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# Indiana Supreme Court Expands Respondeat Superior Liability for Government Employees

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Based on the biblical maxim that “with great power comes great responsibility,” the Indiana Supreme Court recently expanded the doctrine of *respondeat* superior liability in the context of government employees.

The case, *Cox v. Evansville Police Department*<sup>1</sup>, involved sexual assaults and a rape by two police officers while on duty. The officers victimized citizens they were supposed to be assisting. In its decision, the Court sought to clarify the law of vicarious liability in this area, particularly with respect to the twin doctrines of *respondeat* superior and the common carrier/non-delegable duty exception.

The police officers in *Cox* were eventually convicted of their crimes, and the women sued, seeking to hold the departments vicariously liable for the sexual assaults. The departments moved for summary judgment, arguing that the sexual assaults were illegal and thus a matter of law outside the scope employment, which was to enforce the law, not break it. This argument was rejected.

The Court began its discussion by acknowledging prior decisions in cases such as *Barnett v. Clark*<sup>2</sup>, where it rejected, as a general matter, the idea that illegal sexual misconduct is ever in the course and scope of most types of employment: “Beyond question, cities do not authorize their police officers to sexually assault people. Indeed, sexual assault is directly opposed to police officers’ law-enforcement and community-caretaking functions.”<sup>3</sup> However, the Court went on to note that in certain circumstances “the scope of employment encompasses the activities that the employer delegates to employees or authorizes employees to do, plus employees’ acts that naturally or predictably arise from those activities.”<sup>4</sup> Utilizing this proposition, the Court found that:

This means that the scope of employment—which determines whether the employer is liable—may include acts that the

employer expressly forbids; that violate the employer's rules, orders, or instructions; that the employee commits for self-gratification or self-benefit; that breach a sacred professional duty; or that are egregious, malicious, or criminal. The scope of employment extends beyond authorized acts for two key reasons. First, it is equitable to hold people responsible for some harms arising from activities that benefit them. Second, holding employers liable for those injurious acts helps prevent recurrence.<sup>5</sup>

The Court concluded: "So the scope-of-employment rule, shaped by its underlying policies, allows employer liability for an officer's sexual assault. We stress that the unique authority that cities vest in police officers drives this conclusion. As other courts have observed, '[t]he danger that an officer will commit a sexual assault while on duty arises from the considerable authority and control inherent in the responsibilities of an officer in enforcing the law.'"<sup>6</sup>

While on its face the Cox decision is limited to "the unique authority that cities vest in police officers," the rationale underlying the decision could easily transfer to other areas where the government vests its employees with great authority and control. Employees such as teachers, physicians, and prosecutors come to mind.

One silver lining to the decision is that Cox put a final stake through the heart of the creeping expansion of the common carrier/non-delegable duty exception based on cases such as *Stropes v. Heritage House Children's Ctr.*<sup>7</sup> The Court noted that the common-carrier exception has evolved to include situations "outside the common-carrier context—to innkeepers and their guests, theatrical managers and their patrons, and a children's center and its severely disabled resident. So the exception is broader in Indiana than in many other states. But even in Indiana's extended applications, the common-carrier nondelegable duty arises from the parties' 'contract of passage,' which 'formed the basis of [the parties'] relationship.' The exception does not apply to relationships lacking that fundamental feature."<sup>8</sup>

Specifically addressing teacher/student relationships, the Cox court declined to find any "common-carrier nondelegable duty," because the teacher/student relationship does not involve a "contract of

passage.” According to the Court, “This means that relationships may involve lopsided autonomy, responsibility, and control without invoking the common-carrier exception. For example, the State is responsible for inmate safety, and schools exercise control over students. But the duty of care in those relationships is one of reasonable care to preserve safety.”<sup>9</sup>

<sup>1</sup> 2018 WL 4356344 (Ind. 2018).

<sup>2</sup> 889 N.E.2d 281 (Ind. 2008).

<sup>3</sup> Cox, \*4.

<sup>4</sup> Id., \*5.

<sup>5</sup> Cox, \*4.

<sup>6</sup> Cox, \*7.

<sup>7</sup> 547 N.E. 2d 244 (Ind. 1989).

<sup>8</sup> Cox, \*9.

<sup>9</sup> Cox, \*10.

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