PART II

THEORIES OF RECOVERY

A. VICARIOUS LIABILITY

1. [2:600] **Employer Liability for Acts of Employee—"Respondeat Superior":** Under the doctrine of "respondeat superior," an employer may be liable for an employee's (or "ostensible employee's") tortious acts committed *within the scope of the employment*.

[2:601-610] *Reserved.*

a. [2:611] **Vicarious liability (in the nature of strict liability):** Respondeat superior imposes *vicarious* (or derivative liability) upon the employer—i.e., it *imputes* the employee's fault to the employer and thus makes the employer responsible in damages just as if the employer personally committed the tortious act.

Respondeat superior is therefore a form of *strict liability:* The employer is responsible for the employee's wrongful acts (whether negligent or intentional) notwithstanding the exercise of due care in hiring the employee or supervising his or her conduct. [*Hinman v. Westinghouse Elec. Co.* (1970) 2 C3d 956, 960, 88 CR 188, 190]

By the same token, because respondeat superior liability is *derivative* in nature, the employer may raise all defenses that the employee could raise and cannot be assessed damages (on that theory) greater than the amount for which the employee is liable. [*Lathrop v. Healthcare Partners Med. Group* (2004) 114 CA4th 1412, 1423, 8 CR3d 668, 675-676; *Toste v. CalPortland Const.* (2016) 245 CA4th 362, 372, 199 CR3d 522, 530—no respondeat superior liability where employee obtained judgment on merits and P made no allegation employer committed independent tort]

(1) [2:612] **Rationale for imposing liability:** The justification is in part based on "deep pockets": As between employer and employee, it is felt that the employer is more likely to be able to respond in damages to an innocent third person injured by the employee's tortious conduct (i.e., by working for the employer, the employee has increased the employer's profits). Also, employers are generally better able to protect against such risk by insurance, the cost of which can be spread over the entire business (and passed on to the public). [*Hinman v. Westinghouse Elec. Co.*, supra, 2 C3d at 960, 88 CR at 190; see *Perez*

v. Van Groningen & Sons, Inc. (1986) 41 C3d 962, 967-968, 227 CR 106, 108-109; and *Moreno v. Visser Ranch, Inc.* (2018) 30 CA5th 568, 576, 241 CR3d 678, 685; *Newland v. County of Los Angeles* (2018) 24 CA5th 676, 685, 234 CR3d 374, 382]

But "deep pockets" is not the only rationale for respondeat superior liability. The doctrine is also grounded upon "a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities." (As will be seen, liability is imputed *only* for acts arising out of the *course and scope of employment*; ¶*2:685 ff.*) [*Rodgers v. Kemper Const. Co*. (1975) 50 CA3d 608, 618, 124 CR 143, 148; *Ayon v. Esquire Deposition Solutions, LLC* (2018) 27 CA5th 487, 494, 238 CR3d 185, 190-191; *Sumrall v. Modern Alloys, Inc.* (2017) 10 CA5th 961, 967, 216 CR3d 848, 852; see *Mary M. v. City of Los Angeles* (1991) 54 C3d 202, 208, 285 CR 99, 101]

(2) [2:613] **Not limited to businesses:** Although frequently described with reference to business enterprises, respondeat superior liability can attach to *nonbusiness* employers, such as households employing domestic help. Even a household can obtain insurance, and thus is in a better position to absorb the risk of injury than an uninsured employee or an innocent third party victim. [*Miller v. Stouffer* (1992) 9 CA4th 70, 79-81, 11 CR2d 454, 458-460]

(3) [2:614] **Wrongdoing employee need not be joined or identified:** Plaintiffs seeking to hold an employer liable under respondeat superior are *not* required to name or join the employee tortfeasor as a defendant. [*C.A. v. William S. Hart Union High School Dist.* (2012) 53 C4th 861, 872, 138 CR3d 1, 9-10; *Lathrop v. Healthcare Partners Med. Group,* supra, 114 CA4th at 1423, 8 CR3d at 675]

Indeed, plaintiff need only prove *an* employee caused the injury, not necessarily *which* employee was at fault. Where it is clear one or more of defendant's employees acted negligently, but the exact wrongdoer cannot be identified, respondeat superior liability will lie. "Even where the plaintiff names and joins a particular employee and the judgment is for that employee, a simultaneous judgment against the employer will be upheld if the evidence supports the conclusion that other uncharged employees committed the wrongful acts." [*Perez v. City of Huntington Park* (1992) 7 CA4th 817, 821, 9 CR2d 258, 260; *Toney v. State of Calif.* (1976) 54 CA3d 779, 788-789, 126 CR 869, 875]

[2:615] ***PRACTICE POINTER:*** Although joining the employee is not mandatory, it may be useful to do so for *discovery* purposes (i.e., to be able to subpoena or serve interrogatories upon the employee).

(a) [2:616] **Exception—intentional torts committed by elected official:** In suits seeking to hold a public entity vicariously liable for an *elected* official's *intentional* torts (other than defamation), plaintiff *must* name *both* the official and the public entity as *codefendants* in the *same action* (*see ¶2:2626 ff.*). [Gov.C. §815.3(a)]

(4) [2:617] **Employer's vicarious liability not affected by Prop. 51:** Proposition 51 neither abrogates nor diminishes an employer's respondeat superior liability. [*Miller v. Stouffer* (1992) 9 CA4th 70, 84-85, 11 CR2d 454, 461-462]

Reason: Prop. 51 proportionate liability for noneconomic damages according to fault *applies only where liability is "based on principles of comparative fault"* (Civ.C. §1431.2(a)). But the doctrine of respondeat superior *imputes* liability to the employer *by operation of law regardless of fault*. The employer's liability is *derivative* through the wrongdoing employee (*vicarious* liability); in effect, the employer steps into the employee's shoes, *bearing the employee's share of responsibility* for acts and omissions within the course and scope of employment. [*Miller v. Stouffer*, supra, 9 CA4th at 84-85, 11 CR2d at 461-462; see *Schreiber v. Lee* (2020) 47 CA5th 745, 753-754, 260 CR3d 859, 866-867]

Consequently, the employer remains liable for the *entire share* of the *employee's fault* (including the employee's share of noneconomic damages according to fault). [*Miller v. Stouffer*, supra]

(a) [2:618] **Impact in multi-defendant cases:** The same reasoning should limit the employer's vicarious liability for noneconomic damages in *multidefendant* cases. E.g., if both employee and employer are joined as defendants (employee on a direct negligence theory and employer solely on a vicarious liability theory) *along with other defendants* whose fault is being compared, *as between employer and employee,* they would be *jointly and severally* liable for the employee's share of noneconomic damages according to the employee's fault (as well as for the employee's full joint and several economic damages liability). [*Schreiber v. Lee*, supra, 47 CA5th at 757, 260 CR3d at 869 (quoting text); see *Miller v. Stouffer*,

supra, 9 CA4th at 84, 11 CR2d at 462—employer sued with other defendants would be "shielded from liability for noneconomic damages beyond those attributable to . . . employee" (dictum)]

[2:619] ***PRACTICE POINTER:*** There may be cases where the employer can be sued on *other* theories as well—e.g., negligent entrustment, negligent supervision or perhaps negligent hiring. If there is an *independent* basis for holding the employer liable, it will usually be to plaintiff's advantage to plead *both* the respondeat superior *and* independent liability theories. Reason: In multidefendant cases, the trier of fact will have to make a separate determination of what percentage of fault is attributable to the employer under the *independent* theory; the employer, in turn, will be liable for that portion of noneconomic damages resulting from *both* the fault allocated to the employee *and* the fault allocated to the employer on the independent theory. [*Schreiber v. Lee*, supra, 47 CA5th at 757, 260 CR3d at 869-870 (quoting text)]

Example: In a multi-defendant work-related injury case, it is determined that Defendant A is 10% at fault, Defendant B (Employee) is 70% at fault, and Defendant C (Employer) is 20% at fault (on a theory of negligent supervision of Employee). Employer, who presumably has the "deepest pockets," could be reached for 90% of the noneconomic damages (70% on the vicarious liability theory, plus 20% on the negligent supervision theory). [*Schreiber v. Lee*, supra (quoting text)]

CAVEAT: This tactic is subject to one significant exception: *If* it appears the *primary wrongdoer* (Employee in this case) is *more solvent* than the vicariously liable defendant (Employer), it probably will *not* be advisable to plead independent theories against the vicariously liable party (Employer). Reason: The share of several liability of the solvent defendants will *decrease* when the additional theory of liability against the less solvent (or insolvent) defendant is factored in. E.g., in the illustration above, if Employer were facing bankruptcy, it may be that Plaintiff would never be able to realize the 20% share against Employer. It may make more sense not to sue Employer for negligent supervision, leaving the door open for the jury to allocate that 20% among the other two defendants who *are* solvent.

(Of course, even if plaintiff foregoes a negligent supervision theory, the employee or other defendants may raise the issue in order to shift Prop. 51 liability to the employer.)

[2:620-624] *Reserved.*

(5) **Limitations on respondeat superior liability**

(a) [2:625] **Acts violating RICO:** An injured plaintiff seeking to hold an employer liable for damages caused by an employee's violation of the Racketeer Influenced and Corrupt Organizations Act (RICO, 18 USC §1961 et seq.) must show, as a threshold matter, that the employer *benefited* from the violation. Only after the requisite benefit is shown may plaintiff invoke traditional respondeat superior principles (e.g., "course and scope of employment") in an attempt to hold the employer liable for its employee's acts. [*Oki Semiconductor Co. v. Wells Fargo Bank, N.A.* (9th Cir. 2002) 298 F3d 768, 775-777—bank teller's conspiring to violate RICO by laundering proceeds of stolen goods not within scope of employment]

(b) **Government employees**

1) [2:626] **Government Claims Act immunity:** Pursuant to the California Government Claims Act (Gov.C. §810 et seq.), a government entity may be vicariously liable under respondeat superior principles for torts committed by its employees. [Gov.C. §815.2]

However, various statutes *immunize* government employees from liability for their torts; and where the employee is immune, the *government employer* is likewise immune. *See detailed discussion in Ch. 2 Part III*.

2) [2:627] **No vicarious liability for federal civil rights violations:** The doctrine of respondeat superior does *not* apply in actions brought under the Federal Civil Rights Act (42 USC §1983). Unless the government entity employer committed an independent wrong (e.g., failure to supervise, "official policy" of discrimination or indifference to constitutional rights), it has *no liability* for constitutional rights violations committed by its employees. [*Castro v. County of Los Angeles* (9th Cir. 2016) 833 F3d 1060, 1073 (en banc); *Horton v. City of Santa Maria* (9th Cir. 2019) 915 F3d 592, 602-603; *United States v. County of Maricopa, Ariz.* (9th Cir. 2018) 889 F3d 648, 652]

[2:628-634] *Reserved.*

b. [2:635] **Establishing prima facie case:** The following elements must be established to find liability under the doctrine of respondeat superior. Each is a fact question to be determined by the trier of fact.

(1) [2:636] **Employment relationship:** Plaintiff must first show the tortfeasor was actually employed by defendant, *or* that plaintiff was an agent or "ostensible employee" (¶*2:672 ff.*) at the time of the wrongful act or omission. [See *Asplund v. Selected Investments in Fin'l Equities, Inc*. (2000) 86 CA4th 26, 45-49, 103 CR2d 34, 47-49]

(a) [2:637] **"Employee" vs. "independent contractor":** In many respondeat superior cases, the threshold issue is the tortfeasor's employment status—i.e., whether the tortfeasor is the hirer's *employee* or, instead, an *independent contractor*. Subject to a few public policy exceptions (*see* ¶*2:830 ff.*), hirers cannot be held vicariously liable for the wrongdoing of their *independent contractors*. [*Johnson v. Ralphs Grocery Co.* (2012) 204 CA4th 1097, 1107, 139 CR3d 396, 405; *A. Teichert & Son, Inc. v. Sup.Ct. (Gumpert)* (1986) 179 CA3d 657, 661-662, 225 CR 10, 12-13]

1) [2:638] **Factors considered—"right of control" pivotal inquiry:** Evidence that the tortfeasor signed a so-called "independent contractor agreement" with the hirer is not dispositive of employee vs. independent contractor status. Rather, the *factual nature* of the relationship must be examined. [*Santa Cruz Transp., Inc. v. California Unemp. Ins. Appeals Bd.* (1991) 235 CA3d 1363, 1370-1371, 1 CR2d 64, 67-68; *Truesdale v. WCAB* (1987) 190 CA3d 608, 613-618, 235 CR 754, 756-759]

Case law evaluates several factors, but places greatest emphasis on whether the hirer had the *right to control* the *detailed manner and means* by which the work was to be performed. "Under this rule, the right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." [*Blackwell v. Vasilas* (2016) 244 CA4th 160, 168, 197 CR3d 753, 760 (internal quotes and brackets omitted); *Jackson v. AEG Live, LLC* (2015) 233 CA4th 1156, 1179, 183 CR3d 394, 413; see *Bowman v. Wyatt* (2010) 186 CA4th 286, 303-304, 111 CR3d 787, 799—control not exclusive determinant of employee status and hence jury

was erroneously instructed that other factors need not be considered if right to control existed (disapproving CACI 3704); Rest.2d Agency §220(2); *see also* ¶*2:2123 ff.* re factors for determining employment relationship in workers' comp context]

a) [2:639] **Application:** Whether a person is an employee or an independent contractor is ordinarily a question of fact; but if from all the facts only one inference may be drawn, it is a question of law. [*Angelotti v. Walt Disney Co.* (2011) 192 CA4th 1394, 1404, 121 CR3d 863, 870; *Michael v. Denbeste Transp., Inc.* (2006) 137 CA4th 1082, 1093, 40 CR3d 777, 785, fn. 5; see *Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 CA4th 1138, 1142-1143, 159 CR3d 102, 105]

- [2:640] Concert promoter who, at entertainer's insistence, entered into contract with entertainer's physician to accompany entertainer on tour was not physician's employer, and hence was not liable for what proved to be lethal injection of sleep-inducing drug requested by entertainer. Contract did not direct manner or means in which physician was to render medical services. Additionally, physician was engaged in occupation requiring medical license and high degree of skill, was not supervised by or required to report back to promoter, and did not receive any medical equipment or work space from promoter. [*Jackson v. AEG Live, LLC*, supra, 233 CA4th at 1179-1182, 183 CR3d at 413-416]
- [2:640.1] Package delivery driver was delivery company's *independent contractor* where driver used his own car, furnished his own gas and oil and own liability insurance, assumed cost of necessary car repairs, was paid on "per route" basis and received no employee benefits, and company did not withhold taxes from his paychecks or instruct driver how to make deliveries or how to drive his car. That company instructed driver to "be careful" and demanded driver to submit delivery confirmation

forms did not indicate type of control over driver's work as to make him company's employee. [*Millsap v. Federal Express Corp*. (1991) 227 CA3d 425, 431, 277 CR 807, 810]

- [2:641] Oil company was not in an employment relationship with employee of independently owned and operated gas station to which it supplied gas; contracts between the parties expressly *excluded* oil company from "any right to control" gas station's operations or manner in which it conducted its business. [*Weiss v. Valenzuela* (1988) 204 CA3d 1094, 1100, 251 CR 727, 730-731; see also *De Lima v. Magnesite Waterproofing & Refinishing* (1987) 191 CA3d 776, 781, 236 CR 519, 521-522—subcontractor not in employment relationship with original contractor who had no authority over, and no opportunity to control, sub's work]
- [2:642] Foster family agency (licensed by State of California to provide certain foster care services) did not control the manner in which foster parent provided day-to-day care for foster child. Hence, agency was not in an employment relationship with foster parent and was not liable under respondeat superior for child's death resulting from foster parent's negligence. [*Garcia v. W & W Community Develop., Inc.* (2010) 186 CA4th 1038, 1049, 112 CR3d 394, 403]

Cross-refer: The same "control test" applies in "dual employment cases to determine whether a "borrowed employee" is in an employment relationship with the "Borrowing employer." *See* ¶*2:656*.

[2:643-645] *Reserved.*

b) [2:646] **Power to terminate as factor:** Some cases find that the hirer's power to *terminate* the employment at any time is a "strong indication" of employer-employee status . . . because such power is incompatible with the full control of the work usually enjoyed by independent contractors. [See *Jackson v. AEG Live, LLC*, supra, 233 CA4th

at 1180, 183 CR3d at 414; *Angelotti v. Walt Disney Co.*, supra, 192 CA4th at 1405, 121 CR3d at 871; *Brose v. Union-Tribune Publishing Co.* (1986) 183 CA3d 1079, 1085, 228 CR 620, 624]

However, this factor takes on minimal significance where the supposed employee works under a *separate contract* for *each job*; here, the hirer's choice not to continue its relationship with the worker "would be more of a determination not to hire than a determination to fire" and, so, consistent with independent contractor status. [See *Millsap v. Federal Express Corp.*, supra, 227 CA3d at 432, 277 CR at 811, fn. 3]

c) [2:647] **Compare—workers' comp law:** A particularly liberal approach to the "employment relationship" issue is taken in the *workers' compensation* context, for purposes of determining whether an injured worker is an "employee" (rather than an "independent contractor") entitled to workers' comp benefits: Broadly, courts are supposed to consider not only who had the right to control the details of the work performed, but *also* the *liberal remedial purposes* of the workers' comp law. [See *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 C3d 341, 353-354, 256 CR 543, 550-551; *Ware v. WCAB* (1999) 78 CA4th 508, 513, 92 CR2d 744, 747; *and further discussion at* ¶*2:2123 ff.*]

2) [2:648] **U.S. government employees:** The *exclusive remedy* for persons injured by the tortious acts of federal "employees" acting within the scope of their government employment is a suit against the *United States* under the Federal Tort Claims Act (FTCA). Subject to two exceptions (violation of U.S. Constitution or statutes otherwise authorizing individual liability), the *federal employee is immune from suit even when an FTCA exception precludes recovery against the United States.* [28 USC §2679(b)(1); *United States v. Smith* (1991) 499 US 160, 161-162, 111 S.Ct. 1180, 1183; *Levin v. United States* (2013) 568 US 503, 516-517, 133 S.Ct. 1224, 1234; see also *M.J. ex rel. Beebe v. United States* (9th Cir. 2013) 721 F3d 1079, 1084]

Whether the tortfeasor was an "*employee*" of the U.S. government is a question of *federal*

law. But whether a federal employee's tortious act was within the *scope of his or her employment* is determined by respondeat superior principles of the *state in which the tort occurred*. [*Nationwide Mut. Ins. Co. v. Liberatore* (9th Cir. 2005) 408 F3d 1158, 1163; *Billings v. United States* (9th Cir. 1995) 57 F3d 797, 800; see *Lerma v. United States* (ND CA 1988) 716 F.Supp. 1294, 1295, aff'd (9th Cir. 1989) 876 F2d 897—P has burden of proving tortfeasor was U.S. government employee]

a) [2:649] **FTCA definition of "employee":** For FTCA purposes, U.S. government "employees" include:
   — officers or employees of any federal department, branch or agency;
   — members of the U.S. military or naval forces;
   — members of the National Guard while engaged in certain training or duty activities;
   — natural persons "acting on behalf of" a federal department, branch or agency "in an official capacity"; and
   — officers or employees of a federal public defender organization (except when performing "indigent defense" work (18 USC §3006A)). [28 USC §2671; *Adams v. United States* (9th Cir. 2005) 420 F3d 1049, 1050]

   On the other hand, a U.S. government "employee" does *not* include a person acting on behalf of "any contractor within the United States"; i.e., suit does *not* lie against the U.S. under the FTCA for the torts of federal government *independent contractors*. [28 USC §2671]

b) [2:650] **"Control" test:** Like California state law (¶*2:638*), federal law applies a "control" test to make the "employee" vs. "independent contractor" distinction under the facts: "[T]he critical factor in making this determination is the authority of the principal to control the detailed physical performance of the contractor" . . . and "to supervise the day-to-day operations." [*Logue v. United States* (1973) 412 US 521, 527-528, 93 S.Ct. 2215, 2219; *United States v. Orleans* (1976) 425 US 807, 815, 96 S.Ct. 1971, 1976; and