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SCOPE OF EMPLOYMENT: HAVE THE RULES CHANGED IN MASSACHUSETTS?*

THOMAS H. SEYMOUR**

Employers are generally liable for their employees’ torts, under respondeat superior principles, if those torts occur within the employees’ “scope of employment.”1 Until quite recently, Massachusetts courts applied, with relative consistency, a three-part test for scope of employment developed by the Supreme Judicial Court ("SJC") in Wang Laboratories, Inc. v. Business Incentives, Inc.2 With Clickner v. City of Lowell,3 however, the SJC may have signaled a desire to turn away from Wang’s approach to scope of employment and to restrict employer liability for employee torts noticeably more than it has in the past. What is troubling about Clickner is that the outcome reached in the case resulted from questionable reasoning; moreover, the court seemed unaware that it had significantly departed from Wang’s straight-forward scope of employment test or the implications of that departure. Thus, Clickner may have confused more than clarified Massachusetts scope of employment law.

The first part of this Article analyzes the three elements of the scope of employment test articulated in Wang. The second part discusses the Clickner case and explores the potential ramifications of that decision for scope of employment jurisprudence in Massachusetts.

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** Clinical Assistant Professor of Law, University of Michigan Law School. B.A., University of Nebraska; M.A., Simon Fraser University; J.D., Harvard. Many thanks go to the students in my legal practice courses at Suffolk University Law School and Michigan Law School, who helped me immeasurably to sharpen my understanding of Massachusetts scope of employment law.

1. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 219 (1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.").


I. The \textit{Wang} Scope of Employment Test

In 1977, Wang contracted with Dudley L. Post \((\text{whose business was later named Business Incentive, Inc.})\) to help Wang find ways to save on its taxes.\(^4\) Post’s compensation was to be a third of any savings.\(^5\) Over the course of three years Post saved Wang hundreds of thousands of dollars in taxes.\(^6\) A year or so after contracting with Post, Wang hired Lawrence Joseph as its “one-person tax department.”\(^7\) Joseph began to supervise Post’s activities, and at one point Joseph circulated a memorandum to his supervisors, stating that “Post’s services could be performed in-house, and that Post’s fees could be eliminated.”\(^8\) When Wang was unable to buyout Post’s contract, the company terminated it and sued Post for alleged violations of the contract.\(^9\) Post counter-sued Wang for the unpaid fees owed him.\(^{10}\) Wang argued that it could not be held liable because “Joseph’s conduct leading to the termination of Post’s contract was not the kind of conduct he was employed to perform.”\(^{11}\) Wang noted that “Joseph was not directed by anyone at Wang to review Post’s work under the contract but [Joseph] just sort of moved out and . . . got involved on his own.”\(^{12}\)

To decide the question of Wang’s liability, the SJC needed to determine whether Joseph’s conduct was within his scope of employment.\(^{13}\) The court established in \textit{Wang} that an employee’s conduct is within “the scope of [his] employment [1] if it is of the kind he is employed to perform; [2] if it occurs substantially within the authorized time and space limits [of his employment]; and [3] if it is motivated, at least in part, by a purpose to serve the employer.”\(^{14}\) An employee’s conduct must pass all three parts of the \textit{Wang} test to be within his or her scope of employment.\(^{15}\)

Joseph’s activities as a “junior manager” at Wang and as

\(^{11}\) \textit{See id. at 1167.}

\(^{12}\) \textit{Id. (alteration in original) (internal quotation marks omitted) (quoting the superior court judge’s findings).}

\(^{13}\) \textit{See id. at 1166.}

\(^{14}\) \textit{Id. (citations omitted).}

\(^{15}\) \textit{See id.}
Wang’s “in-house” tax consultant,16 the SJC decided, were clearly “the kind of conduct he was employed to perform and that [conduct] occurred within the authorized limits of time and space.”17 The only remaining question concerned Joseph’s motives. The SJC acknowledged that “Joseph’s ‘alliance with Post was broken with an intent to advance [Joseph’s] own interests within the corporation.’”18 Nevertheless, because Joseph was attempting “to obtain the benefits of Post’s contract for Wang without cost,” Joseph had acted, in part, “with an intent to serve Wang.”19 Wang was thus “legally responsible for the losses incurred by Post,” as Joseph’s conduct passed all three part of the Wang test for scope of employment.20

Since Wang, this three-part test has dominated scope of employment law in Massachusetts. Not all three factors are in dispute in every lawsuit, of course. Nearly all post-Wang courts, however, have used the Wang test to shape their scope of employment analyses.21 As well, both pre- and post-Wang courts agree that “[t]he scope of [an employee’s employment should] not [be] construed restrictively in [Massachusetts].”22

A. The “Job” test

The first part of the Wang test asks whether the employee was doing his or her job, doing what he or she was hired to do.23 Some-

16. Id. at 1164.
17. Id. at 1167. No mention was made of Joseph’s actual location during the time that he was working to end Post’s relationship with Wang. For a discussion of the “time and space” test as applied in Wang, see infra notes 90-91 and accompanying text.
18. Wang, 501 N.E.2d at 1167 (quoting the superior court judge’s findings).
19. Id.
20. Id.
23. See Wang, 501 N.E.2d at 1166.
times this question is easy for the court to determine; sometimes not. Blue-collar jobs, which have readily discernible boundaries, are particularly easy. For example, in *Kelly v. Middlesex Corporation*, the employee in question, Sergio Peluffo, was apparently a construction worker. Peluffo became involved in an auto accident while driving from his home to his job site to pick up his paycheck. The accident victim sued both Peluffo and his employer, Middlesex Corporation. The appeals court, noting that Peluffo had not been told to pick up his check, nor was he being paid to do so, determined that Peluffo was not engaged in the work he was employed to perform at the time of his accident. Therefore, the appeals court reversed the trial court's judgment against Middlesex Corporation.

Similarly, in *International Brotherhood of Police Officers Local 433 v. Memorial Press, Inc.*, the appeals court decided that an employee at Memorial Press, who intentionally altered an advertisement in a newspaper, was doing what he or she was hired to do. In one sense, of course, the employee obviously was not doing his or her job; surreptitiously altering ad copy is hardly what newspapers employ people to do. If, however, courts determined the "job" requirement by assessing whether employees were doing their jobs properly, then employers would never be held vicariously liable for the actions of their employees, since no one is ever employed to do his or her job improperly, let alone to commit torts. The question, rather, is whether the employee was doing his or her

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25. *See id.* at 474, 475.
26. *See id.* at 475. Peluffo's supervisor had given Peluffo the option of collecting his paycheck when he arrived at work the following Monday, or of driving to the shutdown job site on Friday to collect it. *See id.* at 474. Peluffo chose the latter option. *See id.*
27. *See id.*
28. *See id.* 475-76.
29. *See id.* at 474.
31. *See id.* at 377-78. While collective bargaining was going on between the Plymouth Police Department and the town, one of the town's selectmen criticized the policemen for spending too much time at a doughnut shop. *See id.* In response, the police union placed an ad with the Old Colony Memorial, published by Memorial Press, the headline of which read: "'Plymouth Police Department Is Undermanned:'" *Id.* at 378. When the ad appeared in the newspaper, "the second 'e' in the word 'Department' looked like a doughnut." *Id.* The police union sued Memorial Press "for libel, deceit, negligence, breach of contract, and violation of [Mass. Gen. Laws ch.] 93A." *Id.*
job at all. In *Memorial Press*, therefore, the intentional misprint passed the first element of the *Wang* test because the unknown employee was, after all, helping to print the newspaper, and “the alteration of the advertisement occurred in the regular course of production . . . .”32

White-collar employment, however, is not so easily delineated. Because of this, and because of the general belief that an employee’s scope of employment should not be construed restrictively33 to determine whether an employee’s questioned conduct was “of the kind he was employed to perform,”34 courts often look less at that person’s “formally described” duties and more at his or her “actual and customary” ones.35

In *Howard v. Town of Burlington*, for example, the chairwoman of Burlington’s finance committee, Paula Davis, was an employee without formally described duties.36 A group of taxpayers sought to enjoin the town from indemnifying Davis in a defamation action brought against her for statements she apparently made during a meeting with Burlington’s chief administrative officer, Robert Mercier, concerning whether the town should purchase a new am-

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32. Id. at 378. Ultimately, Memorial Press was held not to be liable for the unknown employee’s intentional misprint because the appeals court decided that the employee’s reasons for altering the ad were purely personal; thus his or her conduct failed the “motive” test, the third part of the *Wang* test. See id. at 378-79. For a discussion of *Wang*’s “motive” test, see infra Part I.C.

The difference between an employee intentionally doing a job badly and not doing it at all potentially makes all the difference in whether the employer is liable or not. One would therefore expect courts to agonize a little over what distinguishes work purposefully done incorrectly from conduct that is not work in the first place. But they evidently do not. In *604 Columbus Avenue Realty Trust v. Capitol Bank and Trust Co. (In re 604 Columbus Avenue Realty Trust)*, 119 B.R. 350 (Bankr. D. Mass. 1990), aff’d, 968 F.2d 132 (1st Cir. 1992), for example, the court decided that a bank employee who agreed to recommend a loan agreement to his Executive Committee only after he had negotiated a kickback for himself was doing what he was employed to do. See id. at 355-57, 371. This bank employee was performing the kind of work he was employed to perform, the court said, because his duties “included deciding whether loans should be approved and on what terms . . . and negotiating loan agreements . . . .” *Id.* at 371. It was apparently irrelevant to the court that one of those terms was clearly tortious and would surely have been unacceptable to the bank, had it known of it. Perhaps judges recognize the difference between “job” and “not job” when they see it, but are unable to define it.

33. See *supra* note 22 and accompanying text.


36. See id. at 106.
bulance. 37 "Davis did not meet with Mercier at the request or order of the finance committee, and no other members of the committee were present." 38

After a bench trial, a superior court judge enjoined the town from indemnifying Davis because "when 'she walked into Mercier's office she left her official identity behind.'" 39 The SJC reversed, finding "no direct evidence to support the conclusion that Davis met with Mercier as a private citizen and not as a committee chairwoman." 40 On the contrary, the court said, the responsibilities of the town's finance committee were "broad," and discussing whether Burlington needed a new ambulance was "certainly a subject within the official concern of the committee and its chairwoman." 41 Conversing with other town officials about town problems, in other words, was the kind of work Davis was employed to perform because it was the sort of thing she did and because she was not precluded from doing it. 42 Put this way, the court's reasoning sounds circular. However, for many employees, such as Davis, there is no credible way to determine what their job is other than to look at what they ordinarily do.

The SJC dealt with a similarly ill-defined employment situation in Wang itself. 43 Wang argued that its employee, Lawrence Joseph, had not been directed to review the performance of an outside consultant, Dudley Post; rather, Joseph "just sort of moved out and ... got involved on his own." 44 The SJC, however, confirmed the trial court's determination that Joseph was indeed doing what Wang had hired him to do. 45 Joseph, "a junior manager [employed] to conduct [Wang's] in-house tax affairs," 46 was in general doing what he was hired to do when he began to supervise Post, and when he figured out a way for Wang to avoid paying Post many thousands of dollars each year. 47 Of perhaps even greater importance to the court was that "Joseph's appraisals of Post's services and his in-

37. See id. at 103-04.
38. Id. at 104.
39. Id. (quoting the superior court judge's opinion).
40. Id. at 105.
41. Id. at 104-05.
42. See id. at 106.
44. Id. (alteration in original) (internal quotation marks omitted) (quoting the superior court judge's findings).
45. Id.
46. Id. at 1164.
47. See id. at 1165.
Involvement with Post's contract were repeatedly endorsed and utilized by Wang's executives. An employer implicitly signals, therefore, that an employee is doing what he or she was hired to do when the employer "uses" or "endorses" an employee's conduct. The limits of an employee's employment thus can expand (or presumably contract) depending on the employer's response to the employee's actions.

Both Howard's "actual and customary" and Wang's "endorsed and utilized" approaches to Wang's test were employed by the SJC in Pinshaw v. Metropolitan District Commission. After a verbal altercation with Frederick Monk, a Metropolitan District Commission ("MDC") policeman, Alan Pinshaw, complained to Monk's supervisors. When Monk was notified of Pinshaw's civilian complaint, he sought and obtained a criminal complaint against Pinshaw "for failing to comply with an order to move his car on request of an MDC officer . . . ." The complaint against Pinshaw was dismissed, and Pinshaw subsequently won a civil rights suit against Monk in federal court. Pinshaw then filed an action in the superior court to force the MDC and the commonwealth to indemnify Monk.

At trial the superior court judge granted the defendant's motion for summary judgment, concluding that Monk's prosecution of the criminal complaint against Pinshaw was part of Monk's "'private counter-attack or personal vendetta'" against Pinshaw and not within the scope of Monk's employment. The court determined that Monk's conduct, even though it resulted in a successful civil rights action against him, was of the kind he was employed to perform because "[p]rosecution of criminal complaints for violations of MDC regulations [was] part of Monk's job. [And t]he fact that Monk's superiors knew of the retaliatory action is some evidence that they may have endorsed or

48. Id. Similar language appears in Pinshaw v. Metropolitan District Commission, 524 N.E.2d 1351 (Mass. 1988), where the SJC thought that the employer's awareness of the employee's tortious conduct was "some evidence that [the employer] may have endorsed or ratified [the employee's] action." Id. at 1357.
49. 524 N.E.2d at 1357.
50. See id. at 1353.
51. Id.
52. See id. at 1353-54.
53. See id. at 1354.
54. Id. at 1356-57 (quoting the superior court judge's decision).
55. See id. at 1353.
ratified Monk's action."56

That Monk performed his job badly, even deliberately so, did not phase the SJC, just as the court of appeals was not phased by the employee's intentional misprint of an ad in Memorial Press.57 Because courts liberally interpret "scope of employment,"58 an employee is doing what he or she has been hired to do, even if he or she is doing it miserably, as long as the employee's conduct is of the general type that he or she usually does, or the employer knows what the employee is doing and fails to object.59 Only if an employee does something that he or she clearly was not directed or paid to do,60 or that is completely inconsistent with the employer's general practices or policies,61 will that conduct fail Wang's "job" test and fall outside the employee's scope of employment, relieving the employer of liability.

B. The "Time and Space" Test

In addition to passing the "job" test, an employee's conduct is not within his or her scope of employment unless it also "occurs substantially within the authorized time and space limits" of his or her employment.62 This second element of the Wang test apparently intends to strike a balance between two competing concerns. On the one hand, if employers are not in a position to supervise and control their employees, they should not be liable for their employees' torts. This explains why an employee's conduct falls within his or her scope of employment only if it occurs within the authorized time and space limits of the job.63 On the other hand, courts generally choose not to interpret scope of employment restrictively.64

56. Id. at 1357.
57. See supra notes 30-32 and accompanying text.
58. See supra note 22 and accompanying text.
61. See, e.g., Doe v. Purity Supreme, Inc., 664 N.E.2d 815, 818, 820 (Mass. 1996) (finding that an assistant store manager's alleged sexual assault and rape of a store employee was not "the kind of action that Purity Supreme employed him to perform"); Worcester Ins. Co. v. Fells Acres Day Sch., Inc., 558 N.E.2d 958, 967 (Mass. 1990) (finding that day-care center employees' alleged sexual assault of children in their care was not what they were employed to do).
63. See id.
64. See supra note 22 and accompanying text.
Defining the time and space limits of an employee's job too literally or too rigidly would defeat that goal. This explains why, to fall within an employee's scope of employment, his or her conduct must occur only *substantially* within the authorized time and space limits of that employment.65

As is true of the first element of the *Wang* test, the second element is sometimes easy to determine and sometimes more difficult. As a general rule, it seems easier for courts to determine what the "authorized time and space limits" are for blue-collar employees than for white-collar employees. Sergio Peluffo, the construction worker in *Kelly* who was involved in an auto accident as he drove from his home to his closed-down "job site" to pick up his paycheck, is a clear example.66 Peluffo's employer had not instructed him to pick up his paycheck.67 So his "travel[ing] between [his] place of residence and place of business [was not] a mission to further the purposes of [his] employer."68 Thus, the appeals court concluded that the highway where the accident occurred was not within the authorized space limits of Peluffo's employment.69 In *Memorial Press*, the unknown employee's conduct took place "substantially within the authorized time and space limits"70 of his or her employment because the intentional misprint of a newspaper ad copy "occurred in the regular course of the production of the newspaper . . . ."71 These two cases concern employees with well-defined work areas and hours, making it apparently easy for the courts to determine whether the employees' conduct fell "substantially" within or without the time and space limits of their employment.

A policeman's job, on the other hand, has much less clearly defined time and space limits. Twice since the *Wang* decision, the SJC has had to determine whether a policeman's tortious conduct occurred within the scope of employment.72 In *Pinshaw* the answer

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65. See *Wang*, 501 N.E.2d at 1166.
67. See id. at 475.
68. Id.
69. See id. at 475-76.
71. Id.
was probably yes,\textsuperscript{73} in \textit{Clickner}, the answer was certainly no.\textsuperscript{74}

In the course of committing the tort at issue, Frederick Monk, the MDC policeman in \textit{Pinshaw}, had directed traffic near Fenway Park,\textsuperscript{75} sought and obtained a criminal complaint against the plaintiff in Roxbury District Court,\textsuperscript{76} and acted as police prosecutor at the plaintiff's trial.\textsuperscript{77} The SJC believed that whenever and wherever Monk engaged in these activities, he was so obviously within the time and space limits of his employment that the court did not even need to address the issue.\textsuperscript{78} On the other hand, Francis M. Waterman, the Lowell policeman in \textit{Clickner}, was not within the time and space limits of his employment when, while driving to his scheduled shift in Lowell, he tried to respond to an emergency call and drove his automobile across the center line of the road in Groton, hitting the car in which the Clickners were riding.\textsuperscript{79} The SJC noted that at the time of the accident, Waterman "was neither on duty, nor in a place helpful to his employer."\textsuperscript{80}

What distinguishes \textit{Pinshaw} from \textit{Clickner} is that Monk was at all times "in a place helpful to his employer," while Waterman, according to the SJC, was not.\textsuperscript{81} This approach taken by the SJC in determining the "time and space" issue reveals how interconnected the superficially distinct elements of the \textit{Wang} test can be, and frequently are. To be in a place "helpful" to one's employer is, phrased differently, to be in a position to do what one has been

\begin{itemize}
\item \textsuperscript{73} \textit{See Pinshaw}, 524 N.E.2d at 1356.
\item \textsuperscript{74} \textit{See Clickner}, 663 N.E.2d at 856.
\item \textsuperscript{75} \textit{See Pinshaw}, 524 N.E.2d at 1353.
\item \textsuperscript{76} \textit{See id.}
\item \textsuperscript{77} \textit{See id.} at 1353 n.3.
\item \textsuperscript{78} \textit{See id.} at 1356. The court declared that "Monk's conduct clearly was of the kind he was hired to perform," satisfying \textit{Wang}'s "job" test. \textit{Id.} Then, ignoring the time and space limits of Monk's employment, the court immediately turned to address the only issue that it found to be in contention, Monk's motivation for his conduct—the third element of the \textit{Wang} test. \textit{See id.} at 1356-57. The SJC concluded that the trial court judge had erred in ruling that Monk could not reasonably "have believed he was serving his employer in prosecuting the plaintiff . . . ." \textit{See id.}
\item \textsuperscript{79} \textit{See Clickner}, 663 N.E.2d at 854.
\item \textsuperscript{80} \textit{Id.} at 855. The appeals court in \textit{Kelly} did not use the "in a place helpful to his employer" analysis in discussing why Sergio Peluffo was not within the time and space limits of his employment as he drove to his job site to pick up his paycheck. \textit{See Kelly v. Middlesex Corp.}, 616 N.E.2d 473, 475-76 (Mass. App. Ct. 1993). This phrase from \textit{Clickner}, however, helps illuminate the "coming and going" rule that the \textit{Kelly} court applied, under which employees traveling to or from work are almost never within the scope of their employment. \textit{Id.} at 474-75.
\item \textsuperscript{81} For a more detailed analysis of \textit{Clickner}, including a discussion of whether Waterman was in fact "in a place helpful to his employer" at the time of his auto accident, see \textit{infra} Parts II.A. and II.B.
\end{itemize}
employed to do. Monk was doing what he was employed to do, so wherever he was doing it, he was in a "place helpful to his employer." Thus Monk’s conduct passed Wang’s “time and space” test because it passed the “job” test.82 Waterman, on the other hand, was not in a "place helpful to his employer,"83 which is in large part why his conduct was found not to be of “‘the kind of work which he was employed to perform.’”84 Thus, Waterman’s conduct failed Wang’s “job” test mainly because it failed the “time and space” test. The first element of the Wang test is, as well, frequently intertwined with the third element, motive, but not nearly to the extent that the first and second elements are.85

With the limited exception of Worcester Insurance Co. v. Fells Acres Day School, Inc.,86 in every case since Wang, the court has determined that the employee’s conduct either passed both the first and second parts of the Wang test, or failed both parts. The reason for this result is most evident in those cases involving white-collar employees. Such employees may have offices (although even that is not always the case), but spend little time in them. Their work days are vaguely defined, if at all. These employees rarely work shifts and never punch time clocks. White-collar employees work when and where they have to do the kind of work they are employed to perform. For example, in 604 Columbus Avenue Realty Trust v. Capitol Bank and Trust Co. (In re 604 Columbus Avenue Realty Trust),87 a bank employee, Sidney Weiner, helped negotiate a loan with the plaintiffs and agreed to recommend it to the bank for which he worked, but only if he received a kickback.88 In finding that Weiner’s conduct was within his scope of employment, the

82. See supra note 78 and accompanying text for analysis of this point.
83. Clickner, 663 N.E.2d at 855. This was so even though he was driving a Lowell-owned vehicle at the time of his accident. See id. at 864. Being in (or on) the employer’s property apparently is not enough to place the employee substantially within the authorized space limits of his or her employment.
84. Id. at 856 (quoting superior court judge’s decision).
85. For a discussion of Wang’s “motive” test, in general, and its relation to the “job” test, in particular, see infra Part I.C.3.
86. 558 N.E.2d 958 (Mass. 1990). The only factor even arguably supporting the tort plaintiffs’ claims under this theory [of the employer’s vicarious liability] is that some of the abuse [of the children in the care of the day-care center] is alleged to have occurred “within the authorized time and space limits[,]” ... i.e., at the school during school hours. Because some of the abuse is alleged to have been committed off the school grounds, even this factor does not support the plaintiffs.
88. See id. at 355-57.
court said nothing specific about when or where any of Weiner's actions had taken place, but observed that they had all "occurred substantially within the flexible time and space limits in which the Bank permitted him to conduct its business." 89

It is precisely this flexibility in a white-collar employee's "authorized time and space limits" that makes it nearly impossible for a court to determine whether such an employee's conduct passes Wang's "time and space" test, except by deciding whether it passes the "job" test. Thus, in Wang itself, the SJC discussed at length the kinds of things the employee, Lawrence Joseph, had done and whether they were of the sort he had been employed to perform. 90 Nowhere in the opinion, however, does the court mention where Joseph was when he undertook his tortious activities, or when he undertook them. The only comment the court made about Joseph's conduct in relation to element two of its own test was the simple, conclusory statement: "[I]t occurred within the authorized limits of time and space." 91 The court apparently assumed that what Joseph did, he did at his office at Wang (assuming he had one), or the court did not care. That Joseph, Wang's "one-man tax department," was doing tax-related work evidently "proved" that he was where Wang "authorized" him to be, when they "authorized" him to be there.

Likewise, in Howard, the SJC discussed at length the employee's questionable conduct and whether it was of the sort she was employed to perform. 92 The employee, Paula Davis, the town's finance committee chairwoman, conversed with another town official, Robert Mercier, in his office about the town's need for a new ambulance. 93 Whether being in Mercier's office instead of in her own (or in the finance committee's meeting room) might have pushed Davis outside the scope of her employment either did not occur to the court or it did not matter. 94 Davis was doing what she was employed to do. 95 As the court noted, an employee "is authorized to do anything which is reasonably regarded as incidental

89. Id. at 371.
91. Id. at 1167.
93. See id. at 104.
94. Although the Howard court acknowledged Wang's importance in establishing the standards for scope of employment, see id. at 105, it did not specifically apply Wang's three-part test to the facts in Howard. In a less formulaic way, however, it considered the same scope of employment factors that the Wang court did.
95. See id. at 106.
to the work specifically directed or which is usually done in connection with such work.” 96 It was evidently “incidental” to her work for Davis, a town official, to go to another town official’s office in order to discuss official town business.

Cases like Pinshaw, In re 604 Columbus Avenue Realty Trust, Wang, and Howard show that courts have difficulty keeping separate the first two elements of the Wang test. They also show as well the relative unimportance—even redundancy—of the second element, the “time and space” requirement. Part two of the test often collapses back into part one. Rarely is there an independent way for a court to determine whether an employee’s conduct falls within the time and space limits of his or her employment. Rather, courts typically answer the “time and space” question the same way they frame and answer the “job” question.

C. The “Motive” Test

Finally, in addition to passing Wang’s “job” and “time and space” tests, an employee’s conduct must also pass the “motive” test in order to fall within that employee’s scope of employment. 97 This third part of the Wang test determines whether the employee’s conduct was “motivated, at least in part, by a purpose to serve the employer.” 98 This purpose, however, need only be minimal. “The fact that the predominant motive of the [employee] is to benefit himself does not prevent the act from coming within the scope of employment . . . .” 99 Perhaps Pinshaw demonstrates most graphically how little the employee’s conduct can be motivated “by a purpose to serve the employer” and still pass the third part of the Wang test. 100 At trial the superior court judge entered summary judgment for the defendant, 101 finding that the MDC police officer had prosecuted a criminal complaint against the plaintiff as “a private counter-attack or personal vendetta” against the plaintiff . . . .” 102 The criminal complaint was dismissed, and Pinshaw subsequently successfully sued Monk for violating his civil rights. 103 Neve-

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96. Id. (quoting RESTATEMENT (SECOND) OF AGENCY § 229 cmt. a (1958)).
98. Id. (citation omitted). For a discussion of the “motive” test as applied in Wang, see infra notes 108-18 and accompanying text.
101. See id. at 1353.
102. Id. at 1357 (quoting the superior court judge’s decision).
103. See id. at 1353, 1354.
Nevertheless, the SJC opined, "[e]ven if Monk was motivated by a degree of vindictiveness, he also may have believed he was serving his employer in prosecuting the plaintiff . . . ."104 Thus, over a vigorous dissent,105 the court ruled that the MDC was not entitled to summary judgment, since it was not certain that Monk’s motives were entirely personal.106 Only if an employee’s motives are "purely personal," and his or her actions "in no way connected with the employer’s interests," will the employee’s conduct fall outside the scope of employment.107

The decision in Wang and In re 604 Columbus Avenue Realty Trust,108 provide additional examples of employees whose predominant motives were to serve themselves not their employers, yet whose conduct still passed Wang’s “motive” test. In Wang, when he was hired as a “one-man tax department,” Lawrence Joseph began to work with and supervise Wang’s outside tax consultant, Dudley L. Post.109 In his four years with Wang, Post generated nearly $1,400,000 in tax savings for the company.110 Nevertheless, Joseph sent a memorandum to his supervisors criticizing Post’s works, insinuating that Post was not saving Wang as much money as he could, and suggesting that “Post’s services could be performed in-house . . . .”111 The SJC found that Joseph’s assertions were “not advanced in good faith”; rather, “his alliance with Post was broken with an intent to advance his own interests within the corporation.”112 Joseph’s conduct, which “was akin to the tort of intentional interference with contractual relations,”113 led Wang to terminate Post’s contract.114 Since Post’s contract called for him to be paid a third of the tax savings he generated for Wang,115 bringing his tax work in house—where a salaried employee (presumably Joseph) would do it—would clearly save Wang money. The court had

104. Id. at 1357 (emphasis added).
105. See id. at 1360-61 (Lynch, J., dissenting).
106. See id. at 1357.
107. Id. (emphasis added) (citations omitted).
110. See id. at 1164-65.
111. Id. at 1165.
112. Id. (quoting the superior court judge’s findings).
114. See Wang, 501 N.E.2d at 1165.
115. See id. at 1164.
no doubt that “Joseph was motivated by self-interest . . . .” Still, Wang might have benefited from Joseph’s actions. That he assumed his scheme would have saved the corporation some money showed that Joseph “acted with an intent to serve Wang.” Joseph’s motives, though “predominately” personal, were not completely so; therefore, Wang became liable for his tortious conduct.

In *In re 604 Columbus Avenue Realty Trust*, Sidney Weaver, the Capitol Bank employee who agreed to recommend that the plaintiff receive a loan from the bank only after he had “negotiated” a kickback for himself, appears, like Officer Monk in *Pinshaw*, to have been driven by purely personal motives. The Bankruptcy Court decided otherwise, because Weiner’s kickback plan would have taken money out of the plaintiff’s pocket, not the bank’s. The court implicitly acknowledged that Weiner’s predominant motive was to benefit himself, but stated that it did “not prevent the act from coming within [Weiner’s] scope of employment . . . .” The court noted that “by advancing loan proceeds to fund kickbacks, Weiner was not only helping himself but was also helping the Bank earn interest and other substantial fees, all with little risk . . . .” Thus, Capitol Bank was liable for Weiner’s conversion.

Neither the SJC in *Wang* nor the bankruptcy court in *In re 604 Columbus Avenue Realty Trust* considered the long-term value of the employees’ conduct. If they had, they might have come to a different conclusion about the “benefits” the employers received. *Wang*’s “motive” test, however, does not attempt to determine whether the employer profited by the employee’s conduct, only whether a modicum of the employee’s purpose was “to serve the employer.” The test, in other words, is prospective, not retrospective; it judges intent, not result. This has not meant, though, that courts have limited themselves to a single or simple measure of employee motivation.

116. *Id.* at 1167.
117. *Id.*
118. *See id.*
120. *Id.* at 356-57.
121. *See id.* at 371-72.
122. *Id.* at 372 (quoting *Wang*, 501 N.E.2d at 1166).
123. *Id.* (emphasis added).
124. *See id.* at 371.
1. "Subjective" Motive

Appellate courts are understandably reluctant to declare on their own that a given employee's motives were purely personal. How can the appellate court know for sure what motivated the employee to act? A "subjective" motive test looks at motive only from the employee's perspective: what was the employee thinking, what was the employee's state of mind at the time he or she undertook the tortious conduct? This seems to be the inquiry Wang asks courts to undertake.

Courts face both the general directive not to construe "scope of employment" restrictively, and Wang's specific instruction to exclude from an employee's scope of employment only those acts whose motivations are entirely personal. Appellate courts that apply a "subjective" motive test to an employee's conduct, therefore, understandably find that rarely will that conduct fail that test. For example, the courts in Wang, Pinshaw, and In re 604 Columbus Avenue Realty Trust all apply the "subjective" motive test, and all come to the conclusion that the employees' conduct in those cases was not driven entirely by personal motives, despite plentiful evidence to the contrary.

Only in the extreme case of Fells Acres has an appellate court applying the "subjective" motive test concluded that the employees' purposes were wholly personal. In Fells Acres, day-care workers were accused of sexually molesting children at their school. It was so evident to the SJC that the conduct was not within the employees' scope of employment, that the court hardly bothered to discuss what reasons the employees may have had for assaulting the

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126. See, e.g., Pinshaw v. Metropolitan Dist. Comm'n, 524 N.E.2d 1351 (Mass. 1988). In Pinshaw, the SJC refused to say that police officer Monk's "private counter-attack or personal vendetta" against the plaintiff was, as a matter of law, outside the scope of Monk's employment. Id. at 1357 (internal quotation marks and citations omitted). Summary judgment was inappropriate, the court held, because "whether Monk acted within the scope of his official duties . . . is a question of fact." Id. See supra notes 100-07 and accompanying text for further discussion of Monk's motives.

127. See Wang, 501 N.E.2d at 1166 (defining the employee's "motive" in terms of his or her "purpose").

128. See supra note 22 and accompanying text.

129. See Wang, 501 N.E.2d at 1166.

130. See supra notes 97-125 and accompanying text for a discussion of the courts' decisions regarding the employees' motives in those three cases.


132. See id. at 963.

133. See id. at 967.
children. The court simply asserted that the assaults could not have been in response to anything the children had done, and the employees’ motives for the assaults must have been completely personal and not at all “to serve the employer.”

2. “Objective” Motive

If “motive” equates to “purpose,” determining motive can be difficult, since an employee might well conceal the purpose of his or her conduct, especially if that purpose is at least in part personal. Consequently, in their efforts to determine motivation, several courts looked for external evidence that might signal the purposes for an employee’s conduct. These courts, in other words, try to make Wang’s “motive” test “objective.”

The Wang test asks whether the employee’s conduct was “motivated, at least in part, by a purpose to serve the employer.” Courts using the “subjective” approach pay most of their attention to the employee’s “purpose.” Courts that try to make Wang’s motive test “objective” focus to a greater extent on whether the employee’s conduct “serve[d] the employer,” or whether a reasonable person in the employee’s position might think that it could. These courts, then, look for markers of motive, rather than at states of mind.

The clearest example of this occurs in Memorial Press. In trying to determine the employee’s motive in that case, the court faced a difficult situation: the person who deliberately misprinted the police union’s ad in the newspaper was never identified. Therefore, even the trial court had no choice but to deduce the employee’s motives from the act itself. The appeals court agreed with the superior court judge’s findings that “the misprint was . . . contrary to the

134. Id. (quoting Wang, 501 N.E.2d at 1166).
137. Wang, 501 N.E.2d at 1166 (citation omitted).
139. See, e.g., Doe, 664 N.E.2d at 820; Kelly, 616 N.E.2d at 475-76; Memorial Press, 575 N.E.2d at 379.
140. See Memorial Press, 575 N.E.2d at 378. See supra note 30 and accompanying text for an elaboration of the facts in Memorial Press.
newspaper’s policies and interests.” The court noted that “‘[t]he fact that [the] act [was] done in an outrageous or abnormal manner has value in indicating that the [employee was] not actuated by an intent to perform the employer’s business.’” The “outrageous or abnormal” character of the act, together with the fact that it was “contrary to the newspaper’s policies and interests,” signaled that the employee’s motives for the deliberate misprint must have been entirely personal, clearing Memorial Press of liability for the employee’s conduct.

_Doe v. Purity Supreme, Inc._, was similarly decided. There, the store’s assistant manager allegedly assaulted and raped another employee; obviously, this was not “the kind of action that Purity Supreme employed [the assistant store manager] to perform.” Therefore, his conduct failed _Wang’s_ “job” test. The court, however, focused most of its attention on the employee’s motives, concluding that “rape and sexual assault of an employee do not serve the interests of the employer,” and for this reason the assistant store manager’s conduct failed _Wang’s_ “motive” test. His actions, to use _Memorial Press’_ language, were “outrageous” and “abnormal,” they could not have been undertaken “to serve the employer.” His conduct thus “objectively” demonstrated that his motives were entirely self-serving.

The appeals court’s analysis of motive in _Kelly_ was also “objective.” On a Friday morning Middlesex closed down the job site where Sergio Peluffo was working. Peluffo was told that he could return that afternoon to pick up his paycheck, if he wished, or he could collect it when he arrived at work the following Mon-

141. _Memorial Press_, 575 N.E.2d at 379.
142. _Id._ (quoting _RESTATEMENT (SECOND) OF AGENCY_ § 235 cmt. c (1958)).
143. _See id._
145. _Id._ at 820.
146. _Id._
147. _Memorial Press_, 575 N.E.2d at 379.
148. _Doe_ and _Fells Acres_ are alike in that they both involved alleged sexual abuse by an employee. However, the court took a slightly different approach to motive in the two cases. In _Fells Acres_, a “subjective” motive case, _see supra_ notes 131-34 and accompanying text, the court simply asserted that the employees’ motives must have been completely personal. _See Worcester Ins. Co. v. Fells Acres Day Sch., Inc.,_ 558 N.E.2d 958, 967 (Mass. 1990). The court made the “motive” test “objective” in _Doe_ by discussing the employee’s motives in terms of the employer’s interests. _See Doe_, 664 N.E.2d at 820. The employee's motive must have been completely personal because his conduct ran counter to the interests of his employer. _See id._
150. _See id._ at 474.
day.\textsuperscript{151} In a pretrial deposition Peluffo acknowledged that he had been given this choice of times.\textsuperscript{152} He chose to pick it up that Friday afternoon and was involved in an accident while driving to do so.\textsuperscript{153} The court stated that “[a] jury could not reasonably conclude . . . that Middlesex instructed Peluffo to make a special trip for his check . . . .”\textsuperscript{154} The company was statutorily obligated “to make a paycheck available to its weekly wage earners on Friday, but it was not in derogation of any interest of Middlesex if a worker chose to pick up a check the following Monday.”\textsuperscript{155} In determining whether Peluffo’s conduct was motivated even in part “by a purpose to serve the employer,” the \textit{Kelly} court apparently did not consider what Peluffo himself might have thought his “purpose” was. Rather, because no “reasonable” juror (that is, no “objective” outsider) could conclude that Peluffo’s motive was anything but personal, it was personal, and therefore at the time of the accident, Peluffo was not within the scope of his employment.\textsuperscript{156}

3. The “Job” Test as the “Motive” Test

The “subjective” approach to motive tries to determine what the employee was thinking, what he or she intended.\textsuperscript{157} The “objective” approach to motive relieves courts of the haziness of “subjective” motive test in that it allows courts to look for external evidence of intent.\textsuperscript{158} The “objective” test, however, creates a problem of its own. Once motive becomes objectified, once courts look for markers that the employee’s purpose was “to serve the employer,” then Wang’s “motive” test almost inevitably begins to fold back into the “job” test.

\textit{Doe} is the extreme example of this phenomenon. The employee in that case, who allegedly raped and sexually assaulted a fellow employee, “was not motivated by a purpose to serve the employer” \textit{because} “rape and sexual assault of an employee do not serve the interests of the employer.”\textsuperscript{159} This is motive looked at

\begin{footnotes}
\item[151] See id.
\item[152] See id. at 475.
\item[153] See id. at 474.
\item[154] Id. at 475-76.
\item[155] Id. at 476.
\item[156] See id. at 475-76.
\item[157] For a discussion of the “subjective” approach to motive, see supra notes 126-34 and accompanying text.
\item[158] For a discussion of the “objective” approach to motive, see supra notes 135-56 and accompanying text.
\end{footnotes}
"objectively." The assistant store manager's conduct, however, failed the "motive" test for an additional reason: the employer had not "authorized or directed [his] conduct . . . [and] his action was [not] the kind of action that [the store] employed him to perform." Thus, in Wang's terminology, the evidence that the employee was not motivated "by a purpose to serve the employer" was that his conduct was not "of the kind he [was] employed to perform." The employee's conduct failed the "motive" test, it seems, in part because it failed the "job" test. In its application of the "objective" motive test, the Doe court in effect made the test irrelevant. Once the employee was determined not to be doing what he was hired to do, his motives had to have been purely personal.

A similar blending of Wang's "job" and "motive" tests occurred in Memorial Press. There, the employee's deliberate misprint of a newspaper ad was "done in an outrageous or abnormal manner," "objectively" showing that the employee "was [not] motivated by a desire to promote the newspaper's interests." As further evidence of the personal nature of the employee's motives, the court observed that "the misprint was unauthorized [and] uncondoned . . . ." Whether an employer "authorizes" or "condones" the employee's actions, however, indicates much more about whether the employee is doing what he or she was employed to do—Wang's "job" test—than about his or her motives for doing it.

The SJC's analysis of motive in Pinshaw was primarily "subjective," but not exclusively so. The court, looking at motive from the employee's perspective, felt that Officer Monk may have "believed he was serving his employer" when he undertook his "private counter-attack or personal vendetta" against the plaintiff . . . . Furthermore, the court found "objective" evidence that

160. Id. (quoting the superior court judge's decision).
162. This is not to suggest that Doe was wrongly decided; far from it. Who would argue that sexual assault and rape should be within any employee's scope of employment? It is only to suggest that in reaching the right outcome, the Doe court diminished the value of the Wang test, which the Doe court claimed to be applying.
164. Id.
165. See supra notes 100-07 and accompanying text for a discussion of "subjective" motive in Pinshaw.
167. Id. 1357 (quoting superior court judge's decision).
Monk's conduct may have served his employer's purposes, in that the MDC "knew of [his] retaliatory action . . . [and] may have endorsed or ratified [it]." Yet this observation says much less about Monk's intentions than about his superiors'. The "endorsed or ratified" wording in Pinshaw is remarkably close to the language that the Wang court employed to explain how it knew that Wang's employee was doing the kind of work he was employed to perform when his efforts led Wang to violate its contract with an outside tax consultant. This must have been "the kind of conduct [the employee] was [hired] to perform," the court said, in part because it was "repeatedly endorsed and utilized by Wang's executives."

Even the SJC's refusal in Fells Acres to elaborate on its assertion that the day-care workers' motives for allegedly molesting children at the school were wholly personal, can be read as the court's disinclination to maintain a clear separation between the "job" and the "motive" parts of the Wang test. In Fells Acres, the court seems to be saying that, since the assaults were so clearly not the kind of acts these employees were hired to perform, they could not have been motivated, even in part, "by a purpose to serve the employer." In this context, at least, the evidence for, and the analysis of, Wang's "motive" test is identical to that for the "job" test.

168. Id.
170. Id. (emphasis added). Kelly cites Pinshaw for the proposition that an employee's motives are purely personal if his or her conduct is "unconnected in any way with the employer's interests . . . ." Kelly v. Middlesex Corp., 616 N.E.2d 473, 474 (Mass. App. Ct. 1993). This is not really a fair summary of the Pinshaw court's discussion of the "motive" test. What it captures, however, is the way in which Pinshaw blurs the line between the "motive" and the "job" tests. Conduct which is unconnected with the employer's interests is conduct no employee is hired to perform, regardless of his or her motives for performing it.
172. Fells Acres, 558 N.E.2d at 967 (citation omitted).
173. Another case that can be read this way is Burroughs v. Commonwealth, 673 N.E.2d 1217, 1219 (Mass. 1996). There, an off-duty National Guardsman, Michael Morgante, served a fellow Guardsman, Robert LaCasse, some drinks. See id. at 1218. LaCasse was then involved in a motor vehicle accident while under the influence of the alcohol. See id. The SJC concluded that because Morgante had not been paid or requested by his superiors to bartend, his conduct was not "of the kind he [was] employed to perform" and that it was not "motivated, at least in part, by a purpose to serve the [Commonwealth]." Id. at 1219 (quoting Wang, 501 N.E.2d at 1166). The measure for part three of the Wang test was no different from the measure for part one.
As discussed above, courts often have trouble keeping separate the "job" and the "time and space" elements of Wang's scope of employment test. Occasionally they have the same trouble separating the "job" and "motive" elements. This is especially true for those courts tempted by the beguiling but oxymoronic mirage of "objective" motives. For if there are external indicators of an employee's desire to further the purposes of his or her employer, what can they be other than that the employee is trying to do whatever he or she was employed to perform?

II. CLICKNER V. CITY OF LOWELL AND BEYOND

In April of 1996, the SJC decided Clickner v. City of Lowell. This decision signaled that the SJC would no longer be bound by Wang's, approach to scope of employment analysis. Though nominally relying on Wang in its decision, the Clickner court turned away from Wang's division of scope of employment into three distinct and apparently exhaustive categories. Unlike previous courts, the SJC in Clickner did not find that Wang circumscribed the boundaries of scope of employment analysis; instead, the three-part Wang test merely enumerated some of the "[f]actors to be considered" in determining whether an employee's acts fell within his or her scope of employment. Since the Clickner decision, Wang has not completely relinquished its hold on scope of employment jurisprudence; on the other hand, neither does it totally control the field as it did before Clickner.

174. See supra Part I.B.
175. See supra notes 157-73 and accompanying text.
178. See Clickner, 663 N.E.2d at 855.
179. See Wang, 501 N.E.2d at 1166.
180. Clickner, 663 N.E.2d at 855 (citing Wang, 501 N.E.2d at 1166).
181. See, e.g., Burroughs v. Commonwealth, 673 N.E.2d 1217, 1219 (Mass. 1996), (ignoring Clickner and relying entirely on Wang; asserting that Wang "set forth the factors relevant to scope of employment determinations"); see also Doe v. Purity Supreme, 664 N.E.2d 815 (Mass. 1996). Doe is another post-Clickner case that relies entirely on Wang and makes no mention of Clickner. This may be so because Clickner and Doe were decided so close together in time—the former in April, the latter in May—that by the time Doe was decided, Clickner had not yet registered as relevant precedent; neither side in Doe could have known about or relied on Clickner in its arguments.
A. The Clickner Case

Francis M. Waterman, a Lowell policeman, was driving to work when he crossed "the center line of the road and collided with the motor vehicle in which the Clickners were riding," injuring them. The accident occurred in the town of Groton, at about 4:50 in the afternoon. Waterman was trying to get to his five-o’clock shift in Lowell after spending the day in Groton playing golf and drinking. The car he was in belonged to the Lowell Police Department, which had allowed Waterman to drive it to his golf tournament so that he could “report for his shift or . . . respond immediately to any emergency calls without returning home.” He had crossed the center line while attempting to use the cellular phone in the car to respond to a page from the Lowell police station. Waterman was later “found guilty of operating [a motor vehicle] while under the influence of intoxicating liquor and failure to yield.”

At trial, the superior court judge ruled that Lowell was not liable for Waterman’s conduct because he was not acting within the scope of his employment. When Waterman appealed, the SJC affirmed the trial court’s ruling.

The SJC began its discussion of scope of employment law with the well-established basics—that “[t]he scope of an employee’s employment is not construed restrictively,” and that Wang had set down a three-part test for determining whether an employee’s conduct was within his or her scope of employment. What the Clickner facts showed the court was that, in effect, Officer Waterman’s actions failed at least the first two parts of the test. He was in Groton, not Lowell, which meant he was not “in a place helpful

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183. Clickner, 663 N.E.2d at 854.
184. See id.
185. See id.
186. Id.
187. See id.
188. Id.
189. See id.
190. See id.
191. Id. at 855 (quoting Howard v. Town of Burlington, 506 N.E.2d 102, 105 (Mass. 1987) and citing Commonwealth v. Jerez, 457 N.E.2d 1105 (Mass. 1983)).
192. See id. In the court’s view, however, the Wang test was not exhaustive. It was, rather, among the “[f]actors to be considered” in determining whether an employee acted within the scope of his or her employment. Id.
193. See id. at 855 n.5. Because the Clickner court did not rely solely on the Wang test in deciding that Officer Waterman’s conduct was not within his scope of employment, it is unclear to what degree Wang’s approach to scope of employment
to his employer,"194 and "his shift had not yet begun."195 Thus, Waterman's conduct implicitly failed Wang's "time and space" test.196 In addition, although Waterman was in a city-owned vehicle at the time of the accident, he "was not being paid at that time[,] . . . he was intoxicated and unfit for duty[,] . . . [and he] was not acting in the furtherance of the employer's business . . . ."197 "[T]he mere fact of being on call, [which Waterman was]," the court maintained, "does not place employees within the scope of their employment."198 Thus, Waterman's conduct implicitly failed Wang's "job" test as well.199 The SJC did not apply the "motive" part of Wang's test.200 The court said, however, that "Waterman's actions throughout the day of the accident were in the furtherance of his own agenda."201

The only difficult question the court faced was "whether [Waterman's] act of responding to the page was enough to tip the balance and to bring his conduct within the scope of [his] employment . . . ."202 That conduct did not "tip the balance," the SJC decided, agreeing with the trial court's ruling that "'[t]he mere fact that just prior to [the accident] Waterman was attempting to contact his subordinate by cellular telephone in response to her page does not work an electronic alchemy and transmute his entire course of conduct into the kind of work which he was employed to perform.'"203 Therefore, Waterman's conduct was not within the scope of his employment, and Lowell was not liable for the injuries he caused the Clickners.204

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194. Clickner, 663 N.E.2d at 855.
195. Id.
196. See id. at 855 n.5.
197. Id. at 855.
198. Id. (citations omitted).
199. See id. at 855 n.5.
200. The court noted the potential applicability of Wang's "motive" test, but then observed that Clickner is different from Wang in that "in the present case . . . the employee was not acting within the authorized limits of time and space and . . . his conduct was not clearly that which he was hired to perform." Id. This comment suggests that the court felt it was unnecessary to analyze Waterman's motives. His conduct was not within his scope of employment, regardless of his motives.
201. Id. at 856.
202. Id.
203. Id. (alterations in the original) (quoting the superior court judge's decision).
204. See id. at 854, 856.
B. *The Clickner Decision*

The result reached by the SJC in *Clickner* seems wrong for two reasons. First, the court found Waterman’s drunkenness to be a—perhaps the—significant factor in determining that his conduct failed *Wang*’s “job” test. Waterman, the SJC observed, was “intoxicated and unfit for duty” at the time of the accident. Later the court returned to the issue of Waterman’s inebriated state: “He had . . . consumed an amount of beer sufficient to render him intoxicated. . . . [H]e was not permitted to perform his job while intoxicated, and . . . he was not fit for duty at the time of the accident.” Yet what employee is ever “permitted to perform his job while intoxicated”? What employee is ever “fit for duty” when drunk? Intoxication is not part of anyone’s job description; that fact alone, however, should not eliminate the employer’s liability for an inebriated employee’s conduct. Intoxication frequently figures in scope of employment cases, but courts do not generally find it determinative. The question should not be whether the employee was drunk; the question should be what did the employee do while drunk? That Officer Waterman was intoxicated is a fact, but it should not dispose of the question—one way or the other—as to whether when his car ran into the Clickners’ he was doing his job as a Lowell policeman.

The second reason the SJC erred in deciding that Waterman’s conduct was not within his scope of employment relates to the emergency call he received. The court maintained, fairly enough, that merely being “on call” did not automatically put Waterman (or any other employee) within the scope of his employment. The court went further, however, and ruled that Waterman’s attempt to respond to the page from the Lowell police department did not “work an electronic alchemy and transmute his entire course of conduct into the kind of work which he was employed to perform.” This ruling was crucial, because it was just at the moment that Waterman was trying to answer the page on his cellular phone that he swerved across the center line and into the vehicle in which the Clickners were riding.

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205. *See id.* at 855.
206. *Id.* at 856.
208. *See* Clickner, 663 N.E.2d at 855.
209. *Id.* at 856 (quoting the superior court judge’s decision).
210. *See id.* at 854.
interpretation" of scope of employment would "create unreasonable liability for municipalities."211 Perhaps for that reason the SJC narrowly restricted Waterman's scope of employment to the city of Lowell, during his assigned shift.212 The police department, however, had permitted Waterman to drive one of its cars, with its cellular phone, to his golf tournament so that he could "respond immediately to any emergency calls . . . ."213 He had, in other words, been directed to take such calls, presumably regardless of whether he was in Lowell or whether it was after his shift's starting time of 5:00 p.m. If the employer directs the employee to undertake some course of action or if the employer "endorse[s] and utilize[s]" the employee's conduct, Wang says, those actions fall within the employee's scope of employment.214 In this electronic age "alchemical" reactions such as occurred in Clickner are commonplace. The instant the police department paged Waterman, it asked him to begin to do the kind of work he was "employed to perform," at a time and in a place where he had been "authorized" to act. Thus, at that moment Waterman's conduct entered within the scope of his employment.215

C. Clickner's Analysis Versus Wang's

The outcome in Clickner appears to limit employer liability in scope of employment cases more than the Wang court intended. First, the SJC said in Clickner that the employee, the police officer Waterman, was not within his scope of employment because "his conduct was not clearly that which he was hired to perform."216 This use of the word clearly suggests a retreat from the broad interpretation of scope of employment found in Wang and its progeny.217 It also contradicts the court's assertion that "'[t]he scope of

211. Id. at 854-55.
212. See id. at 855.
213. Id. at 854.
215. See Wang, 501 N.E.2d at 1166.
216. Id. at 855 n.5 (emphasis added).
an employee's employment is not construed restrictively."  

Clickner effectively reverses that presumption. Taken at face value, Clickner shifts the burden of proof regarding whether an employee's conduct is within his or her scope of employment in a way beneficial to employers. Scope of employment cases—especially those that reach appellate courts—must often arise at the margin between "scope" and "not scope." Clickner encourages future courts to pull those margins in toward the certain center.

Second, the Clickner court did not find the Wang test for scope of employment exhaustive, as had previous courts. Rather, it listed Wang's three-part test as among the "[f]actors to be considered." The court never set forth, however, what "factors" it believed relevant to scope of employment that do not fit into one of the Wang test's three categories. Officer Waterman's inebriation appears to be the only possible such factor. It made him, the court said, "unfit for duty." Yet Waterman's drunkenness—to the extent that it should even have been considered—only made it so that he could not do his job properly. That is, Waterman was unable to undertake the kind of work he was employed to perform. Being "unfit for duty," in other words, is really no different from an inability to pass Wang's "job" test.

219. Cf. Howard, 506 N.E.2d at 105 (finding that taxpayers who filed a lawsuit to prevent Burlington from indemnifying the town's finance committee chairwoman in a defamation action brought against her "had the burden of proof on the issue" of whether her conduct was within the scope of her employment).
220. With the possible exception of Kelly v. Middlesex Corp., 616 N.E.2d 473 (Mass. App. Ct. 1993), no pre-Clickner case that employed the Wang three-part test for scope of employment analyzed the employee's conduct except in terms of that test. In Kelly, too, the appeals court put the employee's conduct under the Wang microscope. Then, however, the court mentioned "certain additional factors" it found relevant in determining that the employee—apparently a construction worker, who was involved in an automobile accident while voluntarily returning to his closed-down job site to pick up his paycheck—was not within the scope of his employment. Id. at 476. Among these "additional factors" were that the employee was "off duty," that "he was not on call," and that his "conduct at the time of the accident was independent of the requirements or interests of his employer . . . ." Id. These "additional factors" are, of course, not additional at all, but are exactly the kinds of factors that can easily be fit into the Wang test categories.
221. Clickner, 663 N.E.2d at 855.
222. Id.
223. See supra notes 205-07 and accompanying text for a discussion of the questionable relevance of Officer Waterman's inebriation.
224. See Clickner, 663 N.E.2d at 856.
Third, the Clickner court converted Wang's relatively clear “elements” test into a vague “balancing” test. In Clickner, the SJC set forth the factors that suggested Waterman was within his scope of employment and weighed them against those that suggested he was not. The court specifically asked whether Waterman's “act of responding to the page [from the Lowell police] was enough to tip the balance and to bring his conduct within the scope of employment . . . .” Balancing tests are often imprecise; when courts weigh factors, both the choice of factors to be weighed and the weight each is assigned can become subjective. Thus, the outcome of lawsuits in areas of law governed by balancing tests can be unpredictable. Wang's three-part test for scope of employment, though not without its problems, at least provides potential litigants with a clearer sense of how that issue will be analyzed by the courts than does Clickner's “balancing test” approach.

D. The Post-Clickner Future

The future of scope of employment jurisprudence in Massachusetts remains uncertain. Appellate courts have had only a few occasions on which to address scope of employment questions since the SJC's decision in Clickner. In the first post-Clickner case, Doe v. Purity Supreme, Inc., the SJC ignored Clickner, which had been handed down barely a week earlier, and looked at the scope of employment question through the Wang lens. The court in Timpson v. Transamerica Insurance Company, a case decided six months after Clickner, performed the same analysis. There, the court discussed the Wang test extensively, but never even mentioned Clickner.

Only in Armstrong v. Lamy, a federal district court case applying Massachusetts scope of employment law, did a court seem-
ingly rely on *Clickner*, rather than *Wang*, as its primary authority.\(^{236}\)

The district court may have done this because it thought that *Clickner*'s balancing-test approach now governs scope of employment law in Massachusetts. It is far more likely, however, that the *Armstrong* court relied on *Clickner* because both cases arose in the context of public-employer liability for public-employee misconduct under the Massachusetts Torts Claims Act.\(^{237}\) Indeed, the test the *Armstrong* court then used to determine if the employee’s conduct was within his scope of employment was the *Wang* test, as quoted in *Clickner*.\(^{238}\) In *Burroughs v. Commonwealth*,\(^{239}\) the SJC itself once again found the relevant scope of employment formulation in *Wang*, not *Clickner*.\(^{240}\) The *Burroughs* court also cited *Kansallis Finance Ltd. v. Fern*\(^ {241}\) — a case involving a plaintiff’s reliance on the apparent authority of a partner in a partnership—for the proposition that “‘[t]he scope of employment test asks the question: is this the kind of thing that in a general way employees of this kind do in employment of this *kind.*’”\(^ {242}\) By approving the “in a general way” approach to scope of employment, the *Burroughs* court seemed to be returning to the nonrestrictive construction of scope of employment articulated in *Commonwealth v. Jerez*,\(^ {243}\) and acknowledged by the SJC in subsequent cases,\(^ {244}\) but that had been implicitly rejected in *Clickner*.\(^ {245}\)

If these recent cases are any indication, the *Clickner* decision is something of an aberration. So far, fortunately, it has had slight impact on how courts approach scope of employment questions. Courts have declined to accept—and may not even have recognized—*Clickner*'s invitation to reconfigure scope of employment.

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\(^{236}\) See *id.* at 1045. The court noted, however, that *Clickner* itself relied on *Wang*'s three-part test to provide “factors to be considered” in the scope of employment analysis. *Id.*

\(^{237}\) Mass. Gen. Laws ch. 258, § 2 (1994); see also *Armstrong*, 938 F. Supp. at 1045 (“[In *Clickner*], [t]he Supreme Judicial Court . . . had occasion to consider the meaning of the phrase ‘acting within the scope of his office or employment,’ as that phrase is used in § 2 of the MTCA.”) (emphasis added) (citation omitted); *Clickner v. City of Lowell*, 663 N.E.2d 852, 854 (Mass. 1996).

\(^{238}\) See *Armstrong*, 938 F. Supp. at 1045.

\(^{239}\) 673 N.E.2d 1217 (Mass. 1996).

\(^{240}\) See *id.* at 1219 (“[*Wang*] set[s] forth the factors relevant to scope of employment determinations . . . .”) (emphasis added).


\(^{242}\) *Burroughs*, 673 N.E.2d at 1219 (quoting *Kansallis*, 659 N.E.2d at 735).

\(^{243}\) 457 N.E.2d 1105, 1108 (Mass. 1983).

\(^{244}\) See, e.g., *Howard v. Town of Burlington*, 506 N.E.2d 102, 105 (Mass. 1987).

analysis. *Wang* still delineates scope of employment law in Massachusetts. *Clickner*, with its questionable outcome and opaque balancing test, provides a far less reliable precedent than do *Wang* and its progeny. *Clickner* makes results-driven analysis too easy and too tempting. If the *Clickner* approach prevails, a court would be free to select whatever factors it wanted to consider, and to balance those factors as it chose, in deciding whether an employee’s conduct fell within his or her scope of employment. On the other hand, *Wang*’s three-part test, however imperfect, is exhaustive; it gives courts and litigants clear ground rules for determining the boundaries of an employee’s scope of employment. In the final analysis this is fairer to all than the most careful balancing of an ever changing set of scope of employment “factors.”