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Robert Brand Stone
West Virginia University College of Law

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CASE COMMENTS

**Agency—Recovery in Tort Under the Theory of Apparent
Authority or Agency by Estoppel**

P, a minor, was injured in a fall from a horse as a result of the negligence of *K*, a riding instructor. The injury occurred on *Ds'* land, where riding lessons had been given for several years. *Ds*, husband and wife, provided the riding ring and horses for the lessons and their name with the words "Riding School" were painted on their truck and trailer and on a sign hanging near their home. *K* roomed and boarded at *Ds'* home, but he kept all money received from his instruction. *P* and her mother believed that the riding school was run by *Ds* and that *K* was *Ds'* employee. After jury verdicts for *P* against *Ds*, the trial court transferred the question raised by *Ds'* motions for nonsuits and directed verdicts whether there was sufficient evidence to support the verdicts. *Held*, judgment on the verdicts for *P*. When a person is injured by the negligence of one whom the injured party could reasonably have believed was acting on behalf of a third person and when the injured party did in fact rely on this belief, the negligence of the party causing the injury may be imputed to the third party on the theory of "apparent authority" without proof of an actual agency relationship. *Christian v. Elden*, 221 A.2d 784 (N.H. 1966).

Recovery in the New Hampshire decision was based on "apparent authority", but the doctrine adopted by perhaps the majority of courts granting relief in similar situations has been that of "agency by estoppel". The decision thus raises the question whether there is, or should be, a distinction made between the two concepts.

Both apparent authority and agency by estoppel operate to make a principal liable for the acts of another whom the principal has led a third party to believe is acting in his behalf; the other party may or may not be his agent.¹ In both there must be a representation or manifestation springing from the principal to the third

¹ *Northwestern Mut. Life Ins. Co. v. Steckel*, 216 Iowa 1189, 250 N.W. 476 (1933); *Great Am. Cas. Co. v. Eichelberger*, 37 S.W.2d 1050 (Tex. Civ. App. 1931). Real authority, either express or implied in fact, is not discussed in this comment. Although the facts in the principal case suggest the existence of a real agency, the issue on appeal assumed its absence.

party, and not from the agent alone.² Moreover, under each theory it is necessary that the third party have actually relied on the action or omissions of the principal—a subjective test³—and that a reasonably prudent man under the same circumstances would have been misled and have relied on the principal's manifestations—an objective test.⁴ Despite these similarities, some authority, including the *Restatement (Second), Agency*,⁵ views apparent authority and agency by estoppel as distinct concepts. An additional element, it is argued, is required for estoppel—detrimental change of position by the third party.⁶ Under the estoppel doctrine the burden of loss is placed on the party who, although innocent, created the circumstances that made the loss possible. Therefore, a principal, whose conduct creates the appearance of authority on which the third party relied to his detriment, is estopped to deny its existence. Whereas the emphasis of apparent authority is on power to bind the principal, the emphasis of estoppel is to forbid the principal to deny the authority which has caused a loss.⁷

The rationale underlying the Restatement view is in the historical bases of the doctrines. Apparent authority is based on contract; estoppel has a tort base. Under the objective theory of contract, one is bound by his outward expressions and manifestations. Thus, it is consistent to hold that a principal has become a contracting party to a bona fide contract when his outward expressions can reasonably be interpreted as vesting authority in his apparent agent, whether he intended to do so or not. Under apparent authority, it is also consistent to provide a mutuality of remedies; the principal has the right to hold a third party to this real contract

² *Berryhill v. Ellet*, 64 F.2d 253 (10th Cir. 1953) (apparent authority); *Manning v. Leavitt Co.*, 90 N.H. 167, 5 A.2d 667 (1939) (agency by estoppel); see *Springer v. Heath Motor Co.*, 261 S.W.2d 757 (Tex. Civ. App. 1953); *Raftis v. McCloud River Lumber Co.*, 35 Cal. App. 397, 170 Pac. 176 (1917).

³ *Berryhill v. Ellet*, *supra* note 2 (apparent authority); *Manning v. Leavitt Co.*, *supra* note 2 (agency by estoppel).

⁴ *Hartford Acc. & Indem. Co. v. Lougee*, 89 N.H. 222, 196 Atl. 267 (1938).

⁵ *RESTATEMENT (SECOND), AGENCY* § 8, Reporter's Notes (1958).

⁶ *RESTATEMENT (SECOND), AGENCY* § 8, comment d (1958); *Manning v. Leavitt Co.*, 90 N.H. 167, 5 A.2d 667 (1939); *RESTATEMENT (SECOND), AGENCY*; 58, comment d (1958); see *Reo Motor Co. v. Barnes*, 9 S.W.2d 374 (Tex. Civ. App. 1928) (applying estoppel, one of reasons for denying recovery was no change of position).

⁷ See *Safeway Stores, Inc. v. King Lumber Co.*, 45 Cal. App. 2d 17, 113 P.2d 483 (1941); *Kanelles v. Locke*, 12 Ohio App. 210 (1919); *Reserve Ins. Co. v. Duckett*, 240 Md. 591, 214 A.2d 754 (1965).

without ratifying or assenting to his agent's acts. However, under the tort theory of estoppel, the purpose is to prevent loss by compensating innocent parties who have been injured by reliance on the principal's manifestations. No real contract may be formed, but the third party is allowed to hold the principal to the truth of the facts manifested as true. As a result, there is no mutuality of remedies in estoppel.⁸

Notwithstanding the Restatement view, in cases involving recovery on contracts, the courts have applied the two theories in a manner which indicates that the principles of apparent authority and estoppel are elements of a single concept by which the principal is bound. Many opinions state the right of the third party to hold the principal to the full extent of the apparent authority is acquired through the fact of estoppel.⁹ The court in *Manley v. MacFarland*¹⁰ stated that "the theory of estoppel, since it is essentially similar to that of apparent authority, may be applied in establishing apparent authority."¹¹ The courts apply both doctrines for the ultimate purpose of holding the principal bound, "in which case the elements of apparent authority and estoppel are the fact upon which they are based, and the results achieved are the same."¹² A recent Maryland case¹³ used strong language in holding the two concepts to be identical:

Although the cases and texts refer both to "apparent authority" and "agency by estoppel" there seems to be no clear line of demarcation. Each results from certain acts or manifestations by the alleged principal made to third parties. It must be reasonable for the third person dealing with the alleged event to believe that the agent had authority to act. The third person must in fact believe that the alleged agent has such authority, *i.e.*, he must rely on such acts or manifestations.¹⁴

⁸ RESTATEMENT (SECOND), AGENCY § 8, comment d (1958).

⁹ *Berryhill v. Ellet*, 64 F.2d 1050 (Tex. Civ. App. 1931); *Reo Motor Co. v. Eichelberger*, 37 S.W.2d 1050 (Tex. Civ. App. 1931); *Reo Motor Co. v. Barnes*, 9 S.W.2d 374 (Tex. Civ. App. 1928); *Livingston v. Fuhrman*, 37 A.2d 747 (D.C. Mun. App. 1944).

¹⁰ 80 Idaho 312, 327 P.2d 758 (1958).

¹¹ *Id.* at 323, 327 P.2d at 764.

¹² *Ibid.*

¹³ *Reserve Ins. Co. v. Dukett*, 240 Md. 591, 214 A.2d 754 (1965).

¹⁴ *Id.* at 600, 214 A.2d at 759.

Although using estoppel language, these cases do not appear to require a change of position by the relying party, the necessary element for estoppel, according to the Restatement. Seavey argues that merely making a contract is not a sufficient change of position for estoppel to apply, and that where the third party has done no more, the correct theory of recovery is apparent authority, not estoppel. He argues that if estoppel is viewed as part of apparent authority, not only would a change of position be required to bind the principal, but the principal would be able to hold the third party only if he ratified the transaction.¹⁵

The New Hampshire decision involved recovery in *tort* for personal injuries. The facts reveal no real agency or employment, but its appearance was manifested by the defendant to the plaintiff who suffered a loss. The case falls directly within the scope of section 267 of the *Restatement (Second), Agency*, which states that "one who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of skill or the one appearing to be a servant or other agent as if he were such."¹⁶ Besides calling this relationship apparent authority, as in the principal case, the courts also have termed it "agency by estoppel",¹⁷ "apparent agency",¹⁸ and "apparent employment".¹⁹ Despite the difference in terminology, the defendant is consistently held liable when the requisite elements are proven. Perhaps the terminology most frequently used is estoppel. Cases basing liability in tort on the estoppel theory, where the fact situations are similar to that of the principal case, include: a store permitting advertisement to the effect that a particular business was carried on as part of the operation of the store, when it was in fact carried on as a separate

¹⁵ SEAVEY, AGENCY § 8E, at 14-15 (1964). *Contra*, MECHEM, AGENCY §§ 87-88 (4th ed. 1952). An unauthorized act is ratified when a party, having notice of all the material facts confirms or approves the act. Ratification of the previously unauthorized act results in the creation of an agency relationship, and the rights and duties of the principal are the same as if the act had been carried out under prior authority. *Fox v. Morse*, 255 Minn. 318, 96 N.W.2d 637 (1959).

¹⁶ RESTATEMENT (SECOND), AGENCY § 267 (1958).

¹⁷ *Rubbo v. Hughes Provision Co.*, 138 Ohio St. 178, 34 N.E.2d 202 (1941); *Manning v. Leavitt Co.*, 90 N.H. 167, 5 A.2d 667 (1939).

¹⁸ *Getlar v. Rubinstein*, 171 Misc. 40, 11 N.Y.S.2d 943 (Sup. Ct. 1939).

¹⁹ FERSON, AGENCY § 54 (1954).

business operation, leasing one floor of the store;²⁰ a market advertising to the public that a product was for sale at the market, when it actually was for sale from a counter leased to another;²¹ owner defendant cab company granting possession of a cab with colors and name of the cab company upon it to an independent operator who was subsequently negligent;²² and defendant hotel owner permitting one to appear as a clerk with authority to collect valuables for safekeeping.²³

There are but a few cases applying apparent authority to the type of situation present in the principal case. In *Livingston v. Fuhrman*,²⁴ the court held the defendant liable, where he allowed one *L* to use his jewelry store to operate an independent retail jewelry business. Plaintiff relied on the representation of the fact that *L* was an employee of defendant. The court found the defendant had clothed *L* with apparent authority to act as agent and that the plaintiff had assumed she was dealing with the defendant through his agent *L*. The defendant was held liable on the basis of apparent authority and no estoppel was mentioned. However, the case may be distinguished from the cases applying estoppel, since it was an action for breach of warranty, an action arising out of contract, rather than a tort action for damages. As was seen earlier, apparent authority is generally associated with contract law.

Other distinctions are suggested by the cases and authorities in the application of the two theories. In the definitions set forth, there seems to be an assumption of an already existing agency²⁵ that normally, though not necessarily, stems from a prior relationship of principal and agent.²⁶ The apparent authority is separate from the existing authority, and as such may be greater than, equal to, or less than the actual authority.²⁷ The cases discussing estoppel

²⁰ *Manning v. Leavitt Co.*, 90 N.H. 167, 5 A.2d 667 (1939); *Hannon v. Seigle-Cooper Co.*, 167 N.Y. 244, 60 N.E. 597 (1901); *Santise v. Martins, Inc.*, 17 N.Y.S.2d 741 (App. Div. 1940); *Annot.*, 122 A.L.R. 249 (1939).

²¹ *Rubbo v. Hughes Provision Co.*, 138 Ohio St. 178, 34 N.E.2d 202 (1941).

²² *Marchetti v. Olyowski*, 181 F.2d 285 (D.C. Cir. 1950); *Rhone v. Try Me Cab Co.*, 62 App. D.C. 201, 65 F.2d 834 (D.C. Cir. 1933).

²³ *Kanelles v. Locke*, 12 Ohio App. 210 (1919).

²⁴ 37 A.2d 747 (D.C. Mun. App. 1944).

²⁵ *Northwestern Mut. Life Ins. Co. v. Steckel*, 216 Iowa 1189, 250 N.W. 476 (1933); *Great Am. Cas. Co. v. Eichelberger*, 37 S.W.2d 1050 (Tex. Civ. App. 1931); *Bank of Morgantown v. Hay*, 143 N.C. 326, 55 S.E. 811 (1906); *White Lake Lumber Co. v. Stone*, 19 Neb. 402, 27 N.W. 345 (1886).

²⁶ RESTATEMENT (SECOND), AGENCY § 8, comment a (1958).

are in line with this proposition since most are situations where there is no pre-existing agency relationship.²⁸ These cases suggest, as does Seavey,²⁹ that where one makes no affirmative representation of agency, but his wrong is his failure "to tell persons whom he knows to be dealing with the other as agent that the other is not his agent,"³⁰ the better basis of liability is estoppel, requiring a change of position. The rationale behind this is derived from the tort principle of not requiring one to act to prevent harm to another. Seavey thus reasons it is unnecessary protection to allow recovery without a change of position in such a case.

Few cases in West Virginia have considered the doctrines of apparent authority and agency by estoppel. No case similar to the principal case has been before the West Virginia Supreme Court. In *Gallagher v. Washington City Sav., Loan & Bldg. Co.*,³¹ the court held, in a suit for specific performance, that a real estate broker with authority to show land for sale was without authority to bind the owner to the contract of sale under an apparent authority theory. The court states that an apparent agency is an agency by estoppel, and that "it is only such a state of facts from which one by reasons of his representations or the holding out of another as his agent is estopped to deny the existence of the agency, and is bound by the acts of such persons acting within the apparent scope of his authority."³² However, the dictum of the tort case of *Brewer v. Appalachian Constructors, Inc.*³³ seems to apply to the facts of the principal case, stating that "[agency by estoppel] involves a case in which there may be no agency in fact, but by representations upon which reliance is had, the person making those representations is estopped to deny the relationship of principal and agent, or, in the case of an employer, of employer and employee."³⁴ A recent West Virginia case, *General Elec. Credit Corp. v. Fields*,³⁵ examined the state's position and cited the dictum in the *Brewer* case as binding law. In the *Fields* case, an action on a note given

²⁷ *Ibid.*

²⁸ Cases cited notes 20-24 *supra*.

²⁹ SEAVEY, AGENCY § 8E (1964).

³⁰ *Ibid.*

³¹ 125 W. Va. 791, 25 S.E.2d 914 (1943).

³² *Id.* at 800, 25 S.E.2d at 919.

³³ 138 W. Va. 437, 76 S.E.2d 916 (1953).

³⁴ *Id.* at 451, 76 S.E.2d 924 (1953).

³⁵ 148 W. Va. 176, 133 S.E.2d 780 (1963).

on a conditional sales contract, the court held for the defendant stating that payments made to the dealer of the merchandise were valid, as he was the apparent agent of the plaintiff to collect payments on the notes. Concerning agency by estoppel, the court stated that "one who knows that another is acting as his agent or permitted another to appear as his agent, to the injury of third persons who have dealt with the apparent agent as such in good faith and in the exercise of reasonable prudence, is estopped to deny the agency."³⁶ In West Virginia, if the rule adopted from the dictum in the *Brewer* case were applied to the principal case, the same decision would be reached, but on the theory of estoppel as opposed to apparent authority.

The estoppel theory of agency is readily accepted by most of the courts. Where the fact situation presents the same problems as in the principal case, more courts are inclined to base their decision on agency by estoppel than apparent authority. The principal case seems to be in the minority, in calling the basis of their decision apparent authority, where there is no agency in fact, but only an apparent agency. Such apparent agency is more often recognized as being based on estoppel of the apparent principal. The question of whether they are really one concept treated in different contexts remains. The authorities do agree that as a practical matter the underlying principle of both theories is the same, *i.e.*, that a party should be bound by what he actually says and does, and not by any intent hidden in his mind.³⁷ There seems to be no difference in the type of fact situation to which each is applied, except that it appears that where there is no pre-existing agency, or where the defendant is guilty of failing to act rather than an affirmative act, the better view would be to apply estoppel requiring the presence of the extra element of a change in position. There is a difference in the manner of application of the two theories. The contract theory of apparent authority gives a mutual cause of action to the apparent principal, whereas the estoppel theory, based on tort, gives rise to no cause of action in the apparent principal, but merely bars him from denying the authority given the agent under the apparent agency on which the plaintiff relies. But, emphasizing the ultimate singleness of

³⁶ *Id.* at 182, 133 S.E.2d at 783.

³⁷ RESTATEMENT (SECOND) AGENCY § 8, comment d (1958); MECHEM, AGENCY § 89 (4th ed. 1952).

the proposition involved—to hold the principal liable—it seems unfortunate that it takes on different technical names in its varying contexts. As Mechem states, “it seems unfortunate that so much time has been spent and so much heat generated over scarcely more than a difference in terminology. . . . [as] few practical consequences will result from the choice of one formula rather than the other.”³⁸ One can be certain, though, that the debate will continue, and, despite consistently holding the defendant liable, that the courts will continue, in cases bearing similar facts to the principal case, to justify and base their decisions on different and inconsistent terminology.

Robert Brand Stone

Constitutional Law—Bodily Intrusions as Violations of Constitutional Rights

D attempted to smuggle packets of heroin into the United States by swallowing the packets and carrying them into this country in his stomach. United States Customs Agents, who were advised that *D* had told the Royal Canadian Mounted Police he was using this method of smuggling, took *D* to a physician's office twelve miles from the United States - Mexico border to be examined. Following a rectal probe which proved negative, *D* was given a saline solution to drink to produce vomiting. *D* sipped it without objection, and was observed throwing up an object and reswallowing it. The doctor then suggested use of a tube procedure to recover the object, to which *D* did not consent. Following *D*'s refusal, two agents held his arms, one his head, and the tube procedure, in which the tube goes through the nose to the stomach and saline solution is then passed through the tube to produce vomiting, was used. It resulted in *D* expelling two capsules of heroin. *D* was convicted of smuggling narcotics into the United States and appealed. *Held*, affirmed. It was not a violation of *D*'s constitutional rights to have this tube procedure, sometimes termed “stomach pumping,” used to procure the evidence. *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966).

³⁸ MECHEN, AGENCY § 90 (4th ed. 1952).