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INSURANCE COMPANY'S LIABILITY FOR AGENT'S ASSAULT

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On October 10, 1953, an insurance company "field underwriter" in Philadelphia called at the residence of a recently widowed applicant and her 18 year old daughter. The "field underwriter" was an investigator whose job was to confirm and add to the medical and other information contained on the application form submitted to the company by a sales agent. This "field underwriter," armed with the original application forms signed by the widow and her daughter and a black bag resembling a physician's kit, identified himself to the applicants as a doctor sent by the insurance company. He did not limit himself to questioning but proceeded to conduct the type of intimate physical examination which would have been proper only if he had been authorized to make an examination for the presence of a hernia. This examination was conducted upon both women. After the company's authorized doctor actually called upon them about a week later, they claimed to have suffered severe emotional, mental and nervous disturbance.

The two women brought suit against the insurance company. A verdict for the defendant was reversed by the Court of Appeals holding that it was improper for the trial court to have charged that the "field underwriter" must have been acting at least in part to further the purposes of the insurance company in perpetrating this fraud.[1]

A second verdict for the defendant was reversed for error in charging the jury that the women must be found to have exercised ordinary prudence and reasonable diligence in protecting themselves against improper conduct and fraud of the "field underwriter."[2] At the third trial the women declined to testify again and the case proceeded no further.

This case raises severe problems for any principal which has agents authorized to have personal contact with members of the public. It is of particular importance to insurance companies which have various types of agents who call at the homes of policyholders or applicants. Since physical examinations are frequently a necessary part of a life insurance program, the opportunity is great for an insurance company agent clothed with the insignia of his office to pose as

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1 Bowman v. Home Life Ins. Co. of America, 243 F.2d 331 (3d Cir. 1957).

2 Bowman v. Home Life Ins. Co. of America, 260 F.2d 521 (3d Cir. 1958).

a medical examiner. This could also be true in the case of the adjuster for an accident claim made against an insured party.

A parallel might also be made to the meter reader from a public utility company, to the milkman, breadman, paperman or grocery man, or to any employee who, in the normal course of his employer's business, gains access to a customer's home. However, only the insurance situations present the agent with an opportunity for physical contact under color of authority. The other situations all preclude the possibility of any physical contact having the coloration of authorization.

I. Vicarious Liability by Respondeat Superior

The early American view was that any intentional wrong committed by a servant was outside the course of his employment.[3] More recently, however, courts have generally found a master liable for the intentional acts of his servant committed within the course of the servant's employment,[4] and the dividing line has been regarded as "the wilfulness of the act."[5]

The traditional approach to a case like the *Bowman* case, involving a principal without any special duty, is to apply the test of the master-servant relation, and if it is found to exist the principal can be held liable by the doctrine of *respondeat superior*.[6]

The question has sometimes been viewed as one depending on whether the insurance company had the right to direct the activities of its agent to the extent that the relationship of master and servant exists.[7] Support for this approach likewise exists in the Restatement, which provides:

> "A principal is not liable for physical harm caused by the negligent physical conduct of a non-servant agent during the performance of the principal's business, if he neither intended nor authorized the result nor the manner of performance, unless he was under a duty to have the act performed with due care."[8]

The cases which support this approach are mostly ones involving

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[3] Wright v. Wilcox, 19 Wend. (N.Y.) 343 (1838); 2 Mechem, Agency § 1926 (2d ed. 1914).

[4] 2 Mechem, Agency § 1926 (2d ed. 1914).

[5] Ibid.

[6] 2 Mechem, Agency §§ 1926-28, 1977 (2d ed. 1914); Annot., 116 A.L.R. 1389 (1938); Seavey, Speculations as to "Respondeat Superior," Harvard Legal Essays 433 (1934); Note, Master's Liability for the Wilful Assault of His Servant, 34 Ky. L.J. 156 (1946); Annot., 22 A.L.R.2d 1227 (1952).

[7] Annot., 116 A.L.R. 1389 (1938).

[8] Restatement (Second), Agency § 250 (1958). See also, § 219(2)(d).

an insurance agent's negligent operation of an automobile while engaged in company business.[9] However, these cases all require a showing that the agent was acting within the scope of his authority.[10]

The *Bowman* case ignored this approach and imposed liability on theories which take a big step toward imposing absolute responsibility on the principal.[11]

II. Agent Acts for His Own Purposes

The Restatement adopts the rule that:

> "A person who otherwise would be liable to another for the misrepresentations of one apparently acting for him is not relieved from liability by the fact that the servant or other agent acts entirely for his own purposes, unless the other has notice of this."[12]

Judge Goodrich's reliance on Section 262 in the *Bowman* case[13] is the only application of that section to an assault by an agent. However, principals have been sued for the assaults of their agents on other occasions where the agents acted solely for their own purposes.

For instance, where an insurance company sent a check for the benefits of a life policy to its agent, who collected it and paid a bill for preparing the body of the deceased for burial, and later assaulted

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[9] E.g., Dillon v. Prudential Ins. Co., 75 Cal. App. 266, 242 Pac. 736 (1925); Hall v. Sera, 112 Conn. 291, 152 Atl. 148 (1930); American Sav. Life Ins. Co. v. Riplinger, 249 Ky. 8, 60 S.W.2d 115 (1933); Vert v. Metropolitan Life Ins. Co., 342 Mo. 629, 117 S.W.2d 252 (1938); Burdo v. Metropolitan Life Ins. Co., 254 App. Div. 26, 4 N.Y.S.2d 819 (1938); Wesolowski v. John Hancock Mutual Life Ins. Co., 308 Pa. 117, 162 Atl. 166 (1932); American Nat'l Ins. Co. v. Denke, 128 Tex. 229, 95 S.W.2d 370 (1936); Fidelity Union Life Ins. Co. v. McGinnis, 62 S.W.2d 186 (Tex. Civ. App. 1933).

[10] As to scope of employment, see 47 Mich. L. Rev. 1028 (1949).

[11] See 11 Vand. L. Rev. 193 (1957).

[12] Restatement (Second), Agency § 262 (1958). Comment a states: "Rationale. A person relying upon the appearance of agency knows that the apparent agent is not authorized to act except for the benefit of the principal. This is something, however, which he normally cannot ascertain and something, therefore, for which it is rational to require the principal, rather than the other party, to bear the risk. The underlying principle based upon business expediency—the desire that third persons should be given reasonable protection in dealing with agents finds expression in many rules, some in situations in which there is no apparent authority . . . and many in situations in which there is apparent authority. . . . In all of such cases the other party relies upon the honesty of the agent, and, if the principal is disclosed or partially disclosed, realizes that the agent is not authorized if fraudulent. It is, however, for the ultimate interest of persons employing agents, as well as for the benefit of the public, that persons dealing with agents should be able to rely upon apparently true statements by agents who are purporting to act and are apparently acting in the interests of the principal. The line at which the principal's liability ceases is a matter for judicial judgment." Neither of the illustrations to this section is relevant; they both deal with a deceitful business transaction and do not involve a physical touching.

[13] Supra note 1.

the bill payer in an altercation over a receipt for the amount paid, it was held that the company was not liable, since the agent could not have been acting within the scope of his authority when he committed such a tort.[14] Likewise, a showing that an alleged assault was within the scope of employment or was done in furtherance of the company's business or in its interests was a necessary element for company liability where an agent for collecting premiums and soliciting insurance committed an assault.[15] It has, however, been held that a railroad company may be liable for an assault committed upon a person by the agent in the railroad station checking out baggage.[16] Likewise, a pullman company is responsible for an indecent assault made upon a female passenger by a company porter,[17] a cab company is liable for an assault by its driver upon a passenger,[18] a telegraph company has been held liable for an indecent proposal made by a messenger boy to the recipient of a telegram,[19] a bus company has been held liable for an assault committed upon a passenger by a stranger,[20] a city-owned public utility was held liable for an assault committed by its superintendent on a customer who was trying to pay his gas bill,[21] a bus company was held liable for an assault by one of its drivers upon a motorist,[22] and a railroad may be liable where its conductor exceeds the bounds of propriety and either assaults a passenger[23] or kisses an unwilling lady passenger.[24]

Further, where an agent who was not a physician was sent to see a policyholder about a claimed sick benefit and injured the claimant by thrusting an unsanitary spoon into her throat, which was thereby lacerated, the agent was held to be acting within the scope of his employment and recovery against the company was allowed.[25] But,

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[14] Evans v. Metropolitan Life Ins. Co., 202 N.C. 830, 162 S.E. 554 (1932).

[15] Anderson v. Metropolitan Life Ins. Co., 128 Misc. 144, 218 N.Y. Supp. 494 (Sup. Ct. 1926); Life & Casualty Ins. Co. v. Russell, 164 Tenn. 586, 51 S.W.2d 491 (1932).

[16] Georgia R.R. & Banking Co. v. Richmond, 98 Ga. 495, 25 S.E. 565 (1896).

[17] Campbell v. Pullman Palace-Car Co., 42 Fed. 484 (N.D. Iowa 1890). The same result was reached where the porter was not even employed by the company at the time, Dwinelle v. New York Central and Hudson River R.R., 120 N.Y. 117, 24 N.E. 319 (1890).

[18] Korner v. Cosgrove, 108 Ohio 484, 141 N.E. 267 (1923). Likewise, where the assault was by a person unrelated to the company, Yellow Cab Co. of Atlanta v. Carmichael, 33 Ga. App. 364, 126 S.E. 269 (1925).

[19] Buchanan v. Western Union Tel. Co., 115 S.C. 433, 106 S.E. 159 (1920).

[20] Wilson v. Pan-American Bus Lines, Inc., 217 N.C. 586, 9 S.E.2d 1 (1940). See South Plains Coaches, Inc. v. Box, 111 S.W.2d 1151 (Tex. Civ. App. 1937).

[21] Munick v. City of Durham, 181 N.C. 188, 106 S.E. 665 (1921).

[22] Tri-State Coach Corp. v. Walsh, 188 Va. 299, 49 S.E.2d 363 (1948).

[23] Restatement (Second), Agency § 214, Illustration 3 (1958).

[24] Cracker v. Chicago & Northwestern Rwy., 36 Wis. 657 (1875).

[25] National Life & Accident Ins. Co. v. Cruso, 216 Ala. 421, 113 So. 296 (1927).

where a telephone employee entered a customer's home on a business mission and while there wilfully and maliciously committed an assault upon her with licentious intent, the employee was said to have departed from his scope of employment so that no liability could be imposed upon the principal.[26]

III. The Principal's Liability Where the Agent's Position Enables Him to Deceive

In its opinion reversing the judgment of the District Court at the first trial in the *Bowman* case,[27] the Court of Appeals placed reliance upon Section 261 of the Restatement, which provides as follows:

> "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."[28]

It is stated in *comment a* to this Section that "Liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him."[29]

As was the case with Section 262, the *Bowman* case[30] is the only instance of the application of Section 261 to an assault by an agent.

It is difficult to distinguish between Section 261 of the Restatement and the doctrine of apparent authority adopted by the Restatement. Section 261 requires that the agent be "apparently acting within his authority." The Restatement defines apparent authority as follows:

> "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.
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> "Comment:
>
> "a. Apparent authority results from a manifestation by a person that another is his agent, the manifestation being

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26 Hoppe v. Deese, 232 N.C. 698, 61 S.E.2d 903 (1950), 29 N.C.L. Rev. 281 (1951). Accord, Sauter v. New York Tribune, Inc., 305 N.Y. 442, 113 N.E.2d 790 (1953), 39 Cornell L.Q. 505 (1954).

27 Supra note 1.

28 Restatement (Second), Agency § 261 (1958). The illustrations to this section present facts constituting a tortious securing of money from the victim rather than a tortious touching.

29 Restatement (Second), Agency § 261, Comment a (1958).

30 Supra note 1.

> made to a third person and not, as when authority is created, to the agent. It is entirely distinct from authority, either expressed or implied. . . . [A]pparent authority exists only with regard to those who believe and have reason to believe that there is authority; there can be no apparent authority created by an undisclosed principal. . . ."[31]

The first comment to Section 27 of the Restatement says that:

> "[E]ither the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief. The information received by the third person may come directly from the principal by letter or word of mouth, from authorized statements of the agent, from documents or other indicia of authority given by the principal to the agent, or from third persons who have heard of the agent's authority through authorized or permitted channels of communication."[32]

It would appear that the pivotal question in cases of this sort would be whether the reliance of the third persons on the agent's authority was reasonable. This requires an examination of the "insignia" or indicia of office of the agent. These attributes are granted to the agent by the principal and are his warranty of authority to the public with whom his agent deals.[33]

The Restatement provides that:

> "Contributory negligence on the part of the deceived person is not generally recognized as a defense. However, if a third person should know or otherwise has notice that an agent is acting for his own purposes or is otherwise violating his authority, the principal is not liable."[34]

The Restatement reporter, Professor Seavey, states that contributory

[31] Restatement (Second), Agency § 8 (1958). The following is the Restatement's definition of the manner in which apparent authority may be created:

> "Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."

Restatement (Second), Agency § 27 (1958).

[32] Restatement (Second), Agency § 27, Comment a (1958).

[33] See infra, p. 340.

[34] Restatement (Second), Agency § 262, Comment c (1958).

negligence has generally been allowed as a defense to a claim against a principal only where the agent was not acting within the scope of his employment (the "wilful wrongdoer"), but he advocates extending the defense to situations where the agent was acting within the scope of his employment and the harm resulted in part from the plaintiff's own lack of care.[35]

However, though it has been advanced by practitioners[36] and adopted in an inverse fashion by at least one court,[37] the doctrine of contributory negligence should have no application to the case where a wilful tort has been committed. Contributory negligence is a defense only to negligence. Where a wilful tort has been committed there is no negligence on the part of the agent, and usually none on the part of the principal either.[38]

Nevertheless, this is not to say that the victim has no standard of care to which to adhere in dealing with the wilful wrongdoer. The victim's reliance on the agent's authority must always be reasonable, as is more fully set forth in the following Section.

IV. Reasonableness of the Victim's Reliance

Should the principal be made an absolute insurer? That is the question implicit in this entire problem. To do so would require that every insurance company warrant that its agents, whatever they may be authorized to do, will not assault a third person under any circumstances, and that in the event that any such assaults are committed by its agents it will assume liability for any damage resulting from them. While some large corporate enterprises might be able to withstand the imposition of such liability, there are many small or medium size businesses which could be bankrupted overnight merely by a single act of indiscretion by one of its agents, unless it was itself protected against such loss by a fidelity bond.

If bonding companies are to stand the ultimate loss in such situations, by virtue of language in the fidelity bond protecting against the fraud of employees or other risks, they are likely to rewrite bonds so as specifically to exclude such cases. Or they will raise their premium rates in accordance with their experience.

However, it is submitted that even the broad language of Judge Goodrich in the *Bowman* cases does not impose absolute liability. As

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35 Id. § 262, Reporter's Notes.

36 Brief for Appellants, pp. 7-8, Bowman v. Home Life Ins. Co. of America, supra note 2.

37 Bowman v. Home Life Ins. Co. of America, supra note 2.

38 Bowman v. Home Life Ins. Co. of America, supra note 1.

the *Bowman* trial judge said, this would place an intolerable burden upon a principal.

> "It would mean that whenever anyone is in fact defrauded by an agent, the principal is liable, even though the injured party's conduct had been careless to the point of utter recklessness. It is clear . . . that the law of a principal's liability does not go so far; he is not yet *caput lupinum*."[39]

It would seem that the victim's reliance on the agent's authority must still be reasonable in order to impose liability on the insurance company. Liability can be imposed only where the agent's authority is apparent, and reasonable reliance is a basic element of apparent authority.[40]

It has been said that:

> "An act not expressly or impliedly authorized does not take upon itself the quality of an apparently authorized act because the agent chooses to perform it and the third party, with whom he deals, accepts the act of the agent; the third party must use reasonable diligence in ascertaining the extent and nature of the agent's authority and reasonably conclude the act to be within it."[41]

Agents are frequently ingenious in creating an appearance of authority by their own acts and statements, but without the creation of the appearance by the principal there can be no vicarious liability.[42] The two necessary elements of apparent agency are that there be acts by the principal and/or agent justifying belief in the agency and that the victim's reliance thereon be consistent with ordinary care and prudence.[43] Furthermore, the exercise of reasonable care and precaution by the victim[44] can, in some circumstances, be interpreted to require an inquiry by the victim to make a reasonable effort to avoid injury.[45] He cannot blindly trust the agent's statements as to the

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[39] Bowman v. Home Life Ins. Co. of America, 159 F. Supp. 701 (E.D. Pa. 1958).

[40] Hansche v. A. J. Conroy, Inc., 222 Wis. 553, 269 N.W. 309 (1936); Yoars v. New Orleans Linen Supply Co., 185 So. 525 (La. App. 1939).

[41] Spann v. Commercial Standard Ins. Co. of Dallas, Tex., 82 F.2d 593, 598 (8th Cir. 1936).

[42] Mechem, Outlines of Agency § 94 (4th ed. 1952). See 1 Mechem, Agency § 725, 726 (2d ed. 1914).

[43] Mattice v. Equitable Life Assur. Soc'y, 270 Wis. 504, 71 N.W.2d 262 (1955). Cf. Burton v. Brown, 219 Wis. 520, 263 N.W. 573 (1935).

[44] Titus v. Zimbel Brothers, Inc., 34 Pa. D. & C. 495 (1939).

[45] Adair v. Paul & Co., 42 Pa. D. & C. 689 (1941).

extent of his powers.[46] He must open his eyes and be diligent in protecting himself against the falsity of an agent's representations.[47]

Hard cases arise when the appearance of authority is created partially by the agent and partially by the principal. The usual situation involves numerous factors which combine to make up a general appearance. It would not be equitable to impose liability on the principal in any case where it could be said that the victim would not have been duped had it not been for a factor created by the principal. This would amount to absolute liability, since there will inevitably be at least the basic factor of some agency relationship which is the foundation of the fraud and which is admittedly created by the principal. It is submitted, however, that vicarious liability will be proper in any case where there is at least one factor, contributing to the appearance of authority, without which the victim would not have been fooled, which was created by the principal and which the principal could reasonably have eliminated or prevented or protected against.

Care must be taken in these cases to assure that there is not confusion between the principal and his agent in imposing liability. We are here concerned only with the situation where it is admitted that a tort has been committed by an agent upon a third party. The only question is whether, through the principles of the law of agency, liability for that tort may be imputed to the principal vicariously.[48]

The problem presented is a serious one for any principal which has agents making close personal contact with customers. This is especially true where the contact may be in relative privacy. Insurance companies probably cannot operate effectively if they are not allowed to go directly to the homes of prospective policyholders or to the homes of those involved in claims adjustments. Their business would diminish or become highly inefficient if customers or claimants were required to go to the insurance companies for examinations. Thus principals such as insurance companies must have representatives invested with certain insignia of office under circumstances in which the possibilities for committing an assault are present. The principal should avoid giving its agent any implements which would facilitate the agent's posing as a doctor. Perhaps it would be wise also to show in bold faced type on any documents containing confidential information, carried by such agent, that the documents are not to be used

[46] Davidsville First Nat'l. Bank v. St. John's Church, 296 Pa. 467, 146 Atl. 102 (1929).

[47] Mesce v. Auto. Ass'n of New Jersey, 8 N.J. Super. 130, 73 A.2d 586 (1950).

[48] But see, Bowman v. Home Life Ins. Co. of America, supra note 2.

in connection with any medical examination. Any calling cards which the agent is authorized to carry perhaps could be so designed as to eliminate any possibility of adding the initials "M.D." or the designation "Dr." either after or before the agent's name, and of course his actual capacity should be stated on any such calling card.

There may be instances when an insurance company could notify in writing any applicant or policyholder that a certain named person will call at about a certain specified time. This may not be possible where, as in the case of the "field underwriter," a purpose of the call is to confirm information submitted through a company's sales agent, since the element of surprise is of some importance to such a call. However, it would not seem unreasonable to require that, whenever an insurance company knows that a doctor's call may have to be made, the insurance company should immediately write to the applicant or policyholder that such a call may become necessary and that, if so, notification in writing will be sent in advance specifying the name of the doctor and the intended time of the visit. This may not protect against the inside man who has control over the coordination of doctors and notice letters, but at least it will minimize the risks.