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AUTOMOBILE INSURANCE POLICIES BUILD "WRITE-AWAY" AROUND FROLIC AND DETOUR, A PERSISTENT PROBLEM ON THE HIGHWAY OF TORTS

WILLIAM A. WINES†

Historians trace the origin of the doctrine of frolic and detour to the pronouncement of Baron Parke in 1834.¹ The debate over the wisdom and the theoretical underpinnings of the doctrine seems to have erupted not long after the birth of the doctrine. No less a scholar than Oliver Wendell Holmes, Jr., questioned whether the doctrine was contrary to common sense.² This doctrine continued to attract legal scholars who were still debating the underlying policy premises as the doctrine celebrated its sesquicentennial and headed toward the second century mark.³ However, the main source of cases which test the doctrine, namely automobile accidents, has started to decline, at least insofar as it involves “frolic and detour” questions and thus the impact of this doctrine may becoming minimized.⁴

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² Oliver Wendell Holmes, Agency, 5 HARV. L. REV. 1, 14 (1891).


⁴ See infra notes 148-51 and accompanying text.

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Automobile insurance carriers appear to be side-stepping the uncertainty and confusion in this area by including "permissive user" language in their policies. In part I - Liability of its "E-Z Reader Car Policy" for Washington State, Farmers Insurance Group carefully defines both insured and non-insured persons as follows:

**INSURED PERSON as used in this part means:**
1. You or any family member.
2. Any person using your insured car.
3. Any other person or organization with respect only to legal liability for acts or omissions of:
   a. Any person covered under this part while using your insured car.
   b. You or any family member covered under this part while using any private passenger car, utility car, or utility trailer other than your insured car if not owned or hired by that person or organization.

**INSURED PERSON does not mean:**
1. The United States of America or any of its agencies.
2. Any person for bodily injury or property damage arising from the operation of a vehicle by that person as an employee of the United States Government when the provisions of the Federal Tort Claims Act apply.
3. Any person who uses a vehicle without having sufficient reason to believe that the use is with permission of the owner.

Thus the doctrine which was initiated by a servant's negligently driving his master's horse cart, progressed slowly in the annals of the law until the dawn of the age of the automobile.5

This article reviews the controversy surrounding the "frolic and detour" doctrine, looks at the Restatement (Second) of Agency position6 on the question, and examines a standard of automobile insurance policy containing the permissive user clause. Next, the results of an empirical test of whether the frequency of litigation has decreased in the "frolic and detour" area is presented. We estimated the volume of cases filed under a West Publishing Company Key number by using the number of pages in the Decennial Digest as a proxy for the quantity of reported cases over ten year periods beginning in 1927 and ending in 1986. Using the Decennial Digest pages, we have attempted to gauge the amount of

6. Restatement (Second) of Agency § 233-37 (1958) (which employs a mix of intention and physical zone of danger tests to determine whether negligence of servant should be imputed to the master).
“frolic and detour” litigation as a percentage of total agency litigation.⁷ The results of the analysis suggest a relative decline in the number of “frolic and detour” cases from the *Fourth Decennial Digest* of 1927-36 to the *Ninth Decennial Digest* of 1977-86.⁸ While this admittedly is a crude empirical measure, the results of the analysis imply some success on the part of insurers in avoiding “frolic and detour” litigation. The analysis suggests that, while the jurisprudential debate continues over whether and how “frolic and detour” makes theoretical sense, the outcome may have been rendered somewhat academic, for the doctrine may be reaching a natural end which should be so reached by all such confusing and conflicting doctrines.⁹

**DISCUSSION**

If the servant, being on his master’s business, took a detour to call upon a friend, the master will be responsible . . . . If he was going out of his way, against his master’s implied commands, when driving on his master’s business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master’s business, the master will not be liable.¹⁰

Thus, Baron Parke, in his charge to the jury, introduced the “frolic and detour” test for applying *respondeat superior* to master and servant cases involving the operation of vehicles. In that case, the servant was to drive on a highway that bypassed the city but instead drove the master’s cart into town for his own purpose and while there negligently collided with the plaintiff for whom the jury returned a verdict. The case of *Joel v. Morrison* established a substantive defense for the employers of negligent servants, namely that of frolic. Unfortunately, the “frolic and detour” doctrine has not acquired consistency over time; rather, it has generated much debate and numerous conflicting decisions. Some of the inconsistency stems from the two different approaches that courts take in applying the defense: (1) The “intent” approach asks why the agent was doing what he was, i.e., was it for the

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⁷ See infra Tables 1 and 2 and Graph 5 and text accompanying notes 130-50.
⁸ See infra Tables 1 and 2.
⁹ The defense of “frolic” is still used in worker’s compensation, military law (primarily duty, temporary duty, and travel cases) and general liability law cases. For illustrative cases, see infra text accompanying notes 102-113.
employer or agent?\textsuperscript{11} (2) The physical "detour" or "departure" cases use the physical point of departure from the route to determine when a "frolic" ends.\textsuperscript{12}

The respondeat superior rule has been roundly criticized.\textsuperscript{13} The justifications for such vicarious liability vary. One theory is that satisfaction coming from a deep pocket is an understandable policy reason for vicarious liability. Others believe that the rule has its basis in revenge. One scholar attempted to track the doctrine back to the Roman law doctrine of paterfamilias\textsuperscript{14}. Ultimately, most respected scholars support the finding that respondeat superior had its genesis in a 1698 decision by Justice Holt.\textsuperscript{15}

In 1923, one distinguished author, Young B. Smith, recommended an "enterprise test" of vicarious liability in an attempt to reconcile the conflicting cases and provide a sound theoretical underpinnings.\textsuperscript{16} This enterprise test asks: (1) whether the conduct of the master's business was a contributing factor of the servant's act; if not, the master is not liable; and (2) if so, the next question is whether, in view of what the servant was employed to do, it was probable that "he would do what he did," instead of inquiring into the servant's immediate motive in doing the act or considering whether the particular act, when separated from its setting, was an act done in furtherance of the particular work which is the focus of the alternative intent test.\textsuperscript{17}

Using an analogy to worker's compensation, Smith further declared that "it would seem desirable to impose liability upon the master in every case where the loss may fairly be regarded as an

\begin{itemize}
  \item 13. Young B. Smith, Frolic and Detour, 23 Colum. L. Rev. 443, 452 (1923).
  \item 15. Smith, supra note 13, at 453. See also James Fleming, Jr., Vicarious Liability, 28 Tul. L. Rev. 161, 165 (1954).
  \item 16. Smith, supra note 12, at 444 & 716.
  \item 17. Id.
\end{itemize}
incident to carrying on the particular enterprise."18 His justifications for making the master liable for his servant’s unauthorized torts was the desire to include, in the costs of operation, inevitable losses, such as those to third persons, incident to carrying on an enterprise. Thus the burden would be distributed among those benefitted by the enterprise. Hence, the enterprise theory of vicarious liability was born.

Some saw a strong analogy between respondeat superior and worker’s compensation. In one passage, Smith emphasized the similarities as follows:

If it is socially expedient to spread and distribute throughout the community the inevitable losses occasioned by injuries to employees engaged in industry, is it not also socially expedient to spread and distribute the losses due to injuries to third persons which are equally inevitable? Surprising as it may seem, by means of the doctrine of respondeat superior the common law has partially accomplished in the latter case what workmen’s compensation statutes have established in the former. [footnotes omitted.]19

Some differences between respondeat superior and the compensation acts were also noted, in part, as follows:

It is not denied that there are substantial differences between compensation acts and the common law doctrine of respondeat superior. The former are more frequently limited in their application to certain industries, whereas the latter applies to all servants. Furthermore, the compensation acts make the employer an insurer against injuries to his employees accidentally caused, whereas respondeat superior makes the master liable to third persons only when the servant is at fault. Moreover, the compensation acts have abolished the defence of contributory negligence, while contributory negligence will prevent a third person from recovering from the master. If the justification of the two be the same, why these differences? The answer would seem to be found in the way in which the two schemes came about. [footnotes omitted.]20

Interestingly, one of the developments of the past seven decades has been the advent of comparative negligence laws which have further reduced the differences between respondeat superior liability and worker’s compensation. Moreover, Smith asks whether it would be more scientific to require an employer to

18. Id. at 718.
19. Id. at 457.
20. Id. at 458.
carry liability insurance on a mandatory basis. Legal requirements that certain parties carry liability insurance have also been enacted.

Smith did explore the limits of this social policy justification for *respondeat superior*. One of the limits to a policy of liability insurance is that it would require including in the costs of productions costs which are not a direct result of such production. Such liability insurance would add to the cost of production the premiums, paid by the employer, for insurance against an employee’s negligent actions which are not related to the employer’s enterprise. This is not only bad economic policy, but there is currently no mechanism for insuring against such losses and liabilities.

Smith also examined the scope of employment limitation, starting with the proposition that the servant who is employed to do a particular work, such as drive a car, cannot be said to be employed only to drive the car properly. If such a narrow scope were given, the servant would not generate liability for the master if he were driving the car improperly even though the servant would actually be engaged in doing the very things for which he had been employed. This narrow definition of the scope of employment would defeat the purpose of the rule of *respondeat superior*.

The refusal to unreasonably restrict the scope of employment results in a basic problem for frolic and detour: if the master is not responsible for his servant’s conduct where the servant’s objective is not connected with the business but, the master is responsible for the servant’s conduct where the servant is disobedient in achieving a business objective, what shall the law do when the servant has two or more objectives only one of which is connected to the master’s business? One suggestion is that the

21. Id. at 458 n.43.
23. Smith, supra note 13, at 461.
24. Id. at 721, The Michigan Supreme Court made the same point more forcefully as follows:

‘Course of employment’ is not a sterile form of words. It is descriptive of life in the industrial age. These human deviations from he course of the automaton do not suspend the employer-employee relationship. They are not departures from employment, but the very substance of it. Crilly v. Ballou, 91 N.W.2d 493, 505 (Mich. 1958); see also Geeslin v. Workmen’s Compensation Comm’r, 294 S.E.2d 150, 155 (W. Va. 1982) (citing this proposition with approval in this case).
25. Smith, supra note 13, at 721.
same two-part analysis also solves the mixed motive problem.\(^{26}\) Further, it was argued that the master's liability be confined to deviations of the servant which, in view of what the servant was employed to do, were probable.\(^{27}\) Thus, the concept of "probable deviation" emerged.\(^{28}\)

A more difficult problem involves the situation "where the servant has temporarily abandoned the master's work [frolic] and later attempts to resume his work for the master. At what point, either in time or in space does the master's liability re-attach?\(^{29}\)\(^{30}\) This is, indeed, a difficult issue. Courts split on this matter.\(^{30}\) As to this issue, the servant's intent was viewed as marking a better boundary for liability than the zone of risk theory. Under an intent standard, the servant was said to be back within the umbrella of liability when he intended to resume the master's business.\(^{31}\)

Under the zone of risk theory, the servant would not come back under the master's liability umbrella until such time that he reached a point in a zone wherein his labors would have been consistent with an act of mere deviation had the original act been such as to have been a detour rather than a frolic.\(^{32}\) This probable conduct theory might be applied in this instance as suggested by Young B. Smith. Where a driver, for example, goes beyond any zone in which he was likely to venture, considering his employment and the scope thereof, the employer should not be liable for any injury to third parties until the driver returns to the foreseeable zone in which he might "wander" within his employment.\(^{33}\) The following observation was also made:

It does not follow that the mere re-entry of the servant into the zone of risk renders the master responsible for the servant's acts. Such reentry must be coupled with an intention on the servant's part to resume the master's business.\(^{34}\)

\(^{26}\) Id. at 721-22.
\(^{27}\) Id. at 724.
\(^{28}\) Id. at 725.
\(^{29}\) Id. at 727.
\(^{30}\) Id. at 727 (citing Riley v. Standard Oil Co., 132 N.E. 97 (N.Y. 1921)).
\(^{31}\) Smith, supra note 13, at 727 (citing Dokweiler v. American Piano Co., 94 Misc. 714, 160 N.Y. Supp. 270 (1916)).
\(^{32}\) Id. at 727 (citing Dokweiler v. American Piano Co., 94 Misc. 714, 160 N.Y Supp. 270 (1916)).
\(^{33}\) Id. at 728.
\(^{34}\) Id. at 728 n.47.
Thus, some would adopt the intent theory limited by the zone of probable deviation. Smith, for instance, endorses the results in several cases from New York which he analyzes without endorsing the language of the court or the method by which the result was reached:

However, if one will turn to the decisions dealing with the liability of employers to their employees under Workmen's Compensation statutes, the ideas above expressed will seem common place. The purpose of this paper has been to point out that the two problems are fundamentally the same. Once the courts have recognized this fact, much of the mist of which now surround respondeat superior will disappear; the riddle of 'frolic' and 'detour' will be solved.35

The initial commentary on this method for resolving the question of when a frolicking servant had returned under the umbrella of liability appeared the same year as Smith's article.36 In this note by Elizabeth T. Rouse the dominant purpose test was criticized as generating confusion and conflicting decisions in the jurisdictions which used it. Further, this note asserted a growing social tendency to shift the loss to the party best able to bear it even without fault37 and found the intent plus probable deviation theory to be most in accord with the modern tendency.38 It also suggested that such an approach best reflected the economic principles of respondeat superior.39

Rouse went on to characterize its chosen test as "whether the servant was in the zone of the employment at the time of the accident.40 Rouse continued:

... the zone might be defined as the radius in which under all the circumstances the servant might be expected to go. To render the master liable the conduct of his business must have been a contributing cause of the servant's act in starting out. The real question, however, would be 'whether in view of what the servant was actually employed to do it was probable that he would do what he did.'41 [This aspect of the test is much like the enterprise approach.]

35. Id. at 731.
37. Id. at 126.
38. Id. at 127.
39. Id.
40. Id.
41. Id.
The note suggested that at the time a master sends his servant on business in a vehicle, the master necessarily exposes third parties to danger both from expressly authorized acts and from such deviation as a servant would be likely to make under the circumstances. "It is only just that the master pay for injuries occurring in a radius where it might be contemplated, from the nature of employment and of servants in general, that such actions would occur."42

The intent plus probable deviation concept, as described in the Kentucky Law Journal, was "broad enough in its scope to include various tests that had been formerly used."43 To determine probability of deviation, whether the servant was intended to travel, and the distance he actually went, would all be important.44 Moreover, to render the master liable, the servant must have had the furtherance of his employment in mind in starting out.45 In some cases, the extent of his departure is so clearly disproportionate to the distance of the trip as to entirely remove the servant from the employment.46 Thus, seen through the eyes of Elizabeth T. Rouse and the Kentucky Law Journal, the 1923 Columbia Law Review piece may have given rise to the "motivation-deviation" standard47 for determining liability under "frolic and detour," a standard which blends the dominant purpose test with the territorial zone of risk test.48

In 1929, William O. Douglas, later of the United States Supreme Court and then Sterling Professor of Law at Yale, wrote a two-part article entitled "Vicarious Liability and Administration of Risk."49 In this article, Douglas attempted to translate the rules of vicarious liability including "frolic and detour," into administration of risk concepts.50 Douglas commenced his article with five hypothetical cases involving "frolic and detour."51 After

42. Id.
43. Id.
44. Id.
45. Id. at 128-129.
46. Id. at 127.
47. Id. at 126.
48. Id. at 127.
51. Id. at 585-604.
analyzing each of the five cases, he concluded that there was no logic to any of the well known distinctions between frolic and detour on an administration of risk approach.\(^{52}\) Indirectly, Douglas embraced the entrepreneur theory and Smith's economic rationalization for the frolic and detour rules.\(^{53}\)

The next article on frolic and detour appeared in the *Missouri Law Review*.\(^{54}\) This comment written by E.C. Curtis stated that while there is "a tendency to give a plaintiff relief against a large corporation [in frolic and detour cases, such] recovery would be denied in similar circumstances against an individual."\(^{55}\) It cited Riley v. Standard Oil Co.\(^{56}\) as evidence of such a trend. The comment criticized the entrepreneur theory as working fairly well from the standpoint of risk administration in cases involving commercial employers but not being satisfactory when applied to non-commercial employers.\(^{57}\)

A 1952 *Marquette Law Review* note\(^{58}\) analyzed a Wisconsin Supreme Court case,\(^{59}\) which employed an intent test to determine liability of a master for the acts of a servant, criticizing a 1950 Ohio case decision, *Skapura v. Cleveland Electric Co.*,\(^{60}\) that didn't use this test. The note states that the Wisconsin rule would lend itself to a wide application and should be preferred over the rule announced in the Ohio case that would put an employee outside the scope of employment where there is any deviation.\(^{61}\) The note concluded by citing the *Restatement of Agency* rule\(^{62}\) which holds that if the agent is motivated by a purpose to serve this master's business to any appreciable extent, the master should be subject to liability. This rule would, apparently, "give a result similar to the rules of Wisconsin and Washington."\(^{63}\) The

\(^{52}\) Id. at 593.

\(^{53}\) Id. at 734-35.


\(^{55}\) Id. at 355.

\(^{56}\) 132 N.E. 97 (N.Y. 1921).

\(^{57}\) Id. at 356.


\(^{59}\) Linden v. City Car Co., 300 N.W. 925 (Wis. 1941).

\(^{60}\) 100 N.E.2d at 700.

\(^{61}\) Frauentorfer, *supra* note 58, at 384.

\(^{62}\) *Restatement of Agency* § 236 cmt. b (1933).

\(^{63}\) Frauentorfer, *supra* note 58, at 385.
Restatement rule “would seem to be a better rule” than the one applied in Ohio.\textsuperscript{64}

In the same year, Skapura was criticized in the University of Cincinnati Law Review.\textsuperscript{65} In Skapura, the defendant was a public utility serving customers in the Cleveland area and employed sixty-three (63) people for the purpose of meter reading alone.\textsuperscript{66} Except for meter readers assigned to distant areas, all readers were directed to use public transportation.\textsuperscript{67} Five automobiles were provided for distant meter readers, and those readers were instructed to proceed by the most direct route to their respective areas.\textsuperscript{68} Each driver was to transport one other designated reader to an adjacent area but was not to give rides to anyone else.\textsuperscript{69} One particular meter reader, who was provided with an automobile, was assigned to an area which could be reached by traveling a main boulevard.\textsuperscript{70} However, instead of proceeding out the boulevard, the meter reader deviated and picked up other meter readers in violation of company rules.\textsuperscript{71} He then returned to the boulevard and proceeded along a direct route several miles to a place where he stopped and had breakfast with the other meter readers.\textsuperscript{72} Then, instead of continuing on the boulevard, the driver turned south and drove two miles to a point where he dropped off the unauthorized passengers.\textsuperscript{73} As he proceeded to return in the direction of the boulevard, the driver negligently ran into the plaintiff.\textsuperscript{74}

On the appeal of the verdict in favor of the plaintiff against the public utility, the appellate court reversed and entered final judgment for the utility citing with approval the general rule in Ohio as follows:

The owner of an automobile is not liable for injuries to a . . . third person caused by the negligence of an employee in the operation of the automobile, unless it is proven that the employee, at the time

\textsuperscript{64. Id.}
\textsuperscript{65. Note, Administration of Risks Through Ohio’s Application of the Frolic and Detour Test, 21 U. CIN. L. REV. 156 (1952).}
\textsuperscript{66. Id. at 159.}
\textsuperscript{67. Id.}
\textsuperscript{68. Id.}
\textsuperscript{69. Id.}
\textsuperscript{70. Id.}
\textsuperscript{71. Id.}
\textsuperscript{72. Id.}
\textsuperscript{73. Id.}
\textsuperscript{74. Id.}
was engaged on his employer's business and was acting within the scope of his employment. 75

The plaintiff contended that the meter reader's digression furthered company business since he transported three of its employees to their work areas. 76 The court stated that there was no evidence to show how such activities benefited the defendant, and it could be inferred that the digression was for the accommodation of the driver's friends and for their social convenience. 77 The appellate court further ruled on the above facts that it was so clear that the servant was not operating the automobile on his master's business or within the scope of his employment that it was reversible error for the trial court to permit the case to go to a jury. 78

Malcom summarized in the University of Cincinnati Law Review the "zone of risk" test by saying that it involved a case-by-case determination. 79 Further, the time of the accident and the extent of the servant's deviation are important factors for defining the zone. 80 It is more probable that a deviation of one mile will result from an assigned drive of 10 miles than from a drive of 10 blocks. 81 "It [is] a question of fact for the jury in each case whether in view of all the facts and circumstances the accident occurred where the master might reasonably expect to find the particular servant, that is, within the 'zone of risk.'" 82

Although Malcom found the "zone of risk" test to be the better rule, he also approved of the "motivation-deviation" test which applied in most jurisdictions in 1952. 83 Under the motivation-deviation test the employee is under the master's liability umbrella if:

1) in doing the act from which the tort resulted he was motivated in part at least by the desire to serve his employer;

75. Skapura v. Cleveland Elec. Illuminating Co., 100 N.E.2d 700, 701 (1951) (quoting White Oak Coal Co. v. Rivoux, 102 N.E. 302 (Ohio 1913)).


77. Id.

78. Id.

79. Id. at 171.

80. Id.

81. Id.

82. Id.

83. Id. at 171-72.
2) it further appears that the act from which the tort results was not an extreme deviation from the normal conduct of such employees.\textsuperscript{84}

Using either of these two approaches, "zone of risk" or "motivation-deviation," better allocates any risk of loss due to the general hazards of business, taxing the cost to the public as a whole rather than to individual injured parties; thus the courts could use either test to better administer the inherent risks of doing business by the use of agents.\textsuperscript{85}

In 1954, the \textit{Tulane Law Review} included a major article by Fleming James, Jr., Lafayette S. Foster Professor of Law at Yale Law School.\textsuperscript{86} Professor James traced the origins and history of the doctrine of vicarious liability and then turned to the problem of "frolic and detour." Between the two extreme but clear cases, one in which a slight detour does not interrupt the master's liability and the second in which a complete abdication of the pursuit of the master's business absolves the master of liability, James finds the "greatest confusion and contrariety of opinion."\textsuperscript{87} According to Professor James, the tendency on the part of modern courts has been to "recognize the importance of a number of factors [while] attaching to each a weight that varies" under the facts of each case thereby generating a question for the jury.\textsuperscript{88} The factors include the time and place of deviation, its extent with relationship to the assigned route, the motivation of the servant, and whether the deviation is of the sort normally made by servants on such assignments.\textsuperscript{89} On the whole, Professor James concludes that "this approach seems commendable."\textsuperscript{90}

However, in setting limits to the jury's function, courts need to keep in mind the basis for vicarious liability, namely, that the employer should be liable for those faults which may "fairly be regarded" as risks of his business.\textsuperscript{91} In urging this, Professor James found that some holdings involved a weighing of individual items among the factors at the expense of the underlying principle. Thus, some courts have held that a deviation which "involves

\begin{itemize}
\item \textsuperscript{84} \textit{Id.} at 172.
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} Fleming James, Jr., \textit{Vicarious Liability}, 28 \textit{Tul. L. Rev.} 161, 165 (1954).
\item \textsuperscript{87} \textit{Id.} at 182.
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} \textit{Id.} at 178.
\end{itemize}
a distinct departure from a prescribed route and [was] made to serve only the servant's personal interest, is a temporary, abandonment of ... service even though the deviation is relatively insignificant and not unusual. 92 Unfortunately, according to James, the Restatement of Agency language, the illustrations given, and the reporter's notes all suggest that such a case is not meant to be covered by respondeat superior. 93

Professor James also raises the difficult question of when a servant who has temporarily abandoned his master's service will be held to have reentered it for purposes of attaching liability to the master. 94 The analysis of the cases leads him to believe that most courts have required both an intent to reenter service and some concrete conduct that brings the servant again "within the flexible limits of his employment, as to time and space." 95 Also discussed are acts which, while not involving physical deviation from an assigned task, are done on the job but are in no way intended to further the assignment. 96 Typical of such activities is smoking, with its attendant fire hazards. 97

On the smoking cases, there are at least three approaches to imputing negligence to the employer. 98 First, all courts would hold the employer liable if he permitted smoking or failed to take reasonable steps to prevent it on jobs where smoking was unreasonably dangerous. 99 Some courts are unwilling to go beyond that and regard smoking as outside the scope of employment. 100 Second, there is a line of cases which hold that an employer or master is liable if smoking makes negligent the manner of performing an act which is within the scope of employment. 101 Professor James criticizes that rule as leading to capricious results such as the case of Kelly v. Louisiana Oil Refining Co. 102 In Kelly, the driver of a gasoline truck went into a cotton broker's place of business to telephone his employer. 103 While there, the driver lit a cigarette and

92. Id. at 182.
93. Id. at 182-83.
94. Id. at 184.
95. Id.
96. Id. at 185.
97. Id.
98. Id. at 185-86.
99. Id. at 185.
100. Id. at 186.
101. Id. at 188.
102. 661 S.W.2d 997 (Tenn. 1934).
103. Id.
tossed the match into loose lint cotton.\textsuperscript{104} The employer was held not liable although the Tennessee court suggested the result would have been otherwise had the driver tossed the match into the gasoline he was delivering.\textsuperscript{105}

The third and broader view is suggested by a 1950 California case\textsuperscript{106} which framed the issue in terms of whether the injury was one of the "risks of enterprise."\textsuperscript{107} Since the presence of employees on the job was attended by the smoking risk, such a risk was held there to be one of the risks arising out of employment.\textsuperscript{108} The smoking or the manner of it on the employee's part must be negligent in the first place to create any liability at all to anyone.\textsuperscript{109} Such a result is entirely consistent with economic principles of vicarious liability. This last approach may not be as viable in 1993 as it was 30 years earlier due to the decline of smoking among the U.S. public generally\textsuperscript{110} and the increasing public disapproval of smoking\textsuperscript{111} which has been boosted by increasing awareness of health hazards associated with smoking.\textsuperscript{112}

Professor James finds "the most troublesome case" to be the one where the master's affairs are not being furthered but where the servant deliberately injures a plaintiff in a quarrel that does arise out of the employment.\textsuperscript{113} Thus, hypothetically, a truck driver collides with an automobile and in the altercation which occasionally follows an accident, the driver loses her temper and strikes the plaintiff.\textsuperscript{114} Or, as an additional hypothetical, a restaurant counterman is angered by insults over a sandwich, and he

\textsuperscript{104} Id.
\textsuperscript{105} Id. (as quoted in James, supra note 87, at 185).
\textsuperscript{107} James, supra note 86, at 185 (quoting George, 205 P.2d at 1037).
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 186 n.99.
\textsuperscript{112} Id. See also a study by James Ryan of the Harvard School of Public Health quoted in, THE EMPLOYMENT GUIDE, at 14 (Washington D.C.: Bureau of National Affairs 1992), wherein results indicate smokers have a 2.9% excess risk of occupational accidents, a 4.0% excess risk of injury on the job and a 3.4% higher absentee rate as compared to nonsmokers.
\textsuperscript{113} James, supra note 86, at 192.
\textsuperscript{114} Id.
strikes a customer. The majority of courts do not allow recovery in these cases except on much narrower grounds such as non-delegable duties or negligence in employing a person known to be hot-tempered. There was a then recent California Supreme Court opinion (1949) in which arguments for permitting recovery were made along the line of worker's compensation cases holding that similar injuries to workers arise in the course of their employment.

Interestingly, in regards to the dangerous instrument doctrine, which creates special agency rules for the operation of dangerous instruments, Professor James makes the following observation:

Even where there is no such statute [i.e., denying application of the dangerous instrumentality rule to automobiles], the provisions of the standard non-commercial automobile liability insurance policy extend its protection to anyone driving the car with the insured's consent, thereby making any question of vicarious liability unimportant.

This passage is intriguing because it raises the possibility that much of the debate about frolic and detour may have been rendered academic by the provisions in liability insurance policies. Moreover, it raises the possibility that an anomalous result would arise in a situation in which "frolic and detour" rules denied liability recovery against the employer to the third party while the worker's compensation rules allowed the employee to recover against the employer. It would be anomalous in that case because, the "frolic and detour" doctrine would hold the accident to have been outside the employment at the exact time that the worker's compensation rules held it to be within the scope of employment and arising out of it.

In 1961, the "zone of risk" approach was criticized based upon the entrepreneur theory of vicarious liability first publicized in this country by Young B. Smith and more fully developed by William O. Douglas. In a Yale Law Review article, C. Robert Morris investigated the insurance and risk spreading functions of the zone of risk approach, in an attempt to discover whether such

115. Id.
116. Id.
117. Id. at 190-91 (citing George, 205 P.2d at 1037).
118. James, supra note 86, at 192.
functions provided a good basis for legal theory. He characterized the number of articles on the subject as part of a continuing debate arising from Oliver Wendell Holmes' disparagement of vicarious liability as contrary to common sense.\textsuperscript{120}

Morris lists three main criticisms of what he terms "the Smith-Ehrenzweig method" for defining the extent of entrepreneur responsibility.\textsuperscript{121} First, the method suffers from a mistaken concept of risk.\textsuperscript{122} Second, it fails to take into account certain insurance practices dictated by the nature of the risk and principally reflected in actuarial science.\textsuperscript{123} Finally, the method is tautological in the sense that a zone of risk approach would have the law decide which losses should be charged to the entrepreneur by discovering for what losses he has provided.\textsuperscript{124} But the entrepreneur provides only for the losses the law dictates he must bear; thus, the theory is circular.\textsuperscript{125}

After an extensive analysis of actuarial methods, risk, and logic, Morris concludes that there is "real truth" in risk spreading as a rationale for enterprise liability.\textsuperscript{126} But the rule does not provide a sound premise for logical expansion elsewhere and is not very useful in defining the proper extent of liability. Where other factors are equal, the rule can point to the desirability of placing the burden upon a financially solvent institution in preference to a weak one. It may also stress the importance that the burden be relatively stable from an actuarial point of view. On the other hand, some uncertainty or chaos is tolerable; and most judgments based on enterprise liability are the products of chance.\textsuperscript{127} The entrepreneur can adjust to chance here if the law provides additional chance elements of such a magnitude as those which govern losses because the total cost would approximate actuarial prediction.\textsuperscript{128}

\begin{itemize}
\item \textsuperscript{120} Id. at 554.
\item \textsuperscript{121} Id. at 560.
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id. at 560, 581.
\item \textsuperscript{126} Id. at 599.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id.
\end{itemize}
A survey of the case law indicates that contrary, confusing, and, in some cases, outrageous decisions abound. Perhaps the classic outrageous case occurred in 1945 in South Carolina.\(^{129}\) There, in *Carroll et al. v. Beard-Laney, Inc.*, the Supreme Court of South Carolina held that a jury question was presented as to whether the employer was liable for fire damage to plaintiff's house in a setting in which a drunken gasoline truck driver decided after only unloading one-third of his cargo to return to duty via another town in order to see a girlfriend.\(^{130}\) When pursued by police, he was last observed speeding to avoid capture.\(^{131}\) The gasoline truck overturned in the town in which the girlfriend lived and set fire to plaintiff's house.\(^{132}\) The Supreme Court of South Carolina characterized this as a dual motive case.\(^{133}\) Our policy question here is whether any version of enterprise liability theory might give rise to that result.

In *McKinley v. Rawls*,\(^{134}\) the Fourth Circuit held that the question of whether a tire serviceman, who had left his employer's place of business at noon to make a delivery in the company's truck, and who is involved in a collision with an automobile about two hours later after he had allegedly gone home for lunch in a direction away from the place of delivery but before he had delivered tires, had deviated from his employment presented a question for the jury. The Supreme Court of Alaska held that an insurance salesman attending a three-day sales conference who had left the conference seeking out-of-state guests with whom to socialize and who, upon failing to find any guests, had been involved in an accident returning to the conference site would generate liability for his employer.\(^{135}\) Both of these cases seem to be consistent with the enterprise theory of liability expounded by Dean Smith.

In *Ryan v. Western Pacific Insurance, Co.*,\(^{136}\) the Oregon Supreme Court, *en banc*, addressed the question of liability of an employer's insurer for injuries arising out of an accident in which

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130. *Id*.
131. *Id*.
132. *Id*.
133. *Id*.
134. 333 F.2d 198 (4th Cir. 1964).
136. 408 P.2d 84 (Or. 1965).
the employee was driving the employer’s truck at approximately 1:45 a.m. near a club in Portland where the employee had eaten and, perhaps, drank following the use of the truck for moving his household goods. The court affirmed a lower court’s decision against the insurance company on the grounds that the employee was a permissive user. They rejected the minor deviation rule. Instead the court stated that at the time of the accident, the employee was still driving for a personal use, although a different personal use than that contemplated by the supervisor giving permission. The time and place the accident occurred were within the general permission granted and as such the employee was a permissive user for purposes of the automobile insurance policy.

The court emphasized, using the following language, the confusing nature of the problem in this area:

However, here, the problem is not whether Sinovic was acting within the scope of his employment; the problem [was] whether Sinovic, who was held individually liable to [the] plaintiff, is insured individually as a permissive user under Tum-A-Lum’s policy. The scope of employment problem is mentioned only because of sometime confusion with the problem at hand.137

This passage emphasizes the type of problem first highlighted in 1954 by Professor James’ article.

In 1980 the Supreme Court of Wyoming held in Beard v. Brown there was no question for a jury of whether an employee was within the scope of her employment when an automobile collision occurred while she was driving home from work during paid travel time.138 In that case the court decided that since reasonable minds could not differ as to whether the employee’s trip home was within the scope of employment the court could decide the case as a matter of law.139

Even though that result might be defensible had it been returned by a jury, it is hard to understand how the result must be reached as a matter of law. Moreover, there is some reason to believe that the employee driver might be entitled to recover worker’s compensation for the injuries she received in the accident even though the third party plaintiff would be denied recovery from the employer. Such a result seems somewhat anomalous.

In Anderson v. Sam Monday Motors, Justice Brock writing for the Tennessee Supreme Court held that an injury to an employee

137. Id. at 85 [emphasis added].
138. 616 P.2d 726 (Wyo. 1980).
139. Id. at 735 (citing Miller v. Reiman-Wuerth Co., 598 P.2d 20 (Wyo. 1979)).
which occurred when the employee had stopped on his way home to purchase milk for home consumption arose out of and in the course of employment where the employer provided the employee with a demonstrator automobile for his personal use as a form of advertisement. The court also ruled that stopping to purchase milk did not constitute a "frolic and detour" or deviation so as to take the injury outside the worker's compensation law coverage as follows:

Considering the fact that this employer had never laid down any hard and fast rules to be followed by the plaintiff-employee in the use of the demonstrator automobile and particularly had not designated any particular route that he was required to travel between his work and his home, in our opinion, no deviation had occurred at the time of this accident. The employee was still in route [sic] from his place of work to his home. Merely stopping along the way to purchase a gallon of milk for his home consumption did not constitute a "frolic and detour" or a "deviation." [citation omitted] Such stops along the route between the employer's place of business and the plaintiff's home had not been forbidden to him.

Here, the employer chose to furnish the employee with an automobile for the purpose of providing transportation between his place of work and his residence, thereby extending the protection of the Worker's Compensation Laws to that journey. . . . The law does not prevent the parties from thus extending the protection of the Worker's Compensation Law. Moreover, if the employer had intended to do so, it was free to designate a hard and fast rule with respect to the employee's choice of routes between his work and his home; but it did not do so. [emphasis added]

Intriguingly, the court applied "frolic and detour" rules to determine whether or not the worker's compensation law of Tennessee applied. The court then emphasized that the employer had done nothing to forbid a shopping trip on the way home, and thus the employer should be satisfied to have coverage upheld under the worker's compensation laws.

Courts have continued to be reluctant to impose respondeat superior liability on employers when the employee engages in intentional activities which do not further the business of the

140. 619 S.W.2d 382 (Tenn. 1981).
141. Id. at 383.
employer. But dual purpose cases, with their inherent problems, have continued to generate liability for employers even including the U.S. government under the Federal Tort Claims Act.

The reason to attempt to avoid litigation in the frolic and detour arena is the great uncertainty involved in predicting case results. For example, there are some strikingly disparate results in cases involving military personnel under the Federal Tort Claims Act. In Cooner v. United States, the Fourth Circuit held that an Army officer who was proceeding from one duty station to another on orders, driving by a direct route, and authorized to drive his privately owned automobile on a reimbursed basis on travel status could generate liability for the U.S. government as a result of an automobile collision in New York. The Fourth Circuit held the U.S. government subject to liability even though the U.S. Army could not have ordered the use of the private vehicle, and the officer's normal Army duties did not include driving vehicles.

Contrast that result with McSwain v. United States where the Third Circuit held that the U.S. government had no liability for an automobile accident which arose in Colorado as a result of negligent driving by a Marine Corps corporal en route from Camp Pendleton, California to Memphis, Tennessee with leave days, as well as travel time en route. The court there emphasized the physical location of the accident 300 miles north of the direct route from Camp Pendleton to Memphis. This geographical deviation, in conjunction with the availability of leave days, was held to be substantial, geographically.

An exceptionally liberal case under the Federal Tort Claims Act involving military personnel, Williams v. United States held that a jury question was presented where an infantry sergeant carelessly failed to return field simulator explosive devices to the supply sergeant and left them in a cigar box in a drawer in his home. Several months later, the sergeant was overseas, and

144. 276 F.2d 220 (4th Cir. 1960).
145. Id.
146. 422 F.2d 1086 (3rd Cir. 1970).
147. Id.
148. 352 F.2d 477 (5th Cir. 1965).
his wife gave the simulators, which resembled M-80 firecrackers, to a babysitter. The babysitter took the simulators home and ignited the fuse on one of them carrying it to the door with the intent of throwing it outside to see it explode. Before he could throw it, the simulator went off in the 13-year old boy's hands; causing severe injuries which were the basis of the federal action. The Fifth Circuit held that it was conceivable in law that a wife of a soldier might fail to recognize the dangerous potential of such simulator devices and fail to take due care to the point of giving the devices away to a 13-year old boy.\textsuperscript{149}

**A Brief Examination of Permissive User Clauses**

The standard language of a permissive user clause, one example of an "omnibus clause" as it is sometimes called, is that the insurer agrees to provide liability coverage to "the named insured and any resident of the same household and any other person using such automobile with the permission of the named insured . . ."\textsuperscript{150} Even though this clause has generated some interesting litigation, it entirely evades the common law issue of agency and the ensuing issue of frolic and detour by not focusing, as older policies did, on indemnifying the named insured against liability that he might be "legally obligated to pay" as a result of the operation of the insured vehicle.\textsuperscript{151}

Some states have mandated use of permissive user language under so-called "financial responsibility" laws while others have mandated such language under insurance statutes and regulations.\textsuperscript{152} As one leading encyclopedic authority asserts, the result has been that "ordinarily, an automobile policy will cover liability for injury to a third person arising from the negligent operation of the vehicle by the insured's servant."[citations omitted]\textsuperscript{153}

\textsuperscript{149} *Id.* at 481.

\textsuperscript{150} ROBERT E. KEETON AND ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES (Practitioner's Ed.) 1211 (West Co. 1988).

\textsuperscript{151} ROBERT E. KEETON, INSURANCE LAW: BASIC TEXT 662, app. H (1971).

\textsuperscript{152} See, e.g., ARIZ. REV. STAT. ANN. §§ 28-1101, 28-1170(B)(1,2) (1995); see also IDAHO CODE §§ 41-202, 41-203, 41-1812, and 41-1814 (1994) (under which the Director of the State Department of Insurance is granted authority to approve or disapprove provisions in all standard contracts of insurance issued in the State of Idaho).

\textsuperscript{153} See, e.g., cases collected by APPLEMAN, INSURANCE LAW AND PRACTICE in Pub. 6C, Deviation from Permission Granted § 4368 (Buckley ed. 1979).
The intent to provide coverage and avoid the squabbles over coverage can be found in some judicial opinions that declare a presumption in favor of coverage. Some litigation has been generated under the permissive user language that is unique to it such as the question of whether lawful possession is synonymous with permission and whether a vehicle permittee has authority to delegate someone else a permittee so as to require coverage of that person's driving. One commentator has described the public policy of New Jersey that favors coverage as a "come hell or high water" presumption of coverage. To the author, the result is a far cry from the kind of case-by-case determinations under agency's troublesome frolic and detour concept and seems to represent significant progress in the law.

EMPIRICAL EVALUATION

For many years, automobile accident cases were the leading contributor to cases in the frolic and detour area. If the "permissive user" language in automobile insurance policies has effectively avoided litigation then we can expect to see a significant decline in the frolic and detour cases as a percentage of agency cases. In view of the large increase in total reported cases since 1926, we believe that the absolute number of "frolic and detour" cases might grow while at the same time becoming less significant when measured against the total number of cases involving issues of agency. Actual numbers of cases are not readily available.

154. APPLEMAN, supra note 154, at § 4371 (where the editors state "[a]lthough there is generally considered to be a presumption that use made of the automobile by a person other than the owner is with such owner's consent [citations omitted], the plaintiff bears the burden of proof to show that permission actually existed under the facts and circumstances of the case" [citations omitted]).

155. See Caison v. Nationwide Ins. Co., 36 N.C. App. 173, 243 S.E.2d 429, appeal after remand, 45 N.C. App. 30, 262 S.E.2d 296 (1978) (in which "lawful possession" of an automobile and "permission" to operate under the automobile insurance policy were held to be different standards, not synonymous).

156. See generally APPLEMAN, supra note 154, § 4361 and decisions cited therein.


158. Sykes, supra note 3, at 583.

Consequently, we used the number of pages as a proxy for the number of cases. We soon discovered a problem with our chosen proxy. In Digest IV (1927-36) and Digest V (1937-46), West Publishing used a two (2) column format; after 1946, West changed to a three (3) column format. In order to have comparable data, we modified the page data for Digests IV and V to reflect the number of pages those digests would have contained had they been prepared in a three (3) column format. Note the relative occurrence ratio remains constant since both the numerator and denominator are reduced proportionately, i.e. two-thirds. See the data in Table 1 unadjusted and in Table 2 as modified to achieve comparability.

**TABLE 1. ACTUAL PAGES**

<table>
<thead>
<tr>
<th>Digest</th>
<th>Year</th>
<th>Total Pages</th>
<th>Pages of 302(1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>IV</td>
<td>1927-36</td>
<td>53,327</td>
<td>9.2</td>
</tr>
<tr>
<td>V</td>
<td>1937-46</td>
<td>105,204</td>
<td>15.25</td>
</tr>
<tr>
<td>VI</td>
<td>1947-56</td>
<td>53,334</td>
<td>8.33</td>
</tr>
<tr>
<td>VII</td>
<td>1957-66</td>
<td>55,106</td>
<td>7</td>
</tr>
<tr>
<td>VIII</td>
<td>1967-76</td>
<td>78,329</td>
<td>8</td>
</tr>
<tr>
<td>IX</td>
<td>1977-86</td>
<td>115,021</td>
<td>10.75</td>
</tr>
</tbody>
</table>


In order to get a basis for visual comparison, we developed bar graphs to show the number of actual pages in the topic of Master and Servant for the Decennial Digests since 1927 (See Graph 1) and then modified the data to adjust for the lack of a third column in Digests IV and V (See Graph 2). Note that in Graph 2, after modification, the bar graphs — with a jump in Digest V during World War II years — reflect a steady growth in litigation and reported cases.

Following the same line of development, we counted and graphed the actual number of pages in the Decennial Digest devoted to key number 302(1), scope of employment generally. (See Graph 3) Next, we modified the data to reflect comparable columns per page. (See Graph 4)

TABLE 2. ADJUSTED PAGES

<table>
<thead>
<tr>
<th>(A) Digest</th>
<th>(B) Year</th>
<th>(C) Total Pages</th>
<th>(D) Pages of 302(1)</th>
<th>(D)/(C)</th>
<th>1927-36 Base</th>
<th>Relative Occurrence</th>
</tr>
</thead>
<tbody>
<tr>
<td>IV</td>
<td>1927-36</td>
<td>35,550</td>
<td>6.13</td>
<td>0.000 172</td>
<td>0.000 172</td>
<td>100%</td>
</tr>
<tr>
<td>V</td>
<td>1937-46</td>
<td>70,136</td>
<td>10.17</td>
<td>0.000 145</td>
<td>0.000 172</td>
<td>84%</td>
</tr>
<tr>
<td>VI</td>
<td>1947-56</td>
<td>53,334</td>
<td>8.33</td>
<td>0.000 156</td>
<td>0.000 172</td>
<td>91%</td>
</tr>
<tr>
<td>VII</td>
<td>1957-66</td>
<td>55,106</td>
<td>7</td>
<td>0.000 127</td>
<td>0.000 172</td>
<td>74%</td>
</tr>
<tr>
<td>VIII</td>
<td>1967-76</td>
<td>78,329</td>
<td>8</td>
<td>0.000 102</td>
<td>0.000 172</td>
<td>59%</td>
</tr>
<tr>
<td>IX</td>
<td>1977-86</td>
<td>115,021</td>
<td>10.75</td>
<td>0.000 093</td>
<td>0.000 172</td>
<td>54%</td>
</tr>
</tbody>
</table>


Note that in Graph 4, we find the number of pages from 1927 to 1986 devoted to key number 302(1) to be fairly constant. Now, we set the ratio of 302(1) pages to Master and Servant pages in Digest

GRAPH 1. ABSOLUTE GROWTH IN PAGES


IV equal to 100 and generated a comparison with the ratios for subsequent digests. (See Graph 5.) Note the almost steady decline in the proportion of Master and Servant cases devoted to the issue of scope of employment. This decline suggests some success in avoiding frolic and detour litigation under automobile insurance policies. If the “riddle of frolic and detour” has not been solved, the insurance companies seem to have found a way to avoid some of the litigation costs historically associated with it.
The avoidance of a difficult problem may be the next best thing to solving it.

**Observations and Conclusions**

My review of the literature and of the recent cases convinces me that Young B. Smith's article, which is 65 years old, still has currency and should not be "retired." The application of a consistent underlying policy would tend to reduce the number of contrary and conflicting opinions in this area. Moreover, the parallel to worker's compensation laws is still attractive. There is the possibility for a new inquiry in this regard, to wit, whether the scope of the enterprise should be uniform and not dependent upon whether a third party seeking liability from the enterprise or whether the employee is seeking liability. There is also reason to be concerned that courts are looking either to insurance provisions to determine liability coverage in automobile cases or looking exclusively to frolic and detour rules to determine insurance coverage.

At an initial, abstract level, perhaps liability coverage should be read as requiring first some liability through standard agency principles for an employer and secondly within such a context the use of permissive user clauses. The results of such an approach

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would be to render the permissive user question one of a qualifier for the underlying liability issue. Additionally, there is some attraction to having worker's compensation questions produce at least compatible answers with the same inquiry raised on a frolic and detour basis. From my readings, the courts are a long way from such a result.

In conclusion, it seems that Young B. Smith was quite premature in asserting in 1923 that a simple reference to the worker's


compensation laws would "solve the riddle" of frolic and detour.\textsuperscript{162}
It also appears that Fleming James would be as accurate today as
he was in 1954 in ascribing the "greatest confusion and contrari-
ety" to the "frolic and detour" cases.\textsuperscript{163}
Someone once said that "if
you can think about something that is related to something else
without thinking about the thing to which it is related, then you
have a legal mind."\textsuperscript{164}
Apparently, the courts which have been
wrestling with the issues discussed above have been blessed with
"legal minds." The problem of frolic and detour seems to be no
nearer a logical resolution than it was in 1923. Fortunately, how-
ever, the law has made this seemingly insolvable problem much
less significant by substituting the "insurable driver" issue in the
standard automobile liability insurance policy for the problems of
frolic and detour in the law of agency. This apparent bypassing of
the knotty problem of frolic and detour is not in the classic tradi-
tion of the common law's evolving to meet society's changing
needs. But the service rendered to the automobile insurance
industry by the underwriter who devised the "permissive user"
concept is in the finest tradition of the bar.

\textsuperscript{162} See supra note 13 and accompanying text.
\textsuperscript{163} James, supra note 86, at 182.
\textsuperscript{164} Thomas Reed Powell as quoted in Lon Fuller, The Morality of Law 4
(Rev. ed. 1964).
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