St. John's Law Review

Volume 15
Number 1 *Volume 15, November 1940, Number 1*

Article 6

Liability of Department Stores for Torts of Lessees

Arthur Bennett

sion of the interest of the beneficiaries. However, in *Fontheim* v. *Third Avenue Railway*,[37] it was held that "The foundation of every [death] action of this kind is in the injury which caused the death, and not merely in the fact of death itself, and if an injured person recovers a judgment for that injury during his lifetime or compromises his claims and accepts satisfaction for his injury, his representatives cannot maintain any action upon his subsequent death resulting therefrom." On closer study of the statute, this decision appears sound. The enactment does not relate specifically to personal injury actions, but is designed to prevent the abatement of such actions, and applies only to those continued or brought after the death of the injured person. A recovery by one who was permanently disabled for life as a result of a wrongful act, would include damages for the loss of earnings for the probable duration of his working days. These damages would supposedly compensate him for the injury, and enable him to continue to support his family and pay his debts. "In this situation, it is obvious that a recovery under the wrongful death statute, assuming the injury causes premature death, would result in a duplication of damages. Here, one right of action affords complete relief." [38]

BERNARD SCHIFF.

LIABILITY OF DEPARTMENT STORES FOR TORTS OF LESSEES

Theory of Action

It is a fundamental rule in the law of agency, that a principal is liable for the acts of his agent [1] done within the scope of his employ-

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[37] 257 App. Div. 147, 12 N. Y. S. (2d) 90 (1st Dept. 1939), *app. granted*, 257 App. Div. 948, 13 N. Y. S. (2d) 281 (1st Dept. 1939), *app. denied*, 281 N. Y. 392, 24 N. E. (2d) 95 (1940).

[38] N. Y. LAW REVISION COMMISSION, Leg. Doc. (1935) No. 60 (E) p. 55.

[1] Hoffman v. John Hancock Mutual Life Ins. Co., 92 U. S. 161 (1875); Vicksburg & M. R. R. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118 (1886); American Bonding and Trust Co. v. Takahashi, 111 Fed. 125 (C. C. A. 9th, 1901); Mather v. Barnes, 146 Fed. 1000 (C. C. A. 2d, 1906); Armour v. Michigan C. R. R., 65 N. Y. 111 (1875); Isham v. Post, 141 N. Y. 100, 35 N. E. 1084 (1894); MECHEM, AGENCY § 704; RESTATEMENT, AGENCY § 140.

The common law maxims *respondeat superior* and *qui facit per alium, facit per se* form the basis for the principal's liability. The thought is that every man owes a duty to use care in conducting his affairs. Violation of this duty by his agent to the subsequent injury of a third party, should make the principal liable, since he has the privilege of selecting his *alter ego*.

ment.[2] This liability may be *ex contractu*[3] or *ex delicto*.[4] In cases involving a department store, lessee, and injured third party, the plaintiff predicates his cause of action upon this theory, endeavoring to hold the department store accountable for the wrong of the lessee. It becomes necessary, therefore, that an agency relationship between the department store and lessee be established. Where the department store has delegated actual authority, either express or implied, to the lessee, the proof of agency is comparatively simple. The cases which present the difficulty are those in which the facts show that the lessee operated as an independent contractor.[5] It is here that the question of apparent agency assumes importance.

Apparent Agency

Apparent agency,[6] strictly speaking, is no agency at all, but is

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[2] "For the lack of a better term it is said in order to charge the master with the servant's negligence, the servant must be acting 'in the course of his undertaking' or within the 'course of his employment.' This term 'course of his employment,' like the corresponding term 'the scope of the authority' in cases of agency, and 'the scope of the business' in cases of partnership, is one not capable of precise definition although many attempts have been made to define it. It is largely a question of fact and its determination may vary in each case in view of the peculiar circumstances. The utmost that can ordinarily be said is that a servant is acting within the course of his employment when he is engaged in doing for his master, either the act consciously and specifically directed or any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act or a natural, direct and logical result of it. If in doing such an act, the servant acts negligently, that is negligence within the course of the employment." 2 C. J. (1915) § 536, n.39(b), p. 853.

[3] Westfield Bank v. Cornen, 37 N. Y. 320 (1867); Schley v. Fryer, 100 N. Y. 71, 2 N. E. 280 (1885); Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982 (1894); MECHEM, AGENCY §§ 704, 705; 2 AM. JUR. 353; RESTATEMENT, AGENCY § 144.

[4] Bradford v. Hanover F. Ins. Co., 102 Fed. 48 (C. C. A. 3d, 1900); Jackson v. American Telephone & Telegraph Co., 139 N. C. 347, 51 S. E. 1015 (1905).

"If he employs incompetent or untrustworthy agents, it is his fault; and whether the injury to third persons is caused by the negative or positive misfeasance of the agent, the maxim *respondeat superior* applies, provided only, that the agent was acting at the time for the principal and within the scope of the business intrusted to him." Higgins v. Watervliet Turnpike & R. R., 46 N. Y. 23, 27 (1871); Nowack v. Metropolitan St. Ry., 166 N. Y. 433, 60 N. E. 32 (1856).

[5] 2 AM. JUR. (1936) 88, § 8. "An independent contractor may be distinguished from an agent in that he is a person who contracts with another to do something for him, but who is not controlled or subject to the control of the other in the performance of such contract but only as to the result. A principal, on the other hand, has the right to control the conduct of an agent with respect to matters intrusted to him. The theory which in many cases is adopted is to differentiate between an agent and an independent contractor according to whether he is subject to, or free from, the control of the employer with respect to the details of the work." Note (1922) 19 A. L. R. 226.

[6] Bank of Batavia v. N. Y., L. E. & W. R. R., 106 N. Y. 195, 199, 12 N. E. 433 (1889). The court stated, "It is a settled doctrine of the law of agency in this state that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the

based entirely upon estoppel. It exists where one induces another, either intentionally or through negligence, to believe that a third person is his agent.[7] "The rule * * * embraces three primary elements. These are: (1) A representation by the principal; (2) a reliance upon such representation by a third person; and (3) a change of position by such third person in reliance upon such representation. All these elements must be present to bring a case within the rule." [8] *Barton* v. *Studebaker Corp.*[9] affords an excellent illustration of this point. There, the defendant automobile company was held not liable for the injuries of the plaintiff which occurred while riding with an alleged salesman. The corporation was allowed to prove that the salesman was an independent contractor because a vital element of estoppel was missing, namely, reliance on the representation of the defendant.[10] It was not shown "that she (plaintiff) was influenced in the least degree to ride with Owen (the salesman) because she believed that he was the servant of the corporation. It is undoubtedly true that she never gave any thought whatever to the nature of the business relation existing between Owen and the corporation." [11]

The theory of ostensible agency is a just one. It proceeds upon the doctrine that where one of two innocent parties must suffer from the wrongful act of another, the loss should fall upon the one who made it possible for the third party to perpetrate the wrong.[12] Therefore, it would seem to follow, that an apparent agency would have the same legal effect as an actual agency.

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knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." 2 AM. JUR. (1936) § 101; RESTATEMENT, AGENCY § 8. For the technical difference between apparent agency and estoppel, 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 277; RESTATEMENT, AGENCY §§ 8, 31 and 159.

[7] The methods of creating an apparent agency were enumerated in Hackett v. Van Frank, 105 Mo. App. 384, 79 S. W. 1013 (1904).

[8] Fradley v. Hyland, 37 Fed. 49 (C. C. S. D. N. Y. 1888); Gosliner v. Grangers' Bank, 124 Cal. 225, 56 Pac. 1029 (1889); Luft v. Arakelian, 33 Cal. App. 463, 165 Pac. 712 (1917); Young v. Inman and Nelson, 146 Iowa 492, 125 N. W. 177 (1910); Essex County Acceptance Corp. v. Pierce-Arrow Sales Co., 288 Mass. 270, 192 N. E. 604 (1934); Stanton v. Hawley, 193 App. Div. 559, 184 N. Y. Supp. 415 (3d Dept. 1920); Note (1935) 95 A. L. R. 1319.

[9] 46 Cal. App. 707, 189 Pac. 1025 (1920).

[10] 2 C. J. (1915) § 73. RESTATEMENT, AGENCY § 267, comment *a*, reads as follows: "The mere fact that acts are done by one whom the injured party believes to be the defendant's servant is not sufficient to cause the apparent master to be liable. There must be such reliance upon the manifestation as exposes the plaintiff to the negligent conduct. The rule normally applies where the plaintiff has submitted himself to the care or protection of an apparent servant in response to an apparent invitation from the defendant to enter into such relations with such servant. A manifestation of authority constitutes an invitation to deal with such servant and to enter into relations with him which are consistent with the apparent authority."

[11] 46 Cal. App. 707, 189 Pac. 1025, 1031 (1920).

[12] 2 AM. JUR. (1936) § 104.

Liability in Tort

It was not until the case of *Hannon* v. *Siegel-Cooper Co.*[13] that a department store's liability for the wrong of its ostensible agent was extended to the realm of tort. Previously it was felt that apparent agency could only create a liability in contract.[14] In that case, the defendant store represented itself, through extensive advertising, as carrying on the practice of dentistry. Plaintiff relied on the representation and secured treatment which was administered in a negligent and unskillful fashion. In a suit to recover damages for injuries sustained, it was held that the defendant was estopped from denying its liability for the conduct of one whom it held out as agent, despite the fact that the lessee-dentist was in reality an independent contractor. The court said:[15]

> "But whenever the tort consists of a violation of duty which springs from the contract between the parties, the ostensible principal should be liable to the same extent in an action *ex delicto* as in one *ex contractu*. * * * If *A* contracts with the ostensible agent of *B* for the purchase of goods, he relies not only on the business reputation of *B*, as to the goods he manufactures or sells, but on the pecuniary responsibility of *B* to answer for any default in carrying out the contract. So here the plaintiff had a right to rely not only on the presumption that the defendant would employ a skillful dentist as its servant, but also on the fact that if that servant, whether skillful or not, was guilty of any malpractice, she had a responsible party to answer therefor in damages."

This theory of tort liability has been followed to the present day and *Hannon* v. *Siegel-Cooper Co.* has become a leading case throughout the United States.[16]

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[13] 167 N. Y. 244, 60 N. E. 597 (1901).

[14] Two late cases involving liability on contract based on apparent agency, with department stores as defendants, are Timmins v. F. N. Joslin Co., 22 N. E. (2d) 76 (Mass. 1939), and Gottlieb Bros. v. Culbertson's, 152 Wash. 205, 277 Pac. 447 (1929). In the former, plaintiff sued on a breach of implied warranty, having suffered injuries from splinters in bread she had purchased in the grocery department of defendant's store. The court estopped defendant from showing that the grocery section of the store was owned by an independent contractor, since all the elements of ostensible agency were present. In the latter case, the defendant was held liable on an order contract for the delivery of furs, entered into by his lessee. Here, again, liability was based on an estoppel. See Note (1939) 123 A. L. R. 594 for a discussion of other cases on the topic.

[15] 167 N. Y. 244, 247, 60 N. E. 597, 598 (1901).

[16] In tort cases based on apparent agency, with department stores as defendants, the facts coincide almost exactly with those of the *Hannon* case, except that the lessee is usually a beauty shop instead of a dentist. Augusta Friedman's Shop, Inc. v. Yeats, 216 Ala. 434, 113 So. 299 (1927); Manning v. Leavitt Co., 5 A. (2d) 667 (N. H. 1939); Fields v. Evans, 36 Ohio App. 153, 172 N. E. 702 (1929); Christiansen v. Fantle Bros., Inc., 56 S. D. 350, 228 N. W. 407 (1930) (an analysis of this case may be found in PRASHKER, CASES AND MATERIALS ON THE LAW OF PRIVATE CORPORATIONS 479, n.1).

Necessity of Contractual Relationship

Dicta in *Hannon* v. *Siegel-Cooper Co.*, unfortunately, seem to indicate that tort liability based on ostensible agency depends upon the existence of a contractual relationship between the plaintiff and the apparent principal. The *dictum* declares:[17] "It may very well be that where the duty, the violation of which constitutes the tort sued for, springs from no contract with, nor relation to, the principal, a party would not be estopped from denying that the wrongdoer was his agent, even though he had held him out as such. In such a case the representation of the principal would be no factor in producing the injury complained of." A recent Appellate Division decision has served to point out the error in this view. In *Santise* v. *Martins, Inc.*,[18] defendant advertised itself as conducting a shoe department. Plaintiff, before buying any shoes, was injured through the lessee's negligence by a nail protruding from a pair of shoes she was trying on. There was no contractual relationship. The defendant store was estopped from proving that the lessee was an independent contractor and was held liable for the lessee's tort. With regard to the fact that no sale had taken place the court said:[19]

> "The difference [between a contractual and non-contractual relationship] would be important if the action were based on a breach of warranty. It is not significant in an action for negligence. The defendant's duty of reasonable care rose as soon as it offered the shoes to the public, for it must have known that patrons would try on the shoes before making a purchase, and the danger of injury from a protruding nail was just as great before the purchase as after."

Certainly, there can be no question that the stand taken by the court in the *Santise* case is sound law. It is a matter of practical experience that reliance may be placed on a representation despite a lack of contractual relationship. The plaintiff was relying on the representation that the lessee was the defendant's agent even though she had not as yet purchased any shoes. From defendant's representations she was given the right to believe that defendant would select careful servants, and in the event of their negligence would be ready to recompense her for any damages. Furthermore, it would be absurd to hold that in the absence of a sale, no duty of care was owed to the plaintiff. A duty of care need not arise from a contractual relationship. It may exist independently. The plaintiff as an invitee and a prospective buyer was entitled to be protected against all foreseeable dangers by the exercise of reasonable care. It follows, therefore, that the necessity of contractual relationship, which is set down in the *dicta*

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[17] 167 N. Y. 244, 246, 60 N. E. 597, 598 (1901).
[18] 258 App. Div. 665, 17 N. Y. S. (2d) 742 (2d Dept. 1940).
[19] 258 App. Div. 665, 666, 17 N. Y. S. (2d) 740, 743 (2d Dept. 1940).

as a condition precedent to the department store's liability, may be dismissed as a slip of the pen.

Judicial authority may be found for dispensing with the condition of contractual relationship in *Stevens* v. *Hulse*.[20] In that case defendant invited plaintiff to visit his farm to see a bear he had caught. Plaintiff was told it was safe to feed it. While doing so, she was attacked and clawed about the legs. In a suit brought by plaintiff to recover for her injuries, defendant was estopped from disclaiming responsibility on the ground that the bear belonged to his lessee, who had leased that section of the farm where the bear was kept. The court held that plaintiff "had a right to rely on the fact that defendant seemed to be in charge of the premises owned by him and of the bear".[21] This case is farther away from the contractual relationship idea than the *Santise* case. In the latter, the intent to enter into a contract with the apparent principal was present. In the *Stevens* case it was lacking entirely.[22]

A concise test may be formulated for establishing the liability of the department store which may be expressed by two interrogations: (1) Was there an apparent agency upon which the plaintiff relied? (2) Was there a breach of a legal duty owed to the plaintiff? If the answers to both of these questions are in the affirmative, then the defendant store should be liable for any damages suffered. This is a more realistic approach than the arbitrary denial of liability where the contractual relationship is absent.

Defenses

The plaintiff is still a long way from obtaining judgment by proving an ostensible agency. Even as early as the *Hannon* case, certain defenses were raised after the agency was conceded. There, illegality, under an ordinance prohibiting the practice of dentistry without having registered and procured a license, and the *ultra vires* nature of the dental practice, were urged. The court held both defenses to be inadequate, and relied on the rule of *Bissell* v. *Mich. Southern R. R.*[23] that a corporation is liable for the torts of its servants while engaging in activities beyond its corporate powers.[24]

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[20] 263 N. Y. 421, 189 N. E. 478 (1934).

[21] 263 N. Y. 421, 423, 189 N. E. 478, 479 (1934).

[22] Gettlar v. Rubenstein, 71 Misc. 41, 11 N. Y. S. (2d) 943 (1939) is in accord with the *Stevens* case. Defendant represented its summer camp as having horseback riding among its entertainment features. Plaintiff, while riding, was injured through the riding instructor's negligence. The court estopped the defendant from disproving the agency and declared the plaintiff could "recover whether she was an invitee or a mere gratuitous licensee".

[23] 22 N. Y. 258 (1860).

[24] Sullivan v. Arkansas Val. Bank, 176 Ark. 278, 2 S. W. (2d) 1096 (1928); New York, L. E. & W. Ry. v. Haring, 47 N. J. L. 137 (1885); DeGroff v. American Linen Thread Co., 21 N. Y. 124 (1860); Buffet v. Troy & B. R. R., 40 N. Y. 168 (1869); Southwestern Tel. and Tel. Co. v. Long, 182 S. W. 421 (Tex. Civ. App. 1916); PRASHKER, CASES AND MATERIALS ON THE LAWS OF

In *Maloney Tank Mfg. Co.* v. *Mid-Continent Petroleum Corp.*,[25] defendant was engaged in dismantling oil tanks for the plaintiff. One of the apparent agents of the defendant, while working, lit a cigarette and threw the match on the oil-soaked ground. The resulting fire destroyed all the tanks. The defendant was forced to admit an ostensible agency but denied liability on the ground that the damaging acts were committed outside the scope of the agency.[26] The court overruled this contention and held that the smoking was within the bounds of the agency. In *Augusta Friedman's Shop, Inc.* v. *Yeats*,[27] a department store case, a similar conclusion was reached with regard to the same defense.

In proving the specific tort complained of, the plaintiff must again run the gamut of defenses. Here the range is wider, since any one of the essential elements of the tort may be attacked.[28] The more recent cases employ this line of defense to a greater degree than the older, where only apparent agency was challenged. So in the *Santise* case, defendant contended no duty was owed to the plaintiff to inspect the shoes exhibited for sale; *held,* there was a duty, for the defect in the shoes was not latent, but discoverable on reasonable inspection.[29] In the same case contributory negligence of the plaintiff was pleaded. This, too, was overruled. In *Manning* v. *Leavitt Co.*,[30] defendant store requested the court to find the plaintiff guilty of contributory negligence as a matter of law. This was refused. Only the scarcity of late cases involving department stores as apparent principals prevents a greater variety of illustrations.

PRIVATE CORPORATIONS (1937) 387 *et seq.*; FLETCHER, 10 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (Rev. ed. 1931) § 4902; Note (1917A) L. R. A. 749.

[25] 49 F. (2d) 146 (C. C. A. 10th, 1931).

[26] See note 2, *supra.*

[27] 216 Ala. 434, 113 So. 299 (1927).

[28] Sometimes the plaintiff has a choice of remedy as in Timmins v. F. N. Joslin Co., 22 N. E. (2d) 76 (Mass. 1939), where the theory of the action was breach of warranty. In such cases, privity of contract must be present to hold the defendant. Chysky v. Drake, 235 N. Y. 468, 139 N. E. 576 (1923); Pearlman v. Garrod Shoe Co., 276 N. Y. 172, 11 N. E. (2d) 718 (1937); WHITNEY, SALES (2d ed. 1934) § 175.

[29] The court distinguished the immediate case from Bruckel v. Milhaus Son, 116 App. Div. 832, 102 N. Y. Supp. 395 (2d Dept. 1907), where the cause of injury was the explosion of a bottle charged with gas, and Liedeker v. Sears, Roebuck and Co., Inc., 249 App. Div. 835, 292 N. Y. Supp. 541 (2d Dept. 1937), *aff'd,* 274 N. Y. 631, 10 N. E. (2d) 586 (1937), where a folding beach chair collapsed under plaintiff in defendant's store. Only expert examination and mechanical test would have revealed the defects in those instances. The decision relied on in the *Santise* case was Garvey v. Namm, 136 App. Div. 815, 121 N. Y. Supp. 442 (2d Dept. 1910), where a protruding needle in a new wrapper bought from the defendant, caused the injury. This defect could have been corrected by ordinary inspection. Note (1937) 111 A. L. R. 1239.

[30] 5 A. (2d) 667 (N. H. 1939).

Conclusion

Professor Mechem in his treatise on the law of agency recognized the application of apparent agency to all cases, whether founded in tort or contract. He observes that "Reliance upon the appearances, however, does not ordinarily induce the assault, slander, trespass, or negligent injury, and the cases must be very rare, if any, in which it could be an element".[31] With this the writer is inclined to agree. A diligent search of the case books has failed to reveal any other cases or torts but those founded on the theory of negligence.[32] However, the author is confident that, in the future, actions will arise holding apparent principals liable on other torts as well. They will fill in the last gaps in the apparent agency-tort liability scheme.

ARTHUR BENNETT.

VALIDITY OF CONTRACT BASED UPON BREACH OF PRIOR EXISTING CONTRACT

I

A contract represents the legal obligations of all parties thereto and defines their legal rights.[1] Any interference with the legal rights is remediable at law or in equity.[2] And the law goes further. It protects the contracting parties against interference by third parties not in privity with the contract.[3] This protection is of comparatively modern origin although it sprang from the early master and servant relationship,[4] spread to specialty contracts of a personal nature [5] and, at present, is applied to all types of contracts.[6] The courts have definitely classified interference with and procurance of a breach of con-

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[31] 1 MECHEM, AGENCY § 724.
[32] (1931) 29 MICH. L. REV. 640.

[1] WHITNEY, LAW OF CONTRACTS (3d ed. 1937) § 1.
[2] *Id.* § 12.
[3] Blumenthal v. United States, 30 F. (2d) 247 (C. C. A. 2d, 1929), *cert. denied*, 279 U. S. 847, 49 Sup. Ct. 345 (1929); Walker v. Cronin, 107 Mass. 555 (1871); Union Car Advertising Co. v. Collier, 263 N. Y. 386, 189 N. E. 463 (1934); Fradus Contracting Co. v. Taylor, 201 App. Div. 298, 194 N. Y. Supp. 386 (1st Dept. 1922); Axelrod v. 77 Park Ave. Corp., 225 App. Div. 557, 234 N. Y. Supp. 27 (1st Dept. 1929).
[4] Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663, 665.
[5] Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853); Bowen v. Hall, 6 Q. B. D. 333 (1881).
[6] Employing Printers Club v. Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353 (1905); Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924 (1898); Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817 (1907); Lamb v. Cheney, 227 N. Y. 418, 125 N. E. 817 (1920); Temperton v. Russell (1893) 1 Q. B. 715; Note (1923) 36 HARV. L. REV. 663, 671.