

SCOMM

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Alaska State Legislature

Legislative Research Agency



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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.

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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

Volunteer = goes
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.

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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:

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

3 "§8135. Limitation on Liability of Third Parties Rendering Assistance in
4 Oil or Hazardous Material Discharge Cleanup.

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

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

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

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

22 Section 2. Amend Chapter 81, Title 10 of the Delaware Code by striking
23 §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.

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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,

Agency, §§ 212-218. *See* *Chambers*, 1891, 189 A. 434; *Robb v. Horn*, 1914, 189 A. 434; *State Transfer Co.*, 1919, 189 A. 434; *cf. State ex rel. Kane*, 1939, 345 Mo. 50.

Business: *The Borrower*, 1222; *Nob*, 1957, 24 Tenn.L.Rev. 90.

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; *Adomaitis 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. 443, 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.

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.*

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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

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reau v. Bunn, 5 Cir.1947,
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Draper v. Hellman Com
nk, 1928, 203 Cal. 26, 26

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e Note, 1936, 20 Minn.

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R Co. v. Gage, 1918, 135
Donnell v. Chase Hotel

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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 *Ochsridger 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,
133 Ky. 274, 209 S.W. 33 (shooting a debtor). Cf.
Western Ry. of Alabama v. Milligan, 1902, 135 Ala.
20, 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).

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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. *Smothers 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, 20 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.

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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.⁷¹ 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.

Agents Other Than Servants

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.⁷² 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,⁷³ or in which a tort such

as deceit occurs in the course of a consensual transaction between the agent and the injured person.⁷⁴ Thus a client may be made liable for the improper institution of legal proceedings by his attorney,⁷⁵ 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.⁷⁶ 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.⁷⁷ Thus it must appear either that the representations made were within the actual or apparent authority of the agent,⁷⁸ or of a kind reasonably to be expected by the employer in connection with the transaction,⁷⁹ 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.⁸⁰

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, § 258.

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. 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.

72. Second Restatement of Agency, § 250; Great American Indemnity Co. v. Fleniken, 5 Cir., 1943, 134 F.2d 208; Hurla v. Capper Publications, 1939, 109 Kan. 369, 87 P.2d 552; Vert v. Metropolitan Life Ins. Co., 1938, 342 Mo. 629, 117 S.W.2d 252.

73. Rhone v. Try Me Cab. Co., 1933, 62 App.D.C. 201, 6 F.2d 834; Middleton v. Frances, 1934, 257 Ky. 6, 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 Notes, 1941, 11 Boston U.L.Rev. 85; 1938, 22 Minn.L.Rev. 741.

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; Person, *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 more than twenty-four sections to the list.

The exceptions making the employer liable for negligence are not sharp and shade into one another; and the exceptions are 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 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.

Hunt v. McNamee, 4 Cir. 1905, 141 F. 293; *Mooney v. Stainless, Inc.*, 6 Cir. 1964, 338 F.2d 381, 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.

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

Quan Lumber Co. v. McNeely, 1949, 214 Ark. 657, 195 S.W.2d 341; *Brannock v. Elmore*, 1893, 114 Mo. 21 S.W. 451; *Richardson v. Carbon Hill Coal Co.*, 1893, 6 Wash. 52, 32 P. 1012.

Blaley v. Lenwell, 1954, 129 Cal.App.2d 608, 277 P.2d 897; *Kuhn v. P. J. Carlin Const. Co.*, 1935, 154 Cal. 892, 278 N.Y.S. 635; *L. B. Foster & Co. v. Garblad*, 9 Cir. 1969, 418 P.2d 727.

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: one: 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*.

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Co., Mo. 1923, 254
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n. 1889, 149 Mass.
Hsinger, 1900, 81
v. 1965, 44 N.C.L.

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 duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer 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; Livingston 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 condition. 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; Lineaweafer 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. Strosnider, 1910, 67 W.Va. 39, 67 S.E. 1087. The distinction between repair and original construction made by § 422 of the First Restatement of Torts is simply 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. Super. 428, 226 A.2d 43; Boswell v. Laird, 1857, 8 Cal. 469.

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
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York, 1921, 230 N.Y. 357, 130 N.E. 577; Lineaweav-
v. John Wanamaker, Inc., 1930, 299 Pa. 45, 149
A. 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
U.S. 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.
83, 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

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, 13 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. Arena & Co.*, 1938, 23 Cal.App.2d 680, 73 P.2d 1260; *Southwestern Bell Tel. Co. v. Smith*, 1962 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, Mass. 583, 143 N.E. 537; *Olah v. Katz*, 1926, 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); *Wen v. Shivek*, 1950, 326 Mass. 142, 93 N.E.2d 100.

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 peculiar risk of injury, precautions are taken in or near the structure or repair; 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 336;

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.

Boylhart v. Di Marco &
1936, 270 N.Y. 217, 200 N.E. 793 (same);
Tudor City Twelfth Unit, 1938, 276 N.Y.
N.E.2d 307, (washing mats on sidewalk).

Central Trust Co. of New York, 1921,
357, 130 N.E. 577 (installing safety doors
operator while in use); *Watkins v. Gabriel Steel*
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.
A.2d 920 (use of acetylene torch near in-
ammable materials); *Fegles Const. Co. v. Mc-*
Chlin Const. Co., 9 Cir. 1953, 205 F.2d 637 (red
rivets dropped into work below); *Banaghan v.*
1959, 340 Mass. 73, 162 N.E.2d 807 (install-
elevator).

St. Louis & S. F. R. Co. v. Madden, 1908, 77 Kan.
83 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.
Hanley v. Central Sav. Bank, 1938, 255 App.
542, 8 N.Y.S.2d 371, affirmed 1939, 280 N.Y.
21 N.E.2d 513; *Hevel v. Stangier*, 1964, 238
44, 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
ing floors with gasoline); *Beauchamp v. B. &*
Motor Freight, Inc., 1958, 106 Ohio App. 530, 152
2d 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.
2d 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 on 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.

firm 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, 131 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.

an, 1913, 181 Ala.
ros. Co. v. Miller,
0; Rohlf v. Well,
And see Lockowitz
148 N.Y.S.2d 222
de.

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

McNamee v. Hunt, 4 Cir. 1898, 87 F. 2d 800.

Glem v. Williams, 1949, 215 Ark. 705, 222 Ark. 800.

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

Well v. Katz, 1936, 271 N.Y. 444, 3 N.E.2d 588.

Katz v. Well, 1926, 234 Mich. 112, 207 N.W. 892 (plumbing through street to building, hole 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.W.2d 84 (spraying field, failure to cut off spray on plaintiff's land); **McCarrier v. Hollister**, 1902, 136 N.W. 862 (sewer in street, hole unguarded); **Thomas v. Harrington**, 1902, 72 N.H. 45, 46 (same as to water pipe).

62. *Davis v. John L. Whiting & Son Co.*, 1909, 201 Mass. 91, 87 N.E. 199. Cf. *Hoff v. Shockley*, 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. 114½ 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 partnership or a relation akin to partnership." *Kokesh v. Price*, 1917, 136 Minn. 304, 309, 161 N.W. 715, 717; see *Connellee v. Nees*, Tex.Comm.App.1924, 266 S.W. 562.
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, 220 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 situations 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.

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1, 94 N.W.

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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.

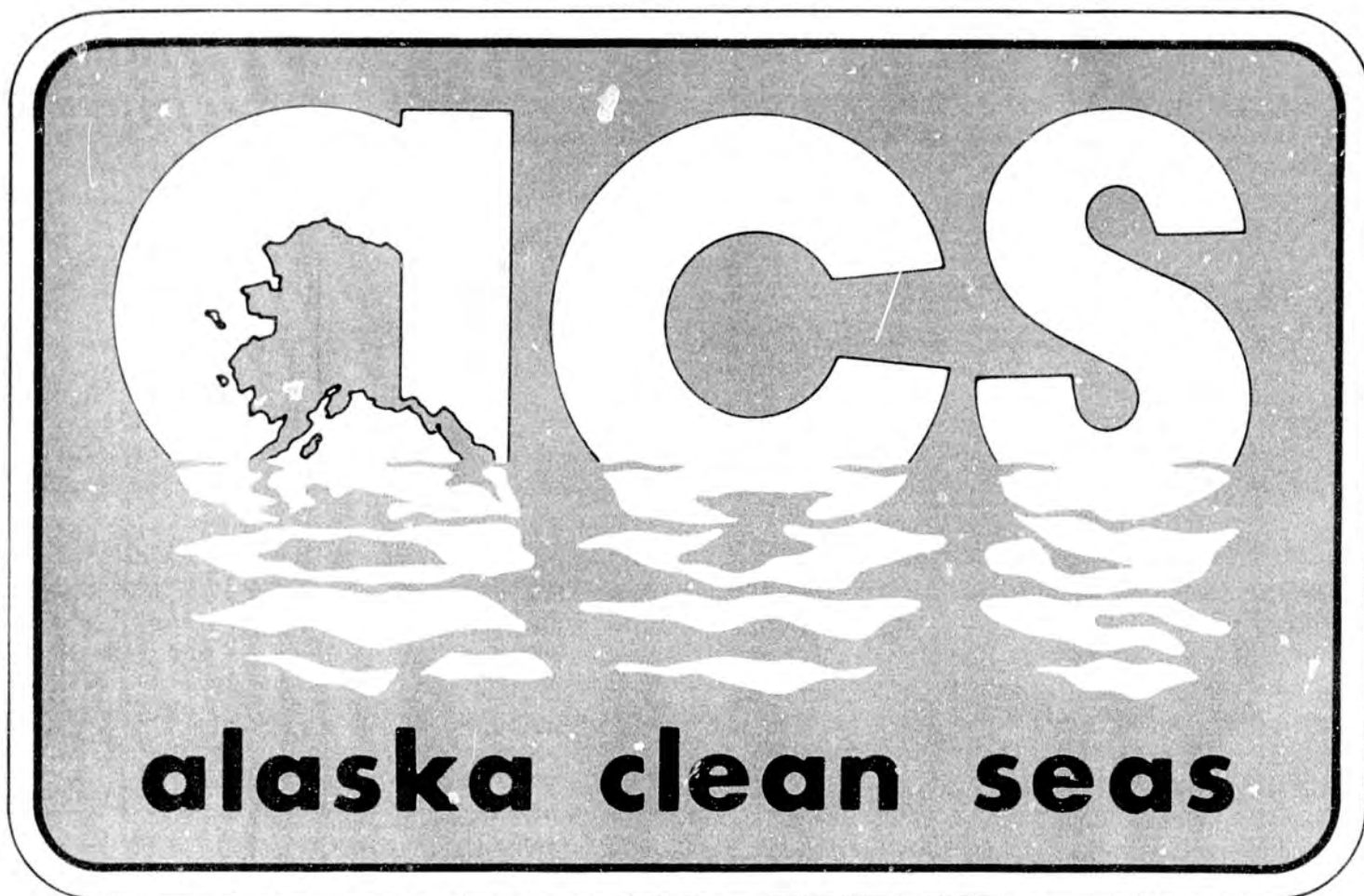
75. *The Halley*, 1868, 2 P.C. 193; *The Jules Fribourg*, N.D.Cal.1956, 140 F.Supp. 333.

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.

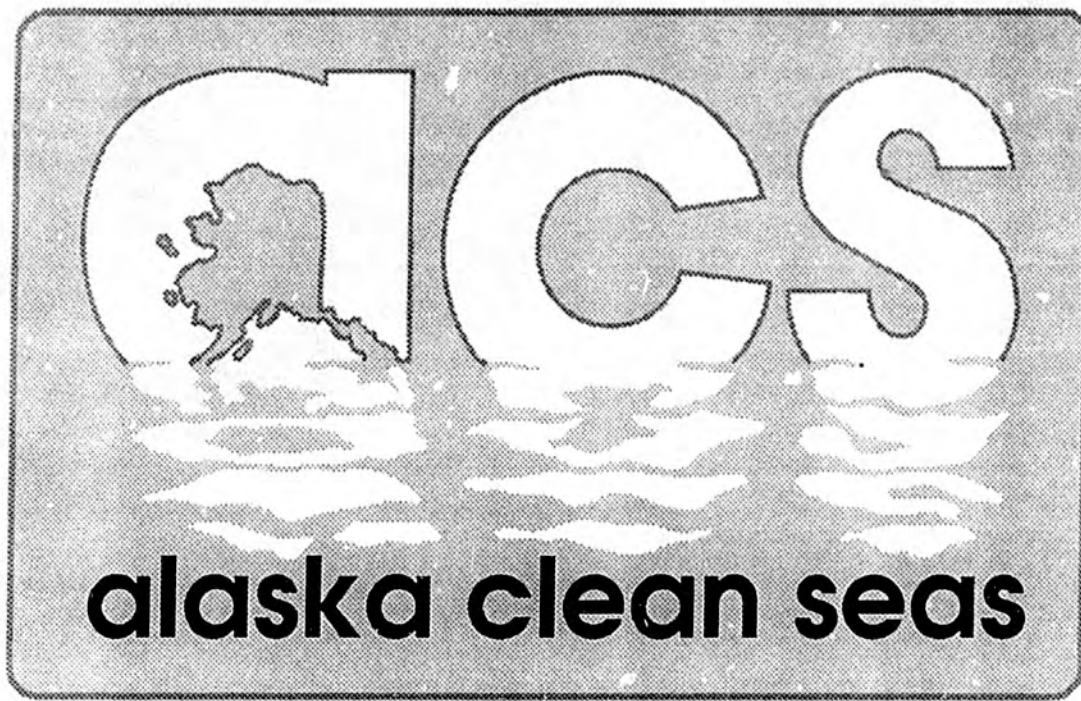
79. *Sildekum v. Animal Rescue League*, 1946, 353 Pa. 408, 45 A.2d 59.



Oil Spill Response

Alaska Arctic Regions

ALASKA CLEAN SEAS



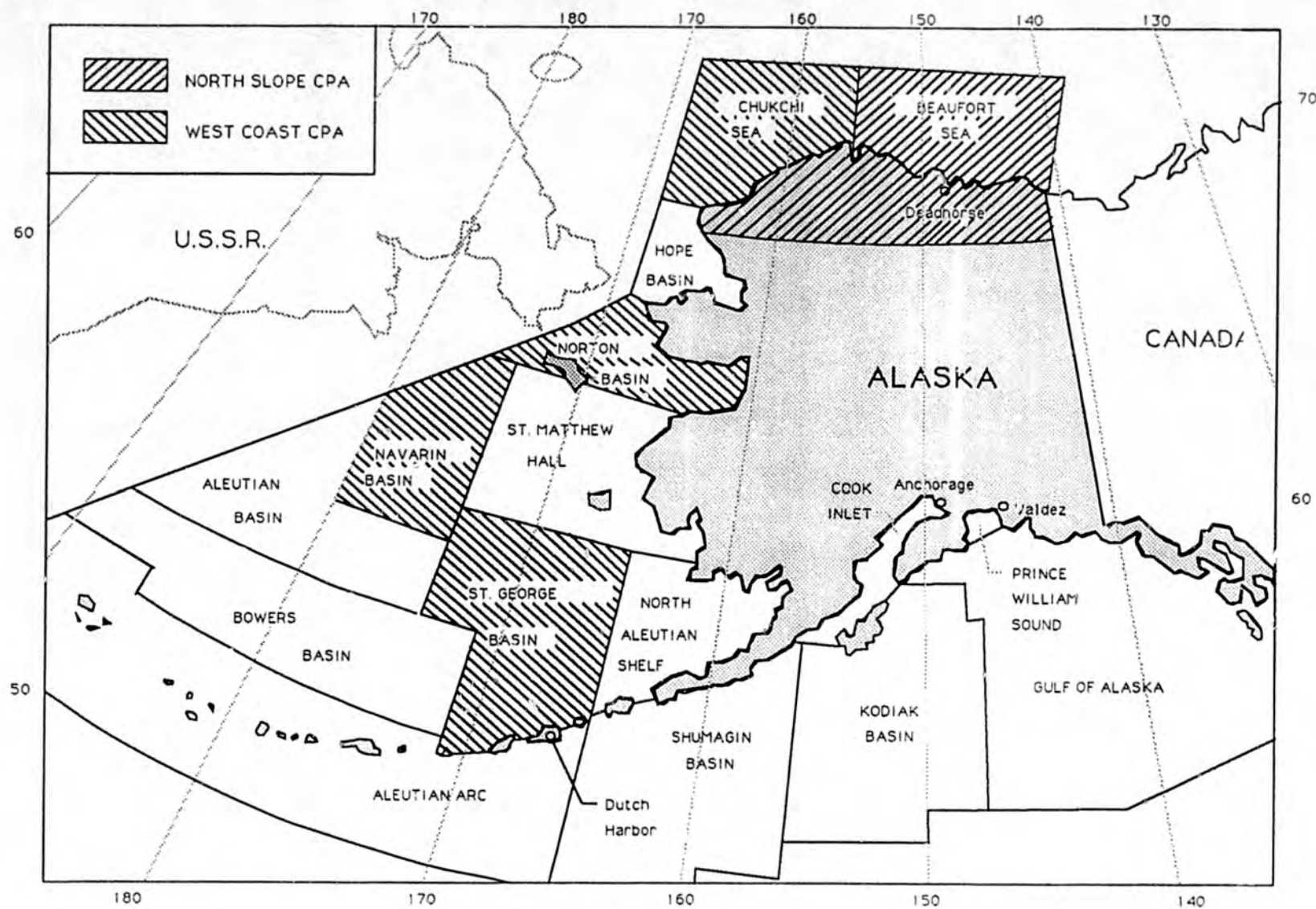
Oil Spill Response

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

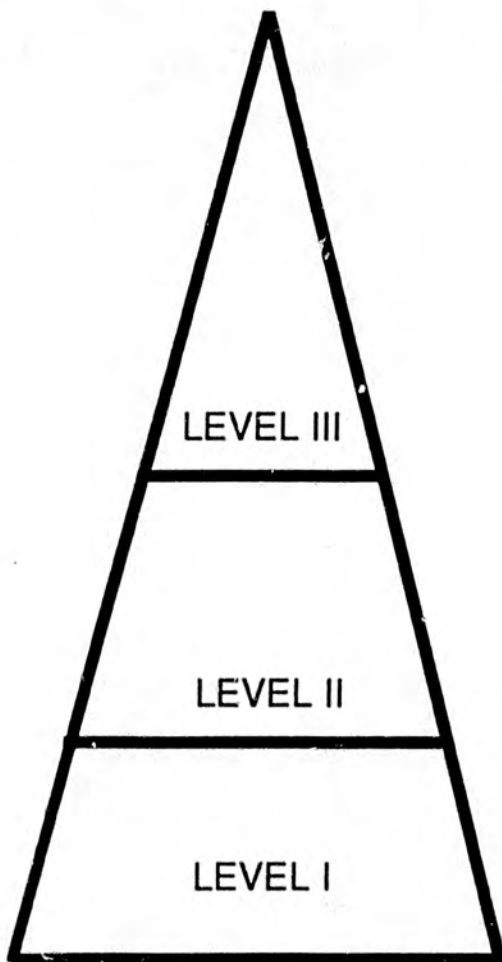
North Slope Oilspill Response Strategy

- **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 1	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

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**

ALASKA CLEAN SEAS

OFFSHORE BURN

Type & Volume of Oil

- **Alaska North Slope
Crude Oil**
- **1,000 BBLS**

ALASKA CLEAN SEAS

OFFSHORE BURN

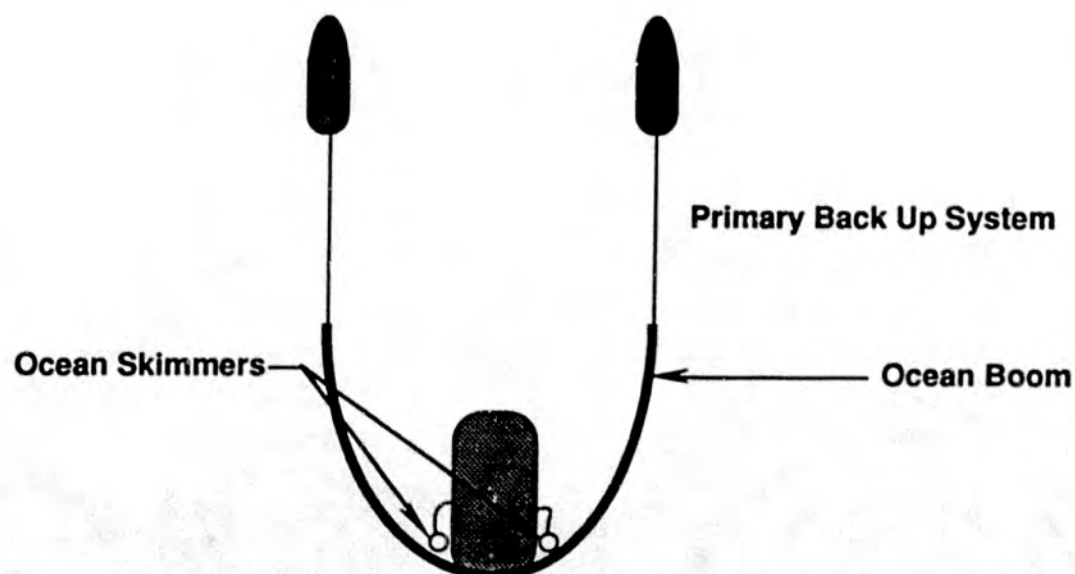
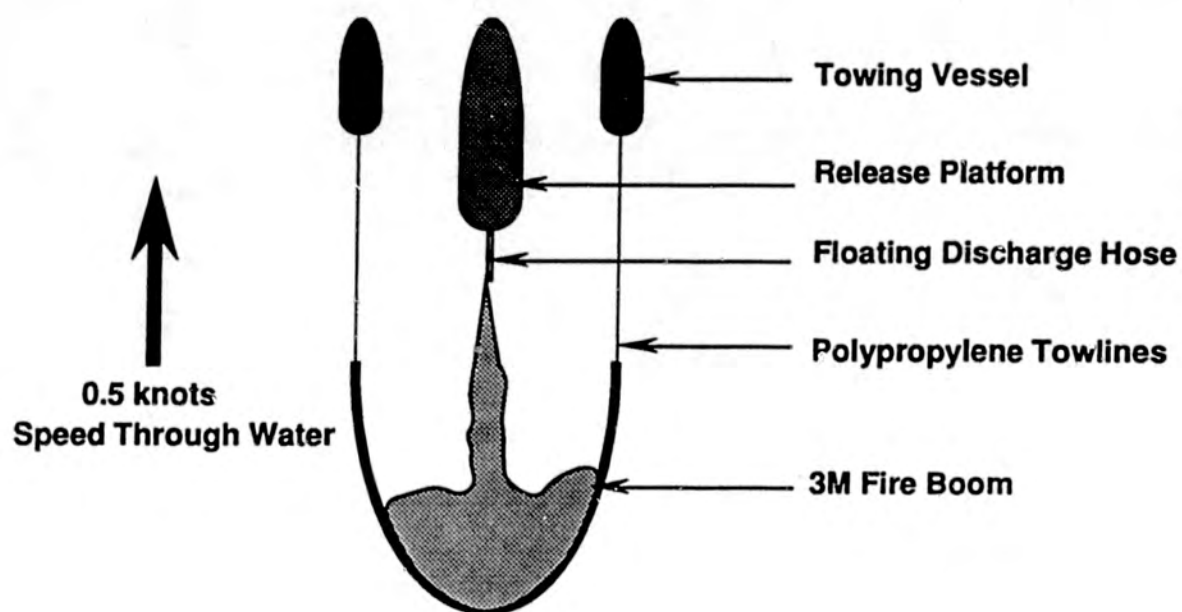
Operations

- **Discharge conducted over a 5 hour period**
- **Initial Discharge of 100 BBLS**
- **200 BBL/Hour Discharge**
- **Discharge into 1000' Boom System**
- **Complete Backup Containment System**

ALASKA CLEAN SEAS

OFFSHORE BURN

Discharge Configuration



ALASKA CLEAN SEAS

OFFSHORE BURN

Contingency

- **Complete Secondary Containment will be Provided:**
 - **Offshore Boom**
 - **High Capacity Skimmers**
 - **Sufficient Storage Capacity**
- **Controlled Release of Oil**
- **Go/No Go Criteria**

ALASKA CLEAN SEAS

OFFSHORE BURN

Go/No Go Criteria

- **Wave Height**
- **Wind Direction**
- **Wind Speed**
- **Surface Currents**
- **Visibility**
- **Ice Concentration**
- **24 and 48 Hour Forecasts**
- **Presence of Wildlife**

ALASKA CLEAN SEAS

OFFSHORE BURN

Monitoring

- **Physical Environment**
- **Smoke Composition and Trajectory**
- **Combustion Process**
- **Biological Resources**
- **Boom Evaluation**

ALASKA CLEAN SEAS

OFFSHORE BURN

Potential Permits/Authorizations

<u>Permit/ Authorization</u>	<u>Agency</u>
Ocean Dumping Permit	EPA
Coastal Zone Consistency	Alaska Division of Govt. Coordination

ALASKA CLEAN SEAS

OFFSHORE BURN

Timing

- **Late August 1992**
- **Require all Permits by May 1, 1992**
- **Avoid unproductive duplication with other test programs**
- **Requires Final ACS Member endorsement**

ALASKA CLEAN SEAS

OFFSHORE BURN

Liability

**Burn test conditional on
government
participation in Liability**

ALASKA CLEAN SEAS

OFFSHORE BURN

Scheduling

ARRT Conceptual Approval	July 91
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Permit Submission	Dec 91
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Permit Approval	May 92
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Burn	Aug 92
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Data Analysis & Report Generation	Feb 93
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ALASKA CLEAN SEAS

OFFSHORE BURN

Consultative Process

ACS Members

Regulatory Agencies

Local Communities

ALASKA CLEAN SEAS

OFFSHORE BURN

Permit Application

- **Executive Summary**
- **Project Description**
- **Operational Plan**
- **Research Plan**
 - **Air Quality Testing & Analysis**
 - **Analysis of Fire Characteristics**
 - **Evaluation of fire Boom**
- **Environmental Assessment**
 - **Toxicity of ANS crude**
 - **Physical Environmental Effects**
 - **Biological Environment & Effects**
- **Public & Community Consultation Process**

ALASKA CLEAN SEAS

OFFSHORE BURN

Project Team/ Permit Preparation

Project Manager	B. McKenzie	ACS
Media/Community Relations	T. & S. Bradner	Consultant
Operations	B. Mackie	ACS
Fire Measurement & Modeling	Prof. W. Nelson	UAA
Air Sampling & Analysis	Prof. P. Hobbs	U. of WA
Environmental Assessment	B. Hoefler	ENSR
Technical Writer	J. Lukin	Consultant
3M Fire Boom	T. Gennrich	3M
Government Liaison	T. Murrell/ J. Jeschke	MMS

SPILL PREVENTION

Volume 1, No. 4

N E W S

December 31, 1991

Burn test planned for Beaufort Sea

Alaska Clean Seas is moving forward with its plans to conduct an offshore burn in the Beaufort Sea, approximately 20 miles offshore of Prudhoe Bay. The burn, tentatively scheduled for late summer of 1992, involves the controlled discharge and burning of 1,000 bbls. of Alaska North Slope crude oil.

The burn has four objectives: first, to conduct the burn in a safe and environmentally sound manner; second, to stress the fire resistant boom both thermally and me-

chanically at the same time over a period of several hours; third, to obtain measurements of critical burn parameters such as rate of oil consumption, flame temperatures, and heat radiation release rates; and finally, to characterize the environmental impacts of burning, specifically the emissions to the atmosphere. The key chemical species for characterizing the emissions are CO₂, CO, VOCs, soot, particulate organics, SO₂ and NO_x.

The burn is anticipated to take

approximately six hours to complete. An initial discharge of 100 bbls., made into the apex of the fire resistant boom system, will be ignited first and then oil will be discharged into the boom at a continuous rate of 200 bbl./hour.

A conservative approach has been taken in developing plans for the burn to ensure that potential environmental damage is minimized. First of all, there will be a complete backup containment recovery and storage system in place and deployed during the burn. Any oil that might escape the burn will be collected in the backup system. The rate of discharge for the oil will be controlled, and if any difficulties are encountered the discharge of oil can be immediately terminated. Finally, criteria will be in place to ensure that the burn takes place only in environmental and operational conditions that will facilitate maximum scientific benefit.

The permit application for the burn was submitted in December 1991 to the U.S. Environmental Protection Agency (EPA). The application was issued concurrently to the Alaska Regional Response Team, Alaska Department of Environmental Conservation, North Slope Borough and a wide range of interested and/or involved groups for concurrence.

Continued on Pg. 2



Photo courtesy of 3M

Photo of short duration burn test carried out in Spitzbergen, Norway in 1988 with similar operational configuration as the planned North Slope test

Manager's notebook

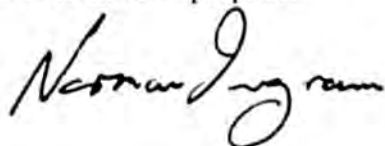
Norman Ingram

After reflecting on several of our key projects this past quarter I am struck by how far we have come in interacting with one another on oil spill response issues here in Alaska. In developing the "Lessons Learned"



from the Mutual Aid Exercise, we benefited greatly from the input of government agency representatives, other oil spill response professionals and members of the community. The recent Foxtail Skimmer test was a collaborative effort of spill response cooperatives and government agencies. Finally, the plan for ACS's proposed Beaufort Sea test burn has been developed as a cooperative effort involving representatives of the government, academia and the spill response community. The review process for the plan now moves forward with a consultative approach involving all government groups—federal, state and local; research and scientific groups; industry; and local communities.

We face future challenges, and groups will undoubtedly differ from time to time on approaches and priorities. However, our recent experience leads me to believe we can make significantly more progress working constructively together rather than independently and often at cross purposes.



Beaufort Sea test burn

Continued from Pg. 1

A number of conditions have to be met for the burn to take place. All permits must be in place by May 1, 1992. The federal government must participate in the sharing of liability. And all parties concerned must feel comfortable with and be supportive of the burn.

ACS is consulting closely with many interested parties concerning the burn. This includes ACS member companies, federal, state and local regulatory authorities as well as public interest groups and local communities. This process is ongoing and will continue through the duration of the project.

It is planned to use this consultative process to ensure the scientific objectives of the burn test are well understood and that it does not become viewed as a demonstration of response capability or as a response drill.

The project team brought together to execute this initial phase of the project includes:

Project Manager

B. McKenzie, ACS

Media/Community Relations

T. & S. Bradner, Consultants

Operations

B. Mackie, ACS

Fire Measurements

Prof. W. Nelson, UAA

Air Sampling & Analysis

Prof. P. Hobbs, U. of Wash.

Environmental Assessment

B. Hoefler, ENSR

Technical Writer

J. Lukin, Consultant

Fire Boom Analysis

T. Gennrich, 3M

Government Liaison

T. Murrell/J. Jeschke, MMS

ACS Hosts Workshop on *In-Situ* Burning

Alaska Clean Seas hosted an *in-situ* burn workshop at the Sheraton Hotel in Anchorage on November 4-6, 1991. The purpose of the workshop was to foster a better understanding of *in-situ* combustion as a spill response tool and to discuss some of the issues associated with burning.

The workshop was well attended with more than 190 participants from Alaska, the Lower 48, Canada and Norway. Internationally recognized experts from industry, the contractor community, academia and government made presentations on issues related to *in-situ* combustion. These included discussions on operational considerations; air quality, environmental and public health considerations; the burn approval process; case histories; and research and development plans.

Spill Prevention News is published quarterly by Alaska Clean Seas, 12350 Industry Way, Suite 200, P.O. Box 196010, Anchorage, Alaska, 99519-6010. Managing Editor: Jack Laasch. Production Editor: Shehla A. Bradner.

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1991: A year of progress and transition for ACS

Alaska Clean Seas made significant progress in 1991 in its transition from an equipment warehousing facility to a full capability oil spill response organization.

Major facility expansion included: the completion of a 2,500-square-foot office complex that provides supplemental Incident Command Post capability in the event of an emergency; a 1,750-square-foot telecommunications center complete with VHF, UHF, HF, microwave and satellite communications capability; an additional 12,000-square-foot heated warehouse that doubles the total ACS capacity; 75,000 square feet of additional cold storage capacity; and a new Emergency Wildlife Treatment Center that includes a laboratory module and a separate, portable utility module.

Major equipment additions include: a 45-foot offshore shal-

low water response craft and two 38-foot offshore work boats and two airboats. Delivery of another 55-foot response boat will be taken in early 1992. Existing inventory of containment boom was supplemented by 16,000 feet of shore barrier boom, 17,000 feet of ocean and harbor Ro-boom and 2,000 feet of river fire boom. Two amphibious track-mounted vehicles were added and delivery of a 400-horsepower heavy duty response vehicle complete with a 13,000-lb. crane will be taken in early 1992.

Additional equipment purchased included suction and discharge hoses, tracking buoys, two 300-gallon helitorch ignition systems and personnel protective equipment for approximately 200 workers. Activities around the warehouse are now facilitated with the purchase of an additional forklift and a number of computers and associated support equipment.

The accompanying chart indicates the current major equipment levels held on-site by ACS and the North Slope oil production operators.

The full-time ACS team varied between 33 and 40 personnel. However, the full complement was in place during the summer open water season when support operations were underway in both the Chukchi and Beaufort Seas while Shell, Amoco, Chevron and ARCO were engaged in exploratory activities. Training with an additional 500 auxiliary members from contractor response teams and North Slope operators response teams also took place at various times during the year.

Finally, and most importantly, while ACS took part in a total of 47 response exercises and drills with member companies in 1991, they were NOT called on for support on any actual SPILLS.

Equipment held on-site by Alaska Clean Seas and North Slope operators

	<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

Mutual aid exercise critique identifies strengths and areas for improvement

On August 23-24, 1991 the North Slope producers and Alaska Clean Seas held an extensive mutual aid oil spill response training exercise. The exercise was hosted by BP Exploration's Endicott oil field with the planning conducted jointly by ACS and Endicott. The spill scenario involved a catastrophic rupture of the 16-inch diameter Endicott sales oil pipeline, at the shoreline point where production from the offshore field comes to shore.

The simulated spillage was calculated to be approximately 750 barrels of oil into the water on the east side of the gravel causeway. The exercise was run in real time for a period of 24 hours under

actual weather conditions of the day—these were challenging with winds out of the west at 28 knots and wind chill temperatures around 0°F. Significant quantities of spill response and support equipment were deployed. This included 21,000 ft. of boom, 21 marine vessels, 14 skimming systems and seven aircraft.

To ensure that maximum benefit was received from the exercise, a plan was developed to critique performance and identify strengths and weaknesses. Exercise objectives were established and reviewers were identified from industry, government and third party consultants to assess performance. Reviewers were requested

to assign a numerical rating of performance (1 to 5, with 5 being the highest) for the objectives. Only about 50 percent of the reviewers provided a numerical rating. The arithmetic mean of all ratings provided was 3.54 or 71 percent.

Written comments were also solicited from the reviewers. Additionally, all of the exercise participants and observers were encouraged to provide comments. All comments received were reviewed and assessed. Comments warranting action were identified as well as the recommended action, the responsible party and timing for completion.

Reviewers' recommendations

Primary conclusions and recommendations were:

1. Uncompromising safety and environmental goals set for the exercise were substantially but not completely met. Further training and procedure review are recommended.

2. A number of very positive practices and procedures that have been implemented by individual operator Immediate Response Teams (IRTs) need to be shared and adopted as "best practice" standards for all operators on the North Slope.

3. The mutual aid concept on the North Slope can become an even more efficient and effective force through further skill specialization and interchange at both command post and field positions.

4. Forward progress in emergency management through utilization of ICS has been extraordi-



Komara 12K skimmer head is stowed on board a Bell 212 helicopter for remote river delta deployment

Mutual aid exercise critique . . .

Continued

nary since the inception of integrated training on the North Slope in April 1991. Continuation and fine tuning of the programs, particularly at the Command, Section and Unit leader levels is required.

5. Spill response training needs to focus more attention and effort on pragmatic containment and removal tactics and techniques.

6. Alaska Clean Seas level II capability including auxiliary response teams and logistical support performed satisfactorily. However, periodic unannounced drills and call-ups should be conducted to verify their continued ability to rapidly provide supplemental spill response personnel.

7. Efforts must be made to ensure the 1992 exercise is treated and perceived as a training exercise rather than a drill.

8. Limitations in the Endicott Incident Command Post and communications console operation identified during the exercise need to be addressed.

9. Endicott should consider further pre-staging spill response equipment on adjacent shorelines and/or barrier islands.

Strategic goals achieved

The 1991 mutual aid exercise substantially achieved its six strategic goals. These were:

1. Carry-out exercise in safe and environmentally sound way.
2. Exercise mutual aid among North Slope operators.
3. Implement Incident Command System.
4. Exercise ACS Level II response capabilities.



Night shift Incident Commander Gene Gregory and Operations Section Chief Jim Matti conduct morning briefing on August 24

5. Exercise interaction with external groups and agencies.

6. Exercise Endicott spill plan and response organization.

Through an open and questioning pursuit of these goals, many lessons were learned. The detailed critiquing program developed and used for the first time, identified and isolated a tremendous number of strengths and areas for improvement. Analysis, conclusions and approximately 55 recommended actions developed by this process provide a level of specificity which facilitates measurable forward progress. It must be noted however that the critiquing program did not fully meet expecta-

tions. Again, experience gained will allow the program to be better communicated and more consistently understood and executed in future situations.

Investment in the mutual aid concept and exercise has raised awareness and preparedness on the North Slope to significant levels. While the diverse nature of the contributions make it difficult to pin down exact costs for the exercise, they are estimated to have exceeded \$500,000. As the process continues and broadens within the framework of the Prudhoe Bay Local Emergency Planning Committee (LEPC) further safety and environmental protection breakthroughs can be achieved.

ACS launches an aggressive training program in 1991

Between mid-1989 and mid-1990 a senior level steering committee of North Slope operators reviewed their oil spill response preparedness in the Alaskan arctic area. The five point summary of the committee's report included recommendation to "maintain an aggressive training program...." The Steering Committee further observed that "there is no substitute for training." That recommendation and observation became the standard-operating-procedure that Bruce McKenzie, ACS Planning and Development Manager, used to plan, create and implement the ACS Training Program.

Bruce recognized that a good training program must follow some basic guidelines. These included:

- A two- to three-year program to complete full and specialized responder training.
- a multi-year commitment, not a crash program.
- prioritize training to ensure overall preparedness.
- providing quality courses and professional instructors.
- a student critique program to ensure appropriate feed-back and corrective actions.
- examinations to confirm successful completion of courses
- State of Alaska approval of the formal training program.

To start the program, Alaska Clean Seas Spill Response Technicians conducted several "brainstorming" sessions over a three-week period and compiled a list of 40 different subjects to be taught. These subjects included classroom training, operational training and a combination of both ranging from two hours to three days of instruc-

tion. They also concurred with the recommendation of bringing in outside expertise to conduct many of the classes and suggested that the Alaska Clean Seas Core Group of technicians provide both classroom and operational training in several areas.

Based on the above, Alaska Clean Seas published the 1991 Training Manual in December 1990. This manual included three major sections:

• **Specialized Training** – These seven courses are geared primarily for the ACS Core Group of Spill Response Technicians, but are also available to member company personnel and other selected individuals. The courses include Advanced Marine Firefighting, Instructor Training, and Supervisor Training.

• **General Training** – This was the heart of the ACS Training Program for 1991. It included 20 different courses that were all taught by outside consultants. Some courses were presented more than once based on demand. Several instructors are internationally renowned for their expertise such as Al Allen of Spiltec; Steve Potter and Ian Buist of S.L. Ross Environmental Research Ltd.; Jim O'Brien of OOPS Inc.; Carl Oskins, Joymai; and Jay Holcomb with IBRRC. Fortunately Alaska is well serviced with high quality local groups and individuals. Many of these such as Brian Horner of LTR, and the IMA group, have been utilized in the ACS program.

• **Short Courses** – This list of courses was designed primarily for the Operator Immediate Response Teams, ACS Auxiliary Contractor Response Teams and

the ACS Village Response Teams. The courses are designed to be no more than four hours in duration and encompass spill response techniques and equipment. Short course needs evolved rapidly based on lessons learned from drills and exercises and as required for new equipment acquisition.

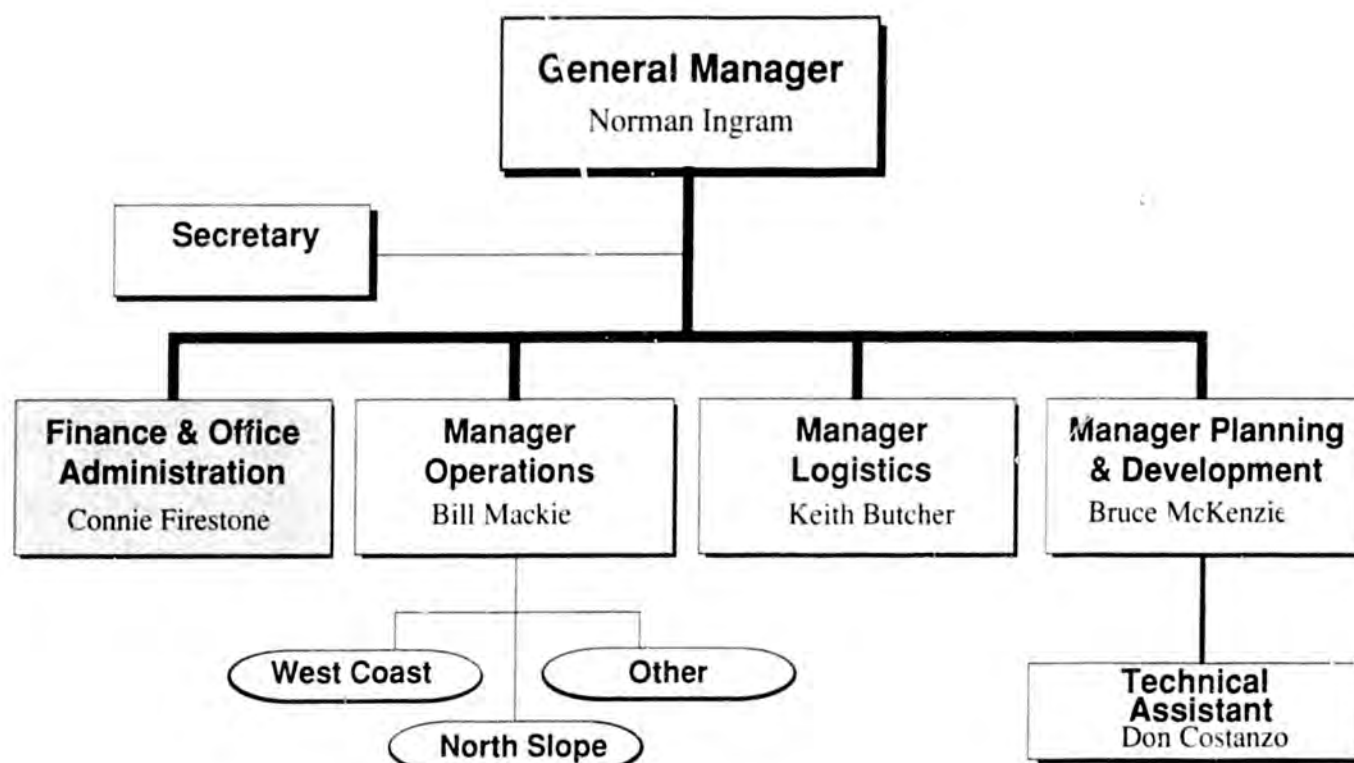
During 1991, an extraordinary total of 20,167 man-hours of classroom and field training was provided for Oil Spill Response and related subjects. This figure excludes time spent on drills and response exercises. The training has not only concentrated on what to do in an emergency, but more importantly, on how to prevent and minimize such an emergency. If a spill should occur, North Slope personnel have a better understanding of how to respond, what equipment to use, how to use it, and how to work cohesively using a common emergency management structure.

The Alaska Clean Seas training program has caught the attention of local, state and federal agencies. Agency representatives that have attended one or more of the General Training classes include:

- United States Coast Guard
- United States Minerals Management Service
- State of Alaska Departments of Environmental Conservation and Fish and Game
- North Slope Borough Planning Department

The 1992 training program will build on the advances made in 1991. The 1992 ACS Training Manual was issued in December. For more specific information on the ACS 1992 Training Schedule, contact the ACS Training Coordinator at 907-659-3206.

Alaska Clean Seas Organization Chart



Connie Firestone: Alaska Clean Seas' link to the past

How important is it to have an employee who has been exposed to, and remembers, the details of a company's past history? The management of ACS considers it invaluable and relies on Connie Firestone to provide this insight.

Connie functions as the Manager of Finance and Office Administration in her normal duties. She joined ACS shortly after her move to Alaska from Oregon in 1981. She experienced company

reorganizations during 1983 when ACS expanded its operations to cover the west coast of Alaska and established an active warehouse of spill response equipment at Dutch Harbor to support exploration activities in the Bering Sea. Again in 1987 when operations were contracted to address the Beaufort and Chukchi Seas only. More important, she has played a key role in the conversion of ACS during the past year from a warehousing facility to a response organization and one with the added responsibilities of the North Slope

onshore areas. Throughout her tenure Connie has been involved in numerous diversified tasks. Connie has obtained her level of expertise in accounting and administration through extensive on-the-job-training and classes at the University of Alaska Anchorage.

Connie and her husband Bill live in Anchorage, Alaska. Her main interests, other than Bill, are the activities associated with her job. She also enjoys sewing, reading, and her cat Sam. Somewhat differently, Connie is also an avid car racing fan.

News Briefs . . .

Foxtail Skimmer Evaluated

During the first week of December, ACS participated in a skimmer evaluation at the Tesoro refinery in Kenai, Alaska. The skimmer test was a joint effort between: Alaska Clean Seas, the Canadian Petroleum Association, Cook Inlet Spill Response and Prevention Inc., and Environment Canada.

The skimmer evaluated was the Norwegian VAB 8-14 Foxtail Skimmer. The test protocol for the trial was developed by engineer Laurie Solsberg. All equipment and logistical support including spill technicians, crane and skimmer operators were supplied by CISPRI.

The skimmer evaluation included five days of critical analysis of the skimmer relative to recovery efficiency and oil recovery rate. These performance parameters were determined for a num-



Foxtail Skimmer test underway at Tesoro Refinery, Kenai, AK., December 1991

ber of oil types and equipment settings. The vertical adhesion band concept, as it relates to the clean up of oil in broken ice, was also evaluated.

The Foxtail skimmer test represents a continuing process of mutual cooperation between the

U.S. and Canadian Oil Spill Cooperatives and government agencies. The resulting skimmer test data will provide essential information for the optimization of skimmer performance as it relates to the U.S./Canadian arctic and sub-arctic operational areas.



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Trouble for Tesoro: Alaska woes hurt oil producer

THE ASSOCIATED PRESS

KENAI — Texas-based Tesoro Petroleum Corp. is having troubles finding its niche among the oil industry's biggest players in Alaska.

The oil tankers moving up and down Cook Inlet are keeping workers busy at the Tesoro Alaska refinery north of Kenai. But that doesn't make the ships a cheerful sight to Tesoro vice president Gene Burden.

"You could call us the reluctant shippers," Burden says.

For Tesoro, the tankers are a symbol of how Alaska's changing oil business has eroded the company's once-favorable position.

As an independent operator in an industry dominated by major players, the San Antonio-based Tesoro has struggled for 34 years to find its place in Alaska. The company has played a big role in Tesoro's strategy, generating two-thirds of the company's revenue.

But Tesoro has reached a critical point. With a shakeout and restructuring under way in the parent corporation, Tesoro Alaska is confronting a growing list of problems.

Its refinery at nearby Nikiski was built in 1969 to process Cook Inlet oil. But production here declined, and now Tesoro pays a extra to ship most of its crude by tanker from Valdez in Prince William Sound.

Shipping costs went up again after the Exxon Valdez spill in 1989, when the owners of North Slope oil — never especially friendly to the maverick independent refiner — quit shipping to Cook Inlet.

Tesoro has had to charter its own double-bottom tanker to stay in business, then pay the newly imposed costs of Cook Inlet oil spill protection itself.

The tankers leaving Cook Inlet are even worse news for Tesoro. Nearly half of every barrel of crude refined in Nikiski gets turned into a low-value byproduct known as residual oil, which is shipped away for use as marine

Texas-based Tesoro Petroleum Corp. has reached a critical point.

With a shakeout and restructuring under way in the parent corporation,

Tesoro Alaska is confronting a growing list of problems.

tanker fuel or further refining.

While a depressed world market for residuals may be better than no market at all, Tesoro says it is losing \$1 million a year shipping its residuals to Japan instead of back to Valdez.

Tesoro's effort to plug its biggest money drain is opposed by Alaska's major oil companies. Tesoro met with the Army Corps of Engineers nine days last month to discuss a new terminal and pipeline in Valdez that would allow the company to re-inject residual waste products in the trans-Alaska pipeline.

The major oil companies that own the pipeline are fighting the idea.

The extra production costs from shipping come as Tesoro Alaska is feeling new retail pressure from pipeline-fed competitors Mapco and Petro Star, which plan a new jet-fuel refinery in Valdez.

A pending bill for past purchases of state royalty oil makes Tesoro Alaska's situation even more precarious. Tesoro's contract calls for retroactive payments once the state determines a final value for its royalty oil. That value is being determined by a mammoth lawsuit charging that producers shorted the state for years by understating the price of crude.

The bill could run higher than \$100 million.

There are mounting environmental costs. Tesoro's biggest effort is a cleanup of the water table under the Nikiski refinery: \$10 million spent since 1987,

with no result in sight.

The company also lost half the \$7.7 million budget last year for the state's spill response group in Cook Inlet — an extra cost that has won Tesoro good marks from Alaska environmentalists.

Tesoro will take on more of the spill prevention costs than Cook Inlet's only other refinery has gone through. Tesoro shut down its Nikiski refinery last year, citing rising environmental costs and the loss of customers to small refineries.

Back in Texas, Tesoro Alaska's parent company is in turmoil. Tesoro Petroleum Corp. has seen its profits fade after climbing back from big losses in the late 1980s. Last month, the company axed several top officials, laid off some 90 employees and announced an \$11 million streamlining. Those actions followed the resignation in January of the company's chairman and founder, Robert West.

Only six people were laid off in Alaska, where operations accounted for 67.5 percent of the company's \$1 billion in revenue last year, according to Nikiski refinery manager Mark Necessary.

Any cutback by Tesoro would hit hard in the Kenai Peninsula, where the company is the third-largest taxpayer and employs 150 workers. Already, the borough government cut Tesoro's \$1.6 million property tax bill by \$140,000 in 1991, citing the company's rising shipping costs and aging facilities.

Borough mayor Don Gilman said he is concerned

about Tesoro's troubles and its rocky relationship with the state's major oil companies.

"It's difficult even to imagine what would happen here if for some reason that plant shut down. Nothing in the state can match its production," Gilman said.

The Alaska refinery was one of the first big projects for Tesoro, formed in 1968 from the merger of four smaller oil companies. But the company's San Antonio headquarters as well as its name, which is Spanish for "treasure," attest to its Texas roots.

Tesoro is considered a large independent oil company, according to Ray Gibson, a stock analyst with the Wall Street firm of Pforzheimer. In addition to its Alaska refining and marketing arm, the company operates oil wells in Indonesia and natural gas fields in Bolivia and South Texas.

The Nikiski refinery apparently did well for the company. For years, Tesoro had a virtual monopoly on gasoline sales in Alaska. The refinery also produces jet fuel and diesel and heating oil.

But Cook Inlet oil production declined, and in 1985 Tesoro spent nearly \$100 million converting the refinery to process North Slope crude.

And when a final value for the state's North Slope royalty oil has been determined, royalty oil purchasers like Tesoro that had been paying the old price will be charged for the difference.

Another high-stakes clash between the independent Tesoro and the major North Slope oil companies concerns Tesoro's bid to ship its residual oil byproduct to Valdez and mix it into the trans-Alaska pipeline.

Tesoro's request was turned down by the companies that own the pipeline, and in December Tesoro appealed to the Alaska Public Utilities Commission.

Residuals are a byproduct of small refineries that don't have the equipment to turn an entire barrel of crude into more marketable products.



Peninsula Clarion



Alyeska blasted for billion-dollar bond

By CATHY BROWN
Peninsula Clarion

Borough Mayor Don Gilman Wednesday blasted Alyeska Pipeline Service Co. for what he calls an "unreasonable" demand that threatens to shut down Tesoro-Alaska Petroleum Corp.'s Nikiski refinery.

Alyeska is requiring Tesoro to come up with a \$1 billion bond to continue shipping oil from the Alyeska pipeline terminal in Valdez to Cook Inlet.

Tesoro officials say they can't possibly meet the requirement. And since they get 90 percent of the crude oil for their Nikiski refinery from Valdez, the refinery would be in serious trouble if it was no longer able to ship from there, said Tesoro vice president Gene Burden.

Gilman said the major member companies of Alyeska — Exxon, British Petroleum and ARCO — are using Tesoro as a pawn in order to pressure the Legislature to pass a bill restricting Alyeska's li-

bility in the event of a spill.

"They're using Tesoro," Gilman said. "They're being unreasonable."

But Alyeska spokesperson Mamie Isaacs said the \$1 billion requirement is necessary because of the liability Alyeska could be subject to if it responds to a spill from Tesoro or another shipper in Prince William Sound.

"Alyeska serves as the initial response action contractor for those vessels calling at the terminal in Valdez," she said. "Because

of the state's liability requirements, Alyeska ... asked the owner-operator or charter of the vessels to pledge a billion dollar bond, which, simply put, indicates they would have access to funds to manage the claims arising from a spill."

The other five companies operating vessels in Prince William Sound — Exxon, BP, ARCO, Shell and Chevron — have been able to comply with the \$1 billion requirement, mainly by pledging \$1 billion in

See ALYESKA, back page

Alyeska: Company says state's liability laws no blame

Continued from page 1

corporate assets.

But Tesoro can't do that, Burden said.

"All five of those other companies are very, very large companies," he said. "Our whole company's only worth \$200 million. To come up with a bond of a billion dollars is just not possible."

He thinks Tesoro should not be required to put up as large an amount as the other companies because Tesoro transports only a small percentage of the oil coming from the terminal, its tanker loads are much smaller, and it has taken many preventive measures, including the recent introduction of a double-bottomed tanker.

Alyeska and Tesoro have worked out a temporary agreement that allows Tesoro to continue operating in the Sound until June 1 with \$1 billion in insurance, rather than a bond.

Alyeska says it may lower its requirements if the Legislature

passes a bill limiting Alyeska's liability in case problems occur when it responds to a spill.

"The core of the problem rests with the state's current liability laws," Isaacs said.

The way the law stands now, the standard of liability is "simple negligence," which Isaacs said could mean if Alyeska responds according to its plan with the state, but inadvertently loses some oil from a boom, it could be held liable.

Alyeska wants the standard of liability for a spill responder to be "gross negligence," which is harder to prove in court than simple negligence.

Tesoro also favors such a bill because it would limit the liability for the Cook Inlet spill response cooperative of which Tesoro is a member.

But fishing and environmental groups are opposed to the idea because they believe it would lessen the incentive for spill responders to be prepared.

A compromise bill, which sought to limit liability but only for the first 15 days after a spill and only if a company does not "substantially deviate" from its contingency plan, was passed out of the House Resources Committee Tuesday.

But Alyeska is not satisfied with the language in the bill, Isaacs said. "The bill is helpful, but it doesn't go quite far enough," she said. "We feel present language does not allow us to relax our liability standards."

Mayor Gilman also favors legislation limiting spill responders' liability because the Kenai Peninsula Borough is a member of the Cook Inlet response cooperative and taxpayers could also be held liable for problems resulting from the cooperative's response to a spill.

But Gilman, a former state senator, does not believe the legislation will pass. He says the bill has to get through two more House committees and the full House

and the Senate, and he doesn't believe that will happen, meaning 34 days of the legislative session.

He believes Alyeska is being inflexible about the bill.

"They don't want anything less than gross negligence," he said. "What I think is happening is Alyeska is trying to get the gross negligence standard, and they're doing it on the backs of Tesoro."

"The big three (Exxon, BP and ARCO) are using this thing unmercifully and unnecessarily," Gilman said.

Isaacs says that Alyeska is "very sympathetic to Tesoro's situation."

"We would like to find a way to accommodate Tesoro's needs and still protect the company's (Alyeska's) liability," she said.

Some of Tesoro's supporters in borough and state government have suggested the Alyeska owner companies are trying to put Tesoro out of business, but Isaacs denies that and Gilman says he

does not believe that's the case.

But if that's the fallout, they could care less," he said. "The big guys just don't care. They could care less if this refinery closed down."

The Kenai Peninsula Borough Assembly cares a great deal, however.

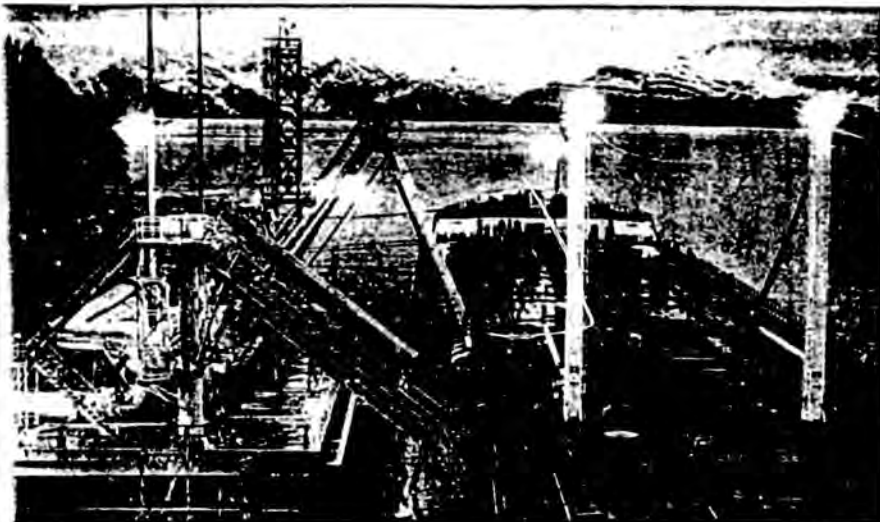
Tesoro employs about 150 people on the borough, according to Burden. The company provides a good chunk of borough tax revenues.

The Borough Assembly unanimously passed a resolution Tuesday night, which was supported even by fishing groups, urging the Legislature to intervene on Tesoro's behalf.

Burden says if Tesoro and Alyeska can't come to an agreement, Tesoro will file suit against the pipeline company, which would include seeking an injunction to allow the company to continue shipping out of Prince William Sound after June 1.

KENAI PENINSULA / MAT-SU

Overseas Washington faces legal round with Alyeska



The Overseas Washington sits at Valdez harbor awaiting an early-morning departure.

into 18 tanks that carry either crude or ballast water.

Oil is hydrostatically loaded into eight of the 12 outside tanks. Such loading allows the pressure inside the tank containing the crude to be less than the pressure of the seawater outside. In case of a rupture, water will rush into the tank, but little oil will be allowed to escape into the ocean. The other outside tanks carry ballast water for additional safety.

"It's a perfect ship for this run," O'Brien said. "It'd take a severe collision to damage the center tanks, and the others are hydrostatically loaded."

The Overseas Washington also has a double bottom to provide protection if the ship runs aground.

Michelle Brown, executive director of the Citizens Oversight Council on Oil and Other Hazardous Substances, applauded Tesoro for using the double-bottomed Washington.

"Tesoro has, on their own, undertaken more prevention steps than some of the others, like the double-bottom and the hydrostatic loading," Brown said. "That certainly is a wonderful thing for companies to do that on their own, but we haven't looked at Tesoro's particular situation."

Stan Stanley, maritime operations specialist for the Regional Citizens Advisory Council in Prince William Sound, said his group has not looked specifically into the Overseas Washington but backs the federal Oil Pollution Act of 1990, which mandates a phased-in period beginning in 1995 for tankers to have a double-bottom and double-hull.

Another feature on the Washington is that the company has assigned an extra second mate to the crew of 24, allowing one to concentrate on the cargo and the

routine operation of the vessel while the other can assist the captain on the bridge.

To keep alert, the crew works a four-hour shift followed by eight hours off. As the mates on the bridge chart the tanker's way through the Sound, some of the off-duty sailors are watching movies in the television room.

On another level of the "house," an eight-story white rectangle structure near the ship's stern, music filters from dorm-style quarters.

On the bridge atop the house, a quartermaster turns the ship's sports car-sized wooden steering wheel a touch to the right every few minutes to counter the natural pull to the left as the 26-foot propeller churns through the Gulf of Alaska at 14 knots.

The sea is calm today. Two- to 3-foot seas with winds around 22 to 24 knots and intermittent rain. But the captain knows it can change.

"You get some pretty rough weather out here," O'Brien said. "You can get some 30-foot to 35-foot seas to where you can't turn into them because they could do damage to the ship. So, I just slow steam. You do whatever is safe for the ship and ride it out."

There are also the physical differences the Sound and the inlet possess that can challenge the most experienced of sailors.

In the Sound, a tanker must be guided through an hourglass-shaped neck of water at the Valdez Narrows, leaving only a quarter mile of distance from the ship's side to shore. Then there are the treacherous winds that can whip the seas into a frenzy as a vessel passes out of the Sound through the Hinchinbrook Entrance and into the gulf.

But the Sound is deep and the tides run 12 feet compared to the shallower inlet and flood tides

that can travel six knots and rise more than 20 feet in minutes.

Catching the flood tide on the rise is part of O'Brien's strategy. He'll use the swift current to help make the horseshoe-shaped maneuver needed to dock.

As the sun begins to rise, the lights of Homer are off the starboard bow. Just as he did through the Valdez harbor and Arm, the captain will pick up a pilot to guide the tanker up the inlet. But unlike Valdez, the vessel will have to dock without the aid of tugboats.

"It would be more dangerous than not using them," O'Brien said. "They just don't have the power to fight the current."

After 15 hours at sea, the dock is in sight and slowly the talk on the bridge is replaced with stern looks and pacing from the windows to the two advanced radar screens and back to the windows. The growing tension is broken by occasional nervous laughter.

A five-knot current is running with the ship, and the dock is off the starboard bow. As the ship passes, O'Brien and the pilot keep glancing ahead and then back to the dock. Measuring. Calculating. Waiting. Always alert to give the quickest of commands.

With the pilot's affirmation, the captain shouts "Hard right," and the huge tanker pivots nearly 180-degrees and begins its final approach into the current.

An hour later, a dozen cables and backup lines hold the Overseas Washington secure to the dock.

After transferring its cargo of crude, the ship will head back to Valdez and do it again.

Loss in spill liability case could shut down refiner

By BEN ELLIS

TIMES KENAI BUREAU

NIKISKI — Tesoro Alaska Petroleum Co. officials are hoping legislation passed in the final hours of the 17th Legislature will help ease the oil company's liability squabble with Alyeska Pipeline Service Co.

The Senate, on a 17-0 vote Tuesday, passed a House version of a bill that could provide liability protection to oil spill response contractors as long as they acted according to an approved cleanup plan and are not grossly negligent in their actions.

But even with legislation in place, Tesoro may face a legal battle with Alyeska. If Tesoro loses, the oil refiner could be forced out of business in the state.

Alyeska's owners will meet Thursday in Seattle to decide if the legislation goes far enough to provide the company, which is the spill response contractor in Prince William Sound, enough liability protection in case it responded to a spill in the Sound and is sued as a result of the cleanup.

"At this point, the legislation is a significant help in adjusting the liability requirements in Alaska," said Marnie Isaacs, Alyeska spokeswoman. "But Alyeska is not sure that it goes far enough. We won't know anything until we take the final legislation back to our owners and see how we might craft an agreement with Tesoro, if that is possible."

Tesoro's woes come from a requirement that all petroleum companies transporting crude through Prince William Sound insure Alyeska for \$1 billion, as the spill-response contractor.

At stake are 150 Tesoro jobs on the peninsula, 575 related jobs throughout the state and an annual Alaska payroll of \$18 million, said Gene Burden, Tesoro vice president for environmental and governmental affairs.

Currently, Tesoro has liability insurance in excess of \$1 billion, but Alyeska is seeking direct access to the insurance company.

"We think the position Alyeska has taken is very unreasonable," Burden added.

Tesoro transports about 375,000 barrels of crude oil every four to five days by way of the double-bottom tanker Overseas Washington.

Alyeska, from whose terminal Tesoro ships about 80 percent of the crude it processes on the Kenai Peninsula, is requiring the liability insurance in case it has to respond to a Tesoro spill and

Tesoro's woes come from a requirement that all petroleum companies transporting crude insure Alyeska for \$1 billion.

later is sued as part of responding to the cleanup.

In addition to Tesoro, Alyeska has shipping contracts with British Petroleum, ARCO Alaska Inc., Exxon, Chevron and Shell.

"With the exception of Tesoro, all have significant corporate assets to largely self-insure," said Marnie Isaacs, Alyeska spokeswoman.

Isaacs said while Tesoro only uses one tanker, the risk of a Tesoro spill could be as great as that of a shipper using four or five tankers in the trade. She said she bases this opinion on the fact that the Washington visits the port more often than any other tanker because of its short run.

If Alyeska continues to require direct access to the \$1 billion insurance, Tesoro officials promise they will seek judicial relief.

"We'd go to court with it," said Mark Necessary, Tesoro refinery vice president. "If it comes to the point we can't get any relief, we'd have to shut down."

The bill calls for a "good Samaritan" provision for teams responding to an oil spill cleanup.

The bill gives immunity to a spill-response contractor from liability that would be the result of simple negligence during the first 15 days after a spill, provided the contractor's actions did not substantially deviate from a plan that the contractor wrote or agreed to implement.

Michele Brown, executive director of the Citizens Oversight Council on Oil and Other Hazardous Substances, said her organization originally opposed the legislation because it ignored contingency plans but now does not object.

"This is a very broad issue," Brown noted. "What was happening was this bill was introduced to solve a business dispute between two companies. We didn't want to see bad legislation being used to solve a legitimate problem Tesoro had."

askas WILD/91 juried exhibit of outdoor photography



MAY IS NATIONAL FITNESS MONTH

Physically fit men are 53% less at risk of premature death, and physically fit women are 98% less at risk of premature death.