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FRAUDULENTLY INDUCED CONSENT TO INTENTIONAL TORTS

David A. Fischer*

I. INTRODUCTION

A. A Fallacy

Half a century ago the First Restatement of Torts introduced the notion that fraudulently obtained consent to intentional torts is valid consent if the fraud relates to matters of inducement, *i.e.*, the victim's reason for consenting. Fraud supposedly vitiates consent only if it relates to the tortious nature of the act. On the surface this distinction has such compelling logic that many scholars have accepted it without question. This Article examines those cases which involve fraudulently induced consent to determine whether any practical basis exists for the rule distinguishing between fraud in the inducement and fraud in the factum. The examination reveals that there is no basis for the distinction. Fraud always invalidates consent, whether the fraud relates to the tortious nature of the act or to matters of inducement.

This Article will first proceed with a brief discussion of the nature of consent, the origin and application of the Restatement rule, and the exceptions to the rule which limit its application. A detailed analysis of the cases will follow.

B. *The Nature of Consent*

Consent is an actual or apparent willingness that certain conduct occur.¹ For purposes of civil liability, no wrong occurs to one who is willing that an interest be invaded.² Therefore, lack of consent is an essential element of most intentional torts.³ Of course, consent is no bar to liability when the plaintiff consents to one act and the defendant performs an entirely

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1. RESTATEMENT (SECOND) OF TORTS § 892 (Tent. Draft No. 18, 1972).

2. W. PROSSER, LAW OF TORTS § 18 (4th ed. 1971).

3. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 3.10 (1956); PROSSER, *supra* note, 2, § 18; Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819 (1924); Carpenter, *Intentional Invasion of Interest of Personality*, 13 ORE. L. REV. 275, 282 (1934); Comment, *Consent in Tort Actions*, 3 MO. L. REV. 44 (1938); 24 MARQ. L. REV. 108 (1940); 8 OKLA. L. REV. 117, 118 (1955); *e.g.*, *Commonwealth v. Carpenter*, 172 Pa. Super. 271, 94 A.2d 74 (1953). However, some courts have treated the issue as an affirmative defense and have placed the burden of proof on the defendant. 8 OKLA. L. REV. 117, 118 (1955); *See, e.g.*, *Sims v. Alford*, 218 Ala. 216, 118 So. 395 (1928).

different act. For example, consent to one type of surgical operation is no defense if the defendant performs a different surgical operation.⁴ In such cases, there simply is no consent in fact to the defendant's act. A further application of this principle occurs where the defendant fraudulently places the plaintiff in a position which enables the defendant to perform an act without consent.⁵ Thus, a defendant might employ false representations to lure a plaintiff into a jurisdiction so that the plaintiff can be falsely arrested.⁶ This situation involves fraud, but fraud is not a necessary element of the plaintiff's case since there is a total absence of consent to the imprisonment in any event.⁷

Actual consent is not required, provided that there is a reasonable manifestation of consent.⁸ This rule encourages individuals to act in response to free choices made by others.⁹ Thus, there is no liability for a touching to which plaintiff apparently agrees, even though he secretly objects¹⁰ or lacks the mental capacity to consent.¹¹ If consent is given because of a mistake as to the existence of some fact, the consent is valid, provided that the other party is not aware of the mistake. This is because there has been a reasonable manifestation of consent on which the defendant may rely. For example, consent to enter a parcel of land, which is given because the owner mistakenly thought the parcel had been conveyed to the entrant, is a valid consent, and no trespass occurs where the entrant also believes mistakenly that he has acquired title.¹²

4. *Hobbs v. Kizer*, 236 F. 681 (8th Cir. 1916); *Keen v. Coleman*, 67 Ga. App. 331, 20 S.E.2d 175 (1942); *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914); *Nolan v. Kechijian*, 75 R.I. 165, 64 A.2d 866 (1949); *Samuelson v. Taylor*, 160 Wash. 369, 295 P. 113 (1931); *Paulsen v. Gundersen*, 218 Wis. 578, 260 N.W. 448 (1935). Additional cases are collected at Annot., 56 A.L.R.2d 695 (1957). Similarly, consent to enter land for one purpose is no defense if the defendant enters for an entirely different purpose. *Kent County Agricultural Soc'y v. Ide*, 128 Mich. 423, 87 N.W. 369 (1901); *RESTATEMENT, supra* note 1, § 892A, Comment g, at 26.

5. *Hobbs v. Kizer*, 236 F. 681 (8th Cir. 1916); *Keen v. Coleman*, 67 Ga. App. 311, 20 S.E.2d 175 (1942); *Nolan v. Kechijian*, 75 R.I. 165, 64 A.2d 866 (1949).

6. *But see Wanzer v. Bright*, 52 Ill. 35 (1869).

7. *State v. Shepard*, 7 Conn. 54 (1828); *Commonwealth v. Burke*, 105 Mass. 376 (1870); *Kent County Agricultural Soc'y v. Ide*, 128 Mich. 423, 87 N.W. 369 (1901); *Hadden v. People*, 25 N.Y. 373 (1862); *Samuelson v. Taylor*, 160 Wash. 369, 295 P. 113 (1931).

8. *RESTATEMENT, supra* note 1, § 892(2). See *Mansfield, Informed Choice In the Law of Torts*, 22 LA. L. REV. 17 (1961) for an in-depth discussion of the theoretical basis of this rule.

9. *Mansfield, supra* note 8.

10. *Guarro v. United States*, 237 F.2d 578 (D.C. Cir. 1956); *McQuirk v. State*, 84 Ala. 435, 4 So. 775 (1888); *Chambless v. State*, 46 Tex. Crim. 1, 79 S.W. 577 (1904).

11. *Beaven v. Commonwealth*, 17 Ky. L. Rptr. 246, 30 S.W. 968 (1865); *State v. Warren*, 232 Mo. 185, 134 S.W. 522 (1911).

12. *Ashcroft v. Cox*, 21 Ky. L. Rptr. 31, 50 S.W. 986 (1899); *Shaw v. Mussey*, 48 Me. 247 (1860). *But see Larrimore v. Homeopathic Hosp. Ass'n*, 54 Del. 449, 181 A.2d 573 (1962).

Difficulty arises when a plaintiff consents to a defendant's conduct because of a mistaken belief which has been fraudulently induced by the defendant. Suppose the defendant, knowing that he has venereal disease, obtains the plaintiff's consent to intercourse without informing her that he has the disease. Should he be liable for battery because he communicated the disease to the plaintiff? Should the consent be a defense?

C. *The Difference Between
Fraud in the Factum and Fraud in the Inducement*

Legal writers have accepted the following rule for determining whether the fraudulently induced mistake will invalidate the consent.¹³ If the mistake relates to the tortious nature of the defendant's acts, then the consent is invalid. For example, a battery is either a harmful or offensive contact. If the mistake relates to that which makes a contact either harmful or offensive, then the consent is invalid. In the venereal disease hypothetical the consent is invalid because the plaintiff thought she was consenting to a contact that involved no harm to her person, but because of facts unknown to her the contact was harmful. It caused her to contract a disease. The consent is invalid since the defendant knew about her mistake and took advantage of it.¹⁴ As a shorthand expression this situation is often called fraud in the factum. This type of fraud vitiates consent.¹⁵

On the other hand, fraud in the inducement is not supposed to vitiate consent. Assume the plaintiff consented to intercourse with the defendant in exchange for a counterfeit twenty-dollar bill. Here, the plaintiff is not mistaken as to the tortious nature of the act. The mistake relates merely to a collateral matter, *i.e.*, the plaintiff's reason for consenting to the act.¹⁶

13. HARPER & JAMES, *supra* note 3; F. HARPER, A TREATISE OF THE LAW OF TORTS § 44 (1933); W. LA FAVE & A. SCOTT, CRIMINAL LAW § 57 (1972); R. PERKINS, CRIMINAL LAW 964-68 (2d ed. 1969); PROSSER, *supra* note 2, § 18; Carpenter, *supra* note 3, at 285; 23 MINN. L. REV. 521 (1939); 15 TEX. L. REV. (1937).

14. PROSSER, *supra* note 2, § 18.

15. The case law clearly supports this result. *Wall v. Brim*, 138 F.2d 478 (5th Cir. 1943) (unauthorized operation); *State v. Lankford*, 29 Del. 594, 102 A. 63 (1917) (venereal disease); *Johnson v. State*, 92 Ga. 36, 17 S.E. 974 (1893) (poison concealed in drink); *Commonwealth v. Stratton*, 114 Mass. 303 (1873) (drug concealed in food); *State v. Marcks*, 140 Mo. 656, 41 S.W. 973 (1897) (dissenting opinion) (venereal disease); *Bolivar v. Monnat*, 248 N.Y.S. 722, 232 App. Div. 33 (1931) (harmful drug concealed in drink); *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920) (venereal disease); *State v. Monroe*, 121 N.C. 677, 28 S.E. 547 (1897) (drug concealed in food); *Belcher v. Carter*, 13 Ohio App. 2d 113, 234 N.E.2d 311 (1967) (failure to disclose risk of operation); *Karriman v. Orthopedic Clinic*, 516 P.2d 534 (Okla. 1973) (failure to disclose effect of operation; no liability because defendant doctor did not know that the bad result would occur at the time he obtained consent); *McCue v. Klein*, 60 Tex. 168 (1883) (dicta) (poison concealed in drink); *Schultz v. Christopher*, 65 Wash. 496, 118 P. 629 (1911) (venereal disease); *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974) (misrepresentation of effect of operation).

16. PROSSER, *supra* note 2, § 18.

Such fraud does not vitiate the consent since the plaintiff knew exactly to what she was consenting. Therefore, there is no cause of action for battery.

D. *Origin of the Rule as Applied to Tort Cases*

The principle that fraud in the factum vitiates consent but that fraud in the inducement does not was introduced to tort law by the First Restatement of Torts.¹⁷ Prior to that time legal scholars either did not discuss this issue¹⁸ or flatly asserted that fraud always invalidates consent¹⁹ without distinguishing between types of fraud. The justification given by the drafters of the Restatement for the rule is contained in the following footnote to the first tentative draft of the rules relating to intentional torts:

No decision has held that fraud as to a collateral matter, as defined in this section, creates liability for an invasion of an interest of personality which does no substantial harm. This section expresses no opinion as to the advisability of extending the liability for fraudulent misrepresentations so as to include such a liability.²⁰

It will be seen shortly that one reason for this apparent dearth of authority is the manipulative nature of the inducement/factum distinction and the way in which the distinction is applied by the Restatement.²¹

The Second Restatement recognizes the inducement/factum distinction, but uses slightly different terminology.²² It provides that consent which is based upon mistaken belief about the nature of the invasion of the plaintiff's interests or about the extent of harm to be expected from the invasion is invalid, if the mistake was known to the defendant or was induced by the defendant's misrepresentation.²³ Thus, in the venereal disease example, the Second Restatement analysis would be that the consent is invalid because the plaintiff was mistaken as to the extent of the physical harm that would result from the contact and because the defendant knew of the mistake.²⁴ However, in the case where the prostitute agrees to have inter-

17. RESTATEMENT OF TORTS §§ 55, 57 (1934).

18. I. C. ADDISON, A TREATISE ON THE LAW OF TORTS § 787 (1881) (discussion of assault); M. BIGELOW, ELEMENTS OF THE LAW OF TORTS (6th ed. 1869); E. KINKEAD, COMMENTARIES ON THE LAW OF TORTS (1903).

19. ADDISON, *supra* note 18, § 447 (discussion of trespass to land); F. BURDICK, THE LAW OF TORTS §§ 84, 317 (3d ed. 1913); H. CHAPIN, LAW OF TORTS § 365, at 115 (1917); F. POLLOCK, THE LAW OF TORTS 163, 217 (12th ed. 1923).

20. RESTATEMENT OF TORTS § 72, Comment at n.1 (Tent. Draft No. 1, 1925).

21. See text Part II *infra*.

22. RESTATEMENT, *supra* note 1, § 892B. Tentative Draft No. 18 was approved by the American Law Institute in 1972. 49 ALI PROCEEDINGS 206-13, 223 (1972). The reporter stated that the essential distinction was between matters going to the nature of the invasion and matters that are collateral. The new terminology was designed to provide a test that could always be applied to make this distinction. *Id.* at 207.

23. RESTATEMENT, *supra* note 1, § 892(B)(2).

24. *Id.* § 892(B), Illustration 5.

course in exchange for counterfeit money, the Second Restatement analysis would be that no battery has been committed because the consent is valid.²⁵ There was no mistake as to the extent of the harm to her person, since none resulted. Moreover, there was no mistake as to the nature of the interest that was invaded. The plaintiff's legally protected interest was in being free from harmful or offensive contacts. She knew that she was consenting to an otherwise offensive contact, and that is what occurred. Her mistake merely related to her reasons for submitting to the contact. Mistakes as to such matters of inducement are collateral and do not affect the validity of the consent.²⁶

E. *Exceptions to the Rule That Fraud in the Inducement
Does Not Vitiolate Consent*

The First Restatement recognized two situations in which fraud in the inducement would vitiate consent. First, if the plaintiff were fraudulently induced to permit the defendant to use or to deal with his property, consent is no defense, and the plaintiff has a cause of action for either trespass to chattels or conversion.²⁷ Suppose the plaintiff sells a chattel to the defendant in exchange for a counterfeit twenty-dollar bill. His consent to the transfer of possession would be vitiated because of the fraud. Therefore, he would have been tortiously dispossessed by the defendant²⁸ and could maintain an action for trespass to chattels or for conversion.²⁹ There was no mistake as to the nature or quality of the defendant's act in accepting possession of the chattel or as to the plaintiff's legally protected interest in not being dispossessed. Rather, the fraud related purely to a matter of inducement, *i.e.*, the plaintiff's reason for consenting to the dispossession.

The Second Restatement recognizes this exception, but limits its application to cases where the plaintiff is dispossessed.³⁰ As a practical matter,

25. *Id.* Illustration 9.

26. *Id.* Comment g.

27. RESTATEMENT, *supra* note 17, §§ 173, 252. See note 85 *infra* and accompanying text.

28. *Id.* § 221.

29. *Id.* § 222.

30. RESTATEMENT (SECOND) OF TORTS § 252A (1965). This rule is well recognized. See HARPER & JAMES, *supra* note 3, § 2.16; PROSSER, *supra* note 2, § 15; and cases cited in Annot., 95 A.L.R. 615 (1935). Actually, the rule that one can commit a conversion by fraudulently obtaining possession did not originate as an exception to the inducement/factum distinction promulgated by the Restatement. It was a well-established rule long before that distinction was recognized. See Addison, *supra* note 18, § 467; BURDICK, *supra* note 19, § 424; CHAPIN, *supra* note 19, § 82. The early common law recognized a now-obsolete distinction between conversion and trespass. Trespass would lie for an unlawful taking, including a taking with consent where the consent was obtained by fraud. *Id.* §§ 81-82. Conversion would lie only if the defendant lawfully acquired possession (*e.g.* by finding) and subsequently exerted unlawful dominion over the property. *Id.* § 81. Logically, conversion would not

the Second Restatement rule is broad enough to cover virtually all trespass to chattel and conversion cases which involve fraud in the inducement. Instances in which the defendant gives the plaintiff a counterfeit bill or perpetrates some other fraud in order to obtain the right to damage the plaintiff's property, as opposed to obtaining the right to take possession of it, are likely to be very rare indeed.

The second exception to the general principle that fraud in the inducement does not vitiate consent is where intended physical harm occurs to the plaintiff.³¹ Suppose a surgeon represents to the plaintiff that amputation of the plaintiff's leg is necessary to save his life. The plaintiff reluctantly agrees to the operation. After the operation, the plaintiff learns that the amputation was totally unnecessary. The doctor made this misrepresentation solely because he wanted the fee. Here, the plaintiff was not mistaken about the nature or quality of the act, the interest invaded, or the extent of physical harm likely to result from the conduct. His mistake related purely to a matter of inducement, *i.e.*, his motivation for consenting to the operation. Yet, fraud clearly vitiates the consent in this case.³² A contrary result is unthinkable, and there is no authority to support the proposition that fraud in the inducement does not vitiate the consent in this situation.³³

It is not clear whether the Second Restatement recognizes the second exception. A comparison of both Restatements points out the ambiguity. The scheme of the First Restatement was to discuss the defense of consent separately for each intentional tort. Sections 49 through 62 discuss the defense with respect to battery. The scheme of the Second Restatement

lie if the original taking was unlawful. However, the remedy evolved to the point where it became broad enough to encompass some trespassory takings, including a taking with consent where the consent was obtained by fraud. *Id.* § 82. Thus, the rule, as it developed, had nothing to do with consent. Instead, it related to the nature of the tort of conversion.

31. RESTATEMENT, *supra* note 17, § 13, 57 Comment b.

32. *Gunder v. Tibbitts*, 153 Ind. 591, 55 N.E. 762 (1899); HARPER & JAMES, *supra* note 3, § 3.10; Comment, *Abolition of Breach of Promise in Wisconsin—Scope and Constitutionality*, 43 MARQ. L. REV. 341, 353 (1960) [hereinafter cited as *Abolition of Breach of Promise*].

33. During the early period of the common law when the distinction between trespass and trespass on the case was rigidly enforced, cases involving consent obtained by fraud or duress had to be brought on the case rather than in trespass. *Cadwell v. Farrell*, 28 Ill. 438 (1862). This was because actual force was essential for trespass. KINKEAD, *supra* note 18, § 190, at 438. Such force is missing when the victim consents. C. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW*, ch. 9, at 185 (1970). Such distinctions are no longer made because the requirement of actual violence has been eliminated, and the distinction between trespass and case has been abolished. RESTATEMENT, *supra* note 17, § 13, Comment h. These early cases dealing with the propriety of a particular form of action are not authority for the rule distinguishing between fraud in the factum and fraud in the inducement. The presence of either type of fraud would render trespass on the case the appropriate form of action since the essential element of force is missing. See notes 61-65 *infra* and accompanying text.

is to have one main section discussing consent generally. This is done in section 892 and sections 892A through 892D of tentative draft 18. The sections which, in Restatement First, stated the black letter rules of consent with respect to each tort contain, in the Second Restatement, a cross-reference to the appropriate general provision. However, these carried-over sections still contain comments and illustrations of how the consent rules apply to the specific torts with which they deal. Illustrations 2 and 3 of section 57 of the Second Restatement are taken directly from section 57 of the Restatement First. They clearly recognize that fraud in the inducement vitiates consent when physical harm results. However, the black letter law of section 57 of the Second Restatement is a mere reference to section 892B(2). This latter section discusses consent given under mistake or misrepresentation generally but does not recognize the exception. Thus, if the rule of section 892B were applied literally to the above example, the surgeon would not be liable for battery. It is possible that the failure to include this exception in section 892B was an oversight. The drafters of this section gave no indication in the note to the Institute, in the comments to the section, in the appendix to the section, or in the ALI proceedings where the section was approved,³⁴ of an intention to change the rule. The drafters cite no authority for the proposition that fraud in the inducement does not vitiate consent where physical harm results to the victim. In fact, they do not discuss this particular issue.

II. CASE LAW SUPPORT FOR THE RESTATEMENT DISTINCTION

The first exception to the Restatement rule, that fraud in the inducement does not vitiate consent, excludes application of the rule to most conversion and trespass to chattel cases. The second exception excludes application of the rule to batteries which involve physical harm. Therefore, the supposed general rule, as a practical matter, is limited exclusively to contacts which are actionable as batteries solely because the contact is offensive.³⁵ The courts have never expressly recognized any distinction between fraud in the factum and fraud in the inducement in deciding tort cases of the type under consideration.³⁶ The rule has merely been offered as an explanation of what the courts have in fact done. A careful examination of the case law reveals that there simply is no support for the supposed rule. Consent procured by fraud is never valid, even where the fraud relates purely to matters of inducement. For fraud to be present there must be a misrepresentation of a material fact or an affirmative concealment of a

34. 49 ALI PROCEEDINGS 206-13, 223 (1972).

35. No authority other than the Second Restatement suggests that the inducement/factum distinction applies to trespass to land cases. Therefore, these cases are discussed in a separate section. See text Part II B *infra*.

36. See note 150 *infra* for a discussion of situations where the distinction has purportedly been recognized.

material fact.³⁷ Failure to disclose a material fact is fraudulent only if special circumstances justify a disclosure.³⁸

To be sure, there are many cases involving fraudulently obtained consent in which the plaintiff is barred from recovery. However, these decisions are not made on the basis that the plaintiff's consent is valid, but rather on the basis that even though the consent is invalid, the plaintiff may not recover for some other reason. For example, there may be a failure of proof with respect to some other essential element of the cause of action,³⁹ or the plaintiff may be barred from recovery because of a policy unrelated to consent.⁴⁰

The relevance of criminal cases to this discussion should be noted. Consent of the parties is not a defense to the commission of most crimes because the public interest in suppressing antisocial conduct is distinct from the interest of the victim in freedom from invasions of his personal rights.⁴¹ However, there are some crimes, such as kidnapping and rape, where the absence of the victim's consent is an essential element of the crime. Here, no crime occurs if the victim consents.⁴² In such cases, the question of whether fraudulently procured consent is valid is similar to the question presented in analogous tort cases. Criminal law writers have tried to explain these cases by using the same fraud-in-the-factum versus fraud-in-the-inducement distinction discussed above.⁴³ The First Restatement of Torts apparently borrowed the "rule" from the criminal writers.⁴⁴ Tort writers and the Restatement have freely cited criminal cases in support of

37. RESTATEMENT, *supra* note 17, § 525; RESTATEMENT (SECOND) OF TORTS § 538 (Tent. Draft No. 10, 1964).

38. RESTATEMENT (SECOND) OF TORTS § 551 (Tent. Draft No. 12, 1966).

39. *E.g.*, cases cited in note 64 *infra*.

40. *See* text Part II C *infra*.

41. LA FAVE & SCOTT, *supra* note 13, § 57; Beale, *Consent in the Criminal Law*, 8 HARV. L. REV. 317, 323-25 (1895); Bohlen, *supra* note 3, at 820; Puttkammer, *Consent in Criminal Assault*, 19 ILL. L. REV. 617 (1925); 47 IOWA L. REV. 1122, 1127 (1962); 4 WAYNE L. REV. 175 (1958). The majority of courts in civil cases follow an analogous rule. Consent to a crime which constitutes a breach of the peace is no defense to a civil action for personal injury. Bohlen, *supra* note 3, at 821. The theory is that the civil action will deter defendants from committing such crimes. PROSSER, *supra* note 2, § 18.

42. LA FAVE & SCOTT, *supra* note 13, § 57; Beale, *supra* note 41, at 323; Puttkammer, *supra* note 41, at 617; Note, *Consent as a Defense to Crimes Against the Person*, 54 DICK. L. REV. 186, 191-92 (1962); 4 WAYNE L. REV. 175 (1958). Criminal battery can fall under either rule. Consent is no defense if serious harm or a breach of the peace is involved. LA FAVE & SCOTT, *supra* note 13, § 81, at 608; Bohlen, *supra* note 3, at 820. It is an excuse where such factors are not present, *e.g.*, a sexual touching between consenting adults is not an indecent assault. *See, e.g.*, *Guarro v. United States*, 237 F.2d 578 (D.C. Cir. 1956).

43. LA FAVE & SCOTT, *supra* note 13, § 57; PERKINS, *supra* note 13, at 964-68.

44. Winfield, *The Restatement of the Law of Torts—Intentional Harms*, 12 N.Y.U. L.Q. 557, 563 (1935).

the rule⁴⁵ on the theory that the rule is identical in both cases. An understanding of the problem, therefore, requires a consideration of the relevant criminal cases as well as the civil cases. Actually the criminal cases also do not support the supposed distinction. In comparing the cases it must be kept in mind that the basic policy underlying a given criminal statute may be vastly different from the policy underlying a superficially analogous civil cause of action. This difference in policy may justify a difference in treatment, depending on the circumstances of the particular case.⁴⁶

Cases raising the issue of "informed consent" to medical treatment also may be relevant to this discussion. The issue arises when a person consents to medical treatment not knowing of a risk of some harm which possibly may result from the procedure. One line of cases holds that a battery occurs if an unfortunate result materializes, and the plaintiff did not know about the risk at the time of consent.⁴⁷ The other line of cases holds that failure to inform of a mere risk of harm (as opposed to a harm that is certain to result) will not invalidate consent. The doctor is liable, if at all, for negligence in failing to make reasonable disclosure in view of all the circumstances.⁴⁸ This latter line of cases is not pertinent to our discussion since the doctor's conduct, even if wrongful, does not result in a battery. Instead, he is liable for malpractice. Assumption of the risk, rather than consent, is the appropriate defense to such an action. This article is concerned only with the first line of cases, where lack of an informed consent can result in a cause of action for battery. Such cases are relevant if the doctor has fraudulently induced the mistake.

A. Batteries Involving Purely Offensive Touchings

A detailed analysis of the cases reveals the illusory nature of the fraud-in-the-factum versus fraud-in-the-inducement distinction. As mentioned previously,⁴⁹ in civil cases the supposed distinction, as a practical matter, applies only to batteries involving offensive contacts. Where consent to such a contact has been obtained fraudulently, it is usually as easy to characterize the case as involving fraud in the factum as it is to characterize it as involving fraud in the inducement. *Bartell v. State*⁵⁰ is a good illustra-

45. *E.g.*, cases cited after § 892B of the RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 18, 1972).

46. *E.g.*, notes 145-52 *infra* and accompanying text.

47. *E.g.*, *Belcher v. Carter*, 13 Ohio App. 2d 113, 234 N.E.2d 311 (1967); Comment, *Informed Consent After Cobbs—Has the Patient Been Forgotten*, 10 SAN DIEGO L. REV. 913, 917-18 (1973).

48. *E.g.*, *Cobbs v. Grant*, 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1 (1972) (en banc); RESTATEMENT, *supra* note 1, § 892B, Comment i; Kessenick & Mankin, *Medical Malpractice: The Right to be Informed*, 8 U.S.F.L. REV. 261, 264 (1973).

49. See note 35 *supra* and accompanying text.

50. 106 Wis. 342, 82 N.W. 142 (1900).

tion. The defendant claimed to be a magnetic healer, whose treatments took the form of massages. After being employed to help an eighteen-year-old girl overcome a nervous problem, the defendant had the victim remove all of her clothing. In the course of the massage, he took indecent liberties with her person. He was convicted of a criminal assault and battery upon a finding that he performed the acts for sexual purposes.

Professor Perkins has characterized this as a case of fraud in the inducement.⁵¹ The theory is that the victim knew precisely what was happening to her person. Her mistake related merely to the reason for submitting to the touching, since she thought that it would cure her ailment. Alternatively, it can be just as easily argued that the case involved fraud in factum. The Second Restatement of Torts analyzes the case this way.⁵² The theory is that under normal circumstances the touching which occurred in the *Bartell* case would be offensive to a reasonable sense of dignity, but if the touching was necessary for the proper purpose of curing a disease, a reasonable person would not find it offensive.⁵³ Thus, a breast examination by a doctor for medical purposes is not offensive, but the same touching by a doctor for sexual purposes is offensive. Under this analysis the *Bartell* case involves fraud in factum because the victim's mistake related to the interest that was being invaded, *i.e.*, freedom from offensive touchings. She thought that she was consenting to a nonoffensive touching. She later discovered that the touching was offensive. It is true that she was not offended at the time of the touching but only later upon discovery of the true motive of the defendant. However, this should be no obstacle to recovery. The Restatement does not require the victim of an offensive touching to even be aware of the contact itself at the time it is inflicted in order to have a cause of action for battery.⁵⁴ For example, the victim of an indecent touching, occurring while she is unconscious, has a cause of action for battery when she later learns of the touching.⁵⁵

*Bartell v. State*⁵⁶ did not deal with the question of whether the fraud related to matters of inducement or to the tortious nature of the defendant's act. The court simply upheld the defendant's conviction because he needlessly performed the indecent act for sexual purposes and because the victim

51. PERKINS, *supra* note 13, at 967-68.

52. RESTATEMENT, *supra* note 30, § 55, Illustration 4. In this Illustration a genuine physician is held liable for inducing his patient to expose her person unnecessarily. The *Bartell* case is cited in support of the illustration. RESTATEMENT (SECOND) OF TORTS, Appendix, § 55, at 65 (1966). In illustration 7 of RESTATEMENT, *supra* note 1, § 892B a defendant is held liable for inducing the plaintiff to remove her clothing by falsely impersonating a physician. The notes following section 892B state that the illustration is taken from the *Bartell* case.

53. RESTATEMENT, *supra* note 30, § 55, Comment b, Illustration 4.

54. *Id.* § 18, Comment d.

55. *Id.* § 18, Illustration 1.

56. 106 Wis. 342, 82 N.W. 142 (1900).

consented to the treatment out of ignorance. Subsequent cases have followed the approach taken in *Bartell*.⁵⁷

Ironically, the First Restatement of Torts, the originator of the inducement/factum distinction, characterized this type of fact situation in both ways. Section 55 deals with mistakes as to the harmful or offensive nature of the contact. Comment b provides that an otherwise offensive contact can be deprived of its offensive quality if it is necessary for some proper purpose, such as to cure a disease. In Illustration 4 a physician induces a patient to expose her person unnecessarily by representing that it is necessary for a thorough diagnosis. He becomes liable to the patient for battery when he assists her in undressing. The fraud vitiates consent because it relates to the offensive nature of the contact. On the other hand, section 57 deals with fraudulently induced mistakes as to collateral matters. Comment a provides that a mistake as to a collateral matter is one which does not affect the plaintiff's realization of the nature of the invasion. Rather, it leads him to consent to an invasion, whose nature he fully comprehends, because he believes that it is to his advantage to consent. In Illustration 3 a surgeon induces a patient to submit to a treatment of his eyes by misrepresenting that the treatment will cure his vision. The doctor's sole purpose in making the representation is to obtain a fee. If the treatment involves no pain or physical harm, the physician is not liable to the patient.

The two illustrations cannot be reconciled. They both involve nonharmful touchings, consented to because of the belief that the touchings were necessary medical treatment. Identical touchings performed by persons who were not doctors would have been objectively offensive in both cases. Nevertheless, sections 55 and 57 of the Second Restatement have retained these apparently conflicting illustrations.⁵⁸

57. Consent to a touching for sexual purposes is no defense if the doctor represented that the touching was necessary medical treatment and if the patient believed him. *Commonwealth v. Goldenberg*, 338 Mass. 377, 155 N.E.2d 187 (1959), *cert. denied*, 359 U.S. 1001 (1959) (intercourse; defendant held not guilty of rape because the essential element of force was missing; the court recognized that he was guilty of assault and battery); *Roy v. Hartogs*, 81 Misc. 2d 501, 366 N.Y.S.2d 297 (Civ. Ct. 1975) (intercourse); *State v. Nash*, 109 N.C. 824, 13 S.E. 874 (1891) (assault with intent to commit rape). The following cases state that the defendant is not guilty of rape because the element of force is missing. *Walter v. People*, 50 Barb. 144 (Sup. Ct. N.Y. 1867); *Don Moran v. People*, 25 Mich. 355 (1872). See notes 60-65 & 138-44 *infra* and accompanying text for a discussion of this issue. See also *Pomeroy v. State*, 94 Ind. 96 (1883) (intercourse without victim's knowledge under guise of medical treatment).

Also, where the defendant impersonates a doctor for the purpose of obtaining consent to an intimate touching of the plaintiff's person, which would have otherwise been a proper medical examination, the defendant is liable if the plaintiff submitted because of the belief that the defendant was a doctor. *Bowman v. Home Life Ins. Co. of America*, 243 F.2d 331 (3d Cir. 1957); *Boyett v. State*, 42 Ala. App. 220, 159 So. 2d 628 (1964); *Commonwealth v. Gregory*, 132 Pa. Super. 507, A.2d 501 (1938).

58. RESTATEMENT, *supra* note 30, § 55, Illustration 4 and § 57, Illustration 3.

As has been seen, application of the Restatement approach can produce contrary results in the *Bartell v. State* type of case with equal facility. The result is so easily manipulated because of the Restatement concept of the nature of a battery. The theory is that not every unauthorized intentional touching constitutes a battery. A contact is tortious only if it is either harmful or offensive or both.⁵⁹ If the arm of a pedestrian in a crowd brushes against the arm of another pedestrian, no tort occurs because the touching is not harmful or offensive.⁶⁰ There may be implied consent to many such touchings, but logically there is no battery even in the absence of consent since this type of touching can never qualify as a battery. For purposes of this Article such contacts shall be referred to as innocuous touchings, as opposed to harmful or offensive touchings.

The concept of the innocuous touching is used impliedly by the Restatement in applying its fraud rules in the following way. Suppose the defendant makes a misrepresentation which leads the plaintiff to believe that the touching to which he is consenting is innocuous, whereas in reality it is offensive. This constitutes fraud in the factum which vitiates the consent. To use the terminology of the First Restatement, the fraud relates to the offensive nature of the act, *i.e.*, that which makes the conduct tortious. In the context of the hypothetical, the plaintiff thought that he was consenting to something that was not a tort (an innocuous contact) whereas the contact that occurred was a tort (an offensive touching). To use the terminology of the Second Restatement, the plaintiff was mistaken as to the nature of the interest that was invaded, *i.e.*, the plaintiff thought that he was consenting to a touching that invaded no legally protected interest (freedom from innocuous touchings), whereas his interest in being free from offensive touchings was invaded. Because of the Restatement concept that the true identity of the defendant or the true motive of the defendant can determine whether a given contact is offensive or innocuous, the result is easily manipulated.⁶¹ Thus, a touching by a doctor for medical purposes is innocuous, but the same touching for sexual purposes is offensive. Likewise, a touching by a layman, pretending to be a doctor, is offensive even though the same touching by a real doctor for medical reasons would be innocuous. Because this reasoning is not limited to medical cases, the logic of the Restatement can be applied to virtually any case allegedly constituting a battery solely because the touching involved is offensive.

A different fact situation illustrating this point is where the defendant obtains plaintiff's consent to intercourse by impersonating her husband. This can be characterized as fraud in the inducement.⁶² The plaintiff and the defendant have the same physical act in mind; the plaintiff's mistake as

59. *Id.* §§ 13, 18.

60. *Id.* §§ 15 and 19.

61. *Id.* § 55, Comment b.

62. PERKINS, *supra* note 13, at 966.

to the identity of the defendant merely relates to her reason for giving consent. The case also can be characterized as fraud in the factum.⁶³ Intercourse with a stranger constitutes an offensive touching, but intercourse with one's husband does not. Therefore, the defendant's identity relates to the tortious nature of the act. Most cases of this type have involved criminal charges of rape under statutes in which actual force is an element of the crime. The cases hold that the crime of rape was not committed because this essential element is missing.⁶⁴ However, courts recognize that the fraudulently induced consent was invalid.⁶⁵ The defendant is still guilty of the lesser included offense of criminal battery since actual force is not required for that crime.⁶⁶

A closely related situation arises when the defendant obtains the plaintiff's consent to sexual intercourse by falsely representing that he will marry her. In this situation a number of courts have recognized a civil cause of action for seduction.⁶⁷ Proof of intercourse alone is not sufficient because consent is a defense. Such consent is held invalid when it is obtained because of a fraudulent misrepresentation of intent to marry.⁶⁸

These cases cannot be reconciled with the Restatement rule. One can argue that sexual intercourse between persons who are engaged to be

63. *Id.* at 966.

64. *Lewis v. State*, 30 Ala. 54 (1857); *Pleasant v. State*, 13 Ark. 360 (1853) (dictum); *State v. Lung*, 21 Nev. 209, 28 P. 235 (1891) (dictum); *Commonwealth v. Duchnicz*, 42 Pa. County Ct. 651 (1914), *rev'd on other grounds*, 59 Pa. Super. 527 (1915); *Commonwealth v. Childs*, 2 Pitts. Rep. 391 (1863) (dictum); *State v. Brooks*, 76 N.C. 1 (1877); *Wyatt v. State*, 32 Tenn. 394 (1852); Hortensius, *The Pall Mall Gazette Exposures and the Law of Consent in Criminal Cases*, 19 AM. L. REV. 833, 857-58 (1885); Puttkammer, *supra* note 41, at 415. See notes 138-44 *infra* and accompanying text for a discussion of the history of the force requirement in rape cases. The following cases indicate in dictum that the defendant can commit rape by impersonating the victim's husband: *People v. Crosswell*, 13 Mich. 427 (1865); *Whittaker v. State*, 50 Wis. 518, 7 N.W. 431 (1880).

65. *Bloodworth v. State*, 65 Tenn. 614 (1872).

66. *Commonwealth v. Goldenberg*, 338 Mass. 377, 155 N.E.2d 187 (1959), *cert. denied*, 359 U.S. 1001 (1959).

A similar analysis is warranted in situations where the defendant leads the plaintiff to believe that they are married by going through a bogus marriage ceremony, *State v. Murphy*, 6 Ala. 765 (1844), *Bloodworth v. State*, 65 Tenn. 614 (1872), or by going through a genuine marriage ceremony without notifying the plaintiff that the defendant is legally disqualified from marrying, and thus that the ceremony has no legal effect, *cf. Blossom v. Barrett*, 37 N.Y. 434 (1868) (fraud cause of action); *Lawyer v. Fritcher*, 7 N.Y.S. 909 (Sup. Ct. Gen. T. 1889) (seduction cause of action given to parents.)

67. *Hutchins v. Day*, 269 N.C. 607, 153 S.E.2d 132 (1967); *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974); *cf. Lawyer v. Fritcher*, 7 N.Y.S. 909 (Sup. Ct. Gen. T. 1889) (father denied recovery against suitor of daughter who poisoned herself after being informed he could not marry her.)

68. See cases cited note 67 *supra*. But see *Boedges v. Dinges*, 428 S.W.2d 930 (Mo. Ct. App. 1968) (recognizing a cause of action notwithstanding an apparently valid consent.)

married is not offensive but that intercourse with a person who does not have such a relationship with the plaintiff is offensive; therefore, the case involves fraud in the factum because the plaintiff's mistake relates to the tortious nature of the act.⁶⁹ This reasoning is fallacious because the cause of action is for seduction rather than for battery. Unlike battery, the seduction action does not distinguish between offensive touchings on the one hand and innocuous touchings on the other hand. Any act of intercourse, whether offensive or not, is actionable if there is no consent. Therefore, there is no mistake as to that which makes the act tortious. The fraud is purely a matter of inducement, *i.e.*, the victim's reason for consenting.

One step beyond the above situation is the case where the prostitute submits to sexual intercourse in exchange for a counterfeit twenty-dollar bill and seeks to maintain an action for battery. Even though such a case has never arisen, this is the "imaginary horrible" which is used as the major justification for the rule which distinguishes between fraud in the factum and fraud in the inducement.⁷⁰ This is said to be a clear case of fraud in the inducement because the prostitute fully understands the nature of the act and is mistaken only with respect to her reason for submitting. The case can also be characterized as involving fraud in the factum. To her, sex with a paying customer in the course of her business might not be in the least bit offensive, but sex with a stranger who has cheated her is offensive.

However, a fraud in the factum characterization is more difficult to make in the prostitute case than in the other cases discussed, because a battery requires an objectively offensive touching.⁷¹ It can be argued that sex with a stranger is objectively offensive whether he pays or not. Since the prostitute knew she was consenting to an objectively offensive touching, her mistake related solely to matters of inducement. However, even if this argument is accepted, valid consent still could not be the basis of the decision. The consent is invalid for another reason. The Restatement recognizes that a conditional consent is effective only within the limits of the condition.⁷² If consent is granted upon the condition that it shall take effect only upon the happening of a particular event or if the defendant does a certain act, then the consent is not effective until the condition has been met.⁷³ If the prostitute consents to intercourse subject to the condition that the defendant pay her twenty dollars, and he gives her a counterfeit twenty-dollar bill, the conduct is not privileged by virtue of the consent because the condition has not been met.

69. *Abolition of Breach of Promise*, *supra* note 32.

70. RESTATEMENT, *supra* note 17, § 57, Illustration 1; RESTATEMENT, *supra* note 1, § 892B, Illustration 9; PROSSER, *supra* note 2, § 18, at 105.

71. RESTATEMENT, *supra* note 30, § 19.

72. RESTATEMENT, *supra* note 1, § 892A.

73. *Id.* Comment f.

The best explanation for why the prostitute cannot recover has nothing to do with the presence or absence of consent. She cannot recover because of the fundamental common law principle that one may not profit from one's own wrong.⁷⁴ This is why most common law courts did not give a woman a cause of action for her own seduction. Adultery and fornication were crimes, and the female was not permitted to complain of a wrong which she helped produce.⁷⁵ The cause of action, if recognized at all, was given to the parent or spouse on the theory that there was an agency between that person and the seduced female, and that the seduction impaired the value of her services.⁷⁶ Several jurisdictions now grant a cause of action to the seduced female.⁷⁷ But where the plaintiff consents to intercourse because of a promise of financial support, rather than a false promise to marry, she cannot recover.⁷⁸ This decision is not based on her consent but rather on a public policy which prevents courts from helping her gain such an award for her own wrongdoing.⁷⁹

The Restatement cites only two cases in support of the proposition that fraud in the inducement does not vitiate consent.⁸⁰ The first is *Oberlin v. Upson*.⁸¹ Plaintiff consented to intercourse with defendant because of his promise of marriage. She bore a child as a result of the affair, and brought suit for physical and mental pain and suffering and for hospital expenses. The court held that plaintiff could not sue for her own seduction because adultery and fornication are crimes and that she cannot complain of a wrong she helped produce. This case hardly supports the Restatement test since the basis of the holding is public policy rather than consent. It is not even clear that the case involved fraud because the defendant may have intended to fulfill his promise at the time of the intercourse. Furthermore, in dictum, the court indicated that the plaintiff might have been able to recover if there had been some fraud, violence, or artifice other than mere solicitation.

The second case relied on by the Restatement is *Martin v. Carbide Carbon Chemicals Corp.*⁸² The defendant corporation maintained a dispensary at

74. *Deeds v. Strode*, 6 Idaho 317, 55 P. 656 (1898); *Hyatt v. McCoy*, 194 N.C. 25, 138 S.E. 405 (1927); *Oberlin v. Upson*, 84 Ohio St. 111, 95 N.E. 511 (1911). If the prostitute sues on a fraud theory rather than on a battery or seduction theory, the same principle would apply and bar her action. *Jekshewitz v. Groswald*, 265 Mass. 413, 164 N.E. 609 (1929); *De Vall v. Strunk*, 96 S.W.2d 245 (Tex. App. 1936).

75. *Oberlin v. Upson*, 84 Ohio St. 111, 95 N.E. 511 (1911).

76. *Lawyer v. Fritcher*, 7 N.Y.S. 909 (Sup. Ct. Gen. T. 1889); *Hyatt v. McCoy*, 194 N.C. 25, 138 S.E. 405 (1927); *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

77. See cases cited in note 67 *supra*.

78. *Hyatt v. McCoy*, 194 N.C. 25, 138 S.E. 405 (1927).

79. *Id.*

80. RESTATEMENT, Appendix, *supra* note 52, § 57, at 67; RESTATEMENT, *supra* note 1, Explanatory Notes § 892B, Comment g, at 37.

81. 84 Ohio St. 111, 95 N.E. 511 (1911).

82. 184 Tenn. 166, 197 S.W.2d 798 (1946).

its plant in Tennessee. Several of the doctors employed in the dispensary were not licensed to practice medicine in Tennessee. Plaintiff, a dispensary worker, injured herself, and she submitted to an examination by two of the unlicensed defendant doctors. She brought suit against the corporation and the doctors on the theory that any touching by the doctors was illegal because they were not licensed. There was no allegation of incompetence or negligence. The court rejected the theory and affirmed a dismissal of the complaint. The issue of consent was not discussed. It is not even clear that the case involved fraudulently obtained consent. The plaintiff's petition stated that the defendant corporation represented that the doctors were "qualified physicians." However, the petition did not state that at the time she submitted to the touching she believed the defendant doctors to be licensed in Tennessee and relied on that belief. Since she was employed in the dispensary, she may well have known where the doctors were licensed. Therefore, it is not clear that the case raises the issue under discussion.

However, even if the defendants had fraudulently induced the plaintiff to believe that the defendant doctors were licensed in Tennessee, it is impossible to determine whether this case supports the Restatement position. There are several possible explanations for the holding, and the court did not explain its decision. The authors of the Restatement presumably would argue that the case involves fraud in the inducement since the plaintiff, fully aware of the nature of the touching, consented because she thought the doctors were licensed in Tennessee. The difficulty is that the case also could be characterized as involving fraud in the factum. The Restatement takes the position that a touching by a physician for medical reasons is not offensive even though the same touching by a layman would be offensive.⁸³ If this were true, it should follow that a touching by a licensed physician is not offensive, but the same touching by an unlicensed charlatan is offensive. Under this view the case involves fraud in the factum and is inconsistent with the Restatement rule. A third explanation of the case is that whether a fully qualified medical doctor is technically licensed to practice in the jurisdiction where the touching occurs is simply not important if it is a proper touching for a proper purpose. If this is correct, the true basis of the decision is that there was no misrepresentation of a *material* fact. The Second Restatement recognizes that insubstantial mistakes will not vitiate consent.⁸⁴

The Restatement rule that fraud in the inducement does not vitiate consent is primarily applicable to cases involving harmless, offensive contacts.

83. RESTATEMENT, *supra* note 30, § 55, Comment b.

84. Consent to purchase an automobile in ignorance of a minor scratch on the fender does not vitiate consent, but ignorance of the absence of a motor does. RESTATEMENT, *supra* note 1, § 892B, Comment f. Note that both of the above fact situations involve fraud in the factum.

Here, the concept is so susceptible to manipulation that it has little value as an analytical tool. In other areas where it is less subject to manipulation (trespass, conversion, and batteries involving bodily harm) the distinction has no practical application because of the exceptions to the rule which exclude most such cases. It may be that one rule cannot explain all cases. However, under the Restatement approach it is normally as easy to characterize fraudulently obtained consent to an offensive contact as involving fraud in the factum as it is to characterize it as involving fraud in the inducement. The rule is of no help; it is merely a statement of conclusion. A better approach is to concentrate on the reasons for the conclusion. Ironically, the courts have done precisely that. These civil cases have been decided without the courts ever mentioning whether the fraud is a matter of factum or a matter of inducement.

B. *Trespass to Land Cases*

The First Restatement of Torts, in section 173,⁸⁵ recognized that fraudulently obtained consent to enter land is always invalid. The inducement/factum distinction was not applied. Common law fraud requires a misrepresentation of a material fact or a failure to disclose a material fact if there are special circumstances which justify a duty to disclose.⁸⁶ A material fact is one that a reasonable person would consider important.⁸⁷ Obviously, the First Restatement rule is broad enough to apply to cases involving fraud in the inducement since such matters can be of material significance. Illustration 1 of section 173 provides an example. There, a surgeon is called to the plaintiff's house to attend her at the birth of a child. The surgeon brings a companion, whose sole purpose in coming is to satisfy his curiosity. The companion is a trespasser. The Illustration, based on *DeMay v. Roberts*,⁸⁸ involves fraud in the inducement. The plaintiff consented to the companion's presence because she thought he was the doctor's assistant, but would not have consented to the presence of a stranger. Unlike battery cases, the identity of the companion does not have an effect on the tortious nature of the act or on the interest that is being invaded. It is true that the presence of a doctor's assistant may

85. RESTATEMENT, *supra* note 17, § 173.

86. RESTATEMENT, *supra* note 38, § 551.

87. RESTATEMENT, *supra* note 37, § 538.

88. 46 Mich. 160, 9 N.W. 146 (1881). The theory of recovery in the case itself is not clear. The petition contained three counts. The first count alleged assault. This was probably really a battery based on a touching by the companion in the course of the birth. Illustration 3 of § 55 of RESTATEMENT, *supra* note 30, is based on this interpretation. RESTATEMENT, Appendix, *supra* note 52, § 55, at 65. The other two counts are not specified. The court does say that the plaintiff had a right to privacy and that no one had a right to intrude. The consent was no defense because it was fraudulently obtained.

not be offensive whereas the presence of a stranger is offensive, but this is unimportant in trespass to land cases. The law of trespass does not distinguish between offensive or harmful entries on the one hand and innocuous entries on the other hand. Any unauthorized entry is a trespass. The victim fully understood the nature of the legally protected interest that was being invaded. However, the consent was vitiated because any fraud, even fraud in the inducement, vitiates consent.

Professors Harper and James, in their treatise on the law of torts, agree with the First Restatement. They recognize the inducement/factum distinction in battery cases,⁸⁹ but for trespass to land cases they merely state that consent obtained by fraud is invalid.⁹⁰ Two of the cases that they cite in support of this proposition involve fraud in the inducement. In *Knocke v. Pratt*⁹¹ the defendant excavated on the plaintiff's land in conjunction with construction on the defendant's land. He obtained consent to do this from the plaintiff's agent by representing to the agent that the plaintiff had given consent. The court held that the agent's consent was invalid because it was induced by the defendant's misrepresentation. This is purely a case of fraud in the inducement. The agent fully comprehended the nature of the defendant's entry on the land. The fraud merely related to his reason for granting permission. In *Gribben v. Carpenter*⁹² the defendant was the testamentary guardian of a minor who owned some real property on which there was an oil well. The defendant leased the oil and gas rights to a business in which he had an interest. He obtained the orphan court's approval of the lease by misrepresenting his interest in the transaction. Citing the First Restatement, the court held that the defendant was a trespasser. The fraud here related solely to the orphan court's inducement for approving the lease. That court was fully aware of the nature of the entry.

The Second Restatement eliminated the black letter rule of section 173 and substituted a cross-reference to section 892B.⁹³ This is the general section dealing with consent induced by misrepresentation or mistake.⁹⁴ This, in effect, changed the rule, since section 173 of the First Restatement recognized that fraud in the inducement vitiates consent, but section 892B of the Second Restatement provides that fraud in the inducement does not vitiate consent.⁹⁵ Section 173 of the Second Restatement contains the same illustrations as are contained in section 173 of the First Restatement, in-

89. HARPER & JAMES, *supra* note 3, § 3.10.

90. *Id.* § 1.11, at 40.

91. 194 Mo. App. 300, 187 S.W. 578 (1916). See also *Windle v. Crescent Pipe-Line Co.*, 186 Pa. 224, 40 A. 310 (1898) (dictum) (a release to lay a pipeline on plaintiff's land is invalid if obtained by fraud in the inducement).

92. 323 Pa. 243, 185 A. 712 (1936).

93. RESTATEMENT, *supra* note 30, § 173.

94. RESTATEMENT, *supra* note 1, § 892B.

95. *Id.* Comment g.

cluding the one based on *DeMay v. Roberts*.⁹⁶ The retention of this illustration creates an inconsistency because the result approved there could not be reached by application of the rule in section 892B. The reporter's notes to section 173 of the Second Restatement cite no authority for changing the rule.⁹⁷ In fact, it appears that the change may have been inadvertent. The notes say that the section was changed by providing a mere cross-reference to section 892B "to avoid duplication."⁹⁸ The notes cite with approval *DeMay v. Roberts*, *Knocke v. Pratt*, and *Gribben v. Carpenter*,⁹⁹ the only cases cited by the reporter. As mentioned above, all three cases involved fraud in the inducement rather than fraud in the factum.

Even though the Second Restatement cites no authority for applying the inducement/factum distinction to trespass cases, inquiry should be made as to whether any exists. There are several cases that at first glance might appear to indicate that consent to an entry to land is a defense even though it has been induced by fraud. However, under close scrutiny none of the cases really support this proposition. In *Alexander v. Letson*,¹⁰⁰ a mortgage held by the defendant on 80 acres of land was foreclosed. He bought the land at a foreclosure sale and took possession. Plaintiff, the former owner, sued in equity to have the mortgage set aside for lack of consideration. He prevailed and was put into possession by the court. He then sued for trespass for damages to the land occurring during the time that the defendant was in possession. The court held that an action for trespass to land would not lie because a disseizin is required for trespass.¹⁰¹ One buying land at a foreclosure sale and taking possession has not committed a disseizin because his entry is lawful. The case does not involve fraudulently obtained consent. There was no fraud by the defendant, and the plaintiff did not consent to the entry. Authority to enter the land was obtained by purchasing it at the foreclosure sale. However, by way of dictum, the court stated that an action for trespass "will not lie unless the plaintiff's possession was intruded upon by the defendant without his consent, even though consent may have been given under a mistake of facts, or procured by fraud" ¹⁰² This dictum is not based on the proposition that consent induced by fraud is valid. Rather, the basis of the dictum is the need for a disseizin, *i.e.*, the wrongful ouster of one seized of a freehold estate in land. Thus, the case is similar to the cases holding that there is no rape if there is no actual force. The basis of the dictum is a failure to prove an essential element of the plaintiff's case (wrongful ouster) rather than on a valid consent.

96. RESTATEMENT, *supra* note 30, § 173.

97. RESTATEMENT, Appendix, *supra* note 52, § 173, at 190.

98. *Id.*

99. *Id.*

100. 242 Ala. 488, 7 So. 2d 33 (1942).

101. *Id.*

102. *Id.* at 492, 7 So. 2d at 36.

In *Kimball v. Custer*¹⁰³ the defendant wanted to enter plaintiff's house to repossess a piano, but could not gain admission because the plaintiff kept it locked. One of the defendant's men gained admittance by pretending to be an insurance agent needing to examine the flues. After he gained admittance, the defendant's other men approached the house. Plaintiff bolted the door and asked the supposed insurance agent to leave by the back way. Instead, the impostor unbolted the door over plaintiff's objection. The other men entered and took the piano. The court held that the impostor became a trespasser when he unbolted the door against the command of the plaintiff.

The impostor's misrepresentation that he was an insurance agent constituted fraud which was the plaintiff's inducement for permitting the entry. One might argue that if fraud in the inducement really vitiates consent in trespass cases, the court should have found that he was a trespasser from the moment he entered rather than from the moment that he attempted to unbolt the door. The court did not discuss this question. When the trespass commenced was not important to the decision. Therefore, the case does not provide much authority for the proposition that the impostor was not a trespasser until he attempted to unbolt the door. If it does stand for this proposition, it is clearly wrong. A person having permission to enter for one purpose commits a trespass to land if he enters the land for a different purpose.¹⁰⁴ Trespass commences the moment he enters the land.¹⁰⁵ Since the impostor had permission to enter for the purpose of inspecting the flues, he became a trespasser the moment he entered because his entry was for a different purpose.

In *Big Sandy & Kentucky River Railway Co. v. Rice*¹⁰⁶ plaintiff sold a right-of-way on his property to defendant railroad but kept his interest in the apple trees located on the right-of-way. The contract provided that the defendant would not cut down the apple tree unless necessary. The railroad later decided to build a telephone line on the right-of-way. Its employees were about to cut down four apple trees when the plaintiff intervened. He claimed that it was not necessary because they could either use taller poles or put the line on the other side of the track. The defendant's vice president arrived and reached an agreement with the plaintiff. The plaintiff claimed that the defendant agreed to pay for the trees, but the vice president claimed that he agreed to pay only "if anything was due him."¹⁰⁷ After this accord was reached the plaintiff helped to cut down the apple trees. The company refused to pay, and the plaintiff sued

103. 73 Ill. 389 (1874).

104. *Kent County Agricultural Soc'y v. Ide*, 128 Mich. 423, 87 N.W. 369 (1901); RESTATEMENT, *supra* note 1, § 892A, Comment g, at 26.

105. See note 104 *supra*.

106. 206 Ky. 128, 266 S.W. 1049 (1924).

107. *Id.*

for trespass to the four apple trees. The court held that he could not sue on a trespass theory because the cutting was not done against his will and consent. He agreed to it and helped cut them down. The court recognized that he had a cause of action for breach of contract to pay for the trees and remanded for trial on that issue.

This case is not authority for the proposition that fraud in the inducement does not vitiate consent. In the first place, there was no finding that the railroad's vice president acted fraudulently. There was no resolution at this stage of the proceedings as to what the vice president promised or as to whether he intended to keep the promise at the time he made it. Whether he acted with fraud is irrelevant because there could be no trespass on the land under Kentucky law as it existed at the time of the decision. The early common law imposed strict liability for trespass to land. Neither intent to enter nor negligence was required.¹⁰⁸ What the cause of action did require was a forcible and direct interference as opposed to an indirect entry.¹⁰⁹ The modern cause of action for trespass requires fault, either intentional or negligent conduct.¹¹⁰ The law no longer distinguishes between direct interferences and indirect interferences.¹¹¹ Until 1956 Kentucky courts recognized the trespass cause of action in its ancient form.¹¹² A trespasser was held strictly liable for any entry he caused, but only if the force was direct and immediate.¹¹³ Fraudulently inducing a third person to interfere with the plaintiff's property constituted an indirect interference.¹¹⁴ In such cases, trespass will not lie; rather, plaintiff must sue in trespass on the case.

*Howe v. State*¹¹⁵ was a prosecution for a criminal trespass. The defendant took possession of land pursuant to a written agreement and removed trees from the land. He had procured the contract by fraud. Sufficient facts are not given in the opinion to determine whether it was fraud in the factum or fraud in the inducement. The court held that there was no

108. PROSSER, *supra* note 2, § 7.

109. *Id.*; HARPER & JAMES, *supra* note 3, § 1.3, at 9.

110. PROSSER, *supra* note 2, § 7.

111. *Id.*

112. 46 Ky. L.J. 187, 188-89 (1957).

113. *Louisville Ry. v. Sweeney*, 157 Ky. 620, 163 S.W. 739 (1914). This was the leading Kentucky case imposing strict liability for trespass to land in Kentucky until it was overruled by *Randall v. Shelton*, 293 S.W.2d 559 (1956). 46 Ky. L.J. 187, 188 (1957). In *Sweeney* the defendant's streetcar left its track and knocked over a telephone pole which struck a gate in the plaintiff's yard. The gate in turn struck the plaintiff and injured her. The court obviously was concerned with whether the injury was directly inflicted, thus making trespass the appropriate form of action. It relied on *Scott v. Shepard* 96 Eng. Rep. 525 (K.B. 1773) in resolving this question in favor of the plaintiff. This is the famous "squib case" that established criteria for distinguishing between direct injuries and indirect injuries.

114. HARPER & JAMES, *supra* note 3, § 2.3, at 107.

115. 10 Ind. 492 (1858).

criminal liability for trespass. The basis of the opinion was a public policy against holding a man "liable to prosecutions for acts committed whilst in the possession of lands under contracts declared fraudulent at the end of a long and doubtful lawsuit" ¹¹⁶ Thus, the basis of the decision is not validity of consent but rather an unrelated public policy. This is similar to the cases imposing no liability because of the principle prohibiting a person from profiting from his own wrong.

Had this been an action for civil damages the result would have been different. When trees valuable for their lumber are removed from another's land, the owner has the option to sue for conversion rather than for trespass.¹¹⁷ As pointed out above,¹¹⁸ fraudulently obtained consent to the transfer of possession of a chattel is no bar to an action for conversion, even if the fraud relates solely to a matter of inducement. Therefore, the case is not relevant to the question of civil liability. The policy basis for refusing to impose criminal liability would not apply in a civil action for trespass to land. Otherwise, the defendant could acquire title by adverse possession before the statute of limitations has expired.

There is no authority for the position of the Second Restatement that the inducement/factum distinction applies to trespass cases. The three cases that raise this issue hold the opposite. Section 892 of the Second Restatement offers illustration 10 as its sole support for applying the inducement/factum distinction to trespass cases. In this illustration the defendant buys land from the plaintiff knowing that there is oil under the land. He pays a low price because the plaintiff does not know about the oil. He enters the land and takes possession. The Restatement states that he is not liable for trespass. Concededly, there is no liability, but not because the fraudulently obtained consent is valid. Rather, the result is correct because there simply is no fraud in this case. The existence of oil under the land is a material fact. However, the buyer made no misrepresentation with respect to the presence of oil. He had no duty to disclose its existence because there was no special relationship between himself and the seller, and the fact was not basic to the transaction.¹¹⁹

C. *Situations Where Liability is Not Imposed for Policy Reasons Unrelated to the Question of Consent*

Kidnapping cases sometimes present the issue of fraudulently obtained consent. While there is great variation in the statutory language used, kidnapping is basically "a false imprisonment aggravated by conveying the imprisoned person to some other place."¹²⁰ Although at common law actual

116. *Id.* at 493.

117. HARPER & JAMES, *supra* note 3, § 1.8, at 27.

118. See notes 27-30 *supra* and accompanying text.

119. RESTATEMENT, *supra* note 38, § 551, Illustrations 4, 6-8.

120. *State v. Gough*, 257 N.C. 348, 352, 126 S.E.2d 118, 121 (1962).

force was required,¹²¹ many courts now have abandoned this requirement.¹²² Consent of the victim to be taken away is a defense, but fraud, including fraud in the inducement, vitiates consent. Thus, decoying the victim away from home on the pretext of taking her to a babysitting job¹²³ or to the woods to see the squirrels¹²⁴ constitutes kidnapping.

In *People v. DeLeon*¹²⁵ the victim agreed to go to Panama to work for Madam DeBlen as a governess. Prior to her arrival she discovered that Madam DeBlen ran a house of prostitution and that she was to be employed there as a prostitute. Upon learning this she returned home. The defendant was convicted of kidnapping. The victim's consent to be transported to Panama was vitiated by fraud.¹²⁶ Two years later a court in the same jurisdiction decided *People v. Fitzpatrick*.¹²⁷ Defendant induced the victim to go to Mexico on the representation that he would be employed at the rate of thirty-five American dollars per month, plus board. Upon arrival, the victim discovered that the job paid one Mexican dollar per day and no board. After working there for two weeks and finding the arrangement unprofitable because of the high cost of food, the victim returned to the United States. The court held that the defendant was not guilty of kidnapping. It distinguished the *DeLeon* case on the basis that there the defendant intended to withhold honest employment and force the plaintiff into prostitution. Here, the victim received the honest employment which he was promised. The misrepresentation related only to the amount of wages.

Both cases involve fraud in the inducement. Both victims were fully aware of the nature of the trip they were taking from New York to Latin America. The fraud merely related to the reason for taking the voyage. Why should fraud in the inducement invalidate consent in one case but not in the other? One thoughtful author suggests that the issue is to be resolved first, by looking at the purpose underlying the statute or common law doctrine imposing liability and second, by deciding why consent is recognized as a defense in such cases.¹²⁸ The gravamen of the offense of kidnapping is an unlawful interference with the freedom of the person kidnapped.¹²⁹ Forcing one to work against one's will as a prostitute is a sufficient interference with personal liberty to warrant imposition of the

121. *State v. Murphy*, 280 N.C. 1, 184 S.E.2d 845 (1971).

122. See cases collected in Annot., 95 A.L.R.2d 450 (1964). This is true even where the statute requires force. E.g., *Moody v. People*, 20 Ill. 316 (1858).

123. *State v. Gough*, 257 N.C. 348, 126 S.E.2d 118 (1962).

124. *State v. Murphy*, 280 N.C. 1, 184 S.E.2d 845 (1971).

125. 109 N.Y. 226, 16 N.E. 46 (1888).

126. *Id.*; accord, *Beyer v. New York*, 86 N.Y. 369 (1881).

127. 10 N.Y.S. 629 (Sup. Ct. Gen. T. 1890).

128. Comment, *Consent, Liability and Guilt: A Study in Judicial Method*, 7 STAN. L. REV. 507, 515 (1955).

129. *State v. Gough*, 257 N.C. 348, 126 S.E.2d 118 (1962).

punishment imposed by the kidnapping statute, while tricking one into working for lower wages than anticipated is not. The defendant was held not guilty in *People v. Fitzpatrick* because the statute was not designed to prohibit his conduct. It is perfectly reasonable for the State of New York to decide to punish the one type of conduct but not the other. On this basis the cases are readily distinguishable.

Logically, the issue of fraudulently obtained consent could arise in the context of the false imprisonment case. For example, the plaintiff might agree to remain in a locked room in exchange for a counterfeit twenty-dollar bill or because of the defendant's misrepresentation that this is necessary for the plaintiff's personal safety. Apparently the only case involving such fraud is *Payson v. Macomber*.¹³⁰ Plaintiff, the mistress of one party to a divorce action, was induced by the defendant to leave town and go to Salem so that she would be unavailable to testify in the divorce case. Defendant induced her to do this by falsely representing that she could be prosecuted and by paying her expenses. She went to Salem but returned when she learned that she could not be prosecuted. The court held that here was no false imprisonment because there was no force or threat of force sufficient to constitute false imprisonment.¹³¹ Thus, the holding is based on the absence of an element of the tort rather than on the proposition that there was a valid consent. Since a genuine threat of criminal prosecution does not constitute the type of force required for false imprisonment, it follows that a fraudulent threat of such prosecution also should not be sufficient.¹³²

The *Payson v. Macomber* requirement of force or threatened force may be desirable in view of the interest that is being protected by the false imprisonment cause of action. Where physical harm does not occur, the false imprisonment cause of action protects the "dignitary interest in feeling free to choose one's own location."¹³³ Thus, at least if the plaintiff is unharmed, he has no cause of action arising out of the confinement which he does not discover until after the confinement has ended.¹³⁴ The law is designed to protect the plaintiff from the mental disturbance experienced from being aware of a present confinement.¹³⁵ It does not

130. 85 Mass. 69 (1861).

131. *Id.* The court did not discuss this issue, but there apparently was no confinement in this case. Plaintiff merely was induced to leave her home for a time. Exclusion from a specified area, such as a city, does not constitute confinement. RESTATEMENT, *supra* note 30, § 36.

132. See *People v. Cavanaugh*, 30 Cal. App. 432, 158 P. 1053 (1916) (defendant pretending to be a police officer and threatening arrest unless victim consent to intercourse is not guilty of rape if victim submits because arrest is not the type of force required for rape).

133. RESTATEMENT, *supra* note 30, § 35, Comment h, at 53.

134. RESTATEMENT, *supra* note 30, § 42.

135. *Id.* Comment a.

protect the affront to dignity arising upon the discovery that one, in the past, had been confined without one's knowledge.¹³⁶ The affront to dignity in this type of situation is indistinguishable from that which would occur in the situation where the plaintiff permits himself to be locked in a room to avoid some supposed danger, and upon his release learns that there was no danger at all. Courts may disagree as to the type of interest that the false imprisonment action will protect.¹³⁷ However, if a court agrees with the above-mentioned statement of the interest being protected, then there is no reason to impose liability in the example where plaintiff consents to confinement because of the misrepresentation. This is not because the consent is valid. It is because the policy underlying the false imprisonment cause of action cannot be furthered by permitting the plaintiff to recover. Thus, it makes sense to require actual force or a threat of force as an element of a false imprisonment cause of action and yet not require actual force or a threat of force for other torts, since the interests being protected by the various causes of action are different.

The history of the force requirement in rape cases is a good illustration. Under the early English law rape was a capital offense. Judges adopted a very restrictive definition of rape, requiring actual force or threats of force, because other conduct simply was not deserving of the extremely harsh penalty.¹³⁸ Defendants perpetrating the grossest fraud in order to obtain the consent of the victim were not guilty of rape because the element of force was missing.¹³⁹ This rationale could be applied to cases of fraud in the factum as well as to cases of fraud in the inducement.¹⁴⁰ As the penalty for rape was reduced, the courts evolved a broader definition of rape which did not always require actual force. Thus, it became possible to commit rape by using fraud in certain instances.¹⁴¹

If the gravamen of the offense of rape in a particular jurisdiction includes violence or a serious risk of violence in addition to an affront to the victim's

136. *Id.*

137. *Cf. Wanzer v. Bright*, 52 Ill. 35 (1869). Defendant enticed plaintiff into the jurisdiction by sending him a phony letter signed by a fictitious person. Plaintiff was arrested upon his arrival. The court held that the arrest was illegal because of the use of fraud to induce plaintiff to enter the jurisdiction. It reasoned that defendant would be liable if he used force to bring plaintiff into the jurisdiction and that the injury and outrage to the plaintiff is the same when fraud is used.

138. Koh, *Consent and Responsibility in Sexual Offenses* (pts. 1-2), 1968 CRIM. L. REV. (Eng.) 81, 150.

139. *Id.* at 88; Hortensius, *supra* note 64, at 857-58; Puttkammer, *supra* note 41, at 414.

140. *E.g., Regina v. Stanton*, 174 Eng. Rep. 872 (Q.B. 1844). The defendant doctor had intercourse with the victim under the pretext of giving her an injection. The court held that the defendant could not be guilty of rape because he did not use force or intend to use force in the event that the fraud failed. This is clearly a case of fraud in the factum since the victim did not know that intercourse was about to occur.

141. Koh, *supra* note 138.

dignity,¹⁴² it makes sense not to apply the statute to the sham-marriage cases.¹⁴³ The threat of violence is simply not present. The husband-impersonation cases fall between the typical rape case and the sham-marriage case. Actual duress is not involved, but there is a threat of violence erupting if the victim discovers the fraud in the course of the act. Whether rape should apply to this situation is a question of social policy. A number of jurisdictions have provided by statute that husband-impersonation constitutes rape.¹⁴⁴

Cases involving the crime of joy-riding, *i.e.*, taking a car without the consent of the owner, are also illustrations of the principle. Joy-riding is similar to the crime of larceny, except that the defendant need not intend to deprive the owner of the property permanently.¹⁴⁵ While some courts hold that a defendant can commit this crime by fraudulently inducing the owner to part with possession,¹⁴⁶ other courts have held that fraud does not vitiate consent in these cases.¹⁴⁷ These later courts interpret joy-riding statutes as punishing only those people who take automobiles without acquiescence.¹⁴⁸ Such statutes are not designed to punish people who obtain consent with fraudulent misrepresentations.¹⁴⁹ Other statutes prohibit fraud of this sort.¹⁵⁰ It is recognized that in other areas of the

142. Comment, *Consent, Liability and Guilt: A Study in Judicial Method*, 7 STAN. L. REV. 507, 515 (1955).

143. See note 66 *supra*.

144. Puttkammer, *supra* note 41, at 59-60.

145. *Shope v. State*, 18 Md. App. 472, 307 A.2d 730 (1973).

146. *Id.*

147. *People v. Donell*, 32 Cal. App. 3d 613, 108 Cal. Rptr. 232 (1973); *People v. Cook*, 228 Cal. App. 2d 716, 39 Cal. Rptr. 802 (1964); *State v. Boggs*, 181 Iowa 358, 164 N.W. 759 (1917); *State v. Mularkey*, 195 Wis. 549, 218 N.W. 809 (1928).

148. *People v. Cook*, 228 Cal. App. 2d 716, 39 Cal. Rptr. 802 (1964); *State v. Mularkey*, 195 Wis. 549, 218 N.W. 809 (1928).

149. See cases cited note 148 *supra*.

150. *People v. Cook*, 228 Cal. App. 716, 39 Cal. Rptr. 802 (1964). This case purports to apply the fraud in the inducement vs. fraud in the factum distinction. For that reason it will be discussed in detail. The defendant participated in a scheme whereby one Satchell, impersonating the defendant, traded in defendant's car on a newer car. Satchell took possession of the newer car in defendant's name and gave the dealer a bad check for the balance due. The court held that defendant could not be guilty of violating the joy-riding statute since the dealer consented to relinquish possession. The court reasoned that the statute was not designed to punish one obtaining consent by misrepresentation. The court distinguished *People v. Perez*, 203 Cal. App. 2d 397, 21 Cal. Rptr. 422 (1962), in which the defendant obtained a car under the false representation that he had a buyer for it. He was given three days to make the sale. The defendant actually had no buyer, but kept the car for his own use. He was convicted of violating the joy-riding statute. The court in *Cook* distinguished *Perez* by saying that *Perez* involved fraud in the factum since the owner did not intend for the defendant to acquire possession for his own use. The fraud in *Cook* related merely to the inducement since the owner intended to sell the defendant the car and consented to his taking possession of it.

law fraud vitiates consent, but this theory does not apply to joy-riding cases because of legislative intent.¹⁵¹

These cases are not analogous tort cases because a defendant who fraudulently obtains possession of an automobile is liable for trespass to chattels or for conversion in situations involving fraud in the inducement.¹⁵² However, they do illustrate a valid method of resolving the criminal issue with which they are concerned. Assume the defendant fraudulently obtains possession of the plaintiff's car by giving him counterfeit money. There is nothing wrong with holding him civilly liable to the plaintiff for conversion in one action and not holding him criminally liable for joy-riding in another action. In view of the gravamen of the offense of joy-riding it is reasonable to adopt a special definition of consent which will more fully carry out the policy underlying the statute.

A similar situation can arise in the tort context. *Fischer v. Market Ford Sales, Inc.*¹⁵³ involved a civil suit against the owner of a motor

The distinction appears fallacious since the victim in *Cook* gave the car to Satchell, thinking that Satchell was the defendant. Therefore, he did not really intend for defendant to have the car. Even so, the distinction appears to be irrelevant. The victims in both cases knew that they were permanently relinquishing possession of their respective cars. They were both mistaken in believing that they would be paid. From the victim's point of view it makes no difference whether the defendant keeps the car or gives it to a third person.

People v. Cook is a good illustration of the manipulative nature of the inducement/factum distinction. The court reasons that fraud is collateral and does not vitiate consent if the victim is fully aware of the nature of the act. By broadly or narrowly defining the nature of the act the court can manipulate the result. The court reasoned that *Perez* involved fraud in the factum because the victim did not intend that the defendant acquire possession of the car "for his own use." The opposite result could have been reached by reasoning that the fraud was collateral because the victim knew that he was permanently relinquishing possession of the car, and this is all he must know in order to give a valid consent. Here, the nature of the act is narrowly defined to include only knowledge that possession is being transferred. *Cook* is the only criminal case the author found employing the inducement/factum distinction. In addition, *People v. Hutchings*, 242 Cal. App. 2d 294, 51 Cal. Rptr. 415 (1966), another joy-riding case, mentions the concept of fraud in the inducement in reference to *Cook*. As discussed in the text accompanying notes 145-52, these joy-riding cases are not valid tort analogies since the defendants in these cases would clearly be liable for conversion.

The only civil cases the author found using the inducement/factum distinction involve the liability of a maker of a negotiable instrument to a holder in due course. The maker is liable if the note was procured by fraud in the inducement. He is not liable if the note was procured by fraud in the factum, *e.g.*, the maker was unaware of the nature of the document he signed. *E.g.*, *United States v. Klatt*, 135 F. Supp. 648 (S.D. Cal. 1955); *Gate City Nat'l Bank v. Bunton*, 316 Mo. 1338, 296 S.W. 375 (1927). These cases are not valid tort analogies. The payee of the note is clearly liable to the maker in tort. The rule is merely one of contract adjusting the equities between two innocent parties.

151. *People v. Donell*, 32 Cal. App. 3d 613, 108 Cal. Rptr. 232 (1973).

152. See notes 27-30 *supra* and accompanying text.

153. 225 N.W.2d 370 (Minn. 1974).

vehicle under a statute which rendered him vicariously liable for the negligence of anyone driving his car with his consent. The defendant was a used car dealer who consented to let an individual take a car for a short test drive. The individual turned out to be an ex-convict who kept the car for 22 days prior to having an accident in which the plaintiff was injured. The defendant used car dealer did not report the theft until after the accident. Defendant argued that he was not liable under the statute because his consent was vitiated by fraud. The court rejected the argument on policy grounds in view of the large number of auto dealers lending vehicles to prospective buyers.¹⁵⁴ The court held that the dealer would remain liable until he withdraws consent by taking reasonable measures to recover the car. The decision is entirely reasonable. The purpose of such a statute is to induce car dealers to lend vehicles to responsible drivers or be prepared to pay the costs of the accident. This policy is unrelated to the question of an attempt by the tortfeasor to cheat the owner. The court furthered the policy by not permitting fraud to vitiate consent. But that does not mean that fraud never vitiates consent. The court recognized that the ex-convict was a converter. In an action by the car dealer against the ex-convict for conversion or for trespass to chattels, consent would be no defense.

III. CONCLUSION

The doctrine that fraud in the factum vitiates consent but fraud in the inducement does not originated as an attempt to explain a line of cases that did not need explaining. Courts have decided cases involving fraudulently obtained consent without reference to this doctrine.

In cases involving offensive contacts, the distinction is illusory because most such contacts can readily be characterized as involving either fraud in the factum or fraud in the inducement. In this area it is a distinction without a difference and certainly no aid to analysis. At best it is a mere statement of conclusion. At worst, it could become a substitute for analysis. A judge who is not fully aware of the manipulative nature of the test could decide a case wrongly by concentrating on issues that have no bearing on the problem. It is better for courts to consciously focus on the issues involved.

In other types of cases the result is less subject to manipulation. In cases involving seduction, kidnapping, trespass to land, trespass to chattels, and conversion there is often a clear distinction between fraud in the inducement and fraud in the factum. Courts have recognized that fraud in the inducement vitiates consent in many such cases. However, the recognized exceptions to the supposed general rule do not cover all of

154. *Id.*

these situations. Therefore, even given the extreme flexibility of the rule, it is not an accurate statement of the law.

In reality, fraud has almost always been held to vitiate consent. It does not matter whether the case involves fraud in the factum or fraud in the inducement. Cases involving fraud where the plaintiff has not been permitted to recover are not based on the validity of the plaintiff's consent. In some of them there has been a failure of the plaintiff to prove an essential element of the case, *e.g.*, lack of force in a rape case. In others, the plaintiff was barred from recovery by some overriding policy, *e.g.*, seduction cases prohibiting the plaintiff from profiting from her own wrong.¹⁵⁵ In some special cases the validity of a fraudulently obtained consent has been determined by looking to the policy to be furthered by the crime or theory of recovery and seeing whether that policy would be impaired by invalidating the consent. Thus, a particular fact situation can give rise to a consent that is valid for some purposes but not for others. This treatment is fully justified. The consent issue arises in an enormous variety of cases. Whether it should be recognized as a defense in one case may be governed by policy considerations that have no place in other cases. Each case must be treated individually.

155. Another example of this is found in *Thibault v. Lalumiere*, 318 Mass. 72, 60 N.E.2d 349 (1945). The court held that submission to a sexual touching because of a misrepresentation of intent to marry the plaintiff does not constitute battery. Consent is a defense. A fraudulent promise to marry does not vitiate consent because the "Heart Balm" statute abolishes the right to sue for breach of contract to marry. Where the only ground for contending that the touching constituted a wrong was defendant's intent not to fulfill his promise, the wrong is directly attributable to the breach of contract and not actionable.

