Chapter 18
Relationships between Principal and Agent

18.1 Introduction to Agency and the Types of Agents

Introduction to Agency Law

Why Is Agency Law Important, and What Is an Agent?

An agent is a person who acts in the name of and on behalf of another, having been given and assumed some degree of authority to do so. Most organized human activity—and virtually all commercial activity—is carried on through agency. No corporation would be possible, even in theory, without such a concept. We might say “General Motors is building cars in China,” for example, but we can’t shake hands with General Motors. “The General,” as people say, exists and works through agents. Likewise, partnerships and other business organizations rely extensively on agents to conduct their business. Indeed, it is not an exaggeration to say that agency is the cornerstone of enterprise organization. In a partnership each partner is a general agent, while under corporation law the officers and all employees are agents of the corporation.
The existence of agents does not, however, require a whole new law of torts or contracts. A tort is no less harmful when committed by an agent; a contract is no less binding when negotiated by an agent. What does need to be taken into account, though, is the manner in which an agent acts on behalf of his principal and toward a third party.

**Recurring Issues in Agency Law**

Several problematic fact scenarios recur in agency, and law has developed in response.

**John Alden**

Consider John Alden (1599–1687), one of the most famous agents in American literature. He is said to have been the first person from the *Mayflower* to set foot on Plymouth Rock in 1620; he was a carpenter, a cooper (barrel maker), and a diplomat. His agency task—of interest here—was celebrated in Henry Wadsworth Longfellow’s “The Courtship of Miles Standish.” He was to woo Priscilla Mullins (d. 1680), “the loveliest maiden of Plymouth,” on behalf of Captain Miles Standish, a valiant soldier who was too shy to propose marriage. Standish turned to John Alden, his young and eloquent protégé, and beseeched Alden to speak on his behalf, unaware that Alden himself was in love with Priscilla. Alden accepted his captain’s assignment, despite the knowledge that he would thus lose Priscilla for himself, and sought out the lady. But Alden was so tongue-tied that his vaunted eloquence fell short, turned Priscilla cold toward the object of Alden’s mission, and eventually led her to turn the tables in one of the most famous lines in American literature and poetry: “Why don’t you speak for yourself, John?” John eventually did: the two were married in 1623 in Plymouth.

**Recurring Issues in Agency**

Let’s analyze this sequence of events in legal terms—recognizing, of course, that this example is an analogy and that the law, even today, would not impose consequences on Alden for his failure to carry out Captain Standish’s wishes. Alden was the captain’s agent: he was specifically authorized to speak in his name in a manner agreed on, toward a specified end, and he accepted the assignment in consideration of the captain’s friendship. He had, however, a conflict of interest. He attempted to carry out the assignment, but he did not perform according to expectations. Eventually, he wound up with the prize himself. Here are some questions to consider, the same questions that will recur throughout the discussion of agency:

- How extensive was John’s authority? Could he have made promises to Priscilla on the captain’s behalf—for example, that Standish would have built her a fine house?
Could he, if he committed a tort, have imposed liability on his principal? Suppose, for example, that he had ridden at breakneck speed to reach Priscilla's side and while en route ran into and injured a pedestrian on the road. Could the pedestrian have sued Standish?

Suppose Alden had injured himself on the journey. Would Standish be liable to Alden?

Is Alden liable to Standish for stealing the heart of Priscilla—that is, for taking the “profits” of the enterprise for himself?

As these questions suggest, agency law often involves three parties—the principal, the agent, and a third party. It therefore deals with three different relationships: between principal and agent, between principal and third party, and between agent and third party. These relationships can be summed up in a simple diagram (see Figure 18.1 "Agency Relationships").

Figure 18.1 Agency Relationships

In this chapter, we will consider the principal-agent side of the triangle. In the next chapter we will turn to relationships involving third parties.

Types of Agents

There are five types of agents.

General Agent

The general agent possesses the authority to carry out a broad range of transactions in the name and on behalf of the principal. The general agent may be the manager of a business or may have a more limited but nevertheless ongoing role—for example, as a purchasing agent or as a life insurance agent authorized
to sign up customers for the home office. In either case, the general agent has authority to alter the principal’s legal relationships with third parties. One who is designated a general agent has the authority to act in any way required by the principal’s business. To restrict the general agent’s authority, the principal must spell out the limitations explicitly, and even so the principal may be liable for any of the agent’s acts in excess of his authority.

Normally, the general agent is a business agent, but there are circumstances under which an individual may appoint a general agent for personal purposes. One common form of a personal general agent is the person who holds another’s power of attorney. This is a delegation of authority to another to act in his stead; it can be accomplished by executing a simple form, such as the one shown in Figure 18.2 “General Power of Attorney”. Ordinarily, the power of attorney is used for a special purpose—for example, to sell real estate or securities in the absence of the owner. But a person facing a lengthy operation and recuperation in a hospital might give a general power of attorney to a trusted family member or friend.

Figure 18.2 General Power of Attorney

Special Agent

The special agent is one who has authority to act only in a specifically designated instance or in a specifically designated set of transactions. For example, a real estate broker is usually a special agent hired
to find a buyer for the principal’s land. Suppose Sam, the seller, appoints an agent Alberta to find a buyer for his property. Alberta’s commission depends on the selling price, which, Sam states in a letter to her, “in any event may be no less than $150,000.” If Alberta locates a buyer, Bob, who agrees to purchase the property for $160,000, her signature on the contract of sale will not bind Sam. As a special agent, Alberta had authority only to find a buyer; she had no authority to sign the contract.

**Agency Coupled with an Interest**

An agent whose reimbursement depends on his continuing to have the authority to act as an agent is said to have an agency coupled with an interest if he has a property interest in the business. A literary or author’s agent, for example, customarily agrees to sell a literary work to a publisher in return for a percentage of all monies the author earns from the sale of the work. The literary agent also acts as a collection agent to ensure that his commission will be paid. By agreeing with the principal that the agency is coupled with an interest, the agent can prevent his own rights in a particular literary work from being terminated to his detriment.

**Subagent**

To carry out her duties, an agent will often need to appoint her own agents. These appointments may or may not be authorized by the principal. An insurance company, for example, might name a general agent to open offices in cities throughout a certain state. The agent will necessarily conduct her business through agents of her own choosing. These agents are subagents of the principal if the general agent had the express or implied authority of the principal to hire them. For legal purposes, they are agents of both the principal and the principal’s general agent, and both are liable for the subagent’s conduct although normally the general agent agrees to be primarily liable (see Figure 18.3 "Subagent").

*Figure 18.3 Subagent*
Servant

The final category of agent is the servant. Until the early nineteenth century, any employee whose work duties were subject to an employer’s control was called a servant; we would not use that term so broadly in modern English. The Restatement (Second) of Agency, Section 2, defines a servant as “an agent employed by a master [employer] to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.”

Independent Contractor

Not every contract for services necessarily creates a master-servant relationship. There is an important distinction made between the status of a servant and that of an independent contractor. According to the Restatement (Second) of Agency, Section 2, “an independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.” As the name implies, the independent contractor is legally autonomous. A plumber salaried to a building contractor is an employee and agent of the contractor. But a plumber who hires himself out to repair pipes in people’s homes is an independent contractor. If you hire a lawyer to settle a dispute, that person is not your employee or your servant; she is an independent contractor. The terms “agent” and “independent contractor” are not necessarily mutually exclusive. In fact, by definition, “… an independent contractor is an agent in the broad sense of the term in undertaking, at the request of another, to do something for the other. As a general rule the line of demarcation between an independent contractor and a servant is not clearly drawn.” [1]

This distinction between agent and independent contractor has important legal consequences for taxation, workers’ compensation, and liability insurance. For example, employers are required to withhold income taxes from their employees’ paychecks. But payment to an independent contractor, such as the plumber for hire, does not require such withholding. Deciding who is an independent contractor is not always easy; there is no single factor or mechanical answer. In Robinson v. New York Commodities Corp., an injured salesman sought workers’ compensation benefits, claiming to be an employee of the New York Commodities Corporation. [2] But the state workmen’s compensation board ruled against him, citing a variety of factors. The claimant sold canned meats, making rounds in his car from his home. The company did not establish hours for him, did not control his movements in any way, and did not reimburse him for
mileage or any other expenses or withhold taxes from its straight commission payments to him. He reported his taxes on a form for the self-employed and hired an accountant to prepare it for him. The court agreed with the compensation board that these facts established the salesman’s status as an independent contractor.

The factual situation in each case determines whether a worker is an employee or an independent contractor. Neither the company nor the worker can establish the worker’s status by agreement. As the North Dakota Workmen’s Compensation Bureau put it in a bulletin to real estate brokers, “It has come to the Bureau’s attention that many employers are requiring that those who work for them sign ‘independent contractor’ forms so that the employer does not have to pay workmen’s compensation premiums for his employees. Such forms are meaningless if the worker is in fact an employee.” Vizcaino v. Microsoft Corporation, discussed in Section 18.3.2 "Employee versus Independent Contractor", examines the distinction.

In addition to determining a worker’s status for tax and compensation insurance purposes, it is sometimes critical for decisions involving personal liability insurance policies, which usually exclude from coverage accidents involving employees of the insureds. General Accident Fire & Life Assurance Corp v. Pro Golf Association [3] involved such a situation. The insurance policy in question covered members of the Professional Golfers Association. Gerald Hall, a golf pro employed by the local park department, was afforded coverage under the policy, which excluded “bodily injury to any employee of the insured arising out of and in the course of his employment by the insured.” That is, no employee of Hall’s would be covered (rather, any such person would have coverage under workers’ compensation statutes). Bradley Martin, age thirteen, was at the golf course for junior league play. At Hall’s request, he agreed to retrieve or “shag” golf balls to be hit during a lesson Hall was giving; he was—as Hall put it—to be compensated “either through golf instructions or money or hotdogs or whatever.” During the course of the lesson, a golf ball hit by Hall hit young Martin in the eye. If Martin was an employee, the insurance company would be liable; if he was not an employee, the insurance company would not liable. The trial court determined he was not an employee. The evidence showed: sometimes the boys who “shagged” balls got paid, got golfing instructions, or got food, so the question of compensation was ambiguous. Martin was not directed in how to perform (the admittedly simple) task of retrieving golf balls, no control was exercised over him, and no equipment was required other than a bag to collect the balls: “We believe the evidence is susceptible of
different inferences....We cannot say that the decision of the trial court is against the manifest weight of the evidence.”

**Creation of the Agency Relationship**

The agency relationship can be created in two ways: by agreement (expressly) or by operation of law (constructively or impliedly).

**Agency Created by Agreement**

Most agencies are created by contract. Thus the general rules of contract law covered in Chapter 8 "Introduction to Contract Law" through Chapter 16 "Remedies" govern the law of agency. But agencies can also be created without contract, by agreement. Therefore, three contract principles are especially important: the first is the requirement for consideration, the second for a writing, and the third concerns contractual capacity.

**Consideration**

Agencies created by consent—agreement—are not necessarily contractual. It is not uncommon for one person to act as an agent for another without consideration. For example, Abe asks Byron to run some errands for him: to buy some lumber on his account at the local lumberyard. Such a gratuitous agency gives rise to no different results than the more common contractual agency.

**Formalities**

Most oral agency contracts are legally binding; the law does not require that they be reduced to writing. In practice, many agency contracts are written to avoid problems of proof. And there are situations where an agency contract must be in writing: (1) if the agreed-on purpose of the agency cannot be fulfilled within one year or if the agency relationship is to last more than one year; (2) in many states, an agreement to pay a commission to a real estate broker; (3) in many states, authority given to an agent to sell real estate; and (4) in several states, contracts between companies and sales representatives.

Even when the agency contract is not required to be in writing, contracts that agents make with third parties often must be in writing. Thus Section 2-201 of the Uniform Commercial Code specifically requires contracts for the sale of goods for the price of five hundred dollars or more to be in writing and “signed by the party against whom enforcement is sought or by his authorized agent.”
**Capacity**

A contract is void or voidable when one of the parties lacks capacity to make one. If both principal and agent lack capacity—for example, a minor appoints another minor to negotiate or sign an agreement—there can be no question of the contract’s voidability. But suppose only one or the other lacks capacity. Generally, the law focuses on the principal. If the principal is a minor or otherwise lacks capacity, the contract can be avoided even if the agent is fully competent. There are, however, a few situations in which the capacity of the agent is important. Thus a mentally incompetent agent cannot bind a principal.

**Agency Created by Operation of Law**

Most agencies are made by contract, but agency also may arise impliedly or apparently.

**Implied Agency**

In areas of social need, courts have declared an agency to exist in the absence of an agreement. The agency relationship then is said to have been implied “by operation of law.” Children in most states may purchase necessary items—food or medical services—on the parent’s account. Long-standing social policy deems it desirable for the head of a family to support his dependents, and the courts will put the expense on the family head in order to provide for the dependents’ welfare. The courts achieve this result by supposing the dependent to be the family head’s agent, thus allowing creditors to sue the family head for the debt. Implied agencies also arise where one person behaves as an agent would and the “principal,” knowing that the “agent” is behaving so, acquiesces, allowing the person to hold himself out as an agent. Such are the basic facts in *Weingart v. Directoire Restaurant, Inc.* in Section 18.3.1 "Creation of Agency: Liability of Parent for Contracts Made by “Agent” Child”.

**Apparent Agency**

Suppose Arthur is Paul’s agent, employed through October 31. On November 1, Arthur buys materials at Lumber Yard—as he has been doing since early spring—and charges them to Paul’s account. Lumber Yard, not knowing that Arthur’s employment terminated the day before, bills Paul. Will Paul have to pay? Yes, because the termination of the agency was not communicated to Lumber Yard. It *appeared* that Arthur was an authorized agent. This issue is discussed further in Chapter 19 "Liability of Principal and Agent; Termination of Agency".
**KEY TAKEAWAY**

An agent is one who acts on behalf of another. Many transactions are conducted by agents so acting. All corporate transactions, including those involving governmental organizations, are so conducted because corporations cannot themselves actually act; they are legal fictions. Agencies may be created expressly, impliedly, or apparently. Recurring issues in agency law include whether the “agent” really is such, the scope of the agent’s authority, and the duties among the parties. The five types of agents include: general agent, special agent, subagent, agency coupled with an interest, and servant (or employee). The independent contractor is not an employee; her activities are not specifically controlled by her client, and the client is not liable for payroll taxes, Social Security, and the like. But it is not uncommon for an employer to claim workers are independent contractors when in fact they are employees, and the cases are often hard-fought on the facts.

**EXERCISES**

1. Why is agency law especially important in the business and government context?
2. What are the five types of agents?
3. What distinguishes an employee from an independent contractor?
4. Why do employers frequently try to pass off employees as independent contractors?

**18.2 Duties between Agent and Principal**

**LEARNING OBJECTIVES**

1. Understand that the agent owes the principal two types of duties: a special duty—the fiduciary duty—and other general duties as recognized in agency law.
2. Recognize that the principal owes the agent duties: contract, tort, and workers’ compensation.
Agent’s Duty to Principal

The agent owes the principal duties in two categories: the fiduciary duty and a set of general duties imposed by agency law. But these general duties are not unique to agency law; they are duties owed by any employee to the employer.

Fiduciary Duty

In a nonagency contractual situation, the parties’ responsibilities terminate at the border of the contract. There is no relationship beyond the agreement. This literalist approach is justified by the more general principle that we each should be free to act unless we commit ourselves to a particular course. But the agency relationship is more than a contractual one, and the agent’s responsibilities go beyond the border of the contract. Agency imposes a higher duty than simply to abide by the contract terms. It imposes a fiduciary duty. The law infiltrates the contract creating the agency relationship and reverses the general principle that the parties are free to act in the absence of agreement. As a fiduciary of the principal, the agent stands in a position of special trust. His responsibility is to subordinate his self-interest to that of his principal. The fiduciary responsibility is imposed by law. The absence of any clause in the contract detailing the agent’s fiduciary duty does not relieve him of it. The duty contains several aspects.

Duty to Avoid Self-Dealing

A fiduciary may not lawfully profit from a conflict between his personal interest in a transaction and his principal’s interest in that same transaction. A broker hired as a purchasing agent, for instance, may not sell to his principal through a company in which he or his family has a financial interest. The penalty for breach of fiduciary duty is loss of compensation and profit and possible damages for breach of trust.

Duty to Preserve Confidential Information

To further his objectives, a principal will usually need to reveal a number of secrets to his agent—how much he is willing to sell or pay for property, marketing strategies, and the like. Such information could easily be turned to the disadvantage of the principal if the agent were to compete with the principal or were to sell the information to those who do. The law therefore prohibits an agent from using for his own purposes or in ways that would injure the interests of the principal, information confidentially given or acquired. This prohibition extends to information gleaned from the principal though unrelated to the agent’s assignment: “[A]n agent who is told by the principal of his plans, or who secretly examines books
or memoranda of the employer, is not privileged to use such information at his principal’s expense.” [1] Nor may the agent use confidential information after resigning his agency. Though he is free, in the absence of contract, to compete with his former principal, he may not use information learned in the course of his agency, such as trade secrets and customer lists. Section 18.3.3 "Breach of Fiduciary Duty", Bacon v. Volvo Service Center, Inc., deals with an agent’s breach of the duty of confidentiality.

Other Duties

In addition to fiduciary responsibility (and whatever special duties may be contained in the specific contract) the law of agency imposes other duties on an agent. These duties are not necessarily unique to agents: a nonfiduciary employee could also be bound to these duties on the right facts.

Duty of Skill and Care

An agent is usually taken on because he has special knowledge or skills that the principal wishes to tap. The agent is under a legal duty to perform his work with the care and skill that is “standard in the locality for the kind of work which he is employed to perform” and to exercise any special skills, if these are greater or more refined than those prevalent among those normally employed in the community. In short, the agent may not lawfully do a sloppy job. [2]

Duty of Good Conduct

In the absence of an agreement, a principal may not ordinarily dictate how an agent must live his private life. An overly fastidious florist may not instruct her truck driver to steer clear of the local bar on his way home from delivering flowers at the end of the day. But there are some jobs on which the personal habits of the agent may have an effect. The agent is not at liberty to act with impropriety or notoriety, so as to bring disrepute on the business in which the principal is engaged. A lecturer at an antialcohol clinic may be directed to refrain from frequenting bars. A bank cashier who becomes known as a gambler may be fired.

Duty to Keep and Render Accounts

The agent must keep accurate financial records, take receipts, and otherwise act in conformity to standard business practices.

Duty to Act Only as Authorized

This duty states a truism but is one for which there are limits. A principal’s wishes may have been stated ambiguously or may be broad enough to confer discretion on the agent. As long as the agent acts
reasonably under the circumstances, he will not be liable for damages later if the principal ultimately repudiates what the agent has done: “Only conduct which is contrary to the principal’s manifestations to him, interpreted in light of what he has reason to know at the time when he acts,...subjects the agent to liability to the principal.”[3]

**Duty Not to Attempt the Impossible or Impracticable**

The principal says to the agent, “Keep working until the job is done.” The agent is not obligated to go without food or sleep because the principal misapprehended how long it would take to complete the job. Nor should the agent continue to expend the principal’s funds in a quixotic attempt to gain business, sign up customers, or produce inventory when it is reasonably clear that such efforts would be in vain.

**Duty to Obey**

As a general rule, the agent must obey reasonable directions concerning the manner of performance. What is reasonable depends on the customs of the industry or trade, prior dealings between agent and principal, and the nature of the agreement creating the agency. A principal may prescribe uniforms for various classes of employees, for instance, and a manufacturing company may tell its sales force what sales pitch to use on customers. On the other hand, certain tasks entrusted to agents are not subject to the principal’s control; for example, a lawyer may refuse to permit a client to dictate courtroom tactics.

**Duty to Give Information**

Because the principal cannot be every place at once—that is why agents are hired, after all—much that is vital to the principal’s business first comes to the attention of agents. If the agent has actual notice or reason to know of information that is relevant to matters entrusted to him, he has a duty to inform the principal. This duty is especially critical because information in the hands of an agent is, under most circumstances, imputed to the principal, whose legal liabilities to third persons may hinge on receiving information in timely fashion. Service of process, for example, requires a defendant to answer within a certain number of days; an agent’s failure to communicate to the principal that a summons has been served may bar the principal’s right to defend a lawsuit. The imputation to the principal of knowledge possessed by the agent is strict: even where the agent is acting adversely to the principal’s interests—for example, by trying to defraud his employer—a third party may still rely on notification to the agent, unless the third party knows the agent is acting adversely.

**“Shop Rights” Doctrine**
In *Grip Nut Co. v. Sharp*, Sharp made a deal with Grip Nut Company that in return for a salary and bonuses as company president, he would assign to the company any inventions he made. When the five-year employment contract expired, Sharp continued to serve as chief executive officer, but no new contract was negotiated concerning either pay or rights to inventions. During the next ten years, Sharp invented a number of new products and developed new machinery to manufacture them; patent rights went to the company. However, he made one invention with two other employees and they assigned the patent to him. A third employee invented a safety device and also assigned the patent to Sharp. At one time, Sharp’s son invented a leakproof bolt and a process to manufacture it; these, too, were assigned to Sharp. These inventions were developed in the company’s plants at its expense.

When Sharp died, his family claimed the rights to the inventions on which Sharp held assignments and sued the company, which used the inventions, for patent infringement. The family reasoned that after the expiration of the employment contract, Sharp was employed only in a managerial capacity, not as an inventor. The court disagreed and invoked the shop rights doctrine, under which an invention “developed and perfected in [a company’s] plant with its time, materials, and appliances, and wholly at its expense” may be used by the company without payment of royalties: “Because the servant uses his master’s time, facilities and materials to attain a concrete result, the employer is entitled to use that which embodies his own property and to duplicate it as often as he may find occasion to employ similar appliances in his business.” The company would have been given complete ownership of the patents had there been an express or implied (e.g., the employee is hired to make inventions) contract to this effect between Sharp and the company.

**Principal’s Duty to Agent**

In this category, we may note that the principal owes the agent duties in contract, tort, and—statutorily—workers’ compensation law.

**Contract Duties**

The fiduciary relationship of agent to principal does not run in reverse—that is, the principal is not the agent’s fiduciary. Nevertheless, the principal has a number of contractually related obligations toward his agent.
General Contract Duties

These duties are analogues of many of the agent’s duties that we have just examined. In brief, a principal has a duty “to refrain from unreasonably interfering with [an agent’s] work.”[^5] The principal is allowed, however, to compete with the agent unless the agreement specifically prohibits it. The principal has a duty to inform his agent of risks of physical harm or pecuniary loss that inhere in the agent’s performance of assigned tasks. Failure to warn an agent that travel in a particular neighborhood required by the job may be dangerous (a fact unknown to the agent but known to the principal) could under common law subject the principal to a suit for damages if the agent is injured while in the neighborhood performing her job. A principal is obliged to render accounts of monies due to agents; a principal’s obligation to do so depends on a variety of factors, including the degree of independence of the agent, the method of compensation, and the customs of the particular business. An agent’s reputation is no less valuable than a principal’s, and so an agent is under no obligation to continue working for one who sullies it.

Employment at Will

Under the traditional “employment-at-will” doctrine, an employee who is not hired for a specific period can be fired at any time, for any reason (except bad reasons: an employee cannot be fired, for example, for reporting that his employer’s paper mill is illegally polluting groundwater). This doctrine, which has been much criticized, is discussed in Chapter 32 "International Law".

Duty to Indemnify

Agents commonly spend money pursuing the principal’s business. Unless the agreement explicitly provides otherwise, the principal has a duty to indemnify or reimburse the agent. A familiar form of indemnity is the employee expense account.

Tort and Workers’ Compensation Duties

The employer owes the employee—any employee, not just agents—certain statutorily imposed tort and workers’ compensation duties.

Background to Workers’ Compensation (omitted)

---

**KEY TAKEAWAY**

The agent owes the principal two categories of duties: fiduciary and general. The fiduciary duty is the duty to act always in the interest of the principal; the duty here includes that to avoid self-dealing and to
preserve confidential information. The general duty owed by the agent encompasses the sorts of obligations any employee might have: the duty of skill and care, of good conduct, to keep and render accounts, to not attempt the impossible or impracticable, to obey, and to give information. The shop rights doctrine provides that inventions made by an employee using the employer’s resources and on the employer’s time belong to the employer.

The principal owes the agent duties too. These may be categorized as contract and tort duties. The contract duties are to warn the agent of hazards associated with the job, to avoid interfering with the agent’s performance of his job, to render accounts of money due the agent, and to indemnify the agent for business expenses according to their agreement. The tort duty owed by the principal to the agent—employee—is primarily the statutorily imposed duty to provide workers’ compensation for injuries sustained on the job. In reaction to common-law defenses that often exonerated the employer from liability for workers’ injuries, the early twentieth century saw the rise of workers’ compensation statutes. These require the employer to provide no-fault insurance coverage for any injury sustained by the employee on the job. Because the employer’s insurance costs are claims rated (i.e., the cost of insurance depends on how many claims are made), the employer scrutinizes claims. A number of recurring legal issues arise: Is the injury work related? Is the injured person an employee? What constitutes an “injury”?

**EXERCISES**

1. Judge Learned Hand, a famous early-twentieth-century jurist (1872–1961), said, “The fiduciary duty is not the ordinary morals of the marketplace.” How does the fiduciary duty differ from “the ordinary morals of the marketplace”? Why does the law impose a fiduciary duty on the agent?

2. What are the nonfiduciary duties owed by the agent to the principal?

3. What contract duties are owed by the principal to the agent?

4. Why were workers’ compensation statutes adopted in the early twentieth century?

5. How do workers’ compensation statutes operate, and how are the costs paid for?


### 18.3 Cases

**Creation of Agency: Liability of Parent for Contracts Made by “Agent” Child**

*Weingart v. Directoire Restaurant, Inc.*

333 N.Y.S.2d 806 (N.Y., 1972)

KASSEL, J.

The issue here is whether defendant restaurant by permitting an individual to park patrons’ cars thereby held him out as its “employee” for such purposes. Admittedly, this individual, one Buster Douglas, is not its employee in the usual sense but with the knowledge of defendant, he did station himself in front of its restaurant, wore a doorman’s uniform and had been parking its customers’ autos. The parties stipulated that if he were held to be defendant’s employee, this created a bailment between the parties [and the “employer” would have to rebut a presumption of negligence if the customer’s property was not returned to the customer].

On April 20, 1968, at about 10 P.M., plaintiff drove his 1967 Cadillac Coupe de Ville to the door of the Directoire Restaurant at 160 East 48th Street in Manhattan. Standing in front of the door was Buster Douglas, dressed in a self-supplied uniform, comprised of a regular doorman’s cap and matching jacket. Plaintiff gave the keys to his vehicle to Douglas and requested that he park the car. He gave Douglas a $1.00 tip and received a claim check. Plaintiff then entered defendant’s restaurant, remained there for approximately 45 minutes and when he departed, Douglas was unable to locate the car which was never returned to plaintiff.

At the time of this occurrence, the restaurant had been open for only nine days, during which time plaintiff had patronized the restaurant on at least one prior occasion.

Defendant did not maintain any sign at its entrance or elsewhere that it would provide parking for its customers (nor, apparently, any sign warning to the contrary).

Buster Douglas parked cars for customers of defendant’s restaurant and at least three or four other restaurants on the block. He stationed himself in front of each restaurant during the course of an evening
and was so engaged during the evening of April 20, 1968. Defendant clearly knew of and did not object to Douglas’ activities outside its restaurant. Defendant’s witness testified at an examination before trial:

Q. Did anybody stand outside your restaurant in any capacity whatsoever?
A. There was a man out there parking cars for the block, but he was in no way connected with us or anything like that. He parked cars for the Tamburlaine and also for the Chateau Madrid, Nepentha and a few places around the block.

Q. Did you know that this gentleman was standing outside your restaurant?
A. Yes, I knew he was there.

Q. How did you know that he was standing outside your restaurant?
A. Well, I knew the man’s face because I used to work in a club on 55th Street and he was there.

When we first opened up here, we didn’t know if we would have a doorman or have parking facilities or what we were going to do at that time. We just let it hang and I told this Buster, Buster was his name, that you are a free agent and you do whatever you want to do. I am tending bar in the place and what you do in the street is up to you, I will not stop you, but we are not hiring you or anything like that, because at that time, we didn’t know what we were going to use the parking lot or get a doorman and put on a uniform or what.

These facts establish to the court’s satisfaction that, although Douglas was not an actual employee of the restaurant, defendant held him out as its authorized agent or “employee” for the purpose of parking its customers’ cars, by expressly consenting to his standing, in uniform, in front of its door to receive customers, to park their cars and issue receipts therefor—which services were rendered without charge to the restaurant’s customers, except for any gratuity paid to Douglas. Clearly, under these circumstances, apparent authority has been shown and Douglas acted within the scope of this authority.

Plaintiff was justified in assuming that Douglas represented the restaurant in providing his services and that the restaurant had placed him there for the convenience of its customers. A restaurateur knows that this is the impression created by allowing a uniformed attendant to so act. Facility in parking is often a critical consideration for a motorist in selecting a restaurant in midtown Manhattan, and the Directoire was keenly aware of this fact as evidenced by its testimony that the management was looking into various other possibilities for solving customers’ parking problems.
There was no suitable disclaimer posted outside the restaurant that it had no parking facilities or that entrusting one’s car to any person was at the driver’s risk. It is doubtful that any prudent driver would entrust his car to a strange person on the street, if he thought that the individual had no authorization from the restaurant or club or had no connection with it, but was merely an independent operator with questionable financial responsibility.

The fact that Douglas received no compensation directly from defendant is not material. Each party derived a benefit from the arrangement: Douglas being willing to work for gratuities from customers, and the defendant, at no cost to itself, presenting the appearance of providing the convenience of free parking and doorman services to its patrons. In any case, whatever private arrangements existed between the restaurant and Douglas were never disclosed to the customers.

Even if such person did perform these services for several restaurants, it does not automatically follow that he is a freelance entrepreneur, since a shared employee working for other small or moderately sized restaurants in the area would seem a reasonable arrangement, in no way negating the authority of the attendant to act as doorman and receive cars for any one of these places individually.

The case most analogous to the instant one is Klotz v. El Morocco [Citation, 1968], and plaintiff here relies on it. That case similarly involved the theft of a car parked by a uniformed individual standing in front of defendant’s restaurant who, although not employed by it, parked vehicles for its patrons with the restaurant’s knowledge and consent. Defendant here attempts to distinguish this case principally upon the ground that the parties in El Morocco stipulated that the ‘doorman’ was an agent or employee of the defendant acting within the scope of his authority. However, the judge made an express finding to that effect: “* * * there was sufficient evidence in plaintiff’s case on which to find DiGiovanni, the man in the uniform, was acting within the scope of his authority as agent of defendant.” Defendant here also points to the fact that in KlotzDiGiovanni placed patrons’ car keys on a rack inside El Morocco; however, this is only one fact to be considered in finding a bailment and is, to me, more relevant to the issue of the degree of care exercised.

When defendant’s agent failed to produce plaintiff’s automobile, a presumption of negligence arose which now requires defendant to come forward with a sufficient explanation to rebut this presumption. [Citation] The matter should be set down for trial on the issues of due care and of damages.
1. Buster Douglas was not the restaurant’s employee. Why did the court determine his negligence could nevertheless be imputed to the restaurant?

2. The plaintiff in this case relied on *Klotz*, very similar in facts, in which the car-parking attendant was found to be an employee. The defendant, necessarily, needed to argue that the cases were not very similar. What argument did the defendant make? What did the court say about that argument?

3. The restaurant here is a bailee—it has rightful possession of the plaintiff’s (bailor’s) property, the car. If the car is not returned to the plaintiff a rebuttable presumption of negligence arises. What does that mean?

---

**Employee versus Independent Contractor**

*Vizcaino v. Microsoft Corp.*

97 F.3d 1187 (9th Cir. 1996)

Reinhardt, J.

Large corporations have increasingly adopted the practice of hiring temporary employees or independent contractors as a means of avoiding payment of employee benefits, and thereby increasing their profits. This practice has understandably led to a number of problems, legal and otherwise. One of the legal issues that sometimes arises is exemplified by this lawsuit. The named plaintiffs, who were classified by Microsoft as independent contractors, seek to strip that label of its protective covering and to obtain for themselves certain benefits that the company provided to all of its regular or permanent employees. After certifying the named plaintiffs as representatives of a class of “common-law employees,” the district court granted summary judgment to Microsoft on all counts. The plaintiffs...now appeal as to two of their claims: a) the claim...that they are entitled to savings benefits under Microsoft’s Savings Plus Plan (SPP); and b) that...they are entitled to stock-option benefits under Microsoft’s Employee Stock Purchase Plan (ESPP). In both cases, the claims are based on their contention that they are common-law employees.

Microsoft, one of the country’s fastest growing and most successful corporations and the world’s largest software company, produces and sells computer software internationally. It employs a core staff of permanent employees. It categorizes them as “regular employees” and offers them a wide variety of
benefits, including paid vacations, sick leave, holidays, short-term disability, group health and life insurance, and pensions, as well as the two benefits involved in this appeal. Microsoft supplements its core staff of employees with a pool of individuals to whom it refuses to pay fringe benefits. It previously classified these individuals as “independent contractors” or “freelancers,” but prior to the filing of the action began classifying them as “temporary agency employees.” Freelancers were hired when Microsoft needed to expand its workforce to meet the demands of new product schedules. The company did not, of course, provide them with any of the employee benefits regular employees receive.

The plaintiffs...performed services as software testers, production editors, proofreaders, formatters and indexers. Microsoft fully integrated the plaintiffs into its workforce: they often worked on teams along with regular employees, sharing the same supervisors, performing identical functions, and working the same core hours. Because Microsoft required that they work on site, they received admittance card keys, office equipment and supplies from the company.

Freelancers and regular employees, however, were not without their obvious distinctions. Freelancers wore badges of a different color, had different electronic-mail addresses, and attended a less formal orientation than that provided to regular employees. They were not permitted to assign their work to others, invited to official company functions, or paid overtime wages. In addition, they were not paid through Microsoft’s payroll department. Instead, they submitted invoices for their services, documenting their hours and the projects on which they worked, and were paid through the accounts receivable department.

The plaintiffs were told when they were hired that, as freelancers, they would not be eligible for benefits. None has contended that Microsoft ever promised them any benefits individually. All eight named plaintiffs signed [employment agreements] when first hired by Microsoft or soon thereafter. [One] included a provision that states that the undersigned “agrees to be responsible for all federal and state taxes, withholding, social security, insurance and other benefits.” The [other one] states that “as an Independent Contractor to Microsoft, you are self-employed and are responsible to pay all your own insurance and benefits.” Eventually, the plaintiffs learned of the various benefits being provided to regular employees from speaking with them or reading various Microsoft publications concerning employee benefits.
In 1989 and 1990, the Internal Revenue Service (IRS)[,]...applying common-law principles defining the employer-employee relationship, concluded that Microsoft’s freelancers were not independent contractors but employees for withholding and employment tax purposes, and that Microsoft would thereafter be required to pay withholding taxes and the employer’s portion of Federal Insurance Contribution Act (FICA) tax. Microsoft agreed....

After learning of the IRS rulings, the plaintiffs sought various employee benefits, including those now at issue: the ESPP and SPP benefits. The SPP...is a cash or deferred salary arrangement under § 401k of the Internal Revenue Code that permits Microsoft’s employees to save and invest up to fifteen percent of their income through tax-deferred payroll deductions....Microsoft matches fifty percent of the employee’s contribution in any year, with [a maximum matching contribution]. The ESPP...permits employees to purchase company stock [with various rules].

Microsoft rejected the plaintiffs’ claims for benefits, maintaining that they were independent contractors who were personally responsible for all their own benefits....

The plaintiffs brought this action, challenging the denial of benefits.

Microsoft contends that the extrinsic evidence, including the [employment agreements], demonstrates its intent not to provide freelancers or independent contractors with employee benefits[.]....We have no doubt that the company did not intend to provide freelancers or independent contractors with employee benefits, and that if the plaintiffs had in fact been freelancers or independent contractors, they would not be eligible under the plan. The plaintiffs, however, were not freelancers or independent contractors. They were common-law employees, and the question is what, if anything, Microsoft intended with respect to persons who were actually common-law employees but were not known to Microsoft to be such. The fact that Microsoft did not intend to provide benefits to persons who it thought were freelancers or independent contractors sheds little or no light on that question....

Microsoft’s argument, drawing a distinction between common-law employees on the basis of the manner in which they were paid, is subject to the same vice as its more general argument. Microsoft regarded the plaintiffs as independent contractors during the relevant period and learned of their common-law-employee status only after the IRS examination. They were paid through the accounts receivable department rather than the payroll department because of Microsoft’s mistaken view as to their legal status. Accordingly, Microsoft cannot now contend that the fact that they were paid through the accounts...
receivable department demonstrates that the company intended to deny them the benefits received by all common-law employees regardless of their actual employment status. Indeed, Microsoft has pointed to no evidence suggesting that it ever denied eligibility to any employees, whom it understood to be common-law employees, by paying them through the accounts receivable department or otherwise.

We therefore construe the ambiguity in the plan against Microsoft and hold that the plaintiffs are eligible to participate under the terms of the SPP.

[Next, regarding the ESPP] we hold that the plaintiffs...are covered by the specific provisions of the ESPP. We apply the “objective manifestation theory of contracts,” which requires us to “impute an intention corresponding to the reasonable meaning of a person’s words and acts.” [Citation] Through its incorporation of the tax code provision into the plan, Microsoft manifested an objective intent to make all common-law employees, and hence the plaintiffs, eligible for participation. The ESPP specifically provides:

*It is the intention of the Company to have the Plan qualify as an “employee stock purchase plan” under Section 423 of the Internal Revenue Code of 1954. The provisions of the Plan shall, accordingly, be construed so as to extend and limit participation in a manner consistent with the requirements of that Section of the Code. (emphasis added)*

The ESPP, when construed in a manner consistent with the requirements of § 423, extends participation to all common-law employees not covered by one of the express exceptions set forth in the plan. Accordingly, we find that the ESPP, through its incorporation of § 423, expressly extends eligibility for participation to the plaintiff class and affords them the same options to acquire stock in the corporation as all other employees.

Microsoft next contends that the [employment agreements] signed by the plaintiffs render them ineligible to participate in the ESPP. First, the label used in the instruments signed by the plaintiffs does not control their employment status. Second, the employment instruments, if construed to exclude the plaintiffs from receiving ESPP benefits, would conflict with the plan’s express incorporation of § 423. Although Microsoft may have generally intended to exclude individuals who were in fact independent contractors, it could not, consistent with its express intention to extend participation in the ESPP to all common-law employees, have excluded the plaintiffs. Indeed, such an exclusion would defeat the purpose of including §
423 in the plan, because the exclusion of common-law employees not otherwise accepted would result in the loss of the plan’s tax qualification.

Finally, Microsoft maintains that the plaintiffs are not entitled to ESPP benefits because the terms of the plan were never communicated to them and they were therefore unaware of its provisions when they performed their employment services....In any event, to the extent that knowledge of an offer of benefits is a prerequisite, it is probably sufficient that Microsoft publicly promulgated the plan. In [Citation], the plaintiff was unaware of the company’s severance plan until shortly before his termination. The Oklahoma Supreme Court concluded nonetheless that publication of the plan was “the equivalent of constructive knowledge on the part of all employees not specifically excluded.”

We are not required to rely, however, on the [this] analysis or even on Microsoft’s own unwitting concession. There is a compelling reason, implicit in some of the preceding discussion, that requires us to reject the company’s theory that the plaintiffs’ entitlement to ESPP benefits is defeated by their previous lack of knowledge regarding their rights. It is “well established” that an optionor may not rely on an optionee’s failure to exercise an option when he has committed any act or failed to perform any duty “calculated to cause the optionee to delay in exercising the right.” [Citation] “[T]he optionor may not make statements or representations calculated to cause delay, [or] fail to furnish [necessary] information....” Similarly, “[I]t is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.” [Citation]...

Applying these principles, we agree with the magistrate judge, who concluded that Microsoft, which created a benefit to which the plaintiffs were entitled, could not defend itself by arguing that the plaintiffs were unaware of the benefit, when its own false representations precluded them from gaining that knowledge. Because Microsoft misrepresented both the plaintiffs’ actual employment status and their eligibility to participate in the ESPP, it is responsible for their failure to know that they were covered by the terms of the offer. It may not now take advantage of that failure to defeat the plaintiffs’ rights to ESPP benefits. Thus, we reject Microsoft’s final argument.

Conclusion

For the reasons stated, the district court’s grant of summary judgment in favor of Microsoft and denial of summary judgment in favor of the plaintiffs is REVERSED and the case REMANDED for the
determination of any questions of individual eligibility for benefits that may remain following issuance of this opinion and for calculation of the damages or benefits due the various class members.

**CASE QUESTIONS**

1. In a 1993 *Wall Street Journal* article, James Bovard asserted that the IRS “is carrying out a sweeping campaign to slash the number of Americans permitted to be self-employed—and to punish the companies that contract with them...IRS officials indicate that more than half the nation’s self-employed should no longer be able to work for themselves.” Why did Microsoft want these employees to “be able to work for themselves”?

2. Why did the employees accept employment as independent contractors?

3. It seems unlikely that the purpose of the IRS’s campaign was really to keep people from working for themselves, despite Mr. Bovard’s assumption. What was the purpose of the campaign?

4. Why did the IRS and the court determine that these “independent contractors” were in fact employees?

---

**Breach of Fiduciary Duty**

*Bacon v. Volvo Service Center, Inc.*

*597 S.E.2d 440 (Ga. App. 2004)*

Smith, J.

[This appeal is] taken in an action that arose when two former employees left an existing business and began a new, competing business....Bacon and Johnson, two former employees of Volvo Service Center, Inc. (VSC), and the new company they formed, South Gwinnett Volvo Service, Ltd. (SGVS), appeal from the trial court’s denial of their motion for judgment notwithstanding the jury’s verdict in favor of VSC....VSC filed suit against appellants, alleging a number of claims arising from the use by Bacon, who had been a service technician at VSC, of VSC’s customer list, and his soliciting Johnson, a service writer, and another VSC employee to join SGVS. SGVS moved for a directed verdict on certain claims at the close of plaintiff’s evidence and at the close of the case, which motions were denied. The jury was asked to respond to specific interrogatories, and it found for VSC and against all three appellants on VSC’s claim for misappropriation of trade secrets. The jury also found for plaintiff against Bacon for breach of fiduciary duty,...tortious interference with business relations, employee piracy, and conversion of corporate assets.
The jury awarded VSC attorney fees, costs, and exemplary damages stemming from the claim for misappropriation of trade secrets. Judgment was entered on the jury’s verdict, and appellants’ motion for j.n.o.v. was denied. This appeal ensued. We find that VSC did not meet its burden of proof as to the claims for misappropriation of trade secrets, breach of fiduciary duty, or employee piracy, and the trial court should have granted appellants’ motion for j.n.o.v.

Construed to support the jury’s verdict, the evidence of record shows that Bacon was a technician at VSC when he decided to leave and open a competing business. Before doing so, he printed a list of VSC’s customers from one of VSC’s two computers. Computer access was not password restricted, was easy to use, and was used by many employees from time to time.

About a year after he left VSC, Bacon gave Johnson and another VSC employee an offer of employment at his new Volvo repair shop, which was about to open. Bacon and Johnson advertised extensively, and the customer list was used to send flyers to some VSC customers who lived close to the new shop’s location.

These activities became the basis for VSC’s action against Bacon, Johnson, and their new shop, SGVS.

1. The Georgia Trade Secrets Act of 1990, [Citation], defines a “trade secret” as
   information, without regard to form, including, but not limited to,...a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information:
   (A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
   (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

If an employer does not prove both prongs of this test, it is not entitled to protection under the Act. Our Supreme Court held in [Citation, 1991] for instance, that information was not a trade secret within the meaning of the Act because no evidence showed that the employer “made reasonable efforts under the circumstances...to maintain the confidentiality of the information it sought to protect.”

While a client list may be subject to confidential treatment under the Georgia Trade Secrets Act, the information itself is not inherently confidential. Customers are not trade secrets. Confidentiality is afforded only where the customer list is not generally known or ascertainable from other sources and was the subject of reasonable efforts to maintain its secrecy....
Here, VSC took no precautions to maintain the confidentiality of its customer list. The information was on both computers, and it was not password-protected. Moreover, the same information was available to the technicians through the repair orders, which they were permitted to retain indefinitely while Bacon was employed there. Employees were not informed that the information was confidential. Neither Bacon nor Johnson was required to sign a confidentiality agreement as part of his employment.

Because no evidence was presented from which the jury could have concluded that VSC took any steps, much less reasonable ones, to protect the confidentiality of its customer list, a material requirement for trade secret status was not satisfied. The trial court should have granted appellants’ motion for j.n.o.v.

2. To prove tortious interference with business relations, “a plaintiff must show defendant: (1) acted improperly and without privilege, (2) acted purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) caused plaintiff financial injury.” [Citation] But “[f]air competition is always legal.” [Citations] Unless an employee has executed a valid non-compete or non-solicit covenant, he is not barred from soliciting customers of his former employer on behalf of a new employer. [Citation]

No evidence was presented that Bacon acted “improperly,” that any of VSC’s former customers switched to SGVS because of any improper act by Bacon, or that these customers would have continued to patronize VSC but for Bacon’s solicitations. Therefore, it was impossible for a jury to calculate VSC’s financial damage, if any existed.

3. With regard to VSC’s claim for breach of fiduciary duty, “[a]n employee breaches no fiduciary duty to the employer simply by making plans to enter a competing business while he is still employed. Even before the termination of his agency, he is entitled to make arrangements to compete and upon termination of employment immediately compete.” [Citation] He cannot solicit customers for a rival business or do other, similar acts in direct competition with his employer’s business before his employment ends. But here, no evidence was presented to rebut the evidence given by Bacon and Johnson that they engaged in no such practices before their employment with VSC ended. Even assuming, therefore, that a fiduciary relationship existed, no evidence was presented showing that it was breached.

4. The same is true for VSC’s claim for employee piracy. The evidence simply does not show that any employees of VSC were solicited for SGVS before Bacon left VSC’s employ....

Judgment reversed.
**CASE QUESTIONS**

1. Why was it determined that the defendants were not liable for any breach of trade secrecy?
2. What would have been necessary to show tortious interference with business relations?
3. The evidence was lacking that there was any breach of fiduciary duty. What would have been necessary to show that?
4. What is “employee piracy”? Why was it not proven?

---

**18.4 Summary and Exercises**

**Summary**

An agent is one who acts on behalf of another. The law recognizes several types of agents, including (1) the general agent, one who possesses authority to carry out a broad range of transactions in the name of and on behalf of the principal; (2) the special agent, one with authority to act only in a specifically designated instance or set of transactions; (3) the agent whose agency is coupled with an interest, one who has a property interest in addition to authority to act as an agent; (4) the subagent, one appointed by an agent with authority to do so; and (5) the servant (“employee” in modern English), one whose physical conduct is subject to control of the principal.

A servant should be distinguished from an independent contractor, whose work is not subject to the control of the principal. The difference is important for purposes of taxation, workers’ compensation, and liability insurance.

The agency relationship is usually created by contract, and sometimes governed by the Statute of Frauds, but some agencies are created by operation of law.

An agent owes his principal the highest duty of loyalty, that of a fiduciary. The agent must avoid self-dealing, preserve confidential information, perform with skill and care, conduct his personal life so as not to bring disrepute on the business for which he acts as agent, keep and render accounts, and give appropriate information to the principal.

Although the principal is not the agent’s fiduciary, the principal does have certain obligations toward the agent—for example, to refrain from interfering with the agent’s work and to indemnify. The employer’s common-law tort liability toward his employees has been replaced by the workers’ compensation system,
under which the employee gives up the right to sue for damages in return for prompt payment of medical
and job-loss expenses. Injuries must have been work related and the injured person must have been an
employee. Courts today allow awards for psychological trauma in the absence of physical injury.

EXERCISES

1. A woman was involved in an automobile accident that resulted in the death of a passenger in her car.
   After she was charged with manslaughter, her attorney agreed to work with her insurance company’s
   claims adjuster in handling the case. As a result of the agreement, the woman gave a statement about the
   accident to the claims adjuster. When the prosecuting attorney demanded to see the statement, the
   woman’s attorney refused on the grounds that the claims adjuster was his—the attorney’s—agent, and
   therefore the statement was covered by the attorney-client privilege. Is the attorney correct? Why?

2. A local hotel operated under a franchise agreement with a major hotel chain. Several customers charged
   the banquet director of the local hotel with misconduct and harassment. They sued the hotel chain (the
   franchisor) for acts committed by the local hotel (the franchisee), claiming that the franchisee was the
   agent of the franchisor. Is an agency created under these circumstances? Why?

3. A principal hired a mortgage banking firm to obtain a loan commitment of $10,000,000 from an insurance
   company for the construction of a shopping center. The firm was promised a fee of $50,000 for obtaining
   the commitment. The firm was successful in arranging for the loan, and the insurance company, without
   the principal’s knowledge, agreed to pay the firm a finder’s fee. The principal then refused to pay the firm
   the promised $50,000, and the firm brought suit to recover the fee. May the firm recover the fee? Why?

4. Based on his experience working for the CIA, a former CIA agent published a book about certain CIA
   activities in South Vietnam. The CIA did not approve of the publication of the book although, as a
   condition of his employment, the agent had agreed not to publish any information relating to the CIA
   without specific approval of the agency. The government brought suit against the agent, claiming that all
   the agent’s profits from publishing the book should go to the government. Assuming that the government
   suffered only nominal damages because the agent published no classified information, will the
   government prevail? Why?

5. Upon graduation from college, Edison was hired by a major chemical company. During the time when he
   was employed by the company, Edison discovered a synthetic oil that could be manufactured at a very
   low cost. What rights, if any, does Edison’s employer have to the discovery? Why?
6. A US company hired MacDonald to serve as its resident agent in Bolivia. MacDonald entered into a contract to sell cars to Bolivia and personally guaranteed performance of the contract as required by Bolivian law. The cars delivered to Bolivia were defective, and Bolivia recovered a judgment of $83,000 from MacDonald. Must the US company reimburse MacDonald for this amount? Explain.

7. According to the late Professor William L. Prosser, “The theory underlying the workmen’s compensation acts never has been stated better than in the old campaign slogan, ‘The cost of the product should bear the blood of the workman.’” What is meant by this statement?

8. An employee in a Rhode Island foundry inserted two coins in a coin-operated coffee machine in the company cafeteria. One coin stuck in the machine, and the worker proceeded to “whack” the machine with his right arm. The arm struck a grate near the machine, rupturing the biceps muscle and causing a 10 percent loss in the use of the arm. Is the worker entitled to workers’ compensation? Explain.

9. Paulson engaged Arthur to sell Paul’s restored 1948 Packard convertible to Byers for $23,000. A few days later, Arthur saw an advertisement showing that Collector was willing to pay $30,000 for a 1948 Packard convertible in “restored” condition. Arthur sold the car to Byers, and subsequently Paulson learned of Collector’s interest. What rights, if any, has Paulson against Arthur?
Chapter 19
Liability of Principal and Agent; Termination of Agency

**LEARNING OBJECTIVES**

After reading this chapter, you should understand the following:

1. The principal’s liability in contract
2. The principal’s liability in tort
3. The principal’s criminal liability
4. The agent’s personal liability in tort and contract
5. How agency relationships are terminated

In Chapter 18 "Relationships between Principal and Agent" we considered the relationships between agent and principal. Now we turn to relationships between third parties and the principal or agent. When the agent makes a contract for his principal or commits a tort in the course of his work, is the principal liable? What is the responsibility of the agent for torts committed and contracts entered into on behalf of his principal? How may the relationship be terminated so that the principal or agent will no longer have responsibility toward or liability for the acts of the other? These are the questions addressed in this chapter.

### 19.1 Principal’s Contract Liability

**LEARNING OBJECTIVES**

1. Understand that the principal’s liability depends on whether the agent was authorized to make the contract.
2. Recognize how the agent’s authority is acquired: expressly, impliedly, or apparently.
3. Know that the principal may also be liable—even if the agent had no authority—if the principal ratifies the agent’s contract after the fact.
Principal’s Contract Liability Requires That Agent Had Authority

The key to determining whether a principal is liable for contracts made by his agent is authority: was the agent authorized to negotiate the agreement and close the deal? Obviously, it would not be sensible to hold a contractor liable to pay for a whole load of lumber merely because a stranger wandered into the lumberyard saying, “I’m an agent for ABC Contractors; charge this to their account.” To be liable, the principal must have authorized the agent in some manner to act in his behalf, and that authorization must be communicated to the third party by the principal.

Types of Authority

There are three types of authority: express, implied, and apparent (see Figure 19.1 "Types of Authority"). We will consider each in turn.

Express Authority

The strongest form of authority is that which is expressly granted, often in written form. The principal consents to the agent’s actions, and the third party may then rely on the document attesting to the agent’s authority to deal on behalf of the principal. One common form of express authority is the standard signature card on file with banks allowing corporate agents to write checks on the company’s credit. The principal bears the risk of any wrongful action of his agent, as demonstrated in Allen A. Funt Productions, Inc. v. Chemical Bank. Allen A. Funt submitted to his bank through his production company various certificates permitting his accountant to use the company’s checking accounts. In fact, for several years the accountant embezzled money from the company by writing checks to himself and depositing them in his own account. The company sued its bank, charging it with negligence, apparently for failing to monitor the amount of money taken by the accountant. But the court dismissed the negligence complaint, citing a state statute based on the common-law agency principle that a third party is entitled to rely on the express authorization given to an agent; in this case, the accountant drew checks on the account within the monetary limits contained in the signature cards on file with the bank. Letters of introduction and work orders are other types of express authority.
Implied Authority

Not every detail of an agent’s work can be spelled out. It is impossible to delineate step-by-step the duties of a general agent; at best, a principal can set forth only the general nature of the duties that the agent is to perform. Even a special agent’s duties are difficult to describe in such detail as to leave him without discretion. If express authority were the only valid kind, there would be no efficient way to use an agent, both because the effort to describe the duties would be too great and because the third party would be reluctant to deal with him.

But the law permits authority to be “implied” by the relationship of the parties, the nature and customs of the business, the circumstances surrounding the act in question, the wording of the agency contract, and the knowledge that the agent has of facts relevant to the assignment. The general rule is that the agent has implied or “incidental” authority to perform acts incidental to or reasonably necessary to carrying out the transaction. Thus if a principal instructs her agent to “deposit a check in the bank today,” the agent has authority to drive to the bank unless the principal specifically prohibits the agent from doing so.
The theory of implied authority is especially important to business in the realm of the business manager, who may be charged with running the entire business operation or only a small part of it. In either event, the business manager has a relatively large domain of implied authority. He can buy goods and services; hire, supervise, and fire employees; sell or junk inventory; take in receipts and pay debts; and in general, direct the ordinary operations of the business. The full extent of the manager’s authority depends on the circumstances—what is customary in the particular industry, in the particular business, and among the individuals directly concerned.

On the other hand, a manager does not have implicit authority to undertake unusual or extraordinary actions on behalf of his principal. In the absence of express permission, an agent may not sell part of the business, start a new business, change the nature of the business, incur debt (unless borrowing is integral to the business, as in banking, for example), or move the business premises. For example, the owner of a hotel appoints Andy manager; Andy decides to rename the hotel and commissions an artist to prepare a new logo for the hotel’s stationery. Andy has no implied authority to change the name or to commission the artist, though he does have implied authority to engage a printer to replenish the stationery supply—and possibly to make some design changes in the letterhead.

Even when there is no implied authority, in an emergency the agent may act in ways that would in the normal course require specific permission from the principal. If unforeseen circumstances arise and it is impracticable to communicate with the principal to find out what his wishes would be, the agent may do what is reasonably necessary in order to prevent substantial loss to his principal. During World War II, Eastern Wine Corporation marketed champagne in a bottle with a diagonal red stripe that infringed the trademark of a French producer. The French company had granted licenses to an American importer to market its champagne in the United States. The contract between producer and importer required the latter to notify the French company whenever a competitor appeared to be infringing its rights and to recommend steps by which the company could stop the infringement. The authority to institute suit was not expressly conferred, and ordinarily the right to do so would not be inferred. Because France was under German occupation, however, the importer was unable to communicate with the producer, its principal. The court held that the importer could file suit to enjoin Eastern Wine from continuing to display the infringing red diagonal stripe, since legal action was “essential to the preservation of the principal’s property.” [3]
The rule that a person’s position can carry with it implied authority is fundamental to American business practice. But outside the United States this rule is not applicable, and the business executive traveling abroad should be aware that in civil-law countries it is customary to present proof of authority to transact corporate business—usually in the form of a power of attorney. This is not always an easy task. Not only must the power of the traveling executive be shown but the right of the corporate officer back in the United States to delegate authority must also be proven.

**Apparent Authority**

In the agency relationship, the agent’s actions in dealing with third parties will affect the legal rights of the principal. What the third party knows about the agency agreement is irrelevant to the agent’s legal authority to act. That authority runs from principal to agent. As long as an agent has authorization, either express or implied, she may bind the principal legally. Thus the seller of a house may be ignorant of the buyer’s true identity; the person he supposes to be the prospective purchaser might be the agent of an undisclosed principal. Nevertheless, if the agent is authorized to make the purchase, the seller’s ignorance is not a ground for either seller or principal to void the deal.

But if a person has no authority to act as an agent, or an agent has no authority to act in a particular way, is the principal free from all consequences? The answer depends on whether or not the agent has apparent authority—that is, on whether or not the third person reasonably believes from the principal’s words, written or spoken, or from his conduct that he has in fact consented to the agent’s actions. Apparent authority is a manifestation of authority communicated to the third person; it runs from principal to third party, not to the agent.

Apparent authority is sometimes said to be based on the principle of estoppel. Estoppel is the doctrine that a person will not now be allowed to deny a promise or assertion she previously made where there has been detrimental reliance on that promise or assertion. Estoppel is commonly used to avoid injustice. It may be a substitute for the requirement of consideration in contract (making the promise of a gift enforceable where the donee has relied upon the promise), and it is sometimes available to circumvent the requirement of a writing under the Statute of Frauds.

Apparent authority can arise from prior business transactions. On July 10, Meggs sold to Buyer his business, the right to use the trade name Rose City Sheet Metal Works, and a list of suppliers he had used. Three days later, Buyer began ordering supplies from Central Supply Company, which was on Meggs’s list
but with which Meggs had last dealt four years before. On September 3, Central received a letter from
Meggs notifying it of Meggs’s sale of the business to Buyer. Buyer failed to pay Central, which sued Meggs.
The court held that Rose City Sheet Metal Works had apparent authority to buy on Meggs’s credit; Meggs
was liable for supplies purchased between July 10 and September 3. [8] In such cases, and in cases
involving the firing of a general manager, actual notice should be given promptly to all customers. See the
discussion of *Kanavos v. Hancock Bank & Trust Company* in Section 19.4.1 ”Implied Authority”.

**Ratification**

Even if the agent possessed no actual authority and there was no apparent authority on which the third
person could rely, the principal may still be liable if he ratifies or adopts the agent’s acts before the third
person withdraws from the contract. Ratification usually relates back to the time of the undertaking,
creating authority after the fact as though it had been established initially. Ratification is a voluntary act
by the principal. Faced with the results of action purportedly done on his behalf but without authorization
and through no fault of his own, he may affirm or disavow them as he chooses. To ratify, the principal may
tell the parties concerned or by his conduct manifest that he is willing to accept the results as though the
act were authorized. Or by his silence he may find under certain circumstances that he has ratified. Note
that ratification does not require the usual consideration of contract law. The principal need be promised
nothing extra for his decision to affirm to be binding on him. Nor does ratification depend on the position
of the third party; for example, a loss stemming from his reliance on the agent’s representations is not
required. In most situations, ratification leaves the parties where they expected to be, correcting the
agent’s errors harmlessly and giving each party what was expected.

**KEY TAKEAWAY**

The principal is liable on an agent’s contract only if the agent was authorized by the principal to make the
contract. Such authority is express, implied, or apparent. *Express* means made in words, orally or in
writing; *implied* means the agent has authority to perform acts incidental to or reasonably necessary to
carrying out the transaction for which she has express authority. *Apparent authority* arises where the
principal gives the third party reason to believe that the agent had authority. The reasonableness of the
third party’s belief is based on all the circumstances—all the facts. Even if the agent has no authority, the
principal may, after the fact, ratify the contract made by the agent.

**EXERCISES**
1. Could express authority be established by silence on the part of the principal?

2. Why is the concept of implied authority very important in business situations?

3. What is the rationale for the doctrine of apparent authority—that is, why would the law impose a contract on a “principal” when in fact there was no principal-agent relationship with the “agent” at all?


5. [2] Allen Funt (1914–99) was an American television producer, director, and writer, best known as the creator and host of Candid Camera from the 1940s to 1980s, which was broadcast as either a regular show or a series of specials. Its most notable run was from 1960 to 1967 on CBS.


**19.2 Principal’s Tort and Criminal Liability**

**LEARNING OBJECTIVES**

1. Understand in what circumstances a principal will be vicariously liable for torts committed by employees.

2. Recognize the difference between agents whose tort and criminal liability may be imputed to the employer and those whose liability will not be so imputed.

3. Know when the principal will be vicariously liable for intentional torts committed by the agent.

4. Explain what is meant by “the scope of employment,” within which the agent’s actions may be attributed to the principal and without which they will not.

5. Name special cases of vicarious liability.

6. Describe the principal’s liability for crimes committed by the agent.

**Principal’s Tort Liability**

**The Distinction between Direct and Vicarious Liability**

When is the principal liable for injuries that the agent causes another to suffer?

**Direct Liability**
There is a distinction between torts prompted by the principal himself and torts of which the principal was innocent. If the principal directed the agent to commit a tort or knew that the consequences of the agent’s carrying out his instructions would bring harm to someone, the principal is liable. This is an application of the general common-law principle that one cannot escape liability by delegating an unlawful act to another. The syndicate that hires a hitman is as culpable of murder as the man who pulls the trigger. Similarly, a principal who is negligent in his use of agents will be held liable for their negligence. This rule comes into play when the principal fails to supervise employees adequately, gives faulty directions, or hires incompetent or unsuitable people for a particular job. Imposing liability on the principal in these cases is readily justifiable since it is the principal’s own conduct that is the underlying fault; the principal here is directly liable.

**Vicarious Liability**

But the principle of liability for one’s agent is much broader, extending to acts of which the principal had no knowledge, that he had no intention to commit nor involvement in, and that he may in fact have expressly prohibited the agent from engaging in. This is the principle of respondeat superior (“let the master answer”) or the master-servant doctrine, which imposes on the principal vicarious liability (*vicarious* means “indirectly, as, by, or through a substitute”) under which the principal is responsible for acts committed by the agent within the scope of the employment (see).

*Figure 19.2 Principal's Tort Liability*
The modern basis for vicarious liability is sometimes termed the “deep pocket” theory: the principal (usually a corporation) has deeper pockets than the agent, meaning that it has the wherewithal to pay for the injuries traceable one way or another to events it set in motion. A million-dollar industrial accident is within the means of a company or its insurer; it is usually not within the means of the agent—employee—who caused it.

The “deep pocket” of the defendant-company is not always very deep, however. For many small businesses, in fact, the principle of respondeat superior is one of life or death. One example was the closing in San Francisco of the much-beloved Larraburu Brothers Bakery—at the time, the world’s second largest sourdough bread maker. The bakery was held liable for $2 million in damages after one of its delivery trucks injured a six-year-old boy. The bakery’s insurance policy had a limit of $1.25 million, and the bakery could not absorb the excess. The Larraburus had no choice but to cease operations. (See http://www.outsidelands.org/larraburu.php.)

Respondeat superior raises three difficult questions: (1) What type of agents can create tort liability for the principal? (2) Is the principal liable for the agent’s intentional torts? (3) Was the agent acting within the scope of his employment? We will consider these questions in turn.

**Agents for Whom Principals Are Vicariously Liable**
In general, the broadest liability is imposed on the master in the case of tortious physical conduct by a servant, as discussed in . If the servant acted within the scope of his employment—that is, if the servant’s wrongful conduct occurred while performing his job—the master will be liable to the victim for damages unless, as we have seen, the victim was another employee, in which event the workers’ compensation system will be invoked. Vicarious tort liability is primarily a function of the employment relationship and not agency status.

Ordinarily, an individual or a company is not vicariously liable for the tortious acts of independent contractors. The plumber who rushes to a client’s house to repair a leak and causes a traffic accident does not subject the homeowner to liability. But there are exceptions to the rule. Generally, these exceptions fall into a category of duties that the law deems nondelegable. In some situations, one person is obligated to provide protection to or care for another. The failure to do so results in liability whether or not the harm befell the other because of an independent contractor’s wrongdoing. Thus a homeowner has a duty to ensure that physical conditions in and around the home are not unreasonably dangerous. If the owner hires an independent contracting firm to dig a sewer line and the contractor negligently fails to guard passersby against the danger of falling into an open trench, the homeowner is liable because the duty of care in this instance cannot be delegated. (The contractor is, of course, liable to the homeowner for any damages paid to an injured passerby.)

**Liability for Agent’s Intentional Torts**

In the nineteenth century, a principal was rarely held liable for intentional wrongdoing by the agent if the principal did not command the act complained of. The thought was that one could never infer authority to commit a willfully wrongful act. Today, liability for intentional torts is imputed to the principal if the agent is acting to further the principal’s business. See the very disturbing *Lyon v. Carey* in .

**Deviations from Employment**

The general rule is that a principal is liable for torts only if the servant committed them “in the scope of employment.” But determining what this means is not easy.

**The “Scope of Employment” Problem**

It may be clear that the person causing an injury is the agent of another. But a principal cannot be responsible for every act of an agent. If an employee is following the letter of his instructions, it will be easy to determine liability. But suppose an agent deviates in some way from his job. The classic test of
liability was set forth in an 1833 English case, Joel v. Morrison. The plaintiff was run over on a highway by a speeding cart and horse. The driver was the employee of another, and inside was a fellow employee. There was no question that the driver had acted carelessly, but what he and his fellow employee were doing on the road where the plaintiff was injured was disputed. For weeks before and after the accident, the cart had never been driven in the vicinity in which the plaintiff was walking, nor did it have any business there. The suggestion was that the employees might have gone out of their way for their own purposes. As the great English jurist Baron Parke put it, “If the servants, being on their master’s business, took a detour to call upon a friend, the master will be responsible….But if he was going on a frolic of his own, without being at all on his master’s business, the master will not be liable.” In applying this test, the court held the employer liable.

The test is thus one of degree, and it is not always easy to decide when a detour has become so great as to be transformed into a frolic. For a time, a rather mechanical rule was invoked to aid in making the decision. The courts looked to the servant’s purposes in “detouring.” If the servant’s mind was fixed on accomplishing his own purposes, then the detour was held to be outside the scope of employment; hence the tort was not imputed to the master. But if the servant also intended to accomplish his master’s purposes during his departure from the letter of his assignment, or if he committed the wrong while returning to his master’s task after the completion of his frolic, then the tort was held to be within the scope of employment.

This test is not always easy to apply. If a hungry deliveryman stops at a restaurant outside the normal lunch hour, intending to continue to his next delivery after eating, he is within the scope of employment. But suppose he decides to take the truck home that evening, in violation of rules, in order to get an early start the next morning. Suppose he decides to stop by the beach, which is far away from his route. Does it make a difference if the employer knows that his deliverymen do this?

**The Zone of Risk Test**

Court decisions in the last forty years have moved toward a different standard, one that looks to the foreseeability of the agent’s conduct. By this standard, an employer may be held liable for his employee’s conduct even when devoted entirely to the employee’s own purposes, as long as it was foreseeable that the agent might act as he did. This is the “zone of risk” test. The employer will be within the zone of risk for vicarious liability if the employee is where she is supposed to be, doing—more or less—what she is
supposed to be doing, and the incident arose from the employee’s pursuit of the employer’s interest (again, more or less). That is, the employer is within the zone of risk if the servant is in the place within which, if the master were to send out a search party to find a missing employee, it would be reasonable to look. See Section 4, Cockrell v. Pearl River Valley Water Supply Dist.

**Special Cases of Vicarious Liability**

Vicarious liability is not limited to harm caused in the course of an agency relationship. It may also be imposed in other areas, including torts of family members, and other torts governed by statute or regulation. We will examine each in turn.

**Use of Automobiles**

A problem commonly arises when an automobile owner lends his vehicle to a personal friend, someone who is not an agent, and the borrower injures a third person. Is the owner liable? In many states, the owner is not liable; in other states, however, two approaches impose liability on the owner. The first approach is legislative: owner’s consent statutes make the owner liable when the automobile is being driven with his consent or knowledge. The second approach to placing liability on the owner is judicial and known as the family purpose doctrine. Under this doctrine, a family member who negligently injures someone with the car subjects the owner to liability if the family member was furthering family purposes. These are loosely defined to include virtually every use to which a child, for example, might put a car. In a Georgia case, Dixon v. Phillips, the father allowed his minor son to drive the car but expressly forbade him from letting anyone else do so. Nevertheless, the son gave the wheel to a friend and a collision occurred while both were in the car. The court held the father liable because he made the car available for the pleasure and convenience of his son and other family members.

**Torts of Family Members**

At common law, the husband was liable for the torts of his wife, not because she was considered an agent but because she was considered to be an extension of him. “Husband and wife were only one person in law,” says Holmes, and any act of the wife was supposed to have been done at the husband’s direction (to which Mr. Dickens’s Mr. Bumble responded, in the memorable line, “If the law supposes that, the law is a ass—a idiot”). This ancient view has been abrogated by statute or by court ruling in all the states, so that now a wife is solely responsible for her own torts unless she in fact serves as her husband’s agent.
Unlike wives, children are not presumed at common law to be agents or extensions of the father so that normally parents are not vicariously liable for their children’s torts. However, they can be held liable for failing to control children known to be dangerous.

Most states have statutorily changed the common-law rule, making parents responsible for willful or malicious tortious acts of their children whether or not they are known to be mischief-makers. Thus the Illinois Parental Responsibility Law provides the following: “The parent or legal guardian of an unemancipated minor who resides with such parent or legal guardian is liable for actual damages for the willful or malicious acts of such minor which cause injury to a person or property.” Several other states impose a monetary limit on such liability.

**Other Torts Governed by Statute or Regulation**

There are certain types of conduct that statutes or regulation attempt to control by placing the burden of liability on those presumably in a position to prevent the unwanted conduct. An example is the “Dramshop Act,” which in many states subjects the owner of a bar to liability if the bar continues to serve an intoxicated patron who later is involved in an accident while intoxicated. Another example involves the sale of adulterated or short-weight foodstuffs: the employer of one who sells such may be liable, even if the employer did not know of the sales.

**Principal’s Criminal Liability**

As a general proposition, a principal will not be held liable for an agent’s unauthorized criminal acts if the crimes are those requiring specific intent. Thus a department store proprietor who tells his chief buyer to get the “best deal possible” on next fall’s fashions is not liable if the buyer steals clothes from the manufacturer. A principal will, however, be liable if the principal directed, approved, or participated in the crime. Cases here involve, for example, a corporate principal’s liability for agents’ activity in antitrust violations—price-fixing is one such violation.

There is a narrow exception to the broad policy of immunity. Courts have ruled that under certain regulatory statutes and regulations, an agent’s criminality may be imputed to the principal, just as civil liability is imputed under Dramshop Acts. These include pure food and drug acts, speeding ordinances, building regulations, child labor rules, and minimum wage and maximum hour legislation. Misdemeanor criminal liability may be imposed upon corporations and individual employees for the sale or shipment of
adulterated food in interstate commerce, notwithstanding the fact that the defendant may have had no actual knowledge that the food was adulterated at the time the sale or shipment was made.

**KEY TAKEAWAY**

The principal will be liable for the employee's torts in two circumstances: first, if the principal was directly responsible, as in hiring a person the principal knew or should have known was incompetent or dangerous; second, if the employee committed the tort in the scope of business for the principal. This is the master-servant doctrine or respondeat superior. It imposes vicarious liability on the employer: the master (employer) will be liable if the employee was in the zone of activity creating a risk for the employer ("zone of risk" test), that is—generally—if the employee was where he was supposed to be, when he was supposed to be there, and the incident arose out of the employee's interest (however perverted) in promoting the employer's business.

Special cases of vicarious liability arise in several circumstances. For example, the owner of an automobile may be liable for torts committed by one who borrows it, or if it is—even if indirectly—used for family purposes. Parents are, by statute in many states, liable for their children's torts. Similarly by statute, the sellers and employers of sellers of alcohol or adulterated or short-weight foodstuffs may be liable. The employer of one who commits a crime is not usually liable unless the employer put the employee up to the crime or knew that a crime was being committed. But some prophylactic statutes impose liability on the employer for the employee's crime—even if the employee had no intention to commit it—as a means to force the employer to prevent such actions.

**EXERCISES**

1. What is the difference between direct and vicarious employer tort liability?
2. What is meant by the "zone of risk" test?
3. Under what circumstances will an employer be liable for intentional torts of the employee?
4. When will the employer be liable for an employee's criminal acts?

Agent's Personal Liability for Torts and Contracts

Tort Liability

That a principal is held vicariously liable and must pay damages to an injured third person does not excuse the agent who actually committed the tortious acts. A person is always liable for his or her own torts (unless the person is insane, involuntarily intoxicated, or acting under extreme duress). The agent is personally liable for his wrongful acts and must reimburse the principal for any damages the principal was forced to pay, as long as the principal did not authorize the wrongful conduct. The agent directed to commit a tort remains liable for his own conduct but is not obliged to repay the principal. Liability as an agent can be burdensome, sometimes perhaps more burdensome than as a principal. The latter normally purchases insurance to cover against wrongful acts of agents, but liability insurance policies frequently do not cover the employee's personal liability if the employee is named in a lawsuit individually. Thus doctors' and hospitals' malpractice policies protect a doctor from both her own mistakes and those of nurses and others that the doctor would be responsible for; nurses, however, might need their own coverage. In the absence of insurance, an agent is at serious risk in this lawsuit-conscious age. The risk is not total. The agent is not liable for torts of other agents unless he is personally at fault—for example, by negligently supervising a junior or by giving faulty instructions. For example, an agent, the general manager for a principal, hires Brown as a subordinate. Brown is competent to do the job but by failing to exercise proper control over a machine negligently injures Ted, a visitor to the premises. The principal and Brown are liable to Ted, but the agent is not.

Contract Liability
It makes sense that an agent should be liable for her own torts; it would be a bad social policy indeed if a person could escape tort liability based on her own fault merely because she acted in an agency capacity. It also makes sense that—as is the general rule—an agent is not liable on contracts she makes on the principal’s behalf; the agent is not a party to a contract made by the agent on behalf of the principal. No public policy would be served by imposing liability, and in many cases it would not make sense. Suppose an agent contracts to buy $25 million of rolled aluminum for a principal, an airplane manufacturer. The agent personally could not reasonably perform such contract, and it is not intended by the parties that she should be liable. (Although the rule is different in England, where an agent residing outside the country is liable even if it is clear that he is signing in an agency capacity.) But there are three exceptions to this rule: (1) if the agent is undisclosed or partially disclosed, (2) if the agent lacks authority or exceeds it, or (3) if the agent entered into the contract in a personal capacity. We consider each situation.

**Agent for Undisclosed or Partially Disclosed Principal**

An agent need not, and frequently will not, inform the person with whom he is negotiating that he is acting on behalf of a principal. The secret principal is usually called an “undisclosed principal.” Or the agent may tell the other person that he is acting as an agent but not disclose the principal’s name, in which event the principal is “partially disclosed.” To understand the difficulties that may occur, consider the following hypothetical but common example. A real estate developer known for building amusement parks wants to acquire several parcels of land to construct a new park. He wants to keep his identity secret to hold down the land cost. If the landowners realized that a major building project was about to be launched, their asking price would be quite high. So the developer obtains two options to purchase land by using two secret agents—Betty and Clem.

Betty does not mention to sellers that she is an agent; therefore, to those sellers the developer is an undisclosed principal. Clem tells those with whom he is dealing that he is an agent but refuses to divulge the developer’s name or his business interest in the land. Thus the developer is, to the latter sellers, a partially disclosed principal. Suppose the sellers get wind of the impending construction and want to back out of the deal. Who may enforce the contracts against them?

The developer and the agents may sue to compel transfer of title. The undisclosed or partially disclosed principal may act to enforce his rights unless the contract specifically prohibits it or there is a representation that the signatories are not signing for an undisclosed principal. The agents may also bring
suit to enforce the principal’s contract rights because, as agents for an undisclosed or partially disclosed principal, they are considered parties to their contracts.

Now suppose the developer attempts to call off the deal. Whom may the sellers sue? Both the developer and the agents are liable. That the sellers had no knowledge of the developer’s identity—or even that there was a developer—does not invalidate the contract. If the sellers first sue agent Betty (or Clem), they may still recover the purchase price from the developer as long as they had no knowledge of his identity prior to winning the first lawsuit. The developer is discharged from liability if, knowing his identity, the plaintiffs persist in a suit against the agents and recover a judgment against them anyway. Similarly, if the seller sues the principal and recovers a judgment, the agents are relieved of liability. The seller thus has a “right of election” to sue either the agent or the undisclosed principal, a right that in many states may be exercised any time before the seller collects on the judgment.

**Lack of Authority in Agent**

An agent who purports to make a contract on behalf of a principal, but who in fact has no authority to do so, is liable to the other party. The theory is that the agent has warranted to the third party that he has the requisite authority. The principal is not liable in the absence of apparent authority or ratification. But the agent does not warrant that the principal has capacity. Thus an agent for a minor is not liable on a contract that the minor later disavows unless the agent expressly warranted that the principal had attained his majority. In short, the implied warranty is that the agent has authority to make a deal, not that the principal will necessarily comply with the contract once the deal is made.

**Agent Acting on Own Account**

An agent will be liable on contracts made in a personal capacity—for instance, when the agent personally guarantees repayment of a debt. The agent’s intention to be personally liable is often difficult to determine on the basis of his signature on a contract. Generally, a person signing a contract can avoid personal liability only by showing that he was in fact signing as an agent. If the contract is signed “Jones, Agent,” Jones can introduce evidence to show that there was never an intention to hold him personally liable. But if he signed “Jones” and neither his agency nor the principal’s name is included, he will be personally liable. This can be troublesome to agents who routinely indorse checks and notes. There are special rules governing these situations, which are discussed in [Reference mayer_1.0-ch25 not found in Book] dealing with commercial paper.
Termination of Agency

The agency relationship is not permanent. Either by action of the parties or by law, the relationship will eventually terminate.

By Act of the Parties

Certainly the parties to an agency contract can terminate the agreement. As with the creation of the relationship, the agreement may be terminated either expressly or implicitly.

Express Termination

Many agreements contain specified circumstances whose occurrence signals the end of the agency. The most obvious of these circumstances is the expiration of a fixed period of time (“agency to terminate at the end of three months” or “on midnight, December 31”). An agreement may also terminate on the accomplishment of a specified act (“on the sale of the house”) or following a specific event (“at the conclusion of the last horse race”).

Mutual consent between the parties will end the agency. Moreover, the principal may revoke the agency or the agent may renounce it; such a revocation or renunciation of agency would be an express termination.

Even a contract that states the agreement is irrevocable will not be binding, although it can be the basis for a damage suit against the one who breached the agreement by revoking or renouncing it. As with any contract, a person has the power to breach, even in absence of the right to do so. If the agency is coupled with an interest, however, so that the authority to act is given to secure an interest that the agent has in the subject matter of the agency, then the principal lacks the power to revoke the agreement.

Implied Termination

There are a number of other circumstances that will spell the end of the relationship by implication. Unspecified events or changes in business conditions or the value of the subject matter of the agency might lead to a reasonable inference that the agency should be terminated or suspended; for example, the principal desires the agent to buy silver but the silver market unexpectedly rises and silver doubles in price overnight. Other circumstances that end the agency include disloyalty of the agent (e.g., he accepts an appointment that is adverse to his first principal or embezzles from the principal), bankruptcy of the agent or of the principal, the outbreak of war (if it is reasonable to infer that the principal, knowing of the
war, would not want the agent to continue to exercise authority), and a change in the law that makes a continued carrying out of the task illegal or seriously interferes with it.

**By Operation of Law**

Aside from the express termination (by agreement of both or upon the insistence of one), or the necessary or reasonable inferences that can be drawn from their agreements, the law voids agencies under certain circumstances. The most frequent termination by operation of law is the death of a principal or an agent. The death of an agent also terminates the authority of subagents he has appointed, unless the principal has expressly consented to the continuing validity of their appointment. Similarly, if the agent or principal loses capacity to enter into an agency relationship, it is suspended or terminated. The agency terminates if its purpose becomes illegal.

Even though authority has terminated, whether by action of the parties or operation of law, the principal may still be subject to liability. Apparent authority in many instances will still exist; this is called lingering authority. It is imperative for a principal on termination of authority to notify all those who may still be in a position to deal with the agent. The only exceptions to this requirement are when termination is effected by death, loss of the principal’s capacity, or an event that would make it impossible to carry out the object of the agency.

### Key Takeaway

A person is always liable for her own torts, so an agent who commits a tort is liable; if the tort was in the scope of employment the principal is liable too. Unless the principal put the agent up to committing the tort, the agent will have to reimburse the principal. An agent is not generally liable for contracts made; the principal is liable. But the agent will be liable if he is undisclosed or partially disclosed, if the agent lacks authority or exceeds it, or, of course, if the agent entered into the contract in a personal capacity.

Agencies terminate expressly or impliedly or by operation of law. An agency terminates expressly by the terms of the agreement or mutual consent, or by the principal’s revocation or the agent’s renunciation. An agency terminates impliedly by any number of circumstances in which it is reasonable to assume one or both of the parties would not want the relationship to continue. An agency will terminate by operation of law when one or the other party dies or becomes incompetent, or if the object of the agency becomes
illegal. However, an agent may have apparent lingering authority, so the principal, upon termination of the 
agency, should notify those who might deal with the agent that the relationship is severed.

**EXERCISES**

1. Pauline, the owner of a large bakery business, wishes to expand her facilities by purchasing the adjacent 
   property. She engages Alice as an agent to negotiate the deal with the property owner but instructs her 
   not to tell the property owner that she—Alice—is acting as an agent because Pauline is concerned that 
   the property owner would demand a high price. A reasonable contract is made. When the economy 
   sours, Pauline decides not to expand and cancels the plan. Who is liable for the breach?

2. Peter, the principal, instructs his agent, Alice, to tour England and purchase antique dining room furniture 
   for Peter’s store. Alice buys an antique bed set. Who is liable, Peter or Alice? Suppose the seller did not 
   know of the limit on Alice’s authority and sells the bed set to Alice in good faith. What happens when 
   Peter discovers he owes the seller for the set?

3. Under what circumstances will the agency terminate expressly?

4. Agent is hired by Principal to sell a new drug, Phobbot. Six months later, as it becomes apparent that 
   Phobbot has nasty side effects (including death), the Food and Drug Administration orders the drug pulled 
   from the shelves. Agent’s agency is terminated; what terminology is appropriate to describe how?

5. Principal engages Agent to buy lumber, and in that capacity Agent deals with several large timber owners. 
   Agent’s contract ends on July 31; on August 1, Agent buys $150,000 worth of lumber from a seller with 
   whom he had dealt previously on Principal’s behalf. Who is liable and why?

**19.4 Cases**

**Implied Authority**

*Kanavos v. Hancock Bank & Trust Company*

*439 N.E.2d 311 (Mass. 1982)*

KASS, J.

At the close of the plaintiff’s evidence, the defendant moved for a directed verdict, which the trial judge 
allowed. The judge’s reason for so doing was that the plaintiff, in his contract action, failed to introduce 
sufficient evidence tending to prove that the bank officer who made the agreement with which the plaintiff
sought to charge the bank had any authority to make it. Upon review of the record we are of opinion that there was evidence which, if believed, warranted a finding that the bank officer had the requisite authority or that the bank officer had apparent authority to make the agreement in controversy. We therefore reverse the judgment.

For approximately ten years prior to 1975, Harold Kanavos and his brother borrowed money on at least twenty occasions from the Hancock Bank & Trust Company (the Bank), and, during that period, the loan officer with whom Kanavos always dealt was James M. Brown. The aggregate loans made by the Bank to Kanavos at any given time went as high as $800,000.

Over that same decade, Brown’s responsibilities at the Bank grew, and he had become executive vice-president. Brown was also the chief loan officer for the Bank, which had fourteen or fifteen branches in addition to its head office. Physically, Brown’s office was at the head office, toward the rear of the main banking floor, opposite the office of the president—whose name was Kelley. Often Brown would tell Kanavos that he had to check an aspect of a loan transaction with Kelley, but Kelley always backed Brown up on those occasions....

[The plaintiff, Harold Kanavos, entered into an agreement with the defendant Bank whereby stock owned by the Kanavos brothers was sold to the Bank and the plaintiff was given an option to repurchase the stock. Kanavos’ suit against the Bank was based on an amendment to the agreement offered by Brown.] Kanavos was never permitted to introduce in evidence the terms of the offer Brown made. That offer was contained in a writing, dated July 16, 1976, on bank letterhead, which read as follows: “This letter is to confirm our conversation regarding your option to re-purchase the subject property. In lieu of your not exercising your option, we agree to pay you $40,000 representing a commission upon our sale of the subject property, and in addition, will give you the option to match the price of sale of said property to extend for a 60 day period from the time our offer is received.” Brown signed the letter as executive vice-president. The basis of exclusion was that the plaintiff had not established the authority of Brown to make with Kanavos the arrangement memorialized in the July 16, 1976, letter.

Whether Brown’s job description impliedly authorized the right of last refusal or cash payment modification is a question of how, in the circumstances, a person in Brown’s position could reasonably interpret his authority. Whether Brown had apparent authority to make the July 16, 1976, modification is
a question of how, in the circumstances, a third person, e.g., a customer of the Bank such as Kanavos, would reasonably interpret Brown’s authority in light of the manifestations of his principal, the Bank. Titles of office generally do not establish apparent authority. Brown’s status as executive vice-president was not, therefore, a badge of apparent authority to modify agreements to which the Bank was a party. Trappings of office, e.g., office and furnishing, private secretary, while they may have some tendency to suggest executive responsibility, do not without other evidence provide a basis for finding apparent authority. Apparent authority is drawn from a variety of circumstances. Thus in Federal Nat. Bank v. O’Connell... (1940), it was held apparent authority could be found because an officer who was a director, vice-president and treasurer took an active part in directing the affairs of the bank in question and was seen by third parties talking with customers and negotiating with them. In Costonis v. Medford Housing Authy.... (1961), the executive director of a public housing authority was held to have apparent authority to vary specifications on the basis of the cumulative effect of what he had done and what the authority appeared to permit him to do.

In the instant case there was evidence of the following variety of circumstances: Brown’s title of executive vice-president; the location of his office opposite the president; his frequent communications with the president; the long course of dealing and negotiations; the encouragement of Kanavos by the president to deal with Brown; the earlier amendment of the agreement by Brown on behalf of the Bank on material points, namely the price to be paid by the Bank for the shares and the repurchase price; the size of the Bank (fourteen or fifteen branches in addition to the main office); the secondary, rather than fundamental, nature of the change in the terms of the agreement now repudiated by the Bank, measured against the context of the overall transaction; and Brown’s broad operating authority... all these added together would support a finding of apparent authority. When a corporate officer, as here, is allowed to exercise general executive responsibilities, the “public expectation is that the corporation should be bound to engagements made on its behalf by those who presume to have, and convincingly appear to have, the power to agree.” [Citation] This principle does not apply, of course, where in the business context, the requirement of specific authority is presumed, e.g., the sale of a major asset by a corporation or a transaction which by its nature commits the corporation to an obligation outside the scope of its usual activity. The modification agreement signed by Brown and dated July 16, 1976, should have been admitted in evidence, and a verdict should not have been directed.
Judgment reversed.

CASE QUESTIONS

1. Why are “titles of office” insufficient to establish apparent authority?
2. Why are “trappings of office” insufficient to establish apparent authority?
3. What is the relationship between apparent authority and estoppel? Who is estopped to do what, and why?

Employer’s Liability for Employee’s Intentional Torts: Scope of Employment

Cockrell v. Pearl River Valley Water Supply Dist.

865 So.2d 357 (Miss. 2004)

The Pearl River Valley Water Supply District (“District”) was granted summary judgment pursuant to the Mississippi Tort Claims Act (MTCA) dismissing with prejudice all claims asserted against it by Sandra Cockrell. Cockrell appeals the ruling of the circuit court citing numerous errors. Finding the motion for summary judgment was properly granted in favor of the District, this Court affirms the final judgment entered by the Circuit Court of Rankin County.

Facts and Proceedings in the Trial Court

On June 28, 1998, Sandra Cockrell was arrested for suspicion of driving under the influence of alcohol by Officer Joey James who was employed as a security patrol officer with the Reservoir Patrol of the Pearl River Valley Water Supply District. Officer James then transported Cockrell to the Reservoir Patrol office and administered an intoxilyzer test. The results of the test are not before us; however, we do know that after the test was administered, Officer James apologized to Cockrell for arresting her, and he assured her that he would prepare her paperwork so that she would not have to spend much time in jail. As they were leaving the Reservoir Patrol office, Officer James began asking Cockrell personal questions such as where she lived, whether she was dating anyone and if she had a boyfriend. Officer James then asked Cockrell for her cell phone number so that he could call and check on her. As they were approaching his patrol car for the trip to the Rankin County jail, Officer James informed Cockrell that she should be wearing handcuffs; however, he did not handcuff Cockrell, and he allowed her to ride in the front seat of the patrol car with him. In route to the jail, Cockrell became emotional and started crying. As she was fixing her
makeup using the mirror on the sun visor, Officer James pulled his patrol car into a church parking lot and parked the car. He then pulled Cockrell towards him in an embrace and began stroking her back and hair telling her that things would be fine. Cockrell told Officer James to release her, but he continued to embrace her for approximately five minutes before continuing on to the jail.

On June 30, 1998, Cockrell returned to the Reservoir Patrol office to retrieve her driver’s license. Officer James called Cockrell into his office and discussed her DUI charge with her. As she was leaving, Officer James grabbed her from behind, turned her around, pinned both of her arms behind her and pulled her to his chest. When Officer James bent down to kiss her, she ducked her head, thus causing Officer James to instead kiss her forehead. When Officer James finally released Cockrell, she ran out of the door and drove away. [Subsequently, Cockrell’s attorney threatened civil suit against Patrol; James was fired in October 1998.]

On September 22, 1999, Cockrell filed a complaint for damages against the District alleging that on the nights of June 28 and June 30, 1998, Officer James was acting within the course and scope of his employment with the District and that he acted with reckless disregard for her emotional well-being and safety. On April 2, 2002, the District filed its motion for summary judgment alleging that there was no genuine issue of material fact regarding Cockrell’s claim of liability. The motion alleged that the conduct described by Cockrell was outside the course and scope of Officer James’s public employment as he was intending to satisfy his lustful urges. Cockrell responded to the motion arguing that the misconduct did occur in the course and scope of Officer James’s employment with the District and also that the misconduct did not reach the level of a criminal offense such that the District could be found not liable under the MTCA.

The trial court entered a final judgment granting the District’s motion for summary judgment and dismissing the complaint with prejudice. The trial court found that the District could not be held liable under the MTCA for the conduct of Officer James which was both criminal and outside the course and scope of his employment. Cockrell...appealed.

**Discussion**

Summary judgment is granted in cases where there is “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”...
Cockrell contends there is a genuine issue of material of fact regarding whether Officer James was acting in the course and scope of his employment with the District during the incidents which occurred on the nights of June 28 and June 30, 1998. Cockrell argues Officer James's conduct, although inappropriate, did not rise to the level of criminal conduct. Cockrell contends Officer James's action of hugging Cockrell was similar to an officer consoling a victim of a crime. Cockrell does admit that Officer James's action of kissing her is more difficult to view as within the course and scope of his employment...

The District argues that although Officer James acted within the course and scope of his duties when he arrested Cockrell, his later conduct, which was intended to satisfy his lustful desires, was outside the scope of his employment with it....

“Mississippi law provides that an activity must be in furtherance of the employer’s business to be within the scope and course of employment.” [Citation] To be within the course and scope of employment, an activity must carry out the employer’s purpose of the employment or be in furtherance of the employer’s business. [Citations] Therefore, if an employee steps outside his employer’s business for some reason which is not related to his employment, the relationship between the employee and the employer “is temporarily suspended and this is so ‘no matter how short the time and the [employer] is not liable for [the employee’s] acts during such time.’” “An employee’s personal unsanctioned recreational endeavors are beyond the course and scope of his employment.” [Citation]

[In one case cited.,] Officer Kerry Collins, a Jackson Police officer, was on duty when he came upon the parked car of L.T., a minor, and her boyfriend, who were about to engage in sexual activity. [Citation] Officer Collins instructed L.T. to take her boyfriend home, and he would follow her to make sure she followed his orders. After L.T. dropped off her boyfriend, Officer Collins continued to follow her until he pulled L.T. over. Officer Collins then instructed L.T. to follow him to his apartment or else he would inform L.T.’s parents of her activities. L.T. followed Officer Collins to his apartment where they engaged in sexual activity. Upon returning home, L.T. told her parents everything that had happened. L.T. and her parents filed suit against Officer Collins, the City of Jackson and the Westwood Apartments, where Officer Collins lived rent free in return for his services as a security guard....The district court granted summary judgment in favor of the City finding that Officer Collins acted outside the course and scope of his employment with the Jackson Police Department. [Citation]
In [Citation] the plaintiff sued the Archdiocese of New Orleans for damages that allegedly resulted from his sexual molestation by a Catholic priest. The Fifth Circuit found that the priest was not acting within the course and scope of his employment. The Fifth Circuit held that “smoking marijuana and engaging in sexual acts with minor boys” in no way furthered the interests of his employer.

The Southern District of Mississippi and the Fifth Circuit, applying Mississippi law, have held that sexual misconduct falls outside the course and scope of employment. There is no question that Officer James was within the course and scope of his employment when he first stopped Cockrell for suspicion of driving under the influence of alcohol. However, when Officer James diverted from his employment for personal reasons, he was no longer acting in the furtherance of his employer’s interests…Therefore, the District cannot be held liable…for the misconduct of Officer James which occurred outside the course and scope of his employment.

Affirmed.

CASE QUESTIONS

1. How can this case and Lyon v. Carey (Section 19.4.2 "Employer’s Liability for Employee’s Intentional Torts: Scope of Employment") be reconciled? Both involve an agent’s unacceptable behavior—assault—but in Lyon the agent’s actions were imputed to the principal, and in Cockrell the agent’s actions were not imputed to the principal.

2. What is the controlling rule of law governing the principal’s liability for the agent’s actions?

3. The law governing the liability of principals for acts of their agents is well settled. Thus the cases turn on the facts. Who decides what the facts are in a lawsuit?

19.5 Summary and Exercises

Summary

A contract made by an agent on behalf of the principal legally binds the principal. Three types of authority may bind the principal: (1) express authority—that which is actually given and spelled out, (2) implied authority—that which may fairly be inferred from the parties’ relationship and which is incidental to the agent’s express authority, and (3) apparent authority—that which reasonably appears to a third party
under the circumstances to have been given by the principal. Even in the absence of authority, a principal may ratify the agent’s acts.

The principal may be liable for tortious acts of the agent but except under certain regulatory statutes may not be held criminally liable for criminal acts of agents not prompted by the principal. Under the doctrine of respondeat superior, a principal is generally liable for acts by a servant within the scope of employment. A principal usually will not be held liable for acts of nonservant agents that cause physical damage, although he will be held liable for nonphysical torts, such as misrepresentation. The principal will not be held liable for tortious acts of independent contractors, although the principal may be liable for injuries resulting from his failure to act in situations in which he was not legally permitted to delegate a duty to act. Whenever an agent is acting to further the principal’s business interests, the principal will be held vicariously liable for the agent’s intentional torts. What constitutes scope of employment is not easy to determine; the modern trend is to hold a principal liable for the conduct of an agent if it was foreseeable that the agent might act as he did.

Most states have special rules of vicarious liability for special situations; for example, liability of an automobile owner for use by another. Spouses are not vicariously liable for each other, nor are parents for children, except for failing to control children known to be dangerous.

In general, an agent is not personally liable on contracts he has signed on behalf of a principal. This general rule has several exceptions recognized in most states: (1) when the agent is serving an undisclosed or partially disclosed principal, (2) when the agent lacks authority or exceeds his authority, and (3) if the agent entered into the contract in a personal capacity.

The agency relationship may be terminated by mutual consent, by express agreement of the parties that the agency will end at a certain time or on the occurrence of a certain event, or by an implied agreement arising out of the circumstances in each case. The agency may also be unilaterally revoked by the principal—unless the agency is coupled with an interest—or renounced by the agent. Finally, the agency will terminate by operation of law under certain circumstances, such as death of the principal or agent.

**EXERCISES**

1. Parke-Bernet Galleries, acting as agent for an undisclosed principal, sold a painting to Weisz. Weisz later discovered that the painting was a forgery and sued Parke-Bernet for breach of contract. In defense,
Parke-Bernet argued that as a general rule, agents are not liable on contracts made for principals. Is this a good defense? Explain.

2. Lynch was the loan officer at First Bank. Patterson applied to borrow $25,000. Bank policy required that Lynch obtain a loan guaranty from Patterson’s employer, a milk company. The manager of the milk company visited the bank and signed a guaranty on behalf of the company. The last paragraph of the guaranty stated, “This guaranty is signed by an officer having legal right to bind the company through authorization of the Board of Directors.” Should Lynch be satisfied with this guaranty? Would he be satisfied if the president of the milk company, who was also a director, affirmed that the manager had authority to sign the guaranty? Explain.

3. Ralph owned a retail meat market. Ralph’s agent Sam, without authority but purporting to act on Ralph’s behalf, borrowed $7,500 from Ted. Although he never received the money, Ralph repaid $700 of the alleged loan and promised to repay the rest. If Sam had no authority to make the loan, is Ralph liable? Why?

4. A guest arrived early one morning at the Hotel Ohio. Clemens, a person in the hotel office who appeared to be in charge, walked behind the counter, registered the guest, gave him a key, and took him to his room. The guest also checked valuables (a diamond pin and money) with Clemens, who signed a receipt on behalf of the hotel. Clemens in fact was a roomer at the hotel, not an employee, and had no authority to act on behalf of the hotel. When Clemens absconded with the valuables, the guest sued the hotel. Is the hotel liable? Why?

5. A professional basketball player punched an opposing player in the face during the course of a game. The opponent, who was seriously injured, sued the owner of the team for damages. A jury awarded the player $222,000 [about $800,000 in 2010 dollars] for medical expenses, $200,000 [$700,000] for physical pain, $275,000 [$963,000] for mental anguish, $1,000,000 [$3.5 million] for lost earnings, and $1,500,000 [$5.2 million] in punitive damages (which was $500,000 more than requested by the player). The jury also awarded $50,000 [$150,000] to the player’s wife for loss of companionship. If we assume that the player who threw the punch acted out of personal anger and had no intention to further the business, how could the damage award against his principal be legally justified?
6. A doctor in a University of Chicago hospital seriously assaulted a patient in an examining room. The patient sued the hospital on the theory that the doctor was an agent or employee of the hospital and the assault occurred within the hospital. Is the hospital liable for the acts of its agent? Why?

7. Hector was employed by a machine shop. One day he made a delivery for his employer and proceeded back to the shop. When he was four miles from the shop and on the road where it was located, he turned left onto another road to visit a friend. The friend lived five miles off the turnoff. On the way to the friend’s house, Hector caused an accident. The injured person sued Hector’s employer. Is the employer liable? Discuss.

8. A fourteen-year-old boy, who had no driver’s license, took his parents’ car without permission and caused an automobile accident. A person injured in the accident sued the boy’s parents under the relevant state’s Parental Responsibility Law (mentioned in Section 19.2.1 "Principal’s Tort Liability"). Are the parents liable? Discuss.

9. In the past decades the Catholic Church has paid out hundreds of millions of dollars in damage awards to people—mostly men—who claimed that when they were boys and teenagers they were sexually abused by their local parish priests, often on Church premises. That is, the men claimed they had been victims of child rape. Obviously, such behavior is antithetical to any reasonable standard of clergy behavior: the priests could not have been in the scope of employment. How is the Church liable?