Chaos and the Law of Borrowed Servant: An Argument for Consistency

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The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence. No lawyer can say with assurance in any given situation when one employment ends and the other begins.¹

INTRODUCTION

As quoted in the epigraph, Justice Cardozo stated in 1921 that the law of borrowed servant,² dealing with the issue when one employment ends and another begins, is in chaos. No improvement has been made since that time. Consistency and predictability are lost values in this area of the law. It is the purpose of this article to suggest an underlying cause for the chaos and to propose a solution to it.

¹ Benjamin N. Cardozo, A Ministry of Justice, 35 Harv. L. Rev. 113, 121 (1921).
² The phrase “borrowed servant” enjoys frequent use in the law of agency. It is ambiguous, however, and thus its use must be ascertained from context. Taken literally and in its narrowest sense, it refers to the situation where a borrowing employer is vicariously liable under respondeat superior for the negligence of a borrowed employee. It is used in a broader sense as a shorthand reference to the entire body of law dealing with borrowed employment, and was so used in the sentence from which this footnote was derived. Also, sometimes the words “lent” or “loaned” are used in place of “borrowed” in the phrase “borrowed servant.”
The importance of achieving consistency and predictability in the law is obvious to all, at least when stated as an abstract proposition. Consistency means that like cases are treated alike, a proposition so fundamental that it has been part of the common law for nearly a thousand years. Predictability, which is closely related to consistency, has the virtue of reducing uncertainty in the law, thus enabling people to govern their relations with some sense of what consequences will flow from their decisions.

Greater deference is paid to the values of consistency and predictability at some times than at others. Sometimes the long term gains achieved by establishing and consistently applying general rules are obvious to those who set the tone for the law, even at the expense of an occasional hard case. At other times the competing value of seeking justice in the individual case prevails at the expense of general rules. It seems that today we have swung to the latter end of the spectrum.

3. See Steven D. Smith, Reductionism in Legal Thought, 91 COLUM. L. REV. 68 (1991), describing one of the functions performed by law as “the coordination of human interaction. . . . Public, comprehensible rules permit individuals to predict the legal consequences of their actions, and to plan and structure their social interactions.” Id. at 72. Professor Smith cites to the writings of Lon Fuller as providing the most careful elaboration of this function of law. Id. Fuller includes the qualities of clarity, consistency, and relative constancy over time as part of an “inner morality” with which the law must comply if it is to perform its facilitative function. Id. at 73 n.19; LON FULLER, THE MORALITY OF LAW 33-91 (rev. ed. 1969). See also Richard A. Epstein, Simple Rules For a Complex World, WALL ST. J., June 27, 1985, at A-30: “Complex rules breed uncertainty, which breeds litigation, which in turn diverts scarce resources from productive use.” Professor Epstein’s essay has as its primary focus the tendency of courts today to do justice in the individual case at the expense of general rules. The borrowed servant rule suffers more from lack of direction and focus than from displacement of a general and clear rule in order to do justice in an individual case. But the point made applies with equal strength to the borrowed servant situation.

4. See 1 HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 9 (Sir Travers Twiss ed., William S. Hein & Co. 1990) (1258), stating as follows: “[I]f indeed any like cases should have occurred, let them be judged after a similar case, for it is a good occasion to proceed from like to like.”

5. Indeed, one can argue that predictability follows inexorably from consistent treatment of like situations and thus it need not be separately identified. While true, there nevertheless is a sense in which the word “predictability” expresses with particular clarity a fundamental value in the law.

6. Several cases involving the parol evidence rule provide an illustration of the tendency today in some circles to search for justice in the individual case at the expense of general rules. The parol evidence rule is designed to provide an apparently complete and final written contract special protection from claims by one of the parties to the contract that the writing does not express the full agreement of the parties. See JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 137 (3d ed. 1987). The philosophy behind the rule includes the assumption that costly litigation over terms will be reduced by establishing written contracts as something upon which one can safely rely. Also, the assumption apparently is made that full recognition and enforcement of the rule will encourage the practice of memorializing contracts in writing, which should further advance the goal of reducing litigation. Yet sometimes the claim that a writing does not express the full agreement of
Thus, a plea for consistency and predictability is less fashionable today. Nevertheless, even accepting that, there exist areas of the law that could stand some firming up, that could profitably develop some focus and clarity, especially when this can be done without sacrificing justice in the individual case. The law of borrowed servant is one of those areas.

The thesis of this article is that movement toward the goal of consistency and predictability in the law of borrowed servant can be achieved through recognition and application of a fundamental element in the law of agency—the element that addresses loyalty—that sometimes has been overlooked by courts. The argument will be made below that the chaos mentioned by Judge Cardozo in the epigraph stems from a failure by some courts to address the "on behalf of" element of the basic agency relation, not from competing policies that resist a general rule in the interest of justice in the individual case.

the parties has a plausible and appealing ring to it. The temptation to do justice in the individual case at the expense of the parol evidence rule under that circumstance is strong.

Justice Traynor, a key figure in this debate, argued for liberal introduction of extrinsic evidence in an effort to do justice between the parties and ascertain their actual agreement, even at the risk that the sympathies of the fact finder may erroneously give victory to a dishonest party. See Delta Dynamics, Inc. v. Arioto, 446 P.2d 785 (Cal. 1968), involving a written exclusive distributorship contract under which plaintiff was to supply locks to defendant for distribution. Defendant agreed to sell a minimum of 50,000 locks during the first year. The agreement was "subject to termination" if the minimum was not met. Defendant in fact sold only 10,000 locks in the first year. Plaintiff sued for damages. The court in a 4-3 decision authored by Justice Traynor approved the admission of oral evidence offered by defendant that defined the remedy of termination as exclusive. There was no hint in the writing that the remedy of termination was intended to be exclusive. A separate provision in the contract allowed for recovery of attorney's fees in any action for damages under the agreement. This would seem to make the option of seeking damages generally available to plaintiff. Yet Judge Traynor allowed the evidence in, noting that the termination provision did not say that it was not exclusive, and thus the exclusivity provision could reasonably be read into the contract. One could argue that this creates an unnatural burden for a person drafting a contract. That is, people would not expect to have to say "and this is not exclusive" after every provision in a writing addressing a remedy for breach.

Another case that appears to take the concept of justice in the individual case to an extreme is Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971), where defendant was sued for damages for failure to order the minimum of 31,000 tons of phosphate specified in a written contract between defendant and plaintiff. Defendant sought to introduce extrinsic evidence of a claimed trade usage that characterized minimum orders between members of the mixed fertilizer industry as mere non-binding projections to be adjusted according to market forces. The court found this evidence admissible. 451 F.2d at 11. If believed on remand, the extrinsic evidence would destroy the written contract between the parties by converting express price and quantity terms into mere projections to be adjusted according to market forces. The Delta Dynamic and Columbia Nitrogen cases appear to pay too little deference to the positive aspects of the parol evidence rule and perhaps can fairly be cited as examples of the tendency today in some quarters to do justice in the individual case even at substantial cost to certainty and predictability.
I. THE BORROWED SERVANT SETTING

The borrowed servant problem typically arises when an employer sends one of its employees to do some work for a separate business. The employer usually is referred to as the “general employer” in the law of agency. The separate business often is called the “borrowing” or “special” employer. The transfer frequently is pursuant to a contract between the general and borrowing employers which calls for compensating the general employer. It sometimes involves the transfer of equipment as well, which the transferred employee operates pursuant to the directions of the borrowing employer.

The general employer has no intention of severing its employment relationship with its employee. Instead, the employee is “loaned” to another for a while. In the ordinary case the loaned employee is subject to the instructions of the borrowing employer. The services of the loaned employee would be of little value to the person receiving them if they did not come with the power of direction. Consent of the employee to this arrangement is presumed in the usual case and is rarely at issue in

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7. The word “servant” has fallen almost entirely out of ordinary usage today. It retains significance in the law of agency as a term of art, however, and enjoys widespread usage by courts in that context. The law of agency distinguishes between servants and independent contractors when addressing the issue of vicarious liability of an employer for torts committed by persons working on its behalf. See Restatement (Second) of Agency [hereinafter Restatement] § 220. A servant is “a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.” Id. § 220(1). An independent contractor is “a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.” Id. § 2(3). Section 220(2) of the Restatement contains a list of various factual matters one looks to in determining if an actor is a servant or an independent contractor, including the extent of control over details of the work, whether the employer or the workman supplies the tools, the length of time the person is employed, whether payment is by the time or by the job, and so forth.

8. This is a frequent occurrence, and appears to be getting more frequent all the time. Manpower, Inc., a business which specializes in providing temporary workers to other businesses, is now the largest private employer in America, employing 560,000 people. See Janice Castro, Disposable Workers, Time, Mar. 29, 1993, at 42.

9. As will be developed infra text accompanying note 18, the use of the word “employer” in this context may in itself play a role in causing the chaos in the law of borrowed servant. It can be read to presume that the actor is acting on behalf of the person or business borrowing the actor’s services, when that is the issue to be proved. Its usage is widespread, however. This article will use the traditional terminology in the interest of clarity of reference to existing cases and materials. The phrase “borrowing employer” usually will be used in preference to the equally widely used “special employer” because the word “borrowing” more precisely and immediately identifies the party at issue. “Temporary employer” also occasionally is used in the literature on this subject.
cases involving respondeat superior liability,\textsuperscript{10} which is the focus of this article.

Legal problems arise when the loaned employee tortiously\textsuperscript{11} causes harm to another while performing services pursuant to the instructions of the borrowing employer. Sometimes the injured party will be a worker on the job site who is regularly employed by the borrowing employer. The injured worker will be able to make a claim against the borrowing employer under worker's compensation in almost all situations.\textsuperscript{12} The question that has troubled courts, however, is whether the injured worker also\textsuperscript{13} can hold the general employer liable on respondeat superior grounds for the negligence of its employee.

\textsuperscript{10} The matter of consent of the employee has arisen most frequently in worker's compensation law. See IB Arthur Larson, \textit{The Law of Workmen's Compensation} §§ 48.11--12 (1993), explaining this in the following terms:

Although the lent servant doctrine is a familiar one at common law, and has produced some of the most venerable [citing Laugher v. Pointer, 108 Eng. Rep. 204 (1826), where horses and a driver were borrowed by a country gentleman] and most intricate [citing Schmedes v. Deffaa, 138 N.Y.S. 931 (N.Y. App. Div. 1912), 	extit{aff'd per curiam}, 108 N.E. 1107 (N.Y. 1915), where a carriage, horses and driver were loaned by one livery stable to another, which in turn loaned them to an undertaker, who in turn loaned them an estate for a funeral] cases in the law of master and servant, it is necessary to stress once more that the workmen's compensation lent-employee problem is different in one significant respect: There can be no compensation liability in the absence of a contract of hire between the employee and the borrowing employer. For vicarious liability purposes, the spotlight was entirely on the two employers and what they agreed, how they divided control, how they shared payment, and whose work, as between themselves, was being done. No one paid much attention to the employee or cared whether he had consented to the transfer of his allegiance, since, after all, his rights were not usually as a practical matter involved in the suit. In compensation law, the spotlight must now be turned on the employee, for the first question of all is: Did he make a contract of hire with the special employer? . . . This must be necessarily so, since the employee loses certain rights along with those he gains when he strikes up a new employment relation. Most important of all, he loses the right to sue the special employer at common law for negligence; and when the question has been presented in this form, the courts have usually been vigilant in insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be a bar to common law suit.

\textsuperscript{11} Almost all of the borrowed servant cases involve negligent tortious behavior. Intentional torts by the transferred servant would raise an additional complexity, whether the act was within the scope of employment.

\textsuperscript{12} See 1 Larson, \textit{supra} note 10, § 1.10 at 1. This claim arises independently of the cause of the injury, so long as it is work related and not self-inflicted.

\textsuperscript{13} An injured worker retains a cause of action in tort against a third person who causes the injury. Many state worker's compensation systems require that an injured employee who recovers both under worker's compensation and against a third-party tortfeasor must net out the overall recovery, however. Usually the proceeds are applied first to reimbursement of the employer for the compensation outlay already made to the employee, with the balance going to the employee. \textit{See} 1 Larson, \textit{supra} note 10, § 1.20, at 2.
The liability of the general employer seems obvious. An employer ordinarily is liable for the torts of its full-time employee who negligently causes a loss while doing a task with the consent of the employer and thus within the scope of employment.\textsuperscript{14} Yet if the actor is held to be a borrowed servant, the general employer is not liable because the tortfeasor legally is no longer its servant.\textsuperscript{15} Instead, the negligent actor has become the servant of the borrowing employer. In this sense, the phrase "borrowed servant"\textsuperscript{16} is a term of art, one that involves serious consequences for the parties involved.

The problem is defined in slightly different terms when the injured person is not an employee of the borrowing employer. Under that circumstance the immunity provided the borrowing employer by worker's compensation no longer applies and the question instead is, who is vicariously responsible for the negligence of the actor: the general employer, the borrowing employer, or both?

The law of agency has encountered surprising difficulty formulating a clear and widely adopted set of rules to apply to these fairly straightforward situations. This confusion has persisted throughout the 19th and 20th centuries. No sign of stability or predictability has emerged. Even the Restatement of Agency, in a rare moment of weakness, muddles this situation by uncritically embracing conflicting posi-

\textsuperscript{14} Actions taken under such circumstances presumably would be within the scope of employment since the employee is complying with the wishes of the general employer when working at the site of the borrowing employer. Scope of employment is defined as follows in the Restatement:

\begin{quote}
Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and

(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
\end{quote}

\textbf{Restatement $\S$ 228(1) (1957).}

Conduct of a servant is not within the scope of employment "if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." \textit{Id.} at $\S$ 228(2).

\textsuperscript{15} \textit{See} Haight v. Aldridge Elec. Co., Inc., 575 N.E.2d 243 (Ill. App. Ct. 1991), characterizing the relationship between the general employer and its employee as "suspended" during the time the employee is performing the special service for the borrowing employer. \textit{Id.} at 252.

\textsuperscript{16} The word "borrow" is a little awkward in this setting. One borrows a hammer or a saw. One does not normally think of "borrowing" a person. Yet the usage is technically accurate. The word "borrow" is defined to mean, "To receive temporarily from another, implying or expressing the intention either of returning the thing received or of giving its equivalent to the lender: obtain the temporary use of." \textit{Webster's Third International Dictionary} 256 (Unab. ed., 1961).
tions with no recognition of the resulting inconsistencies, as will be de-
veloped below.\footnote{17}

One source of this difficulty may be that in one sense the actor is
being controlled by and performing services for both parties, which
causes confusion as to whom to hold liable. Also, the use of the phrase
“borrowing employer” may contribute to the confusion because of its
unconventional use of the word “employer” in this context.\footnote{18} Ordinarily
one thinks of an employer as someone who hires and pays the acting
party. In this setting only the general employer does that. Yet both
parties are confusingly described as “employers” in almost all the court
decisions and secondary authority dealing with this topic. In addition,
the element of control plays a powerful and sometimes seductive role in
the law of agency. The exercise of (or right to the exercise of) control
over the actor by two different persons can paralyze and confuse
thought, as will be developed below.

This article will describe and evaluate the various approaches
taken by courts in this troubled area of the common law. Thereafter
one rule will be identified which should provide consistency and pre-
dictability and in addition allow most decisions to be made by a judge
as a matter of law, thus reducing the costs of litigation. A further bene-
fit is that it will increase compensation in many cases for workers in-
jured on the job.

II. \textbf{The Three Judicial Approaches}

Courts have responded to the borrowed servant problem with three
rules,\footnote{19} each inconsistent with the other. These rules will be described
and evaluated immediately below.

\footnote{17}{See infra notes 89-105 and accompanying text.}
\footnote{18}{While unconventional, the terminology is not technically inaccurate. The word “employ” is
ambiguous. It means in its broadest sense “make use of.” See Webster’s Third International
Dictionary 743 (Unab. ed., 1961). In that sense the borrowing employer is employing the actor.
The hazard posed by the use of “employer” in this context, as noted \textit{supra} note 9, is that, used
uncritically, it begs the question of whether the work is being done on behalf of the borrowing party.
This point will be developed in the text accompanying notes 44-58. As noted \textit{supra} note 9, this
article utilizes the conventional terminology in view of its widespread usage by all authorities.}

\footnote{19}{The division of this area into three rules is oversimplified to some extent. The common law
rarely falls into sharply defined, easily enumerated categories. With some borrowed servant cases it
is impossible to ascertain exactly what approach is being taken. But it is within the broad range of
accuracy to divide the different judicial approaches into three rules, each resting on a different phi-
losophy, often unarticulated, as will be developed in the text immediately following this note.}
A. The "Spot Control" Rule

Courts utilizing the "spot control" rule focus on which employer had control over the details of the work at the time of the incident causing injury. The leading case adopting the spot control rule is Nepstad v. Lambert. In that case the L.G. Arnold Company ("Arnold"), a general contractor engaged in expanding the plant of an aluminum company, rented a crane, operator and oiler on an hourly basis from the Truck Crane Service Company ("Truck Crane"), owned by J.M. Lambert. The crane was used for the placement of prefabricated steel trusses, each weighing four tons. The operator of the crane was Pasma, a regular employee of Truck Crane. Pasma operated the crane pursuant to hand and arm signals from Morris, the foreman on the job and an employee of Arnold. Plaintiff Nepstad, a laborer working for Arnold, was severely injured when the crane made contact with a high voltage power line. He was helping guide one of the trusses at the time.

Nepstad sued Pasma and Truck Crane, the former for direct liability and the latter on respondeat superior grounds. The defense of Truck Crane was that Pasma had been loaned to Arnold and thus it was not subject to vicarious liability for his negligence. A jury found that Pasma was not a borrowed servant. The trial court entered a judgment against Truck Crane based on the negligence of its servant. This

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20. This descriptive phrase captures well the focal point of analysis in the decisions utilizing this standard. One does not often see the courts themselves using it, however.

21. 50 N.W.2d 614 (Minn. 1951), noted in 36 MINN. L. REV. 290 (1952).

22. In its opinion the court explained that an oiler drives the truck on which the crane is mounted. 50 N.W.2d at 617.

23. This would be unusual today. Most crane companies when renting a large crane for a job send along not only an operator but also an employee who gives hand signals to the operator. The companies do not want to risk damage to their large cranes, which are expensive and difficult to operate, by taking signals from a stranger on site. Presumably the crane company's signalman, functioning in a professional capacity, would be more alert to overhead wires and other hazards of the crane business. Telephone interview of Dana Nichols, research assistant, with Robert N. Laingor, Boulder Excavating Company (July 7, 1992).

24. Plaintiff "sustained burns so severe that he lost the use of one hand, lost one leg by amputation, and underwent numerous operations." Nepstad, 50 N.W.2d at 616.

25. A servant is personally liable for tortious behavior. Acting as the servant of another does not somehow confer immunity upon the actor. To so hold would be to take the fiction of identity to an extreme that no court has done. See O.W. Holmes, Jr., Agency, 4 HARV. L. REV. 345, 350 (1891), discussing the fiction of identity.

26. Nepstad did not include Arnold in his suit, doubtless because his remedy against Arnold was confined to worker's compensation. See supra text accompanying note 10.
The decision was reversed on appeal on the reasoning that Pasma was a borrowed servant as a matter of law.27

The Minnesota Supreme Court, after recognizing the uncertainty of borrowed servant law,28 stated that in the main, courts have relied on two tests in resolving these disputes. One is the "whose business" test, which asks whose business was being furthered at the time of the negligent act. This test appropriately was rejected by the court as valueless because, in most cases, it is impossible to name the responsible employer through use of it.29 It is manifestly clear that the business of both employers was being furthered by the actions of Pasma. Focusing on the "whose business" test accomplishes nothing unless one seeks to hold both employers liable, a point of view that will be discussed below.

27. The effect of this decision was to reduce the compensation available to plaintiff, who was left with only a worker's compensation claim against his employer. It is likely that the judgment he received at trial against Truck Crane was much greater than the compensation he received from his employer because tort damages include recovery for pain and suffering, an element of damages excluded under worker's compensation. Also, in many jurisdictions the holding in Nepstad would have had the consequence of destroying plaintiff's independent cause of action against Pasma. Most worker's compensation laws provide that, absent intentional wrongdoing, an employee is not liable for an injury caused to a fellow employee. See 2A Larson, supra note 10, § 72.21. Such provision, however, was not part of Wisconsin law, the place of the accident, when Nepstad was decided. Nepstad, 50 N.W.2d at 624.

28. The court stated, "[t]he criteria for determining when a worker becomes a loaned servant are not precise; as a result, the state of the law on this subject is chaotic. Respectable authority for almost any position can be found, for even within a single jurisdiction the decisions are in conflict." Nepstad, 50 N.W.2d at 620.

29. An interesting distinction is drawn in 2 Floyd R. Mech. Law of Agency 1447 (2d ed. 1914), while discussing the "whose business" test. Mechem states,

If A undertakes to loan or rent or otherwise furnish servants to B to act under B's control doing B's business, such servants while so engaged will be deemed to be the servants of B, even though A originally hired them and pays them. If, on the other hand, A agrees to perform certain work for B, and to furnish servants to do it, as A's undertaking and business, they will be A's servants, even though B may have the right, either expressly or by implication, under his contract with A, to give directions to A's servants as to the time or manner or place in which they shall perform the service, and this would not be altered by the fact that B might have the right, under his contract with A, to hire or discharge servants for A, or to pay the servants of A on A's account.

While this language may not be helpful in making the "whose business" test of any practical use, nevertheless Mechem does draw an interesting distinction between the situation where the general employer is itself discharging a contract to complete a particular job by sending employees to B and the situation where an employee of a general employer is simply hired out to B to follow whatever orders B may choose to give. This distinction has an appealing quality to it. It may in part account for the division of authority in this area. Yet in the long run it must be rejected, if true transfer of allegiance is to be the test (see infra text accompanying notes 79-83). The circumstances under which an employee is sent to do a job matter less than who is providing regular employment to the employee, when allegiance is the issue.
The second test described by the court focuses on "right of control or direction." In addressing it the court recognized and thoughtfully discussed the inherent ambiguity of the word control, noting that "[i]n a general sense," both employers have control over the employee. "The control possessed by the general employer may be more remote than that of the special employer, but nevertheless it has real force behind it." The court gave as examples of this Truck Crane's power to discharge Pasma and to direct how the crane should be cared for. "On the other hand, the Arnold company exercised detailed on-the-spot control over the actual construction work done by Pasma." Because both employers exercised control, the court was faced with the question of how to allocate liability to one of them.

The court suggested a solution to this problem by stating that, "[s]ince both employers may each have some control, there is nothing logically inconsistent, when using this test, in finding that a given worker is the servant of one employer for certain acts and the servant of another for other acts." Taking this as a premise, the court stated that "[t]he crucial question is which employer had the right to control the particular act giving rise to the injury." The court adopts this approach, noting that its theoretical basis probably is "the desire to impose the liability upon the employer who was in the best position to prevent the injury." This is known as the spot control test.

The court observed that "the task of defining the meaning of control remains. Detailed authoritative control must be distinguished from mere designation of work or suggestions made incident to encouraging cooperation between related activities on large projects." In short, the orders of Arnold must be commands and not requests, and must include the right to exercise detailed control over the manner in which the work is done before Pasma can be found to be a borrowed servant.

30. Nepstad, 50 N.W.2d at 620.
31. Id. at 621.
32. Id.
33. Id.
34. Id. at 621-22. The court quoted from section 227, comment a, of the Restatement in support of this point, as follows:

Since the question of liability is always raised because of some specific act done, the important question is not whether or not he [the negligent actor] remains the servant of the general employer as to matters generally, but whether or not, as to the act in question, he is acting in the business of and under the direction of one or the other.

Nepstad, 50 N.W.2d at 622.
35. Id. at 620.
36. Id. at 622.
The court stated, however, that it was not necessary that the penalty for disobedience be discharge in order to characterize orders as commands.

Applying the spot control test to the facts before it, the court concluded as a matter of law that Pasma was under the detailed authoritative control of the Arnold company because every movement of the crane was directed through hand signals by an Arnold company employee. In a sentence employing a justly famous metaphor in the law of agency, the court stated "[t]he crane operator was virtually an automatic eye which caused the machinery of the crane to respond to signals given by the Arnold company's employees."37

In a concluding passage, the court stated that the right of control was the important factor, not the actual exercise of control.38 Appar-

37. Id. at 623. The court developed this point as follows:

There can be no doubt that these signals carried the force of command. The work of the crane involved moving heavy pieces of steel to within inches of workmen standing on narrow platforms 10 or 20 feet above the ground. A hesitant response or disobedience to a signal jeopardized their lives, and Pasma was fully aware of it. In such a situation, the orders given, viewed realistically, must be considered authoritative.

Id.

Although the above statements sound plausible, they cannot literally be correct. All acts of cooperation between people are not automatically converted into commands just because the stakes are high. Suppose, for example, Pasma thought that Morris was seeking to overload the crane or to move the load too rapidly. Doubtless Pasma could safely ignore Morris's directions. See Standard Oil Co. v. Anderson, 212 U.S. 215 (1909) (supporting the characterization of similar conduct as cooperative in a borrowed servant context); Redmond v. Republic Steel Corp., 131 N.E.2d 593, 598 (Ohio Ct. App. 1956) ("Only [borrowing employer] knew where the scaffolding was needed and, of necessity, it alone, was able to transmit such information to the operator of the crane. Such combined activity was no more than teamwork between two sets of workers cooperating to accomplish the work at hand."); see also White v. Bye, 70 N.W.2d 780 (Mich. 1955), where one contractor on a construction site had rented a crane and operator, and one day loaned them gratuitously to another contractor on the site, who was giving signals to the operator at the time of the accident. In affirming a judgment against the general employer, the court stated that:

The giving of signals under the circumstances of this case was not the giving of orders, but of information; and the obedience to those signals showed cooperation rather than subordination . . . . We cannot conceive of a master-servant relationship so fluid in nature that it would attach to all of these users of equipment by the giving of a few hand signals and directions and virtually nothing more. The relationship is deeper rooted and more fundamental.

Id. at 783, 785.

38. The court elaborated that,

If the Arnold company had the exclusive right to direct all movements of the crane, then Lambert did not; . . . The right to control is the basis for imposing this responsibility, and the actual control exercised is merely evidence of which employer held that right. Actual control becomes material only when an attempt is made to hold an employer personally liable as procurer of the negligent act.

Nepstad, 50 N.W.2d at 623.
ently it raised this point because Morris, the foreman, had earlier left the site of the accident to attend to other matters. Ironically, the facts of this tragic incident lend themselves to the inference that it was the plaintiff himself who unwittingly directed the boom of the crane into the high voltage wires.\textsuperscript{59}

\textit{Evaluation of the Spot Control Test}

The thoroughness of the \textit{Nepstad} opinion and the force of its language has made it one of the best known and most frequently cited borrowed servant cases.\textsuperscript{40} Also, focusing on the specific act of negligence has an appealing quality to it because it identifies the time of maximum control over the events causing injury, a natural inquiry.\textsuperscript{41} Nevertheless, the court confused analysis of the case before it by focus-

\textsuperscript{59} This fact would appear to destroy Nepstad's case on the ground that he was contributorily negligent. The court opinion, however, indicated that Wisconsin, where the injury took place, is a comparative negligence state. \textit{Id.} at 616.

\textsuperscript{40} A number of cases apply the spot control test, and many of them cite to the \textit{Nepstad} case as a leading case in the field. Representative cases include Nagakawa v. Apana, 477 P.2d 611 (Haw. 1970) (crane operator and signalman rented by defendant; court followed spot control test but held defendant not liable due to lack of detailed control because general employer used its own signalman); N.Y. Cent. R.R. Co. v. Northern Ind. Pub. Serv. Co., 221 N.E.2d 442, 447 (Ind. 1966) (crane operator who followed signals of defendant borrowing employer held to be borrowed; court defined standard as being "who was the master at the very time of the negligent act"); Olson v. Veness, 178 P. 822 (Wash. 1919) ("The respondents in the course of business had transferred the vehicle and driver to the control of the hirer, who alone could say where and in what the work of the truck should thereafter consist, and if this effected a transfer of control it must, ipso facto, have effected a transfer of responsibility"). Nutley v. MacRae Bros. Constr. Co., 418 P.2d 253, 254 (Wash. 1966) (borrowing employer's foreman had ordered crane operator to "pick up the hammer" that was attached to the crane. Operator pulled wrong lever and injured plaintiff, an employee of the borrowing employer, who sued general employer. Court affirmed verdict for defendant, upholding jury finding that crane operator was a borrowed servant because he obeyed "specific orders" of foreman.); McCollum v. Smith, 339 F.2d 348, 351 (9th Cir. 1964) (court affirmed a directed verdict against plaintiff, who was injured on a construction site and sued the general employer. "In deciding this issue, a factor usually considered to be controlling is the location of the power to control the servant, for responsibility is regarded as a correlative of power.").

\textsuperscript{41} Focusing on control can be frustrating, however, due to the ambiguity inherent in the word "control." The court in N.Y. Central R.R. Co. v. Northern Ind. Pub. Serv. Co., 221 N.E.2d 442, 448 (Ind. Ct. App. 1966), acknowledged this by saying "the results [of the control test] can vary with the facts chosen to be emphasized." The court also quoted the following from a leading article in this area, Talbot Smith, \textit{Scope of the Business: The Borrowed Servant Problem}, 38 Mich. L. Rev. 1222, 1253 (1940):

[O]ne seeking an explanation of the results of the borrow-servant cases in terms of a weighing of the elements of control is inexorably driven to the expedient of making and accepting "desperate refinements," ethereal in substance and revolting in reason, in order to approach any semblance of reconciliation.

It is curious that the court in \textit{N.Y. Central} acknowledges these limitations on the spot control test, yet unhesitatingly adopts the test in the case before it.
ing exclusively on control. The question before the court was whether the Arnold company was the master\textsuperscript{42} of Pasma, the crane operator. Answering that question involves making two inquiries, not just one, if analysis is to be consistent with fundamental principles of the law of agency. It is necessary not only to ask whether Pasma was being controlled by Arnold but also whether he was acting on behalf of Arnold.\textsuperscript{48}

The law of agency distinguishes between merely benefiting someone\textsuperscript{44} and acting on behalf of someone,\textsuperscript{48} and defines acting “on behalf of” as acting “primarily for the benefit of.”\textsuperscript{48} This distinction requires

42. The word “master” is a term of art in the law of agency. It signals that the person so labelled is subject to vicarious liability for the physical torts of another, called the “servant” (\textit{supra} note 7). Both terms of art are outdated in everyday speech today, but they serve as useful signals for respondent superior liability, supplying greater precision to a legal discussion of these concepts. The Restatement uses them for that reason. Of course, people are more comfortable today with the words “employer” and “employee.” This article sometimes uses those words as a substitute for master and servant, but it is important to recognize that the words employer and employee are ambiguous since there exist employees who are not servants and thus do not subject the employer to liability for their physical torts. See Cooke v. E.F. Drew & Co., 319 F.2d 498 (2d Cir. 1963) (rejecting an argument that a full time employee is a servant as a matter of law); \textit{RESTATEMENT} § 14 N (1958).

43. The \textit{RESTATEMENT} § 1 defines the basic agency relationship as involving three elements: consent, control, and action on behalf of the principal. Section one reads in full as follows:

1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
2) The one for whom action is to be taken is the principal.
3) The one who is to act is the agent.

The following cases provide authority for the proposition that the exercise of control does not alone create an agency relationship, even when the person exercising control directly benefits from the relationship: Stansifer v. Chrysler Motors Corp., 487 F.2d 59 (9th Cir. 1973) (substantial control by Chrysler over auto distributor did not make distributor Chrysler’s agent because distributor purchased the cars from Chrysler and could resell at any price, thus distributor was operating on its own behalf when selling the cars); Slates v. International House of Pancakes, 413 N.E.2d 457 (III. Ct. App. 1980); Stanford v. Dairy Queen Prods., 623 S.W.2d 797 (Tex. Ct. App. 1981) (extensive control by franchisor did not make franchisee an agent of franchisor because franchisee was operating the business for its own behalf).

44. The word “benefit” is not a term of art in the law of agency. It is used by the \textit{RESTATEMENT} in its ordinary sense to mean anything that promotes or enhances well being.

45. \textit{See} \textit{RESTATEMENT} § 13 cmt. b (1958), stating that “the understanding that one is to act primarily for the benefit of another is often the determinative feature in distinguishing the agency relation from other relations.” Acting “primarily for the benefit of another” is often used by the Restatement as a synonym for acting “on behalf of.”

46. \textit{Id.} This distinction was addressed during the debate on the adoption of the second edition of the Restatement. The specific context was a discussion of § 14 J of the Restatement, which distinguishes an agent from a buyer. It states in part, “[W]hether . . . [one] is an agent for this purpose or is himself a buyer depends upon whether the parties agree that his duty is to act primarily for the benefit of the one delivering the goods to him or is to act primarily for his own benefit.” \textit{RESTATEMENT} § 14 J. \textit{In A Discussion of the Restatement (Second) of Agency}, 32 A.L.I. Proc. 174 (1955) (microfilm), Professor Seavey, speaking as Reporter for the second edition of the
drawing a fine line in some circumstances. Yet it is important to recognize the distinction and to make every effort to draw the correct inference from the facts. The law of respondeat superior would cast far too wide a net, unfairly imposing costs on others, if it included all circumstances where one party exercised control over another and merely benefited from the other's activity.\(^{47}\)

In the *Nepstad* case it is obvious that the actions of Pasma were intended to benefit Arnold. But were they on Arnold's behalf? In order

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Restatement, responded to the following question from the floor: "Is there any authority in the cases for the proposition that the distinction between a buyer and his agent is the extent of his benefit?" Professor Seavey stated:

I'm sorry. I didn't use the word "benefit." I used "primarily for the benefit of." "Primarily for the benefit," but not the extent of the benefits which are received in any given case. It is a problem of loyalty. A buyer does not necessarily have loyalty to his seller. The agent necessarily does have loyalty. The buyer can prefer his own interests. That is what we mean, "acts for the benefit of," not that he receives in any given case specific benefits, but whether he is under a duty to prefer the interests of the other party or his own. In any case of conflict, an agent must prefer or at least must not ignore the interests of his principal. . . .

We have only the factor of loyalty. That is important and you cannot get along without it. That is the thing beside which all others fade into insignificance. Once we have loyalty—or no loyalty as opposed—then we have agency or no agency. The difficulty comes when you determine whether or not that situation exists, and that is why we give these factors, to determine whether ultimately he has the duty of loyalty.

*Id.* at 190, 193.

The above quotation is in the context of distinguishing an agent from a buyer, which is unrelated to the subject of this paper. Nevertheless, the language relating the "on behalf of" element to the fiduciary aspects of the agency relationship, and noting that the agent must be loyal to the principal and is under a duty to prefer the principal's interests, is directly relevant to the question whether a borrowing employer is the master of a borrowed worker. It seems clear that in the ordinary case the actor does not owe a duty of loyalty to the borrowing employer. If the interest of the borrowing employer and the general employer conflict in any way, it is hard to imagine the worker preferring any interest other than that of the person providing regular employment to the worker.

47. Consider the situation of a newspaper carrier whose manner of delivery is controlled by the subscriber ("Throw the paper over here. Don't ever throw it over there.") and whose actions in delivering the paper clearly benefit the subscriber. Would it be sensible and fair to hold the subscriber strictly liable for torts committed by the carrier while delivering the paper? To the knowledge of the author, the answer to that is no in all jurisdictions. The actions of the carrier, while benefiting the subscriber, are not on behalf of the subscriber. The carrier is either conducting her own business or is working for the newspaper. The foreman illustration mentioned in the text immediately following *infra* note 50 provides another example of the importance of distinguishing between benefit and on behalf of. A foreman is benefited by the actions of the workers he controls because if the work is not done the foreman will not be paid, yet the work is not done on the foreman's behalf. Finally, the *Stansifer, States,* and *Stanford* cases, discussed *supra* note 43, provide clear evidence of situations where the extensive exercise of control, coupled with benefit to the controlling party, did not result in an agency relationship. Action "on behalf of" was also required by those courts and was found to be missing in the cases before them. The cases are not physical tort liability cases, but the fundamental elements of the agency relationship apply equally to those situations and that being addressed by this paper.
to answer that question it is necessary to ask whether Pasma was acting primarily for the benefit of Arnold and thus owed a duty of loyalty to Arnold. It seems clear that was not the situation. Pasma was hired by and was being paid by another, Truck Crane, who had instructed him to do the job for Arnold. The inference is strong that Pasma was acting primarily for Truck Crane. If the interests of Truck Crane and Arnold had come into conflict in any way, it is hard to imagine Pasma not preferring the interests of the person who pays him. The *Nepstad* court did not address the issue in these terms, perhaps because it equated mere benefit with acting on behalf of, a mistake that has been made before in the law of agency.

The opinion in *Nepstad* does not seem to recognize that one can control in detail the actions of another without being the master of the person being controlled. A common example of this is the foreman of a construction crew issuing orders to workers on the job. It is difficult to imagine a more genuine illustration of control over the details and manner of the work of others. Yet no authority would hold a foreman vicariously liable for the negligence of a worker. This is because the worker is not acting on behalf of the foreman; instead, they are co-employees. Both the worker and the foreman are working on behalf of their common employer, who hired and is paying them.

Perhaps the assumption underlying the court's concern about control was that unless a controlling party is subject to respondeat superior liability there is no incentive for it to act responsibly. This assumption is false. A controlling person is subject to a standard of liability, that of negligence. The common law of torts for centuries has held persons

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48. In support of the inference that the general employment continues, see § 14 L of the RESTATEMENT, which has as its subject the ambiguous principal problem, addressing situations not involving physical torts. Comment a to § 14 L contains the following language on this point: "The ultimate question is whether it is understood that the agent owes primary allegiance to the general employer or to the other party. In answering this question, there is an inference that the general employment continues." RESTATEMENT § 14 L cmt. a (1958).

49. Indeed, it did not address this issue at all. Instead, it focused exclusively on the matter of control, as if that answered all questions of respondeat superior liability.

50. See, e.g., A. Gay Jenson Farms Co. v. Cargill, 309 N.W.2d 285 (Minn. 1981), dealing with the liability of a controlling creditor as a principal under § 14 O of the Restatement. The court in the *Cargill* case, which (as in *Nepstad*) was the Minnesota Supreme Court, placed its focus on control and found liability for the controlling creditor despite the lack of any credible evidence of action by the debtor on behalf of the creditor. See J. Dennis Hynes, *Lender Liability: The Dilemma of the Controlling Creditor*, 58 TENN. L. REV. 635, 650-656 (1991) (commenting on the *Cargill* case).
exercising control over others to a duty of due care. Thus the Arnold company was subject to a duty of care while guiding the crane. That is very different from holding it strictly liable for the negligence of Pasma, a person who was not hired by Arnold and who it could not discharge or effectively discipline.

51. See W. Page Keeton et al., Prosser & Keeton on the Law of Torts 510 (5th ed. 1984) (noting that if an employer of an independent contractor exercises control over any part of the project "he is required to exercise reasonable care for the protection of others. . . ."); accord, Restatement (Second) of Torts § 414 (1965).

52. It should be possible to litigate the issue of due care without undue difficulty and expense when the defendant is a borrowing employer, as contrasted with a true employment relationship. The unusual difficulties involved in proving negligence of a master, which are used by some scholars to justify the imposition of strict liability, are not present when dealing with a borrowing employer. See Warren A. Seavey, Speculations as to "Respondeat Superior," Harv. Legal Essays 433, 449 (1934), addressing the difficulties of proof which would be involved in holding a master only to a negligence standard, stating as follows:

Another reason for liability without fault in many cases is the difficulty of proving negligence. This reason is particularly cogent in imposing liability upon a master. Whether an employee was unfit at the time of the accident or whether there was improper supervision would ordinarily have to be proved by the testimony of fellow workers. Truthful testimony in such cases is difficult to obtain from the members of a well-disciplined organization. Aside from self-interest, which is obvious, only disgruntled fellow-workers are likely to subject themselves to the name commonly applied to a "tattle-tale" within the organization.

See also Richard A. Posner, A Theory of Negligence, 1 J. Legal Stud. 29, 43 (1972) (explaining why strict liability applies to employers by observing that under a negligence system the courts would have "to regulate in great detail the company's methods of selecting, supervising, and disciplining employees").

Both of the above explanations reinforce the assumption that applying a standard of due care to a borrowing employer is feasible. The negligent actor is a stranger in relation to the rest of the work force, thus avoiding the problems identified by Professor Seavey. The borrowing employer does not select or discipline the actor, thus avoiding the problems identified by Professor (now Judge) Posner.

53. It is difficult to see how Arnold could effectively discipline Pasma. Arnold could not threaten Pasma with job termination, nor could it threaten to dock his pay, change his working conditions, or give him a poor reference. It is true that Arnold could threaten Pasma with reporting negligent or uncooperative behavior to Truck Crane. Under some circumstances this could act as a spur to appropriate behavior, but it is no substitute for the power to fire or reduce wages. But see Olson v. Veness, 178 P. 822 (Wash. 1919), where the court stated, "If Clark [borrowing employer] had been dissatisfied with Smith's [driver] services, he could have effected his discharge or removal by complaint to the respondents [general employer], or, by terminating the hiring of both truck and driver; the fact of the discharge would originate with the dissatisfied hirer, though the actual words might alone come from the original employer of the servant." There is some truth to what the court says, but it takes too narrow a view of the matter. In the absence of an extreme case, a borrowing employer doubtless would hesitate to interrupt its work schedule by sending the truck and driver away from the job site. And it will not be every case where the general employer will immediately fire its employee merely because of one complaint about performance.

For a recent case addressing these issues by drawing a distinction between supervision and control, see Harris v. Miller, 407 S.E.2d 556, 563 (N.C. Ct. App. 1991). Harris involved a suit against a doctor for the negligence of a nurse anesthetist during an operation the doctor was conducting. The court held the doctor not liable, noting that "[A] servant of one employer does not become the servant of another for whom the work is performed merely because the latter . . . supervises the
The strict liability of respondeat superior is imposed by the law of agency on employers in part due to the special position an employer as principal enjoys, that of having a person chosen by the employer act both on its behalf and subject to its detailed control. With that position go certain burdens imposed by the common law, including strict liability for the harms caused by the actor within the scope of employment. It has not been considered fair to hold a defendant strictly responsible for a negligent loss caused by another who was not chosen by the defendant and who was not acting on the defendant’s behalf.

As noted previously, the court in Nepstad stated that “[s]ince both employers may each have some control, there is nothing logically inconsistent, when using this test, in finding that a given worker is the servant of one employer for certain acts and the servant of another for other acts.” That statement is true as an abstract proposition. But it

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54. The liability of the master under respondeat superior (“let the master respond”) is strict in nature rather than fault based. Seavey, supra note 52. An inquiry into the care an employer exercises when hiring and supervising an employee thus is irrelevant in a respondeat superior case, which focuses only on whether the actor was a servant acting in a tortious manner within the scope of employment. See WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY 141 (1964).

55. A master is a principal. All masters are principals, but not all principals are masters. The dividing point is based on control over means and details of the work being done. The tortious conduct that triggers the above distinction is physical tort liability. Because the word master is included within the word principal, this article will sometimes use the word principal when a broader point than liability for physical torts is being addressed.

56. The rationale for imposing common law strict liability has never been fully explained to the satisfaction of many readers despite the existence of a number of sophisticated, thoughtful essays on the topic. The main arguments for and against vicarious liability, and citations to the literature on the subject, are contained in J. DENNIS HYNES, AGENCY AND PARTNERSHIP. CASES, MATERIALS AND PROBLEMS 76-80 (4th ed. 1994). The existence of a common law right of indemnification by the principal against the agent for losses imposed upon the principal by the agent’s misconduct has done much to reconcile people’s minds to the theory, although in many instances the right of indemnification exists more in theory than in practice. See Fireman’s Fund Am. Ins. Co. v. Turner, 488 P.2d 429 (Or. 1971) (containing a lengthy discussion of the policy behind the right of indemnification).

57. It is true that defendant by choice entered into a contractual arrangement with Pasma’s employer, but that is distinct from choosing Pasma for the job of operating the crane.

58. See supra note 43 for the definition of the agency relationship describing the necessary element of acting on behalf of the principal. This limitation is fundamental to the moral foundation of the law of agency in the sense that it is unfair to impose strict liability for the acts of others on a person unless, as a minimum, the acts are being taken on behalf of the person being held strictly liable.

59. Nepstad, 50 N.W.2d at 621.
is flawed in the context in which the court places it. The court qualified its statement by saying "when using this test." The flaw lies in the test itself, which focuses exclusively on control.

B. THE DUAL LIABILITY RULE

Dual liability, where the court finds both employers liable, is a separate and distinct approach taken in the law of borrowed servant. *Gordon v. S.M. Byers Motor Car Co.*[^61^] is the classic case on dual liability. In *Gordon*, a truck and driver (Lewis) were loaned by the Byers Motor Car Company ("Byers"), which was in the business of selling trucks, to one J.N. Hazlett ("Hazlett"), who was engaged in the wholesale gasoline business and was interested in purchasing a truck. It was agreed that a truck and driver would be furnished to Hazlett for one week, presumably demonstrating to him that the truck was suitable for his business. If at the end of the week Hazlett was satisfied, he agreed to buy the truck. If he was not satisfied, he agreed to pay a per diem fee for the use of the truck and driver.

Lewis reported to Hazlett, filled the truck with a load of gasoline, and was told by Hazlett to deliver the gasoline to Minor, a customer of Hazlett's. In the course of delivery Lewis negligently caused an explosion and fire on Minor's premises by manipulating the flow mechanism of the truck under unusual circumstances in close proximity to an open gas flame.[^62^] The explosion killed plaintiff's husband. She sued both Byers and Hazlett as joint tortfeasors. The jury found both liable. The trial judge, reasoning that he might have misled the jury by submitting the case against both defendants to them, gave a judgment n.o.v. for

[^61^]: There are many cases in the law of agency where agency status is divided according to functions performed. This point often is made in the ambiguous principal context. See *Restatement* § 14 L., *supra* note 48. One pattern that frequently recurs in litigation involves group health or life insurance, where an employer assumes responsibility for administering aspects of a group policy that covers its employees. A mistake is made by the employer. Liability turns on whose agent the employer was when it made the mistake. See Norby v. Bankers Life Co., 231 N.W.2d 665 (Minn. 1975) (containing an extensive and careful discussion of the law on this matter).

[^62^]: The gasoline would not flow into the underground storage tanks in Minor's garage, apparently because it was disturbed by the drive to the garage. Rather than letting the truck stand for a time, Lewis climbed onto it and opened a large cap 12 inches in diameter, called a manhole cover. There was so much pressure in the tank that the cap flew off. The gasoline overflowed from the top of the truck and ran across the garage floor until it reached a stove with an open gas flame approximately 40 feet away in an office in the garage. The resulting explosion killed both the plaintiff's husband and Lewis. *Id.*
Hazlett and granted a new trial to Byers. Plaintiff appealed from this decision.

The Supreme Court of Pennsylvania reversed with instructions to enter judgment on the verdict for the plaintiff against both defendants. The reasoning in this brief opinion is captured in the following quotation:

Lewis, thus in the sales service of Byers Company as demonstrator, was transferred to the service of Hazlett, also to do his work as directed by him. The employment involved a double service: (a) to Byers Company; (b) to Hazlett.

He was acting for both parties in accord with their common understanding; the power of control as to one part of this work being in Byers company, and, as to the other part, in Hazlett.

He was promoting the interest of Byers Company in manipulating the machinery on the truck to cause the gasoline to flow for, obviously, if the mechanism on the tank would not discharge the load, Hazlett would hardly wish to purchase the truck. . . . Lewis was also complying with specific instructions in delivering the gasoline. The conduct, which the jury doubtless found to be negligent, was an act or acts done on behalf of both . . . they are joint tort-feasors.63

Evaluation of the Dual Liability Rule

The reasoning in the Gordon case is both appealing and troubling. It is appealing because treating the acts of Lewis as attributable to both Byers and Hazlett seems to be an obvious solution to the borrowed servant problem. In one sense, Lewis indeed was acting for both while doing the negligent act. Also, both were exercising control over his conduct, directly or indirectly. So why not hold both liable? Yet justifying dual liability under the common law by characterizing Byers and Hazlett as joint tortfeasors is troubling because the facts in the Gordon case are far removed from conventional joint tortfeasor liability.

Joint tortfeasor liability is defined as follows in a widely respected treatise: “All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer’s acts done for their benefit, are equally liable.”64 It cannot fairly be said that Byers and Hazlett had a “com-

63. Id. at 335-336.
64. KEETON ET AL., supra note 51, at 323.
mon plan or design" to commit, encourage, or ratify a tortious act. Instead, each was advancing his own purpose, and both were pursuing a lawful act which tragically miscarried as a result of negligence.

Also, it is clear that Byers and Hazlett were not partners, which would create joint liability, because they were not co-owners of a business for profit.\(^6\) They were not joint venturers because they did not share profits generated by a business venture jointly entered into,\(^6\) nor were they carrying out a joint enterprise\(^6\) in any conventional meaning of that phrase. Instead, each was furthering his own enterprise. In finding joint liability under the circumstances before it, the Gordon opinion overlooks the well known doctrine of the common law that "a man cannot serve two masters at the same time; he will obey the one and betray the other."\(^8\)

The court's finding of common law joint and several liability for Byers and Hazlett thus is curious and unconventional. That alone does not make it wrong, of course, but on the merits the decision is questionable because the policy underlying joint and several liability for the wrongs of others does not apply to the borrowed servant situation. In

\(^{65}\) See Uniform Partnership Act § 6(1), 7 U.L.A. (Master Ed. 1969), defining a partnership as "an association of two or more persons to carry on as co-owners a business for profit."

\(^{66}\) Joint ventures are treated as partnerships. The definition of a joint venture is the same as a partnership except that the business is usually limited in scope. It is essential that the parties share profits from the venture in order for a joint venture to exist. See Connor v. Great Western Sav. & Loan Ass'n, 447 P.2d 609 (Cal. 1968) (holding that a savings and loan was not a joint venture with a developer of a large tract despite the exercise of considerable control because it did not share in profits with the developer). The arrangement between Byers and Hazlett clearly was not a joint venture.

\(^{67}\) The definition of a joint enterprise has been narrowing in recent times. It used to include almost any activity undertaken jointly. It has now been confined in most jurisdictions to shared income generating activities, thus treating joint enterprises the same as joint ventures. See Holliday v. Bannister, 741 P.2d 89 (Wyo. 1987) (articulating the modern approach to this doctrine).

\(^{68}\) This frequently quoted language is taken from the case of Atwood v. Chicago, R.I. & P. Ry., 72 F. 447 (W.D. Mo. 1896). It reads in full as follows:

It is a doctrine as old as the Bible itself, and the common law of the land follows it, that a man cannot serve two masters at the same time; he will obey the one and betray the other. He cannot be subject to two controlling forces which may at the time be divergent. So the English courts, which are generally apt to hit the blot in the application of fundamental rules, hold that there can be no application of the doctrine of respondeat superior in its application to two distinct masters; that the servant must be subject to the jurisdiction of one master at one time.

*Id.* at 455.

Another well known quotation on this issue is contained in the opinion of Littledale, J., in Laugher v. Pointer, 5 B.&C. 547, 558, 108 Eng. Rep. 204, 208 (1826), stating, "The coachman or postillion cannot be the servant of both. He is the servant of one or the other, but not the servant of one and the other; the law does not recognize a several liability in two principals who are unconnected."
all of the joint and several liability situations noted above, the parties
are jointly engaged in a common activity that is designed to benefit
each of them through gains generated by the activity itself, either fis-
cally (partnership and joint venture) or through whatever objective is
sought to be achieved by jointly committing a tort against another
(joint tortfeasors). The borrowed servant situation does not fit this mold
since no proceeds are generated from the activity and shared by the
employers. Instead, each employer is engaged in its own business with
its own profits or losses, and has no interest in the business of the other
employer.

The opinion in the *Gordon* case is questionable not only because it
imposes joint and several liability on people who are not acting in con-
cert. It also overlooks an independent basis of liability for the borrow-
ing employer (Hazlett), namely, direct liability based on a duty of care
created by his control over Lewis. And it stretches vicarious liabili-
ty—a fearsome weapon—to cover a defendant (Hazlett) who did not
choose and could not effectively discipline the negligent actor. Finally,
seems odd to stretch doctrine in order to compensate injured persons
in this context. In every borrowed servant situation the injured party
already has two defendants available: the negligent actor and the per-
son who is found to be the master of the actor. That would seem to
reduce the incentive to depart from well accepted doctrine in order to
add a third person as defendant. Perhaps for these reasons the

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69. It may be that sending Lewis out with a full load of gasoline to be delivered to a customer,
apparently without any inquiry into his experience and competence, would lay the basis for a plausi-
ble case in negligence against Hazlett, especially since Lewis seemed unfamiliar with the dangers
posed by gasoline in a disturbed state.

70. The policy underlying dual liability was thoughtfully addressed in *DePratt v. Sergio*, 306
N.W.2d 62 (Wis. 1981), a case involving facts similar to the *Nepstad* case. Plaintiff argued that
both employers should be responsible under an enterprise theory of liability because “both exercise a
degree of control, both profit from the employee’s conduct, and both are capable of planning for and
transferring the losses incurred.” *Id.* at 64. Plaintiff further contended that the borrowed servant rule
is difficult to apply, leading to unpredictable and inconsistent results. The court conceded “that the
traditional borrowed servant rule has deficiencies in theory and in application.” *Id.* at 65. It con-
cluded, however, that the dual liability approach does not offer a simple and easily applicable alter-
native, noting that it would still be necessary to decide whether each employer retained sufficient
control to be classified as a master. Also, “courts would have to decide how responsibility and liability
should be allocated to each employer. One way of allocating responsibility and liability between
the employers is on the basis of their degree of control over the employee's conduct.” *Id.* The court
noted that this would involve the same difficult factual problems that are involved in the borrowed
servant control test. Thus the dual liability approach does not promise “greater certainty or precision
in its application than the current approach.” *Id.* Finally, instead of diminishing unfairness the dual
liability approach “might . . . add unfairness in an already troubled area.” *Id.* The court gave as an
example the case before it where if the plaintiff’s argument succeeded one of the two employers
The Gordon decision has not enjoyed widespread acceptance in the more than 50 years since it was decided.\textsuperscript{71}

\section*{C. THE TRANSFER OF ALLEGIANCE RULE}

The transfer of allegiance rule differs sharply from the spot control and dual liability rules. It will not classify a servant who is furthering the business of the general employer as borrowed unless command has been totally surrendered and a new relation can be inferred.

The transfer of allegiance test was succinctly set forth by Judge Cardozo in the case of Charles v. Barrett.\textsuperscript{72} In that case Steinhauser, who was in the trucking business, supplied a truck and driver to the Adams Express Company at an hourly rate. Adams loaded the truck using its own employees, sealed the truck, and sent the driver to a railroad terminal where the truck would be unloaded, again by Adams'
employees. While on route the driver negligently struck and killed plaintiff.

Plaintiff's executor sued Adams Express for vicarious liability on respondeat superior grounds, arguing that the driver was a borrowed servant. The trial court ruled in favor of plaintiff as a matter of law. The Appellate Division dismissed the complaint. The case was appealed to the New York Court of Appeals. In a unanimous opinion written by Judge Cardozo the decision of the Appellate Division was affirmed. Judge Cardozo reasoned as follows in this brief opinion:

We think that truck and driver were in the service of the general employer. There was no such change of masters as would relieve Steinhauer of liability if the driver of the van had broken the seals, and stolen the contents. By the same token, there was no such change as to relieve of liability for other torts committed in the conduct of the enterprise. Where to go and when might be determined for the driver by the commands of the defendant. The duty of going carefully, for the safety of the van as well as for that of wayfarers, remained a duty to the master at whose hands he had received possession. Neither the contract nor its performance shows a change of control so radical as to disturb that duty or its incidence. The plaintiff refers to precedents which may not unreasonably be interpreted as pointing in a different direction. Minute analysis will show that distinguishing features are not lacking. Thus, in Harrett v. T.H. Simonson & Son Co., 218 N.Y. 345, 113 N.E. 255, the special employer used his own truck. The submission to a new "sovereign" was more intimate and general. Driscoll v. Towle, 181 Mass. 416, 418, 63 N.E. 922. We do not say that in every case the line of division has been accurately drawn. The principle declared by the decisions remains unquestioned. At most the application is corrected. The rule now

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73. The opinion of the Appellate Division is contained in 190 N.Y.S. 137, 140-41 (1921). The court reasoned that:

At the time of the accident the driver [Moses] was upon the business of his employer Steinhauer, engaged in earning the $2 an hour which the company [Adams Express, the borrowing employer] agreed to pay Steinhauer for the transportation of its goods by means of his truck. No claim was made upon the trial nor upon this appeal that [Adams Express] had any voice in the selection of [Moses], and it was powerless to discharge him. Under such circumstances it cannot reasonably be claimed that Moses was the servant of the express company at the time of the accident.

[Steinhauer] was an independent contractor, and undertook to transport goods for [Adams Express] in consideration of the payment of $2 an hour for the use of his car in such transportation. As between [Adams Express] and Steinhauer the contract was merely one of service.

In following [Adams Express's] instructions . . . [Moses] was merely performing the work of his employer . . .

74. 135 N.E. at 200. The opinion indicates that Hogen, J., did not vote in the case.
is that as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division.78

The opinion in the Charles case focuses on control but in a different way than the Nepstad opinion. The Nepstad court was willing to look at division of control and hold a servant borrowed even though some control was retained by the general employer. The court in Charles poses a much more demanding standard, insisting on a total surrender of control before it will infer a “new relation” and recognize a new master in the borrowing employer.76

What aspect of the law of agency is Judge Cardozo referring to when he writes about a “new relation” or a “new sovereign”? One inference that can be drawn is that he is addressing the matter of loyalty, which goes to the essence of the agency relationship.77 Judge Cardozo seems to be saying that the employee driving the truck owed his loyalty to Steinhauser, the general employer, who hired and was paying him and who sent him to do the work he was doing at the time of the accident. It is inferred that he was working on Steinhauser’s behalf unless a legitimate inference of a new relation could be drawn. A division of control, like that in the Charles case, will not support an inference of a new relation because the contractual relationship between the general and borrowing employers contemplated such division. That is, it was

75. Id. at 199-200.
76. Perhaps the facts of Winchester v. Seay, 409 S.W.2d 378 (Tenn. 1966), could serve as an example of a true “new relation.” In that case a full-time handyman for a hotel was told by his employer to do “any little thing” for the owners of a restaurant two doors away. The owners of the restaurant were residents of the hotel. They would give the handyman a tip after doing work for them. This relationship went on for some time. One day at the request of one of the owners of the restaurant the handyman helped install a metal plate in an air conditioner in the restaurant, and injured himself. The work was done without the knowledge of his general employer. In this worker’s compensation case the court held that the restaurant owners, not the general employer, were responsible for the injury, reasoning that they were “employers” for purposes of the activity giving rise to the injury. The consent of the general employer to lending the handyman was gratuitous, he did not even know about the particular activity causing the injury, and the restaurant owners tipped the handyman whenever he worked for them. On those facts it plausibly can be argued that the handyman was acting primarily for the benefit of the restaurant owners at the time of the injury, and thus a new relation was created.
77. As noted supra notes 44-47, the requirement of loyalty in the agency relationship is most clearly connected to the “on behalf of” element of the relationship. The full definition of the agency relationship is set forth supra note 43. The Restatement was not in existence at the time that the Charles case was decided. But the fundamental principle of loyalty as the essence of an agency relationship long predated the Restatement and came from a large body of precedent that was crafted into a definition by the drafters of the Restatement.
understood from the outset that the employee would continue to serve the general employer by acting pursuant to the directions of the borrowing employer. In short, the general employer was an independent contractor supplying a worker to do a job.\textsuperscript{78}

Although Judge Cardozo does not use the word "allegiance," one way to characterize his approach is to ask if one can fairly infer from the facts of a particular case whether the actor's allegiance has been transferred and thus a new relation can be found.\textsuperscript{79} As noted above, the Nepstad and Gordon opinions, which give no hint of such analysis, seem to have lost sight of the fact that the basic agency relationship involves three elements (consent, control, and on behalf of\textsuperscript{80}), not just two (consent and control).\textsuperscript{81} Of the three cases only the Charles case appears to see this clearly.

Under the Charles test an employee would almost never be found to be the servant of the borrowing employer.\textsuperscript{82} Under what circumstances realistically would a true transfer of allegiance take place, considering that the employee is paid by the general employer and thus would naturally tend to give preference to the interests of that person?\textsuperscript{83} It is especially difficult to imagine a transfer of allegiance when

\begin{itemize}
\item \textsuperscript{78} The Appellate Division opinion in the Charles case, quoted supra note 73, clearly expresses this characterization of the relationships.
\item \textsuperscript{79} In one sense this is related to the issue whether an employee has left the scope of employment prior to or contemporaneously with a tortious act. In general, courts look for "abandonment" of the employment, which occurs when an employee is off on a personal venture, even while continuing to be paid by the unknowing employer. When an employee has abandoned the employment, the employer is no longer vicariously liable for the misconduct of the employee. Under such circumstance the employee's allegiance is no longer with the employer, as a factual matter.
\item \textsuperscript{80} The allegiance test is another way of expressing the "on behalf of" element, with the underlying issue being addressed that of loyalty.
\item \textsuperscript{81} See supra note 43. It can be argued that the court in Gordon, supra note 61, does not fail to recognize the importance of all three elements because it in effect held that Lewis was acting on behalf of both employers. This fails, however, to confront the maxim that a servant cannot give full allegiance to two masters with respect to the same act unless the masters are engaged in joint activity.
\item \textsuperscript{82} Indeed, one could characterize the Charles approach as destroying the borrowed servant rule, on the reasoning that an employee always is going to retain at least some allegiance to the person who is paying him or her. Only routine issues under the independent contractor defense, such as the applicability of the nondelegable duty exception, would remain. The author sees no great harm in that.
\item \textsuperscript{83} Although payment of salary supports a strong inference of loyalty, it would not be conclusive in all cases. Cardozo himself suggests a different result when the equipment is supplied by the borrowing employer. Perhaps under those circumstances a question of fact for the jury would exist, whereas the Charles case was decided as a matter of law. Also, the liability of the general employer might cease if its employee obeys an order of the borrowing employer to do an act beyond the employee's ordinary duties, involving something that the general employer would not anticipate. For example, suppose a crane operator obeys an instruction of the borrowing employer to leave the crane
\end{itemize}
equipment of the employer also is transferred to the job site. The employee naturally is going to have some concern for the safety and care of the equipment owned by the general employer, who put the employee in charge of it.

**Evaluation of the Charles Approach**

Under the transfer of allegiance test the general employer would remain liable for the torts of its employee in almost all cases. Most cases would be decided as a matter of law, as in *Charles*. In this sense, the transfer of allegiance test would bring consistency and predictability to the law. Also, in many situations it would result in an increase in compensation because a worker injured on the job site would have a respondeat superior claim against the general employer in almost all cases. This contrasts with the spot control approach, which in the *Nepstad* case confined the injured worker to a worker's compensation claim against his employer and a negligence claim against the crane operator, an unlikely source of compensation. The transfer of allegiance test also appears to be sound economically, not only because the general employer is the one who is most likely to carry insurance covering the torts of the negligent actor but also because ordinarily the price of the general employer's product should bear this expense, as will be developed below.

momentarily and drive a truck owned by the borrowing employer away from the site in order to make room for further work. The crane operator negligently injures someone while driving the truck. A change of allegiance under such setting readily can be found. One can argue that the operator had left the scope of employment of the general employer and was on a personal venture, working temporarily for another. This setting is well beyond the normal run of borrowed servant cases, however.

84. As noted *supra* note 83, an exception to this would be those cases in which the servant is doing an extraordinary act, outside of the contemplated arrangement of the parties. Predictability and certainty would still be served in the ordinary circumstance, which seems to be as far as that goal can be achieved in the law. The goal of predictability through placing the loss on the general employer also is advanced by Richard W. Power, *It's Time to Bury the Borrowed Servant Doctrine*, 17 ST. LOUIS U. L.J. 464 (1973). Professor Power proposes a statutory solution, leaving liability with the general employer except for gratuitous loaning of domestic servants. His thesis rests on pragmatic grounds, arguing that the accident prevention potential of immediate control is largely illusory and that only the kind of control exercised by the general employer, including the power to discipline and discharge, has significant accident prevention potential.

85. In contrast, the spot control test frequently would call for submission of the case to a jury, it seems, in view of its situation-specific focus on the factual issue of control.

86. This would not include all borrowed servant cases, but many cases involve job site injuries where the injured party is trying to avoid the damages limitations that are part of Worker's Compensation. As noted *supra* note 13, in many jurisdictions double compensation is avoided by reimbursing the injured worker's employer for sums paid under Worker's Compensation.
These factors speak strongly to the desirability of the transfer of allegiance approach. Yet it has not dominated borrowed servant analysis, perhaps in part because of the beguiling nature of the control test. Sometimes courts will adopt first one approach, then another, even within the same jurisdiction, with no recognition of the resulting inconsistency.

III. The Restatement of Agency

What guidance on these issues do we receive from the Restatement of Agency? The Restatement is a widely respected and frequently cited source of agency law. Its control over concepts is clear and the taxonomical work in the Restatement is superb. Yet its analysis of the borrowed servant problem lacks focus and seems internally inconsistent. Two sections of the Restatement, Sections 226 and 227, contain language relevant to this matter. They are discussed below.

87. Of course, the Charles case does not stand alone. See Beatty v. J.B. Owsley & Sons, 280 S.E.2d 484 (N.C. Ct. App. 1981), petition for review denied, 285 S.E.2d 95 (N.C. 1981), a case involving a claim based on negligence by a crane operator who had worked for several months in the plant of the borrowing (special) employer, subject to detailed control by the borrowing employer. The court held that the operator had not become a borrowed servant, noting that a general employer had been held liable in North Carolina “even when the special employer controlled the details of the work and the manner of doing the work.” Id. at 487. See also Occidental Fire & Casualty Co. v. International Ins. Co., 804 F.2d 983, 992-93 (7th Cir. 1986), where the court quoted the following authority which it found controlling:

[It is clear that an employee in the special service of a second employer cannot be considered a loaned servant unless he is wholly free from the control of the first employer and wholly subject to the control of the second employer. Further, it has been held that a person cannot become an employee of the second employer unless the second employer has the power to discharge or fire the employee. And the fact that the employee obeys directions or signals given by the second employer in performing his special service does not make the employee a loaned servant (quoting Richard v. Ill. Bell Tel. Co., 383 N.E.2d 1242, 1249-50 (1978)).

Other representative cases include Chartier v. Winslow Crane Co., 350 P.2d 1044 (Colo. 1960); White v. Bye, 70 N.W.2d 780 (Mich. 1955); and Redmond v. Republic Steel Corp., 131 N.E.2d 593 (Ohio App. 1956).

88. For example, not more than a year after the Charles opinion was published the Court of Appeals in New York decided a case which, while quoting the Charles opinion, departed from it in fact. In Wagner v. Motor Truck Renting Corp., 136 N.E. 229 (N.Y. 1922), a majority of the Court of Appeals was content to assign responsibility to a borrowing employer (who in turn subcontracted to another borrowing employer) in a truck rental situation. Judge Cardozo was one of two dissents, urging that liability should rest on the general employer.
A. Section 226

Section 226 of the Restatement is entitled "Servant Acting for Two Masters." Its text reads in full as follows: "A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve the abandonment of the service to the other." In one respect this language is distinguishable from the borrowed servant problem because it presumes master-servant relationships, which is the matter at issue in borrowed servant cases. But in another respect it appears to contradict borrowed servant doctrine in the overwhelming majority of states by its indifference to the traditional theory that a servant cannot have two masters for the same act without joint employment. That is, the text of section 226 appears to deny the long-standing maxim quoted above that "[a] man cannot serve two masters. He will betray one or the other." In Illustration 1 of section 226, P employs A to drive a truck and directs A to obey the orders of B, who has hired the truck by the hour for advertising purposes, in the management of colored lights used for lighting a display on the truck. The illustration concludes that A is P's servant in the driving of the truck and is B's servant in the management of the colored lights. If A drives negligently because he dimmed the headlights in order to make the colored lights more conspicuous, however, "both B and P are subject to liability." It is this part of the hypothetical that directly applies the test of section 226.

89. Comment a of § 226 develops the black letter text a little further by stating that, "[a person] may be the servant of two masters, not joint employers as to the same act, if the act is within the scope of employment for both..." Restatement § 226 cmt. a (1957). 90. See the quotation from the Atwood case quoted supra note 68. The maxim "no man can serve two masters..." necessarily underlies the borrowed servant rule in the overwhelming majority of jurisdictions that search for a single master. The comments to § 226 of the Restatement contain some language and illustrations that are consistent with the maxim. For example, illustration 4 describes a situation where two persons agree to employ a servant together, each of them paying half of the wages of the servant. The illustration states that both persons are liable for the negligence of the servant while carrying out appropriate orders. This is consistent with settled doctrine from all perspectives because there is no doubt that the servant is acting on behalf of both people. The relationship naturally fits the label "joint employers." Illustration 5 also involves separate payment by each employer. These situations are distinguishable from the borrowed servant problem. See Colorado and S. Ry. Co. v. Duffy Storage and Moving Co., 361 P.2d 144 (Colo. 1961) (railroad engineer paid by two separate railroads held to be joint employee of both). Yet curiously the black letter text on § 226 specifically excludes joint employers from its coverage.

91. The illustration poses a classic borrowed servant situation, yet the text analyzing it gives no recognition that the doctrine of borrowed servant has any relevance to the facts. 92. The text assumes without further analysis that the control by B makes A the servant of B. 93. See Restatement § 226 cmt. a, illus. 1 (1957).
If one applies the text of section 226 as it reads, what is left of the doctrine of borrowed servant? Section 226 appears to focus solely on control and abandonment of service. By hypothesis in a borrowed servant situation the servant (A) is acting pursuant to the consent of P, the general employer, and thus the acts of A do not result in abandonment of the service to P. Also, in such situation A is acting pursuant to the control of B when the accident happens or B would not be liable, so A is not abandoning B’s service but instead performing it. Thus both P and B are liable under the analysis of section 226 in every fact situation in which the borrowed servant doctrine would apply, if one applies literally the language of section 226.

Assuming that section 226 swallows the doctrine of borrowed servant, it can be argued that this represents a deliberate choice by the Restatement to adopt the approach of Gordon v. Byers and to cease the search for a single master. This argument can be treated seriously, however, only as long as the reader does not cast a glance at section 227, to be covered shortly.

Section 226 of the Restatement is troubling. It appears to draw too fine a line, creating confusion in the law, and overemphasizing

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94. One could argue that § 226 does indeed recognize the doctrine of borrowed servant in its analysis, described in the above text, of the factual variations in Illustration 1 where A was only driving when the accident happened, or only manipulating the lights when somehow he caused injury to another. In those two instances the analysis is that only P (in the first variation) or B (in the second) is liable and thus it can be argued that the Illustration recognizes and applies the doctrine of borrowed servant. But when A was only driving, B was not exercising any control and thus could not be held liable as a master under any approach to the borrowed servant problem. And the analysis in the illustration falters under the variation where A causes damage to someone while manipulating the lights. A straightforward application of the standard posed in the black letter text of § 226 would call for liability of both P and B in that setting because A was not abandoning his service to P while manipulating the lights. Instead, he was advancing the interests of P (who was renting his truck and driver to B for that purpose) as well as those of B. Both should be liable under the test posed in § 226.

95. See supra note 61.

96. The original Reporter for the Restatement did not in his own treatise appear to recognize the concept underlying § 226. See 2 MECHEN, supra note 29, at 1441, stating that “two different persons may at the same time severally stand in the attitude of principal or of master in some respect of the same agent or servant, with reference to different acts which he may perform” (emphasis added). Professor Mechem died during the preparation of the first edition of the Restatement, while it was still in a preliminary stage. Professor Seavey became Reporter and completed the project. See 1 RESTATEMENT OF AGENCY viii (1933).

97. Suppose, for example, a person hires a taxi and driver for an afternoon in order to do some shopping at several locations. She gives the driver orders throughout the afternoon on where and when to drive and at what speed. The driver negligently causes an accident during that period of time. Both the passenger and the taxi company could be held liable under the literal language of § 226. The driver is not abandoning his service to the taxi company when performing services for the passenger. Also, the driver is performing services for the passenger pursuant to her detailed
control. It has enjoyed some judicial recognition, however. It has been cited by several courts as justification for following Gordon v. Byers and placing liability on both employers in a non-joint employment setting.

B. SECTION 227

Section 227 is the section of the Restatement devoted exclusively to the borrowed servant problem. It is entitled “Servant Lent to Another Master.” The black letter text states in full as follows: “A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other’s servant as to some acts and not as to others.”

This language suggests that the Restatement is adopting the spot control test. Comment a to section 227 reinforces this assumption. It focuses on “the specific act done” and states that the borrowing employer can be characterized as the master if the servant is acting “in the business of and subject to the direction of the temporary employer as to the details of such act.”

The language of Comment a makes instructions and thus theoretically could be characterized as her servant under the standard posed in § 226 and its illustrations. Yet it is hard to imagine any court holding a passenger liable for the negligence of a taxi driver, which underscores the overreach of § 226.

See supra notes 43-47, and accompanying text (noting that control alone does not establish a master-servant relationship). There is no evidence of any payment from B to A in Illustration 1, nor any other evidence that would support a transfer of allegiance. Payment is not required to establish a master-servant relationship in all cases, of course. But the context of the borrowed servant case by hypothesis involves an actor who is employed by another, thus making the inference of a distinct master-servant relationship unrelated to payment of wages more difficult to draw than might otherwise be the case.

See Brickner v. Normandy Osteopathic Hosp., 746 S.W.2d 108 (Mo. Ct. App. 1988) (hospital held vicariously liable for the negligence of an employee under the direction and control of an independent physician, who was also held liable); Tonsic v. Wagner, 329 A.2d 497 (Pa. 1974) (jury verdict against doctor and in favor of hospital in an operating room setting, pursuant to trial court instruction that only one of the defendants could be held liable, rev’d, citing § 226); Brimbau v. Ausdale Equip. Rental Corp., 440 A.2d 1292 (R.I. 1982) (construction site injury); Kastner v. Toombs, 611 P.2d 62 (Alaska 1980). It should be noted, however, that the number of cases citing § 226 is eclipsed by the much greater number citing § 227, to be covered shortly.

The complete text of Comment a reads as follows:

Whether or not the person lent or rented becomes the servant of the one whose immediate purpose he serves depends in general upon the factors stated in Section 220(2) [listing the factors used in distinguishing a servant from an independent contractor]. Starting with a relation of servant to one, he can become the servant of another only if there are the same elements in his relation to the other as would constitute him a servant of the other were he not originally the servant of the first. Since the question of liability is always raised because of some specific act done, the important question is not whether or not he remains the servant of the general employer as to matters generally, but whether or not, as to the act in question,
particularly clear its indifference to the matter of allegiance to the borrowing employer in its statement that, "It is not conclusive [in resolving the issue of whose servant the actor is] that in practice he would be likely to obey the directions of the general employer in case of conflict of orders." One might ask why that is not conclusive if loyalty is the essence of the agency relationship, as the Reporter himself stated during the proceedings that promulgated the Restatement.¹⁰¹

The reader then turns to Comment b of section 227 and is startled to discover that it restates the Charles test. Comment b states, "[T]here is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer." Some of the language of Comment b is close to that used by Cardozo in his opinion in Charles.¹⁰² For example, the last sentence of Comment b states that, "There is no inference that because the general employer has permitted a division of control, he has surrendered it."¹⁰³ This language by necessary implication focuses on the allegiance of the actor as the central point of analysis. It recognizes that control almost always is divided in the ordinary borrowed servant case but does not let that dictate analysis of the situation. Instead, it draws the common sense inference that the servant's loyalty ordinarily will remain with the general employer,

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¹⁰¹ ReSTATEMENT § 227 (1957).

¹⁰² See supra text accompanying note 75.

¹⁰³ The complete text of Comment b reads as follows:

In the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer. There is no inference that because the general employer has permitted a division of control, he has surrendered it.

RESTATEMENT § 227 cmt. b (1957).
who provides regular employment, and treats that as a serious matter. Because of this, Comment b concludes that the actor “remains in his general employment” in a divided control case.

Comment a focuses exclusively on control. Comment b focuses on the continuing relationship between actor and general employer and argues that the relationship continues even when control is divided between general and borrowing employers. It is frustrating to have to confront apparent inconsistencies in a work as competent as that of the Restatement of Agency. Yet it is undeniable that Comments a and b of section 227 appear flatly inconsistent.

The reader is left with no clear sense of direction concerning the position of the Restatement. In this rare instance it appears to be taking all sides on a disputed matter with no recognition of the resulting inconsistencies and the problems this poses for the reader.

Unfortunately, there is nothing in the Proceedings of the American Law Institute evidencing any discussion of §§ 226 and 227 for either the first or second editions of the Restatement. Sections 226 and 227 originally were numbered §§ 451 and 452 in early drafts of the first Restatement, then were renumbered without a change in text. Also, the text was not changed from the first to the second editions of the Restatement.

A point of collateral interest raised in § 227 of the Restatement is the relationship of the borrowed servant doctrine to the independent contractor doctrine. The first two sentences of Comment a to § 227 address this issue as follows:

Whether or not the person lent or rented becomes the servant of the one whose immediate purposes he serves depends in general upon the factors stated in Section 220(2) [which distinguishes servants from independent contractors]. Starting with a relation of servant to one, he can become the servant of another [the borrowing employer] only if there are the same elements in his relation to the other as would constitute him a servant of the other were he not originally the servant of the first.

Read literally, this analysis would mean that servants would almost never be borrowed because there are not “the same elements” in the actor’s relation to the borrowing employer. Instead, the actor was hired by and is paid by another and was directed to work in accordance with the instructions of the borrowing employer. Only the element of control is “the same element.” The element of “on behalf of” is not as easily found. This weakens the analogy to section 220(2), which is devoted almost exclusively to identifying factors to consider in drawing inferences concerning control over means of performance. This reading of the first two sentences of Comment a draws support from Comment c to § 227, where it is stated as follows:

Many of the factors stated in Section 220 which determine that a person is a servant are also useful in determining whether the lent servant has become the servant of the borrowing employer. Thus a continuation of the general employment is indicated by the fact that the general employer can properly substitute another servant at any time, that the time of the new employment is short, and that the lent servant has the skill of a specialist.

This language from Comment c is reminiscent of § 14 L of the Restatement, supra note 48, where the inference is drawn that the general employment continues in an ambiguous principal context. In both situations the underlying matter being addressed is loyalty. One assumes that the actor remains loyal to the general employer, in large part because that is the person who providing pay
IV. AN ECONOMIC ANALYSIS

The borrowed servant problem lends itself well to economic analysis, particularly as seen through the lens of the general deterrence theory. That theory, first articulated by Professor Guido Calabresi, argues that one way to reduce accidents is to require that enterprises bear their full cost, including the cost of accidents associated with carrying on an enterprise. Such costs would ordinarily be reflected in the price charged by the business. Customers, who are price sensitive, would be likely to choose safer substitutes on the basis of lesser price. Accidents thus would be reduced overall because the more accident prone businesses would be less active or be put out of business altogether.

and steady employment. It is of interest that comment a to § 14 L gives the following examples of when a new agency is created: "This is always true where the second employment operates as a fraud upon the general employer, or where the second employment was consciously concealed by the parties from the general employer." Those examples clearly turn on the fundamental element of loyalty.


107. Calabresi explains the role of cost and price as follows:

At its base are certain fundamental ethical postulates. One of these, perhaps the most important, is that by and large people know what is best for themselves. . . . [I]n order for people to know what they really want they must know the relative costs of producing different goods. The function of prices is to reflect the actual costs of competing goods, and thus to enable the buyer to cast an informed vote in making his purchases.

Id. at 502.

108. Although most of the article focuses on placing losses onto industries rather than leaving them with the victim or absorbing them by government subsidy, Calabresi also directs his attention to general deterrence within a particular industry. He states as follows:

Similarly, if the costs of accidents vary not only from industry to industry, but among firms within an industry, and if the difference is substantial enough to be reflected in different insurance premiums charged to each firm, there is every reason to have these accident costs placed on each firm. Thus, the product of the low cost more efficient firm will be favored, enabling that firm to expand at the expense of its guiltless, but more accident prone, competitor.

Id. at 532.

109. The general deterrence concept is developed more fully in Calabresi's later writings. The following language from Guido Calabresi, Fault, Accidents and the Wonderful World of Blum and Kalven, 75 Yale L.J. 216, 223 (1965) [hereinafter Fault], is helpful in explaining the concept:

Specifically, the thesis holds that although, for instance, we may not want the safest possible product, we do want the manufacturer to choose a means of production which may be somewhat more expensive in terms of materials used if this expense is made up by savings in accident costs. Similarly, . . . we may, if we are made to pay for car-caused accidents, drive less, or less at night, or less when we are of accident-prone ages, or with more safety devices, than if we are not made to pay for accident costs when we decide to use a car. I call this thesis general deterrence, because it seeks to diminish accident costs not by directly attacking
Matters become more complex when several enterprises play a causal role in a single loss, as in the borrowed servant situation. Although Professor Calabresi did not focus specifically on the borrowed servant problem, it was the subject of direct analysis in a note in the Yale Law Journal written from the general deterrence perspective.\textsuperscript{110} The Yale Note advanced the thesis that accident costs normally should be placed on the general employer on the theory that it is better able to evaluate the risk of accidents and thus reflect the cost of accidents in its price. A crane company, for example, "has a better statistical background for estimating the likelihood of crane accidents, and thus can make more accurate insurance and pricing decisions."\textsuperscript{111} A builder who hires a crane and operator for a job, on the other hand, would "probably lump all the potential accident costs of his project together and use a broad insurance policy. He is unlikely to isolate the cost of accidents involving cranes, for the purpose either of demanding safer practices from the crane company or of considering safer and cheaper substitutes."\textsuperscript{112} The crane company thus is the "more efficient risk-bearer."\textsuperscript{113}

The Yale note suggests three limitations to its thesis. First, it recommends reversal of the above priority of liabilities if the borrowing employer is a better predictor of accidents. The example given is rental by the borrowing employer of a machine and operator to perform the same services that a whole fleet of its own machines and employees perform regularly.\textsuperscript{114} Second, it argues that liability should be shifted specific occasions of danger, but (like workmen’s compensation) by making more expensive those activities which are accident prone and thereby making more attractive their safer substitutes.

\textsuperscript{110} Note, Borrowed Servants and the Theory of Enterprise Liability, 76 Yale L.J. 807 (1967).

\textsuperscript{111} Id. at 817.

\textsuperscript{112} Id. Admittedly, it is difficult to imagine substitutes for a crane on a construction job. The construction company nevertheless should be able to exercise a meaningful choice among crane companies, choosing the better run company on the basis of lower price. This reinforces the argument that crane companies should not be able to avoid having the costs of accidents fully reflected in their prices by resorting to the borrowed servant doctrine.

\textsuperscript{113} Id. at 816.

\textsuperscript{114} This qualification was first recognized in Smith, supra note 41. Professor Smith, after rejecting the control and whose business tests, argued for a "scope of the business" test. Under that test liability would be shifted to the borrowing employer if the questioned act is within "the normal sphere of operations" of the borrowing employer. Id. at 1249. Smith asks whether the activities of the negligent actor are "sufficiently intimately connected with the conduct of the business that it should respond for mishaps in the performance of such activities." Id. at 1252. Rental of a machine and operator to perform the same services that a fleet of the borrowing employer's own machines and operators perform regularly would constitute conduct within "the scope of the business" of the bor-
to the borrowing employer if the injury arises from activities outside the scope of the contract. The example given is where a building contractor uses a crane for some particularly exotic and dangerous purpose which it did not disclose to the crane company. Third, recovery against the borrowing employer is advocated if the general employer is judgment proof. This is advocated in order to ensure compensation of victims and to ensure that the price of the final product (the building, apparently) bears the full accident cost of its production. Questions can be raised about each of these limitations.

With regard to the first limitation, the fact that the borrowing employer has its own fleet of cranes and operators does not appear to compromise the argument that the business of the general employer is the superior risk bearer. The customer choice that is central to Professor Calabresi’s theory relates to competing prices. The customer making the choice of a safer substitute is the borrowing employer; the entrepreneur charging a price is the general employer. It does not aid general deterrence to increase the costs of the person who is doing the purchasing of the goods or services at issue, whether or not that person already has similar goods or services available on an internal basis.

The second limitation, addressing the situation where the borrowing employer puts the crane and operator to a risky and unanticipated use, seems adequately covered by the negligence standard that applies to persons who, like the borrowing employer in this situation, misuse control. Resort to vicarious liability does not seem necessary.115

In the third limitation, the general employer is presumed judgment proof. However, this fact does not in itself provide justification under the general deterrence theory for shifting the loss to the borrowing employer. Instead, the reasoning underlying liability for the borrowing employer. See also Keitz v. National Paving & Contracting Co., 134 A.2d 296 (Md. 1957). The policy underlying Smith’s thesis is “the rarely articulated consideration that a business must meet its normal burdens.” Smith, supra at 1253. Unless the borrowing employer has in fact and in good faith farmed out that portion of its business, it should pay the loss on the reasoning that “a business should pay its passage.” Id. at 1223.

While this reasoning is not as sophisticated as the concept of general deterrence and superior risk bearer, it seems to express the same fundamental idea. A question remains, however. Why is not the negligent act also within the "scope of the business" of the lender? Its business consists of lending workers and equipment to others for a fee. That business also should have to “pay its passage.” If one acknowledges that sometimes the negligent act is within the scope of the business of both businesses, one again is left without a clear sense of direction.

115. Alternatively, one could argue that the conduct of the negligent actor in participating in this risky and unanticipated use is outside of the scope of employment of the general employer. If that is the case, then a plausible argument for an agency relationship with the borrowing employer for that particular act could be made.
employer under this circumstance appears to be deep pocket in nature. That is, the borrowing employer is assessed liability because it has the resources to respond to a judgment and is related to the loss in a causal way.\textsuperscript{116} While deep pocket reasoning may in fact underlie much of the rationalization for respondeat superior liability,\textsuperscript{117} it has never found favor as a principled,\textsuperscript{118} fair justification for imposing vicarious liability upon a person.\textsuperscript{119} Also, the third limitation undermines the goal of con-

\textsuperscript{116} If one adopts compensation as the overriding interest to be advanced, the approach of \textit{Gordon v. Byers}, supra note 61, seems preferable. It is not a large step to dual liability from reasoning that the borrowing employer should be liable if the general employer proves insolvent. Also, under dual liability the two employers are in a contractual relationship and thus, with minimal transaction costs, can anticipate and allocate the costs of liability among themselves in a jurisdiction that imposes it on both of them. See Ronald H. Coase, \textit{The Problem of Social Cost}, 3 J.L. \& ECON. 1 (1960). Professor Calabresi briefly addressed this argument in \textit{Fault}, supra note 109, where he acknowledged that sometimes it makes no difference which party in a contractual relationship the loss is placed upon, but then stated as follows:

But it may make a great deal of difference. Among the factors which operate to determine who is the better loss bearer from a general deterrence point of view are: (1) which of the parties can better evaluate the risk involved; (2) which of the parties can better evaluate the accident proneness of potential parties on the other side; (3) which of the parties can better let this knowledge, when significant, be reflected in the prices it can command; (4) which of the parties can most cheaply insure against the liability . . . .

\textit{Id.} at 230-31.

It can be argued that each of these four factors point to continued liability for the general employer. Also, the case of Elliott Crane Serv. v. H.G. Hill Stores, 840 S.W.2d 376 (Tenn. Ct. App. 1992), proves that it is not always possible to sort things out by contract. In \textit{Elliott}, the court held an indemnity contract between the general and borrowing employers void under a Tennessee statute declaring indemnity agreements in connection with or collateral to construction contracts against public policy. Also, not all transfers of service are pursuant to a contractual relationship. The case of White v. Bye, 70 N.W.2d 780 (Mich. 1955), involved a gratuitous transfer between subcontractors on a construction site of a crane and operator for a momentary job. No realistic opportunity for allocation of risk exists under such circumstances, which involves conduct on the spur of the moment.

\textsuperscript{117} See Thomas Baty, \textit{Vicarious Liability} (1916), suggesting that the real basis for respondeat superior is that servants are impecunious and masters usually solvent. "[T]he damages are taken from a deep pocket." \textit{Id.} at 154.

\textsuperscript{118} See Glanville Williams, \textit{Vicarious Liability and the Master's Indemnity}, 20 MOD. L. REV. 220, 232 (1957):

What other theory is there? Well, there is the purely cynical theory that the master is liable because he has a purse worth opening. The master is frequently rich, and he is usually insured—two arguments that might be used by any burglar, if he ever troubled to justify his thefts. The strange thing is to find them put forward by judges of eminence.

\textsuperscript{119} For an illustration that may raise doubts about the fairness of imposing vicarious liability upon someone who is insured and who plays a causal role in a loss, consider the case of a homeowner who purchases a new hot water heater, complete with installation. She sets a time for the plumber who sold it to her to make the installation. The plumber negligently causes an accident and injures a third party while driving to the home to install the hot water heater. He was speeding because he had let himself fall behind schedule for that day. Should the homeowner be included among those liable for the resulting loss? She is causally related to the loss because it would not have happened if
sistency and predictability by requiring an additional factual inquiry (into solvency) and by creating a fictional agency relationship in order to advance the cause of compensation.

With the exception of the above limitations, the economic analysis in the Yale Comment supports the thesis of this article. It is true that the reasoning is different. Nothing is said about the fundamental elements of the agency relationship; instead, a search is made for the superior risk bearer. But the result is the same. Those supporting this approach may find themselves in agreement with the statement that this is one of many instances where the intuitive sense of the common law, expressed in the fundamental elements of the agency relationship, is consistent with economic analysis.

CONCLUSION

The conflict among the spot control, dual liability, and transfer of allegiance tests demonstrates that the law in this area is in chaos, as Judge Cardozo noted seventy years ago. There has been no improvement in the intervening seventy years. Sometimes uncertainty in the law is understandable and seemingly inevitable, where close questions raising conflicting matters of policy are at issue. The law of borrowed servant was developed in the context of an economic analysis of the problem of insurance. It was argued that the insurer, as the superior risk bearer, should be responsible for the losses of the insured. However, this approach has been criticized for creating a fictional agency relationship in order to advance the cause of compensation.

The court’s hesitation to accept the general deterrence theory as the rationale for decision in place of traditional common law analysis is understandable. The court is being asked to leave behind familiar language and concepts and to leap into the unknown, adopting a different language and set of assumptions, much of which is subject to dispute. One person’s assumption about who is the more efficient risk bearer or the cheapest cost avoider can be contradicted by others, resulting in a lack of focus and certainty. Nevertheless, the Kiefer court may not have intended to deny altogether the usefulness of economic analysis. Economic analysis can play an important role, not the least of which is reinforcing and providing a cogent explanation for much of the intuitive basis of the common law.

120. See also Howard C. Klemme, The Enterprise Liability Theory of Torts, 47 U. COLO. L. REV. 153 (1976), stressing the control a hospital has over the "economic well being" of its nurses and the control it has through "its personnel policies, from recruitment to firing," in characterizing the hospital as the superior risk bearer in a hospital injury case. Id. at 199.

121. Reasoning by economic analysis has not always been fully embraced by others. For example, the analysis of the Yale note was specifically commented on in the case of Kiefer Concrete, Inc. v. Hoffman, 562 P.2d 745 (Colo. 1977). The case involved a borrowed servant issue resulting from a crane accident. After describing the analysis of the Yale note identifying the crane company as the more efficient risk bearer, the court stated as follows: "Because of the empirical nature of the presumptions underlying such views, and the fact that the record in this case (as in most cases) is devoid of a basis for supporting such an assumption, we do not deem it prudent to adopt such a position on this issue." Id. at 748 n.4.
servant raises no such conflict of policy, however, nor does it seem so complicated as to invite confusion among the courts. It thus is mystifying why the courts have not long ago settled this matter. Perhaps the mesmerizing effect of the word "control" accounts for this. It is clear that the desire to compensate victims, which sometimes plays a major role in introducing uncertainty into the law, cannot be assigned much of the blame for the chaos in this area. As noted above, one of the effects of the spot control rule, a major line of authority in the law of borrowed servant, is to reduce compensation for victims in many cases.

It is argued above that much of the uncertainty can be avoided by giving full effect to the "on behalf of" element of the agency relationship. This translates into an inquiry into allegiance, or loyalty. Recognition of the special significance of loyalty will not resolve all questions, of course. It is not always easy, for example, to distinguish between actions that are taken on behalf of a person and those that merely benefit a person, especially in this setting where the actor in many borrowed servant cases is simultaneously advancing the interests of several different people. Also, loyalty is not an instantly identifiable quality, particularly under the sometimes complex circumstances and relationships that can arise in this area. In addition, doctrinal boundaries tend to blur when they conflict or appear to conflict with the goal of compensating victims of negligence. Nevertheless, some progress can be made in removing the stain of "chaos" from this area of the law by redirecting the inquiry to include loyalty and by recognizing the inference that ordinarily the general employment continues.

The law is complex, and daily becomes more so. This intensifies the need to adopt clear rules whenever the interests of justice make this feasible. Indeed, the interests of justice are defined in part as clarity and predictability in the law. Courts can contribute toward this goal by ending confusion and inconsistency in the common law of borrowed servants. This article proposes that the goal of certainty and predictability be advanced by confining liability to the general employer except in extraordinary circumstances, a result which is consistent with the fundamental principles of the law of agency.

122. See supra note 27.