co. v. Noppenberger*, 1937, 171 Md. 378, 189 A. 434; *Rankin v. Western Union Tel. Co.*, 1946, 147 Neb. 411, 23 N.W.2d 676; Second Restatement of Agency, § 230.

²² *Limpus v. London General Omnibus Co.*, 1862, 1 H. & C. 526, 158 Eng.Rep. 993.

²³ In *Joel v. Morrison*, 1834, 6 C. & P. 501, 172 Eng.Rep. 1338.

²⁴ *Lemurier v. A. Towle Co.*, 1947, 94 N.H. 246, 51 A.2d 42; *Vadyak v. Lehigh & N. E. R. Co.*, 1935,

has no intention, at least in part, to perform any service for the employer, but only to further a personal end, his act is not within the scope of the employment.²⁵ This is true, for example, where he borrows the owner's car to go for a ride for his own amusement,²⁶ or lends it to a friend for the same purpose.²⁷ But so long as there is an intent, even though it be a subordinate one, to serve the master's purpose, the master may be liable if what is done is otherwise within the service.²⁸

Certain activities for the personal benefit of the employee, such as going to the toilet,²⁹ or lighting a fire to keep warm,³⁰ are quite generally recognized as so necessary, usual, and closely tied in with the work, that they are held not to constitute deviations from the

employment. There has been an argument about smoking.³¹ The prevailing view has been that it is solely for the amusement of the servant, so that it is in itself outside the scope of employment,³² although in conjunction with authorized acts, such as pouring gasoline, it may amount to an unauthorized way of doing something which is within it.³³

A comparatively recent California decision³⁴ has taken the position that smoking on the part of employees is so usual and foreseeable that it is to be regarded as one of the normal risks of the enterprise, and so within the scope of vicarious liability.

Questions of fact of unusual difficulty arise in determining whether the servant's conduct is an entire departure from the master's business, or only a roundabout way of doing it—and likewise, the point at which the departure is terminated, and the servant may be said to have reentered the employment. This is particularly true in the "detour" cases,³⁵ where the servant deviates from his route on a personal errand, and later returns to it. Various tests have been proposed. One approach makes the question turn on

318 Pa. 580, 179 A. 435; *Reilly v. Connable*, 1915, 214 N.Y. 586, 108 N.E. 853; *Adomaities v. Hopkins*, 1920, 90 Conn. 239, 111 A. 178.

Cf. *District Certified TV Service, Inc. v. Neary*, 1965, 122 U.S.App.D.C. 21, 350 F.2d 998 (hit and run driver trying to escape).

25. *Salomone v. Yellow Taxi Corp.*, 1926, 242 N.Y. 251, 151 N.E. 442, reargument denied 242 N.Y. 602, 152 N.E. 445; *Herr v. Simplex Paper Box Corp.*, 1938, 330 Pa. 129, 198 A. 309; *Kelly v. Louisiana Oil Ref. Co.*, 1934, 167 Tenn. 101, 66 S.W.2d 997; *Lucas v. Friedman*, 1928, 58 App.D.C. 5, 24 F.2d 271; *Pratt v. Duck*, 1945, 28 Tenn.App. 502, 191 S.W.2d 562; Second Restatement of Agency, § 235.

26. *Fiske v. Enders*, 1900, 73 Conn. 338, 47 A. 681.

27. *Robinson v. McNeil*, 1897, 18 Wash. 163, 51 P. 355. On the other hand, permitting a friend to drive while the employee remains in the vehicle on the employer's business, is not beyond the scope of employment. *Meagher v. Garvin*, 1964, 80 Nev. 211, 391 P.2d 507.

28. *Nelson v. American-West African Line*, 2 Cir. 1936, 86 F.2d 730, cert. denied 300 U.S. 665; *Forsberg v. Tevis*, 1937, 191 Wash. 355, 71 P.2d 358; *Tuttle v. Dodge*, 1922, 80 N.H. 304, 116 A. 627; *Jones v. Lozier*, 1922, 195 Iowa 365, 191 N.W. 103; *McKinley v. Rawls*, 4 Cir. 1964, 333 F.2d 198; Second Restatement of Agency, § 236.

Cf. *Erwin v. United States*, D.C.Okla. 1969, 302 F.Supp. 693 (operating government car for purpose of catching airplane on vacation and leaving car in safe place of storage).

29. *J. C. Penney Co. v. McLaughlin*, 1939, 137 Fla. 594, 188 So. 783.

30. *Brown v. Anzalone*, 3 Cir. 1962, 300 F.2d 177.

31. See Note, 1950, 4 Ark.L.Rev. 217.

32. *Williams v. Jones*, 1865, 3 H. & C. 602, 159 E. Rep. 668; *Kelly v. Louisiana Oil Ref. Co.*, 1934, 167 Tenn. 101, 66 S.W.2d 997; *Shuck v. Carney*, 1922, 22 Tenn.App. 125, 118 S.W.2d 896; *Herr v. Simplex Paper Box Co.*, 1938, 330 Pa. 129, 198 A. 309; *Tomlinson v. Sharpe*, 1946, 226 N.C. 177, 37 S.E. 498.

33. *Mack v. Hugger Bros. Const. Co.*, 1929, 199 Tenn.App. 402 (laying explosive floor mixture); *Wood v. Saunders*, 1930, 228 App.Div. 69, 238 N.Y. 571; *Jefferson v. Derbyshire Farmers, Ltd.*, [1922] 2 K.B. 281; *George v. Bekins Van & Storage Co.*, 1949, 33 Cal.2d 834, 205 P.2d 1037.

34. *George v. Bekins Van & Storage Co.*, 1949, 33 Cal.2d 834, 205 P.2d 1037. Cf. *Vincennes Storage Corp. v. Gibson*, 1937, 194 Ark. 58, 106 S.W.2d 1037.

35. See *Smith, Frolic and Detour*, 1923, 23 Col.L.Rev. 444, 716; *Rouse, Deviation and Departure by Servant*, 1929, 17 Ky.L.J. 123; *Douglas, Vicarious Liability and Administration of Risk*, 1929, 38 Yale L.J. 584; *James, Vicarious Liability*, 1954, 28 Tul.L.Rev. 161.

clusively on the servant's purpose in the deviation, holding to the strict rule that he is outside of his employment while he is off on his own concerns,³⁶ but that he is still within it while he intends in part to serve his master or during the departure,³⁷ or as soon as he starts to return to his route.³⁸

This very mechanical solution has been losing ground in recent years, and has given way to another approach, now more generally accepted, which looks to the foreseeability of such a deviation,³⁹ and holds the employer liable only for torts occurring in a "zone of risk" within which the servant might reasonably be expected to deviate, even for purposes entirely his own.⁴⁰ Under this view distance becomes controlling, and the servant

who intends to return to his master's business does not resume it at least until he is reasonably near the authorized route.⁴¹ It seems to be more or less generally agreed that the master will be liable at least for those slight departures from the performance of the work which might reasonably be expected on the part of servants similarly employed, and that the foreseeability of such deviations is an important factor in determining the "scope of employment."⁴² The tendency has been to recognize a number of factors as affecting the result, which vary with the circumstances.⁴³ Essentially the question is one of major and minor departures, having always in mind that the employer is to be held liable for those things which are fairly to be regarded as risks of his business.⁴⁴

³⁶ *Skapura v. Cleveland Elec. Illumin. Co.*, 1900, 89 Ohio App. 403, 100 N.E.2d 700; *Carter Truck Line v. Gibson*, 1938, 195 Ark. 994, 115 S.W.2d 770; *McCauley v. Steward*, 1945, 63 Ariz. 524, 164 P.2d 465; *Lemarié v. A. Towle Co.*, 1947, 94 N.H. 246, 51 A.2d 42; *Lucas v. Friedman*, 1928, 58 F.Supp.D.C. 5, 24 F.2d 271; Note, 1952, 21 U.Cin.L.Rev. 156.

³⁷ *Edwards v. Earnest*, 1922, 208 Ala. 539, 94 So. 208; *Hayes v. Wilkins*, 1907, 194 Mass. 223, 80 N.E. 449; *Eckel v. Richter*, 1926, 191 Wis. 409, 211 N.W. 128; *Westberg v. Willde*, 1939, 14 Cal.2d 360, 94 P.2d 590; *Clawson v. Pierce-Arrow Motor Co.*, 1921, 231 N.Y. 273, 131 N.E. 914, reargument denied, 1921, 231 N.Y. 640, 132 N.E. 921.

³⁸ *Slenth v. Wilson*, 1839, 9 C. & P. 607, 173 Eng. Rep. 976; *McKiernan v. Lehmanier*, 1911, 85 Conn. 111, 81 A. 969; *Duffy v. Hickey*, 1922, 151 La. 274, 91 So. 733; *Riley v. Standard Oil Co.*, 1921, 231 N.Y. 301, 132 N.E. 97; Note, 1952, 35 Marq.L.Rev. 381.

³⁹ *Smith, Frolic and Detour*, 1923, 23 Col.L.Rev. 644, 716. Much the same idea may be expressed by the question: if the master should send out a search party to find the servant, within what area would they reasonably be expected to look?

⁴⁰ *Leuthold v. Goodman*, 1945, 22 Wash.2d 583, 157 P.2d 326; *Healey v. Cockrill*, 1918, 133 Ark. 327, 132 S.W. 229; *Kohlman v. Hyland*, 1926, 54 N.D. 730, 210 N.W. 643; *Edwards v. Benedict*, 1946, 79 Ohio App. 134, 70 N.E.2d 471; *Fleischmann Co. v. Howe*, 1926, 213 Ky. 110, 280 S.W. 496. These cases indicate that the distance the servant may depart without getting outside of his employment is somewhat proportional to the length of the authorized journey. See Second Restatement of Agency, § 234.

⁴¹ *Bell v. Martin*, 1941, 241 Ala. 182, 1 So.2d 906; *A. S. Abell Co. v. Sopher*, 1941, 179 Md. 687, 22 A.2d 462; *Riley v. Standard Oil Co. of New York*, 1921, 231 N.Y. 301, 132 N.E. 97; *Crady v. Greer*, 1919, 183 Ky. 675, 210 S.W. 167; *Tuttle v. Dodge*, 1927, 80 N.H. 304, 116 A. 627; Second Restatement of Agency, § 237.

⁴² Compare: Not within scope, *Jasper v. Wells*, 1943, 173 Or. 114, 144 P.2d 505; *Summerville v. Gillespie*, 1947, 181 Or. 144, 179 P.2d 719; *McCauley v. Steward*, 1945, 63 Ariz. 524, 164 P.2d 465; *Gordoy v. Flaherty*, 1937, 9 Cal.2d 524, 164 P.2d 465. Within scope: *Loper v. Morrison*, 1944, 23 Cal.2d 600, 145 P.2d 1; *George v. Bekins Van & Storage Co.*, 1949, 33 Cal.2d 834, 205 P.2d 1037; *Leuthold v. Goodman*, 1945, 22 Wash.2d 583, 157 P.2d 326; *Edwards v. Benedict*, 1946, 79 Ohio App. 134, 70 N.E. 2d 471.

⁴³ See *McConville v. United States*, 2 Cir.1952, 197 F.2d 680, cert. denied 344 U.S. 877; *Osipoff v. City of New York*, 1941, 286 N.Y. 422, 36 N.E.2d 646; *Kohlman v. Hyland*, 1926, 54 N.D. 710, 210 N.W. 643; *Glass v. Davison*, 1964, 276 Ala. 328, 161 So.2d 811; *Leuthold v. Goodman*, 1945, 22 Wash.2d 583, 157 P.2d 326; Second Restatement of Agency, §§ 229-237.

⁴⁴ See *Ryan v. Western Pac. Ins. Co.*, 1965, 224 Or. 84, 408 P.2d 84; *Luke v. St. Paul Mercury Indem. Co.*, 1941, 140 Nev. 557, 300 N.W. 577; *Standard Tire & Battery Co. v. Sherrill*, 1936, 170 Tenn. 418, 95 S.W.2d 915; *McCarthy v. Timmins*, 1901, 178 Mass. 378, 59 N.E. 1038. But quite extreme deviations have been held not to take the servant out of employment, where the automobile is involved. Cf. *Carroll v. Beard-Laney, Inc.*, 1945, 207 S.C. 339, 35

has been an argument. The prevailing view is for the amusement of it is in itself outside of the employment,³² although in some cases, such as for unauthorized acts, such as for an amount to an unauthorized something which is within

recent California has taken the position that small deviations of employees is so usual and necessary to be regarded as one of the risks of the enterprise, and so within the scope of the employer's liability.

of unusual difficulty in determining whether the servant's deviation from the master's authorized way of doing business is at the point at which the deviation is so great, and the servant has entered the employment in the "detour" and the servant deviates from the master's authorized way of doing business, and later returns to the master's authorized way of doing business. The question turns on the facts.

L.Rev. 217.

1865, 3 H. & C. 602, 159 L.J. 101; *Louisiana Oil Ref. Co.*, 1934, 197 Ark. 997; *Shuck v. Carney*, 1937, 195 Ark. 994, 115 S.W.2d 896; *Herr v. Slane*, 1930, 330 Pa. 129, 198 A. 194; *Bekins Van & Storage Co.*, 1946, 226 N.C. 177, 37 S.E.2d 1037.

Bros. Const. Co., 1923, 23 Col.L.Rev. 644, 716. Much the same idea may be expressed by the question: if the master should send out a search party to find the servant, within what area would they reasonably be expected to look?

Van & Storage Co., 1946, 226 N.C. 177, 37 S.E.2d 1037. Cf. *Vincennes v. 194 Ark. 58, 106 S.W.2d 896*.

and Detour, 1923, 23 Col.L.Rev. 644, 716. Much the same idea may be expressed by the question: if the master should send out a search party to find the servant, within what area would they reasonably be expected to look?

It has been suggested⁴⁵ that such questions ought to be determined by the convenience with which the employer may obtain liability insurance to cover the risk; but as a matter of realistic actuarial practice it appears that this is largely pure theorizing.⁴⁶

Intentional Torts

Early decisions,⁴⁷ adhering to the fiction of an "implied command" of the master, refused to hold him liable for intentional or "wilful" wrongdoing on the part of the servant, on the ground that it could not be implied that such conduct was ever authorized. Under modern theories of allocation of the risk of the servant's misbehavior, it has been recognized that even intentional torts may be so reasonably connected with the employment as to be within its "scope," and the present tendency is to extend the employer's responsibility for such conduct.⁴⁸ Here again space does not permit any extended discussion of the subject.⁴⁹ It may be said, in gen-

eral, that the master is held liable for an intentional tort committed by the servant where its purpose, however misguided, wholly or in part to further the master's business.

Thus he will be held liable where his driver crowds a competitor's bus into a ditch,⁵⁰ or assaults a trespasser to eject him from the bus,⁵¹ or a salesman makes fraudulent statements about the products he is selling,⁵² or defames a competitor⁵³ or disparages his product;⁵⁴ or where the servant resorts to false imprisonment,⁵⁵ or malicious prosecution⁵⁶ for a like purpose. Thus

Liability of an Employer for the Wilful Torts of His Servants, 1968, 45 Chi.Kent L.Rev. 1.

S.E.2d 425 (25 mile trip, 15 miles off route); *M. K. Hall Co. v. Caballero*, Tex.Civ.App.1962, 358 S.W.2d 179 (off route, drunk, picked up girl, stopped on highway to allow her to relieve herself, passed out on seat).

45. Douglas, Vicarious Liability and Administration of Risk, 1929, 38 Yale L.J. 584-594; Smith, Frolic and Detour, 1923, 23 Col.L.Rev. 444, 716.

46. Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 1961, 70 Yale L.J. 554.

47. *McManus v. Crickett*, 1800, 1 East 105, 102 Eng. Rep. 43; *Wright v. Wilcox*, 1838, 19 Wend., N.Y., 343; *Poulton v. London & S. W. R. Co.*, 1867, L.R. 2 Q.B. 534; *Maille v. Lord*, 1868, 39 N.Y. 381.

48. Seavey, Speculations as to "Respondeat Superior," Harvard Legal Essays, 1934, 433, 453; Laski, Basis of Vicarious Liability, 1916, 26 Yale L.J. 105, 118; Notes, 1932, 45 Harv.L.Rev. 348; 1927, 21 Ill. L.Rev. 619. See *Limpus v. London General Omnibus Co.*, 1862, 1 H. & C. 526, 158 Eng.Rep. 993; *Cohen v. Dry Dock E. B. & B. R. Co.*, 1877, 69 N.Y. 170; *Lowe v. Newmarch*, 1866, 12 Allen, Mass., 49; *Osipoff v. City of New York*, 1941, 286 N.Y. 422, 36 N.E.2d 646.

49. See 2 Mechem, Agency, 2d Ed. 1914, §§ 1916-1927; James, Vicarious Liability, 1954, 28 Tulane L.Rev. 161, 187; Seavey, Studies in Agency, 1949, 249 ff.; Second Restatement of Agency, § 245. Brill, The

50. *Limpus v. London General Omnibus Co.*, 1862, 1 H. & C. 526, 158 Eng.Rep. 993.

51. *Pelletier v. Bilbiles*, 1967, 154 Conn. 544, 227 A.2d 251; *Hyde v. Baggett Transp. Co.*, E.D.Tenn.1964, 236 F.Supp. 194; *Tarman v. Southard*, 1953, 92 U.S.App.D.C. 297, 205 F.2d 705; *Joyce v. Southern Bus Lines*, 5 Cir.1949, 172 F.2d 432. Cf. *Florida East Coast R. Co. v. Morgan*, Fla.App.1968, 213 So.2d 632 (assault on picket). See Note, 1967, 9 Ark. L.Rev. 110.

52. *Moynes v. Applebaum*, 1922, 218 Mich. 198, 18 N.W. 241; *Rutherford v. Rideout Bank*, 1938, 11 Cal.2d 479, 80 P.2d 978; *Gleason v. Seaboard Air Line R. Co.*, 1929, 278 U.S. 349; *McCord v. Western Union Tel. Co.*, 1888, 39 Minn. 181, 39 N.W. 313; *Downey v. Finucane*, 1912, 205 N.Y. 251, 96 N.E. 391. See Second Restatement of Agency, § 245, 257-264.

As to negligent misrepresentation, see Note, 1968, 45 Temp.L.Q. 185.

53. *Hooper-Holmes Bureau v. Bunn*, 5 Cir.1947, 160 F.2d 102; *Baker v. Atlantic C. L. R. Co.*, 1939, 160 Fla. 184, 192 So. 606; *Draper v. Hellman Commercial Trust & Sav. Bank*, 1928, 203 Cal. 26, 263 P. 240; *West v. F. W. Woolworth Co.*, 1939, 215 N.C. 211, 1 S.E.2d 546. See Note, 1936, 20 Minn.L.Rev. 805. Cf. *Grist v. Upjohn Co.*, 1962, 368 Mich. 578, 118 N.W.2d 985.

54. *Rosenberg v. J. C. Penney Co.*, 1939, 30 Cal.App.2d 609, 623, 86 P.2d 696, 704; Second Restatement of Agency, §§ 247, 248.

55. *Staples v. Schmid*, 1803, 18 R.I. 224, 26 A. 185; *Cobb v. Simon*, 1903, 119 Wis. 597, 97 N.W. 270; *Gearity v. Strasbourger*, 1909, 133 App.Div. 701, 120 N.Y.S. 257; *Nash v. Sears, Roebuck & Co.*, 1908, 18 Mich.App. 353, 163 N.W.2d 471.

56. *Chicago, R. I. & P. R. Co. v. Gage*, 1918, 136 Ill. 122, 206 S.W. 141; *O'Donnell v. Chase Hotel, Inc.*

er is held liable for
committed by the
however misguided
to further the mas

held liable where his
competitor's bus in
a trespasser to eject
salesman makes fr
ut the products he
competitor⁵³ or di
or where the servan
isonment,⁵⁵ or mal
like purpose. The

oyer for the Wilful To
5 Chi.Kent L.Rev. 1.

General Omnibus Co., 1
ep. 993.

1907, 154 Conn. 544, 227
t Transp. Co., E.D.Tenn.

man v. Southard, 1953,
F.2d 705; Joyce v. Sou

1912, 172 F.2d 432. Cf. *Fla.*
Morgan, Fla.App.1968, 213

cket). See Note, 1967, 9

um, 1922, 218 Mich. 195,
d v. Rideout Bank, 193

78; Gleason v. Seaboard
U.S. 349; McCord v. W

39 Minn. 181, 39 N.W.
1912, 205 N.Y. 251, 96

statement of Agency, 91

resentation, see Note, 196

reau v. Bunn, 5 Cir.1947,
Atlantic C. L. R. Co., 1939

Draper v. Hellman Com
nk, 1928, 203 Cal. 26, 26

Woolworth Co., 1939, 215
e Note, 1936, 20 Minn.

ohn Co., 1962, 368 Mich.

Penney Co., 1939, 30 Cal.
96, 704; Second Restate

1803, 18 R.I. 224, 26 A.
119 Wis. 597, 97 N.W.

r, 1909, 133 App.Div. 7
ears, Roebuck & Co., 19

2d 471.

R Co. v. Gage, 1918, 13
Donnell v. Chase Hotel

179

railway ticket agent who assaults, arrests or
assaults a passenger, in the belief that he
has been given a counterfeit bill for a ticket,
is within the scope of his employment,⁵⁷ al-
though the employer has not authorized such
conduct, or has even expressly prohibited it.
But if he acts from purely personal motives,
because of a quarrel over his wife which is
in no way connected with the employer's in-
terests, he is considered in the ordinary case
to have departed from his employment, and
the master is not liable.⁵⁸ Where the conduct
of the servant is unprovoked, highly unusual,
and quite outrageous, there has been some-
thing of a tendency to find that this in itself
is sufficient to indicate that the motive was
a purely personal one,⁵⁹ but it seems clear
that this cannot hold true in all cases.⁶⁰

44 App. 1965, 388 S.W.2d 489; *Eastman v. Leiser*
Co. 1921, 148 Minn. 96, 181 N.W. 109; *Ruth v. St.*
Louis Transit Co., 1903, 98 Mo.App. 1, 71 S.W. 1055.

5 *Palmer v. Manhattan R. Co.*, 1892, 133 N.Y. 261,
3 N.E. 1001. Accord: *Bergman v. Hendrickson*,
1900, 106 Wis. 434, 82 N.W. 304 (barkeeper attack-
ing customer who refused to pay); *Johnson v. Mon-*
ahan, 1920, 183 Cal. 149, 190 P. 635 (same as to
drunken and noisy customer); *Rice v. Marler*, 1940,
307 Colo. 57, 108 P.2d 868 (taxicab driver assaulting
passenger in argument over attempt to collect fare).

6 *Cary v. Hotel Rueger*, 1954, 195 Va. 980, 81 S.E.
2d 211; *Brazier v. Betts*, 1941, 8 Wash.2d 549, 113
P.2d 34; *Park Transfer Co. v. Lumbermen's Cas.*
Co., App.D.C.1944, 142 F.2d 100; *Georgia Power Co.*
v. Shipp, 1943, 195 Ga. 446, 24 S.E.2d 764; *Sauter*
v. New York Tribune, 1953, 305 N.Y. 442, 113 N.E.
2d 750.

7 *Ochsridner v. Reading Co.*, E.D.Pa.1959, 172 F.
Supp. 830 (sudden and unprovoked assault, "strong-
ly suggestive of personal motivation"); *Averill v.*
Lattrell, 1958, 44 Tenn.App. 56, 311 S.W.2d 812
(fight between baseball players); *Linden v. City*
Car Co., 1941, 239 Wis. 236, 300 N.W. 925 (taxi
driver assaulting one who refused to ride in his
cab); *Craig's Adm'x v. Kentucky Utilities Co.*, 1919,
153 Ky. 274, 209 S.W. 33 (shooting a debtor). Cf.
Western Ry. of Alabama v. Milligan, 1902, 135 Ala.
26, 33 So. 438 (tickling fellow employee).

8 *Davis v. Merrill*, 1922, 133 Va. 69, 112 S.E. 628
(railroad gateman shooting at car); *Jackson v.*
American Tel. & Tel. Co., 1905, 139 N.C. 347, 51 S.
E. 1015 (having plaintiff arrested so as to put poles
on his land while he was in jail).

Pomer Torts 4th Ed. HB-30

Even where the servant's ends are entire-
ly personal, the master may be under such a
duty to the plaintiff that responsibility for
the servant's acts may not be delegated to
him.⁶¹ This is true in particular in those
cases where the master, by contract or other-
wise, has entered into some relation requir-
ing him to be responsible for the protection
of the plaintiff. The employees of a carrier,
for example, would be under a duty to a pas-
senger to exercise reasonable care to protect
him against assaults on the part of third
persons, even for personal motives;⁶² and
they are no less under a duty to protect him
against their own assaults, which is the duty
of the master as well.⁶³ It follows that the
master will be liable even for such entirely
personal torts as the rape of a passenger.⁶⁴
The same is true of innkeepers⁶⁵ and hospi-
tals.⁶⁶

The most difficult questions arise where
the servant, for strictly personal reasons and
not in furtherance of his employment, loses
his temper and attacks the plaintiff in a quar-
rel which arises out of the employment—as

61. Second Restatement of Agency, § 214; Notes,
1932, 45 Harv.L.Rev. 342; 1927, 21 Ill.L.Rev. 619.

62. See *supra*, p. 395.

63. *Korner v. Cosgrove*, 1923, 108 Ohio St. 484, 141
N.E. 267; *Garvik v. Burlington, C. R. & N. R. Co.*,
1906, 131 Iowa 415, 108 N.W. 327; *Southern R. Co.*
v. Beaty, 1925, 212 Ala. 608, 103 So. 658; *Pine*
Bluff & A. R. R. Co. v. Washington, 1915, 116 Ark.
179, 172 S.W. 872.

64. *Co-op. Cab Co. v. Singleton*, 1942, 66 Ga.App. 874,
19 S.E.2d 541; *Berger v. Southern Pac. Co.*, 1936,
144 Cal.App.2d 1, 300 P.2d 170; cf. *Jenkins v. Gen-*
eral Cab Co. of Nashville, 1940, 175 Tenn. 409, 135
S.W.2d 448. The same is almost certainly true as
to other public utilities. *Munick v. City of Dur-*
ham, 1921, 181 N.C. 188, 106 S.E. 665 (water compa-
ny).

65. *Danile v. Oak Park Arms Hotel, Inc.*, 1965, 55
Ill.App.2d 2, 203 N.E.2d 706; *Clancy v. Barker*,
1904, 71 Neb. 83, 98 N.W. 440, affirmed 103 N.W.
446; cf. *Belike v. Carroll*, 1909, 51 Wash. 395, 98
P. 1119 (saloon). But cf. *Smother v. Welch & Co.*
House Furnishing Co., 1925, 310 Mo. 144, 274 S.W.
678 (storekeeper not liable for rape by salesman).

66. *Vannah v. Hart Private Hospital*, 1917, 228 Mass.
132, 117 N.E. 328.

where, for example, a truck driver collides with the plaintiff, and an altercation follows. Here, unless some non-delegable duty can be found, the older rule denied recovery, and this is still the holding of the majority of the decisions.⁶⁷ There has been a tendency in the later cases, however, to allow recovery on the ground that the employment has provided a peculiar opportunity and even incentive for such loss of temper;⁶⁸ and there have been California decisions⁶⁹ which have found something of an analogy to the workmen's compensation acts, and have considered that the intentional misconduct arises out of and in the course of the employment.

67. Thus in the collision situation stated: *Johnson v. M. J. Uline Co.*, Mun.App.D.C.1949, 40 A.2d 260; *Georgia Power Co. v. Shipp*, 1943, 195 Ga. 446, 24 S.E.2d 764; *Plotkin v. Northland Transp. Co.*, 1939, 204 Minn. 422, 283 N.W. 758; *Sauter v. New York Tribune*, 1953, 305 N.Y. 442, 113 N.E.2d 790; *State ex rel. Gosselin v. Trimble*, 1931, 328 Mo. 760, 41 S.W.2d 801. Cf. *Dias v. Associates Loan Co.*, Fla. 1957, 99 So.2d 279 (collector entered residence and assaulted plaintiff).

68. *Fields v. Sanders*, 1947, 29 Cal.2d 834, 180 P.2d 684; *United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Humphreys*, 1962, 203 Va. 781, 127 S.E.2d 98, cert. denied 371 U.S. 954 (strike violence by union representatives); *Dilli v. Johnson*, 1939, 71 U.S.App.D.C. 139, 107 F.2d 669; *Tri-State Coach Corp. v. Walsh*, 1948, 188 Va. 299, 49 S.E.2d 363; and cf. *Bowman v. Home Life Ins. Co.*, of America, 3 Cir.1957, 243 F.2d 331, where an insurance company's field underwriter represented himself to be a doctor, and made an indecent examination of an applicant for insurance. Also *Andrews v. Norvell*, 1941, 65 Ga.App. 241, 15 S.E.2d 808.

69. *Fields v. Sanders*, 1947, 29 Cal.2d 834, 180 P.2d 684; *George v. Bekins Van & Storage Co.*, 1949, 33 Cal.2d 834, 205 P.2d 1037; *Carr v. Wm. C. Crowell Co.*, 1946, 28 Cal.2d 652, 171 P.2d 5; *Caldwell v. Farley*, 1955, 134 Cal.App.2d 84, 285 P.2d 294. See *Small, The Effect of Workmen's Compensation Trends on Agency-Tort Concepts of Scope of Employment*, 1953, 11 NACCA L.J. 19, 12 NACCA L.J. 21.

Much the same result was accomplished in *Ira S. Bushey & Sons, Inc. v. United States*, 2 Cir.1968, 398 F.2d 167, where the court rejected the "motive" test and held that damage to a ship by a drunken sailor was one of the "characteristic" risks of his employment. See Note, 1969, 82 Harv.L.Rev. 1562.

Dangerous Instrumentalities

In a small group of cases a master who has entrusted his servant with an instrumentality which is highly dangerous in itself, or is capable of being misused in some way involving a high degree of risk to others, has been held liable when the servant has misused it for a purpose entirely his own.⁷⁰ Thus the rule has been applied in the case of steam locomotives,⁷¹ torpedoes,⁷² and poisons.⁷³ The cases indicate that the master will be held liable only while the servant is engaged in his employment, and while so engaged has custody of the instrumentality.⁷⁴ The doctrine has been rejected by perhaps the greater number of courts.⁷⁵ It is not very difficult to find a justification for it in the case of things such as dynamite or vicious animals, which are

70. See *Horack, The Dangerous Instrument Doctrine*, 1917, 26 Yale L.J. 224.

71. *Alsever v. Minneapolis & St. L. R. Co.*, 1902, 181 Iowa 338, 88 N.W. 841; (blowing off steam to frighten child); *Toledo, W. & W. R. Co. v. Harmon*, 1868, 47 Ill. 298 (similar facts); *Stewart v. Cary Lumber Co.*, 1907, 146 N.C. 47, 59 S.E. 545 (blowing whistle to "make the mule dance"). Cf. *Danbeck v. New Jersey Traction Co.*, 1895, 57 N.J.L. 463, 38 A. 1038 (electric car).

In *Southern Cotton Oil Co. v. Anderson*, 1920, 80 Fla. 441, 86 So. 629, this rule was applied to an automobile; and this has continued to be the Florida doctrine. All other courts have rejected such an application. See for example *Terrett v. Wray*, 1937, 177 Tenn. 448, 105 S.W.2d 93.

72. *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 1892, 45 Ohio St. 11, 12 N.E. 451; *Euting v. Chicago & N. W. R. Co.*, 1902, 116 Wis. 13, 92 N.W. 358.

73. *Smith's Adm'x v. Middleton*, 1902, 112 Ky. 588, 6 S.W. 388.

74. *Obertoni v. Boston & M. R. Co.*, 1904, 186 Mass. 481, 71 N.E. 980; *Johnson v. Chicago, R. I. & P. R. Co.*, 1913, 157 Iowa 738, 141 N.W. 430. See *Horack, The Dangerous Instrument Doctrine*, 1917, 26 Yale L.J. 224.

75. *American Ry. Exp. Co. v. Davis*, 1922, 152 Ark. 258, 238 S.W. 50, 1063 (pistol); *Galveston, H. & A. R. Co. v. Currie*, 1906, 100 Tex. 136, 96 S.W. 200 (compressed air); *Vadyak v. Lehigh & N. E. R. Co.*, 1935, 318 Pa. 580, 179 A. 435 (steam locomotive); *Thomas-Kincannon-Elkin Drug Co. v. Hendrix*, 1936, 175 Miss. 767, 168 So. 287 (powerful laxative). See also second Restatement of Agency, § 238, Comment d.

cases a master who with an instrument generous in itself, or is in some way involved to others, has been found to have misused it to his own.⁷⁰ Thus the case of steam locomotives and poisons.⁷³ The master will be held liable if he is engaged in his business, and so engaged has caused the injury.⁷⁴ The doctrine is perhaps the greater number of cases very difficult to apply in the case of things owned by wild animals, which

s & St. L. R. Co., 1902, 80 N.J.L. 461; (blowing off steam).
W. & W. R. Co. v. Har-
r facts); Stewart v.
C. 47, 59 S.E. 545 (blow-
le dance"). Cf. Danbe-
o., 1895, 57 N.J.L. 461.
v. Anderson, 1920, 80
was applied to an auto-
nued to be the Florida
ave rejected such an a-
Terrett v. Wray, 1937

th, C. & St. L. R. Co.,
451; Euting v. Chica
s. 13, 92 N.W. 358.
leton, 1902, 112 Ky. 58

M. R. Co., 1904, 186
n v. Chicago, R. I. 41
41 N.W. 430. See Ho
nt Doctrine, 1917, 28

v. Davis, 1922, 152
istrict); Galveston, H.
100 Tex. 136, 96 S.W.
v. Lehigh & N. E. R.
435 (steam locomot
Drug Co. v. Hen
o. 287 (powerful laxa
gency. § 238, Comm

extremely dangerous in themselves that strict liability may properly be imposed upon the enterprise which makes use of them, and the employer would be liable even if they were entrusted to an independent contractor.⁷⁰ The courts which have extended it beyond such instrumentalities are pursuing a policy of holding the enterprise responsible for the danger, which goes beyond the limitations usually imposed upon strict liability at the present time. The justification for it must lie in the especial opportunity and temptation afforded to the servant to misuse the instrumentality under the conditions likely to arise in the employment—or in other words, again, the foreseeability and indeed especial likelihood of the tort.

Since an agent who is not a servant is not subject to any right of control by his employer over the details of his physical conduct, the responsibility ordinarily rests upon the agent alone, and the principal is not liable for the torts which he may commit.⁷⁷ There are, however, a number of situations in which such liability may exist. These include all cases in which a tort may be based upon the apparent authority of the agent to act for his principal,⁷⁸ or in which a tort such

See *Cf. Baker v. Snell*, [1908] 2 K.B. 352, 825, 77 L.J. K.B. 1090 (vicious animal); *Stapleton v. Butensky*, 1919, 188 App.Div. 237, 177 N.Y.S. 18 (same). As to the similarity of the rule as to independent contractors, see *Montgomery v. Gulf Refining Co. of Louisiana*, 1929, 168 La. 73, 121 So. 578.

■ Second Restatement of Agency, § 250; *Great American Indemnity Co. v. Fleniken*, 5 Cir., 1943
 134 F.2d 208; *Hurla v. Capper Publications*, 1939
 140 Kan. 369, 87 P.2d 552; *Vert v. Metropolitan Life Ins. Co.*, 1938, 342 Mo. 629, 117 S.W.2d 252.

■ *Rhone v. Try Me Cab. Co.*, 1933, 62 App.D.C. 201.
 ■ *F.2d 834*; *Middleton v. Frances*, 1934, 257 Ky.
 ■ 77 S.W.2d 425; *Standard Oil Co. v. Gentry*,
 1941, 241 Ala. 62, 1 So.2d 29; *Acherman v. Robert*
 ■ 1942, 240 Wis. 421, 3 N.W.2d 723. See Note
 ■ 1941, 11 Boston U.L.Rev. 85; 1938, 22 Minn.L.Rev.
 341.

as deceit occurs in the course of a consensual transaction between the agent and the injured person.⁷⁹ Thus a client may be made liable for the improper institution of legal proceedings by his attorney,⁸⁰ and a seller of land or goods may, in most states, be subject to an action of deceit for the fraud of his agent committed in the course of the sale.⁸¹ In such cases liability is based wholly upon the relation of principal and agent, but it is subject, in general, to the same limitations as those placed upon the liability of a master for the tort of a servant.⁸² Thus it must appear either that the representations made were within the actual or apparent authority of the agent,⁸³ or of a kind reasonably to be expected by the employer in connection with the transaction,⁸⁴ or that the agent has been placed by the principal in a position which enables him to commit the fraud, while apparently acting within his authority.⁸⁵

The field of vicarious liability is a very large one, and any full discussion of it must be left to texts on the law of master and servant, agency, partnership and the like. The space here available permits only the briefest review of some of the more common problems which have arisen in tort cases.

79. Second Restatement of Agency, §§ 256-261. See Horack, Vicarious Liability for Fraud and Deceit in Iowa, 1931, 16 Iowa L.Rev. 361.

80. *Otto v. Levy*, 1935, 244 App.Div. 349, 279 N.Y.S. 462; Second Restatement of Agency, § 253.

81. *Heidegger v. Burg*, 1917, 137 Minn. 53, 162 N.W. 889; *Howe v. Johnson*, 1920, 236 Mass. 379, 128 N. E. 634; *Moynes v. Applebaum*, 1922, 218 Mich. 198, 187 N.W. 241; *Gulf Electric Co. v. Fried*, 1929, 218 Ala. 684, 119 So. 685.

82. Second Restatement of Agency, §§ 251-262.

83. Second Restatement of Agency, § 257.

84. Second Restatement of Agency, § 238.

85. Second Restatement of Agency, § 261. Cf. *Wise v. Western Union Tel. Co.*, 1934, 6 W.W.Harr. 155, Del., 172 A. 757; *Ripon Knitting Works v. Railway Express Agency*, 1932, 207 Wis. 452, 240 N.W. 840.

71. INDEPENDENT CONTRACTORS

For the torts of an independent contractor, as distinguished from a servant,⁸⁶ it has long been said to be the general rule that there is no vicarious liability upon the employer.⁸⁷ This doctrine developed, both in English⁸⁸ and in American⁸⁹ law at a time when such liability for the torts of a servant was well established, and it seems to have been, in its inception, something of a retreat from the rigors of that rule. Various reasons have been advanced for it, but the one most commonly accepted⁹⁰ is that, since the employer

has no right of control over the manner in which the work is to be done, it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and administering and distributing it.

Against this argument, it has been contended⁹¹ that the enterprise is still the employer's, since he remains the person primarily to be benefited by it; that he selects the contractor, and is free to insist upon one who is financially responsible, and to demand indemnity from him, and that the insurance necessary to distribute the risk is properly a cost of his business. Upon this basis, the prediction has been made⁹² that ultimately the "general rule" will be that the employer is liable for the negligence of an independent contractor, and that he will be excused only in a limited group of cases where he is not in a position to select a responsible contractor, or the risk of any harm to others from the enterprise is obviously slight. The English courts have taken steps in this direction,⁹³ until the position of the ordinary independent contractor in England approaches that of a servant. The American courts, have not gone so far, and have continued to repeat the "general rule" of non-liability with exceptions, whose very number is sufficient to cast doubt upon the validity of the rule.⁹⁴

86. See *supra*, § 70.

87. *Globe Indemnity Co. v. Victill Corp.*, 1956, 208 Md. 573, 119 A.2d 423; *Turner v. Lewis*, Ky. 1955, 282 S.W.2d 624; *Pickett v. Waldorf System*, 1922, 241 Mass. 569, 136 N.E. 64; *Kruse v. Wiegand*, 1931, 204 Wis. 195, 235 N.W. 426; *Jourdenais v. Hayden*, 1932, 104 Vt. 215, 158 A. 664. See McCleary, *Liability of an Employer for the Negligence of an Independent Contractor in Missouri*, 1933, 18 St. Louis L.Rev. 289; Notes, 1930, 39 Yale L.J. 871; 1956, 44 Cal.L.Rev. 762.

88. In *Bush v. Steinman*, 1799, 1 Bos. & P. 404, 121 Eng.Rep. 978, the employer was held liable, despite "great difficulty in stating with accuracy the grounds for liability." But in *Laugher v. Pointer*, 1826, 5 B. & C. 547, 108 Eng.Rep. 204, the employer was held not liable for the negligence of a hired driver, and this decision was followed in subsequent cases. *Quarman v. Burnett*, 1840, 6 M. & W. 499, 151 Eng.Rep. 509; *Milligan v. Wedge*, 1840, 12 Ad. & El. 737, 113 Eng.Rep. 993; *Reedie v. London & N. W. R. Co.*, 1849, 4 Ex. 244, 154 Eng.Rep. 1201.

89. Early cases held the employer liable. *Lowell v. Boston & L. R. Corp.*, 1839, 23 Pick., Mass., 24; *Stone v. Cheshire R. Corp.*, 1839, 19 N.H. 427. Later decisions to the contrary apparently were influenced by the English cases. *Blake v. Ferris*, 1851, 5 N.Y. 48; *Hilliard v. Richardson*, 1855, 3 Gray, Mass., 349; *Painter v. City of Pittsburgh*, 1863, 46 Pa. 213. See Note, 1902, 2 Col.L.Rev. 112.

90. See Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 1935, 10 Ind.L.J. 494; Morris, *The Torts of an Independent Contractor*, 1935, 29 Ill.L.Rev. 339; Douglas, *Vicarious Liability and Administration of Risk*, 1929, 38 Yale L.J. 584, 594; Steffen, *Independent Contractor and the Good Life*, 1935, 2 U.Chi.L.Rev. 501; Brown, *Liability for the Torts of an Independent Contractor in West Virginia*, 1953, 55 W.Va.L.Rev. 216; Ferson, *Liability of Employers for Misrepresentations Made by Independent Contractors*, 1949, 3 Vand.L.Rev. 1; James, *Vicarious Liability*, 1954,

28 Tulane L.Rev. 161. Also N.Y. Law Revision Comm'n Report, 1939, 411-688.

91. See the articles cited in the preceding note.

92. Morris, *The Torts of an Independent Contractor*, 1935, 29 Ill.L.Rev. 339. But see, to the contrary, Steffen, *Independent Contractor and the Good Life*, 1935, 2 U.Chi.L.Rev. 501, pointing out the difficulties involved.

93. See Chapman, *Liability for the Negligence of Independent Contractors*, 1934, 50 L.Q.Rev. 71; Williams, *Liability for Independent Contractors*, [1934] Camb.L.J. 180; Jolowicz, *Liability for Independent Contractors in the English Common Law—A Suggestion*, 1957, 9 Stan.L.Rev. 690; Charlesworth, *Law of Negligence*, 1938, 58-66.

94. See Note, 1930, 39 Yale L.J. 861. "Indeed it would be proper to say that the rule is now prima-

and the Restatement of Torts⁹⁵ has devoted no less than twenty-four sections to the list.

The exceptions making the employer liable for negligence are so numerous and shade into one another; and the cases are so comparatively rare in which at least one of them do not appear. The method of decision then has been almost invariably to state and rely upon both or all, as alternative or cumulative grounds. The various categories of situations can be roughly grouped as follows:

Liability of the Employer

In the first place, quite apart from any question of vicarious responsibility, the employer may be liable for any negligence of his employees in connection with the work to be done. Where there is a foreseeable risk of harm to others unless precautions are taken, it is the duty to exercise reasonable care to select competent,⁹⁶ experienced,⁹⁷ and careful⁹⁸ factor with the proper equipment,⁹⁹ and to provide, in the contract or otherwise, for

such precautions as reasonably appear to be called for.¹ So far as he in fact gives directions for the work,² furnishes equipment for it,³ or retains control over any part of it,⁴ he is required to exercise reasonable care for the protection of others; and he must likewise interfere to put a stop to any unnecessarily dangerous practices of which he becomes informed,⁵ and make a reasonable inspection of the work after it is completed,

such precautions as reasonably appear to be called for.¹

1. *Mountain States Tel. & Tel. Co. v. Kelton*, 1955, 79 Ariz. 126, 285 P.2d 168 (failure to warn against underground cable); *A. M. Holter Hardware Co. v. Western Mortgage & W. T. Co.*, 1915, 51 Mont. 94, 149 P. 489; *State Highway & Public Works Comm'n v. Diamond S.S. Transp. Corp.*, 1946, 226 N.C. 371, 38 S.E.2d 214; *Fegles Const. Co. v. McLaughlin Const. Co.*, 9 Cir.1953, 205 F.2d 637; *Whelan v. Shivek*, 1950, 326 Mass. 142, 93 N.E.2d 393.

2. *Ellis v. Sheffield Gas Co.*, 1853, 2 El. & Bl. 767, 118 Eng.Rep. 955; *Posner v. Paul's Trucking Service, Inc.*, 1 Cir. 1967, 380 F.2d 757; *Keldon v. Steiner*, 1939, 138 Pa.Super. 66, 10 A.2d 19 (undue risk); *Besner v. Central Trust Co. of New York*, 1921, 230 N.Y. 357, 130 N.E. 577 (dangerous method); *Humphries v. Kendall*, 1937, 195 Ark. 45, 111 S.W.2d 492 (interference with the work).

3. *Johnson v. J. I. Case Threshing Mach. Co.*, 1916, 193 Mo.App. 198, 182 S.W. 1089; *Brady v. Jay*, 1904, 111 La. 1071, 36 So. 132; *Willis v. San Bernardino Lumber & Box Co.*, 1927, 82 Cal.App. 751, 256 P. 224.

4. *Terry v. A. P. Green Fire Brick Co.*, E.D.Ark. 1958, 164 F.Supp. 184; *Bergquist v. Penterman*, 1957, 46 N.J.Super. 74, 134 A.2d 20; *McGrath v. Pennsylvania Sugar Co.*, 1925, 282 Pa. 265, 127 A. 780; *Willis v. San Bernardino Lumber & Box Co.*, 1927, 82 Cal.App. 751, 256 P. 224; *Fluor Corp. v. Sykes*, 1966, 3 Ariz.App. 211, 413 P.2d 270, rehearing denied 3 Ariz.App. 599, 416 P.2d 610. But this must be more than the mere general supervisory right to object to something unsatisfactory, which is retained by nearly every employer. *McDonald v. Shell Oil Co.*, 1955, 44 Cal.2d 785, 285 P.2d 902.

Such cases of course shade into those in which such complete control is retained that the employee is regarded as a servant, and the distinction seldom is made clear.

5. *United States v. Standard Oil Co. of New Jersey*, D.Md.1919, 258 F. 697, affirmed 4 Cir., 1920, 264 F. 66; *Bergen v. Morton Amusement Co.*, 1917, 178 App.Div. 400, 165 N.Y.S. 348; *La'ab v. South Unit Jehovah's Witnesses*, 1950, 232 Minn. 259, 45 N.W.2d 403.

1. *Hunt v. McNamee*, 4 Cir. 1905, 141 F. 293; *Mooney v. Stainless, Inc.*, 6 Cir. 1964, 338 F.2d 407, cert. denied 381 U.S. 925; *Norwalk Gaslight Co. v. Borough of Norwalk*, 1893, 63 Conn. 495, 28 A. 32; *Board of Comm'rs of Wabash County v. Carson*, 1889, 120 Ind. 426, 22 N.E. 134; *Baker v. Scott County Milling Co.*, 1929, 323 Mo. 1089, 20 S.W.2d 494.

2. *Ellis & Lewis v. Warner*, 1929, 180 Ark. 53, 20 S. 320; *Mullich v. Brocker*, 1905, 119 Mo.App. 97 S.W. 349.

to be sure that it is safe.⁶ If the work is done on the employer's own land, he will be required to exercise reasonable care to prevent activities or conditions which are dangerous to those outside of it,⁷ or to those who enter it as invitees.⁸ In all of these cases, he is liable for his personal negligence, rather than that of the contractor.

Non-delegable Duty

A different approach, adopted in several of the exceptions to the general rule of non-liability, has been to hold that the employer's enterprise, and his relation to the plaintiff, are such as to impose upon him a duty which cannot be delegated to the contractor. It has been mentioned earlier⁹ that there are numerous situations in which it may be negligence to rely upon another person, and the defendant is not relieved of the obligation of taking reasonable precautions himself. But the cases of "non-delegable duty" go further, and hold the employer liable for the negligence of the contractor, although he has himself done everything that could reason-

ably be required of him. They are the cases of vicarious liability.

Such a duty may be imposed by statute, by contract,¹¹ by franchise or charter,¹² or by the common law.¹³ The catalogue is long: the duty of a carrier to transport passengers in safety,¹⁴ of a railroad to keep its tracks properly¹⁵ or to maintain crossings,¹⁶ and of a municipality to keep streets in repair;¹⁷ the duty to afford

6. *Hickman v. Toole*, 1926, 35 Ga.App. 697, 134 S.E. 635; *McGuire v. Hartford Bulck Co.*, 1944, 131 Conn. 417, 40 A.2d 269; *Bethlehem Steel Co. v. Variety Iron & Steel Co.*, 1921, 139 Md. 313, 115 A. 59; *Pulaski Housing Authority v. Smith*, 1955, 39 Tenn.App. 213, 282 S.W.2d 213; *Rumetsch v. John Wanamaker, N. Y., Inc.*, 1915, 216 N.Y. 379, 110 N.E. 760. Cf. *Sheridan v. Rosenthal*, 1923, 206 App.Div. 279, 201 N.Y.S. 169 (holding that under the circumstances there was a duty to inspect the work as it proceeded).

7. *Inhabitants of Rockport v. Rockport Granite Co.*, 1901, 177 Mass. 246, 58 N.E. 1017; *Wright v. Tudor City Twelfth Unit*, 1938, 276 N.Y. 303, 12 N.E.2d 307; *United States v. Standard Oil Co., of New York*, D.C.Md.1919, 258 F. 697, affirmed, 1919, 264 F. 66; *Lamb v. South Unit Jehovah's Witnesses*, 1950, 232 Minn. 259, 45 N.W.2d 403; *Probst v. Hinesley*, 1909, 133 Ky. 64, 117 S.W. 389.

8. *Lineaweaver v. Wanamaker*, 1930, 299 Pa. 45, 149 A. 91; *Thornton v. Maine State Ag. Society*, 1903, 97 Me. 108, 53 A. 979; *Stickel v. Riverview Sharpshooters' Park Co.*, 1911, 250 Ill. 452, 95 N.E. 445; *Smith v. Cumberland County Ag. Society*, 1913, 163 N.C. 340, 79 S.E. 632; *Hartman v. Tennessee State Fair Ass'n*, 1915, 134 Tenn. 149, 183 S.W. 733.

9. See *supra*, p. 177.

10. *Snyder v. Southern Cal. Edison Co.*, 1955, 44 Cal.2d 793, 285 P.2d 912; *Blount v. Tow Fong*, 1911, R.I. 453, 138 A. 52; *Semanchuck v. Fifth Avenue Thirty-Seventh St. Corp.*, 1943, 290 N.Y. 412, 4 E.2d 507; *John Griffiths & Son Co. v. Nash Fire Proofing Co.*, 1923, 310 Ill. 331, 141 N.E. 263.

11. *Colgrove v. Smith*, 1894, 102 Cal. 220, 36 P. 673. Particularly where the contract calls for the employer to do the work himself. *Radel v. Bar*, 1912, 147 Ky. 506, 145 S.W. 155; *Maryland Dring & Contracting Co. v. Maryland*, 4 Cir. 1917, F. 11; *Mahany v. Kansas City R. Co.*, Mo.1922, S.W. 16; *Sciolaro v. Asch*, 1910, 198 N.Y. 77, E. 263.

12. *Dixie Stage Lines v. Anderson*, 1931, 222 Ill. 673, 134 So. 23; *Cotton v. Ship-By-Truck Co.*, 337 Mo. 270, 85 S.W.2d 80; *City of Chicago v. Leach*, 1904, 212 Ill. 9, 72 N.E. 46; *Murray v. Le Valley R. Co.*, 1895, 66 Conn. 512, 34 A. 506; *ford v. Pawtucket St. R. Co.*, 1896, 19 R.I. 53, A. 67. See Note, 1930, 79 U.Pa.L.Rev. 90. Cf. *De v. Youngren*, 1956, 12 Ill.App.2d 198, 138 N.E.2d 198.

13. *Woodman v. Metropolitan R. Co.*, 1889, 149 Mo. 335, 21 N.E. 482; *Corrigan v. Elsinger*, 1900, Minn. 42, 83 N.W. 492. See Note, 1965, 44 N.Y. Rev. 242.

14. *Dixie Stage Lines v. Anderson*, 1931, 222 Ill. 673, 134 So. 23. Or freight. *Ell v. Murphy*, 39 Cal.2d 598, 248 P.2d 756.

15. *Rockford, R. I. & St. L. R. Co. v. Heflin*, 1871, Ill. 366; *Chicago, K. & W. R. Co. v. Hutchins*, 1891, 45 Kan. 186, 25 P. 576. Compare, as to crossings, *Boucher v. New York, N. H. & H. R. Co.*, 196 Mass. 355, 82 N.E. 15; *Choctaw, O. & W. Co. v. Wilker*, 1906, 16 Okl. 384, 84 P. 1086.

16. *Boucher v. New York, N. H. & H. R. Co.*, 196 Mass. 355, 82 N.E. 15; *Choctaw, O. & W. Co. v. Wilker*, 1906, 16 Okl. 384, 84 P. 1086.

17. *Storrs v. City of Utica*, 1858, 17 N.Y. 104; *Ell v. City of Waterloo*, 1909, 144 Iowa 689, 123 W. 346; *City of Baltimore v. Leonard*, 1917, Md. 621, 99 A. 891; *City of Glasgow v. Gillespie*, 1902, 113 Ky. 140, 67 S.W. 381. See *Hepburn Liability of Municipal Corporations for Negligence*.

by are thus can
sed by statute
charter,¹² or b
alogue is a lo
to transport
ailroad to fence
maintain sa
ality to keep
to afford later

Co., 1955, 44 Cal.
Fong, 1927, 44
k v. Fifth Ave.
90 N.Y. 412, 49 N.
n Co. v. National
331, 141 N.E. 73
al. 220, 36 P. 411
calls for the em-
Radel v. Borches
Maryland Dredg-
d, 4 Cir. 1919, 208
Co., Mo. 1923, 254
198 N.Y. 77, 91 N.

n. 1931, 222 Ala.
y-Truck Co., 1935,
f Chicago v. Mur-
Murray v. Lehigh
34 A. 506; San-
6, 19 R.I. 537, 35
Rev. 90. Cf. Louis
8, 138 N.E.2d 696
n. 1889, 149 Mass.
Hsinger, 1900, 81
v. 1965, 44 N.C.L.

n. 1931, 222 Ala.
y-Truck Co., 1935,
f Chicago v. Mur-
Murray v. Lehigh
34 A. 506; San-
6, 19 R.I. 537, 35
Rev. 90. Cf. Louis
8, 138 N.E.2d 696
n. 1889, 149 Mass.
Hsinger, 1900, 81
v. 1965, 44 N.C.L.

n. 1931, 222 Ala.
y-Truck Co., 1935,
f Chicago v. Mur-
Murray v. Lehigh
34 A. 506; San-
6, 19 R.I. 537, 35
Rev. 90. Cf. Louis
8, 138 N.E.2d 696
n. 1889, 149 Mass.
Hsinger, 1900, 81
v. 1965, 44 N.C.L.

n. 1931, 222 Ala.
y-Truck Co., 1935,
f Chicago v. Mur-
Murray v. Lehigh
34 A. 506; San-
6, 19 R.I. 537, 35
Rev. 90. Cf. Louis
8, 138 N.E.2d 696
n. 1889, 149 Mass.
Hsinger, 1900, 81
v. 1965, 44 N.C.L.

n. 1931, 222 Ala.
y-Truck Co., 1935,
f Chicago v. Mur-
Murray v. Lehigh
34 A. 506; San-
6, 19 R.I. 537, 35
Rev. 90. Cf. Louis
8, 138 N.E.2d 696
n. 1889, 149 Mass.
Hsinger, 1900, 81
v. 1965, 44 N.C.L.

n. 1931, 222 Ala.
y-Truck Co., 1935,
f Chicago v. Mur-
Murray v. Lehigh
34 A. 506; San-
6, 19 R.I. 537, 35
Rev. 90. Cf. Louis
8, 138 N.E.2d 696
n. 1889, 149 Mass.
Hsinger, 1900, 81
v. 1965, 44 N.C.L.

v. Heflin, 1872, 65
o. v. Hutchinson,
pare, as to cross-
& H. R. Co., 1907,
law, O. & W. R.
v. 1086.

H. R. Co., 1907,
law, O. & W. R.
v. 1086.

N.Y. 104; Prow-
Iowa 689, 123 N.
sonard, 1917, 129

gow v. Gillenwa-
1. See Hepburn
ns for Negligence

to adjoining land,¹⁸ to refrain from
ing or endangering the public high-
keep premises reasonably safe for
visitors,²⁰ to provide employees with
place to work;²¹ the duty of a landlord
tain common passageways,²² to make
according to covenant,²³ or to use
care in making them,²⁴ and no doubt

Independent Street Contractors, 1930, 6
Dame Lawyer 55. The same rule has been
to the state, where it can be sued. Saari v.
1953, 203 Misc. 859, 119 N.Y.S.2d 507, af-
1953, 282 App.Div. 526, 125 N.Y.S.2d 507.

Sharam v. Investment Underwriters, 1943, 58
App.2d 346, 136 P.2d 363; Kolodkin v. Griffin,
87 Ga.App. 725, 75 S.E.2d 197; Levi v.
1953, 201 Md. 575, 95 A.2d 322; Law v.
1952, 136 W.Va. 761, 68 S.E.2d 452; Davis
1903, 133 N.C. 325, 45 S.E. 654.

Globe Indemnity Co. v. Schmitt, 1944, 142 Ohio
535, 53 N.E.2d 790; Brown Hotel Co. v. Size-
1946, 303 Ky. 431, 197 S.W.2d 911; May v.
1948, 137 N.J.L. 324, 59 A.2d 823; Campus
1936, 122 Conn. 14, 187 A. 29; Magay
Clafin-Sumner Coal Co., 1926, 257 Mass. 244, 153
E. 534.

Blancher v. Bank of California, 1955, 47 Wash.2d
236 P.2d 92; Besner v. Central Trust Co. of New
York, 1921, 230 N.Y. 357, 130 N.E. 577; Lineaweav-
v. John Wanamaker, Inc., 1930, 299 Pa. 45, 149
91; Daly v. Bergstedt, 1964, 267 Minn. 244, 126
W.2d 242; Modlin v. Washington Ave. Food Cen-
ter, Fla.App.1965, 178 So.2d 596, cert. denied 231
So.2d 70, quashed, cause remanded 205 So.2d 295,
reformed to 208 So.2d 862.

Myers v. Little Church by the Side of the Road,
1961, 37 Wash.2d 897, 227 P.2d 165; Webb v. Old
ham, Inc., 4 Cir. 1969, 416 F.2d 223. Cf. Van Ars-
dale v. Hollinger, 1968, 68 Cal.2d 245, 66 Cal.Rptr.
437 P.2d 508 (marking lines on busy street).

Brown v. George Pepperdine Foundation, 1943, 23
Cal.2d 256, 143 P.2d 929; Koskoff v. Goldman, 1912,
Conn. 415, 85 A. 588; Cramblitt v. Percival-Por-
ter Co., 1916, 176 Iowa 733, 158 N.W. 541; Hussey
Long Dock R. Co., 1924, 100 N.J.L. 380, 126 A.

Peerless Mfg. Co. v. Bagley, 1901, 126 Mich. 225,
N.W. 568; Vitale v. Duerbeck, 1933, 332 Mo.
104, 62 S.W.2d 559; Paltey v. Egan, 1910, 200 N.Y.
93 N.E. 207.

Arlington Realty Co. v. Lawson, 1934, 228 Ala.
153 So. 425; Bailey v. Zlotnick, 1945, 80 U.S.
D.C. 117, 149 F. 505; Covington Co. v. Masonic

several others.²⁵ The owner of land or a
building who entrusts repairs or other work
on it to a contractor remains liable for any
negligence injuring those on or outside the
land, while he retains possession during the
progress of the work,²⁶ or resumes it after
completion,²⁷ but not while he has vacated
the premises during the work.²⁸

It is difficult to suggest any criterion by
which the non-delegable character of such du-
ties may be determined, other than the con-
clusion of the courts that the responsibility
is so important to the community that the em-
ployer should not be permitted to transfer
it to another. So far as they may be willing
to broaden the category in the future, the
law may approach an ultimate rule that any
duty which can be found to rest upon the em-

Temple Co., 1917, 176 Ky. 729, 197 S.W. 420; Liv-
ingston v. Essex Inv. Co., 1941, 219 N.C. 416, 14
E.2d 489; Rubin v. Girard Trust Co., 1944, 154 Va.
Super. 257, 35 A.2d 601.

25. California has applied this to the statutory duty
to have automobile brakes in good operating condi-
tion. Maloney v. Rath, 1968, 69 Cal.2d 442, 71 Cal.
Rptr. 897, 445 P.2d 513; Dutcher v. Weber, 1969,
275 Cal.App.2d 1078, 80 Cal.Rptr. 378. See Note,
1969, 14 Vill.L.Rev. 560.

26. E. R. Harding Co. v. Paducah St. R. Co., 1926,
208 Ky. 728, 271 S.W. 1046; Lineaweaver v. John
Wanamaker, Inc., 1930, 299 Pa. 45, 149 A. 91; S.
H. Kress & Co. v. Reaves, 4 Cir. 1936, 85 F.2d 915,
cert. denied 299 U.S. 616; De Palma v. Weinman,
1909, 15 N.M. 68, 103 P. 782; Walker v. Strosni-
der, 1910, 67 W.Va. 39, 67 S.E. 1087. The distinc-
tion between repair and original construction made
by § 422 of the First Restatement of Torts is sim-
ply not borne out by the cases, and is abandoned by
the Second Restatement, § 422, Comment b.

27. Connolly v. Des Moines Inv. Co., 1905, 130 Iowa
633, 105 N.W. 400; Cork v. Blossom, 1894, 162
Mass. 330, 38 N.E. 495; Wilkinson v. Detroit Steel
& Spring Works, 1888, 73 Mich. 405, 41 N.W. 490;
McCrorey v. Thomas, 1909, 109 Va. 373, 63 S.E.
1011; Walker v. Strosnider, 1910, 67 W.Va. 39, 67
S.E. 1087.

28. Prest-o-lite Co. v. Skeel, 1914, 182 Ind. 593, 106
N.E. 365; Burke v. Ireland, 1901, 166 N.Y. 305, 59
N.E. 914; Csaranko v. Robilt, Inc., 1967, 93 N.J.Su-
per. 428, 226 A.2d 43; Boswell v. Laird, 1857, 8 Cal.
469.

ployer himself cannot be delegated to an independent contractor.²⁹

"Inherently Dangerous" Activities

The leading English case of *Bower v. Peate*,³⁰ in which the foundation of the plaintiff's building was undermined by an excavation, adopted still another approach, saying that the employer would be liable for the negligence of the contractor if, in the course of the work, injurious consequences might be expected to result "unless means are taken to prevent them." This gave rise to an exceptional category of work likely to be peculiarly dangerous "unless special precautions are taken."³¹ American courts on the whole have preferred to adopt the language of Judge Dillon³² as to work which is "inherently dangerous." Neither phrase has ever yet been very well defined by anyone, and they are apparently intended to mean very much the same thing. They have been used more or less interchangeably by the courts, which usually state and rely upon both as the basis of an exceptional rule. If there is a distinction, it is that the "special precautions" exception is more commonly applied where the employer should anticipate the need for some one specific precaution, such as a railing around an excavation in the sidewalk while "inherent danger" is used where the work calls for a whole set of precautions, against a number of hazards, as in the case of painting carried on upon a scaffold above a highway.

Obviously included within either concept are activities, such as the construction of

reservoirs,³³ the use or keeping of animals,³⁴ high tension electric wires,³⁵ mining,³⁶ crop dusting,³⁷ and the exhibiting fireworks,³⁸ which will be dangerous in the absence of all reasonable care, so that strict liability might be imposed upon the employer, who should carry them out himself.

But liability on either basis has been extended beyond this, to work which, in its nature, will create some peculiar risk of injury to others unless special precautions are taken—as, for example, excavations in or near a public highway,³⁹ or construction or repair work on buildings adjoining it⁴⁰ or like

29. Compare the English rule, which approaches this result. Chapman, *Liability for the Negligence of Independent Contractors*, 1934, 50 L.Q.Rev. 71.

30. 1876, 1 Q.B. 321.

31. Second Restatement of Torts, § 416.

32. Dillon, *Municipal Corporations*, 1st Ed 1872, § 792. See Note, 1950, 38 Ky.L.J. 282; Second Restatement of Torts, § 427. "Inherent danger" converges not only with "special precautions," but also with "non-delegable duty." The courts not infrequently state all three. Cf. *Besner v. Central Trust Co. of New York*, 1921, 230 N.Y. 357, 130 N.E. 577.

33. *Rylands v. Fletcher*, 1868, L.R. 3 H.L. 330. This is itself a case involving an independent contractor.

34. *Stapleton v. Butensky*, 1919, 188 App.Div. 177 N.Y.S. 18; *Austin v. Bridges*, 1912, 3 Tex. App. 151; *Yazoo & M. V. R. Co. v. Gordon*, 184 Miss. 885, 186 So. 631.

35. *Person v. Cauldwell-Wingate Co.*, 4 Cir. 194 F.2d 237.

36. *Garden of the Gods Village v. Hellman*, 1934 Colo. 286, 294 P.2d 597; *Wilson v. Rancho*, 8 Cal. App. 2d 10, 24 Cal.Rptr. 296; *Carland & Co. v. Burke*, 1916, 197 Ala. 435, 7 So. 10; *Freebury v. Chicago, M. & P. S. R. Co.*, 77 Wash. 464, 137 P. 1044; *Giem v. Williams*, 215 Ark. 705, 222 S.W.2d 800.

37. *S. A. Gerrard Co. v. Fricker*, 1933, 42 Ariz. 50, 10 P.2d 678; *Alexander v. Seaboard Air Line R.R.*, 1952, 221 S.C. 477, 71 S.E.2d 299; *Pendergraft v. Lovelace*, 1953, 57 N.M. 661, 262 P.2d 231; *Moffatt v. A. Arena & Co.*, 1938, 23 Cal.App.2d 680, 73 P.2d 1260; *Southwestern Bell Tel. Co. v. Smith*, 1962, 350 Ark. 223, 247 S.W.2d 16.

38. *Blue Grass Fair Ass'n v. Bunnell*, 1924, 206 Mo. 462, 267 S.W. 237; see Note, 1927, 37 Yale L.J. 429, reversed on other grounds 419 F.2d 536, 1969, 398 U.S. 938 (loading and discharging combustible fuel).

39. *Thomas v. Harrington*, 1902, 72 N.H. 45, 50 N.H. 285; *Campus v. McElligott*, 1936, 122 Conn. 14, 100 A. 29; *Evans v. Elliott*, 1941, 220 N.C. 253, 17 S.E.2d 125; *McGinley v. Edison Elec. Ill. Co.*, 1924, 133 Mass. 583, 143 N.E. 537; *Olah v. Katz*, 1926, 231 Mich. 112, 207 N.W. 892.

40. *Rohlf v. Weil*, 1936, 271 N.Y. 444, 3 N.E.2d 84; *Richman Bros. Co. v. Miller*, 1936, 131 Ohio St. 3, 3 N.E.2d 360 (both painting over sidewalk); *Wright v. Shivek*, 1950, 326 Mass. 142, 93 N.E.2d 84.

keeping of victrolas, and similar activities,⁴² such as the burning of land by fire,⁴³ tearing down chimneys,⁴⁴ the construction of and many other kinds of work.⁴⁵ As the cases indicate the principle to be limited to work in which there is a degree of risk in relation to the particular surroundings,⁴⁷ or some rather spe-

cific risk or set of risks to those in the vicinity, recognizable in advance as calling for definite precautions. The emphasis is upon the "peculiar" character of the risk, and the need for special, unusual care. One who hires a trucker to transport his goods must, as a reasonable man, always realize that if the truck is driven at an excessive speed, or with defective brakes, some collision or other harm to persons on the highway is likely to occur. But this is not "inherent danger," as the courts have used the term; and for such more or less usual negligence the employer will not be liable.⁴⁸ When the trucker is to transport over the highway giant logs which require special care to fasten them securely,⁴⁹ there is obviously a special danger, and the exception applies. On the other hand, it is certainly not at all essential that the risk be an unavoidable one, necessarily⁵⁰ involved in the work itself. It is enough that the usual or contemplated⁵¹ methods of doing the

for blasting in an uninhabited area. *Holt v. Texas-New Mexico Pipeline Co.*, 5 Cir. 1945, 145 F.2d 802.

48. Cf. *Fitzgerald v. Conklin Limestone Co.*, D.R.I. 1955, 131 F.Supp. 532 (dust hazard); *Jacob v. Mosler Safe Co.*, 1940, 127 Conn. 186, 14 A.2d 736 (same); *Oklahoma City v. Caple*, 1940, 187 Okl. 600, 105 P.2d 209 (excavating sewer ditch); *Millstone Corp. v. Laurel Oil Co.*, 1945, 131 Conn. 636, 41 A.2d 711 (steaming out gasoline tank); *Jennings v. Vincent's Adm'x*, 1940, 284 Ky. 614, 145 S.W.2d 537 (insulating floor with plastic).

49. *Risley v. Lenwell*, 1954, 129 Cal.App.2d 608, 277 P.2d 807. Cf. *Van Arsdale v. Hollinger*, 1968, 68 Cal.2d 245, 66 Cal.Rptr. 20, 437 P.2d 508 (marking lines on busy street, special precautions to detour traffic).

50. In this the First Restatement of Torts, § 416, appears definitely to have been in error, and the position is reversed in the Second Restatement, § 416, Comment e.

51. Where the acts of the contractor were neither usual nor contemplated, it is held that the employer is not liable. *Oklahoma City v. Caple*, 1940, 187 Okl. 600, 105 P.2d 209 (failure to repair leak in other sewer line discovered in course of excavation); *Swarsky v. Stanley Dry Goods Co.*, 1936, 122 Conn. 7, 186 A. 556 (washing windows, water allowed to flow onto sidewalk); *Von Longerke v. City of New York*, 1912, 150 App.Div. 98, 134 N.Y.S. 832, af-

sis has been which, in its particular risk of injury, precautions are taken in or near the construction or repair of it⁴⁰ or likely

R. 3 H.L. 330 was
independent contractor.

188 App.Div. 2
es, 1912, 3 Tenn.C
Co. v. Gordon, 19

Co., 4 Cir. 1949, 17

Hellman, 1956, 13
n v. Rancho Sesp
Al.Rptr. 296; J. C
197 Ala. 435, 73 S
P. S. R. Co., 1914
n v. Williams, 194

933, 42 Ariz. 503, 2
rd Air Line R. Co.
99; Pendergrass
P.2d 231; Miles v
pp.2d 680, 73 P.2
v. Smith, 1952, 22

nell, 1924, 206 Ky
7, 37 Yale L.J. 113
a.1968, 290 F.Supp
419 F.2d 536, cert
n Corp. v. Texier
arguing combustible

72 N.H. 45, 54 A
122 Conn. 14, 1
0 N.C. 253, 17 S.E
Ill. Co., 1924, 24
v. Katz, 1926, 234

444, 3 N.E.2d 588;
131 Ohio St. 434,
sidewalk); *Whal*
12, 93 N.E.2d 333;

Held v. Federal Reserve Bank of St. Louis,
336 Mo. 1018, 204 S.W.2d 718; *Warden v.*
Manila R. Co., 1931, 123 Ohio St. 304, 175 N.

St. Louis v. Van Etten, 1918, 211 Ill.App. 524
(building materials); *Boylhart v. Di Marco &*
Co., 1936, 270 N.Y. 217, 200 N.E. 793 (same);
St. v. Tudor City Twelfth Unit, 1938, 276 N.Y.
193 N.E.2d 307, (washing mats on sidewalk).

St. v. Central Trust Co. of New York, 1921,
193 N.E. 577 (installing safety doors
operator while in use); *Watkins v. Gabriel Steel*
Co., 1932, 260 Mich. 692, 245 N.W. 801 (installing
on steel building frame); *Nashua Gummed &*
Paper Co. v. Noyes Buick Co., 1945, 93 N.H.
194 A.2d 920 (use of acetylene torch near in-
flammable materials); *Fegles Const. Co. v. Mc-*
Millin Const. Co., 9 Cir. 1953, 205 F.2d 637 (red
rivets dropped into work below); *Banaghan v.*
Co., 1959, 340 Mass. 73, 162 N.E.2d 807 (install-
elevator).

St. Louis & S. F. R. Co. v. Madden, 1908, 77 Kan.
193 P. 586; *Cameron v. Oberlin*, 1897, 19 Ind.
142, 48 N.E. 386; cf. *Black v. Christchurch*
Co., [1894] A.C. 48.

Bonczkiewicz v. Merberg Wrecking Corp., 1961,
Conn. 573, 172 A.2d 917; *Covington & C. Bridge*
v. Steinbrock, 1899, 61 Ohio St. 215, 55 N.E.
193; *Hanley v. Central Sav. Bank*, 1938, 255 App.
v. 542, 8 N.Y.S.2d 371, affirmed 1939, 280 N.Y.
21 N.E.2d 513; *Hevel v. Stangier*, 1964, 238
194, 395 P.2d 201.

Trump v. Bluefield Waterworks & Imp. Co., 1925,
W.Va. 425, 129 S.E. 309.

Medley v. Trenton Inv. Co., 1931, 205 Wis. 30, 236
W. 713 (exterminating bedbugs); *Alabama Power*
v. McIntosh, 1929, 219 Ala. 546, 122 So. 677
(pouring floors with gasoline); *Beauchamp v. B. &*
Motor Freight, Inc., 1958, 106 Ohio App. 530, 152
192d 334 (brakes on heavy tractor-trailer); *T. E.*
Corp. v. Rose, 1959, 200 Va. 736, 107 S.E.2d
(crossing railroad with heavy equipment);
Schodomu v. Lindstrom, 1955, 260 Wis. 455, 69 N.
194 908 (mixer machine attracting child).

Evans v. Elliott, 1941, 220 N.C. 253, 17 S.E.2d
Thus the employer has been held not liable

work are likely to lead to such a special risk, as where, for example, a contractor laying pavement in the street may be expected to follow the usual practice of piling the gravel in the street, and so to create a special hazard for travelers.⁵²

"Collateral" Negligence

Another distinction, as yet not very exactly defined, is the rule generally accepted, that the employer is liable only for risks inherent in the work itself, and not for "collateral" or "casual" negligence on the part of the contractor.⁵³ This doctrine, apparently originated in some dicta in an English case⁵⁴ where, in violation of statutory provisions, the construction of a bridge was permitted to delay traffic on a river for more than three days. It is very closely related to the exception as to "inherent danger," and seems in reality to represent nothing more than a negative statement of it, describing the type of situa-

tion in which the special danger is not necessarily involved in the work to be done, not contemplated in connection with the work it is expected to be done.

There are many cases⁵⁵ in which the language of the court seems to regard "general" or "casual" negligence as referring to negligence in the operative details of the work, easily controlled by the contractor, and not ordinarily considered or controlled by the employer, as distinguished from negligence in the general objective or plan, which must necessarily be so contemplated. This, however, appears to be an illusory distinction borne out by the decisions themselves. It has been held to be "collateral" negligence for the servant of an independent contractor to splash mortar from a mortar box on the sidewalk, but not to splash mortar from a wall in the course of construction over the plaintiff's windows, and the clothes hanging in her yard;⁵⁶ to drop a paint bucket out of a window while the workman is painting inside storeroom, but not to drop a paint bucket while he is painting a sign over the sidewalk;⁵⁷ to dislodge a board from a windowsill while working on a building on private land, but not a stone from a bridge.

firming 211 N.Y. 558, 105 N.E. 1101 (contractor changed course of tunnel, broke a water main); *Kunan v. De Matteo*, 1941, 308 Mass. 427, 32 N.E.2d 613 (gasoline shovel used in resurfacing sidewalk broke meter box set in walk); *Barrabee v. Crescenta Mut. Water Co.*, 158 Cal.App.2d 192, 198 P.2d 558 (contractor drilling a well allowed water to flow into highway).

52. *Pine Bluff Natural Gas Co. v. Senyard*, 1913, 108 Ark. 229, 158 S.W. 1091. Accord: *Philadelphia, B. & W. R. Co. v. Mitchell*, 1908, 107 Md. 600, 69 A. 422 ("probable consequences" which "might have been anticipated" unless, etc.); *Mallory v. Louisiana Pure Ice & Supply Co.*, 1928, 320 Mo. 95, 6 S.W.2d 617 ("would likely result in damage unless," etc.); *Evans v. Elliott*, 1941, 220 N.C. 253, 17 S.E.2d 125 ("in the natural course of things injurious consequences must be expected to arise"); *State v. Williams*, 1941, 12 Wash.2d 1, 120 P.2d 496 (same); *Richman Bros. Co. v. Miller*, 1936, 131 Ohio St. 424, 3 N.E.2d 360 ("danger likely to attend the doing of certain work unless," etc.).

53. Second Restatement of Torts, § 426. See the excellent discussion in Talbot Smith, *Collateral Negligence*, 1941, 25 Minn.L.Rev. 399. The leading American case making the distinction is *Robbins v. City of Chicago*, 111.1866, 4 Wall., 71 U.S. 657, 18 L.Ed. 427.

54. *Ho. v. Sittingbourne R. Co.*, 1861, 6 H. & N. 488, 158 Eng.Rep. 201.

55. See for example *Hyman v. Barrett*, 1918, 291 N.Y. 436, 121 N.E. 271 (dropping board while doing pair work); *Long v. Moon*, 1891, 107 Mo. 334, 17 W. 810 (plank allowed to remain against elevation); *Wilton v. City of Spokane*, 1913, 73 Wash. 619, 126 P. 404 (leaving stick of dynamite under imprudent street); *Pickett v. Waldorf System*, 1922, 241 N.Y. 569, 136 N.E. 64 (allowing water to flow onto sidewalk in washing windows); *O'Hara v. Lac Gaslight Co.*, 1912, 244 Mo. 395, 148 S.W. 884 (carelessly loaded).

56. Compare *Strauss v. City of Louisville*, 1900, Ky. 155, 55 S.W. 1075, with *Pye v. Faxon*, 1892, Mass. 471, 31 N.E. 640.

57. Compare *Drennan Co. v. Jordan*, 1913, 181 N.Y. 570, 61 So. 938, with *Richman Bros. Co. v. Miller*, 1936, 131 Ohio St. 424, 3 N.E.2d 360; *Rohlf v. W.*, 1936, 271 N.Y. 444, 3 N.E.2d 588. And see *Locke v. Melnyk*, 1956, 1 App.Div.2d 138, 148 N.Y.S.2d 100, where the precise distinction is made.

anger is not ne
k to be done,
ation with the

in which the
to regard "coll
e as referring
ve details of
the contract
ed or contemp
nguished from
which must nec

This, howev
distinction, n
hemselves. Th
teral" negligenc
ndent contracte
ortar box on th
an passing on th
mortar from
ruction over th
clothes hanging
nt bucket out of
an is painting an
to drop a paint
g a sign over
ard from a win
building on pri
m a bridge over

arrett, 1918, 224 N.
ard while doing r
107 Mo. 334, 17 E.
against elevator);
73 Wash. 619, 12
te under improv
m, 1922, 241 Mas
to flow onto side
Hara v. Laclede
48 S.W. 884 (pipes

ouisville, 1900, 160
A. Faxon, 1892, 150

an, 1913, 181 Ala.
ros. Co. v. Miller,
0; Rohlfs v. Weil,
And see Lockowitz
148 N.Y.S.2d 232
de.

highway;⁵⁸ to blast negligently
contract does not contemplate blast-
not when it does;⁵⁹ to allow water
to the sidewalk when the employer
reason to expect it, but not where he

of "collateral" negligence, there-
appears to be, not its character as a
incident or operative detail of the
to be done, but rather its disassociation
inherent or contemplated special
which may be expected to be created by
The employer is not liable because
negligence is "collateral" to the risk cre-
which is to say, that the performance
work contracted for in the normal
contemplated by the contract would
no expectation of such a risk of harm
plaintiff, and it is the abnormal de-
from usual or contemplated methods
servants of the contractor which has
the danger. Where the peculiar risk
involved in the work to be done itself, as
a sign is to be painted over the side-
the fact that the risk which was to
pected materializes through the inciden-
negligence of the servant in dropping the
will not relieve the employer of lia-
But where the employer reasonably

expects that windows will be painted in place
on the building, and the contractor decides to
remove them and in the process drops one
five floors,⁶² the negligence is collateral to
the risk.

72. JOINT ENTERPRISE

The doctrine of vicarious responsibility in
connection with joint enterprises rests upon
an analogy to the law of partnership. In a
partnership, there is a more or less perma-
nent business arrangement, creating a mu-
tual agency between the partners for the pur-
pose of carrying on some general business,
so that the acts of one are to be charged
against another. A "joint enterprise" is
something like a partnership,⁶³ for a more
limited period of time, and a more limited
purpose. It is an undertaking to carry out
a small number of acts or objectives, which
is entered into by associates under such cir-
cumstances that all have an equal voice in
directing the conduct of the enterprise. The
law then considers that each is the agent or
servant of the others, and that the act of any
one within the scope of the enterprise is to
be charged vicariously against the rest.⁶⁴
Whether such a relation exists between the
parties is normally a question for the jury,
under proper instructions from the court.⁶⁵

Compare Hyman v. Barrett, 1918, 224 N.Y. 436,
N.E. 271, with Philadelphia B. & W. R. Co. v.
Hall, 1908, 107 Md. 600, 69 A. 422.

Compare McNamee v. Hunt, 4 Cir. 1898, 87 F.
with Glem v. Williams, 1949, 215 Ark. 705, 222
34 800.

Compare Pickett v. Waldorf System, 1922, 241
569, 136 N.E. 64, with Wright v. Tudor City
North Unit, 1938, 276 N.Y. 303, 12 N.E.2d 307.

Rhlf v. Weil, 1936, 271 N.Y. 444, 3 N.E.2d 588.
Rhlf v. Katz, 1926, 234 Mich. 112, 207 N.W. 892
(falling plumbing through street to building, hole
street left unguarded); Watkins v. Gabriel Steel
1932, 260 Mich. 692, 245 N.W. 801 (erecting
building, failure to secure joists); Hammond
Corp. v. Dodson, 1940, 199 Ark. 846, 136 S.
484 (spraying field, failure to cut off spray
plaintiff's land); McCarrier v. Hollister, 1902,
D. 366, 89 N.W. 862 (sewer in street, hole un-
); Thomas v. Harrington, 1902, 72 N.H. 45,
235 (same as to water pipe).

62. Davis v. John L. Whiting & Son Co., 1909, 201
Mass. 91, 87 N.E. 199. Cf. Hoff v. Shockey, 1904,
122 Iowa 720, 98 N.W. 573 (piling sand in street);
Yellow Poplar Lumber Co. v. Adkins, 1927, 221 Ky.
794, 299 S.W. 963; Callahan v. Salt Lake City,
1912, 41 Utah 300, 125 P. 863; May v. 11½ East
49th St. Co., 1945, 269 App.Div. 180, 54 N.Y.S.2d
860, affirmed 1946, 296 N.Y. 599, 68 N.E.2d 881.

63. "The rule is founded on the theory of partner-
ship or a relation akin to partnership." Kokesh v.
Price, 1917, 136 Minn. 304, 309, 161 N.W. 715, 717;
see Connelley v. Nees, Tex.Comm.App.1924, 266 S.W.
502.

64. One of the best statements of this is in Howard
v. Zimmerman, 1926, 120 Kan. 77, 242 P. 131, 132.

65. Hollister v. Hines, 1921, 150 Minn. 185, 184 N.W.
856; Farthing v. Hepinstall, 1928, 243 Mich. 380,
226 N.W. 708; Clark v. Missouri Pac. R. Co., 1924,
115 Kan. 823, 224 P. 920. It is a "mixed question

TOPIC 2

LIABILITY OF MASTER FOR TORTS OF SERVANTS

AMBIT OF LIABILITY

83. A master, although not liable because of his own conduct, is liable for the unauthorized tortious conduct of a servant which is within the scope of employment.

A. *Rationale*. "Respondeat superior" is the phrase used by the courts to indicate the area within which a master is liable for the torts of servants which, although committed disobediently, are connected with the service of the employer. This is a condition imposed by the common law in return for the privilege of utilizing the services of others in household and business matters.

The origin and reasons for the rules have been much debated in legal literature.³⁵ It is perhaps sufficient to say that they evolved in response to a belief that the head of a household or enterprise should pay for the harm caused by the tortious conduct of its members. The rules are not unfair. The expansion of the master's activity by use of the activity of others inevitably leads to wreckage caused by it, and it is proper for him to pay for this when tortiously caused in return for the benefits he receives from his servant's proper conduct. Although it is a rule of strict liability with respect to the master—that is, liability without violation of any duty by him personally,—it does not invoke strict liability for the servant's conduct; the master is liable only when the servant's conduct is tortious. The rule tends to foster safety measures. The master is likely to be more careful in the selection and supervision of servants if responsible for their conduct. The fact that he has an ac-

tion over against them is probably of little benefit to him, but he can readily procure liability insurance which removes any substantial risk of personal disaster and, in business ventures, the premiums are, in the end, borne by those whom the business serves.

B. *Limits of liability*. Although the fiduciary duties of a servant exist during the entire period of employment, his activities are ordinarily confined to a portion of the time. It is only during the period in which the servant has duties that the employer is liable for his unauthorized conduct. Further, the master's peculiar liability is based on the physical activities of servants, including their batteries, and for this he is liable only if the servant's conduct was in some way caused by an intent to serve his employer's interests and connected with his authorized acts.

In addition a master may be liable for other tortious conduct by a servant, as he would be for the conduct of any agent, whether servant or not, as described in Sections 91-93. In those situations the intent to serve the principal may not be a necessary element.

WHAT IS A SERVANT

84. A servant is normally one who gives personal service as a member of a business or domestic household, and subject to control by the employer as to his physical activities.

A. *Difficulties of definition*. No short statement can give an accurate picture of what the courts include within the term servant.³⁶ In general they have in mind a more

³⁵ Holmes, *The History of Agency*, 1890, 4 H.L.R. 345, 1891, 5 H.L.R. 1; Laski, *Basis of Vicarious Liability*, 1916, 26 Yale L.J. 105; Seavey, *Speculations as to Respondeat Superior*, Harvard Legal Essays, 1934 reprinted in *Studies in Agency*, 129.

³⁶ For statements from different standpoints see: Steffen, *The Independent Contractor and the Good Life*, 1935, 2 Univ. of Chi.L.R. 501; Jacobs, 1953, *Are Independent Contractors Really Independent*, 3 De Paul L.R. 23; Ledy, 1930, *Salesmen are Independent Contractors*, 38 Mich.L.R. 365.

intimate relation than that between principal and a non-servant agent or one who is casually employed and who is not primarily a part of the core of workers in the enterprise. However, that generality is also misleading since a person may fall within the servant category for the purposes of respondeat superior by acting momentarily for another, as when the owner and occupant of a car asks a friend to drive. Perhaps the idea can be conveyed more helpfully by saying that a servant sells or gives his time, while a non-servant agent is paid primarily for results rather than for the time which it takes to accomplish them. At least, this comes nearer to describing the relation which causes an employer to be subject to the Workmen's Compensation and Unemployment Acts.

B. *Factors.* Because a definition of the relation is not a reliable guide it is useful to state the factors which in varying situations have been used by the courts for the purpose of determining the liability of the one claimed to be a master. Even the right to control the physical activity of the employee, which in many cases is determinative, has been disregarded, at times as has the right to delegate performance, both theoretically essential to the relation.

C. *Right to control.* The right to control the physical movements of the employee is the most important single element in most of the situations.³⁷ This does not mean de facto control, which is usually absent, but the right to control. This may be described as the element responsive to the tort principle that control creates responsibility. The name the parties give to the relation may not be important, since a servant in fact may be called

an independent contractor, in order to avoid liability.³⁸

D. *Other factors.* The relation of master and servant is indicated by the fact that the employee is given a salary and is employed for a considerable period; that he is using an instrumentality of the principal on his premises; that the work is unskilled, usually supervised; that the one employed does not have a distinct business; that the work is part of the regular business of the employer; that there is no right of delegation; and that the parties intend to create the relation of master and servant.

A number of these elements are probably merely evidence to indicate that the employer has the right to control the physical activities of the employee, such as the place in which the work is done, and the ownership of the instrumentality used.

When the right to control does not exist in fact, the economic factors become important—the kind of work which is being done and the absence of a distinct business by the employee; these are important since the strict liability of the master for his servant's torts can best be justified by the fact that he profits from the work of its servants and, except in the case of household servants, costs will be borne by the ultimate consumer or user of the products or services.

Below are given a number of typical situation in which the master and servant relation has been found or denied. In Section 86 are somewhat similar situations in which the problem is as to who is the employer of an admitted servant.

E. *Employment of vehicle and driver.* In these cases, the right to control is the decisive factor, other factors being only evi-

37. In some cases, the only factor considered, as in the case of an automobile owner who is a passenger in his own car. See paragraph H, *infra*.

38. *Bond v. Harrel*, 1961, 13 Wis.2d 369, 108 N.W.2d 552. Persons labeled servants were found to be independent contractors in *Bartels v. Birmingham*, 1947, 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed. 1947.

tracts for control over the way in which the work is done, even when the contractor has the power of delegation, it may be found that he is the master of the workers.⁵⁰

Workers at the regular place of business of the employer are normally servants, although paid by the piece. An exception is the licensed mine foreman who is paid by the ton mined and employs his own helpers who are sub-servants.⁵¹

Unskilled labor usually connotes a master and servant relation. Thus it was held that a person employed as a janitor for a bank was a servant, despite a formal contract, permitting him to do the work when and as he pleased without supervision for a period of eleven months, largely because he was regularly employed in the business of the bank.⁵² So a cleaning woman, who regularly opened up defendant's summer home without supervision, was, as a servant, barred from recovery for the negligence of a fellow servant.⁵³

fixing water pipes; *American Homes v. U. S.*, D.C. Mass.1959, 173 F.Supp. 857, roofing; *Murrin v. Rifugiato*, 1953, 373 Pa. 561, 96 A.2d 865; *Grothe v. Erickson*, 1953, 157 Neb. 248, 59 N.W.2d 368, cost-plus contract; *Steen v. Potts*, 1953, 75 S.D. 184, 61 N.W.2d 825; *Snider v. T. & P. Ry. Co.*, C.A.Tex. 1958, 315 S.W.2d 82, grading roadbed; *Fitzgerald v. Conklin Limestone Co.*, D.C.R.I.1955, 131 F.Supp. 532, spreading limestone; *Strangi v. U. S.*, C.A.5th, 1954, 211 F.2d 305, clearing land; *Houston Pipe Line Co. v. Peddy*, C.A.Tex.1956, 292 S.W.2d 364.

50. *Walls v. McKinney*, 1954, 139 W.Va. 866, 81 S.E.2d 901, in which, on the court's reasoning, the employees were sub-servants; *Peterson v. Brune*, Mo. 1954, 273 S.W.2d 278; *E. I. Du Pont De Nemours v. I. D. Griffith*, 1957, 50 Del. (11 Terry) 348, 130 A. 2d 783; *Doane Agricultural Service v. Coleman*, C.A.6th, 1958, 254 F.2d 40.

51. *Turner v. Lewis*, Ky.App.1955, 282 S.W.2d 624.

52. *First Nat. Bank of Oxford v. Mississippi Unemployment Comm.*, 1945, 199 Miss. 97, 23 So.2d 534, unemployment compensation Contra: *Farmers & Merchants Bank v. Vocelle*, Fla.1958, 106 So.2d 92, on similar facts.

53. *Bell v. Sawyer*, 1943, 313 Mass. 250, 47 N.E.2d 1.

A neighbor or friend who volunteers assistance in making repairs or doing similar work is almost certainly placed in the servant class.⁵⁴ So with a neighbor who exchanges services.⁵⁵

H. *Passengers in automobiles.* An early case raised the problems relevant to this section and also to the section which deals with the "transferred servant" question. Defendant rented a pair of horses with driver from a stablekeeper to drive him in his coach. The driver negligently injured the plaintiff. An evenly divided court denied recovery.⁵⁶ Then, as in modern cases, the result depended upon the inferences drawn as to the right to control the driving. In many of the cases the issue is whether an action for negligence against a third person by a passenger is barred by the negligence of the driver, but the same factors exist as in actions against the passenger. Normally, if the owner is a passenger, it will be inferred that he retains the right to control and is liable for the driver's negligence, or barred from recovery because of it.⁵⁷ If the passenger is a joint owner with the driver the result is doubtful;⁵⁸ it can well be argued that joint control might be inferred.⁵⁹ If the owner is the driver, he is not a servant of the passenger normally, although he is acting in the pas-

54. *Hill v. Morey*, 1854, 26 Vt. 178.

55. *Erickson v. Erickson*, 1959, 250 Iowa 491, 94 N.W. 2d 728.

56. *Laughter v. Pointer*, K.B., 1826, 5 B. & C. 547.

57. *Pearson v. Erb*, N.D.1957, 82 N.W.2d 818; *Koch v. Lemmerman*, 1956, 12 Ill.App.2d 237, 139 N.E.2d 806; *Robbins v. Greene*, 1953, 43 Wash.2d 315, 261 P.2d 83, salesman driven by prospective customer; *Ross v. Burgan*, 1955, 163 Ohio St. 211, 126 N.E.2d 592, wife the owner, husband driving; *Watt v. U. S.*, E.D.Ark.1954, 123 F.Supp. 906, same. But see *Menzigian v. La Riviere*, 1950, 334 Mass. 610, 137 N.E.2d 925.

58. *Sherman v. Korff*, 1958, 353 Mich. 387, 91 N.W.2d 485, a five to three decision against liability, wife was driving.

59. *Moore v. Skiles*, 1954, 130 Colo. 191, 274 P.2d 311.

his assist-
lar work
servant
changes

An early
this sec-
als with
Defend-
er from
ch. The
iff. An
covery.⁵⁶
epended
right to
he cases
r negli-
senger is
ver, but
against
ner is a
he re-
e for the
recovery
s a joint
s doubt-
oint con-
er is the
assenger
the pas-

1, 94 N.W.

547.

3; Koch v.
39 N.E.2d
d 315, 261
customer;
126 N.E.2d
Watt v.
3. But see
5. 610, 137

91 N.W.2d
ality, wife

1 P.2d 311.

senger's interests, and driving to the place directed by the passenger.⁶⁰ It is improbable that a taxi driver would be the servant of his passenger even if hired by the hour. Where employees of a common employer take turns in driving each other to work, the driver is not the servant of his passenger.⁶¹ Two employees of a common employer, driving on the employer's business, are not engaged in a joint enterprise in the absence of joint control.⁶²

I. Joint enterprises. The fact that two or more persons have a common interest in a trip does not make them joint enterprisers for the purpose of making them responsible for the conduct of the driver.⁶³ Thus, where a group agree to share with the owner of the car the cost of a trip for a common purpose, a member of the group is not responsible for the owner's negligence, in driving,⁶⁴ unless he has a right to share in the driving.⁶⁵

J. Distributors. Many manufacturers and other producers sell their products to persons known as distributors over whose operations no control is exercised except as to prices, and who therefore are buyers and not servants. This is largely true of automobile manufacturers.⁶⁶ A number of oil producers have followed a different course. For economic reasons they have purchased property

and leased it to one who sells their products and who may or may not be a selling agent. In any event, the producers tend to keep a more or less tight control over the operation of the physical plant, sometimes supplying much of the equipment and making requirements as to policing and hours of service. This has resulted in the finding by some courts that the station operator is a servant and his employees subservants, although the operator is free to choose his employees and the methods by which he performs the terms of his lease or contract.⁶⁷ These decisions may be based upon the expediency of making the large oil companies responsible. A similar result was reached where a newspaper company employed a "dealer" who in turn employed a newsboy or carrier to deliver the papers.⁶⁸

K. Physicians and attorneys. These are not normally servants of their patients or clients, even though paid a retainer which gives first call on their services.⁶⁹ But the fact that they are highly skilled and licensed does not prevent them from being servants. An attorney may be a servant of a firm which employs him⁷⁰, and a partner in a firm may be a servant of the partnership. A physician

67. Operator a servant and his employees subservants: *Texas Co. v. Mills*, 1934, 171 Miss. 231, 156 So. 866; *Dockens v. La Caze*, W.D.La.1948, 78 F.Supp. 515; *Frank v. Sinclair Refining Co.*, 1954, 363 Mo. 1054, 256 S.W.2d 793; *Tate v. Claussen-Lawrence Const. Co.*, 1932, 168 S.C. 481, 167 S.E. 826.

Operator found not to be a servant: *Pure Oil Co. v. Lassing*, C.A.6th, 1955, 222 F.2d 886; *Zancanaro v. Hopper*, 1940, 79 Ariz. 207, 286 P.2d 205; *Arkansas Fuel Oil Co. v. Scaletta*, 1940, 200 Ark. 645, 140 S.W.2d 684; *Gulf Refining Co. v. Shirley*, C.A.Tex.1937, 99 S.W.2d 613.

68. *Burlingham v. Gray*, 1943, 22 Cal.2d 87, 137 P.2d 9.

69. *In re Walker's Estate*, 1944, 53 N.Y.S.2d 106, 185 Misc. 1046, physician, on monthly retainer, not an employee under the provisions of a will.

70. *Ryan v. Wisconsin Dept. of Taxation*, 1943, 242 Wis. 491, 8 N.W.2d 393, the salary of an attorney employed by a federal agency as an assistant was not subject to a payment of state income tax.

60. *Ashworth v. Baker*, 1956, 197 Va. 582, 90 S.E.2d 860, volunteer.

61. *Bridgewater v. Wagoner*, 1960, 28 Ill.App.2d 201, 170 N.E.2d 785; *Lacovara v. Fleet Transp. Co.*, 1961, 12 A.D.2d 957, 211 N.Y.S.2d 215.

62. *Indemnity Ins. Co. of N. America v. Odom*, 1960, 237 S.C. 167, 116 S.E.2d 22.

63. *McCoy v. Carter*, Ky.App.1959, 323 S.W.2d 210; *West v. Soto*, 1959, 85 Ariz. 255, 336 P.2d 153.

64. *Hurly v. Tymofichuk*, 1961, 139 Mont. 50, 359 P.2d 378.

65. *Bonney v. San Antonio Transit Co.*, C.A.Tex.1958, 317 S.W.2d 69.

66. *Burkhalter v. Ford Motor Co.*, 1923, 29 Ga.App. 592, 116 S.E. 333. See *Isaacs on Agents and Agencies*, 1925, 3 Harv.Bus.Rev. 265.

may be a servant of a hospital in which he is employed as a "resident" or interne or where he is paid a salary, although the hospital governors would have neither the desire nor the legal right to interfere with his treatments.⁷¹ A nurse or other assistant of a physician is his ad hoc servant during an operation conducted by him.⁷² A physician who merely uses hospital facilities to attend his own patients, not being paid by the hospital, is not its servant.⁷³ A nurse or technician, except when a servant of the physician is a servant of the hospital.⁷⁴

L. *Marine pilots*, that is, persons employed by ship owners to guide the ship into harbor, are normally not servants, since the nature of their employment makes them independent of directions from anyone.⁷⁵

M. *Volunteers*. Persons assisting another are not the less servants because they receive no remuneration.⁷⁶ Persons thus assisting servants are servants of the master if, but only if, the servant they assist has power to

employ them for the employer, because of an emergency or otherwise.⁷⁷

SERVANT OF TWO MASTERS

85. A person can act as a servant of two persons not joint employers with reference to a single act, if the employments are not inconsistent.

A. *Purposes of both satisfied*. One can be a servant of one person for some acts and the servant of another person for other acts, even when done at the same time, as where a city detective, in search of clues, finds employment as a waiter and, while serving the meals, searches the customer's pockets. In the first, he is the servant of the restaurateur; in the second, of the city. A person may also be the servant of two persons, not partners, or joint employers with reference to the same act. For example: the owner of a truck, made to deliver gasoline, furnished it with driver, to a prospective purchaser, a dealer in gasoline, for demonstration. The driver was negligent in delivering gasoline owned and sold by the prospective buyer, causing a fire. It was held that in this he was acting for both the seller and the buyer.⁷⁸ So one employed by the Animal Rescue League to find and care for stray dogs is also performing its contract with the city in doing so.⁷⁹ A nurse may be both the servant of a hospital and a doctor, as to some of her acts with reference to a patient. Perhaps the principals could be described as joint enterprisers. Partners and other joint employers are of course all responsible for the conduct of their employees.

71. *Frost v. De Moines College of Surgery*, 1956, 248 Iowa 294, 79 N.W.2d 306, where "professional" direction of doctors could not be controlled by a corporation; *Cassidy v. Ministry of Health, C.A.*, [1951] 2 K.B. 343, [1951] All E.R. 574; *Bowers v. Olch*, 1953, 120 Cal.App.2d 108, 260 P.2d 997; *Staple v. Winnipeg*, 1956, Manitoba Q.B., 5 D.L.R.2d 751.

72. *McConnell v. Williams*, 1949, 361 Pa. 355, 65 A.2d 243.

73. *Mayers v. Litow*, 1957, 154 Cal.App.2d 413, 316 P.2d 351.

74. *Berg v. N. Y. Society for Relief*, Sup.1954, 136 N.Y.S.2d 528, technician. In *Dickerson v. American Sugar Refining Co.*, C.A.3d, 1954, 211 F.2d 200, the physician in charge of a dispensary operated by the defendant was found not to be a servant, but it was held that the jury could find the intern to be his servant, that of the defendant, or the servant of both.

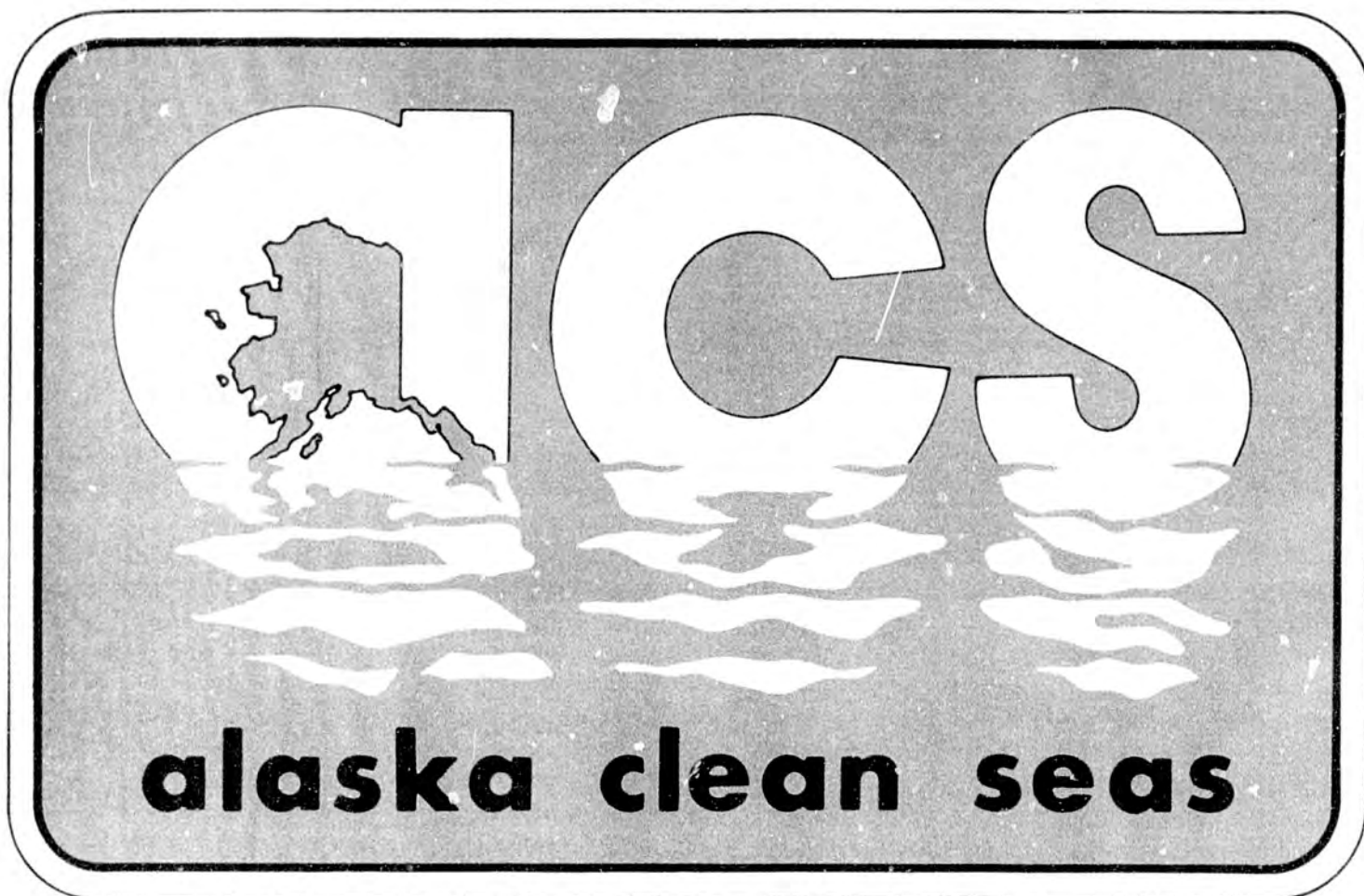
75. *The Halley*, 1868, 2 P.C. 193; *The Jules Fribourg*, N.D.Cal.1956, 140 F.Supp. 333.

76. *Hill v. Morey*, 1854, 26 Vt. 178, neighbor helping to repair a fence; *Helms v. Hanke*, 1958, 5 Wis.2d 467, 93 N.W.2d 455, washing automobile. *Bledenbach v. Teague*, 1960, 194 Pa.Super. 245, 166 A.2d 320.

77. *State ex rel. Nienaber v. Dist. Ct.*, 1917, 138 Minn. 416, 165 N.W. 268, holding that plaintiff became a servant under Workmen's Compensation Act by helping to get a wagon out of the mud.

78. *Gordon v. S. M. Byers Motor Car Co.*, 1932, 309 Pa. 453, 164 A. 334.

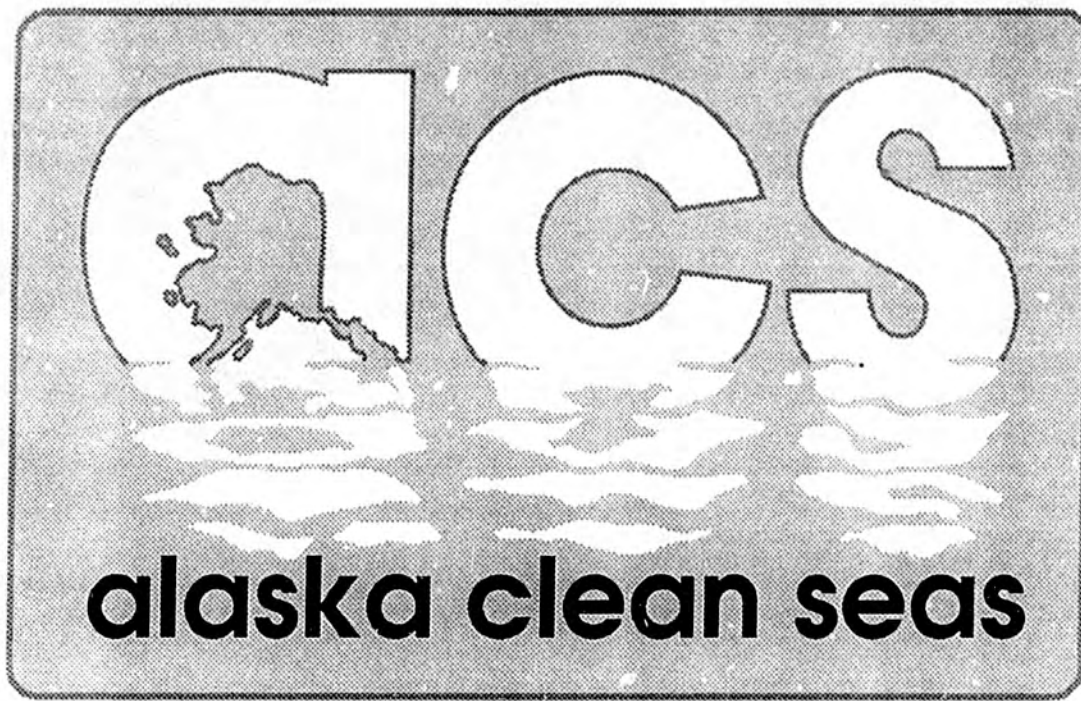
79. *Sildekum v. Animal Rescue League*, 1946, 353 Pa. 408, 45 A.2d 59.



Oil Spill Response

Alaska Arctic Regions

ALASKA CLEAN SEAS



Oil Spill Response

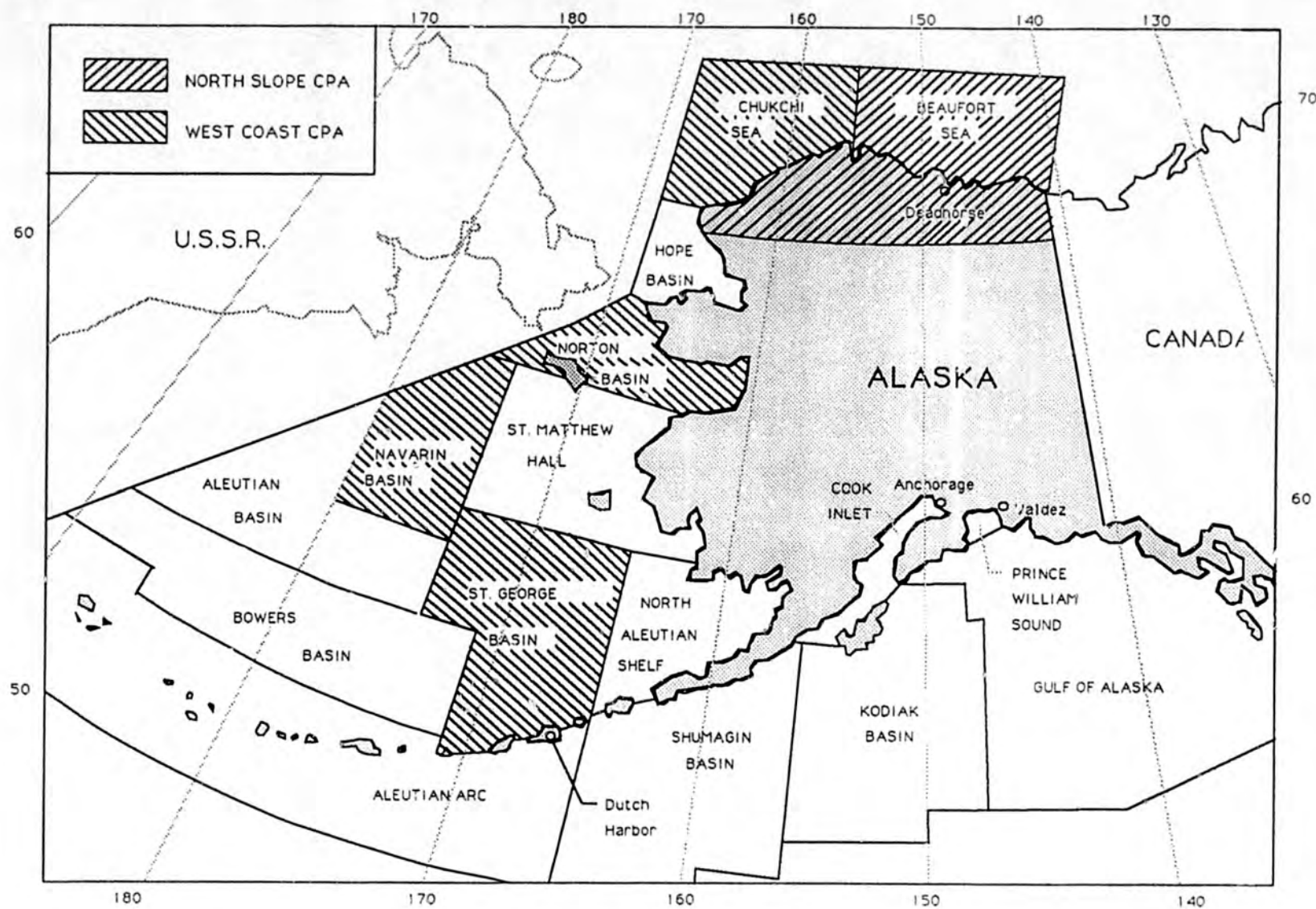
Alaska Arctic Regions

ALASKA CLEAN SEAS

A Non-profit Oilspill

Response Cooperative

ALASKA CLEAN SEAS



ALASKA CLEAN SEAS AREA OF INTEREST

ALASKA CLEAN SEAS

Alaska Clean Seas Members

- **Alyeska Pipeline Service Company**
- **Amerada Hess**
- **Exxon**
- **Amoco**
- **Marathon**
- **ARCO Alaska**
- **Mobil**
- **BP Exploration (Alaska)**
- **Shell Western E & P**
- **Chevron**
- **Texaco**
- **Conoco**
- **Unocal**

ALASKA CLEAN SEAS

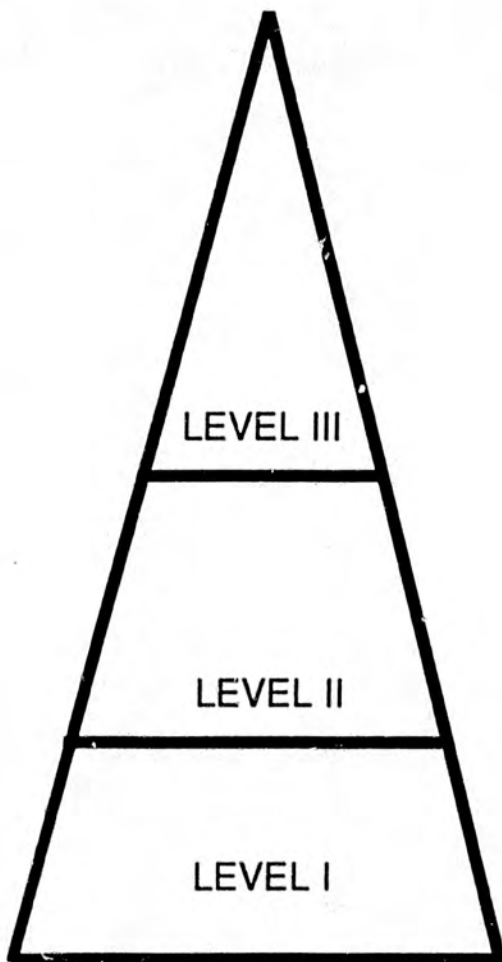
North Slope Oilspill Response Strategy

- **Initial Response**
 - **Immediate Response Team**
- **Secondary Support**
 - **ACS**
 - **Auxiliary Contractor Teams**
 - **Village Response Teams**
 - **Mutual Aid from Other Operators**

ALASKA CLEAN SEAS

Spill Levels

LEVEL I, II, III



CATASTROPHIC

EXAMPLE: 100,000 BBL

MAJOR

EXAMPLE: 10,000 BBL

MODERATE

EXAMPLE: 100 BBL

Recommended Response Organizations

- **LEVEL I (100 BBL)**
 - Operator Immediate Response Team (IRT)
- **LEVEL II (10,000 BBL)**
 - Response Co-op
- **LEVEL III (100,000 BBL)**
 - Contractor

ALASKA CLEAN SEAS

Spill Response
Primary Responder Identification

S P I L L L E V E L			
	HOUR I	HOUR 8	HOUR 48
I	IRT	IRT	IRT
II	IRT	IRT Co-Op Mutual Aid	Co-Op
III	IRT	IRT Co-Op Mutual Aid	Co-Op Contractors

ALASKA CLEAN SEAS

Oilspill Response Personnel
for North Slope Area

	On-site	Available supplement within 24 hours	24 hour total
ACS	11	25	36
ACRT	50	150	200
VRT	-	40	40
IRT	<u>160</u>	<u>160</u>	<u>320</u>
Total	221	375+	596

ALASKA CLEAN SEAS

Facilities & Equipment

- **Facilities**

- North Slope - 23,000 s.f. Heated Warehouse Space, Office Unit, Communications Center & Small Camp
- Additional Warehouse in Anchorage

- **Major Equipment**

- **Containment**

- 190,900 Feet of Boom
(Includes 11,500 feet of Fire Boom)

- **Recovery**

- Range of Weir, Disc, Belt and Mop Skimmers with name plate pumping capacity in excess of 9,500 BBL's per hour.

- **Marine**

- 27 vessels ranging from light river craft up to 65 foot Ocean Skimming Catamaran

ALASKA CLEAN SEAS

Prudhoe Bay Area Major Spill Response Equipment Summary

	<u>North Slope Operators</u>	<u>Alaska Clean Seas</u>	<u>Total</u>
Boom (feet)	171,830	190,900	362,730
Marine Vessels	57	27	84
Skimmers	132	66	198
Skimmers' Name plate pumping capacity (bbls./hr.)	13,372	9,540	22,912

ALASKA CLEAN SEAS

Major Current & Future R & D Focus Areas for Oilspill Response in Arctic Regions

- **In-Situ Combustion**
- **Tracking/Detection**
- **Oilspill Response
Techniques in Broken Ice
Conditions**

ALASKA CLEAN SEAS

OFFSHORE BURN

Rationale

- **Innovative Response Tool**
- **Potential order of magnitude increase in Removal Capabilities**
- **Burning not yet fully understood or accepted as an oilspill response technique**

ALASKA CLEAN SEAS

OFFSHORE BURN

Objectives

- **Conduct burn in a safe and environmentally sound manner**
- **Stress Fire Boom Thermally and Mechanically**
- **Obtain measurements of critical burn parameters**
- **Characterize environmental impacts of burning**

ALASKA CLEAN SEAS

OFFSHORE BURN

Location

- **U.S. Beaufort:
20 mile radius
Prudhoe Bay**
- **Designate an area,
rather than
specific site**