Pace Law Review

Volume 15
Issue 3 *Spring 1995*

Article 4

April 1995

Kleeman v. Rheingold: There Are No Small Mistakes - A Process Server's Negligence Leads to the Creation of a Nondelegable Duty

Barbara S. Goldstein

Note

Kleeman v. Rheingold: There Are No Small Mistakes—A Process Server's Negligence Leads to the Creation of a Nondelegable Duty

I. Introduction

Talk about having a bad day! Have you ever asked someone to give another person a message? The person you were trying to contact probably got the message. Well, not everyone is so lucky. In one recent instance, the intended recipient claimed not to get the message. The sender did not make a federal case of it, but she took it to the highest court of the state.

Kleeman v. Rheingold[1] should have been a medical malpractice suit. Unfortunately, the process server mistakenly served the papers on the physician's secretary rather than the physician himself.[2] The doctor raised the affirmative defense of lack of jurisdiction and the case was dismissed.[3] When Mrs. Kleeman attempted to have the papers served on the doctor again, the statute of limitations had run and the medical mal-

1. 81 N.Y.2d 270, 614 N.E.2d 712, 598 N.Y.S.2d 149 (1993).

2. *Id.* at 272, 614 N.E.2d at 714, 598 N.Y.S.2d at 151. Although the doctor received actual notice of the claim, under New York's strict construction of the service rules, there was improper service and, therefore, no jurisdiction. *See* Macchia v. Russo, 67 N.Y.2d 592, 595, 496 N.E.2d 680, 682, 505 N.Y.S.2d 591, 593 (1986) ("Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court.") (citations omitted). "The personal delivery contemplated by CPLR § 308(1) . . . can ordinarily be satisfied only by handing the summons to the defendant himself." OSCAR G. CHASE & ROBERT A. BARKER, CIVIL LITIGATION IN NEW YORK 185 (2d ed. 1990).

3. Kleeman v. Rheingold, 148 Misc. 2d 853, 854, 562 N.Y.S.2d 915, 916 (Sup. Ct. N.Y. County 1990).

practice suit was barred.[4] Mrs. Kleeman, having been deprived of her remedy, brought a second suit for legal malpractice against the law firm she had hired to pursue the medical malpractice claim.[5]

It is Mrs. Kleeman's second suit that is the focus of this Note. The issue raised before the New York Court of Appeals was whether the attorney could be held liable for the negligence of the process server he hired.[6] The court answered this question affirmatively by creating a new nondelegable duty. Mrs. Kleeman's attorney was held liable because he had the responsibility of insuring proper service of process.[7] Part II of this Note lays a foundation for the Court of Appeals' decision through an exploration of the background of the law of vicarious liability and its numerous exceptions. The *Kleeman* case is discussed in depth in Part III, including the facts, the procedural history, and the divided opinion of the New York Court of Appeals. Next, Part IV analyzes and critiques the court's opinion. It also provides a suggestion of how the court could have more appropriately decided the case by focusing on more narrow grounds. The Note concludes with an evaluation of probable future trends regarding vicarious liability and service of process in New York.

II. Background

A. *Vicarious Liability*

Generally, one is liable only for his own acts of negligence.[8] An exception to the general rule is "vicarious liability,"[9] which

4. *Kleeman*, 81 N.Y.2d at 272, 614 N.E.2d at 713, 598 N.Y.S.2d at 150. The statute of limitations on medical malpractice actions is two years and six months. N.Y. CIV. PRAC. L. & R. 214-a (McKinney 1990 & Supp. 1995). Mrs. Kleeman also sued the hospital. That case went to trial resulting in a verdict for the defendant. *Kleeman*, 148 Misc. 2d at 854, 562 N.Y.S.2d at 916.

5. *Kleeman*, 148 Misc. 2d at 854, 562 N.Y.S.2d at 916.

6. *Kleeman*, 81 N.Y.2d at 272, 614 N.E.2d at 713-14, 598 N.Y.S.2d at 150-51.

7. *Id.* at 275, 614 N.E.2d at 716, 598 N.Y.S.2d at 153.

8. Rodgers v. Kemper Constr. Co., 124 Cal. Rptr. 143, 148 (Ct. App. 1975) (explaining that normally liability follows fault); Feliberty v. Damon, 72 N.Y.2d 112, 117, 527 N.E.2d 261, 263, 531 N.Y.S.2d 778, 780 (1988); Kavanaugh v. Nussbaum, 71 N.Y.2d 535, 546, 523 N.E.2d 284, 287, 528 N.Y.S.2d 8, 11 (1988) ("Liability in negligence generally rests on a defendant's own fault.").

9. Vicarious liability is the imposition of liability on one person for the conduct of another based on the relationship between the two persons. BLACK'S LAW DIC-

imputes negligence to another because of the relationship between the two individuals.[10] Vicarious liability was recognized by the New York Court of Appeals as early as 1871 in *Higgins v. Watervliet Turnpike Co.*[11] In *Higgins*, a train conductor expelled a passenger from a train for misconduct.[12] The conductor produced evidence that the passenger had been noisy and disorderly and refused to obey the "reasonable directions of the conductor."[13] According to the plaintiff, unnecessary force was used in ejecting him and he suffered injury as a result.[14] The court imputed the act of the conductor to the railroad, thereby holding the railroad liable because it could not act except through its agents and employees.[15] Ejecting passengers who misbehaved was completely within the authority of the conductor.[16] Acting this way, the conductor was the railroad's agent. The decision to impose vicarious liability was founded on public policy and convenience.[17] The court noted: "[e]very person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed."[18] An additional justification for imputing negligence from the conductor-agent to the railroad-principal is that the negligence of the agent is the negligence of the principal.[19] Therefore, the court found that the principal is justly liable.[20]

TIONARY 1566 (6th ed. 1990). A common example is that of an employer being held liable for the acts of an employee. *Id.*

10. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499 (5th ed. 1984). The negligence of A is to be charged against B although B played no part in A's conduct. *Id.*

11. 46 N.Y. 23 (1871).

12. *Id.* at 25.

13. *Id.*

14. *Id.*

15. *Id.* at 25-26.

16. *Id.* at 26. Even if the conductor's conduct was not authorized, the railroad would be liable because "[t]he master's liability for the negligence or tort of his servant, does not depend upon the existence of an authority to do the particular act from which the injury resulted." *Id.*

17. *Id.* at 27.

18. *Id.*

19. *Id.*

20. *Id.*

1. *Scope of Employment*

Respondeat superior[21] is a form of vicarious liability which applies when an agent acts for the benefit of his principal and within the scope of his employment.[22] The scope of employment is defined by the Restatement (Second) of Agency as conduct of the servant that (a) is of the kind he is employed to perform; (b) occurs within the authorized time and space limits; and (c) is actuated, at least in part, by a purpose to serve the master.[23] In order to determine the scope of employment, the court must examine each situation and the surrounding circumstances.[24]

Acts that are incidental to authorized conduct are considered within the scope of employment if they are done to accomplish the purpose of the employment.[25] Even an act that is unauthorized can result in vicarious liability if it is done within the course of employment.[26] Conduct is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits or too little actuated to serve the master.[27] Generally, control is the determina-

---

21. Literally, respondeat superior means "[l]et the master answer." BLACK'S LAW DICTIONARY 1311-12 (6th ed. 1990). This doctrine means that a master or principal is liable for the wrongful acts of his servant or agent in some cases. *Id.*

22. *Id. See also* Standard Oil Co. v. Anderson, 212 U.S. 215, 220 (1909) (stating that one who employs a servant is answerable to strangers for the negligent acts of the servant committed within the course of employment).

23. RESTATEMENT (SECOND) OF AGENCY § 228 (1958). *See also* Di Cosala v. Kay, 450 A.2d 508, 513 (N.J. 1982); Stanfield v. Laccoarce, 588 P.2d 1271, 1274 (Or. 1978) (defining scope of employment involves a consideration of whether the act in question is of the kind the employee was hired to perform, whether it occurred within the authorized limits of time and space, and whether it was motivated by a purpose to serve the employer).

24. Chalmers v. Harris Motors, Inc., 179 A.2d 447, 451 (N.H. 1962).

25. Sears, Roebuck & Co. v. Creekmore, 23 So. 2d 250, 252 (Miss. 1945) (holding the employer liable because moving a stove was a necessary incident to the work the employee was doing); Gonzales v. Southwest Sec. & Protection Agency, Inc., 665 P.2d 810, 811 (N.M. Ct. App. 1983) (holding the employer liable for acts naturally incidental to the business, done while engaged upon the master's business to further the master's interest).

26. Goodyear Tire & Rubber Co. v. Paddock, 40 N.E.2d 697, 697-98 (Ind. 1942); Fanciullo v. B. G. & S. Theatre Corp., 8 N.E.2d 174, 176 (Mass. 1937); Rankin v. Western Union Tel. Co., 23 N.W.2d 676, 677 (Neb. 1946). *See also* Thompson v. United States, 504 F. Supp. 1087, 1091 (D.S.D. 1980) (stating that a forbidden act may cause the imposition of vicarious liability if it is done within the scope of employment).

27. RESTATEMENT (SECOND) OF AGENCY § 228(2).

tive factor in defining the scope of employment.[28] In some cases, however, courts have used a benefit theory to define scope of employment.[29]

a. *Control Theory*

A leading New York case on vicarious liability is *Lundberg v. State*.[30] *Lundberg* involved a car accident caused by the negligence of a state employee.[31] The only issue raised on appeal was whether the negligence of the employee could be imputed to the state.[32] The state employee was driving back to work after a weekend at home when the accident occurred.[33] The Court of Appeals held that the employee was not acting in the scope of his employment when he was driving to the worksite because the employer lacked control over his activity, and that therefore, the state was not liable for his negligence.[34] Under the doctrine of respondeat superior, the court explained that an employer is liable for the negligence of an employee committed while the employee is acting within the scope of his employment.[35] The court stated that "[a]n employee acts in the scope of his employment when he is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be, exercising some control, directly or indirectly, over the employer's activities."[36] The *Lundberg* court pointed out that generally, driving to and from work is not "acting in the

28. *Standard Oil Co.*, 212 U.S. at 222; Becker v. Industrial Accident Comm'n, 298 P. 979, 982 (Cal. 1931) (explaining that the true test of the employer-employee relationship is the right to exercise control); Kersten v. Van Grack, Axelson & Williamowsky, P.C., 608 A.2d 1270, 1272 (Md. Ct. Spec. App. 1992) (stating that the decisive test of whether a master-servant relation exists is whether the employer has the right to control the manner of doing the work). *See infra* part II.A.1.a.

29. Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983) (if the employer benefits from the conduct, he may be held liable). If the employee acts for the benefit of the employer, he is acting within the scope of employment. Foss v. Anthony Indus., 189 Cal. Rptr. 31, 34, 36 (Ct. App. 1983). *See infra* part II.A.1.b. for a discussion of the benefit theory.

30. 25 N.Y.2d 467, 255 N.E.2d 177, 306 N.Y.S.2d 947 (1969).

31. *Id.* at 469, 255 N.E.2d at 178, 306 N.Y.S.2d at 949. The claimant's husband was killed when his car was struck by an auto owned and operated by an employee of the State of New York. *Id.*

32. *Id.*

33. *Id.* at 470, 255 N.E.2d at 178, 306 N.Y.S.2d at 949.

34. *Id.* at 470, 255 N.E.2d at 178-79, 306 N.Y.S.2d at 950.

35. *Id.* at 470, 255 N.E.2d at 179, 306 N.Y.S.2d at 950.

36. *Id.*

scope of . . . employment."[37] Because the employer lacked control over the employee's conduct, the court held there could be no liability despite the fact that the activity was work-motivated.[38] In addition, the court said that the employee was driving to satisfy a personal desire and not a work obligation so he was not acting within the scope of his employment.[39]

The New York Court of Appeals reinforced the idea that control determines liability again in 1988 in *Kavanaugh v. Nussbaum*, a medical malpractice case.[40] The patient in *Kavanaugh* was a forty-year-old pregnant woman.[41] She went to the emergency room because of abnormal bleeding and was treated by the emergency room physician.[42] Her regular obstetrician, who was unavailable, had arranged for a colleague to cover for him.[43] The emergency room physician reported the patient's condition to the covering doctor who instructed him to send the patient home.[44] The patient returned to the emergency room later that night with increased bleeding.[45] At that time she was treated by her regular obstetrician who delivered her severely deformed son by Cesarean section.[46]

A jury returned a verdict against the covering doctor and the obstetrician.[47] The court noted, however, that the only basis for imposing liability on the obstetrician was vicarious liability.[48] In determining whether this was an appropriate case to apply vicarious liability, the court acknowledged "that it was common practice in the community for sole practitioners to cover for each other."[49] Because the doctors, as sole practitioners, are not controlled by the doctors for whom they cover, the

37. *Id.* at 471, 255 N.E.2d at 179, 306 N.Y.S.2d at 950.

38. *Id.*

39. *Id.* at 471-72, 255 N.E.2d at 179, 306 N.Y.S.2d at 951. The employer had gone home to spend the weekend with his family. *Id.* at 472, 255 N.E.2d at 179, 306 N.Y.S.2d at 951.

40. 71 N.Y.2d 535, 523 N.E.2d 284, 528 N.Y.S.2d 8 (1988).

41. *Id.* at 542, 523 N.E.2d at 285, 528 N.Y.S.2d at 9.

42. *Id.* at 543, 523 N.E.2d at 286, 528 N.Y.S.2d at 10.

43. *Id.* at 542-43, 523 N.E.2d at 285, 528 N.Y.S.2d at 9.

44. *Id.* at 543, 523 N.E.2d at 285, 528 N.Y.S.2d at 9.

45. *Id.* at 543, 523 N.E.2d at 285-86, 528 N.Y.S.2d at 9-10.

46. *Id.* at 543, 523 N.E.2d at 286, 528 N.Y.S.2d at 10. The Cesarean was performed by her regular doctor. *Id.*

47. *Id.* at 543-44, 523 N.E.2d at 286, 528 N.Y.S.2d at 10.

48. *Id.* at 545, 523 N.E.2d at 287, 528 N.Y.S.2d at 11.

49. *Id.*

court held there could be no vicarious liability.[50] The court explained that "[u]nderlying the doctrine of vicarious liability—the imputation of liability to defendant for another person's fault, based on defendant's relationship with the wrongdoer—is the notion of control."[51]

The reason for imputing negligence is that the employer is better able to bear the consequences,[52] and it encourages the employer "to act carefully in the selection and supervision of its employees."[53] The court found that vicarious liability in these situations would discourage doctors from getting full-time coverage for their patients.[54] Since this is contrary to the public policy goal of having full medical coverage, the court "decline[d] to enlarge the doctrine of vicarious liability to reach [this] situation."[55]

b. *Benefit Theory*

Some courts make their decision to impose vicarious liability on the employer because of the idea that the employer benefits from the employee's work and, therefore, should be responsible for any harm the employee causes.[56] The Supreme Court of Minnesota explained this concept in *Ponticas v. K.M.S. Investments*.[57] In *Ponticas*, the jury found the owners and managers of an apartment complex were negligent in their hiring of a resident manager who sexually assaulted a female tenant.[58] The resident manager was hired with little inquiry into his past and without even a phone call to his references.[59] Such an investigation would have revealed his criminal record for violent

50. *Id.* at 548-49, 523 N.E.2d at 289, 528 N.Y.S.2d at 13.

51. *Id.* at 546, 523 N.E.2d at 287-88, 528 N.Y.S.2d at 11-12.

52. *Id.* at 546, 523 N.E.2d at 288, 528 N.Y.S.2d at 12.

53. *Id.*

54. *Id.* at 548, 523 N.E.2d at 289, 528 N.Y.S.2d at 13 (citing Graddy v. New York Med. College, 19 A.D.2d 426, 430, 243 N.Y.S.2d 940, 944-45 (1st Dep't 1963)).

55. *Id.* at 549, 523 N.E.2d at 289, 528 N.Y.S.2d at 13.

56. *See* Holman v. State, 124 Cal. Rptr. 773, 779 (Ct. App. 1975). The benefit concept used to be part of the definition of scope of employment. T. BATY, VICARIOUS LIABILITY 131 (1916). The rule was that "[a]n act done within the scope of employment is by legal intendment for the benefit of the master . . . ." *Id.* at 132 (quoting Smith v. Martin, 2 K.B. 783 (1911)). For a general discussion of the benefit theory, see *id.* at 128-45.

57. 331 N.W.2d 907, 911 (Minn. 1983).

58. *Id.*

59. *Id.* at 910. His references were his mother and sister. *Id.* at 914.

offenses and his work history.[60] It is possible that this information would have discouraged the manager of the complex from hiring this applicant. The rationale for imposing liability on the employer is that "since the employer receives some benefit, even if only a potential or indirect benefit, . . . there exists a duty on the employer to exercise reasonable care" in hiring.[61] Because the managers and owners received a benefit from the hire, they owed the tenants the duty of exercising reasonable care in hiring a resident manager.[62]

The benefit theory was also explained by a dissenting justice in *Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd.*[63] Justice Peterson of the Minnesota Supreme Court discussed the two theories of vicarious liability. The first is the control theory.[64] The other justification the dissenter noted was the benefit theory.[65] The benefit theory "argues that since the employer reaps a benefit when the employee acts properly, the employer should share the cost when he acts improperly."[66] Liability is therefore limited to acts that the employee engages in which could result in a benefit to the employer.[67]

Thus, vicarious liability is imposed upon the person who is best able to compensate the injured party. It may be the person who exercised control over the individual who caused the harm or, under the benefit theory, the person who benefitted, or could potentially benefit, from the acts of the tortfeasor. In both instances, liability falls on the party most deserving of the obligation to compensate the injured party.

B. *Independent Contractor Exception*

An exception to the rule that an employer is vicariously liable for the acts of his employers states that an employer is not liable for the torts of an independent contractor.[68] This excep-

60. *Id.* at 909.
61. *Id.*
62. *Id.*
63. 329 N.W.2d 306, 312 (Minn. 1982) (Peterson, J., dissenting).
64. *Id.* at 313. *See supra* part II.A.1.a for a discussion of the control theory.
65. *Marston*, 329 N.W.2d at 314 (Peterson, J., dissenting).
66. *Id.*
67. *Id.*
68. Schwartz v. Merola Bros. Constr. Corp., 290 N.Y. 145, 152, 48 N.E.2d 299, 302 (1943); Hermance v. Daddy-O's Restaurant Corp., 159 A.D.2d 924, 925, 553

tion is based on the lack of control an employer may exercise over an independent contractor.[69] The Restatement (Second) of Torts defines an independent contractor as one who "does work for another under conditions [insufficient] to make him a servant."[70] To determine who is an independent contractor, several factors must be considered. Among them are: the extent of control the master has over the work; whether or not the employee is engaged in a distinct occupation; the kind of occupation; the skill required; who supplies the instrumentalities; and the duration of the employment.[71] Many courts determine who is an independent contractor by focusing on who retains control of the performance of the contract.[72] One New York court de-

---

N.Y.S.2d 239, 240 (3d Dep't 1990). *See also* Holman v. State, 124 Cal. Rptr. 773, 779 (Ct. App. 1975); Misiulis v. Milbrand Maintenance Corp., 218 N.W.2d 68, 70 (Mich. Ct. App. 1974); Galentine v. Borglum, 150 S.W.2d 1088, 1090, 1093 (Mo. Ct. App. 1941); Manus v. Kansas City Distrib. Corp., 74 S.W.2d 506, 509 (Mo. 1934); Majestic Realty Assocs., Inc. v. Toti Contracting Co., 153 A.2d 321, 324 (N.J. 1959); Barnard v. Trenton-New Brunswick Theatres Co., 108 A.2d 873, 876 (N.J. Super. Ct. App. Div. 1954); Blount v. Tow Fong, 138 A. 52, 53 (R.I. 1927); KEETON ET AL., *supra* note 10, § 71, at 509.

69. 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 26.11, at 61 (2d ed. 1986). *See also* RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (1958) ("In determining whether one acting for another is a servant or an independent contractor, the following . . . are considered: (a) the extent of control which . . . the master may exercise over the details of the work . . . .").

70. RESTATEMENT (SECOND) OF TORTS § 409 cmt. a (1965). In order to have a master-servant relationship, the employer must retain the right to direct the details of how the work shall be done as well as the result to be accomplished. Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523 (1889).

71. RESTATEMENT (SECOND) OF AGENCY § 220(2). One is considered an employee, rather than an independent contractor, if the master retains supreme control and right of direction over the details of the work and not merely the ultimate result. Irwin v. Klein, 271 N.Y. 477, 484, 3 N.E.2d 601, 605 (1936).

72. Sharkey v. Airco, Inc., 522 F. Supp. 646, 652 (E.D. Pa. 1981) (describing the difference between an employer and an independent contractor; defining the employer as one who only has the right to specify results and to insure that the contract terms are fulfilled), *aff'd*, 688 F.2d 824 (3d Cir. 1982); Drummond v. Hilton Hotel Corp., 501 F. Supp. 29, 31 (E.D. Pa. 1980) (explaining that an independent contractor has exclusive control over the manner of performance and is responsible only for the result); Manus v. Kansas City Distrib. Corp., 74 S.W.2d 506, 509 (Mo. 1934) (stating that an independent contractor renders service as to a result and not the means by which it is accomplished); Soderback v. Townsend, 644 P.2d 640, 641 (Or. Ct. App. 1982) (defining independent contractor as one who carries on an independent business, contracts to do a piece of work according to his own methods, without being subject to employer's control except as to the result, not the means) (citing Oregon Fisheries Co. v. Elmore Packing Co., 138 P. 862, 863-64 (Or. 1914)); Damron v. C.R. Anthony Co., 586 S.W.2d 907, 912-13 (Tex. Ct.

fined an independent contractor as "one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except, as to the result of his work."[73] Thus, the exception is based on a lack of control over the acts of the independent contractor. Because the employer lacks control over the independent contractor, vicarious liability is not extended to the employer.[74]

Some commentators have argued that there should be vicarious liability for independent contractors because the employer is still the person who benefits from the work.[75] In fact, there are exceptions to the independent contractor exception when the employer is held vicariously liable for the acts of an independent contractor.[76] A well-known commentator, W. Page Keeton, noted that the number of exceptions may be sufficient to cast doubt upon the validity of the rule.[77] It has been said, and often quoted, that "the rule is now primarily [of importance] as a preamble to the catalog of its exceptions."[78] These

Civ. App. 1979) (explaining that absent a right of control the employee is an independent contractor).

73. Ostrander v. Billie Holm's Village Travel, 87 Misc. 2d 1049, 1051, 386 N.Y.S.2d 597, 599 (Dist. Ct. Suffolk County 1976) (quoting Hogan v. Comac Sales Inc., 245 A.D. 216, 221, 281 N.Y.S. 207, 213 (3d Dep't 1935) (Heffernan, J., dissenting), *aff'd*, 271 N.Y. 562, 2 N.E.2d 695 (1936)). A Maryland court used a similar definition in Kersten v. Van Grack, Axelson & Williamowsky, P.C., 608 A.2d 1270, 1272 (Md. Ct. Spec. App. 1992) (giving a definition of independent contractor as a person who contracts to perform work according to his own methods, free from control of his employer except as to the result). *See also* Roscoe T. Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501, 502 (1934-35) ("A person who undertakes to complete a specified job according to his own methods and without being subject to the control of his employer as to the means of doing the work is an independent contractor.").

74. KEETON ET AL., *supra* note 10, § 71, at 509.

75. *Id.* The argument is that because the employer selects the contractor, he can insist on a competent and financially responsible individual. *Id.* Courts have departed from the rule of nonliability for the actions of independent contractors because the employer is the party primarily to benefit by the enterprise. Foss v. Anthony Indus., 189 Cal. Rptr. 31, 34 (Ct. App. 1983) (citing Van Arsdale v. Hollinger, 437 P.2d 508, 513 (Cal. 1968)). This theory is similar to the benefit theory used to define scope of employment. *See supra* part II.A.1.b.

76. *See infra* parts II.B.1-3.

77. KEETON ET AL., *supra* note 10, § 71, at 510.

78. Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 277 N.W. 226, 228 (Minn. 1937). *See* Misiulis v. Milbrand Maintenance Corp., 218 N.W.2d 68, 70 (Mich. Ct. App. 1974) ("general rule serves merely as a prelude to a discussion of why it does not apply"). One commentator predicted that ultimately the exception will become

exceptions fall into three main categories: (1) negligence of the employer in selecting, instructing, or supervising the independent contractor;[79] (2) nondelegable duty;[80] and (3) work which is inherently dangerous.[81] Therefore, employers may be liable for acts of an independent contractor provided one of the above exceptions exists.

1. *Negligence of Employer in Hiring or Supervising*

The independent contractor exception is generally not applied where an employer is negligent in hiring or supervising an independent contractor.[82] An employer has a "duty to exercise reasonable care to select a competent, experienced, and careful contractor . . . ."[83] Failure to employ a competent and careful contractor to do work involving a risk of physical harm therefore results in liability for the employer.[84] In addition, the employer must stop unnecessarily dangerous practices of which he

---

the "general rule." KEETON ET AL., *supra* note 10, § 71, at 509 (citing Clarence Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1934)).

79. *See infra* part II.B.1.

80. *See infra* part II.B.2.

81. Wright v. Tudor City Twelfth Unit, 276 N.Y. 303, 307, 12 N.E.2d 307, 308 (1938); Rohlfs v. Weil, 271 N.Y. 444, 448, 3 N.E.2d 588, 589 (1936); RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965). *See infra* part II.B.3.

82. Di Cosala v. Kay, 450 A.2d 508, 513-14 (N.J. 1982); Wilk v. Haus, 460 A.2d 288, 294 (Pa. Super. Ct. 1983).

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: (a) in giving improper or ambiguous orders of [sic] in failing to make proper regulations; or (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others; (c) in the supervision of the activity; or (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

RESTATEMENT (SECOND) OF AGENCY § 213 (1958). *See generally* 5 HARPER ET AL., *supra* note 69, § 26.4, at 16-17.

83. KEETON ET AL., *supra* note 10, § 71, at 510. An employer has a duty to hire a "competent and careful contractor" to do work that involves a risk of physical harm if not done carefully. RESTATEMENT (SECOND) OF TORTS § 411 (1965). *See also* Steffen, *supra* note 73, at 505 (the employer has a duty to select a competent contractor).

84. Watsontown Brick Co. v. Hercules Powder Co., 265 F. Supp. 268, 271 (M.D. Pa.) (holding an employer liable for furnishing an incompetent, inexperienced blaster), *aff'd*, 387 F.2d 99 (3d Cir. 1967).

is aware,[85] and inspect completed work to be sure it is safe.[86] If an employer breaches any of these duties, he is liable for the negligence of the independent contractor.[87] This is not truly an imputation of liability because the employer was at fault for negligent supervision.[88] Thus, although the employer does not actually cause the harm, he is considered at fault.

The employer may be liable for failure to make an adequate inquiry into the employee's qualifications.[89] Liability is imposed if the employer knew or should have known the employee was not qualified for the job.[90] However, the employer may be

85. If the general contractor knows that the subcontractor is doing negligent work, he may be liable for any injury resulting from the subcontractor's negligence. Schwartz v. Merola Bros. Constr. Corp., 290 N.Y. 145, 152, 48 N.E.2d 299, 302 (1943) (citing Rosenberg v. Schwartz, 260 N.Y. 162, 166, 183 N.E. 282, 283 (1932)). *See also* Funk v. General Motors Corp., 220 N.W.2d 641, 648 (Mich. 1974) (holding that the employer has a duty to provide proper supervision and inspection and to stop work which is an obvious dereliction of duty), *overruled in part by* Hardy v. Monsanto Enviro-Chem Systems, Inc., 323 N.W.2d 270 (Mich. 1982).

86. KEETON ET AL., *supra* note 10, § 71, at 510. *See also* RESTATEMENT (SECOND) OF TORTS § 412 cmt. a (1965) ("[T]his section requires the employer of a contractor to exercise reasonable care to subject the work after completion to such an inspection as is reasonable under the circumstances."). *See generally* McGuire v. Hartford Buick Co., 40 A.2d 269, 270-71 (Conn. 1944) (holding employer has a duty to inspect completed work before accepting); Schwartz v. Zulka, 175 A.2d 465, 467 (N.J. Super. Ct. App. Div. 1961) (holding employer has a duty to inspect before accepting completed work), *modified sub nom.* Schwartz v. North Jersey Bldg. Contractors Corp., 182 A.2d 865 (N.J. 1962).

87. Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 910-11 (Minn. 1983).

88. Sharkey v. Airco, Inc., 522 F. Supp. 646, 650 (E.D. Pa. 1981) (explaining that negligent supervision is based on direct negligence of the landowner-employer and not imputation of negligence on the part of the independent contractor), *aff'd*, 688 F.2d 824 (3d Cir. 1982); Allen v. Toledo, 167 Cal. Rptr. 270, 273-74 (Ct. App. 1980) (stating that liability for negligent entrustment is not truly vicarious liability because it is based on the defendant's own acts); 5 HARPER ET AL., *supra* note 69, § 26.1, at 4 ("The principle that rests liability on individualized fault covers these situations without any fiction, extension, or distortion.").

89. Western Stock Ctr., Inc. v. Sevit, Inc., 578 P.2d 1045, 1048 (Colo. 1978) (holding employer has a duty of reasonable care in selecting a properly qualified contractor); Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 910 (Minn. 1983); Galentine v. Borglum, 150 S.W.2d 1088, 1092 (Mo. 1941); Hudgens v. Cook Indus., Inc., 521 P.2d 813, 815 (Okla. 1973) (holding employer liable because he made no inquiry concerning the employee's ability or equipment).

90. Springer v. Joseph Schlitz Brewing Co., 510 F.2d 468, 475 (4th Cir. 1975); Easley v. Apollo Detective Agency, Inc., 387 N.E.2d 1241, 1248 (Ill. App. 1979) (allowing a cause of action against an employer for hiring a person the employer should have known was unfit for the position); Galentine v. Borglum, 150 S.W.2d 1088, 1093-94 (Mo. Ct. App. 1941) (holding employer liable for selecting a manifestly unfit person such as a driver with poor vision); Frontier Theatre Inc. v.

relieved of liability if he has exercised due care in selecting a competent contractor.[91] A competent contractor is "one who possesses the knowledge, skill, experience, personal characteristics, and available equipment which a reasonable man would realize that an independent [sic] contractor must have in order to do the work which he contracts to do without creating unreasonable risk of injury to others."[92]

2. *Nondelegable Duties*

"The real question in all independent contractor cases is whether one may 'farm out' or 'lop off' some of one's affairs and escape liabilities in connection with them."[93] The privilege to "farm out" has its limits.[94] One such limit is when the employer has a nondelegable duty.[95] This duty may be imposed by statute,[96] contract,[97] or common law.[98] For example, a landlord has

---

Whisenant, 291 S.W.2d 395, 398 (Tex. 1956) (holding owner liable for entrusting vehicle to unlicensed driver).

91. Hudgens v. Cook Indus., Inc., 521 P.2d 813, 816 (Okla. 1973).

92. *Hudgens*, 521 P.2d at 816 (citing Risley v. Lenwell, 277 P.2d 897, 908 (Cal. 1955)).

93. 5 HARPER ET AL., *supra* note 69, § 26.11, at 73.

94. *Id.*

95. A nondelegable duty is one which the employer is not free to delegate. RESTATEMENT (SECOND) OF TORTS, Ch. 15, topic 2, introductory note, at 394 (1965). "[T]he person upon whom it is imposed [is required] to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted." *Id.*

96. *See, e.g.*, N.Y. LAB. LAW § 241(6) (McKinney 1986 & Supp. 1995) (imposing a nondelegable duty on construction contractors to provide a safe working environment); Celestine v. City of New York, 86 A.D.2d 592, 593, 446 N.Y.S.2d 131, 132 (2d Dep't 1982), *aff'd*, 59 N.Y.2d 938, 453 N.E.2d 548, 466 N.Y.S.2d 319 (1983). *See also* Holman v. State, 124 Cal. Rptr. 773, 776 (Ct. App. 1975) (finding that a statutory duty exists to provide a guard on revolving or reciprocating parts of a machine); Strayer v. Lindeman, 427 N.E.2d 781, 783 (Ohio 1981) (explaining that a landlord has a statutory duty to keep up with repairs and keep premises fit and habitable); Choctaw, O. & W. Ry. v. Wilker, 84 P. 1086, 1090 (Okla. 1906) (stating that a railroad has a statutory duty to keep the highway safe where it intersects the railroad).

97. Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 277 N.W. 226, 228 (Minn. 1937) ("Where one person owes another a contractual duty to act, the law imposes upon the person owing that duty the further duty of acting with due care in the performance of his contract so as not to injure the contractee's person or property. This duty is nondelegable."); Sciolaro v. Asch, 198 N.Y. 77, 82-83, 91 N.E. 263, 264-65 (1910) (creating duty to provide elevator service by lease).

98. Rozmajzl v. Northland Greyhound Lines, 49 N.W.2d 501, 504 (Iowa 1951) (holding carrier of passengers has duty to exercise more than ordinary care to pro-

a common law "duty to maintain [a] staircase in a reasonably safe condition for use. That duty [is] of a personal character. [He can] not discharge it by delegating the operations even to a competent independent contractor."[99] The performance of the contract may be delegated, but that does not relieve the employer of his contractual duty.[100] Another nondelegable duty, imposed by common law, is that of an owner of a building "to protect members of the public traveling on the sidewalk."[101]

Generally, courts have not stated principles to define a nondelegable duty.[102] No criterion exists to determine the character of a nondelegable duty other than a court's conclusion that "the responsibility is so important to the community that the employer should not be permitted to transfer it to another."[103] The New York Court of Appeals recently noted that nondelegable duties fall into four general situations.[104] In those situations where a nondelegable duty exists, "the employer is as liable for the conduct of the contractor as though it were his own."[105]

---

tect passengers); Banaghan v. Dewey, 162 N.E.2d 807, 811 (Mass. 1959) (holding landlord must use reasonable care to keep common passageways in good condition); Page v. Sloan, 190 S.E.2d 189, 192 (N.C. 1972) (stating innkeeper has nondelegable duty to keep premises in reasonably safe condition); Eide v. Skerbeck, 8 N.W.2d 282, 285 (Wis. 1943) (explaining that persons conducting places of amusement must use ordinary care to keep them safe for the public). *See also* RESTATEMENT (SECOND) OF TORTS, Ch. 15, topic 2, introductory note, at 394 (1965).

99. Russo v. Watson, 249 A.D. 782, 782, 292 N.Y.S. 249, 250 (2d Dep't 1936) (citing Paltey v. Egan, 200 N.Y. 83, 91, 93 N.E. 267, 269 (1910)).

100. *Pacific Fire Ins.*, 277 N.W.2d at 228; *see also* Miles v. R & M Appliance Sales Inc., 26 N.Y.2d 451, 453, 259 N.E.2d 913, 916, 311 N.Y.S.2d 491, 493-94 (1970) (delegating performance of the assumed responsibility to an independent contractor did not absolve the employer of liability).

101. Schwartz v. Merola Bros. Constr. Corp., 290 N.Y. 145, 155, 48 N.E.2d 299, 304 (1943) (citing Rohlfs v. Weil, 271 N.Y. 444, 3 N.E. 588 (1936); Appel v. Muller, 262 N.Y. 278, 280, 186 N.E. 785, 785 (1933)).

102. RESTATEMENT (SECOND) OF TORTS, Ch. 15, topic 2, introductory note, at 394 (1965).

103. KEETON ET AL., *supra* note 10, § 71, at 512. "There are also situations wherein the law views a person's duty as so important and so peremptory that it will be treated as nondelegable." 5 HARPER ET AL., *supra* note 69, § 26.11, at 83.

104. Rosenberg v. Equitable Life Assurances Soc'y of the United States, 79 N.Y.2d 663, 668, 595 N.E.2d 840, 842-43, 584 N.Y.S.2d 765, 767-68 (1992). There may be a statutory duty, a duty assumed by contract, a duty to keep the premises safe, or the work may involve special inherent danger. *Id.*

105. 5 HARPER ET AL., *supra* note 69, § 26.11, at 88.

One duty courts have found nondelegable is the upkeep of a car by its owner.[106] In *Maloney v. Rath*,[107] the defendant's automobile hit a car the plaintiff was driving because of a brake failure.[108] The court held the defendant liable in spite of the fact that the defendant had just had her brakes repaired and it was the mechanic's negligence, rather than her own, that caused the brake failure resulting in an accident.[109] Responsibility for maintaining an automobile has fallen on the owner because it is deemed important to the public.[110]

The *Maloney* court explained the policy underlying the imposition of liability based on the negligence of an independent contractor:

> Unlike strict liability, a nondelegable duty operates not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent contractor.[111]

Imposing liability also encourages the hiring of responsible subcontractors.[112] The Restatement (Second) of Torts section 429 states that:

> one who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.[113]

New York adopted this doctrine in *Miles v. R & M Appliance Sales, Inc.*[114] *Miles* was a personal injury case involving an

106. Maloney v. Rath, 445 P.2d 513 (Cal. 1968) (en banc).
107. *Id.*
108. *Id.* at 514.
109. *Id.* at 516-17.
110. *Id.* at 516.
111. *Id.* at 515.
112. Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 301, 376 N.E.2d 1276, 1280, 405 N.Y.S.2d 630, 634 (1978).
113. RESTATEMENT (SECOND) OF TORTS § 429 (1965).
114. 26 N.Y.2d 451, 454, 259 N.E.2d 913, 915, 311 N.Y.S.2d 491, 494 (1970).

air conditioner repair.[115] The plaintiff had bought a defective air conditioner from the defendant.[116] When the plaintiff discovered that the air conditioner was defective, she went to the defendant who assured her that "the matter would receive their prompt attention."[117] The shop manager repeatedly promised the plaintiff that the unit would be repaired by the shop.[118] Because the defendant-seller did not have a service department, it had to hire an independent contractor to make the repair. After repairing it, the repairman left the air conditioner outside of the plaintiff's apartment where she tripped over it.[119] Because plaintiff reasonably believed the defendant would make the repairs and he undertook this responsibility of repair, redelivery and reinstallation, he was liable for the negligence of the repairman.[120]

In *Mduba v. Benedictine Hospital*,[121] vicarious liability was applied to an emergency room facility at a hospital. *Mduba* was a wrongful death action in which blood was not available in time for a transfusion.[122] The plaintiff contended that the hospital was negligent because the doctor failed to take a blood sample from the decedent and failed to order blood.[123] Although the hospital had a contract with the doctor that stated the emergency room doctors were not employees,[124] the hospital maintained a sufficient amount of control so that the doctor was not an independent contractor but an employee of the hospital.[125] In addition, the court pointed out that

> [p]atients entering the hospital through the emergency room could properly assume that the treating doctors and staff of the hospital were acting on behalf of the hospital. Such patients are

115. *Id.* at 452, 259 N.E.2d at 914, 311 N.Y.S.2d at 492.
116. *Id.*
117. *Id.*
118. *Id.* at 454, 259 N.E.2d at 915, 311 N.Y.S.2d at 494.
119. *Id.* at 453, 259 N.E.2d at 915, 311 N.Y.S.2d at 493.
120. *Id.* at 454, 259 N.E.2d at 916, 311 N.Y.S.2d at 494.
121. 52 A.D.2d 450, 384 N.Y.S.2d 527 (3d Dep't 1976).
122. *Id.* at 451, 384 N.Y.S.2d at 528.
123. *Id.* at 451-52, 384 N.Y.S.2d at 528.
124. *Id.* at 452, 384 N.Y.S.2d at 528.
125. *Id.* at 453, 384 N.Y.S.2d at 529.

not bound by secret limitations as are contained in a private contract between the hospital and the doctor.[126]

The New York Court of Appeals has held that one who employs an independent contractor to perform services that the individual has undertaken to perform is liable for the negligence of the independent contractor.[127] The hospital held itself out to the public as providing emergency medical care services, thereby creating a duty to perform those services.[128] The hospital was, therefore, liable for negligent performance of those services by the staff it hired to provide the services.[129]

3. *Inherently Dangerous Activities*

If one engages in inherently dangerous activities,[130] he is subject to vicarious liability for the torts of an independent contractor.[131] An activity is inherently dangerous if the work, by

---

126. *Id.* *See also* Martell v. St. Charles Hosp., 137 Misc. 2d 980, 989, 994-95, 523 N.Y.S.2d 342, 348, 351-52 (Sup. Ct. Suffolk County 1987) (holding that patients are not bound by limitations imposed by private contracts between a doctor and a hospital).

127. Miles v. R & M Appliance Sales, Inc., 26 N.Y.2d 451, 453, 259 N.E.2d 913, 915, 311 N.Y.S.2d 491, 493 (1970).

128. *Mduba*, 52 A.D.2d at 453-54, 384 N.Y.S.2d at 529-30. *See also* RESTATEMENT (SECOND) OF AGENCY § 267 (1958) ("One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.").

129. *Mduba*, 52 A.D.2d at 454, 384 N.Y.S.2d at 530.

130. This is not the same inherent danger that leads to strict liability. 5 HARPER ET AL., *supra* note 69, § 26.11, at 89.

131. RESTATEMENT (SECOND) OF TORTS § 427 (1965).

> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Id.

> [W]hile under the law the owner of a building who hires an independent contractor to do work is not ordinarily liable for the negligence of the contractor's servants, there is an exception to that rule in a case where the nature of the work contracted to be done involves the creation of a dangerous condition . . . .

May v. 11 1/2 East 49th Street Co., 269 A.D. 180, 181, 54 N.Y.S.2d 860, 862 (1st Dep't 1945), *aff'd*, 296 N.Y. 599, 68 N.E.2d 881 (1946).

its nature, is likely to cause injury to others.[132] Work that involves a peculiar risk of harm, if precautions are not taken, is also considered inherently dangerous.[133] Another explanation of what constitutes an inherently dangerous activity is found in *Western Stock Center Inc. v. Sevit, Inc.*[134] In *Sevit*, a fire occurred during the removal of pipes by an independent contractor.[135] The Colorado Supreme Court discussed the law of liability for the acts of an independent contractor.[136] The court held that there may have been negligence in the selection of the independent contractor because, on inquiry, the defendant could have discovered that the independent contractor was inexperienced in doing this work.[137] The court went on to discuss situations when vicarious liability applies. It stated that vicarious liability applies in the case of an independent contractor if the activity is inherently dangerous.[138] An inherently dangerous activity is work which presents a "foreseeable and significant risk of harm to others if not carefully carried out."[139]

Courts have held various activities create a peculiar risk of harm.[140] For example, New York imposes a strict duty of care

---

132. Blount v. Tow Fong, 138 A. 52, 53-54 (R.I. 1927) (erecting and maintaining a sign that overhangs a busy sidewalk creates an absolute nondelegable duty to take precautions to avoid injury to third persons). An inherent danger exists if danger adheres in the instrumentality such that special precautions are required to avoid injury. Feyers v. United States, 561 F. Supp. 362, 368 (E.D. Mich. 1983) (holding that a nondelegable duty exists to insure the inherently dangerous activity is conducted with the requisite degree of care), *vacated*, 749 F.2d 1222 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).

133. Majestic Realty Assocs., Inc. v. Toti Contracting Co., 153 A.2d 321, 323, 326 (N.J. 1959) (characterizing demolition of a building adjacent to buildings to be left untouched as hazardous work). *See also* RESTATEMENT (SECOND) OF TORTS § 416 (1965).

134. 578 P.2d 1045 (Colo. 1978).

135. *Id.* at 1047.

136. *Id.* at 1048-50.

137. *Id.* at 1049.

138. *Id.* at 1049-50.

139. *Id.* at 1050.

140. *See, e.g.*, Emelwon Inc. v. United States, 391 F.2d 9, 11 (5th Cir.) (cropdusting is inherently dangerous), *cert. denied sub nom.* Florida v. Emelwon, Inc., 393 U.S. 841 (1968); Washington Metro. Area Transit Auth. v. L'Enfant Plaza Properties, Inc., 448 A.2d 864, 866-67, 868-69 (D.C. Cir. 1982) (backfilling an excavation is hazardous work); Curtis v. Kiley, 26 N.E. 421, 421 (Mass. 1891) (digging trench across a passageway is inherently dangerous); Majestic Realty Assocs., Inc. v. Toti Contracting Co., 153 A.2d 321, 323 (N.J. 1959) (demolition of a building adjacent to a building to be left untouched is inherently dangerous).

on those who work on a public highway "to guard against risk inherent in the work."[141] Another activity that the court found to be inherently dangerous is repairing an elevator.[142]

As with every rule, the inherently dangerous activity exception has its limits. "Even where the employer's duty is nondelegable . . . the employer will not be liable for negligence of the independent contractor that is 'collateral' to the nondelegable duty."[143] Where the danger arises because of negligence which was not reasonably to be expected, the employer is not liable.[144] This principle was applied in *Hyman v. Barrett*.[145] *Hyman* involved a tenant who was struck by a board that fell from a scaffold while repairs were in progress at his building.[146] The tenant sued the landlord. The New York Court of Appeals declined to hold the landlord liable for the injury because the landlord could not have anticipated this danger.[147] The court held that the defendant had fulfilled his duty to provide a safe courtyard.[148] Accordingly, the landlord was not liable for any danger that was not inherent in the work contracted for.[149]

The court applied this principle again in *May v. 11 1/2 East 49th Street Co.*[150] The case involved an independent contractor hired to paint a tenant's apartment.[151] The plaintiff slipped on a streak of shellac that was on the floor, fell and injured herself.[152] Since painting is not ordinarily an inherently dangerous

141. Rohlfs v. Weil, 271 N.Y. 444, 450, 3 N.E.2d 588, 590 (1936) (Lehman, J., dissenting in part).

142. Besner v. Central Trust Co., 230 N.Y. 357, 362, 130 N.E. 577, 578 (1921). *See also* State of New York v. Schenectady Chems., 103 A.D.2d 33, 38, 479 N.Y.S.2d 1010, 1014 (3d Dep't 1984) (disposal of hazardous waste may be considered inherently dangerous).

143. 5 HARPER ET AL., *supra* note 69, § 26.11, at 93.

144. Schwartz v. Merola Bros. Constr. Corp., 290 N.Y. 145, 152, 48 N.E.2d 299, 302 (1943). *See also* Balagna v. Shawnee County, 668 P.2d 157, 167 (Kan. 1983) (explaining that danger must inhere in performance of contract and result directly from the work to be done, otherwise there is no liability).

145. 224 N.Y. 436, 121 N.E. 271 (1918).

146. *Id.* at 437, 121 N.E. at 271.

147. *Id.* at 438, 121 N.E. at 272.

148. *Id.*

149. *Id.* at 439, 121 N.E. at 272. The employer is not liable for negligence that is collateral. Balagna v. Shawnee County, 668 P.2d 157, 167 (Kan. 1983).

150. 269 A.D. 180, 54 N.Y.S.2d 860 (1st Dep't 1945).

151. *Id.*

152. *Id.* at 181, 54 N.Y.S.2d at 861.

activity,[153] the danger was not foreseeable.[154] Therefore, the employer was not liable for the negligence of the independent contractor painter.[155] The negligence "arose casually out of the performance or in the progress of the work, and thus was 'collateral' negligence for which the employer of an independent contractor would not be liable."[156]

Thus, the doctrine of vicarious liability does not provide a bright line test for when an employer will be liable for the acts of his employee. Only after considering whether the employee is an agent or an independent contractor can one begin to apply the rules of vicarious liability. Moreover, even once it is determined that the person causing the injury was an independent contractor, one must decide if one of the exceptions applies. Therefore, an employer has to be extremely careful about who he hires, how much supervision and inspection he provides and what responsibilities he assumes.

C. *Process Server Negligence*

1. *In New York*

Despite the general expansion of liability in many instances, at least one area remained unaffected by the rules of vicarious liability until recently. It was not until 1993 that the New York Court of Appeals imposed vicarious liability on a lawyer for the negligence of a process server.[157]

In 1984, the New York County Supreme Court refused to extend vicarious liability to a lawyer for the malfeasance of a process server in *Bockian v. Esanu, Katsky, Korins & Siger*.[158] The court reasoned that "[a]n attorney does not generally retain

153. *Id.* at 183, 54 N.Y.S.2d at 862.

154. *Id.* at 184, 54 N.Y.S.2d at 864.

155. *Id.* at 187, 54 N.Y.S.2d at 867.

156. *Id.* at 187, 54 N.Y.S.2d at 866.

157. Kleeman v. Rheingold, 81 N.Y.2d 270, 614 N.E.2d 712, 598 N.Y.S.2d 149 (1993).

158. 124 Misc. 2d 607, 476 N.Y.S.2d 1009 (Sup. Ct. N.Y. County 1984). The following acts were alleged:

> Specifically, it is alleged that the process server continuously rang the doorbell at 36 East 63rd Street. He then allegedly solicited a delivery person who had access to the premises in an attempt to gain access for himself. Further, it is alleged that a scurrilous sign saying that plaintiff suffered from "venereal herpes" was taped by the process server to the building, and threats were made to tape similar signs all over the city. It is also alleged

a sufficient degree of control over an independent process server's performance of his duties . . . ."[159] It characterized the process server as an independent contractor.[160] The court based this determination on the fact that the attorney "did not select the particular process server, nor did [he] direct the manner for effecting service of process."[161] The court explained that none of the established exceptions applied and that if it created a new exception, it would have a "chilling effect" on citizens' attempts to settle disputes through the legal process.[162]

In *Balzano v. Lublin*,[163] the New York Appellate Division, First Department, acknowledged the fact that a process server was an independent contractor.[164] *Balzano* was a landlord-tenant dispute.[165] The court superficially addressed the issue of whether a process server was an independent contractor, in dicta, in a single sentence at the end of the opinion.[166] The issue was not contested and the court did not challenge the assertion.[167]

The First Department addressed the issue of an attorney's liability for negligent service again in *Robinson v. Jacoby & Meyers*.[168] In *Robinson*, the plaintiff alleged that the process server forwarded an affidavit of service to the defendant law firm without serving process.[169] The court recognized that the allegations were "wholly conclusory, and . . . therefore legally

---

that the process server assaulted Mrs. Bockian when she attempted to photograph him.

Id. at 608, 476 N.Y.S.2d at 1011.

159. *Id.* at 610, 476 N.Y.S.2d at 1013.

160. *Id.* at 610-11, 476 N.Y.S.2d at 1013. The Third Department also characterized a process server as an independent contractor when faced with the issues of whether an agency must pay unemployment insurance for process servers. *In re* Paragon Process Serv. Inc., 103 A.D.2d 882, 882, 477 N.Y.S.2d 1009, 1009-10 (3d Dep't 1984).

161. *Bockian*, 124 Misc. 2d at 611, 476 N.Y.S.2d at 1013.

162. *Id.* Justice Saxe characterized the notion of an attorney's being liable for the alleged bad acts of a process server as "ludicrous". *Id.* at 611, 476 N.Y.S.2d at 1013.

163. 162 A.D.2d 252, 556 N.Y.S.2d 610 (1st Dep't 1990).

164. *Id.*

165. *Id.* at 252, 556 N.Y.S.2d at 611.

166. *Id.* at 253, 556 N.Y.S.2d at 611.

167. *Id.*

168. 167 A.D.2d 134, 561 N.Y.S.2d 221 (1st Dep't 1990).

169. *Id.* at 134, 561 N.Y.S.2d at 221.

insufficient to charge an attorney with negligence and malpractice."[170] No discussion of vicarious liability appears in the opinion, and the issue was not mentioned again until *Kleeman v. Rheingold*,[171] the focus of this Note.

2. *Other States' Handling of Process Servers*

The Maryland Court of Special Appeals confronted the issue of process server negligence in *Kersten v. Van Grack, Axelson & Williamowsky*.[172] There the court held that a law firm did not exercise a sufficient degree of control over process servers to impose vicarious liability on the law firm.[173] *Kersten* was a summary judgment proceeding.[174] The appellee law firm was hired by the defendant in the first action to represent her.[175] The law firm filed a third party complaint against appellants, and hired a process server to serve them.[176] The process server submitted affidavits stating that he had personally served the appellants.[177] However, there had been no personal service and a default judgment was eventually entered against appellants.[178] Despite the default judgment's being vacated, appellants brought an action against the process server and the law firm.[179] The court found a process server to be an independent contractor due to a lack of control or agency relationship.[180] The law firm could not dictate how or when service would be made but merely who had to be served.[181] The process server set his own hours, had his own office and had no obligation to accept work from the law firm.[182] Based on these facts, the court held the process server was an independent contractor.[183] The plaintiff asserted that a nondelegable duty was necessary as a policy

170. *Id.*
171. 81 N.Y.2d 270, 614 N.E.2d 712, 598 N.Y.S.2d 149 (1993).
172. 608 A.2d 1270 (Md. Ct. Spec. App. 1992).
173. *Id.* at 1271.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 1271-72.
180. *Id.* at 1272.
181. *Id.* at 1274.
182. *Id.* at 1273.
183. *Id.* at 1274.

matter to protect the public from negligent process servers.[184] She relied on the Maryland Rules of Professional Conduct as an expression of this public policy.[185] The court rejected the argument that the defendant law firm had a nondelegable duty based on the Maryland Rules of Professional Conduct[186] because the rules of professional conduct do not provide a basis upon which to impose civil liability.[187] It went on to note that the rules are intended "to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."[188] The Maryland court was "not persuaded that imposition of a non-delegable duty on appellee [was] warranted."[189]

A California court, in an unpublished opinion, handled the issue of whether an attorney is liable for the negligence of a process server differently from the Maryland court in *Kersten*.[190] Without addressing the specific issue of whether a process server is an independent contractor, the court held the attorney bore the ultimate responsibility for serving process in order to comply with the court order.[191] The court noted that "[t]he process server's negligence did not relieve counsel of his duty to [follow a court order]."[192]

Other states have not faced the issue of who bears the ultimate responsibility for insuring proper service. The New York County Supreme Court stated that its research had not revealed any reported opinions in New York or other jurisdictions that imputed liability to a law firm for the negligence of a pro-

184. *Id.* at 1275.

185. *Id.*

186. *Id.* at 1275-76.

187. *Id.*

188. *Id.* at 1275.

189. *Id.* at 1276. The court also rejected plaintiff's argument that vicarious liability should be imposed based on the work contracted to be done, without discussion. *Id.*

190. Tkaczyk v. City of Los Angeles, 251 Cal. Rptr. 75 (Ct. App. 1988).

191. *Id.* at 79. *But see* Zincoris v. Hobart Bros. Co., 611 N.E.2d 1327, 1333 (Ill. App. Ct. 1993) (holding the party has the nondelegable duty to take all steps necessary to bring his case to a prompt conclusion, including insuring service of process is accomplished); Schusterman v. Northwestern Medical Faculty Found., 552 N.E.2d 1178, 1182 (Ill. App. Ct. 1990) (holding plaintiff has the duty of obtaining proper service).

192. *Tkaczyk*, 251 Cal. Rptr. at 79.

cess server.[193] However, at least one court has held a process server to be an employee for purposes of unemployment insurance.[194]

III. *Kleeman v. Rheingold*

A. *Facts*

What should have been an ordinary medical malpractice suit resulted in a revolutionary legal malpractice case because of a mistake by a process server.[195] On November 2, 1978, plaintiff, Janet Kleeman, retained the defendant law firm to commence a medical malpractice suit against New York Hospital and Doctor Neils Laursen, who had treated Mrs. Kleeman between November 14, 1972 and May 7, 1976.[196] Two days before the statute of limitations was to run, the defendant law firm delivered a summons and complaint to the law firm's regular process serving agency, Fischer's Service Bureau Inc., with notice that the statute of limitations would expire on November 7, 1978, and the request that service should be made immediately.[197]

Jerome Campbell, an employee of Fischer's Service Bureau, submitted an affidavit of service stating that Dr. Laursen had been personally served on November 8, 1978.[198] In his answer dated February 8, 1979, Dr. Laursen raised the affirmative defense of lack of personal jurisdiction because he had not been

193. Kleeman v. Rheingold, 148 Misc. 2d 853, 853, 562 N.Y.S.2d 915, 916 (Sup. Ct. N.Y. County 1990).

194. Legal Process Serv., Inc. v. Ward, 518 N.E.2d 768, 770-72 (Ill. App. Ct. 1988). *But see* Fullerton v. Arizona Dep't of Economic Sec., 661 P.2d 210 (Ariz. Ct. App. 1983) (holding process servers to be independent contractors). However, neither court discussed who bore responsibility for insuring proper service of process.

195. Kleeman v. Rheingold, 81 N.Y.2d 270, 614 N.E.2d 712, 598 N.Y.S.2d 149 (1993). The mistake was that the process server served the papers on the physician's secretary rather than the physician himself. *Id.* at 272, 614 N.E.2d at 714, 598 N.Y.S.2d at 151. Nevertheless, the process server stated in an affidavit that he had made personal service upon the physician. Kleeman v. Rheingold, 185 A.D.2d 118, 118, 585 N.Y.S.2d 733, 734 (1st Dep't 1992). After a traverse hearing, the court held that there was no jurisdiction over the physician "because he had never been personally served." *Id.*

196. Kleeman v. Rheingold, 148 Misc. 2d 853, 854, 562 N.Y.S.2d 915, 916 (Sup. Ct. N.Y. County 1990).

197. *Id.*

198. *Id.*

personally served within the time frame required by CPLR section 203(b)(5).[199] Justice Beverly Cohen determined that service was not untimely because November 7, 1978 was a legal holiday;[200] however, "[s]he referred the factual issue of whether the process server actually served Doctor Laursen to a referee for a traverse hearing."[201] The claim was dismissed when the referee found that the "process server had given the papers to Dr. Laursen's secretary rather than Dr. Laursen himself."[202]

A jury trial was held on the claim against the hospital and resulted in a verdict in favor of the defendant.[203] On February 8, 1989, plaintiff commenced this action for legal malpractice against the defendant law firm.[204] She alleged "failure to timely commence an action against Doctor Laursen and failure to properly supervise the process server with respect to the timeliness of service of the complaint."[205]

B. *Supreme Court Disposition*

The New York County Supreme Court was responsible for ruling on the complaint, along with the defendant's motion for

---

199. *Id.* N.Y. CIV. PRAC. L. & R. 203(b)(5) (McKinney Supp. 1995) provides an opportunity to extend the statute of limitations by filing the summons and complaint with the county clerk. The plaintiff then has sixty days to serve the defendant. *Id.*

Since *Kleeman* was decided, the filing rules in New York have been amended. *See* Jay C. Carlisle, *Civil Practice*, 44 SYRACUSE L. REV. 65, 65 (1993) ("Effective December 31, 1992, all civil actions in supreme and county courts must be commenced by filing a summons and complaint . . . ."). Under the current rule, an action is commenced and the statute of limitations stops running upon the filing of a summons and complaint with the county clerk. N.Y. CIV. PRAC. L. & R. 304 (McKinney Supp. 1995). The plaintiff then has 120 days to file proof of service. N.Y. CIV. PRAC. L. & R. 306-b(a) (McKinney Supp. 1995).

200. 148 Misc. 2d at 854, 562 N.Y.S.2d at 916. November 7, 1978 was election day, a public holiday according to N.Y. GEN. CONSTR. LAW § 24 (McKinney 1951 & Supp. 1995) ("The term public holiday includes . . . each general election day . . . .").

201. 148 Misc. 2d at 854, 562 N.Y.S.2d at 916. A traverse hearing is held to determine whether there is jurisdiction.

202. Kleeman v. Rheingold, 81 N.Y.2d 270, 272, 614 N.E.2d 712, 714, 598 N.Y.S.2d 149, 151 (1993). *See supra* note 2.

203. *Kleeman*, 81 N.Y.2d at 272, 614 N.E.2d at 714, 598 N.Y.S.2d at 151.

204. *Kleeman*, 148 Misc. 2d at 854, 562 N.Y.S.2d at 916. The legal malpractice claim was commenced eleven years after the medical malpractice claim. There was no statute of limitations problem, however, because the legal malpractice claim did not accrue until the final dismissal of the original claim in 1987. *Kleeman*, 81 N.Y.2d at 272, 614 N.E.2d at 714, 598 N.Y.S.2d at 151.

205. *Kleeman*, 148 Misc. 2d at 854-55, 562 N.Y.S.2d at 916.

summary judgment and the plaintiff's cross-motion for summary judgment.[206] Plaintiff argued, in her motion papers, that the process server was an agent of the attorney and that the attorney had a nondelegable duty to commence the action.[207] She claimed that the defendant should have supervised the service of the summons and complaint more carefully.[208] She also made reference to Fischer's reputation as "being notorious for sloppy and casual service."[209] Defendant contended that he delivered the summons and complaint to Fischer prior to the expiration of the statute of limitations and advised it that "service had to be made immediately."[210] Selection of the individual process server and the precise manner of service was left to the Fischer Service Bureau.[211]

The Supreme Court held that a process server is an independent contractor and not an agent of the attorney who hires him.[212] Recognizing that the attorney did not have control over the details of the service, the court explained that the process server had discretion in providing the method of service including the time, place, and manner.[213] Because of this lack of control, the court declined to "extend an attorney's responsibility to impose a duty to oversee the actions of a process server."[214] The court granted the defendant's motion for summary judgment, dismissed the complaint, and denied the plaintiff's cross-motion for summary judgment.[215]

C. *Appellate Division's Treatment*

A divided panel of the Appellate Division, First Department, affirmed the lower court's decision for much the same rea-

206. *Id.* at 853, 855 n.2, 562 N.Y.S.2d at 916, 917 n.2.

207. *Id.* at 855, 562 N.Y.S.2d at 916-17.

208. *Id.* at 855, 562 N.Y.S.2d at 917.

209. *Id. See also supra* notes 89-92 and accompanying text.

210. *Kleeman*, 148 Misc. 2d at 855, 562 N.Y.S.2d at 917.

211. *Id.* Because the process server is an independent contractor, the method of service is within the process server's discretion. *Id. See supra* notes 172-73 and accompanying text.

212. *Kleeman*, 148 Misc. 2d at 855, 562 N.Y.S.2d at 917.

213. *Id.*

214. *Id.* (citing Robinson v. Jacoby & Meyers, 167 A.D.2d 134, 561 N.Y.S.2d 221 (1st Dep't 1990)).

215. *Id.* at 855 n.2, 562 N.Y.S.2d at 917 n.2.

son.[216] Citing *Balzano v. Lublin*,[217] the majority held, "under New York law, an attorney cannot be held vicariously liable for the negligence of a process server when the process server is an independent contractor and further the attorney receives an affidavit of service in proper form."[218] Justices Milonas and Rosenberger dissented.[219]

1. *Dissenting Opinion of Justice Milonas*

Justice Milonas believed "there [were] factual matters involved herein which preclude[d] summary judgment."[220] There was no indication that the defendant law firm supervised the accomplishment of process beyond "merely delegating the service of process to Fischer Service Bureau . . . despite its knowledge that there were only two days remaining for undertaking valid service."[221] The defendant law firm did not take the opportunity to protect against defective service by filing the summons and complaint with the county clerk.[222] Justice Milonas noted that the plaintiff had also presented evidence that the process server used by defendant had a "history of performing its task in a slipshod manner."[223]

---

216. Kleeman v. Rheingold, 185 A.D.2d 118, 585 N.Y.S.2d 733 (1st Dep't 1992).

217. 162 A.D.2d 252, 556 N.Y.S.2d 610 (1st Dep't 1990). *Balzano* was a landlord-tenant case in which the First Department summarily stated that a process server is an independent contractor and, accordingly, the defendant is not liable for the negligence of the process server. *Id.* at 253, 556 N.Y.S.2d at 611. *See supra* text accompanying notes 163-67.

218. *Kleeman*, 185 A.D.2d at 119, 585 N.Y.S.2d at 734.

219. *Id.* at 119, 122, 585 N.Y.S.2d at 735, 736.

220. *Id.* at 120, 585 N.Y.S.2d at 735 (Milonas, J., dissenting).

221. *Id.*

222. *Id.* N.Y. CIV. PRAC. L. & R. 203(b)(5) (McKinney Supp. 1993) provides an automatic sixty-day extension of the statute of limitations if the complaint is delivered to the county sheriff or filed with the county clerk within the statute of limitations. *See supra* note 199.

This point has even more force under the new filing law. *See supra* note 199. Filing the summons and complaint with the clerk commences the action and stops the statute of limitations. It provides 120 days after filing the summons and complaint with the clerk to file proof of service on the defendant. "If the action was timely commenced but dismissed 'for failure to effect proper service,' i.e., . . . failure to make proper service pursuant to the strict compliance requirements in New York, plaintiff may refile and receive another 120 days to complete the service," even if the statute of limitations would otherwise have already run. Carlisle, *supra* note 199, at 75.

223. *Kleeman*, 185 A.D.2d at 120, 585 N.Y.S.2d at 735.

Justice Milonas criticized the majority[224] for relying on *Balzano v. Lublin*.[225] The *Balzano* majority held that an attorney could not be vicariously liable for the negligence of the process server because "the attorney does not retain a sufficient degree of control over the process server's performance of his duties."[226] Justice Milonas noted that *Balzano's* only reference to a process server is a brief comment, without further discussion, that he is an independent contractor.[227] The *Balzano* case, in Justice Milonas's words, "dealt with an entirely different matter."[228]

The other case the *Kleeman* majority cited, *Robinson v. Jacoby & Meyers*,[229] held the allegations insufficient to charge an attorney with malpractice.[230] Justice Milonas noted that "[t]he Court of Appeals has held that a defendant who retains an independent contractor to fulfill services that the former has agreed to perform is liable for the negligence of that independent contractor."[231] Justice Milonas noted that although the general rule is that an employer is not liable for the acts of independent contractors, there are growing public policy exceptions.[232] Because the lawyer was the client's agent, Fischer's Service Bureau, even if an independent contractor, was a subagent.[233] According to Justice Milonas,

> there is certainly a question of fact involved here as to whether defendant was negligent in failing to monitor the manner in

224. *Id.* (Milonas, J., dissenting).

225. 162 A.D.2d 252, 556 N.Y.S.2d 610 (1st Dep't 1990).

226. *Kleeman*, 185 A.D.2d at 120, 585 N.Y.S.2d at 735 (Milonas, J., dissenting).

227. *Id. See* Balzano v. Lublin, 162 A.D.2d 252, 253, 556 N.Y.S.2d 610, 611 ("[T]he third-party defendant has asserted, without contradiction, that its process server was an independent contractor.").

228. *Kleeman*, 185 A.D.2d at 120, 585 N.Y.S.2d at 735 (Milonas, J., dissenting).

229. 167 A.D.2d 134, 561 N.Y.S.2d 221 (1st Dep't 1990).

230. *Kleeman*, 185 A.D.2d at 120, 585 N.Y.S.2d at 735 (citing *Robinson*, 167 A.D.2d at 134, 561 N.Y.S.2d at 221).

231. *Id.* at 121, 585 N.Y.S.2d at 736 (citing Miles v. R & M Appliances Sales, 26 N.Y.2d 451, 259 N.E.2d 913, 311 N.Y.S.2d 491 (1970); Mduba v. Benedictine Hosp., 52 A.D.2d 450, 384 N.Y.S.2d 527 (3d Dep't 1976)).

232. *Id.* These exceptions are for negligent supervision, *see supra* part II.B.1, nondelegable duties, *see supra* part II.B.2, and inherently dangerous activities, *see supra* part II.B.3.

233. An independent contractor may be an agent or a subagent. *Kleeman*, 185 A.D.2d at 121, 585 N.Y.S.2d at 736.

which the process server carried out its delegated duties or in not taking any other means to protect against faulty service, such as filing the summons and complaint with the county clerk.[234]

2. *Dissenting Opinion of Justice Rosenberger*

Justice Rosenberger's dissent is based on more narrow grounds than Justice Milonas's dissent.[235] He stated that defendant's failure to take the precaution against defective service provided by CPLR section 203(b)(5)[236] may be negligence in itself.[237] Justice Rosenberger believed it was at least a question of fact.[238] However, he agreed with the majority that an attorney should not be vicariously liable for a negligent process server who is an independent contractor.[239]

D. *Court of Appeals Opinion*

1. *Majority Opinion*

The New York Court of Appeals modified the judgment of the lower courts.[240] In an opinion by Judge Titone, the court acknowledged that the "threshold issue . . . [was] whether an attorney may be held vicariously liable to his or her client for the negligence of a process server . . . hired on behalf of [the] client."[241] However, the Court of Appeals reached a different conclusion than the two lower courts and denied defendant's motion for summary judgment.[242] The court held that the defendants had a nondelegable duty to Mrs. Kleeman and they could not evade their legal responsibility for performance of that duty by assigning the task of serving process to an "independent contractor."[243]

---

234. *Id.* at 121-22, 585 N.Y.S.2d at 736.

235. *Id.* at 122, 585 N.Y.S.2d at 736 (Rosenberger, J., dissenting).

236. *See supra* note 222.

237. *Kleeman*, 185 A.D.2d at 122, 585 N.Y.S.2d at 736-37 (Rosenberger, J., dissenting).

238. *Id.* at 122, 585 N.Y.S.2d at 737.

239. *Id.* at 122, 585 N.Y.S.2d at 736-37.

240. Kleeman v. Rheingold, 81 N.Y.2d 270, 614 N.E.2d 712, 598 N.Y.S.2d 149 (1993). The Court of Appeals affirmed the denial of Kleeman's cross-motion for summary judgment and denied the defendant's motion. *Id.* at 278-79, 614 N.E.2d at 718, 598 N.Y.S.2d at 155.

241. *Id.* at 272, 614 N.E.2d at 713-14, 598 N.Y.S.2d at 150-51.

242. *Id.* at 273, 614 N.E.2d at 714, 598 N.Y.S.2d at 151.

243. *Id.*

The court recognized the general rule of nonliability for independent contractors and observed that it " 'is now primarily important as a preamble to the catalog of its exceptions.' "[244] The exceptions have been established for public policy reasons and fall into three basic categories: (1) negligence of employer in selecting, instructing, or supervising the contractor;[245] (2) employment work that is inherently dangerous;[246] and (3) "instances in which the employer is under a specific nondelegable duty."[247]

The court affirmed the adoption of the Restatement's definition of nondelegable duty.[248] The court held that the duty at issue "fits squarely and neatly within the category of obligations that the law regards as 'nondelegable.' "[249] Proper service of process is an integral part of the task an attorney undertakes.[250] A mistake in service may deprive a client of his or her day in court regardless of the merits of the claim.[251] The court stated: "Given the central importance of this duty, our State's attorneys cannot be allowed to evade responsibility for its careful performance by the simple expedient of 'farming out' the task to independent contractors."[252]

The court held that the Code of Professional Responsibility reinforced this conclusion.[253] Under the Code, a lawyer may not seek to prospectively limit liability for malpractice.[254] The Code

---

244. *Id.* at 274, 614 N.E.2d at 715, 598 N.Y.S.2d at 152 (quoting Pacific Fire Ins. Co. v. Kenny Boiler & Mfg Co., 277 N.W. 226, 228 (Minn. 1937)).

245. This may not truly be an example of vicarious liability because this really is the employer's negligence. *Kleeman*, 81 N.Y.2d at 274 n.1, 614 N.E.2d at 715 n.1, 598 N.Y.S.2d at 152 n.1. *See supra* part II.B.1.

246. *See supra* part II.B.3.

247. *Kleeman*, 81 N.Y.2d at 274, 614 N.E.2d at 715, 598 N.Y.S.2d at 152. *See* RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965); *see also supra* part II.B.2.

248. 81 N.Y.2d at 274, 614 N.E.2d at 715, 598 N.Y.S.2d at 153. A nondelegable duty is "one that 'requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted.' " *Id.* (quoting RESTATEMENT (SECOND) OF TORTS, Ch. 15, topic 2, introductory note, at 394 (1965)).

249. *Kleeman*, 81 N.Y.2d at 275, 614 N.E.2d at 716, 598 N.Y.S.2d at 153.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.31(a) (1986) ("A lawyer shall not seek, by contract or other means, to limit prospectively the lawyer's individual liability to a client for malpractice . . . .").

also forbids a lawyer from neglecting legal matters entrusted to him or her.[255] Noting that a common practice among attorneys may be unknown to the general public,[256] the court found additional support for its decision in the average client's perception that the tasks associated with commencing a lawsuit are performed by the attorney or someone under the attorney's direction.[257]

The court discussed additional policy reasons for imposing liability. Attorneys are licensed with the understanding that they have specialized knowledge and the character to represent clients in a responsible manner.[258] Judge Titone noted that the responsibility for achieving proper service "must remain squarely on the shoulders of trained and licensed attorneys who, as members of a 'learned profession,' alone have the necessary knowledge and experience to protect their clients' rights."[259]

2. *Concurring Opinion of Judge Bellacosa*

Judge Titone was explicit in noting that the majority's holding was a narrow one.[260] Judge Bellacosa, however, although concurring in the result, wrote a separate opinion. In his opinion, Judge Bellacosa stated that he would have rested the decision on the defendant's alleged negligence in choosing a process server and in failing to obtain the automatic sixty-day extension under CPLR section 203(b)(5).[261] In Judge Bellacosa's opinion, selecting an incompetent process server, given Fischer's "reputation for poor and sloppy service,"[262] was adequate grounds for imposing liability. Additionally, Judge Bellacosa stated that

255. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.30(a)(3) (1986) ("A lawyer shall not . . . neglect a matter entrusted to the lawyer.").

256. *Kleeman*, 81 N.Y.2d at 276, 614 N.E.2d at 716, 598 N.Y.S.2d at 153.

257. *Id. See also supra* notes 112-29 and accompanying text.

258. *Id.*

259. *Id.* at 277, 614 N.E.2d at 717, 598 N.Y.S.2d at 154.

260. *Id.*

261. *Id.* at 279, 614 N.E.2d at 718, 598 N.Y.S.2d at 155 (Bellacosa, J., concurring). *See supra* notes 199, 222. Judge Bellacosa adopted the view of Justice Rosenberger that a question of fact existed as to the defendant's negligence without imputing liability from the process server. *See supra* part III.C.2.

262. *Kleeman*, 81 N.Y.2d at 279, 614 N.E.2d at 718, 598 N.Y.S.2d at 155.

the failure to act under section 203(b)(5) raised a question of fact sufficient to survive a motion for summary judgment.[263]

Judge Bellacosa was uncomfortable with the court's classification of service of process as a nondelegable duty of the attorney because it "open[ed] up an unrealistic and undue liability channel not only with respect to the relationship of attorneys to process servers but, by analogous extension, also to many other relationships in which attorneys retain specialists and experts in the discharge of their professional obligations to clients."[264] He stated that the new rule "contradict[ed] the justification and practicality for the long-standing practice of utilizing and relying on independent process servers. For practical purposes, it will compel attorneys to assume the role of process servers themselves."[265] Because Judge Bellacosa felt the ordinary question-of-fact path was available, he saw no justification for expanding this rule.[266] In addition, he noted that this holding conflicted with lower courts and other states that classify outside process servers as independent contractors.[267]

IV. Analysis

Every time an appellate court decides a case, it must consider the impact its decision will have on the entire body of existing law and on future cases. This is a huge responsibility and one that should not be taken lightly. The New York Court of Appeals seems to have forgotten this when it decided *Kleeman v. Rheingold*.[268] The opinion was based on broader principles than necessary to settle the dispute before the court. Rather than simply finding the particular defendant in the case negligent, the Court of Appeals created a new nondelegable duty.[269] The court justified its decision with rules of professional responsibility and public policy.[270] Having an attorney responsible for ensuring proper service of process will result in accountability

263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 280, 614 N.E.2d at 718, 598 N.Y.S.2d at 155.
267. *Id.* at 280, 614 N.E.2d at 719, 598 N.Y.S.2d at 156.
268. 81 N.Y.2d 270, 614 N.E.2d 712, 598 N.Y.S.2d 149 (1993).
269. *Id.* at 275, 614 N.E.2d at 716, 598 N.Y.S.2d at 153.
270. *Id.* at 275-77, 614 N.E.2d at 716-17, 598 N.Y.S.2d at 153-54.

and more conscientious lawyering. However, the court should have rested its decision on more narrow principles of ordinary negligence, thereby limiting its ruling to the dispute before it. Moreover, the court failed to address relevant precedent[271] and improperly used the Code of Professional Responsibility as a basis for the imposition of civil liability.[272]

A. *Broader than Necessary*

"This case [would have been] more prudently resolved on the narrower ground that questions of fact exist[ed] as to whether the defendant law firm was negligent in choosing its process server and in failing to obtain an automatic 60-day extension under CPLR 203(b)(5)."[273] The *Kleeman* case was based on a summary judgment motion.[274] Plaintiff's bill of particulars alleged that the defendant law firm was guilty of malpractice for failure to commence the action in a timely manner and failure to properly supervise the process server.[275] The plaintiff could have prevailed by showing that a reasonable attorney would have filed the summons and complaint with the county clerk, thereby extending the statute of limitations for sixty days.[276] Although Dr. Laursen did not raise his defense until after the sixty day extension would have run,[277] an issue of fact remained as to whether the attorney was negligent in failing to file for the extension. If the extension had been obtained, the process server may have acted less hastily in serving the physi-

---

271. *See supra* part II.C.2.

272. *See supra* notes 253-57 and accompanying text.

273. *Kleeman*, 81 N.Y.2d at 279, 614 N.E.2d at 718, 598 N.Y.S.2d at 155 (Bellacosa, J., concurring).

Under current law, *see supra* note 199, there is an even stronger argument that the law firm was negligent in not filing the summons and complaint with the county clerk. Had they filed with the clerk, they would have stopped the statute of limitations and received an extra 120 days to file proof of service on the defendant. N.Y. CIV. PRAC. L. & R. 306-b (McKinney Supp. 1995).

274. *Id.* at 272, 614 N.E.2d at 714, 598 N.Y.S.2d at 151. A motion for summary judgment must be denied if a party shows facts sufficient to require trial of any issue of fact. N.Y. CIV. PRAC. L. & R. 3212(b) (McKinney 1992).

275. *Kleeman*, 148 Misc. 2d at 854-55, 562 N.Y.S.2d at 916.

276. N.Y. CIV. PRAC. L. & R. 203(b)(5) (McKinney Supp. 1995). This statute provides for an automatic 60 day extension of the statute of limitations if the summons is delivered to the sheriff or filed with the county clerk. *See supra* note 222.

277. *Kleeman*, 148 Misc. 2d at 854, 562 N.Y.S.2d at 916 (the defense was raised in February).

cian and may have waited for the physician himself rather than leaving the papers with the secretary.

The defendant in *Kleeman* did not take any precautions despite his knowledge that the statute of limitations was about to expire.[278] This should have influenced the court when deciding whether an issue of material fact existed.[279] Proper service of process is essential to the commencement of a lawsuit. Without it, even a meritorious claim will go unheard and the client will be left without a remedy.[280] A lawyer who neglects his duty to assure proper service of process is not living up to his duty and *should* be subject to liability in a malpractice suit.

Plaintiff brought forth evidence that Fischer had a reputation for sloppy service.[281] As Judge Bellacosa of the New York Court of Appeals and Justices Milonas and Rosenberger of the Appellate Division remarked, the court could have rested its decision on the defendant's own negligence in selecting an incompetent process server rather than creating a nondelegable duty.[282] All the court had to find was that there was a triable issue of fact.[283] There definitely was. However, the court did not just settle the dispute before it. Instead, the court created a new nondelegable duty that lawyers must ensure proper service.[284]

B. *Professional Responsibility Justifications*

The court also acted improperly by relying on the Code of Professional Conduct to impose civil liability.[285] The Rules of

278. *Id.* However, the defendant did advise the process service bureau that service had to be made immediately. *Id.*

279. Summary judgment can be granted only if "no material and triable issue of fact is presented." Wanger v. Zeh, 45 Misc. 2d 93, 94, 256 N.Y.S.2d 227, 229 (Sup. Ct. Albany County 1965), *aff'd*, 26 A.D.2d 729 (3d Dep't 1966).

280. Service is a necessary part of personal jurisdiction and "[a] judgment obtained in the absence of jurisdiction is void." OSCAR G. CHASE & ROBERT A. BARKER, CIVIL LITIGATION IN NEW YORK 171 (2d ed. 1990).

281. *See supra* notes 209, 223 and accompanying text.

282. *See supra* notes 235, 237-39, 261-63 and accompanying text.

283. "Issue-finding, rather than issue-determination, is the key to [summary judgment]." Estev v. Abad, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947) *quoted in* Sillman v. Twentieth Century-Fox Film Corp, 3 N.Y.2d 395, 404, 144 N.E.2d 387, 392, 165 N.Y.S.2d 498, 505 (1957).

284. *Kleeman*, 81 N.Y.2d at 278, 614 N.E.2d at 717, 598 N.Y.S.2d at 154.

285. *See supra* notes 253-55 and accompanying text.

Professional Responsibility were not intended to create civil liability.[286] The New York Court of Appeals disagreed and found justification for its decision in these rules.[287] The court also failed to acknowledge the opinion of a Maryland court that expressly rejected the argument that the existence of a code of professional conduct reflects public policy and justifies imposing civil liability.[288] As the Maryland Court of Special Appeals remarked in *Kersten*, the rules are designed to provide guidance to lawyers and to provide structure to regulate and discipline lawyers' conduct.[289] The Maryland court recognized that these rules should not be used to impose civil liability.[290] The New York Court of Appeals, however, failed to acknowledge that the Rules of Professional Responsibility are intended to be only an internal regulating mechanism for the legal profession. By using the Rules of Professional Responsibility as a basis upon which to impose civil liability, the court forces lawyers to think of themselves before their clients.[291] Attorneys will consider the extent of liability they are potentially exposing themselves to rather than representing their clients' best interests, which is what the Rules of Professional Responsibility advocate.

C. *Comparison to Other Exceptions to Vicarious Liability: Right Idea, Wrong Time*

The court also acted improperly by creating the new nondelegable duty. In doing so, the court reasoned that service of process is like other nondelegable duties because of its impor-

---

286. "Note that the ABA took pains to emphasize in both the code and the rules that neither should be used to create civil liability." STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 635 (1992).

287. The court relied on provisions of professional responsibility. N.Y. COMP. R. & REGS. tit. 22, §§ 1200.30(a)(3), 1200.31(a) (1986). These regulations provide that a lawyer cannot neglect matters entrusted to him and cannot limit liability prospectively through contract.

288. Kersten v. Van Grack, Axelson & Williamowsky, P.C., 608 A.2d 1270, 1275-76 (Md. Ct. Spec. App. 1992). *See supra* part II.C.2 for a discussion of *Kersten*.

As common practice, when there is no controlling precedent in the applicable jurisdiction, judges and lawyers look to other jurisdictions for persuasive authority, as Judge Bellacosa did. *Kleeman*, 81 N.Y.2d at 280, 614 N.E.2d at 280, 598 N.Y.S.2d at 156. The majority should have done the same.

289. 608 A.2d at 1275.

290. *Id.* at 1275-76.

291. GILLERS, *supra* note 286, at 611.

tance. Nevertheless, this was not the proper case in which to create this duty. In order to determine whether service of process should be a nondelegable duty, one must examine its similarities to and differences from other nondelegable duties. Service of process is similar to other duties that have been held nondelegable by the courts in that failure to perform this duty will cause harm.[292] Without proper service, a meritorious claim will go unheard and the plaintiff will have no remedy.[293] The importance of a responsibility may also be sufficient grounds for making it nontransferable.[294] A lawyer's duty to commence a lawsuit is similar to other nondelegable duties because its breach results in harm to the individual to whom the duty is owed.

In addition, public policy suggests lawyers should be liable for improper service.[295] Clients should be able to rely on a lawyer to carry out duties owed to them. It is in the interest of lawyers to have the public's trust and faith. Imposing liability forces lawyers to be more conscientious and helps to restore the public's confidence in them.

Similarly, a major reason for holding hospitals liable for the negligence of emergency room workers is public perception.[296] When a patient comes into the emergency room of a hospital, he is not aware of any contracts between the hospital and the doctors. The same is true of clients seeking lawyers. A client comes into a law office with little or no knowledge of how the firm operates. He expects the lawyer to commence his lawsuit.[297] He has no way of knowing that the lawyer will call a process service agency and have them deliver the papers. In

---

292. *See supra* note 113 and accompanying text.

293. *See supra* note 280 and accompanying text.

294. *See, e.g.*, Maloney v. Rath, 445 P.2d 513 (Cal. 1968) (en banc). *See supra* notes 106-11 and accompanying text.

295. The public perception as well as that of the client is that all tasks associated with commencing an action, including service of process, are performed by the attorney or someone acting under his direction. *Kleeman*, 81 N.Y.2d at 276, 614 N.E.2d at 716, 598 N.Y.S.2d at 153. Just as the public's perception of who provides emergency room services allowed the court to impose liability in *Mbuda*, the client's perception justifies imposing liability to the hospital on the attorney. *See supra* notes 121-29 for a discussion of the *Mbuda* case. *See also supra* note 120 and accompanying text.

296. *See supra* notes 121, 124-29 and accompanying text.

297. *Kleeman*, 81 N.Y.2d at 276, 614 N.E.2d at 716, 598 N.Y.S.2d at 153.

addition, clients usually are in a type of emergency situation. They need help solving a problem that they are not trained to deal with. The public should be able to go to a lawyer and expect the lawyer to help them.

Despite the importance of proper service and the other similarities with other nondelegable duties, it is different from other duties that have been deemed nondelegable.[298] The harm caused by improper service is generally financial, not physical.[299] None of the cases or restatements impose vicarious liability for financial harm; it is always for physical harm.[300] Undeniably, financial injury is often severe. Nevertheless, generally it does not rise to deserving the same protection as one expects from physical harm. If we can impose liability on an attorney for causing financial harm to his client, the next step may be to allow a suit against a stockbroker if the client's stocks do not do well. Is this really where we want the law to go?

The element of control is also lacking in the case of an independent process server. An attorney hands the summons and complaint to a process server with the reasonable expectation that service will be made, but has no control over the details of service. He normally receives an affidavit stating that service has been made. Unless the court wants attorneys to personally assume the role of process server, the creation of this duty is ludicrous.[301]

D. *Policy Justifications*

The *Kleeman* court decided that allowing attorneys to delegate their duty was contrary to public policy.[302] The state gives lawyers the privilege of practicing law.[303] With that privilege comes the expectation of responsible fulfillment of the job. This responsibility is justified because of the benefit lawyers receive from being licensed by the state. If lawyers want to continue to

298. *See supra* part II.B.2 for a discussion of nondelegable duties.

299. The claim goes unheard if proper service is not made but there is no physical injury to the client.

300. *See supra* part II.

301. *See* Bockian v. Esanu, Katsky, Korins & Siger, 124 Misc. 2d 607, 611, 476 N.Y.S.2d 1009, 1013 (Sup. Ct. N.Y. County 1984) (stating that it was "ludicrous" for an attorney to be vicariously liable for the alleged bad acts of a process server).

302. *Kleeman*, 81 N.Y.2d at 276, 614 N.E.2d at 716, 598 N.Y.S.2d at 153.

303. *Id.*

have the privilege of practicing law, they must be willing to assume the responsibilities that come along with it.

The court has very sound reasons for wanting to impose liability.[304] Lawyers *should* be discouraged from "farming out" their responsibilities. However, the outcome of this case would have been the same regardless of the creation of a nondelegable duty. This case did not require the court to create the new duty to solve the dispute before it. The court went beyond settling the controversy it faced.

The court's decision has implications for the future of New York vicarious liability law. With the new duty in mind, lawyers may be reluctant to hire outside process server agencies. A big firm will be able to cover the additional cost of hiring in-house process servers through higher rates. The big firms may also simply choose to assume the risk of a negligent process server and cover it with malpractice insurance. However, a sole practitioner faces a bigger hurdle when he accepts a case if he has to guarantee proper service of process. He may opt to hire his own process server, if he can afford to. He could serve process himself, or maybe the sole practitioner will take the gamble and risk the cost of a malpractice suit. No longer can an attorney rely on the affidavit of service of process. He will have to personally verify the service. As Judge Bellacosa commented, this contradicts the justification and practicality of relying on independent process servers.[305] It may also cause attorneys to be reluctant to rely on any outside experts for fear that they will be held liable for acts which they have no ability to prevent.

By creating another nondelegable duty based on the importance of proper service, the court took another step down the road to abandoning the independent contractor exception entirely. It has been a long process, but the trend has been to expand liability.[306] One commentator states that, "[i]t has been noted for years that the immunity is vanishing or waning."[307]

---

304. *See supra* part III.D.1.

305. *Kleeman*, 81 N.Y.2d at 279, 614 N.E.2d at 718, 598 N.Y.S.2d at 155 (Bellacosa, J., concurring).

306. RESTATEMENT (SECOND) OF TORTS, Ch. 15, topic 2, introductory note, at 395 (1965).

307. 5 HARPER ET AL., *supra* note 73, § 26.11, at 77 n.33.

The independent contractor exception is losing support.[308] The New York Court of Appeals has set a precedent that will enable the courts of New York to impose liability for every obligation that they deem important.

V. Conclusion

Had the New York Court of Appeals decided *Kleeman v. Rheingold* based on the narrow issue before it, lawyers would be able to concentrate on lawyering rather than on who they hire as process servers. A process server delivered a summons and complaint to a secretary rather than the defendant. Because of this "small mistake," the New York Court of Appeals decided to impose complete responsibility for service of process on attorneys. This duty may not only cause lawyers to discontinue the practice of hiring independent process servers but it will force lawyers to take time away from doing the work they were trained to do in order to insure that proper service of process is made. Lawyers who hire independent process servers will be subjecting themselves to liability for negligence they cannot prevent. This decision "will compel attorneys to assume the role of process servers themselves,"[309] a role that attorneys should not be playing.

The *Kleeman* court took another strike at the independent contractor exception to vicarious liability. Not only will this ruling impact on lawyers and process servers, but it will provide support for courts to impose additional liability on the so-called deep-pockets of the world. Individuals need to take responsibility for their own actions and not put liability on others. Maybe Mrs. Kleeman should have gone to an attorney sooner, rather than waiting nearly two and one-half years. Maybe the law firm should have been more careful about who they hired to deliver the summons and complaint. Maybe the New York Court of Appeals should have decided this case based on the legal issue of whether a question-of-fact existed. Whatever should

308. Of late, there has been a growing tendency to look upon the independent contractor exception "with disfavor, as little more than a sham, a mere lawyer's device, conceived in sin and brought forth to provide undeserved immunity." Steffen, *supra* note 73, at 501.

309. 81 N.Y.2d at 279, 614 N.E.2d at 718, 598 N.Y.S.2d at 155 (Bellacosa, J., concurring).

have been done by Mrs. Kleeman or by the defendant law firm or by the New York Court of Appeals was not done. Now we have to deal with this new nondelegable duty. Perhaps it will cause lawyers to be the first to assume full responsibility for their own (and for some others') actions.

*Barbara S. Goldstein**

* This Note is dedicated to my parents, Marvin and Harriette, for their continued support and encouragement.