

# THE LOANED SERVANT DOCTRINE IN OHIO

## I. INTRODUCTION

Within the law of master and servant, the question of who shall bear the vicarious responsibility for the negligence of a "loaned" or "borrowed" servant has proven to be not only one of the most difficult, but also one of the most litigated problems.<sup>1</sup> This combination of difficult and frequent litigation has given rise to a situation in which there appears to be little consistency in the decisions, either generally or within a given jurisdiction.<sup>2</sup> While two major tests have evolved for resolving the issue of which of two employers will be liable under the doctrine of respondeat superior, the standards to be used in applying either of the tests are fraught with ambiguity. In large part, this ambiguity can be traced to a failure to recognize the purpose of the doctrine.

The law of Ohio is no exception to this problem. Ohio courts have applied both the "control" test and the "whose business" test in attempting to fix vicarious liability in the loaned servant situation, but have been hampered by a failure to perceive consistently and correctly the goal of the doctrine and by an absence of clearly defined standards to be used in applying either of the tests. These cases will be reviewed in an attempt not only to examine what standards have been applied, but also to suggest what the standard ought to be. Before embarking on this mission into the "wilderness,"<sup>3</sup> however, the setting in which the problem arises and the effect the application of the doctrine should bring about will be briefly discussed.

## II. THE SCOPE AND PURPOSE OF THE DOCTRINE

The factual setting that invites application of the loaned servant doctrine is a common one: an employer finds himself short of workers for a particular undertaking and borrows employees from another business to fill his manpower requirements. Often, the borrowed employees have special skills needed by the borrowing employer to complete the task in question<sup>4</sup> and this borrowing of employees may be

---

<sup>1</sup> P. MECHEM, *OUTLINES OF THE LAW OF AGENCY* 309 (4th ed. 1952) [hereinafter cited as MECHEM].

<sup>2</sup> *Borrowed Servants*, 76 *COM. L.J.* 307 (1971). Cardozo once described the state of the law in this area as "chaotic." Cardozo, *A Ministry of Justice*, 35 *HARV. L. REV.* 113, 121 (1921).

<sup>3</sup> Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 *MICH. L. REV.* 1222, 1232 (1940).

<sup>4</sup> See, e.g., *McAndrews v. E. W. Bliss Co.*, 186 F.2d 499 (6th Cir.), cert. denied, 342 U.S.

incidental to the borrowing or leasing of equipment needed for the job.<sup>5</sup> It is not unusual, however, for general labor to be borrowed.<sup>6</sup> As in all employment relationships, consent of the parties involved in the loan — lending employer, borrowing employer,<sup>7</sup> and employee — is a prerequisite.<sup>8</sup> Such consent may be either express or implied.<sup>9</sup>

The loaned servant problem does not arise where the work done by the employee is pursuant to a joint venture by two employers,<sup>10</sup> or when the task is pursuant to the instructions of both employers and yields separate and equally direct benefits to each.<sup>11</sup> In the case of a worker who is referred to various employers needing temporary help and who will pay the worker's salary, should both worker and employer agree to the hiring, there is no need to apply the loaned servant doctrine. In such a case, the referral service would be an agent of the worker, not his master.<sup>12</sup> Since the referral service would not be subjected to vicarious liability, the situation is not one in which a choice must be made between vicariously liable employers. The loaned servant question does arise where an employer pays the worker's salary and is in the business of hiring him out to others in need of temporary help.<sup>13</sup>

The loaned servant doctrine generally will not affect other aspects of the employment relationship; it governs only the allocation of vicarious tort liability between employers.<sup>14</sup> Therefore, broad powers may be retained by the general employer during the period of the loan without affecting the worker's status as a loaned employee. The

821 (1951); *Halkias v. Wilkoff Co.*, 141 Ohio St. 139, 47 N.E.2d 199 (1943); *Redmond v. Republic Steel Corp.*, 102 Ohio App. 163, 131 N.E.2d 593 (1956).

<sup>5</sup> See, e.g., *Bobik v. Industrial Comm'n*, 146 Ohio St. 187, 64 N.E.2d 829 (1946); *Scharf v. Gardner Cartage Co.*, 95 Ohio App. 153, 113 N.E.2d 717 (1953). This situation raises special problems when the "control" test is used. See text accompanying notes 46 & 47 *infra*.

<sup>6</sup> See, e.g., *Daniels v. MacGregor Co.*, 2 Ohio St.2d 89, 206 N.E.2d 554 (1965); *Giovinale v. Republic Steel Corp.*, 151 Ohio St. 161, 84 N.E.2d 904 (1949).

<sup>7</sup> The cases and literature tend to use the terms "general employer" and "special employer" respectively. "Long-term employer" and "short-term employer" have also found wide use.

<sup>8</sup>MECHEM, *supra* note 1, at 11; RESTATEMENT (SECOND) OF AGENCY § 15 (1958).

<sup>9</sup> *Mayflower Ins. Co. v. Star Block & Builders Supply Co.*, 84 Ohio L. Abs. 297, 170 N.E.2d 861 (Ct. App. 1959).

<sup>10</sup> This would result in dual liability. MECHEM, *supra* note 1, at 310.

<sup>11</sup> *Id.*; RESTATEMENT (SECOND) OF AGENCY § 226 (1958). This also would result in dual liability, should such a case ever arise.

<sup>12</sup> RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

<sup>13</sup> *Daniels v. MacGregor Co.*, 2 Ohio St. 2d 89, 92, 206 N.E.2d 554, 556 (1965).

<sup>14</sup> See, e.g., *Kant Slip Federal Credit Union v. Dudley*, 9 Ohio Misc. 123, 223 N.E.2d 912 (C.P. 1965), *aff'd*, 9 Ohio St. 2d 135, 224 N.E.2d 341 (1967), which held that the loaned servant status of credit union employees did not control which employer was to pay unemployment compensation.

cases, in Ohio and generally, seem to attach little significance to the fact that wages continue to be paid by the general employer.<sup>15</sup> Likewise, the general employer's retention of the ultimate power to discharge the employee has not been held to be crucial to the loaned servant question.<sup>16</sup> In this respect, both the general and the special employer have been said to be masters of the employee.<sup>17</sup> As to either employer, the employee in question is a "person employed to perform service for another in his affairs and who with respect to his physical conduct in the performance of the service is subject to the other's control or right of control."<sup>18</sup> As Professor Mechem has pointed out, while the employee performs a specific task under the direction of the special employer, he does so for the ultimate benefit of his general employer<sup>19</sup> and is always subject to the general employer's ultimate control.<sup>20</sup> It is the presence of two concurrent masters that gives rise to the problem dealt with by the loaned servant doctrine.

Because there are two masters, the loaned servant doctrine ought not be used to determine which is the "true" master. Indeed, a strict application of respondeat superior would hold both employers vicariously liable.<sup>21</sup> Rather, the proper role of the doctrine is that of a mechanism for choosing the better risk bearer or loss distributor. In this respect, the doctrine operates as an extension of respondeat superior, not as a substitute for it. When respondeat superior indicates two possible risk bearers or loss distributors, the loaned servant doc-

<sup>15</sup> See *Standard Oil Co. v. Anderson*, 212 U.S. 215, 225 (1909); *Daniels v. MacGregor Co.*, 2 Ohio St. 2d 89, 206 N.E.2d 554 (1965); *Bobik v. Industrial Comm'n*, 146 Ohio St. 187, 64 N.E.2d 829 (1946); *Scharf v. Gardner Cartage Co.*, 95 Ohio App. 153, 113 N.E.2d 717 (1953). *But see* *Babbitt v. Say*, 120 Ohio St. 177, 165 N.E. 721 (1929). As the cases indicate, the general employer is usually reimbursed for these wages by the special employer.

<sup>16</sup> See authorities cited in note 15, *supra*.

<sup>17</sup> The classic statement of this dual master relationship is that of Lord Cockburn in *Rourke v. White Moss Colliery Co.*, 2 C.P.D. 205, 209 (1877):

But when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him.

*But cf.* *Atwood v. Chicago, R.I. & P. Ry.*, 72 F. 447, 455 (C.C. Mo. 1896):

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 be at the time divergent.

<sup>18</sup> RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958).

<sup>19</sup> MECHEM, *supra* note 1, at 315.

<sup>20</sup> *Id.* at 314. See *Borrowed Servants*, *supra* note 2, at 310.

<sup>21</sup> This is basically the approach taken in Pennsylvania. When dual masters are found for a single employee, the masters have joint vicarious liability for his negligence. See generally MECHEM, *supra* note 1, at 311-13; *Borrowed Servants*, *supra* note 2, at 317.

trine indicates which of these candidates will better serve to promote the policies underlying respondeat superior.

Viewing the loaned servant doctrine as an extension of respondeat superior is consistent with each of the rationales advanced for the rule of respondeat superior. If, for example, vicarious liability under respondeat superior is based on the employer's ability to prevent injuries by controlling the conduct of the employee, the loaned servant doctrine would fix liability on the one who had sufficient control to have prevented the loss, even though the other might have had a lesser degree of control.<sup>22</sup> Similarly, if vicarious liability has as its goal the deterrence of undesirable conduct, it should be placed on the employer who could have *best* affected a change in that conduct,<sup>23</sup> even though others might also have been able to do so.

It is under the "entrepreneur" theory of vicarious liability that the loaned servant doctrine's role in choosing a loss distributor is best brought into focus. Under this theory of respondeat superior, it is posited that incidental losses occur in fulfilling the needs of society through commerce and that these losses are passed on to society as a part of the cost of the benefits it receives from that commerce. When several enterprises are involved in a particular loss, the loss bearer ought to be that enterprise which can most efficiently distribute that loss to society.<sup>24</sup> When translated into loaned servant terms, the problem of efficient loss distribution becomes which of two employers is best situated to absorb the cost of the employee's negligence and pass it on via the price structure.<sup>25</sup>

In short, the function of the loaned servant doctrine is to determine on which of two employers society wishes to place the burden of vicarious liability.<sup>26</sup> If this function is to be performed properly, it is imperative that the courts recognize that there are two masters, one of which will be the better loss distributor. On occasion, the Ohio courts have been influenced by this principle. In *Scharf v. Gardner Cartage Co.*, the court of appeals, finding that the employees in question were loaned servants, stated that "such servants must be

---

<sup>22</sup> See text accompanying notes 15 & 16 *supra*; see also discussion at III.A. *infra*.

<sup>23</sup> Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 116 (1916).

<sup>24</sup> *Id.*, at 112, 127; Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584, 599-604 (1929); Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 456-60 (1923).

<sup>25</sup> Cf. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961). Calabresi's hypothesis — that enterprise liability promotes proper resource allocation by causing the price to reflect the true cost of the product — may not be strictly applicable in the area of loaned servants, in that the liability of a particular employer may not be fixed until after the pricing decision has been made.

<sup>26</sup> *Borrowed Servants*, *supra* note 2, at 313, 318.

regarded as servants of the party to whom they are loaned, even though they remain in the general employ of the supplier.”<sup>27</sup> Similarly, the Court of Common Pleas of Franklin County, in *Kant Slip Federal Credit Union v. Dudley*, recognized the ongoing relationship of the employee with the general employer, despite the possibility of vicarious liability of a special employer:

Under such a factual situation, however, the obligation of the general employer to pay the wages to such employee continues, and the general relationship of employer-employee between the general employer and the employee continues.<sup>28</sup>

Although the Supreme Court of Ohio subsequently approved the common pleas court’s reasoning in *Kant Slip*,<sup>29</sup> it has never explicitly subscribed to the dual master theory. At most, its adherence to the concept of two coexisting masters can only be inferred from the cases before it. In *Babbitt v. Say*,<sup>30</sup> for instance, the court apparently recognized that the real contest over liability was between the owner and the hirer of a truck accompanied by a driver, not between the hirer and the driver employee. In *Daniels v. MacGregor Co.*<sup>31</sup> the court came close to declaring its allegiance to the dual master concept. In finding that the employee of a “temporary help” business was also the employee of the customer of that business when the employee was hired out to the customer, the court consistently referred to the general employer as “employer” and the special employer as “customer.” This language implies that the special employer status of the customer did not affect the employer status of the general employer.

On the other hand, the Ohio Supreme Court may have rejected the dual master approach. In at least two cases coming from that bench, the concern seems to be more with finding a single employer than with finding the better loss distributor. In *Halkias v. Wilkoff Co.*,<sup>32</sup> Ferrara, a general employee of Wilkoff, operated a crane to move earth for the Joyce Company under the direction of Joyce’s foreman. When the crane moved, Halkias, an employee of a painting firm, was injured. In considering whether Wilkoff or Joyce should be vicariously liable for Halkias’ injuries, Justice Hart stated that it was

---

<sup>27</sup> 95 Ohio App. 153, 159, 113 N.E.2d 717, 720 (1953).

<sup>28</sup> 9 Ohio Misc. 123, 128, 223 N.E.2d 912, 917 (C.P. 1965).

<sup>29</sup> *Kant Slip Federal Credit Union v. Dudley*, 9 Ohio St. 2d 135, 224 N.E.2d 341 (1967).

<sup>30</sup> 120 Ohio St. 177, 165 N.E. 721 (1929).

<sup>31</sup> 2 Ohio St. 2d 89, 206 N.E.2d 554 (1965).

<sup>32</sup> 141 Ohio St. 139, 47 N.E.2d 199 (1943).

“not important whether he [Ferrara] remain[ed] the servant of the general employer as to matters generally.”<sup>33</sup> However, if Wilkoff were the better loss distributor, it would indeed be important to recognize its liability as the general employer of the negligent crane-man. In *Babbitt v. Say*, despite the general recognition of a contest for vicarious liability between owner and hirer, the court spoke of the necessity of finding “exclusive control” in the hirer as a prerequisite to the hirer’s vicarious liability, thereby implying that the owner’s control must be so removed that he could not be a master as well.<sup>34</sup>

While the discussion of the loaned servant doctrine in *Halkias* is dictum,<sup>35</sup> it is nonetheless the most definite statement concerning the dual master theory to come from the state’s highest court. Moreover, it is unclear whether either this statement or the earlier “exclusive control” language of *Babbitt* have since been repudiated, either by the language used in *MacGregor* or by the supreme court’s broad approval of the common pleas opinion in *Kant Slip*.

Such vacillation on a concept fundamental to the proper implementation of the policy goals of the loaned servant doctrine has had a pragmatic consequence. Where courts have not recognized that the doctrine contemplates the existence of two concurrent masters, the failure to show “exclusive control,” “sole direction and control,”<sup>36</sup> or a “change of masters”<sup>37</sup> has prevented the finding of a loaned servant. However, since the purpose of the doctrine is to find the better loss distributor rather than the “true” master, this requirement of exclusive control is not only unnecessary, but also frustrates the functioning of the doctrine by eliminating from consideration all but one of the choices for loss distribution. Inconsistency in recognizing the presence of dual masters in the loaned servant situation may be a primary cause of the inconsistency in the results of the cases; certainly, it is more difficult to shift liability to another if it must be shown that the other was the sole master rather than merely the more dominant or interested of two masters.

---

<sup>33</sup> 141 Ohio St. at 152, 47 N.E.2d at 205.

<sup>34</sup> 120 Ohio St. 177, 177-78, 165 N.E. 721 (1929) (paragraph 4 of syllabus).

<sup>35</sup> The ratio decidendi for relieving Wilkoff of liability was the fact that Ferrara had no authority to operate the crane. 120 Ohio St. at 153, 47 N.E.2d at 206. Inasmuch as the Joyce Company was not a party to the action, its liability could not be adjudicated. The status of the loaned servant discussion as dictum was recognized in *Bennett v. Wilson*, 113 Ohio App. 503, 505, 179 N.E.2d 86, 87 (1961).

<sup>36</sup> *Redmond v. Republic Steel Corp.*, 102 Ohio App. 163, 169, 131 N.E.2d 593, 597 (1956).

<sup>37</sup> *Id.* at 171, 131 N.E.2d at 598 (quoting from *Standard Oil Co. v. Anderson*, 212 U.S. 215, 226 (1909)).

### III. TESTS USED UNDER THE DOCTRINE

#### A. *The Control Test*

The most widely used test, both in Ohio and generally, for determining which employer will bear the vicarious liability for a loaned servant's negligence is the "control" test. Under this test, the party having superior control over the employee's acts must also bear the liability.<sup>38</sup> Control, however, can be of at least two types, and courts have not always been sure which is determinative under this test.

##### 1. Broad Control

The first type of control is commonly referred to as "broad" control — *i.e.*, the power of "hiring, training, and firing."<sup>39</sup> As has been indicated, this broad control may be retained by the general employer without affecting the loaned servant status of the employee.<sup>40</sup> Thus, it is apparent that possession of broad control is not decisive as to liability. However, the broad control retained by the general employer might be recognized by the employee as superior to the control possessed by the special employer, for the primary desire of the employee is to please his long-term employer.<sup>41</sup> If the mental impetus of the employee were to be considered as an important element in determining where the ultimate liability rests,<sup>42</sup> such superior allegiance to the long-term employer would seem to indicate that, in a given case, he who holds the broad control ought also to bear the liability. Such subjective considerations, however, have not been used to date in the loaned servant area. Regardless of whether liability hinges on who has the broad control over the employee, the presence of broad control in the general employer does play an important role in the mechanics of the loaned servant doctrine. When such broad control rests with the long-term employer, it raises the presumption that the servant was not loaned and places the burden of proof on the party asserting the liability of the special employer. The classic statement of the presumption is that of the Judge Cardozo, in *Charles v. Barrett*:

[T]here will be no inference of a new relation unless command has

---

<sup>38</sup> See Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188 (1939) for a discussion of the role of control as a dominant factor in the law of master and servant.

<sup>39</sup> Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1230 (1940).

<sup>40</sup> See text accompanying notes 15 & 16 *supra*.

<sup>41</sup> MECHEM, *supra* note 1, at 314.

<sup>42</sup> The mental impetus of the employee is an important consideration in determining the scope of the employment. RESTATEMENT (SECOND) OF AGENCY § 228 (1)(c) (1958).

been surrendered, and no inference of its surrender from the mere fact of its division.<sup>43</sup>

While the Ohio cases contain no such concise statement of this presumption, it is clear that Ohio courts recognize it. Language to the effect that neither division of control nor cooperation alone will establish loaned servant status is found in several of the opinions,<sup>44</sup> indicating support for the latter half of Cardozo's statement. In addition, directed verdicts at the close of the plaintiff's case, relieving the defendant of liability on the basis of the loaned servant doctrine, have universally been reversed, indicating that the burden of demonstrating the loaned servant relationship lies with him who seeks to take advantage of it.<sup>45</sup>

The presumption of continuing liability of the general employer who retains broad control is strengthened when the long-term employer has hired out both the machine owned by him and an operator-employee of the machine.<sup>46</sup> The rationale underlying this presumption is that the employee will be more mindful of the general employer's interest in the machine than of the orders given by the special employer. In Ohio, the presumption is somewhat more detailed than in other jurisdictions; ownership of the machine alone will not suffice to raise a *prima facie* case for the owner's liability for acts of the operator-employee. Probably the best statement of the Ohio version of the presumption is that contained in *Halkias v. Wilkoff Co.*:

This court, however, is committed to the proposition that proof of ownership alone is not sufficient to raise such an inference of fact. To raise such an inference of fact. To raise such an inference, it must be shown, in addition to such ownership, not only that the operator is an employee of the owner but that he is employed generally in the business of his employer to operate such an instrumentality.

. . . .

When such essential facts . . . are shown, an inference arises that in operating the instrumentality at any specific time, the operator is acting within the scope of his authority, and this stands as an item of evidence, subject to be counterbalanced or overthrown by

---

<sup>43</sup> 233 N.Y. 127, 129, 135 N.E. 199, 200 (1922). See RESTATEMENT (SECOND) OF AGENCY § 227, comment b. (1958).

<sup>44</sup> See, e.g., *Bennett v. Wilson*, 113 Ohio App. 503, 505, 506, 179 N.E.2d 86, 87, 88 (1961); *Redmond v. Republic Steel Corp.*, 102 Ohio App. 163, 170-71, 131 N.E.2d 593, 598 (1956).

<sup>45</sup> See, e.g., *Gilmore v. Grandview Cement Products, Inc.*, 116 Ohio App. 313, 187 N.E.2d 895 (1962); *Bennett v. Wilson*, 113 Ohio App. 503, 179 N.E.2d 86 (1961).

<sup>46</sup> *W. SELL*, AGENCY 88 (1975); *J. FRASCONA*, AGENCY 9 (1964); *MECHEM*, *supra* note 1, at 314-15.



other competent evidence.<sup>47</sup>

In the usual loaned servant case, there will be no issue as to whether operation of the machine was within the employee's scope of authority; the fact that the employee accompanied the machine as the operator at his employer's request will generally suffice to establish this. Similarly, the fact that the operator was the general employee of the lessor will not often be contested. Therefore, unless either the scope of authority to operate the machine or the general employment relation is challenged, the Ohio version of the presumption operates in much the same manner as the majority version. If it is shown that the machine is owned by the long-term employer, there will be a presumption of that employer's continuing control over the acts of the employee-operator.

## 2. Spot Control

It is the second type of control, "spot" control, that is the decisive factor in the control test of liability. Spot control has been defined as "the control exercised by the employer on the spot, the man who says when and where to go and how fast."<sup>48</sup> An early formulation of the control test in Ohio stated that liability would rest with the employer who had "such . . . control over the drive that permits him to do more than to designate what work is to be done."<sup>49</sup> Subsequent loaned servant cases have adopted the language used in the two leading Ohio cases governing the existence of *any* employer-employee relationship. In the second paragraph of the syllabus of *Gillum v. Industrial Commission* the standard was said to be "the right to control the manner or means of doing the work."<sup>50</sup> While in *Councill v. Douglas* the applicable test was "control of, or the right to control, the mode and manner of doing the work."<sup>51</sup>

Two things must be emphasized about the control test. First, it is the *right* to exercise spot control, not the actual exercise of it, that is determinative. Thus, it is possible to place vicarious liability on the short-term employer even if his supervisory personnel were not di-

<sup>47</sup> 141 Ohio St. 139, 142-45, 47 N.E.2d 199, 201-03 (1943).

<sup>48</sup> Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1230 (1940); see also Comment, *The Loaned Servant Doctrine*, 29 TENN. L. REV. 448 (1962).

<sup>49</sup> Babbitt v. Say, 120 Ohio St. 177, 177-78, 165 N.E. 721 (1929)(paragraph 4 of syllabus).

<sup>50</sup> 141 Ohio St. 373, 48 N.E.2d 234 (1943). The "manner or means" language appears in a loaned servant context in *Daniels v. MacGregor Co.*, 2 Ohio St. 2d 89, 206 N.E.2d 554 (1965) and *Bobik v. Industrial Comm'n*, 146 Ohio St. 187, 64 N.E.2d 829 (1946).

<sup>51</sup> 163 Ohio St. 292, 126 N.E.2d 597 (1955)(paragraph 1 of syllabus). The "mode and manner" language appears in a loaned servant context in *Gilmore v. Grandview Cement Products, Inc.*, 116 Ohio App. 313, 187 N.E.2d 895 (1962) and *Bennett v. Wilson*, 113 Ohio App. 503, 179 N.E.2d 86 (1961).

recting the acts of the employee at the time of the injury, as long as there was a right so to direct. An example of the significance of this distinction is found in *Bobik v. Industrial Commission*.<sup>52</sup> There, the driver of a truck was held to be a loaned servant and the short term employer was held liable, even though no representative of the short-term employer was present when the injury occurred and the activities of the driver were not pursuant to specific directions of the short-term employer. Secondly, it appears that the control possessed by the short-term employer must be capable of exercise to some degree of specificity and detail in the direction of the employee. In cases using the control test, directed verdicts for the defendants were reversed despite the demonstration of a right of detailed control in the special employer.<sup>53</sup> While there are other cases in which less specific control was sufficient to find the employee to be a loaned servant,<sup>54</sup> these cases had proceeded to verdict or judgment, and the appellate courts were therefore reluctant to dispute the factfinders' conclusions.<sup>55</sup> Thus while the control must be specific, the degree of specificity necessary to shift liability to the special employer will, as a practical matter, be a function of trial strategy. In other words, evidence of control lacking the high degree of specificity needed to support a directed verdict may nonetheless be sufficient to support the factfinder's decision to impose liability on the special employer.

As is readily apparent, the demonstration that the special employer has spot control over the employee will overcome the presumption of the general employer's liability, based on his broad control of the employee. This is true even where the presumption has been reinforced by the presence of machinery leased to the special employer and to be operated by the employee. The more specific and immediate control of the special employer overrides the long-term pecuniary and proprietary interest of the general employer in the

---

<sup>52</sup> 146 Ohio St. 187, 64 N.E.2d 829 (1946). See also *Boaz v. Ostrander*, 77 Ohio L. Abs. 453, 147 N.E.2d 671 (Ct. App. 1958) where a truck driver was held to be a loaned servant even though the special employer was on the other side of the job site talking to a neighbor at the time of the accident.

<sup>53</sup> See, e.g., *Sullivan v. General Electric Co.*, 226 F.2d 290 (6th Cir. 1955); *New York, C. & St.L. R.R. v. Heffner Constr. Co.*, 9 Ohio App.2d 174, 223 N.E.2d 649 (1967); *Gilmore v. Grandview Cement Products, Inc.*, 116 Ohio App. 313, 187 N.E.2d 895 (1962); *Bennett v. Wilson*, 113 Ohio App. 503, 179 N.E.2d 86 (1961).

<sup>54</sup> See, e.g., *Daniels v. MacGregor Co.*, 2 Ohio St. 2d 89, 206 N.E.2d 554 (1965); *Bobik v. Industrial Comm'n*, 146 Ohio St. 87, 64 N.E.2d 829 (1946); *Boaz v. Ostrander*, 77 Ohio L. Abs. 453, 147 N.E.2d 671 (Ct. App. 1958). But cf. *McAndrews v. E. W. Bliss Co.*, 186 F.2d 499 (6th Cir.), cert. denied, 342 U.S. 821 (1951).

<sup>55</sup> *Bank of Buffalo v. Wendel*, 100 Ohio St. 47, 125 N.E. 111 (1919); *Western Ohio R.R. v. Fairburn*, 99 Ohio St. 141, 124 N.E. 131 (1918).

employee and the machinery.

Though widespread in its use, the control test does not appear to implement efficiently the loss-distributing function of the loaned servant doctrine.<sup>56</sup> There is little reason to believe that spot control indicates anything about the employer's capacity for absorbing the cost of incidental losses or his ability to pass on such costs to his customers. Rather, the focus of the test of control is the same here as it is in the master and servant area generally: to find *a* loss distributor, not necessarily *the best* loss distributor.<sup>57</sup> Even if the dual-master problem were overcome, the ambiguity over what is meant by "control" and what degree of that control is necessary for liability to adhere has caused the control test to be a less than efficient loss-distribution talisman.<sup>58</sup>

Despite its inadequacy as a guide to which of two employers is the better loss distributor, the control test does serve to promote a secondary goal of the loaned servant doctrine and of vicarious liability generally. It is said that vicarious liability will promote safety, for the person held responsible will take precautions to prevent accidents that would give rise to liability.<sup>59</sup> It would seem that the employer possessing spot control, thus having the right to engage in close and detailed supervision, would be in a better position to take those precautions than the more remote possessor of broad control.<sup>60</sup>

### B. *The "Whose Business" Test*

Dissatisfaction with the chaotic results of the control test has led many courts to abandon it for that reason alone,<sup>61</sup> irrespective of its lack of efficacy as a loss distributor. In its place, the determinative question has become "whether the employee is furthering the interests of his general employer."<sup>62</sup> Under this test, liability attaches to the employer whose business was being done by the employee at the time of the injury.

---

<sup>56</sup> See generally Douglas, *supra* note 24, at 601-03; Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 456-60 (1923).

<sup>57</sup> See text *supra* at II; *Borrowed Servants*, *supra* note 2, at 312-13.

<sup>58</sup> Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1230-32 (1940).

<sup>59</sup> See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 459 (4th ed. 1971).

<sup>60</sup> Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1232 (1940); Douglas, *supra* note 24, at 603; Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 455 (1923).

<sup>61</sup> See, e.g., *Jones v. George F. Getty Oil Co.*, 92 F.2d 255 (10th Cir. 1937).

<sup>62</sup> *J.L. Querner Truck Lines, Inc. v. Safeway Trucklines, Inc.*, 65 N.J. Super. 554, 561, 168 A.2d 216, 220 (1961).

The formulation of the "whose business" test is generally credited to Justice Moody's opinion in *Standard Oil Co. v. Anderson*.<sup>63</sup> After hypothesizing two cases, one in which the liability would rest with the general employer and one in which it would rest with the special employer, Justice Moody stated the test as follows:

To determine whether a given case falls within one class or the other, we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work.<sup>64</sup>

Applying this test, the Court concluded that Standard Oil's winchman was not subject to the control of the stevedores he was assisting and therefore was not doing their work. Thus Standard Oil, not the stevedores when a load was lowered before the proper signal had been given, was liable for the injury sustained by another stevedore.

The "whose business" test was used by the Ohio Supreme Court in two cases in the 1940's and by the Eighth District Court of Appeals (Cuyahoga County) in two cases in the 1950's. Perhaps the most concise statement of the test as used in Ohio is that found in *Halkias v. Wilkoff Co.*:

When one party loans his servant to another for a particular employment in the business and under the direction of the latter, the servant, for anything done in that employment, must be regarded as the servant of the party to whom he is loaned, although he remains the general servant of the party who loaned him.<sup>65</sup>

This formulation of the test, like the *Standard Oil* formulation, has two elements: a "control" element, which the *Halkias* court calls "direction," and a "business" element. It is unfortunate that the later Ohio cases attempting to apply the "whose business" test did not adhere more closely to the *Halkias* formulation. Its language all but avoids the three conceptual problems encountered in using the test.

The first of these problems concerns the proper role to be played by the "control" or "direction" element of the test. The language of the *Standard Oil* formulation seems to indicate that control is not itself the test, but only a major factor in determining whose is the business. The Tenth Circuit Court of Appeals appears to have put the

---

<sup>63</sup> 212 U.S. 215 (1909).

<sup>64</sup> *Id.* at 221-22.

<sup>65</sup> 141 Ohio St. 139, 47 N.E.2d 199, 200 (1943)(paragraph 4 of syllabus). The statement that the servant remains in the employ of the general employer does not seem to be supported in the opinion. See text accompanying note 37 *supra*.

issue in its proper perspective when it stated that “the question of the power to control the work is of great importance . . . but is not conclusive.”<sup>66</sup> The *Halkias* version of the test seems to follow this spirit. By conjoining the “business” and “control” elements, the language of the court indicates, at least grammatically, that the “control” element is essential, but not decisive. Two of the other Ohio “whose business” cases also adopt the conjunctive technique,<sup>67</sup> while a third, *Scharf v. Gardner Cartage Co.*, strays slightly from the pattern by using “and further” to join the “business” and “control” elements.<sup>68</sup>

The second conceptual problem in working with the “whose business” test is defining “control,” as used in this test. There is a great risk that the word will be used in the same sense as in the control test — *i.e.*, spot control.<sup>69</sup> The appropriate standard, however, seems to require less specificity than spot control, yet somewhat more detail than broad control. This intermediate degree of control might be called “project control.”

The identity of the person who, in fact, directs the details of the work and gives the immediate instructions to the workmen is of comparatively small importance, the power of control referred to being the power to control the undertaking as a whole.<sup>70</sup>

The Ohio Supreme Court appears to have embraced the “project control” standard in its “whose business” decisions. Indeed, it does not use the term “control” at all; rather, it has used less confusing designations such as “direction”<sup>71</sup> or “supervise and direct.”<sup>72</sup> Moreover, the conspicuous absence of the “manner or means” language used in conjunction with these terms in the control test would seem to indicate that the terms are being used in a different sense in the “whose business” test.

The court of appeals has not been as precise in its language. In *Scharf v. Gardner Cartage Co.* the court speaks of “direction or control . . . in the manner or way in which the work . . . was to be

---

<sup>66</sup> *Jones v. George F. Getty Oil Co.*, 92 F.2d 255, 263 (10th Cir. 1937).

<sup>67</sup> *Giovinale v. Republic Steel Corp.*, 151 Ohio St. 161, 169, 84 N.E.2d 904, 908 (1949) (quoting paragraph 4 of the *Halkias* syllabus); *Redmond v. Republic Steel Corp.*, 102 Ohio App. 163, 169, 131 N.E.2d 593, 597 (1956) (“under the control of the defendant and doing its work”).

<sup>68</sup> 95 Ohio App. 153, 159, 113 N.E.2d 717, 720 (1953).

<sup>69</sup> See text at III.A.2 *supra*.

<sup>70</sup> *Jones v. George F. Getty Oil Co.*, 92 F.2d 255, 263 (10th Cir. 1937).

<sup>71</sup> *Halkias v. Wilkoff Co.*, 141 Ohio St. 139, 152, 47 N.E.2d 199, 205 (1943).

<sup>72</sup> *Giovinale v. Republic Steel Corp.*, 151 Ohio St. 161, 170, 84 N.E.2d 904, 908 (1949) (quoting from the dissenting opinion below).

done or accomplished.”<sup>73</sup> Were it not for the later inclusion of a “business” element, one might think that this was the control test, rather than merely the “control” element of the “whose business” test. Similarly, in *Redmond v. Republic Steel Corp.*, in deciding the question of whether Republic’s crane operator was loaned to a subcontractor, the court points out the fact that the subcontractor “had no right to control him in the manner in which he operated the crane.”<sup>74</sup> The use of “control” and “manner” here seems more indicative of the spot control standard than the “project control” standard apparent in *Halkias*.

The final and most difficult problem in using the “whose business” test is determining the limits of the business of each employer. In other words, how can it be determined whose business it is that the employee is doing? Even when the ordinary business activities of the general and the special employer are substantially dissimilar, the reimbursements and rentals received by the general employer for the use of his machines and employees give him a substantial economic interest in the special employer’s work.<sup>75</sup> Moreover, it could be said that, because men and equipment not normally employed by the special employer must be brought in to perform a particular task, the doing of that task is not a part of the special employer’s business operations.<sup>76</sup> On the other hand, employees might be borrowed to do work normally done by general employees of the special employer who, for one reason or another, are not available to do the job at the time. Finally, the cost to the special employer may be less if he rents machines and operators rather than buying the machines and keeping the operators on the payroll full-time.

The problem of adequately defining the “business” element should be resolved in light of the goal of choosing the better loss distributor. Under the entrepreneur theory of vicarious liability, the business is that of the employer who seeks to profit from the resulting product; he is the one who will be better able to distribute losses to society through the price charged for the product. Moreover, it is this same employer who will possess the “project control,” inasmuch as he is the one ultimately responsible for the product.<sup>77</sup>

---

<sup>73</sup> 95 Ohio App. 153, 159, 113 N.E.2d 717, 720 (1953).

<sup>74</sup> 102 Ohio App. 163, 171, 131 N.E.2d 593, 598 (1956).

<sup>75</sup> See, MEICHEM, *supra* note 1, at 315; Comment, *Workman’s Compensation: Liability of General and Special Employers*, 26 CAL. L. REV. 370 (1938).

<sup>76</sup> MEICHEM, *supra* note 1, at 315.

<sup>77</sup> Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1239-40 (1940).

The factors examined by the Ohio courts in applying the "whose business" test appear to be those that indicate who will profit from the product itself, rather than who will profit from the provision of labor to produce the product. In *Halkias* the determinant question was whether the work was being done "in the ordinary course of business" of the employer, indicating that liability would attach to the employer if the activity of the employee was part of the normal profit-making scheme of the employer in question.<sup>78</sup> On occasion, a contract between the special and general employers, delineating the tasks to be performed by each, has been used to resolve the question of whose is the business.<sup>79</sup> Finally, in the case of equipment leased to the special employer that is to be operated by the lessor's employee, it has been recognized that the lessor will profit only from the provision of labor and equipment, and not from the product of that labor and equipment; consequently, the work is not the lessor's.<sup>80</sup>

While the "whole business" test has generally been well regarded as both an efficient loss distribution mechanism<sup>81</sup> and as a loss preventor,<sup>82</sup> it has suffered some criticism. Because of the different use of the "control" idea and confusion surrounding the proper definition of the "business" element, the "whose business" test is, perhaps, even more ambiguous than the "control" test.<sup>83</sup> The test has also come in for criticism because of the results it produces; the vast majority of instances in which the "whose business" test has been applied have resulted in liability for the short term employer. One student states that it is "the rationalization of a result and not a test."<sup>84</sup> Other commentators defend the results of the test by observing that special employer liability is favored, because the special employer is in a better loss-bearing position.<sup>85</sup>

---

<sup>78</sup> 141 Ohio St. 139, 153, 47 N.E.2d 199, 206 (1943). This seems to go a long way toward the "scope of the business" standard suggested in Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 122, 1249 (1940).

If the act in question is within the scope of the business, within its normal sphere of operations, within the boundaries reasonably fixed by the usual conduct of similar enterprises, liability should normally follow.

<sup>79</sup> *Giovinale v. Republic Steel Corp.*, 151 Ohio St. 161, 169, 84 N.E.2d 904, 908 (1949); *Redmond v. Republic Steel Corp.*, 102 Ohio App. 163, 169, 131 N.E.2d 593, 597 (1956).

<sup>80</sup> *Scharf v. Gardner Cartage Co.*, 95 Ohio App. 153, 159, 113 N.E.2d 717, 720 (1953).

<sup>81</sup> Douglas, *supra* note 24, at 601-04; Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 461 (1923).

<sup>82</sup> Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1232 (1940); Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 455 (1923).

<sup>83</sup> Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1239-40 (1940).

<sup>84</sup> *Borrowed Servants*, *supra* note 2, at 314.

<sup>85</sup> Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1233-39 (1940).

#### IV. *Conclusion*

In Ohio, as elsewhere, the courts seem to have lost sight of the purpose of the loaned servant doctrine. The decisions have too often indicated a preoccupation with finding a single master for the employee, rather than recognizing the task to be one of choosing between masters. There are, however, some hints in the most recent decisions that the supreme court, at least, has adopted the dual master theory and may begin to put the doctrine to its proper use.

Even if the courts recognize that the aim of the doctrine should be to find the better of two loss distributors, there is considerable doubt that they will be able to effectively implement that goal. Both of the tests used to fix liability in the loaned servant situation are fraught with definitional problems that have been only partially resolved. Moreover, while the "whose business" test appears to be better situated to rationally determine loss distributing ability, the more recent decisions, both from the supreme court and the courts of appeals, seem to indicate that, after a brief period of use, the "whose business" test has been abandoned in favor of the less efficacious control test. Hopefully, a renaissance of the "whose business" test will not be long in coming.

Frederick S. Coombs, III