Employer Liability for Assaults by Employees

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I. INTRODUCTION

Under modern authority there is little doubt that an employer may be held liable for an assault committed by his employee when the act is done in the scope or course of employment. There is some difficulty, however, in determining what acts will qualify under this test. The employer is not liable for all acts done by his employee, even if done during working hours. The employer is held liable because there is a relationship between the act and his business, not because he employed the person. A majority of courts appears to use the motive of the employee as the determining factor. For an employee’s conduct to fall within the scope of employment it must be actuated at least in part by a purpose to serve the master.

The test to be applied in Missouri is unclear. Some cases make intent to serve the employer indispensable while others do not appear to require such intent. In Wellman v. Pacer Oil Co., the court held that, irrespective of purpose, an employer is not vicariously liable if the employee’s assault was so outrageous and excessively violent that it was unforeseeable. The case left undecided the question whether liability can attach in a situation where the employer’s business has been completed and the employee has no intent to promote the employer’s business. This Comment will demonstrate that existing Missouri law supports the proposition that under certain circumstances an employee’s assault can give rise to employer liability even though the employee, at the time of the assault, was not intending to further any

2. State ex rel. Gosselin v. Trimble, 328 Mo. 760, 768, 41 S.W.2d 801, 805 (1931).
4. Milazzo v. Kansas City Gas Co., 180 S.W.2d 1, 6 (Mo. 1944); Restatement (Second) of Agency § 228(1)(c) (1958).
5. 504 S.W.2d 55 (Mo. en banc 1973), cert. denied, 416 U.S. 961 (1974).
6. Id. at 57-58.
interest of the employer. While intent to further the employer’s interest may often be sufficient to impose liability on the employer, lack of such intent should not bar vicarious liability.

II. SCOPE OF EMPLOYMENT

To say that an employer will be held vicariously liable only when the tortious act of his employee was done in the scope of his employment is to say little more than that the employer will be liable when the court decides to impose liability. “Scope of employment” is a malleable expression that courts have used when they have found it expedient to hold, or not to hold, the employer liable. A brief review of the history of the expression will show that the term is not a formula used to determine liability but rather a conclusory label appended when liability has been found to exist.

Under early English law, an employer was not vicariously liable for the unauthorized torts of his employee. It appears that the earliest cases holding an employer liable where his employee caused harm involved either direct negligence of the master, absolute liability for dangerous instrumentalities, or some representation by the employer that was relied on to the detriment of a person who dealt with the employer through his factor. Thus, in Michael v. Alsetree, a master directed his servant to take two untrained horses to a public field to break them and make them fit for a coach. The horse ran into a person, and the master was held accountable for the injury. Here, although the servants may have handled the horses negligently, the master’s order was itself sufficiently negligent to warrant imposing liability on him. In Tuberville v. Stamp, a case that is often cited as the progenitor of respondeat superior, an employer was held liable when his servant kept the master’s fire negligently, causing injury to a neighbor. Tuberville turned not on liability for servants, however, but on the absolute common law duty of a landowner to keep his fires. The question whether the servant at the time was acting for the master’s benefit was relevant as a limitation on the master’s absolute liability—i.e., to prove whether the fire

8. W. PROSSER, supra note 7, at 470.
9. Factors were considered superior to other types of employees since they performed ministerial duties. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 415 (1765).
11. See id.
13. See T. BATY, VICARIOUS LIABILITY 19 (1916); Holmes, supra note 10, at 359.
was actually the master's—not as a basis for imposing liability for negligence within the scope of employment.\textsuperscript{15}

It was not until after 1700 that a master was liable for the act of a servant merely because the act was done while serving the master. In \textit{Hem v. Nichols},\textsuperscript{16} a master was held liable for an agent's misrepresentation concerning the quality of certain silks sold to the plaintiff. The rationale of the case was that since the employer had invited the plaintiff to enter into contracts with his agent, he should not be surprised if called upon to fulfill those contracts.\textsuperscript{17}

Whether by the survival and expansion of early Roman or medieval notions\textsuperscript{18} or by misapplication of the language in these and other cases,\textsuperscript{19} the doctrine was firmly established by the beginning of the nineteenth century that a master was liable for the \textit{negligence} of his servant in carrying out the work of the master.\textsuperscript{20} The concept \textit{qui facit per alium, facit per se}, or "he who acts through another acts through himself,"\textsuperscript{21} had evolved from the causal argument that one who orders an act done is liable for the doing of that act to a theory based on invited and justified expectations of apparent authority and finally to the rule that one who orders an act done bears the risk of negligence in the doing of the act even where no absolute duty or invitation to repose confidence in the servant existed.\textsuperscript{22} One author has described the master's liability in tort, aside from absolute duty and cases of contract, as "a gigantic inverted pyramid whose apex is nothing but nisi prius dicta."\textsuperscript{23}

For a time the courts would not extend liability of the employer to

\begin{footnotes}
\item[15] Id.
\item[16] 1 Salk 289, 90 Eng. Rep. 1154 (1709).
\item[17] See T. BATY, supra note 13, at 11.
\item[18] Holmes determined that the concept of employer liability had its roots in slavery and the \textit{patria potestas} of Roman law. Holmes, supra note 10, at 350.
\item[19] See W. BLACKSTONE, supra note 9, at 419; see also T. BATY, supra note 13, at 22-25.
\item[21] Brucker v. Fromont, 6 Term. Rep. 659, 101 Eng. Rep. 758 (1796), cited \textit{Tuberville} as authority for upholding the fiction that where a servant is acting in service to his employer, the master is so acting. The plaintiff had alleged that the defendant employer was driving his cart and negligently injured the plaintiff when in fact the defendant was not present. The defendant's servant was driving. The case also cited Blackstone as authority for the proposition that a master is liable for the negligence of his servant in the employ of his master. Blackstone, however, cites as authority for this rule the fact that a master is liable for damages from a fire that his servant negligently sets. See W. BLACKSTONE, supra note 9, at 419. Thus the citation to Blackstone is in effect an additional citation to \textit{Tuberville}.
\item[22] See Wigmore, supra note 20, at 385; see also 1 W. BLACKSTONE, supra note 9, at 417.
\item[23] T. BATY, supra note 13, at 28.
\end{footnotes}
damages caused by unauthorized intentional torts, although their reasons for doing so seem overly technical and strained today. In *M'Manus v. Crickett*, a servant willfully drove his master's chariot against the plaintiff's carriage. The master was not held liable because "when a servant quits sight of the object for which he was employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and . . . his master will not be answerable for such act." The court found that the servant gained a "special property" of the master's instrumentality for a time. The distinction made was that between trespass and an action on the case. Willful trespass would not lie against the employer because all defendants in trespass cases had to be principals; the master must actually have authorized the act to be liable in trespass. In an action on the case, on the other hand, the employer did not have to authorize the act to be liable for the employee's negligence.

While the propriety of this distinction was questioned, it was transported to America as though it were deeply rooted in the common law. The American authorities did not emphasize stark rules of pleading but rather sought a justification for the rule based on the scope of employment. It was held that the willfulness of the servant's act was the dividing line because the relation of master and servant must subsist between the parties "in the particular affair." An employee's negligence could give rise to employer liability because "[i]t is of the very nature of business that it may be well or ill done" and because "negligence in servants is so common, that the law will hold the master to the consequences, as a thing that he is bound to foresee and provide against." Where the servant's act was willful, however, the law held the act to be a departure from the master's business even if the willful act had been "done in the immediate performance of his master's business." No employer liability would arise.

26.  id.
27.  id.
29.  In Wright v. Wilcox, 19 Wend. 343, 347-48 (N.Y. 1838), the court stated, "The line where the master's liability shall terminate must be placed somewhere; and the acquiescence of Westminster Hall for many [38] years in the rule we have cited as laid down by Lord Kenyon, is an evidence of the common law not to be resisted . . . ."
30.  The Wilcox court, in fact, noted that the line between trespass and case had been blurred by statute.  id. at 348.
31.  id. at 345.
32.  id.
33.  id. at 346.
Authority to do the act was said to be the basis of liability. The basis was not authority to be negligent but authority to do the work out of which the negligence and injury arose. But while the courts were willing to conclusively presume implied authority to do all lawful acts to achieve the employer's purposes, even where the employer had given express orders not to do a certain act, they would not imply authority for willful wrongs. Scope of employment simply did not include unauthorized intentional torts.

The distinction between intentional and negligent acts was adopted by the Missouri Supreme Court in the early case of Douglass v. Stephens. While today Missouri courts do not so differentiate, it is difficult to determine at what point the distinction was overruled due to the language of the cases. In Garretzen v. Duenkel, the court held that a master would be liable for an accidental injury even though the cause of the accident was willful disobedience of the master's instructions, so long as the employee had acted with the purpose of serving the master. The court stated:

The true ground upon which a master avoids responsibility for most of the willful acts of his servants, when unauthorized by him, is that they are not done in the course of the servant's employment. When they are so done, the master is liable for them. . . . [The servant in this case] was unquestionably aiming to execute the order of his principal or master. He was acting within the scope of this authority and engaged in furtherance of his master's business. . . . It makes no difference that he disobeyed instructions.

At first blush, this language appears to overrule (in dicta) the distinction in Douglass. It appears to make motive to serve the employer as the test, even if the injury was caused by an intentional unauthorized act of the employee. But the Garretzen court cited the distinction in Douglass with approval. A second reading of the above quotation shows that the court was careful to state that the employee "was acting within the scope of this authority and engaged in furtherance of his master's business." In effect, the Garretzen court raised an irrebuttable presumption that an employee was authorized to do any lawful act if it was done with a purpose to serve the

35. T. Baty, supra note 13, at 92.
36. Garretzen v. Duenckel, 50 Mo. 104, 111-12 (1872) (not error to exclude evidence showing that loading guns in store was not part of the business of selling guns).
37. 18 Mo. 362, 367 (1853).
39. 50 Mo. 104 (1872).
40. Id. at 111.
41. Id. at 111 (emphasis added).
employer. Since the Douglass distinction was based on the legal rule that no authority will be implied to do an unlawful act,\(^4\) the cases are consistent. Courts continued to cite the rule that an employer could not be held liable for an intentional tort committed by his employee unless the act had been expressly authorized.\(^5\)

That Missouri courts have abandoned the distinction but have never overruled Douglass can be explained by the vagueness of the term "scope of employment" and by the language and facts of Missouri's leading case on employer responsibility for torts of an employee, Haehl v. Wabash Railroad Co.\(^6\) In Haehl, the defendant's employee was a watchman employed to keep trespassers off the defendant's bridge. The plaintiff's decedent was crossing the bridge and was confronted by the watchman. After some discussion—and a tap by a billy club—the decedent turned to go back. The watchman then chased after the trespasser and shot and killed him. The defendant contended that since the trespasser was already leaving the bridge, no purpose of the employer was furthered by using excessive force, and therefore the employer should be liable only if he authorized or sanctioned such wanton and malicious killing.\(^7\) The court affirmed a judgment against the defendant, stating that however wanton or malicious the act, the employer is liable if it was done in the course of the servant's employment.\(^8\)

While Haehl has been cited for the proposition that an employer is liable for his employees' assaults when done with an intent to serve the employer,\(^9\) it is at least doubtful that the Haehl court intended to break

\(^{44}\) See Douglass v. Stephens, 18 Mo. 362, 367 (1853).

\(^{45}\) See, e.g., Jackson v. St. Louis, I.M. & S. Ry., 87 Mo. 423, 430 (1855) (dicta).

\(^{46}\) 119 Mo. 325, 24 S.W. 737 (1893).

\(^{47}\) Id. at 338, 24 S.W. at 740.

\(^{48}\) Id. at 340-41, 24 S.W. at 741.

\(^{49}\) See Bova v. St. Louis Pub. Serv. Co., 316 S.W.2d 140, 143 (Mo. App., St. L. 1958); see also Brown v. Associated Dry Goods, Inc., 656 F.2d 306 (8th Cir. 1981) (store liable for assault by janitor where he acted in furtherance of store's interest); Butler v. Circulus, 557 S.W.2d 469, 475 (Mo. App., St. L. 1977) (school could be liable where employee made assault in attempt to further school's business). Such an interpretation is probably attributable to application of cases in which employer liability was denied because the assault was not done in an attempt to further the master's business. In State ex rel. Gosselin v. Trimble, 328 Mo. 760, 41 S.W.2d 801 (1931), the court discussed the Haehl decision and concluded: "The employee... was engaged in the performance of his duty... in the course of carrying out his idea of how his duty, of putting him off, should be performed. Therefore the defendant was properly held liable." Id. at 766, 41 S.W.2d at 804. The court went on to hold that the defendant's demurrer was properly sustained in the case before it because "the assault was not shown to be incident to any attempt upon the employee's... part to do his master's business." Id. at 769, 41 S.W.2d at 805. While the court's discussion mentioned that the watchman in Haehl had been authorized to use force, id. at 760, 41 S.W.2d at 804, the negative inference of the two quoted
with the established rule that an intentional tort is not within the scope of employment absent express authority. This is evidenced by the court's statement that the holding was not outside the authorities cited by the defendants, \(^{50}\) by the fact that the court found no need to cite precedent for what it considered a well-settled proposition, \(^{51}\) and by the care the court took to point out that the watchman's job necessarily involved the duty of "putting . . . [trespassers] off after they got on."\(^{52}\)

The holding in *Haehl* was not in conflict with the intent/negligence distinction. When an employer authorized an employee to use force for certain purposes and the employee used excessive force to achieve those purposes (i.e., shooting at a trespasser to make him get off of a bridge), holding the employer liable was in accord with the prior rule.\(^{53}\) Two rationales for employer liability that did not change the basic distinction had been advanced in other states. First, the court could find that the act was not an intentional trespass but negligence in the performance of a lawful act in the course of employment.\(^{54}\) Second, the court could find the action to be one for trespass and consider the employer to have authorized the act. That is, where an employee is authorized to use force at his discretion, the "use of such discretion or force is a part of the thing authorized."\(^{55}\) Due to the express finding in *Haehl* that putting trespassers off the bridge was a part of the employee's duties, either of these rationales could be used to make *Haehl* consistent with prior cases. Nonetheless, the broad language used in *Haehl* has been read to impose potential liability for all acts done to further the interests of the employer.\(^{56}\)

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\(^{50}\) *Haehl*, 119 Mo. at 340, 24 S.W. at 740.

\(^{51}\) "It is apparent without argument, upon the facts shown in evidence as they appear upon the face of the foregoing statement, that all these requirements were fully met by the plaintiff." *Id.* at 338, 24 S.W. at 741.

\(^{52}\) *Id.* at 340, 24 S.W. at 740.

\(^{53}\) *See* Rounds v. Delaware, L. & W.R.R., 64 N.Y. 129 (1876) (employer held liable where employee removed trespasser from train by violently knocking him off while train was still in motion); T. BATY, *supra* note 13, at 190.

\(^{54}\) In *Healy* v. City Passenger R.R., 28 Ohio St. 23 (1875), the court held that the employer would be liable if the jury found that manner in which the conductor intentionally ejected the plaintiff was negligent; the conductor allegedly had pushed the plaintiff off a moving car for failure to pay his fare.


\(^{56}\) *See* note 49 *supra*. The additional limitation of foreseeability of the act was imposed in Wellman v. Pacer Oil Co., 504 S.W.2d 55 (Mo. en banc 1973), *cert. denied*, 416 U.S. 961 (1974). The court's language appears to imply that motive to further the interests of the employer is the underlying test of liability. *See id.* at 57.
A major step was taken when the *Haehl* rule was interpreted to allow recovery against an employer not only when there was no express authorization of force but also when the assault itself was not made for the purpose of furthering the employer's interests. In *Maniaci v. Inter-Urban Express Co.*,\(^\text{57}\) the plaintiff had received a shipment through the defendant carrier. The plaintiff refused to sign a receipt for it, claiming that the shipment was short. An employee of the defendant asked the plaintiff to come to the company offices to discuss a settlement. When the plaintiff got near the office, the employee confronted him and demanded that the plaintiff sign the receipt. Under protest, the plaintiff started to comply when the employee drew a pistol and shot him in the chest and shoulder. The defendant carrier contended that since the plaintiff was already signing the document, the act of the employee in shooting him could have served no purpose of the employer. The Missouri Supreme Court, sitting en banc, reversed a ruling that sustained the defendant's demurrer.\(^\text{58}\)

In *Maniaci*, liability was imposed on an employer although none of the traditional principles for imputation of liability applied. There was neither an express command for the assault nor an awareness on the part of the employer that the assault would occur. There was no expectation or representation that the employer would be bound by the act of the employee. There was no contractual or absolute duty of protection. There was no negligence in the hiring of the employee, and there was no implied authority to do the act since it was not done to achieve a purpose that the employee was hired to do. In *Maniaci*, the supreme court finally abandoned the notion of a metaphysical connection between authority and act and recognized that the basis of liability was founded in public policy.\(^\text{59}\) While there is language in *Maniaci* which might indicate that liability arose as a result of a special duty imposed on common carriers,\(^\text{60}\) the traditional basis of such a heightened duty is the implied contract of safe passage\(^\text{61}\) and the helplessness of a passenger once on board.\(^\text{62}\) Since the plaintiff in *Maniaci* was not a passenger, the duty of common carriers could not be the basis of the liability imposed. Moreover, later cases apply the principle of *Maniaci* to noncarriers.\(^\text{63}\)

57. 266 Mo. 633, 182 S.W. 981 (en banc 1916).
58. *Id.* at 650, 182 S.W. at 985 (4-3 decision with two judges concurring in result only).
59. *Id.* at 644, 182 S.W. at 983.
60. *See id.*
63. *See* Panjwani v. Star Serv. & Petroleum Co., 395 S.W.2d 129 (Mo. 1965); Barger v. Green, 255 S.W.2d 127 (Mo. App., K.C. 1953); Doyle v. Scott's Cleaning Co., 224 Mo. App. 1168, 31 S.W.2d 242 (St. L. 1930).
EMPLOYER LIABILITY

Whether *Maniaci* should be read to expand the concept of scope of employment or to abandon the over-used concept in favor of a policy approach, it is clear that the court was willing to impose liability where liability had not been imposed before. Since 1916, *Maniaci* has been both followed and criticized. The remainder of this Comment will show that the principle espoused in *Maniaci* is still being applied and that it should not only be continued, but expanded.

III. THE MANIACI LINE OF CASES

In finding that the motive for the act was not determinative, the *Maniaci* court approved the following language from *Mechem on Agency*:

> [I]n general terms it may be said that an act is within the course of the employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill advisedly with a view to further the master's business or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.

Narrowly interpreted, *Maniaci* states that a common carrier is liable for an unprovoked assault committed on or just outside the employer's premises by its employee against a legitimate patron-invitee when the assault arises out of an attempt to settle a controversy concerning the employer's business and is made by the person the plaintiff was directed to deal with in order to settle the controversy. The result in the case may be in accord with modern notions of fairness, but it cannot be deduced from most of the authorities cited in the opinion without a leap of faith. Whatever the true

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64. *Maniaci* v. Inter-Urban Express Co., 266 Mo. 633, 182 S.W. 981 (en banc 1916).

65. 2 F. *Mechem*, *supra* note 55, § 1960, quoted in *Maniaci*, 266 Mo. at 649-50, 182 S.W. at 985.

66. An examination of the authorities cited in *Maniaci* reveals that, with one or two exceptions, they do not support the result in the case. As previously discussed, *Maniaci* did not involve a higher degree of care or absolute liability, as the court implied, 266 Mo. at 644, 182 S.W. at 983, even though the defendant was a carrier. The cases cited involve excessive violence used in treatment of passengers or trespassers, e.g., Whiteaker v. Chicago, R.I. & P. Ry., 252 Mo. 438, 160 S.W. 1009 (en banc 1913) (plaintiff riding on top of car kicked off by conductor while train was moving); Haehl v. Wabash R.R., 119 Mo. 325, 24 S.W. 737 (1893) (defendant’s watchman shot and killed trespasser on defendant’s bridge). Some of the cases involve questions of employer liability where negligence caused the injury, e.g., O’Malley v. Construction Co., 255 Mo. 386, 164 S.W. 564 (1913); Garretzen v. Duenckel, 50 Mo. 104 (1872).

The *Maniaci* court explained its reliance on *Haehl*. The court reasoned that
rationale for the decision, it is broader than this narrow interpretation and

since liability was imposed in *Haehl* when the defendant's employee shot a trespasser, liability should be imposed when the victim was a customer. 266 Mo. at 646-47, 182 S.W. at 984. The court ignored the necessary finding in *Haehl* that the employee was authorized to use force in removing trespassers. The agent in *Maniaci* was not authorized to use violence against customers.

The *Maniaci* court cited language from Rounds v. Delaware, L. & W.R.R., 64 N.Y. 129 (1876), to the effect that when a master puts an employee in a position of responsibility and management, the master will be liable when the employee, through lack of judgment or discretion, goes beyond his authority and inflicts an unjustifiable injury on another. *Maniaci*, 266 Mo. at 647-48, 182 S.W. at 984. But in *Rounds*, the employee was authorized to use force in such situations and the question was whether the excessive force used could give rise to employer liability. 64 N.Y. at 136.

In support of its holding the *Maniaci* court also cited Otis Elevator Co. v. First Nat'l Bank, 163 Cal. 31, 124 P. 707 (1912), and J. *STORY*, *AGENCY* § 453 (9th ed. 1882), for the proposition that a principal is responsible for the wrongful acts of its agent because the principal holds the agent out to be competent and trusted and therefore warrants his fidelity and good conduct. The California case was a suit against a bank for cashing a "raised" check. The plaintiff was estopped from claiming the bank was not justified in cashing the check since it had been raised by an agent of the plaintiff whose duties included cashing such checks. While this reliance argument is appropriate in a case of an agent's fraud, it is not authority for imposition of liability for an assault by an employee. See text accompanying notes 107-12 infra.

It is also easy to distinguish the language of Justice Cooley, quoted in *Maniaci*:

The master is liable for the acts of his servant, not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of.

266 Mo. at 649, 182 S.W. at 985 (quoting 2 T. *COOLEY*, *TORTS* 1017 (3d ed. 1906)) (emphasis added). Cooley followed these words with examples of application of the rule that were not cited in *Maniaci*. Cooley, for example, would apply the rule when a merchant left a clerk in his store to sell goods, and the clerk, in order to make the sale, misrepresented the quality of the goods. The merchant would be responsible for the fraud. Similarly, when a railroad puts a conductor in charge of ejecting trespassers and he purposefully and wrongfully ejects a passenger, or when excessive violence is used to eject a trespasser, the railroad company would be made to respond in damages. 2 T. *COOLEY*, *supra*, at 1017-18. In both of these situations the employee was given authority to do the kind of act that gave rise to the injury. The rule was based on an implied authority to do the act, *id.* at 1024, and should not be applied unless the employee either was authorized to do the act or was acting, at least in part, to further the interests of the employer.

The *Maniaci* court also quoted from *Pierce on Railroads*: "The company is liable for the acts of its servants in the course of their employment, both in the rightful use and in the abuse of the powers conferred upon them . . . ." 266 Mo. at 648, 182 S.W. at 985 (quoting E. *PIERCE*, A TREATISE ON THE LAW OF RAILROADS 278 (1881)) (emphasis added). This language is also distinguishable. Pierce continues with the following statement, which was not included in the *Maniaci* opinion:

http://scholarship.law.missouri.edu/mlr/vol48/iss3/4
This rule applies where the servant exercises a power conferred by the company on an occasion or under circumstances when its exercise is unlawful, as when a conductor or other servant, having the power to remove passengers from the company's carriages who have no right to remain in them, removes a passenger who has such a right; and also when a servant so authorized uses the power in a case when it is lawful to use it, but in an unlawful manner, as with excessive force.

E. Pierce, supra at 278 (emphasis added). Pierce concluded that while authority to use force could be inferred by an order which implies the use of force, express authority was required to impose employer liability for acts on behalf of the company which were not the kind of acts that the company itself lawfully could do. Id. at 279-80. In Maniaci, there was no allegation that the company had authorized its agent to use violence if necessary to procure the receipt from the plaintiff. 266 Mo. at 652, 182 S.W. at 986 (Woodson, C.J., dissenting). In addition, it was alleged that the plaintiff was already giving the agent the requested signature, so the violence could not be said to have been done in an effort to procure the signature for the employer. See 266 Mo. at 641, 182 S.W. at 981.

There are two authorities cited in Maniaci that can be read to support the result. Professor Mechem, in his work on agency, gave some general rules for determining whether an act is within the course of employment:

[A]n act is within the course of the employment if . . . it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill-advisedly . . . from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent and personal motive on the part of the servant to do the act upon his own account.

F. Mechem, supra note 55, § 1960. It is not clear what Mechem meant by this general rule, as he neither explains it nor cites any authority for it. Due to the similarity in language, it may be supposed that the rule was gleaned from Rounds v. Delaware, L. & W.R.R., 64 N.Y. 129 (1876):

The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another.

Id. at 134. Thus it is possible that Mechem was referring to a case in which the employer had given authority to the employee to use force in similar circumstances, but the employee, spurred by the emotion of the situation, used more force than was authorized. This is especially likely in light of Mechem's comment that the limitations of employer liability should not be expanded except by legislation. 2 F. Mechem, supra note 55, § 1963.

The only authority cited in Maniaci that is unquestionably on point is Richberger v. American Express Co., 73 Miss. 161, 18 So. 922 (1895). In that case, the plaintiff alleged that he had been overcharged by defendant's agent and had complained to the agent's superiors, that the agent then repaid the amount of the overcharge and demanded a receipt, and that upon the plaintiff's signing and re-
has been applied where the employer was not a common carrier,\(^{67}\) where the assault arguably was not unprovoked,\(^{68}\) where the assault did not occur on the defendant's premises,\(^{69}\) and where the victim had not been sent to settle a controversy with anyone but was assaulted by the person with whom the controversy arose.\(^{70}\)

In *Doyle v. Scott's Cleaning Co.*,\(^{71}\) an employee delivered some clothes to the plaintiff's residence. The plaintiff had complained to her husband that the deliveryman had been discourteous to her on a prior occasion. When the husband answered the door he asked the employee (Appler) to be more courteous in his conversation when delivering goods. Appler asked what discourteous remarks were being referred to. The husband, thinking he might be mistaken about Appler's identity, called his wife to the porch. When the wife identified him as the discourteous employee, Appler got angry and asked if they were looking for trouble. The plaintiff said no and asked him to leave. Appler then struck the plaintiff in her face, knocking her to the floor. The St. Louis Court of Appeals, citing *Maniaci*, found that the plaintiff had stated a cause of action against the employer under these facts.\(^{72}\)

[T]he complaint made to . . . Appler, dealt with an alleged discourtesy in his conduct of defendant's business. It is but natural that plaintiff's husband would inquire of Appler regarding any believed discourtesy on Appler's part to his wife which arose in turning the receipt the agent immediately did "curse, abuse, insult, and maltreat plaintiff because plaintiff had demanded and received . . . said overcharge." *Id.* at 167, 18 So. at 922. The Mississippi Supreme Court recognized that an express company was not subject to the higher common carrier standard of liability, but that since it "opens its offices every day to thousands of citizens, in its dealings with customers . . . it is bound . . . for respectful treatment and for decency of demeanor." *Id.* at 171, 18 So. at 923. The test was whether the act was done "in the master's business." *Id.* at 169, 18 So. at 923. The court found that the "whole transaction occurred in the shortest time, and was one continuous and unbroken occurrence." *Id.* at 171, 18 So. at 923. It was therefore "impossible to say . . . that the tort committed . . . because of the demand for the refunding of what was plaintiff's conceded due, was so separated in time or logical sequence as not to have been done in the master's business." *Id.*. Richberger thus would allow a customer to collect from a business for an assault made by an agent that was neither authorized nor done to serve the purposes of the employer.

68. *See, e.g.*, Barger v. Green, 255 S.W.2d 127 (Mo. App., K.C. 1953).
70. *See, e.g.*, Panjwani v. Star Serv. & Petroleum Co., 395 S.W.2d 129 (Mo. 1965); Doyle v. Scott's Cleaning Co., 224 Mo. App. 1168, 31 S.W.2d 242 (St. L. 1930).
71. 224 Mo. App. 1168, 31 S.W.2d 242 (St. L. 1930).
72. *Id.* at 1175, 31 S.W.2d at 245.
connection with and out of the business done through Appler as agent for the Scott’s Cleaning Company. The adjustment of such a complaint would be to the interest of the master’s business, and as the complaint arose out of the alleged conduct or action of Appler, it was not without reason that the matter in the first instance should be called to his attention.\textsuperscript{73}

In \textit{Barger v. Green},\textsuperscript{74} the plaintiff complained to the manager of the defendant corporation about an alleged breach of contract. The manager referred the plaintiff to Green. During their conversation the plaintiff said to Green, “I thought you were a man of your word. You can take your chickens and go to hell with them.” Green suddenly struck plaintiff on the left side of his head with his fist. The plaintiff then said, “[D]on’t hit me, I am going out.” As he was walking to the door, Green hit him again and pushed him out the door and off a loading dock. The plaintiff broke his leg near the hip. Although the assault took place at the termination of the discussion, the Kansas City Court of Appeals found that the assault occurred as plaintiff was engaged in trying to settle a controversy concerning a portion of plaintiff’s business, on the premises, during working hours, and with the employee to whom plaintiff had been sent to discuss the controversy by the corporate defendant’s manager.\textsuperscript{75}

The \textit{Barger} court cited \textit{Doyle} as authority for denying a motion for a directed verdict for the defendant corporation. In spite of the defendant’s argument that a man should not be able to “come into a respectable place of business and cause a disturbance and abuse people and start a fight and then come back and . . . collect a bill of damages after he gets hurt,”\textsuperscript{76} the court affirmed a $3,900 judgment for the plaintiff.

\textit{Doyle} and \textit{Maniaci} were criticized by the St. Louis Court of Appeals in \textit{Tockstein v. P.J. Hamill Transfer Co.},\textsuperscript{77} which involved a suit for damages against a transfer/delivery company for injuries incurred when the defendant’s employee struck the plaintiff in the face. The employee was making a delivery to a hardware store. The plaintiff was a customer in the hardware store. As the employee carried in a roll of woven wire fencing, he passed the plaintiff and part of the wire scratched the plaintiff. The plaintiff told the employee he should be more careful and the employee continued to the back of the store. At the back of the store, the employee had a heated argument with the store owner because the delivery had not been made through the delivery door. The store owner threatened to report the employee to his employer. As the employee was leaving, he passed the plaintiff again and said, “I suppose you want to make a report too.” The plaintiff decided to get the license number of the truck. At the curb, the plaintiff

\begin{itemize}
\item \textsuperscript{73} \textit{Id.} at 1174, 31 S.W.2d at 244.
\item \textsuperscript{74} 255 S.W.2d 127 (Mo. App., K.C. 1953).
\item \textsuperscript{75} \textit{Id.} at 131.
\item \textsuperscript{76} \textit{Id.} at 129.
\item \textsuperscript{77} 291 S.W.2d 624, 626-27 (Mo. App., St. L. 1956).
\end{itemize}
passed in front of the employee, who struck him, fracturing his nose.\(^\text{78}\)

The \textit{Tockstein} court held that before an employer could be liable for an assault by the employee, the assault must be "made with the intent to promote or further the master's business."\(^\text{79}\) The court stated that \textit{Maniaci} set no precedent because it was a four-to-three decision with two judges concurring in the result only. Moreover, the \textit{Tockstein} court stated that the employee in \textit{Maniaci} shot the plaintiff in an attempt to force the consignee to do something for the benefit of the employer\(^\text{80}\)—contrary to the statement in the \textit{Maniaci} petition that the plaintiff was shot after he was already complying with the employee's order.\(^\text{81}\)

The \textit{Tockstein} court recognized that \textit{Doyle} was on point but stated that it should no longer be followed.\(^\text{82}\) Nonetheless, the \textit{Barger} case, which followed \textit{Doyle}, was relied on by the Missouri Supreme Court in \textit{Panjwani v. Star Service \\& Petroleum Co.},\(^\text{83}\) a unanimous decision. \textit{Panjwani} involved a personal injury suit by a customer who was assaulted by the defendant's employee, a gas station attendant. The plaintiff had asked for one dollar's worth of ethyl. After the employee had put the gasoline in plaintiff's car, the plaintiff asked the employee to check the oil and rear tires. The employee became angry and used abusive language to the effect that he wasn't about to check tires for a one dollar sale and that the plaintiff should "get the hell out of here." The plaintiff asked to see the manager. On finding that the defendant employee was the assistant manager, the plaintiff paid him for the gasoline and started walking toward the office to get someone to check the tires. The employee then struck the plaintiff with the nozzle of a gas hose, fracturing the bones on the left side of his face.\(^\text{84}\)

The defendant argued that because its employee had completed service to the plaintiff and gone on to serve another customer, he was not acting in the course and scope of his employment with the intent to promote its business at the time of the assault.\(^\text{85}\) The supreme court held the employer liable even though the sales transaction had been completed. The court found that the plaintiff had made a submissible case of unprovoked assault and battery, since the plaintiff was trying to settle a controversy concerning the defendant company's business "on the premises, during working hours, and with the employee to whom plaintiff had been sent to discuss the controversy by the corporate defendant's manager."\(^\text{86}\) The \textit{Panjwani} court did not expressly overrule \textit{Tockstein} but merely dismissed that case as not dispos-

\(^{78}\) \textit{Id.} at 625.

\(^{79}\) \textit{Id.} at 626.

\(^{80}\) \textit{Id.} at 627.

\(^{81}\) See \textit{Maniaci}, 266 Mo. at 641-42, 182 S.W. at 981.

\(^{82}\) 291 S.W.2d at 627.

\(^{83}\) 395 S.W.2d 129 (Mo. 1965).

\(^{84}\) \textit{Id.} at 131.

\(^{85}\) \textit{Id.} at 130-31.

\(^{86}\) \textit{Id.} at 131-32.
itive of the issue. While the Panjwani court did not cite Maniaci, its reliance on Barger is an approval of Doyle, which is an approval of Maniaci.

The Maniaci-Doyle-Barger-Panjwani line of cases leaves us with the rule that when a dispute between a customer and an employee arises out of the employer's business transaction with the customer, the employer will be called on to answer for an assault by the employee that occurs during or immediately after the customer's attempt to settle the controversy. In cases outside of this "complaint case" setting, the supreme court has held that for the employer to be vicariously liable for an employee's assault, the assault must be made with an intent to further some interest of the employer. The requirement of intent found in these cases stems from language found in Haehl:

The principal is responsible, not because the servant has acted in his name or under color of his employment, but because the servant was actually engaged in and about his business, and carrying out his purposes; and it matters not in such case whether the injury from which it is sought to charge him is the result of negligence, unskillful or wrongful conduct, for he must choose fit agents for the transaction of his business. But if his business is done, or is taking care of itself, and his servant, not being engaged in it, not concerned about it, but impelled by motives that are wholly personal to himself, and simply to gratify his own feeling of resentment, whether provoked or unprovoked, commits an assault upon another, when that has and can have no tendency to promote any purpose in which the principal is interested, and to promote which the servant was employed, then the wrong is the purely personal wrong of the servant . . . .

The basis of this language was that the employer was liable where he could be said to have authorized the wrongful act. This rationale called for a teleological test of liability; the employer could be held to have impliedly authorized any act done by the employee if the act was done in an attempt to do the job the master told him to do, but no authority would be implied if the particular act was not done in an attempt to serve the master. At the time of the Haehl decision, no authority was implied for unlawful assaults that were not at least partially authorized.

87. Id. at 132. Tockstein, unlike Panjwani, did not involve an invitee or patron of the defendant corporation.
88. See State ex rel. Gosselin v. Trimble, 328 Mo. 760, 41 S.W.2d 801 (1931); see also Bova v. St. Louis Pub. Serv. Co., 316 S.W.2d 140 (Mo. App., St. L. 1958).
89. 119 Mo. at 339, 24 S.W. at 740.
90. See Garretzen v. Duenckel, 50 Mo. 104, 111 (1872); Douglass v. Stephens, 18 Mo. 362, 367 (1853).
91. See Douglass v. Stephens, 18 Mo. 362, 367 (1853); see also State ex rel. Gosselin v. Trimble, 328 Mo. 760, 768, 41 S.W.2d 801, 804; E. Pierce, supra note 66, at 279-80.
92. See Jackson v. St. Louis, I.M. & S. Ry., 87 Mo. 422, 430 (1885); McKeon v. Citizens Ry., 42 Mo. 79, 88 (1867). These authorities were cited by the defendant.
The broad language of *Haehl*\(^93\) apparently was read as imposing employer liability for any assault so long as it was committed with the purpose of furthering the employer’s interests.\(^94\) While such a reading would liberalize the old law by implying authority to use unlawful force—where only express authorization to use force previously had been sufficient to impose liability—it would limit the effect of *Maniaci* if applied in a complaint case. The employer would be liable for an assault by his employee only if by committing the assault the employee was doing something or thought he was doing something he was hired to do, albeit in an unorthodox manner. While *Maniaci* cited *Haehl*, the underlying rationales of the two cases are different and may provide opposing results. In a later case imposing the *Haehl* limitation, *Maniaci* was distinguished on the ground that the plaintiff in the later case was not an invitee-patron of the defendant.\(^95\)

There are thus two theories of employer liability available in Missouri.\(^96\) One rule imposes liability under a theory that ascribes the act of the employee to the employer.\(^97\) By hiring an employee to do a job for him, the employer has authorized the employee to do acts designed to achieve the employer’s purpose.\(^98\) *Qui facit per alium, facit per se.* The theory underlying the *Maniaci* line is more elusive.

As has been shown, the *Maniaci* rule does not proceed from most of the precedents cited to support it.\(^99\) The *Maniaci* court introduced a new theory of liability and clothed it with the language of established law. Liability was imposed, not because the employee was doing something that the employer could be deemed to have ordered or authorized the employee to do, but because the assault *arose out of the employer’s business*.\(^100\)

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\(^{93}\) *Haehl*. Brief for Defendant at 30, *Haehl*. The court found that the evidence brought “the case fairly within the principle” formulated by the defendants by finding that the employee’s duties involved the duty of putting trespassers off after they got on. 119 Mo. at 340, 24 S.W. at 740.

\(^{94}\) The *Haehl* court concluded its discussion of employer liability by stating: “[H]owever wanton or malicious the act . . . was, the principal is liable if it was done in the course of the servant’s employment.” 119 Mo. at 341, 24 S.W. at 741.

\(^{95}\) *See* note 49 *supra*.

\(^{96}\) State *ex rel.* Gosselin v. Trimble, 328 Mo. 760, 765, 41 S.W.2d 801, 803 (1931).

\(^{97}\) *See* note 66 *supra*.


\(^{99}\) *See* note 66 *supra*.

\(^{100}\) *See* *Maniaci*, 266 Mo. at 644, 182 S.W. at 983.
The \textit{Maniaci} line of cases requires that the employer respond in damages not only for assaults that are made with the purpose, however misguided, of furthering the employer's interests, but also for assaults inflicted upon patrons of the employer when made at the termination of an attempt to settle some controversy concerning the employer's business. While the result may be in line with modern expectations, no Missouri case has clearly articulated the basis for imposing such liability. Even the more recent complaint cases cite decisions in which liability was imposed because the employee committed an assault with the purpose of furthering the employer's interest as authority for imposing liability for an assault \textit{without} finding such a purpose.\footnote{See, e.g., \textit{Panjwani} v. Star Serv. & Petroleum Co., 395 S.W.2d 129, 132 (Mo. 1965). The \textit{Panjwani} court cited \textit{Haehl} and \textit{Bova} v. St. Louis Pub. Serv. Co., 316 S.W.2d 141 (Mo. App., St. L. 1958), cases which imposed liability for employee assaults made for the purpose of furthering the employer's interest.}

Courts have used the same precedents and language to find, in some cases, that an employee could not be acting within the scope of employment absent a purpose to serve the employer by the injurious act and, in others, that the employer was liable notwithstanding the lack of such a purpose. This has led to confusion over when an employer is liable for his employee's assault.\footnote{See note 106 infra.} Such confusion can be cleared up by examining the true basis of liability underlying the \textit{Maniaci} line.

To find the basis of liability in these cases, it is perhaps easiest to begin with what the basis cannot be. The traditional rationale for imposing vicarious liability on an employer was that the employer had "delegated to another the doing of an act which, if done by himself would impose the duty of care and prudence commensurate with the nature and requirements of the work to be done."\footnote{\textit{Hinkle} v. Chicago B. \& Q.R.R., 199 S.W. 227, 229 (Mo. 1917) (citing \textit{Flor} v. Dolph, 192 S.W. 949, 951 (Mo. 1917)).} The employer is responsible because the employee "was actually engaged in and about his business and carrying out his purposes. He is then responsible because the thing complained of although done through the agency of another, was done by himself."\footnote{\textit{Haehl}, 119 Mo. at 339, 24 S.W. at 740.} Even where the employee disobeyed express orders about how a job was to be done, liability was imposed because to do otherwise would nullify the doctrine—every employer would tell his employees to act in a lawful, non-negligent manner.\footnote{See \textit{Philadelphia \& Reading R.R.} v. \textit{Derby}, 1 U.S. (14 How.) 291 (1852); \textit{Garretzen} v. \textit{Duenckel}, 50 Mo. 104, 111 (1872).} Thus where an assault was not made in an attempt to do the employer's business the employer would not be liable.

In the complaint cases, the employees originally had been acting to further the interests of the employer but at the time of the assault could not
be said to be motivated by any purpose of the employer.\textsuperscript{106} Since, in the complaint cases, the particular act was not done, even misguidedely, for the benefit of the employer, liability under the traditional theory would not attach to the employer.

At least one court has indicated that the employer’s liability is based on the reliance and confidence that the public has been invited to repose in the employee, stating that in “every such case the principal holds out the agent as competent and fitted to be trusted; and thereby in effect he warrants his fidelity and good conduct in all matters within the scope of his agency.”\textsuperscript{107} This language was taken from \textit{Story on Agency}.\textsuperscript{108} But Justice Story clearly was referring to agents entering into contractual relations with the plaintiff\textsuperscript{109} and liability for breaches arising from the contract.\textsuperscript{110} That Story’s words were not meant to impose liability for an unauthorized willful assault cannot be doubted.\textsuperscript{111} Nonetheless, this misapplication of Story’s language at first glance provides a tempting theory of liability for assaults. By inviting the public to do business at his store, the employer warrants that his employees are safe to do business with. This theory, however, does not help us define what acts are done in the scope of the employment. Without some limitation, it would prove too much. Absolute liability for acts of employees, such as that imposed on common carriers vis-a-vis passengers, has never been applied to shopkeepers.\textsuperscript{112} Thus, liability as imposed in the complaint cases cannot be based on a warranty of safety to customers entering a store.

A rationale that does explain liability of the employer in the complaint cases, and that does not impose absolute liability on a business for all acts of its employees, has been articulated by Justice Traynor and espoused by the

\textsuperscript{106} Some cases, however, present a fact situation that could give rise to a complaint case but are decided on the ground that the assault could be found to have been made in the interest of the employer. In Bova v. St. Louis Pub. Serv. Co., 316 S.W.2d 141 (Mo. App., St. L. 1958), a bus driver assaulted a person who had accused him of leaving the scene of an accident and who had called him a “lying bastard.” The court actually found that the driver might have committed the assault in an effort to stay on schedule and not to vindicate his own outraged feelings. \textit{Id.} at 144.

\textsuperscript{107} Doyle v. Scott’s Cleaning Co., 224 Mo. App. 1168, 1175, 31 S.W.2d 242, 245 (St. L. 1930).

\textsuperscript{108} J. STORY, supra note 66, § 452.

\textsuperscript{109} T. BATY, supra note 13, at 187.

\textsuperscript{110} Such liability might lie, for example, for negligent damage or loss of goods committed to an agent, tortious conversion of goods entrusted to an agent, fraud, and warranties of an agent. See J. STORY, supra note 66, § 453.

\textsuperscript{111} Closely following the excerpt under discussion, he wrote that “the principal is never liable for the unauthorized, the wilful, or the malicious act or trespass of his agent.” \textit{Id.} § 456. See T. BATY, supra note 13, at 187.

EMPLOYER LIABILITY

California courts. In *Carr v. William C. Crowell Co.*,113 two carpenters, one employed by the defendant contractor and the other employed by a different contractor, had a disagreement about the way certain work was to be done. The disagreement ended with the first employee throwing a hammer at the second, seriously injuring him. The defendant claimed that the assault was not made in the course and scope of the employment since it was not intended to and could not further any interest of the defendant.114 The California Supreme Court held that liability could be imposed if the injury merely resulted from a dispute arising out of the employment.115 The court based its holding partially on a provision of the California Civil Code, but since that provision merely declared a principal liable for wrongful acts committed "in and as a part of" the principal’s business,116 the court was constrained to review case law on liability for assaults made in the scope of employment.

As authority for imposing vicarious liability, the court cited various complaint cases,117 including the Missouri case of *Doyle v. Scott’s Cleaning Co.*118 The California court did not adopt motive or concepts of warranty and reliance as the basis for liability. It explained that the defendant’s business required the association of human beings and was attended by the risk that someone might be injured. Quoting from an opinion written by Judge Cardozo which defined the scope of employment for workers’ compensation, the court continued:

Such associations “include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional makeup. In bringing men together, work brings these qualities together, causes friction between them, creates occasions for lapses into carelessness, and for fun-making and emotional flareup. Work could not go on if men became automatons repressed in every natural expression. . . . These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.”119

113. 28 Cal. 2d 652, 171 P.2d 5 (1946).
114. *Id.* at 654, 171 P.2d at 6-7.
115. *Id.*, 171 P.2d at 7.
117. Among the cases cited was Stansell v. Safeway Stores, 44 Cal. App. 2d 822, 113 P.2d 264 (1941), in which the court imposed liability on an employer when one of its managers quarreled with a customer over an order and, after an exchange of epithets, chased her outside the store and injured her.
118. 224 Mo. App. 1168, 31 S.W.2d 242 (St. L. 1930).
119. 28 Cal. 2d at 656, 171 P.2d at 7-8 (quoting Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 472, 128 N.E. 711, 713 (1920)).
The policy becomes clear. When an employer requires interpersonal contact in order to conduct his business, at some point the business may give rise to disruptions, complaints, and arguments. Since an employer's business is dependent on human beings and not machines to function, the business should bear the risk of human emotion just as it bears the risk of human carelessness. Where an employer's business has given rise to an argument, as where a customer is trying to settle a complaint, but the employee will not or can not give the customer satisfaction, the employer should not be able to remove himself from the situation his business has created by claiming his business had terminated when the two reached an impasse. The Maniad court cited this justification when it stated:

"An act is within the course of employment if . . . it be done . . . with a view to further the masters' interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent and personal motive on the part of the servant to do the act upon his own account." 120

This theory does not impose the equivalent of absolute liability on the employer. Liability would be imposed only when the emotion giving rise to the assault arises from and is incident to the work performed for the employer. Thus, while this rationale would impute liability for an indecent assault committed by an employee out of anger arising out of his work, 121 it would not impute liability for a similar assault where no work-related dispute preceded the assault. 122 This theory requires only that an enterprise be charged with the cost of those injuries attributable to its activities. 123

Some states have refused to follow Carr, noting that Justice Traynor relied in part on a California statute 124 or arguing that such a major change in employer liability is a decision for the legislature to make. 125 Other courts have cited the decision favorably, 126 and it has been the subject of

120. 266 Mo. at 649-50, 182 S.W. at 985.
121. See Lyon v. Carey, 533 F.2d 649 (D.C. Cir. 1976) (rape by deliveryman arose out of dispute over delivery; employer held liable).
123. Id. at 139, 176 Cal. Rptr. at 292.
125. See, e.g., Sandman v. Hagan, 261 Iowa 560, 569, 154 N.W.2d 113, 122 (1967). The Sandman court refused to hold the employer liable unless the employee was engaged in furthering the employer's interests. Id. at 564, 154 N.W.2d at 117.
126. See, e.g., Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968) (motive test inadequate; government liable for acts of drunken seaman); Lange v. National Biscuit Co., 297 Minn. 399, 405, 211 N.W.2d 783, 786 (1973)
vigorouss dissent where it has not been followed. 127 Other courts have abandoned the motive requirement without benefit of the Carr decision. 128

Missouri courts already have abandoned motive as the test of employer liability in limited circumstances and have imposed liability where an assault by an employee was made out of anger arising out of an employer's business. The task that now faces the courts is to develop a rationale that will reconcile the cases and give some predictability to the concept of employer liability.

A full scale adoption of the California rationale would broaden the liability that has been recognized in the Missouri complaint cases. Missouri has limited this extended liability to cases in which a legitimate patron of the employer's business has been attempting to settle some controversy with the

(employer liable where argument that precipitated assault concerned employee's conduct in his work).

One case that appears to abandon the "furtherance of employer's interest" test—but does not—is Tri-State Coach Corp. v. Walsh, 188 Va. 299, 49 S.E.2d 363 (1948). The Tri-State court stated that an act may be within the scope of authority "and yet not be in the interest of the principal or in prosecution of the principal's business," id. at 306, 49 S.E.2d at 366, and cited California law, id. at 308-09, 49 S.E.2d at 368. It found that a bus company was liable for an assault by one of its drivers which occurred after the bus had stopped while making a turn. The court noted, however, that no liability would have arisen if the turn had been negotiated completely and the driver had returned immediately to the scene and committed the tort to gratify his hostile feelings. Id. at 305, 49 S.E.2d at 366. Apparently the court found that the assault was made to allow the driver to continue serving the employer.


128. See, e.g., Son v. Hartford Ice Cream Co., 102 Conn. 696, 701, 129 A. 778, 780 (1925) (argument and assault were "one continuous transaction"); Lyon v. Carey, 533 F.2d 649, 652 (D.C. App. 1976) (employer liable for rape by deliveryman after dispute over delivery; "dispute arose out of the very transaction which had brought . . . [deliveryman] to the premises"); Dilli v. Johnson, 107 F.2d 669 (D.C. App. 1939) (complaining customer beaten by employee; insufficient break in connection when anger led to assault); Metzler v. Layton, 373 Ill. 88, 91, 25 N.E.2d 60, 61 (1939) (principal/agent relationship "existed . . . in respect to the particular transaction out of which the injury arose"); New Ellerslie Fishing Club v. Stewart, 123 Ky. 8, 13, 93 S.W. 598, 600 (1906) (employer liable where "agent begins a quarrel while acting within the scope of agency, and immediately follows it up by a violent assault"); Richberger v. American Express Co., 73 Miss. 161, 18 So. 922 (1896) (sales clerk assaulted customer after clerk had refunded money overcharged); Kornec v. Mike Horse Min. & Mill Co., 120 Mont. 1, 10, 180 P.2d 252, 257 (1947) ("act complained of arose out of and was committed in prosecution of the task the servant was performing for his master"); Prell Hotel Corp. v. Antonacci, 86 Nev. 390, 392, 469 P.2d 399, 400 (1970) (card dealer struck obnoxious patron without leaving his position behind card table; when assault is "so inextricably intertwined with . . . [agent's] service to his employer," personal act does not break employment relationship).
Justice Traynor's theory apparently would permit recovery by anyone assaulted as a result of emotions engendered by the employer's business.

The reason for limiting the ability to recover to legitimate patrons of the employer is unclear. At one point, the rule appeared limited to invitees until this proved to be too narrow. Some language appears to base the limitation on an employer's duty to an invitee-patron or his implied warranty that his employees are safe to do business with. These arguments may be akin to reliance arguments made to hold a principal liable for contracts of his factor but are not consistent with the manner in which liability is imposed. If an employer were liable because of a duty to an invitee or a warranty of safety, an employer would be liable for all assaults made on his premises by an employee during working hours against invitee-patrons. No case has adopted such a strict liability approach. The limitation appears to be the result of judicial attempts to fit round pegs of new concepts into square holes of precedent. They can be made to fit, but the gaps are not filled.

Whether Missouri continues to limit recovery to patrons in a complaint setting or recognizes a broader liability where emotions engendered by the employer's business give rise to an assault, the courts should not rely on language from cases in which the assault was for the purpose of furthering the employer's interests to impose liability in a case in which the assault was not so motivated. The cases are not completely incompatible, but the basis of liability is different. The language can give rise to inconsistencies.

If the California rationale is adopted, the patron limitation could still be applied. The California rationale is rooted in public policy, and it may be the policy of Missouri courts to expand employer liability only where there is an element of reliance on the part of the injured party that the employee is safe to do business with. This reliance factor, though not sufficient to provide the basis of liability, could provide a limit of liability.

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129. See State ex rel. Gosselin v. Trimble, 328 Mo. 760, 765, 41 S.W.2d 801, 803 (1931).
130. See Maniaci v. Inter-Urban Express Co., 266 Mo. 633, 646-47, 182 S.W. 981, 984 (en banc 1916); see also State ex rel. Gosselin v. Trimble, 328 Mo. 760, 765, 41 S.W.2d 801, 803 (1931).
131. See Doyle v. Scott's Cleaning Co., 224 Mo. App. 1168, 1173-74, 31 S.W.2d 242, 244 (St. L. 1930).
132. Compare State ex rel. Gosselin v. Trimble, 328 Mo. 760, 769, 41 S.W.2d 801, 805 (1931) (assault not perpetrated with aim to further employer's interests is not done within scope of employment), with Barger v. Green, 255 S.W.2d 127, 131 (Mo. App., K.C. 1953) (assault could be within scope of employment if employee acting to further employer's interests just before assault commenced).
133. Another possible justification for such a limitation might be the distribution of losses theory mentioned in another context in Seavey, supra note 7, at 450. The business enterprise can shift the cost of liability to its customers through price
Finally, the California rationale is not contrary to the result in *Wellman v. Pacer Oil Co.*\(^{134}\) In a four-to-three decision, the Missouri Supreme Court in *Wellman* held that some acts are so outrageous (a gas station attendant shot a complaining customer) that the act is unforeseeable and cannot be deemed to be within the scope of employment.\(^{135}\) *Wellman* involved an assault that probably was not done in furtherance of the employer's interests, but the court did not reach that issue. While the *Wellman* rule seems inappropriate for acts found to be done in an attempt to further the employer's interests,\(^{136}\) the foreseeability limitation is not inconsistent with the public policy "risk of the business" theory propounded by Justice Traynor.\(^{137}\)

The *Wellman* decision is a good example of the confusion that can arise if the basis of liability is not clear. While it was a case in which the act could hardly be said to have been done in furtherance of the employment, the plaintiffs apparently felt constrained to argue on appeal that their facts not only could fit the complaint case type of action but also could fit case law built around similar facts though based on a finding of intent to serve the employer.\(^{138}\) While the court did not limit prior case law which im-

\(^{134}\) 504 S.W.2d 55 (Mo. en banc 1973), cert. denied, 416 U.S. 961 (1974).

\(^{135}\) *Id.* at 58.

\(^{136}\) The rule, if applied to such acts, appears to be a vestige of the intent/negligence distinction announced in Wright v. Wilcox, 19 Wend. 343 (N.Y. 1838). *See* text accompanying notes 28-35 supra. *Wilcox* held an employer not liable for an unauthorized willful wrong; the *Wellman* rule holds an employer not liable for more serious willful wrongs. If, however, the basis of employer liability for acts done in furtherance of the employer's interests is implied authority, an ascription of the act to the employer, the distinction between minor wrong and major wrong is hardly more logical than the old distinction between negligence and intent. Interestingly, the comments to *RESTATEMENT (SECOND) OF AGENCY* § 231 (1958), which espouse the distinction, merely restate the rule without supplying a rationale and give examples of its application. While the outrageousness or unforeseeability of an act may be evidence that it was not done in furtherance of the employer's interest, the classification of the action is irrelevant if motive to serve the employer is established.

\(^{137}\) The policy can be said to be that where a business puts people together, the risk of foreseeable human reactions to business operations should be borne by the business, but the risk of unforeseeable reactions might not be. One court has described a policy of imposing liability on the business where the emotions and assault were "not so unusual or startling that it would seem unfair to include ... it among other costs of the employer's business." *Rodgers v. Kemper Constr. Co.*, 50 Cal. App. 3d 608, 619, 124 Cal. Rptr. 143, 148-49 (1975).

\(^{138}\) *See* Brief for Respondent at 13, *Wellman v. Pacer Oil Co.*, 504 S.W.2d 55 (Mo. en banc 1973), cert. denied, 416 U.S. 961 (1974). In addition to citing true complaint cases such as *Panjwani*, the plaintiffs cited *Bova v. St. Louis Pub. Serv. Co.*, 316 S.W.2d 140 (Mo. App., St. L. 1958), for the proposition that the employee, in shooting the plaintiff after a complaint, was acting in the scope of the employ-
posed employer liability where an assault by an employee may not have been done to serve the interests of the employer, the court’s authority for its foreseeability limitation was based on the assumption that motive is determinative. Indeed, one of the reasons given for the rule adopted in Wellman is that the outrageousness of a certain act is evidence that the “servant is not actuated by an intent to perform the employer’s business.”

V. Conclusion

We would be better off without terms like “scope of employment,” *dum fervet opus, respondeat superior*, and *qui facit per alium facit per se*. Legal jargon and Latin phrases may give comfort, but they do not solve problems. Such terms may provide valuable flexibility in judicial decisionmaking, but eventually they become stumbling blocks in the pathway of juristic progress. The Maniaci court used the play in the joints to impose liability in a new situation. Sixty-seven years later the flexibility of the Maniaci language has left inconsistencies and uncertainty in the law of employer liability.

If the term “scope of employment” is to continue to be used, it should mean something. The definition suggested by some of the cases is workable. For purposes of attributing liability for an assault, an act is done in the scope of employment if it is done in furtherance of the employer’s interest and the employee was hired to promote that interest. At the same time, courts should not be hesitant to recognize that at times they impose liability on an employer for acts done outside the scope of employment as so defined. This would be preferable to—and more honest than—the historic practice

139. The Wellman majority appears to refer to the prior complaint cases as though they were decided on the basis that where one of the employee’s duties is to handle complaints, and a complaint ends in an assault on a customer, the employer is liable because this was the employee’s way of handling the matter for the employer. 504 S.W.2d at 57. This may be due to the fact that respondent’s brief in Wellman relied both on Panjwani, a complaint case, and Bova, which was not a true complaint case. See note 138 supra. By trying to fit the facts of Wellman into both rationales, respondents understandably appear to have confounded the issues.

140. For example, the Wellman court relied primarily on the language of the Restatement (Second), which espoused the view that “intent to serve his master” is a prerequisite to imposing liability on an employer for a tortious act of an employee. See Restatement (Second) of Agency § 235 (1958).

141. 504 S.W.2d at 58 (quoting Restatement (Second) of Agency § 235 comment c (1957)).


143. See W. Prosser, supra note 7, at 473; Seavey, supra note 7, at 453.

144. Laski, supra note 142, at 107.
of changing the definition to make the ancient formula fit modern social policy. The courts could then work out limitations and exceptions that are consistent with the claimed basis of liability.

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