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# TORT LIABILITY OF STORE MANAGER TO BUSINESS INVITEES OF THE CORPORATE EMPLOYER

By S. Sheldon Weinhaus†

When a business visitor suffers injury in either a large chain store, department store, chain restaurant, theatre, service station or other similar enterprise, he (or more correctly his attorney) generally determines immediately that the owner-operator shall pay in damages for the injuries that have resulted. At the present time, the owner-operator of the large stores and other places of business is usually a corporation rather than an individual or a partnership. If there is negligence, whether it be a negligent employee or a defective condition which was or should have been known, the corporate owner is liable.

The basis of this liability is twofold. First, under the general principles of agency and tort, the master is liable for the torts of its servants committed in the course of their employment—the doctrine of respondeat superior. And, secondly, as a possessor of land, the corporate owner or lessee is liable for defective conditions. Since the corporate master-owner is liable for both negligence of employees and defective conditions of land, the doctrine of *res ipsa loquitur* easily applies to the corporate owner as well. E.g., a customer while walking through the auto accessory department is hit by a tire unexpectedly and unexplainably thrown from a tire mounting machine then in semi-automatic operation. Since the throwing of the tire is more than likely due either to a defective condition in the machine itself, for which the corporate possessor is liable, or to its negligent operation by an employee, for which the corporate master is liable, and since the “more likely than not” requirements are met, there is no reason why *res ipsa loquitur* should not be applied.

The attorney may or may not be satisfied with making the corporate owner the sole defendant of a personal injury suit. If there exists any basis for finding any employee of the corporation liable, the attorney will probably want to join the employee as defendant. One of the main reasons for this is to keep the matter in the chosen state forum. If the employer is a foreign corporation, joining a resident employee will preclude removal to the federal district court on the grounds of diversity of citizenship. However, except in the case of a positive act by some employee—e.g., intentional torts such as assault, defamation, or false imprisonment—one can rarely find

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reason to make the individual employee liable. For example, which employee could be sued if a business invitee falls due to a slippery substance on the floor? Certainly, not the sales force. A person on the janitorial force perhaps, but proof would be difficult in any event, if not impossible, as would finding a "duty" to the business invitee, although this latter problem is not insurmountable. The problem is similar in a case in which the customer trips due to a small hole in the floor, or in the "flying tire" example above.

There appears one exception to the above statement in regard to liability of an individual employee. It may be that the manager of the operation<sup>1</sup> is liable, although this suggestion usually evokes disbelief that one who himself is a subordinate should be liable together with his master, assuming that the manager has committed no affirmative act of negligence. An extension of the doctrine of vicarious liability to include managers is, however, worthy of notice. Joining the manager may be important to prevent removal from the state to the federal forum. But more important, if one should carry the manager's vicarious liability to its logical extreme, then even the small storekeeper who has incorporated his small business to protect himself personally from claims against the corporation is nonetheless liable for personal injuries, the corporate mode of protection being of no effect.

The purpose of this article is to consider the basis by which vicarious liability may extend to the manager. As indicated above, there are two bases for the liability of the corporation: one is as the ultimate master, the other as possessor and occupier of land. Do the same bases apply to the manager?

#### THE MANAGER AND THE LAW OF AGENCY

There is no question but that the corporate occupier-operator-master of the retail outlet owes a duty of due care to its business invitees. This is well accepted hornbook law. The liability is usually discussed in terms of an occupier of land,<sup>2</sup> but the basis of liability is not the mere possession of land, especially when the possessor is a corporation and possession is accomplished only through subordinate individuals. Liability then hangs on the verge of being vicarious, if it is not actually vicarious, and this is all the more true when the negligent defect is not merely a condition of the land, but the result of negligence of an employee, as when a store employee stacks goods

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1. Manager is used in this article as an all-inclusive term. It includes primarily those in charge of retail merchandising outlets and other forms of commercial outlets, but it also applies to many other types of supervisors and superintendents, whenever applicable.

2. See, e.g., Prosser, Torts §§ 75-80 (2d ed. 1954).

dangerously high on a counter. In *res ipsa loquitur* cases, as in the "tire throwing" example above, liability must be vicarious, since theoretically there is no way to handle or distinguish the acts of the employee (the operation) from the possible defective conditions.

Liability of the corporation is justified by sound social philosophy. The corporation is better equipped to handle and distribute the risk. In addition, the corporation is the possessor through those it controls and over whom it is the ultimate master. The corporation is the final arbiter. However, one cannot say the same thing about the manager of the retail outlet. The manager is in a far different position from his master as to the employees under him. He is not liable to them for their compensation, he cannot claim their loyalty in his own right, he is not owed any fiduciary duties, nor will his own termination of employment terminate the employer-employee relationship of any other.<sup>3</sup>

Section 220 of the Restatement of Agency sets out the essential element necessary for a subordinate employee to be considered a servant in the master-servant relationship: he must be subject to *control*, and control is "sole" control. Mechem points out<sup>4</sup> that in the final analysis there can only be one master. If control must be unitary, then the real control is that of the corporate employer who exercises it through his control of the supervisor. Thus, the manager is not and cannot be the master; he is simply a "conduit of communication."<sup>5</sup>

If there is no master-servant relationship, then the basis on which vicarious liability is imposed on the corporate master is lacking in an attempt to impute the negligence of a subordinate employee to the superior employee (the manager) who is acting under the direction and control of both his and his subordinates' employer.<sup>6</sup> The majority of courts have adopted this view.

Cases concerning "activities," as opposed to "conditions," best exemplify the majority view.<sup>7</sup> Consider an assault by the subordinate

3. Seavey, *Subagents and Subservants*, 68 Harv. L. Rev. 658 (1955). For an interesting comment on this article, although not pertinent to the problem herein discussed, see Millner, *Sub-agents and Sub-servants*, 73 So. African L.J. 85 (1956).

4. Mechem, *Outlines Agency* § 416 (4th ed. 1952).

5. *Hewett v. Swift*, 85 Mass. (3 Allen) 420, 425 (1862).

Nonetheless, some courts may find sufficient "control" by the manager to consider him a master. See, e.g., *Stith v. J. J. Newberry Co.*, 336 Mo. 467, 485, 79 S.W.2d 447, 455 (1934) (dictum).

6. The text writers agree: Mechem, *Outlines Agency* § 346 (4th ed. 1952); Paley, *Principal and Agent* 226 n.(k) (1) (2d Am. ed. 1822); Seavey, *Studies in Agency* 9 n.21 (1949); Story, *Agency* § 201 (4th ed. 1851).

7. This is because issues of liability of possessors of land are not present to confuse the problem as they might otherwise do. See, e.g., *Stith v. J. J. Newberry Co.*, 336 Mo. 467, 79 S.W.2d 447 (1934).

employee. In *Weis v. Skinner*<sup>8</sup> the manager of a theatre, who was authorized to transact all business and to do all things necessary in regard to the local business of the theatre, was held not liable to a paying theatre-goer who was forcefully ejected from his seat and from the theatre by a subordinate employee. The court correctly treated the manager as another employee of the ultimate proprietor. The fact that the employee acts under general orders of the manager to keep people out of or off the master's premises is not sufficient to impute liability.<sup>9</sup> It might be said that in the case of any type of intentional trespassory act by the subordinate employee, the superior servant is not responsible vicariously solely on the basis of his supervisory capacity.<sup>10</sup>

However, intentional trespasses are only a very small part of tort litigation. Generally, the servant is simply negligent and his supervisor is not held liable. For example: a bible school superintendent was held not liable to a pupil for the negligent driving of one of the teachers who was in the process of taking students to a recreation area;<sup>11</sup> a general superintendent of blasting operations was held not liable to persons hit by fragments of rock;<sup>12</sup> a superintendent of mining operations was held not vicariously liable for subsidence of plaintiff's overlying land;<sup>13</sup> a property manager was held not liable for negligent repairs of porch railing by a carpenter he had hired to a tenant who fell from the porch and suffered injuries.<sup>14</sup> Hence, one

8. 178 S.W. 34 (Tex. Civ. App. 1915).

9. *Hewett v. Swift*, 85 Mass. (3 Allen) 420 (1862); *Canfield v. Chicago, R.I. & P. Ry.*, 59 Mo. App. 354 (1894).

10. *Bachelor v. Pinkham*, 68 Me. 253 (1878) (trespass q.c.f.); *Bath v. Caton*, 37 Mich. 199 (1877) (trespass q.c.f.). See Story, Agency § 313 (4th ed. 1851).

11. *Malloy v. Fong*, 37 Cal. 2d 356, 378, 232 P.2d 241, 254 (1951) (respondeat superior not applicable to the relationship between a supervisor and his subordinate employees).

12. *Brown v. Lent*, 20 Vt. 529, 533 (1848) (supervisor termed a "mere middleman" and an intermediate agent who would not be held vicariously liable).

13. *Stone v. Cartwright*, 6 Term R. 411, 101 Eng. Rep. 622 (K.B. 1795).

14. *White v. Macoubray*, 309 Pa. 266, 163 Atl. 521 (1932). It should be noted that in this case and in *Stone v. Cartwright*, supra note 13, the courts treated the person in charge of the property as an employing agent. Quaere what the results would have been had the person in charge been treated as an occupier of land so that the court need not have considered the relation between the ultimate master and the subordinate employee. See text infra. It would appear that the supervisors should have been treated as possessors and the negligence of the subordinate employee as a condition rather than an operation. But, treated as the courts treat them—as intermediaries—the results with regard to these defendants seem correct.

Sometimes one might get the impression that a court is desirous of freeing all persons from liability, except, of course, the corporate master. Thus, in *Atterbury v. Temple Stephens Co.*, 353 Mo. 5, 181 S.W.2d 659 (1944), where plaintiff

might properly conclude that the doctrine of respondeat superior does not apply to intermediaries in a chain of employment between the ultimate master and the subordinate servant.<sup>15</sup> Generally, it is this writer's feeling that, if liability can be attached to the corporate master, the courts do not care to add on the liability of the manager.<sup>16</sup> Judicial reasons for refusing to hold the manager liable have been clearly stated: (1) in the first place, economic positions are so different that one could hardly ascribe to the corporation and the manager the same legal position<sup>17</sup>—especially since vicarious liability is based essentially on differing economic positions of the parties; (2) the work that is performed is for the benefit of the corporate master, not the manager,<sup>18</sup> who has no interest in the profits of the business;<sup>19</sup> (3) the manager is usually only a better paid wage-earner without the ability to regain the loss that is available to the master;<sup>20</sup> (4) the manager has in reality very little discretion to exercise<sup>21</sup> and often has persons in supervisory levels superior to his own.<sup>22</sup> As the Tennessee court assessed the problem in *Brown & Sons Lumber Co. v. Sessler*,<sup>23</sup> the consequences of an extension of the rule of vicarious liability to include a manager would be so onerous that no one would care to rise to such a rank. Thus, simple and logical reasons of justice prevail in most of our courts.

This, of course, does not mean that the manager should never be liable, but the basis of his liability should be the same as that of any other employee. A general supervisory capacity should not be sufficient; the manager must be so connected with the wrongful act that,

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tripped on chicken wire fencing which had been stretched on the sidewalk in front of a store by the manager—apparently direct primary negligence—the court not only failed to treat this as a problem involving liability of a manager, but allowed the jury to find the manager not liable for direct negligence if it found that any other employee was responsible for a failure to warn. Thus, the manager in the Atterbury case was not necessarily even a concurrent tortfeasor.

15. In passing, one should note that, if there exists no fair basis for applying respondeat superior to the manager, then any attempt to apply *res ipsa loquitur* against the manager must also fail. See, e.g., *Bryce v. Southern Ry.*, 125 Fed. 958 (4th Cir. 1903).

16. See, e.g., *Atterbury v. Temple Stephens Co.*, 353 Mo. 5, 181 S.W.2d 659 (1944) (discussed in note 14 *supra*).

17. *Malloy v. Fong*, 37 Cal. 2d 356, 232 P.2d 241 (1951).

18. See *Malloy v. Fong*, 37 Cal. 2d 356, 232 P.2d 241 (1951); *S. H. Kress & Co. v. Selph*, 250 S.W.2d 883 (Tex. Civ. App. 1952); *Stone v. Cartwright*, 6 Term R. 411, 101 Eng. Rep. 622 (K.B. 1795).

19. *Malloy v. Fong*, 37 Cal. 2d 356, 232 P.2d 241 (1951); *Stone v. Cartwright*, 6 Term R. 411, 101 Eng. Rep. 622 (K.B. 1795).

20. *S. H. Kress & Co. v. Selph*, 250 S.W.2d 883 (Tex. Civ. App. 1952).

21. *Malloy v. Fong*, 37 Cal. 2d 356, 232 P.2d 241 (1951).

22. *S. H. Kress & Co. v. Selph*, 250 S.W.2d 883 (Tex. Civ. App. 1952).

23. 128 Tenn. 665, 163 S.W. 812 (1913).

without regard to the liability of his corporate employer, he would be personally liable for his act.<sup>24</sup> If the supervisor effectively directed the wrongful acts, or should have known his orders would cause damage, he, of course, would be liable.<sup>25</sup>

There are, however, cases which indicate the manager may be vicariously liable under the doctrine of respondeat superior. The foremost example is the case of *Orcutt v. Century Building Co.*<sup>26</sup> Plaintiff, injured by a falling elevator in a building managed by the defendant, alleged defective construction and maintenance and negligent operation of an elevator located in the building. The Missouri Supreme Court held the management agent liable for both the defective condition and negligent operation, allegedly concurrent. Obviously, by holding the agent liable for negligent operation by the elevator operator, respondeat superior had been adopted as the basis of liability.<sup>27</sup> To insure there would be no doubt as to the applicability of vicarious liability to the building management agent, the court stated that the doctrine of *res ipsa loquitur* would apply.<sup>28</sup> However fair may have been the decision of the Missouri court in the *Orcutt* case under its own peculiar circumstances,<sup>29</sup> one may question the propriety of applying *res ipsa loquitur* to supervisors, superintendents and managers. A Mississippi court apparently used this doctrine in finding the general superintendent of a bottling works liable to a

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24. *Frorer v. Baker*, 137 Ill. App. 588 (1907). See *Brown v. Lent*, 20 Vt. 529 (1848).

25. *Ellis v. Southern Ry.*, 72 S.C. 465, 52 S.E. 228 (1905); Restatement, Agency 2d § 351 (1958).

In stream pollution cases in which pollution is the result of mining operations the courts do not seem hesitant to hold the general mining superintendent liable. *Hindson v. Markle*, 171 Pa. 138 (1895); *Nunnally v. Southern Iron Co.*, 94 Tenn. 397, 29 S.W. 361 (1895). The courts do, however, hold the superintendent liable for direct negligence since they are of the opinion that he either knew or should have known of the pollution and did nothing to change the mining operations.

26. 201 Mo. 424, 99 S.W. 1062 (1906).

27. However, the *Orcutt* case does not, in light of all the circumstances, seem unjust, since one really could not equate the building management company to the type of supervisor under consideration in this article. In this case the defendant may as well have been treated as the ultimate master-owner. The defendant was Mississippi Valley Trust Company, acting as trustee of a deed of trust covering the Century Building in the City of St. Louis, and as trustee had irrevocable power to rent the building and collect rents, pay taxes, pay ground rent, pay the interest on bonds secured by the deed of trust, pay all expenses in regard to the maintenance, repair and management of the building, and pay for insurance. For its services, the defendant was given three and one half per cent of all monies collected. The defendant further had complete discretion as to rental terms and the amount expended upon repair, maintenance and management, and had the power to hire and fire employees.

28. *Id.* at 440, 99 S.W. at 1065 (dictum).

29. See note 27 *supra*.

consumer injured by deleterious substances found in a bottle of Coca-Cola.<sup>30</sup> Thus, according to this Mississippi court, manufacturing supervisors are personally liable for improper actions of subordinate employees and for defective conditions of the machinery and premises.

There are a few courts which, while expressly upholding the doctrine of respondeat superior in its broad application to intermediate supervisory personnel, indicate some reaction against the doctrine. For example, in *S. H. Kress & Co. v. Selph*,<sup>31</sup> a Texas court found that the manager of a retail merchandising outlet could be liable for the action of his subordinates if he failed to take "proper measures" to insure that the floor of the premises was in safe condition. What will constitute "proper measures" was held to be a jury question—the court indicating that what may be "proper measures" for the manager are not necessarily what they are for the ultimate master. In Texas, it is not inconsistent for the jury to return a verdict for the manager and against the ultimate corporate master, although both could be liable under the doctrine of respondeat superior.

The same result may be reached under Missouri Law. *Orcutt*<sup>32</sup> dictated that respondeat superior was applicable in this state. So, in *Stith v. J. J. Newberry Co.*,<sup>33</sup> the court said (1) it may be that the manager is liable for the acts of his employees,<sup>34</sup> and (2) as to conditions his duty is the same as that of the ultimate employer,<sup>35</sup> and in spite of these two pronouncements the court finds nothing inconsistent with a verdict in favor of the manager and against the ultimate corporate manager. The *Stith* case was followed by *Devine v. Kroger Grocery & Baking Co.*,<sup>36</sup> which made it clear that respondeat superior was applicable to managers, but which in dealing with the jury's verdict in favor of the manager and against the ultimate master found no inconsistency because the court treated Kroger as the possessor. The court, apparently and all too obviously, forgot its other pronouncements that the manager is to be treated as an occupier—*Orcutt*,<sup>37</sup> *Lambert v. Jones*,<sup>38</sup> and *Stith v. J. J. Newberry Co.*<sup>39</sup>—in order to find

30. *Bufkin v. Grisham*, 157 Miss. 746, 128 So. 563 (1930). The court found the superintendent responsible for the proper operation of the manufacturing process, for if the operations had been properly conducted no deleterious substance could have entered the bottle. The court did not consider the effect of negligence of a subordinate.

31. 250 S.W.2d 883 (Tex. Civ. App. 1952).

32. 201 Mo. 424, 99 S.W. 1062 (1906).

33. 336 Mo. 467, 79 S.W.2d 447 (1935).

34. *Id.* at 492, 79 S.W.2d at 460 (dictum).

35. *Id.* at 485, 79 S.W.2d at 455-56.

36. 349 Mo. 621, 162 S.W.2d 813 (1942).

37. 201 Mo. 424, 99 S.W. 1062 (1906).

38. 339 Mo. 677, 98 S.W.2d 752 (1936).

39. 336 Mo. 467, 79 S.W.2d 447 (1934).

consistency. In light of these cited Missouri cases and the discussion below, if the manager is liable as a possessor and is responsible by reason of respondeat superior, as the Missouri courts have consistently indicated, then there is no way to justify a finding for the manager but against the ultimate master, since both have the same basis of liability in Missouri. Thus, while giving lip service to an application of respondeat superior against the manager, the Missouri courts have failed to effectuate this extension of liability, apparently failing to see the inconsistency created.<sup>40</sup> The above Texas and Missouri cases indicate difficulties of extending liability to the manager. Juries may not allow it,<sup>41</sup> and perhaps because the court's own reaction is much the same as the jury's, it finds some reason to justify the inconsistency of verdicts. It is unfortunate that these courts do not adopt the majority view, which not only seems to be the only fair view of the law and the only one socially justifiable, but would eliminate the necessity of finding an "out" for one who it decrees should be liable.

#### THE MANAGER AND THE LAW OF OCCUPIERS OF LAND

According to the great weight of authority, however, the manager is not liable for the negligence of an employee acting under his general supervision when that negligence itself is the cause of injury. But often it may be that the negligence of the subordinate employee results in a defective condition which in turn is the cause of the injury. If some basis can be found for placing upon the manager the duty to prevent or remove the defective condition, then the situation might be handled in a different way, by treating the manager as a possessor and occupier of land.

One might do well to start off with the proposition that the agent is under a duty to prevent land and chattels in his control from harming others.<sup>42</sup> In this regard, the manager of a retail outlet, the supervisor or superintendent of a project may be treated much the same as the real estate management agent. In the case of the latter, control of the property is the basis of liability and the agent's duty to invitees becomes an obligation independent of his agency.<sup>43</sup>

When control of the property by the managing agent is complete there is no reason why the courts should have difficulty in holding

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40. See *De Moulin v. Roetheli*, 189 S.W.2d 562 (Mo. 1945).

41. But see *Harbourn v. Katz Drug Co.*, 318 S.W.2d 226 (Mo. 1958).

42. *Baird v. Shipman*, 132 Ill. 16, 23 N.E. 384 (1890); *Stith v. J. J. Newberry Co.*, 336 Mo. 467, 485, 79 S.W.2d 447, 455 (1934); *Mechem*, *Outlines Agency* § 348 (1952); *Restatement, Agency* 2d § 355 (1958).

43. *Baird v. Shipman*, *supra* note 42; *Tippecanoe Loan & Trust Co. v. Jester*, 180 Ind. 357, 101 N.E. 915 (1913); *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491 (1902).

him liable. For example, in *Lambert v. Jones*,<sup>44</sup> one defendant was president of the corporation which owned the building and had personal charge of the management of the building. For these duties he was paid by the corporate owner. The court held him liable for failure to repair a loose step on the second floor stairway, the basis of liability resting on his personal assumption of complete and exclusive control of the building as manager.<sup>45</sup>

Although failure to have control would be fatal,<sup>46</sup> complete and absolute control is not essential. It would seem that the basis of liability is satisfied if the real estate management agent had sufficient authority and control to prevent or repair the particular defective condition.<sup>47</sup> The Kansas City Court of Appeals summed up the matter as follows:

[A]n agent of the owner should be held responsible for injuries caused by the condition of premises in the possession or under the control of the agent where the condition is one for which he is responsible and the injury is such as he would be liable for if he were controlling the premises on his own account.<sup>48</sup>

44. 339 Mo. 677, 98 S.W.2d 752 (1936).

45. "[W]here an agent of a corporate owner has complete control and management over property, which if not properly maintained might create such a condition as would cause injury to third persons rightfully upon and expected to frequently be, in considerable numbers, upon [the premises] which the public was invited to use on so many occasions, . . . such agent not only has a duty to his principal to exercise ordinary care . . . but also . . . a duty to the public as well." *Id.* at 687, 98 S.W.2d at 758.

See also *Tippecanoe Loan & Trust Co. v. Jester*, supra note 43; *Orcutt v. Century Bldg. Co.*, supra note 32. In both cases it would appear that the control of the trust company was absolute and the true owner had little or nothing to say in regard to the management of the building. See also *Ellis v. McNaughton*, 76 Mich. 237, 42 N.W. 1113 (1889).

For the necessary control required of managing agents to find them liable for defective conditions of elevators, compare *Zurich Gen. Acc. & Liab. Ins. Co. v. Watson Elevator Co.*, 253 N.Y. 404, 171 N.E. 688 (1930), with *Orcutt v. Century Bldg. Co.*, 201 Mo. 424, 99 S.W. 1062 (1906). This writer believes that under Missouri law the Zurich case could have been decided so as to find liability.

46. *Eads v. YWCA*, 325 Mo. 577, 29 S.W.2d 701 (1930).

47. *Baird v. Shipman*, supra note 42; *Joshmer v. Fred Weber Contractors, Inc.*, 294 S.W.2d 576 (Mo. App. 1956); *Lough v. John Davis & Co.*, supra note 43.

48. *Edwards v. E. B. Murray & Co.*, 305 S.W.2d 702, 706 (Mo. App. 1957). See also *Carson v. Quinn*, 127 Mo. App. 525, 105 S.W. 1088 (1907). Cf. *Weigel v. Reintjes*, 154 S.W.2d 412 (Mo. App. 1941) (rev'd on other grounds).

However, not all courts are in agreement with the above textual propositions. See, e.g., *Wendland v. Berg*, 188 Iowa 202, 174 N.W. 410 (1919). In the earlier cases liability often turned on a misfeasance-nonfeasance distinction, liability being based solely on the former which was quite strictly applied. See, e.g., *Dean v. Brock*, 11 Ind. App. 507, 38 N.E. 829 (1894); *Delaney v. Rochereau*, 34 La. Ann. 1123 (1882). But for the better view rejecting this distinction as meaningless, see *Baird v. Shipman*, supra note 42; *Rising v. Ferris*, 216 Ill. App. 252 (1919);

Agents who can not repair or remove a defective condition without first getting permission of the owner are not held liable.<sup>49</sup> But, as indicated above, the agent is liable to the extent of the control he is authorized to exercise. For example, in *Giles v. Moundridge Milling Co.*,<sup>50</sup> the defendant mill manager had authority to make ordinary repairs, but had no authority to make large repairs without first securing her master's permission. Plaintiff fell into an elevator shaft as a result of the defective condition of a bar guarding the shaft. The defendant manager prior to the accident had supports on which the bar rested repaired. The court held that this was sufficient for the jury to find the manager liable on the ground that it was an ordinary repair within her discretion.

When the control of the store manager is similar to that of the real estate management agent, there would seem to be no logical reason to distinguish between them.<sup>51</sup> The basis of the liability is the same—control, rather than agency.<sup>52</sup> Thus, the manager receives fair treatment when he is deemed to be a possessor and occupier of land.<sup>53</sup>

But it should be recognized that the store manager may be in a slightly different position from that of the usual real estate management agent. That is, are not store managers more limited in their control and is not their control much less exclusive than that of their real estate cousins? The real estate management agent, usually through his own employees, is chiefly concerned with conditions of the land and the repair of same; on the other hand, the main concentration of the retail outlet manager is increasing sales, conditions of the land

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Orcutt v. Century Bldg. Co., supra note 32; Ryan v. Standard Oil Co., 144 S.W.2d 170 (Mo. App. 1940) (dictum); Tippecanoe Loan & Trust Co. v. Jester, supra note 43.

When an independent contractor originally created the defective condition or improperly repaired a pre-existing defective condition, one court treated the managing agent who had full control as to repairs merely as an employing agent rather than as the possessor, thus freeing the managing agent of liability. *White v. Macoubray*, 309 Pa. 266, 163 Atl. 521 (1932). See also *Bailey v. Zlotnick*, 133 F.2d 35 (D.C. Cir. 1942). In light of the discussion in the text of the above in regard to realty management agents, the use of "independent contractor" to defeat liability is obviously a "red herring."

49. *Peterson v. Brune*, 273 S.W.2d 278 (Mo. 1954); *Brown v. Yeckel, Earickson & Co.*, 129 S.W.2d 66 (Mo. App. 1939).

Subordinate employees generally are not treated as possessors and occupiers of land. See *Ryan v. Standard Oil Co.*, 144 S.W. 2d 170 (Mo. App. 1940).

50. 351 Mo. 568, 173 S.W.2d 745 (1943).

51. See, e.g., *Rising v. Ferris*, 216 Ill. App. 252 (1919).

52. *Stith v. J. J. Newberry Co.*, 336 Mo. 467, 485, 79 S.W.2d 447, 455 (1935); *Restatement, Agency* 2d § 355 (1958).

53. See *Landreth v. Phillips Petroleum Co.*, 74 F. Supp. 801 (W.D. Mo. 1947); *Dillon v. Wallace*, 306 P.2d 1044 (Cal. App. 1957); *Stith v. J. J. Newberry Co.*, supra note 52; *Dean v. Safeway Stores, Inc.*, 300 S.W.2d 431 (Mo. 1957) (semble).

being only secondary and incidental thereto. Real estate management is based on preservation, whereas merchandising and selling are more progressive and pushing. In the selling area would not the corporate master-owner be more actively interested in directing the affairs of the company in all fields of endeavor? As in *Franklin v. May Department Stores Co.*,<sup>54</sup> one might well question whether the manager of a multi-million dollar merchandising operation has exclusive control against all but the corporate board of directors. Hence, it is not surprising that some courts refuse to hold the manager liable as a possessor and occupier of land.<sup>55</sup> For example, one court insulated the manager from liability by finding that the existence of or failure to remove a defective condition could have been due to policies of the corporate owner-master for which the manager was not responsible.<sup>56</sup>

Nevertheless, if the manager is held liable, liability can only be justified by treating the manager as a possessor and occupier of land. The reasons for refusing to allow an extension of the doctrine of respondeat superior are partially inapplicable when the manager is treated as a possessor. As a possessor and occupier, he owes a duty to the public to maintain the premises in a safe condition. However, one should recognize that the presence of many defective conditions may be attributed to the negligence of the manager's subordinate employees—that a defective condition may have been either created by them or permitted to remain by their failure to report it to their superior. Thus, the problem of imposing vicarious liability upon the manager for a subordinate employee's negligence may also be present. If one imputes either the negligence or the knowledge of the subordinate employee to his ultimate master-owner, one must ask whether negligence or knowledge should also be imputed to the intermediary. The above discussion of vicarious liability indicates that there should be no liability imposed upon the manager when he has no personal notice of the defect. Juries apparently agree, for their verdicts in these defective condition cases are often for the manager and against the employer.<sup>57</sup>

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54. 25 F. Supp. 735 (E.D. Mo. 1938).

55. *Duvall v. Warner Bros. Theatres, Inc.*, 112 F. Supp. 496 (D. Ore. 1951). See also *Atterbury v. Temple Stephens Co.*, 353 Mo. 5, 181 S.W.2d 659 (1944).

56. *Newman v. Fox West Coast Theatres*, 86 Cal. App. 2d 428, 194 P.2d 706 (1948).

57. See, e.g., *Newman v. Fox West Coast Theatres*, supra note 56; *De Moulin v. Roetheli*, 354 Mo. 425, 189 S.W.2d 562 (1945); *Devine v. Kroger Grocery & Baking Co.*, 349 Mo. 621, 162 S.W.2d 813 (1942); *Stith v. J. J. Newberry Co.*, supra note 52; *S. H. Kress & Co. v. Selph*, 250 S.W.2d 883 (Tex. Civ. App. 1952). But see *Harbourn v. Katz Drug Co.*, 318 S.W.2d 226 (Mo. 1958).

## CONCLUSION

Apparently inconsistent jury verdicts bring the problem sharply into focus. Since most courts treat the manager as a possessor, if liability is imposed upon him at all, the problem of supposed inconsistency in the verdicts can be easily solved by recognition and acceptance of the above mentioned points. That is, if imputation of a subordinate employee's negligence to the manager is required to find the manager negligent, the manager should not be held liable. There should simply be a refusal to hold the manager-possessor vicariously liable. No court thus far has expressly reached this position.

The Texas Court of Civil Appeals calls for treating the manager primarily as a possessor, but also requires him to take "proper measures" to insure that the premises are free of defects.<sup>58</sup> If the jury determines that measures the manager adopted were reasonably well suited to discover and prevent defects, then, even though another employee was negligent or had notice of the defect, the manager will not be liable.<sup>59</sup>

The only other way to remove the label of inconsistency of verdicts is to give the jury a wider latitude in finding some additional negligence over which the manager had no control—e.g., failure of the corporate owner-master to provide sufficient personnel.<sup>60</sup>

Missouri law is so confused that there is no simple solution to the problem. The courts have stated in chronological order that: the real estate management agent is liable as a possessor and under respondeat superior;<sup>61</sup> the retail manager is liable as a possessor and may be liable for acts of subordinate employees;<sup>62</sup> as custodian of a building, the manager is liable for negligent conditions;<sup>63</sup> the manager is liable under respondeat superior but not as a possessor, only the ultimate corporate employer being liable as a possessor;<sup>64</sup> the manager

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58. *S. H. Kress & Co. v. Selph*, supra note 57.

59. One should recognize that this is almost "double-talk," simply giving the jury an "out." However, if "proper measures" were interpreted to mean that if the manager himself inspected the premises at reasonable intervals and ordered others to do so more often (whether they did so or not) and corrected such defects upon their actual discovery by him or actual notice being given to him by a subordinate employee, then this "proper measures" test would certainly be worthy of consideration.

60. *Newman v. Fox West Coast Theatres*, 86 Cal. App. 2d 428, 194 P.2d 706 (1948).

61. *Orcutt v. Century Bldg. Co.*, 201 Mo. 424, 99 S.W. 1062 (1906).

62. *Stith v. J. J. Newberry Co.*, 336 Mo. 467, 79 S.W.2d 447 (1935).

63. *Lambert v. Jones*, 339 Mo. 677, 98 S.W.2d 752 (1936).

64. *Devine v. Kroger Grocery & Baking Co.*, 349 Mo. 621, 162 S.W.2d 813 (1942).

is not liable as a possessor and may or may not be liable otherwise.<sup>65</sup> The most recent decision seems to treat the manager as a possessor.<sup>66</sup> The Missouri courts attempt to circumvent inconsistency of the verdicts by saying that a corporate defendant is liable for defects as a possessor regardless of the actions of any of its other employees. But by continuously asserting the possibility of liability of the manager under the doctrine of respondeat superior and refusing to hold him not subject to vicarious liability, the Missouri courts adopt a harmful and unfair rule which at sometime they will be forced either to implement as law or to strike down. Until that time, supervisory employees in Missouri occupy the onerous position of being liable for the negligent acts of their subordinate employees whose loyalty, trust and ultimate control repose in another.

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65. *De Moulin v. Roetheli*, 189 S.W.2d 562 (Mo. 1945). See also *Atterbury v. Temple Stephens Co.*, 353 Mo. 5, 181 S.W.2d 659 (1944).

66. *Harbourn v. Katz Drug Co.*, 318 S.W.2d 226 (Mo. 1958). One could argue from the facts of this case that the court need not have treated the manager as an occupier, since the facts indicated direct primary negligence on his part, but the court treated the corporate master-operator and the manager together as occupiers.

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