

For many years, a furniture store employed drivers to deliver furniture to its customers in vans it owned.

Several months ago, however, the store decided to terminate the employment of all its drivers. At the same time, the store offered each driver the opportunity to enter into a contract to deliver furniture for the store as an independent contractor. The proposed contract, labeled "Independent-Contractor Agreement," provided that each driver would

- (1) provide a van for making deliveries;
- (2) use the van only to deliver furniture for the store during normal business hours and according to the store's delivery schedule; and
- (3) receive a flat hourly payment based upon 40 work hours per week, without employee benefits.

The proposed Independent-Contractor Agreement also specified that the store would not withhold income taxes or Social Security contributions from payments to the driver.

The store also offered each driver the opportunity to lease a delivery van from the store at a below-market rate. The proposed lease required the driver to procure vehicle liability insurance. It also specified that the store would reimburse the driver for fuel and liability insurance and that the lease would terminate immediately upon termination of the driver's contract to deliver furniture for the store.

All the drivers who had been employed by the store agreed to continue their relationships with the store and executed both an Independent-Contractor Agreement and a lease agreement for a van.

Three months ago, a driver delivered furniture to a longtime customer of the store during normal business hours. The customer asked the driver to take a television to her sister's home, located six blocks from the driver's next delivery, and offered him a \$10 tip to do so. The driver agreed, anticipating that this delivery would add no more than half an hour to his workday.

In violation of a local traffic ordinance, the driver double-parked the delivery van in front of the sister's house to unload the television. A few minutes later, while the driver was in the sister's house, a car swerved to avoid the delivery van and skidded into oncoming traffic. The car was struck by a garbage truck, and a passenger in the car was seriously injured.

The passenger has brought a tort action against the store to recover damages for injuries resulting from the driver's conduct. Pretrial discovery has revealed that delivery vans routinely double-park; survey evidence suggests that, in urban areas like this one, 80% of deliveries are made while the delivery van is double-parked.

In this jurisdiction, there is no law that imposes liability on a vehicle owner for the tortious acts of a driver of that vehicle solely on the basis of vehicle ownership.

The store argues that it is not liable for the passenger's injuries because (a) the driver is an independent contractor; (b) even if the driver is not an independent contractor, the driver was not making a delivery for the store when the accident occurred; and (c) the driver himself could not be found liable for the passenger's injuries.

1. Evaluate each of the store's three arguments against liability.
2. Assuming that the store is liable to the passenger for the passenger's injuries, what rights, if any, does the store have against the driver? Explain.

Question Presented

The store fired its drivers, then rehired them under an 'Independent-Contractor Agreement,' but each van may be used only for the store's deliveries, on the store's schedule, for a flat hourly rate with no benefits or withholding.

← the label says IC, but courts look to the right to control, not the label

The store also leased each driver a van below market and reimbursed fuel and insurance.

← supplying the tools points to an employee

While making a store delivery, a driver took a customer's \$10 tip to drop a TV six blocks away, about half an hour.

← a short side trip is a detour, not a frolic → still in scope

He double-parked in violation of a traffic ordinance; a car swerved to avoid the van, skidded, and its passenger was seriously hurt.

← violating a safety ordinance is negligence per se

Discovery shows 80% of urban deliveries are double-parked.

← conforming to custom is no defense

The store, sued by the passenger, has no independent fault of its own.

← a faultless employer gets full indemnity from the active tortfeasor

1. Evaluate the store's three arguments: independent contractor, not in scope, and driver not liable.

← → control, scope, negligence per se

2. What rights does the store have against the driver?

← → indemnification

Argument (a): Employee or Independent Contractor

Issue. Whether the driver is an employee or an independent contractor.

Vicarious liability turns on this.

Rule. G/R: an agent is an employee if the principal has the right to control the manner of performance; otherwise the agent is an independent contractor. Factors include the method of payment (hourly vs by the job), the duration of the relationship, who

Right to control is the test; the label is not.

supplies the tools, the skill required, and whether the work is part of the principal's regular business. A principal is liable for an employee's torts within scope, but generally not for an independent contractor's. The contract label is not determinative.

Analysis. Here, the drivers are paid hourly, work indefinitely on the store's schedule, use vans leased from and paid for by the store, need little special skill, and do work central to the store's furniture business. Every factor points to a right to control, and the 'Independent-Contractor' label does not change that.

Conclusion. Therefore, the driver is an employee, so the store may be held vicariously liable; the first argument fails.

Every factor points to control.

Store's first defense fails.

Argument (b): Respondeat Superior (Detour vs Frolic)

Issue. Whether the driver was acting within the scope of employment during the side trip.

Rule. G/R: conduct is within the scope of employment if it is the kind the employee is hired to do, occurs substantially within the authorized time and space, and is motivated at least in part to serve the employer. A substantial deviation (a frolic) is outside scope; a slight deviation (a detour) remains within it.

Analysis. Here, driving and parking to deliver goods is the driver's core task; the six-block, roughly half-hour side trip during business hours was a slight detour, and completing a longtime customer's request also served the store's goodwill despite the \$10 tip.

Conclusion. Therefore, the driver was within the scope of employment, and the store's second argument fails.

Scope at the moment of the accident?

Detour stays in; frolic goes out.

Slight deviation + serves the employer.

Detour, not frolic.

Argument (c): Negligence Per Se

Issue. Whether the driver himself could be found liable for the passenger's injuries.

Rule. G/R: an unexcused violation of a safety statute is negligence per se, conclusively establishing breach, where the plaintiff is within the class the statute protects and the harm is of the type the statute guards against. Compliance with custom is no defense.

Analysis. Here, the driver's double-parking violated the traffic ordinance, which exists to prevent traffic accidents and the injuries that follow; the passenger is within the protected class and suffered

The store's third defense.

The statute sets the standard; custom does not excuse.

The custom of double-parking is irrelevant.

the very harm the ordinance guards against. That 80% of drivers double-park does not excuse the violation.

Conclusion. Therefore, the driver is negligent per se, so the store's third argument fails.

The driver himself is liable.

Question 2: Indemnification

Issue. Whether the store may recover from the driver what it pays the passenger.

Allocating the loss.

Rule. G/R: a defendant whose liability is purely vicarious and who is not personally at fault may obtain indemnification, a full shifting of the loss, from the actively negligent party; a partially-at-fault defendant gets only contribution.

No fault → indemnity; some fault → contribution.

Analysis. Here, the store's liability is purely vicarious with no independent fault, while the driver was actively negligent, so the store may shift the entire loss to the driver rather than share it.

Store faultless; driver the active tortfeasor.

Conclusion. Therefore, the store is entitled to full indemnification from the driver.

Full loss shifts to the driver.

Step-by-Step: Employer Liability for a Driver's Tort

Classify the worker, test scope, confirm the worker's own tort, then allocate the loss.

1. Employee or independent contractor? Apply the right-to-control factors (pay, duration, tools, skill, regular business); ignore the label.

→ Hourly + store's van + core work → **employee**



2. Within SCOPE? Kind of work + time and space + serve the employer; detour (in) vs frolic (out).

→ 6 blocks, about 30 minutes = **detour**



3. Did the worker commit a tort? Unexcused ordinance violation = negligence per se; custom is no defense.

→ Double-parking violation = **negligence per se**



4. Allocate the loss: a faultless employer gets full indemnity; a partly-at-fault one gets only

contribution.

→ Store faultless → **full indemnity from the driver**