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Torts: The Coming and Going Rule

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In 2002, an employee of V.I.P., Inc. volunteered to work at a weekend promotional event at the Oxford Plains Speedway, which V.I.P. sponsored. The employee was given $25 and a t-shirt. On his way home from the event, employee crossed into the oncoming lane of traffic, killing one person and injuring two others.

The Superior Court granted summary judgment, but the Law Court reversed. The Court explained that, under Maine law, employee's activity is within the scope of his employment where "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; and (c) it is actuated, at least in part, by a purpose to serve the master." *Spencer v. V.I.P, Inc.*, 2006 ME 120, ¶ 3 910 A.2d 366. The Court held that, under the circumstances of this case, whether these factors were satisfied was a question for the jury.

Spencer was a 3-2 decision. The dissent criticized the majority for failing to apply the "coming and going" rule -- that is, the "universally acknowledged ... general rule" that "employee is not within the scope of employment while commuting to and from work." *Id.* at ¶ 16.

It may seem odd that Maine does not recognize the "coming and going" rule in tort cases. But as the *Spencer* dissenters noted, even in jurisdictions where the "coming and going" rule is nominally recognized, it is not without exceptions.

Indeed, even in states where the "coming and going" rule normally applies, it is often not easy to determine whether, under a specific set of facts, the "general rule" on "coming and going" applies. As Judge Posner explained in *Konradi v. U.S.*, 919 F.2d 1207 (7th Cir. 1990), "[t]he rub is 'normally' ... this weasel word is definitely required for the sake of accuracy." *Konradi v. U.S.*, 919 F.2d 1207, 1209 (7th Cir. 1990).

As Judge Poster notes, "[i]t is impossible to find the pattern in th[e] carpet" of case law "without a conception of what the law is trying to accomplish" with the doctrine of vicarious liability. *Id.* at 1210. In short, because "'scope of employment' can be functionally defined by reference to the likelihood that liability would induce beneficial changes in activity," employer should be responsible for employee's coming and going only where placing the burden on employer would tend to "induce the employer to consider activity changes that might reduce the number of accidents." *Id.* at 1213.

Our recent case, *Rollins-Allen v. Northern Clearing, Inc.*, 1:21-cv-00343-JDL, 2023 U.S. Dist. LEXIS 167939 (D. Me. Sep. 21, 2023), demonstrates the complexity of determining the contours of vicarious liability for commuters. There, a heavy equipment mechanic employed by an out-of-state clearcutting company crashed into our client's vehicle while commuting to work. Our client was catastrophically injured, and tragically, her husband -- high school sweetheart and the love of her life -- died.

The mechanic was driving a commercial truck, equipped with a built-in crane and welding machine, that he used at work. The truck was his own, but he leased the vehicle to his employer during the workday. At work, it served as a mobile mechanic workshop and the company provided gas for it.

Northern Clearing moved for summary judgment, arguing it was not responsible for their driver's conduct under either *Spencer* or the "coming and going rule." On September 21, 2023, Chief Judge Levy denied Northern Clearing's motion, holding that under both *Spencer* and the "coming and going rule," the issue of vicarious liability was reserved for the fact finder.

In Maine, we ostensibly do not recognize the "coming and going" rule. But we believe that, whether you call it the "coming and going" rule or the *Spencer* rule, the principles articulated by Judge Posner in *Konradi* best explain what the law is trying to do: determine whether, and under what circumstances, holding an employer responsible for an employee's commute will reduce the number and seriousness of accidents on our roads.

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At Maine Law, Meryl Poulin distinguished herself as an appellate advocate, winning the honor of "Prize Arguer" in her class and the Gignoux Award for Appellate Advocacy. After law school, she worked at a large firm in Portland defending medical malpractice and personal injury cases. More recently, she worked at Pine Tree Legal Assistance, trying nearly twenty cases to verdict and prevailing in all but one.

Due Process, Exclusivity, Rule 80C, and the APA

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property interest in continued participation in the MaineCare program, RCSS asserted that its property interest existed in "receiving and retaining payment for the services it properly rendered." The court was unpersuaded by DHHS's suggestions that RCSS was overpaid, stating that the factor was "not determinative" of whether a property interest existed. The court instead focused on whether "a legitimate claim of entitlement" existed, as set forth in *Bd. Of Regents of State Colleges v. Roth* (1972 US).

The court concluded that, under the circumstances, RCSS had offered "the better characterization of the property interest at stake," and held that DHHS had failed to "meaningfully dispute the notion that a provider enjoys a property interest in payment for services properly delivered."

The next consideration before the court was whether RCSS had received "all the process it was due" as DHHS had asserted. The court found that RCSS "was deprived of a critical component of procedural due process: The right to an impartial decision-maker," and explained that a presumption of honesty and integrity, as typically enjoyed by agency actors, was not sufficient grounds for dismissing RCSS's claim on that count.

Under *Ward v. Village of Monroeville* (1972 US), "decision-makers may be disqualified for bias based not only on their personal financial interests, but also upon the interests of the governmental entities they serve." The court addressed how bias might arise from "executive responsibility over an entity's budget" and could result in "possible temptation" of bias that would be "inconsistent with the requirements of due process. Thereafter, the court found that RCSS had asserted allegations "sufficient to establish a procedural due process claim under Rule 12(b)(6)'s low threshold standard."

Kelly McDonald

The court made swift work of summarizing its position on the DHHS motion's preservation / waiver assertion, noting that, during the hearing, DHHS had "conceded that independent claims are not subject to the preservation / exhaustion requirement." Justice Lipez subsequently reiterated that the complaint had sufficiently stated a plausible independent claim regarding the inadequacy of the administrative process, and thus "any failure by RCSS to preserve the issues or exhaust its administrative remedies is not fatal to its claim…"

Finally, the court reviewed DHHS's contention that RCSS had "no right to due process regarding legislative enactments," concluding that "legislation which violates an express mandate of the constitution is invalid even though it is expedient or is otherwise in the public interest," and that "a statutory provision may authorize a particular agency action [but it] does not preclude RCSS from challenging the statute on due process grounds." *Maine Beer & Wine Wholesalers Ass'n v. State* (1993 ME); *Harrington v. Harrington* (1970 ME).

Overall, the matter offered an opportunity for the court to perform a significant examination of due process in the context of administrative proceedings and its role in the proceedings. Notably, the court recognized the limitations of its review scope under 5 M.R.S. § 11007(3), which prevented a *de novo* examination of the agency record. The decision serves to underscore the necessity of the court's commitment to safeguarding procedural fairness and party rights within the framework of Maine administrative law.

Kelly McDonald of Murray Plumb & Murray appeared for plaintiff. Kevin Beal, Shannon Collins, and Jeffrey Schwartz of the Maine Attorney General's office represented defendant.

In an email, Kelly McDonald noted: "We challenged the part of Maine's Administrative Procedures Act which requires the courts to defer to the state agency as being unconstitutional. We are asking that the Superior Court apply a *de novo* standard of review to the evidentiary record instead of deferring to the agency. Here, DHHS is demanding repayment of over $30 million. Those dollars paid for services that were actually provided by hundreds of RCSS employees to Maine's vulnerable population of adults with disabilities. DHHS's efforts to reclaim that money is misguided, legally wrong, and also threatens RCSS's abilities to provide those services in the future. "The funds in question would go directly to DHHS's bottom line. But DHHS also served as the administrative decision-maker to which the courts are required to defer. We believe that it is a fundamental tenet of our justice system that the decision-maker should be impartial and that DHHS cannot be impartial. The Superior Court agreed that these unique circumstances were sufficient to allege a deprivation of procedural due process and denied DHHS's motion to dismiss." The opinion in *Residential and Community Support Services, Inc. v. Maine Department of Health and Human Services*, MLR/SC#149-24, is summarized in this issue at page 7.

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