Louisiana Law Review

Volume 50 | Number 2
Developments in the Law, 1988-1989
November 1989

Business Associations

Glenn G. Morris
Louisiana State University Law Center

BUSINESS ASSOCIATIONS

*Glenn G. Morris**

A year ago the Supreme Court of Louisiana still had pending before it a case with potentially far-reaching implications in the field of contract and agency law. The case was *9 to 5 Fashions, Inc. v. Spurney*,[1] and it was important because the lower appellate court in the case had used a tort-law negligence theory to affirm a personal judgment against a corporate officer for ordinary commercial damages arising out of his corporation's breach of contract.

The case has since been decided by the supreme court,[2] but in a rather surprising way. Unlike the parties and the lower court, the supreme court did not view the case as posing a question concerning the general, contract-related duty of care owed to third parties by a corporate officer, but saw it instead as a challenge to the narrower, traditional jurisprudential rule against recognizing the tort of intentional or negligent interference with contract.[3]

That characterization of the case did permit the court to reach, and to abrogate, a bar against such suits that had already been removed in every other state in the country.[4] In so doing, the court also approved a limited theory for holding an officer or agent liable under tort law in connection with his corporation's breach of contract: he may be held personally liable if he interferes intentionally and without justification with a known contract of his corporation.[5]

---

* Associate Professor of Law, Louisiana State University

1. 520 So. 2d 1276 (La. App. 5th Cir. 1988), rev'd, 538 So. 2d 228 (1989).
2. 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989).
3. Id. at 230-31.
4. In the court's words, "our courts' previous expressions barring absolutely any action based on a tortious interference with a contract are annulled insofar as they conflict with this opinion." Id. at 234. However, said the court,

> It is not our intention . . . to adopt whole and undigested the fully expanded common law doctrine of interference with contract, consisting of "a rather broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes must be considered improper in some undefined way." W. Prosser & P. Keeton, The Law of Torts § 129, p. 979 (5th Ed. 1984).

Id.

5. Id. at 232-34. The officer in this case was held not to be liable under the new test, so the judgment against him was reversed. For an extensive annotation on the subject of a corporate officer's tortious interference with his corporation's contracts, see 72 A.L.R. 4th 492 (1989).

But the court did not use *9 to 5*, as it had earlier appeared that it might, to clear up a growing misunderstanding about two of its own earlier decisions on the subject of employee tort duties.

The decisions creating the confusion were *Canter v. Koehring Co.*,[6] and *Fryar v. Westside Habilitation Center, Inc.*[7] Each contained language about the tort liability of corporate officers and employees that, out of context, actually seemed to support the lower court's negligence theory in *9 to 5*. Yet it was obvious in *9 to 5* that a purely commercial creditor of an insolvent corporation was attempting to use a theory of personal injury law to avoid standing in line with the many other commercial creditors of the corporation for its share of the company's remaining assets. Thus, *9 to 5* seemed to provide the court with the perfect opportunity for limiting the misunderstood language in the earlier decisions.

Nevertheless, all the supreme court would say about the theory used by the lower court was that it "[did] not seem to be based clearly on any one legal rationale but appear[ed] to be loosely associated with several legal theories."[8] This statement, combined with the result in the case, did clearly repudiate the reasoning of the lower court under the facts of this particular case, but it also left much room for continued misunderstanding of the earlier supreme court decisions. The purpose of this discussion is to address the nature and consequences of this misunderstanding, and to suggest how it might be resolved.

The seminal case in the area of contract-related tort duties of employees is undoubtedly the 1973 supreme court decision in *Canter*. *Canter* was a wrongful death action brought by the widow and children of a construction worker who was killed on the job as a result of the collapse of an overloaded crane at his worksite.[9] The crane was overloaded due to the negligence of the employees of another company that had undertaken, but failed, to give accurate load figures to the company that was operating the crane.[10] It was in this context, speaking about the imposition of duties to exercise care to prevent personal injury, that the *Canter* court set out the four elements of a tort action against an employee or agent based on his breach of a duty arising out of an employment relationship. According to *Canter*, an officer or agent is personally liable in this type of case whenever:

> 1. The principal or employer owes a duty of care to the third person (which in this sense includes a co-employee), breach of

6. 283 So. 2d 716 (La. 1973).
7. 479 So. 2d 883 (La. 1985).
8. 538 So. 2d at 231.
9. 283 So. 2d at 723.
10. Id. at 726.

which has caused the damage for which recovery is sought.
2. This duty is delegated by the principal or employer to the defendant.
3. The defendant officer, agent, or employee has breached this duty through personal (as contrasted with technical or vicarious) fault. The breach occurs when the defendant has failed to discharge the obligations with the degree of care required by ordinary prudence under the same or similar circumstances—whether such failure be due to malfeasance, misfeasance, or nonfeasance, including when the failure results from not acting upon actual knowledge of the risk to others as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty.
4. With regard to the personal (as contrasted with technical or vicarious) fault, personal liability cannot be imposed upon the officer, agent, or employee simply because of his general administrative responsibility of performance of some function of the employment. He must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiff's damages. If the defendant's general responsibility has been delegated with due care to some responsible subordinate or subordinates, he is not himself personally at fault and liable for the negligent performance of this responsibility unless he personally knows or personally should know of its non-performance or mal-performance and has nevertheless failed to cure the risk of harm.[11]

At the time it was decided, the *Canter* theory was viewed principally as a means of circumventing the statutory tort immunity of employers under workers' compensation law.[12] That use of the case has since been abrogated by statute.[13]

Nevertheless, outside of situations in which *Canter* might have interfered with workers' compensation policies, its result was consistent with general principles of tort law. Prior to *Canter*, the lower courts

---

11. Id. at 721.

12. If the courts were going to hold corporate officers personally liable for negligence which caused work-related injuries to co-employees, the corporate employer was often going to end up, through officer indemnity or insurance arrangements, paying for the very tort claims for which it was supposed to have immunity under workers' compensation law. See *Canter*, 283 So. 2d at 728-33 (dissenting opinion of Justice Summers); 2 W. Malone & A. Johnson, Workers' Compensation Law & Practice § 364, at 154-57, in 14 Louisiana Civil Law Treatise (2d ed. 1980).

13. Under La. R.S. § 23:1032, enacted in 1976, the tort immunity of the employer was extended to cover not only the employer or principal itself, but also "any officer, director, stockholder, partner or employee of such employer or principal."

had been split on the question of whether a duty of care that arose strictly out of an employment relationship, and which would not have been owed by a person outside of such a relationship, was owed only to the other party to the relationship—the employer—or was instead owed generally to all persons who might be injured by a breach of that duty.[14] Here, as in later cases that went too far in the opposite direction, some of the courts confused the functions and scope of contract and tort law. They concluded that tort duties were limited to those duties owed by all members of society, regardless of their contracts, so that a contractual relationship could not itself create risks of personal injury which would justify the imposition of a tort duty of care. Thus, where a person assumed special duties as a result of a contractual relationship, these responsibilities were considered strictly contractual in nature, and so could be enforced only by parties to the contract.

Canter explicitly rejected this theory and held that "the duty may be imposed upon the defendant solely because of the employment or agency relationship, but its breach may nevertheless make him individually liable for harm thereby sustained by a third person."[15] The *Canter* court noted Professor Malone's observation that its broader theory of liability incorporated the principle of Section 354 of the Restatement (Second) of Agency,[16] and citing that section along with Sections 282 and 284,[17] as well as several earlier Louisiana cases, explained that "the breach of the duty imposed by the employment or agency relationship may, under general tort principles, be actionable negligence because of the creation or maintenance thereby of an undue risk of harm to others."[18]

---

14. Compare, e.g., Maxey v. Aetna Casualty & Sur. Co., 255 So. 2d 120, 122 (La. App. 3rd Cir.), writ refused, 260 La. 123, 255 So. 2d 351 (1971) and Shelton v. Planet Ins. Co., 280 So. 2d 380, 383 (La. App. 2d Cir.), writ denied, 281 So. 2d 758 (La. 1973) (duty owed strictly to employer) with, e.g., Adams v. Fidelity & Casualty Co. of N.Y., 107 So. 2d 496, 500-08 (La. App. 1st Cir. 1958) and Johnson v. Schneider, 271 So. 2d 579, 583-86 (La. App. 1st Cir. 1972) (duty owed to the class of persons subjected to harm by the employee's negligent behavior).

15. 283 So. 2d at 722.

16. Id. at 720. The Restatement (Second) of Agency § 354 (1958) provides that:

> An agent who, by promise or otherwise, undertakes to act for his principal under such circumstances that some action is necessary for the protection of the person or tangible things of another, is subject to liability to the other for physical harm to him or to his things caused by the reliance of the principal or of the other upon his undertaking and his subsequent unexcused failure to act, if such failure creates an unreasonable risk of harm to him and the agent should so realize.

17. The Restatement (Second) of Agency §§ 282 and 284 (1958) deal, respectively, with imputing an agent's knowledge to the principal, and with the admissibility of evidence of an agent's statement for purpose of proving that the statement was made, if the fact of making the statement is relevant.

18. 283 So. 2d at 722.

Notice that *Canter* did *not* say that *all* contractual duties always create corollary or incidental tort duties on the part of the person through whose personal action the contractual duty is to be performed. Instead, it simply recognized that contractual relationships, like other events or circumstances, might create a situation in which the failure of a person to exercise due care could cause personal injury to another.[19] Thus, although members of society may not generally owe a duty to exercise care in calculating load figures for construction cranes, and though no such duty would have been owed by the defendants in *Canter* had they not taken the jobs they had, the supreme court has held that this kind of duty *can* be imposed on a particular person if for some reason—including his contractual relationship with his employer—his conduct (or another person's reliance on his expected conduct) poses a risk of personal injury to others.[20] A duty such as this is imposed for the same reason that similar duties are imposed under tort law generally: to avoid—or at least properly allocate the economic costs of—accidental personal injury. Certainly, this is not the type of duty which is imposed *regardless* of the contract—the relationship and expectations associated with the contract have a causal relationship with the risk of injury posed—but neither is it a duty imposed simply because a contract exists and the employer is relying on his employees to perform it.[21]

Nevertheless, despite the personal injury context[22] of *Canter*, and despite the court's efforts to emphasize the connection between an

---

19. Accord, W. Prosser & P. Keeton, The Law of Torts §§ 92 and 93, at 657-58, 667-68, 670 (5th ed. 1984) [hereinafter Prosser].

20. 283 So. 2d at 721-23.

21. The *Canter* court did say that a duty may arise "solely" as a result of an employment relationship, yet be enforceable by third parties. See supra text accompanying note 15. But the court could not have meant, literally, that anyone injured "solely" by any breach of any duty arising out of the employment relationship would have a cause of action against the employee. Such a rule would have effectively abolished the long recognized legal distinction between incidental and intended third party beneficiaries of contracts because all third parties, regardless of the intention of the parties to the employment contract, would have become, for all practical purposes, "intended" third party beneficiaries of the employment contract, entitled to sue if their interests were damaged by any breach of any duty that the contract imposed; see La. Civ. Code arts. 1978-1982; Smith, Third Party Beneficiaries in Louisiana: The Stipulations *Pour Autrui*, 11 Tul. L. Rev. 18, 28 (1936). Nothing in the opinion suggests that the court had any idea that it was doing anything so radical. In context, the court's language has a much more limited meaning. The court was responding to the arguments of some lower courts that a duty that would not have arisen without, or but for, the employment relationship could not be enforced by persons outside that relationship, that is, by anyone other than the employer. See supra text accompanying notes 14-18. So when the *Canter* court referred to a duty arising "solely" out of the employment relationship, it was referring simply to duties that would not have arisen without the relationship.

22. Similar tort duties of care have also been recognized to avoid accidental physical harm to the tangible things of another. See Restatement (Second) of Agency § 354 (1958); H.B. "Buster" Hughes, Inc. v. Bernard, 318 So. 2d 9, 12 (La. 1975).

employee's tort duty and general principles of tort law, some lower courts eventually latched on to the "delegation of duty" language in *Canter*, and interpreted it to mean that an employee incurred a personal, tort duty of care to third parties whenever he was assigned, or somehow undertook, to carry out the tasks with respect to which the employer owed *any* duty of care, and sometimes any duty whatsoever, regardless of the source or purpose of that duty.[23]

Thus, in the lower court decision in *9 to 5*, once the court declared that the corporate employer owed a duty of care in connection with its administration of a uniform supply contract, it was a short and easy step to the conclusion that an officer who had been careless personally in carrying out the contract-related tasks assigned to him by the corporation could be held personally liable under *Canter* to the other party to the contract.[24]

---

23. See 9 to 5 Fashions, Inc. v. Spurney, 520 So. 2d 1276 (La. App. 5th Cir. 1988). The fifth circuit, addressing liability for alleged financial losses arising out of a corporation's breach of a uniform supply contract, stated:

> [A] corporation has a duty to exercise due care in its relationship with third parties, and the same acts or omissions may constitute breaches of both general duties giving rise to actions in both tort and contract. [citations omitted] When the duty to exercise due care is breached by an officer or agent to whom the duty is delegated, and a third party is injured thereby, personal liability attaches, regardless of whether the breach was accomplished through malfeasance, misfeasance or nonfeasance . . . LWE [the employer] delegated to Spurney [the employee] the responsibility of securing and administering the contract with 9 to 5 Fashions. With the delegation of authority went the responsibility or duty to act with due care.

Id. at 1283; Hemphill-Kunstler-Buhler v. Davis Wholesale Elec. Supply Co., Inc., 516 So. 2d 402, 404 (La. App. 1st Cir. 1987), writ denied, 520 So. 2d 751 (1988) (in dealing with liability for alleged financial losses arising out of corporation's breach of auctioneer's contract, the court reversed the trial court's exception of no cause of action where the complaint alleged that the employer "owed a duty to [the plaintiff] to carry out its end of the contract . . . that this duty was delegated to Williamson [the employee] by Davis [the employer], that Williamson breached this duty by his personal fault . . . and that [the plaintiff] suffered damages in the form of lost commissions as a result of Williamson's breach of duty."); Scariano Bros., Inc. v. Hammond Constr., 428 So. 2d 564, 566-67 (La. App. 4th Cir. 1983) (in dealing with liability of an insulation subcontractor's president for defects in construction arising out of subcontractor's alleged breach of insulation subcontract, the court reversed the trial court's exception of no cause of action against the president. The plaintiff alleged that the defendant employee had "(1) personally allowed certain insulation to be left out of the job, (2) personally failed to inspect and supervise the work to insure compliance with plans and specifications, (3) allowed the work to be sealed and closed in without having same checked and approved by the architects and expert; and (4) failed to insure proper sealing of penetrations of the vapor barrier." These pleadings "[met] the Canter test, supra, in that [they] allege that [the employee] had been delegated the duty of properly handling the subcontract, this was a personal duty which he owed to [the plaintiff contractor] and he breached this duty by his fault through the acts which are enunciated in the pleadings. . . .").

24. 520 So. 2d at 1283-84.

And under similar reasoning, though *Canter* was not cited, the supreme court itself could point out in its 1985 *Fryar* decision that when a bank entered into a contract for a collateralized certificate of deposit, a bank officer who had carelessly handled the transaction for the bank could be held personally liable under tort law in connection with the bank's failure to deliver the collateral as promised. This was so, the court reasoned, because the defendant was "personally involved" in the transaction, and indeed was "the only officer of [the bank] directly involved and responsible for the Bank's commitments in [the contract]."[25] The court pointed out that "[a]n employee cannot shield himself behind a corporate wall when he is the officer responsible for the corporation's acts in a particular transaction."[26]

In contrast to *Canter* itself, these were shocking, incredible decisions. They essentially said that every *contract* duty of a principal or employer would become—sometimes in modified, due-care form[27]—a *tort* duty owed by the employer's workers whenever the employer chose to perform its contracts in the usual way, i.e., through the personal conduct of its employees.

Traditionally, this sort of arrangement—a company performing its contracts through the personal conduct of its employees—had not been thought to create any personal liability on the part of the employees, for it had not been supposed that the mere fact that an employee engaged, or was told or expected to engage, in personal *conduct* in connection with his principal's contracts automatically imposed on him a personal *duty* to the other party to exercise care to avoid injuring

---

25. 479 So. 2d 883, 890 (La. 1985).

26. Id. This statement suggests some misunderstanding of the source of an officer's freedom from liability for contracts he negotiates for a corporation. Any disclosed agent enjoys freedom from liability for the performance of the contracts he negotiates for his principal, whether or not the principal happens to be a corporation. See La. Civ. Code art. 3013. It is not the "corporate wall" which "shields" an officer/agent from liability, but the simple application of basic agency law principles. The persons who need the "shield" of corporation law are the shareholders of corporations, who without the limited liability provided by corporation law would normally be held personally liable as principals or partners for the contracts negotiated in their business' names. Compare La. Civ. Code arts. 2817 (partners personally liable) and 3021 (principal bound by authorized acts of agent) with La. R.S. 12:93 B (1969) (shareholders not personally liable). The court's implicit assumption that there is something extraordinary about a corporate officer's freedom from liability for his corporation's contracts suggests that the *Fryar* court failed to understand that an officer is normally not considered liable for his company's contracts for the simple reason that, under the terms of those contracts, the contracting parties do not expect him to be personally liable. See infra text accompanying notes 42-46.

27. Some of the cases seemed to go so far as to say that the employee actually was obliged to perform the contractual duty itself. See *Hemphill-Kunstler-Buhler*, 516 So. 2d at 402, and *Scariano Bros.*, 428 So. 2d at 564.

that party's interests in the proper performance of the contract.[28] These types of interests—in the performance of a contract—were generally thought to be protected by contract law,[29] and contract law held that only those persons who were parties to a contract owed the duties that the contract created.[30]

Yet, contrary to this traditional understanding, the new decisions seemed to say that personal liability could *not* be avoided by a worker whose personal conduct was to contribute in some way to his employer's fulfillment of its contractual obligations.[31] These decisions seemed to leap from the idea that all persons owe *certain* duties of care in their personal conduct to the conclusion that all persons, including workers, owe some general duty of care to the world that makes them liable for *any* type of injury, to any person, that is a foreseeable result of some

---

28. Obviously, even while performing his job, an employee owes the same duty of care to avoid personal injury and other traditionally protected forms of interest as he owes as a result of engaging in the same conduct outside of an employment setting. Moreover, under *Canter*, it was clear that the traditional bar against tort suits based solely on negligent "nonfeasance" (the careless failure to act) was lifted in those situations in which, as a result of the reliance of an employer and/or a third party on an employee's undertaking job-related duties, a failure to act created risks of personal injury. But *Canter* did not say that employees had become obligated to the contract obligee to perform—or to exercise care in helping to perform—the employer's contractual duties, as such.

29. This principal was recognized by the supreme court in *9 to 5*, even as it abolished the traditional bar against all forms of tortious interference with contract. Under *9 to 5*, the new limitations on tortious interference cases, like the old absolute bar, recognize that tort law does not protect a contract obligee against damage to his interests in the performance of a contract caused by the carelessness of the obligor's employees. See 538 So. 2d 228, 232, 234-35 (La. 1989). Where the interests involved are not those arising purely out of the expectations of contract performance, of course, tort law might well impose a duty of care in connection with a contract. For example, a physician agreeing to perform surgery would incur a tort duty to act with care to avoid personal injury in carrying out the agreed operation. But this type of duty would arise independently of the contract terms themselves as a means of implementing the policies of tort law in protecting certain types of interests from harm—here the interest in avoiding personal injury—and not as a means of providing tort law protection of purely commercial interests in the performance of a contract; see Prosser, supra note 19, at 657.

30. Subject to a few limited, generally consent-based exceptions provided by law, for example the law concerning third party beneficiaries, La. Civ. Code arts. 1978-1982, and the heritability and transferability of rights and obligations, La. Civ. Code arts. 1821-1830, 1879-1887, 1984, 2642-2654, contract duties are owed strictly by and to the parties to the agreement. See La. Civ. Code arts. 1983, 1985.

31. See, e.g., 9 to 5 Fashions, Inc. v. Spurney, 520 So. 2d 1276 (La. App. 5th Cir. 1988), rev'd, 538 So. 2d 228 (1989); Hemphill-Kunstler-Buhler v. Davis Wholesale Elect. Supply Co., Inc., 516 So. 2d 402 (La. App. 1st Cir. 1987), writ denied, 520 So. 2d 751 (1988); Scariano Bros., Inc. v. Hammond Constr., 428 So. 2d 564 (La. App. 4th Cir. 1983).

act or failure to act on their part.[32] *Canter*, under this reasoning, simply created a job-related expectation of conduct that would permit *inaction* by an employee—an officer's failure to get needed information to a uniform supplier, for example—to constitute a breach of his duty of care.[33]

The result of this confused thinking was the creation of a doctrine that would have made it virtually impossible for the parties to a contract to negotiate for themselves the identity of the parties to be held liable in the event that the contract was breached. Theoretically, of course, the contracting parties could still have determined who was going to be liable under the contract itself, but that would have mattered little if the law was going to impose liability under another theory anyway; few defendants would have found much comfort in learning that they had become liable *only* in tort, and not in contract, for the duties that their contracts had created.

Moreover, as a practical matter, an owner of a small incorporated business would have lost much of the limited liability that contract, agency, and corporation law would otherwise have conferred on him in connection with a corporate contract.[34] Theoretically, the owner would still not have borne liability under corporation or agency law. But if, as a practical matter, his behavior was expected to contribute in some way to the corporation's performance of the contract (as it commonly would be in most small businesses) then the owner would have become liable for reasonable care in his contract-related efforts—and perhaps even for the performance of the contract itself[35]—even though he had neither guaranteed the contract nor promised in any contract binding

---

32. The supreme court has rejected this type of analysis, see PPG Indus., Inc. v. Bean Dredging, 447 So. 2d 1058, 1061 (La. 1984) (citing Malone, Ruminations on Cause-in-Fact, 9 Stan. L. Rev. 60, 73 (1956)).

33. See *9 to 5*, 520 So. 2d at 1282-83; *Scariano Bros.*, 428 So. 2d at 566-67; *Hemphill-Kunstler-Buhler*, 516 So. 2d at 404. Cf., Fryar v. Westside Habilitation Center, Inc., 479 So. 2d 883, 890 (La. 1985) (*Canter* not cited, but similar duty theory utilized). Where *Canter* had rejected the idea that tort liability to a third party could never arise out of an employee's failure to act—and imposed such a duty where the failure to act caused the death of a construction worker (see supra text accompanying notes 15-22)—these later cases misunderstood the *Canter* language about negligent nonfeasance to mean that tort liability would always be imposed when an employee's failure to act caused harm of any kind to any other person, provided only that the failure to act could be characterized as negligent.

34. Generally, contract duties are owed strictly by and to the parties to the agreement. See supra note 30. Under agency law, a disclosed agent, acting within his authority, is not liable for the performance of his principal's contracts. See La. Civ. Code arts. 3012 and 3013. And under corporation law, the shareholders of a corporation are not liable for the obligations owed by their corporation. La. R.S. 12:93 B (1969).

35. See *Fryar*, 479 So. 2d at 883, *Hemphill-Kunstler-Buhler*, 516 So. 2d at 402, and *Scariano Bros.*, 428 So. 2d at 564.

on him as an individual that he would personally perform, or even exercise care in trying to perform, the obligations created in the contract. And finally, as illustrated in *9 to 5* itself, if a corporate employer had purchased officer and director liability insurance, a purely commercial creditor of the corporation would have been given indirect access to third party negligence insurance as a means of covering the risks of corporate insolvency that he would otherwise have been considered to have assumed (and priced into his contract) in dealing with the corporation.[36]

Thus, ironically, a case which had been designed to correct jurisprudential confusion of the respective roles of contract and tort law had now come to add to the confusion itself. *Canter* had been successful in correcting the overly restrictive view of tort duties in some of the pre-*Canter* decisions, but some of its teachings, out of context, had eventually ended up being interpreted to create an overly expansive—indeed a limitless—new theory of law, i.e., that tort law protected *all* interests that might be threatened by any behavior that, by reference to any such interest, might be characterized as careless.

Yet as far apart as the cases in these two different periods seemed to be, the early ones overly restrictive and later ones overly broad, in at least one sense they shared the same conceptual weakness. During both of these periods, some of the courts were too quick to rely on secondary rules of law without devoting enough attention to the more fundamental question being posed, namely, whether the duty being enforced was one that really ought to have been considered imposed by tort law, or instead was one that should have depended on consent under contract law for its existence.

A tort duty is a duty that society imposes on a person, without his consent, in order to protect other persons from harm to certain legally protected interests.[37] If a person causes damage by breaching a tort duty owed to the plaintiff, then, absent immunity, he is personally liable to the plaintiff for those damages. The fact that he may have agreed—in

---

36. The corporate obligor in *9 to 5*, LWE, was the nonprofit corporation that had operated the 1984 World's Fair in New Orleans. The corporation had agreed in its contract with 9 to 5 to pay for excess material ordered as a result of misinformation concerning the number of uniforms to be required. 520 So. 2d at 1289. This was the very loss claimed by 9 to 5 in its suit against the corporate officer. The corporation would clearly have been liable for this claim under its contract, but the corporation had become insolvent. Id. at 1282. Suing the officer under a tort theory provided a means for the plaintiff to seek access to the corporation's director and officer liability policy—and perhaps to the personal assets of the employee as well—and to avoid the consequences of the insolvency risks that it had assumed in its contract with the corporation.

37. See Restatement (Second) of Torts § 1, comments (d) and (e) (1965); Prosser, supra note 19, §§ 1, 30, 53, 92, 93, 129; S. Speiser, The American Law of Torts §§ 1:8-.14 (1983).

a contract or otherwise—to commit the tort on behalf of someone else (or, more realistically, to have agreed to engage in the conduct giving rise to the risk of injury against which the duty involved is designed to protect) is a matter that is irrelevant to his own liability. While the person for whom he was acting may also be held liable under appropriate circumstances—if, for example, he had the requisite control and economic relationship[38]—the fact that someone else may be held vicariously liable for the tort does not eliminate the liability of the tortfeasor himself.[39] The liability is not *transferred* in these cases from the worker to his employer; it is owed solidarily by both.[40] The employer is obliged because of his relationship with the tortfeasor and the employee is obliged because he committed the tort.[41]

If, on the other hand, the duty involved is contractual in nature, it is a duty owed only by those persons who agree, or who appear to agree, to assume it.[42] Since a disclosed agent does neither, he will not be held liable for his principal's contracts unless he has personally guaranteed them.[43] The principal, on the other hand, *is* obliged to the other party to the contract because he has consented, or has appeared to have consented, to his agent's expressing the necessary assent to the agreement.[44] Thus, in contrast to the tort duty, where liability for the breach of the duty is normally imposed on *both* parties (employer and employee) based on the policies underlying tort law, in the typical contract setting, *only* the principal owes the duty because it is only the principal who has agreed to owe it. That is why, when speaking of

---

38. See La. Civ. Code arts. 176, 2320; Rowell v. Carter Mobile Homes, Inc., 500 So. 2d 748, 751 (La. 1987).

39. See H.B. "Buster" Hughes, Inc. v. Bernard, 318 So. 2d 9, 12 (La. 1975); Restatement (Second) of Agency §§ 219 and 343 (1958).

40. See La. Civ. Code art. 1797, comment (b); Foster v. Hampton, 381 So. 2d 789 (La. 1980).

41. Id.

42. See supra note 30.

43. La. Civ. Code art. 3013.

44. See La. Civ. Code arts. 2985 and 2992 (agent acquires power through principal's act of giving it to him); La. Civ. Code art. 3021 (principal bound to execute engagements contracted by the agent in accordance with the principal's grant of power to him); Boulos v. Morrison, 503 So. 2d 1, 3 (La. 1987) (agent's power may be created by actual grant of authority to him by the principal, or, as far as the third party is concerned, by acts which make it appear to the third party that such authority has been granted). Consistent with the consent-based theory of principal-agent liability, an agency relationship does not by itself give rise to vicarious tort liability on the part of the principal for the negligent conduct of the agent. Liability of that type is based on a master-servant relationship, which under tort law principles, justifies the imposition of vicarious liability, due to the characteristics of a right of control and economic closeness. See Rowell v. Carter Mobile Homes, Inc. 500 So. 2d 748, 751 (La. 1987); Blanchard v. Omiga, 253 La. 34, 39-40, 215 So. 2d 902, 904-07 (1968).

contractual obligations, it can be said that the principal is generally liable only for those transactions that he has authorized, or appeared to authorize, i.e., consented to or appeared to have consented to,[45] while in a tort suit, the lack of the principal's actual or apparent consent to the tortious conduct involved will not prevent the imposition of liability.[46]

Of course, it is possible to view the law from purely a contract law or purely a tort law perspective, for the contract advocate could rationalize tort duties as implied-in-law social promises,[47] and the tort lawyer could treat contract promises as one means through which a person might incur a legal duty.[48] Indeed, if a person were clever enough, and well-informed enough, it seems likely that he could preserve the functional effects of the rules in either field, even while using the concepts and terminology of the other.

But, in practice, when lawyers or courts start using the terminology of one field in order to resolve a dispute traditionally analyzed through the concepts of the other, there is much more at stake than simple semantics. The traditional field is being ignored precisely because the policy judgments that have been made in that field, and expressed through its legal rules, would dictate a result different from the one desired. Thus, in the employee duty cases, when the plaintiff starts talking about "personal conduct" and "personal negligence," he is attempting to use the language of tort law to persuade the court to impose personal liability,[49] and when the defendant keeps emphasizing

---

45. See La. Civ. Code arts. 2985, 2992, 3021; Boulos v. Morrison, 503 So. 2d 1, 3 (La. 1987); Restatement (Second) of Agency § 140 (1958). The Restatement, in §§ 8 A and 140 (c), for example, recognizes that contractual liabilities can sometimes arise as a result of a relationship, without meeting the traditional elements of actual and apparent authority. But in those situations, the principal has still engaged in acts which give rise to an appearance that the agent is able, either as an agent or as an apparent principal himself, to enter into transactions of that kind. See Restatement (Second) of Agency § 8 A, comment (b), §§ 194-202 (1958).

46. See La. Civ. Code art. 2320 (liability imposed based on relationship); Rowell v. Carter Mobile Homes, Inc., 500 So. 2d 748, 751 (La. 1987); Restatement (Second) of Agency §§ 8 A, comment (a) and 216, comment (a) (1958).

47. Certainly, in connection with contract "interpretation" the law will often imply promises that were never consciously made, or will interpret contract language in a way not anticipated by one or both parties.

48. See G. Gilmore, The Death of Contract (1974).

49. See 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989); Hemphill-Kunstler-Buhler v. Davis Wholesale Elect. Supply Co., Inc., 516 So. 2d 402 (La. App. 1st Cir. 1987), writ denied, 520 So. 2d 751 (1988); Scariano Bros., Inc. v. Hammond Constr., 428 So. 2d 564 (La. App. 4th Cir. 1983); see also, Unimobil 84, Inc. v. Spurney, 797 F.2d 214 (5th Cir. 1986); Dutton & Vaughan, Inc. v. Spurney, 496 So. 2d 1126 (La. App. 4th Cir. 1986), writ denied, 501 So. 2d 208 (1987); Fine Iron Works v. Louisiana World Exposition, Inc., 472 So. 2d 201 (La. App. 4th Cir.), writ denied, 477 So. 2d 104 (1985); Donnelly v. Handy, 415 So. 2d 478 (La. App. 1st Cir. 1982); Ashley v. Volkswagen of America, Inc., 380 So. 2d 702 (La. App. 4th Cir. 1980).

that the employee was merely an agent, he is attempting to use the language of contracts so that the court will find the employee free of legal responsibility for the damages involved.[50]

But neither of these semantic arguments sheds much light on the real issues involved, for while both are equally correct, they support opposite results. Yes, a person may be held liable for breaching a tort duty that he personally owes to another—even if he breaches that duty in his capacity as an employee or agent of someone else. But no, in the absence of the newly-recognized tort of intentional interference with contract, a person may not be held liable for the breach of a contractual duty assented to by someone else—even if his personal conduct as an employee had something to do with the other person's breach.

The key to deciding whether to hold an employee liable in a given case, therefore, is to decide whether to treat that dispute purely as a breach of contract action, in which case the noncontracting employee will not be liable, or instead to recognize some tort duty owed by the employee to the plaintiff, the breach of which has rendered the employee personally liable. But to decide that basic question properly, a court must consider the functional, as opposed to the semantic, distinctions between the law of contracts and the law of torts. It will not do to say simply that an employee was "careless" or "negligent" with respect to another person's interests, for unless the employee owed some duty to that person to avoid injury to that particular interest, his "carelessness" should not give rise to liability.

The functional distinctions between contract and tort law can perhaps best be explained through a simple illustration. Consider the case of an architect working for a firm hired to design an office building. The architect could hardly be heard to say that he owed only those duties of care created in his employment contract, and that since he had not become a party to his employer's contract to design the building, he owed no duties of care to persons who might be injured as a result of his carelessness on the job. The social policies expressed through tort law would impose upon him a duty to exercise care as to safety in the design of the building, despite any terms in his contracts to the contrary, for his job will have placed him in a position through which his carelessness in carrying out the tasks undertaken by him in connection with his employer's contracts could result in personal injury or death to others.

In some sense, it is true, the architect's tort duty would arise out of the combination of his own contract of employment and his em-

---

50. See American Bank & Trust Co. v. Shel-Boze, Inc., 527 So. 2d 1052 (La. App. 1st Cir.), writ denied, 532 So. 2d 155 (1988); Sondes v. Sears, Roebuck & Co., 501 So. 2d 829 (La. App. 4th Cir. 1986).

ployer's contract to design the building. But the duty would not be owed simply because the employer owed some contractual duty that he delegated to the employee architect. Rather, the relationship that the design and employment contracts created would have set up a situation in which the employer was so manifestly relying on the architect to help him meet the duties he owed to third parties that the architect could foresee that his own carelessness in designing the building might result in personal injury to others. Under these circumstances, in accordance with general principles of tort law, a personal duty would surely be imposed on the architect.

It is important to understand, however, that even though the duty involved would be factually related to the contract, it would be legally distinct from and independent of that contract. Indeed, it really would not matter whether the situation was created by a contract that was enforceable as such—as a legal contract—or whether by some other form of consensual undertaking the architect had simply undertaken to provide these services under circumstances in which the owner's reliance on him was evident. Thus, if the contract happened to be unenforceable on grounds of mistake, for example, or the failure to comply with formality requirements, the tort duty would arise nevertheless. That would be so because the source of the duty involved would not be the contract itself, but rather society's interests in protecting its members against uncompensated accidental personal injury; the enforceability of the duties created solely by the contract itself would not be at issue.

But having recognized that tort law does, and should, impose *some* duties as a result—but independently—of an employer's contract, it is equally important to say that the policies of contract law have their place as well, and that tort law should not be allowed to control *all* of the terms through which persons transact their affairs with others.

Take the same architect/employee and the same design contract. Now assume that the employer promised in its contract that the building involved would be designed so that energy costs would not exceed some stated maximum amount annually. Assume also that this promise was breached as a result of the egregious recklessness of the architect employee, who never bothered to determine how the energy costs of the building might be affected by the side-by-side fireplaces and ice sculpture displays that he called for in his drawings.

In this case, the employer would undoubtedly be said to have owed a duty of care, indeed a duty of strict performance, to the contract obligee to make sure that the building conformed to the promised specifications. He may well have "delegated" that duty to the employee,[51]

51. The "delegation" would occur not in the technical, contractual sense that the

who in turn failed to exercise care in seeing to it that the duty was fulfilled, which failure caused damage not only to the contract obligee but to other persons who may have some interest in controlling energy costs. But despite all that, it would still represent a major new expansion of tort law to say that the owner of the building, or anyone else, would have a tort claim against the employee for the economic harm he had suffered as a result of the employee's carelessness.

Traditionally, tort law has not attempted to protect the intangible economic or financial interests of a party in the proper performance of a contract.[52] That has been left to contract law.[53] Hence, if the owner had wanted some personal assurance from the employee that he, personally, would exercise care in designing an energy-efficient building, he would have been expected to ask for it in the form of some sort of personal contract or guarantee by the employee himself. Absent that, the owner would be considered to have satisfied himself that his interests in getting an energy-efficient building constructed were adequately protected—at least in light of what he was willing to pay to get the protection—by the terms of his contract. Had he wanted something more than what was provided for in the contract, he should have asked for it—and paid for it—through different contractual terms.

These are extreme examples, surely, but they make the point: a duty to exercise care to avoid personal injury is imposed for reasons quite different from those that might support the imposition of a duty to exercise care to avoid the wasting of energy. Although society has long recognized an interest in regulating private behavior that poses risks of personal injury, it has so far not deemed itself interested in protecting the owners of buildings, or others who might have similar concerns, against damage to their interests in energy efficiency. It has therefore left those types of matters to freedom of choice and private agreement, i.e., to contract law.

In summary, then, the courts in most contract-related employee duty cases are being asked to decide whether to let the private agreements

---

employee assumed the employer's contractual obligations to the other party, but in the ordinary, nontechnical sense that the employer instructed the employee to carry out the task that the employer had assumed. The employee would be bound to carry out the instructions of his employer in connection with the design of the building because of the existing terms of the employment contract, not because of any new, independent, contract of assumption on the part of the employee.

52. Cf., PPG Indus., Inc. v. Bean Dredging, 447 So. 2d 1058 (La. 1984) (no protection against intangible economic losses caused by negligence, even where the plaintiff not a party to the contract involved, and therefore not in a position to negotiate contractual protections).

53. Cf., *9 to 5 Fashions, Inc.*, 538 So. 2d at 232, 235 (rejecting theory of negligent interference with contract); *PPG Indus., Inc.*, 447 So. 2d at 1061-62 (rejecting claim for economic losses arising out of negligent damage to pipeline).

of the parties control the nature of the duties owed, and the identity of the parties who owe them, or, instead, to recognize some public interest in the transaction or event involved that would justify the imposition and enforcement of a particular socially-imposed duty. If the parties are free to choose, then under contract and agency law an employee or agent will normally[54] not incur liability for the misperformance or nonperformance of the contract, despite his personal carelessness. If, on the other hand, some socially-imposed duty is deemed to be controlling, then under tort law the employee will be held liable if his departure from the socially-imposed standard of conduct has caused injury of a kind that the socially-imposed duty was designed to prevent.

It is not the purpose of this discussion to suggest where, exactly, the functional boundary between contracts and torts ought to be drawn—even if such a boundary *could* be drawn exactly—nor to suggest that, once drawn, it ought to remain in the same place. But it does seem appropriate to suggest that, in practical effect, contract law has always occupied whatever area in private law that tort law has left open for free choice of action, that area within which a person, having satisfied his tort duties, owes only those additional duties that he has agreed (or appeared to have agreed) to undertake in his contracts. Of course, this area of free choice has never been any more fixed or precise in size or shape than the prevailing compromise among competing social interests has let it be. But it is still vital for the law to recognize that *some* such area must be acknowledged, and that some obligations must be deemed *not* to exist unless they are assumed consensually in accordance with the rules governing the formation of contracts. Otherwise, the policy choices expressed through the rules of contract law, choices which favor freedom of choice and private ordering, will be suppressed. Private agreements will simply be factors to consider in ascertaining the presence of one or another of the elements of a tort law theory of liability—for example, the reasonableness of the defendant's behavior in light of his consensual undertakings or expectations, and/or the reasonableness of the plaintiff's behavior in relying on the defendant's promises.

The policies implicated in making the contract-tort distinctions are likely to change over time, of course, and when that happens, it would be perfectly consistent with the traditional role of the courts for them to decide to impose a tort duty that has never before been recognized. Although the need for the new duty might be disputed by some, as long as the deciding court recognized the step that it was taking in reducing the scope of contractual freedom, and tailored the new duty to fit the particular social policy that it had identified, it would be

54. If the agent has guaranteed the performance, or otherwise bound himself under contract law, of course, he would be personally liable.

difficult to fault the court's legal reasoning from a technical standpoint.

But what is disturbing about some of the post-*Canter* decisions[55] is that they have imposed liability under a virtually limitless new theory, based either on the duty language of *Canter* or on some expansive, all-encompassing tort law duty of care as in *Fryar*,[56] that all contract duties of an employer become tort duties of the employer's workers *simply* because the duties are "delegated" to the employees in the ordinary sense that it is the employee's personal behavior through which the employer expects to fulfill his contractual obligations. That kind of analysis cannot be defended. Tort law in Louisiana has so far not come anywhere close, as a matter of deliberate policy, to protecting a commercial contract obligee from the losses caused by the negligent failure of the obligor's employees to see to it that the obligor performs his contract.[57] It is simply erroneous, therefore, to interpret earlier personal injury cases to say that it has.

Undoubtedly, by recognizing even a limited form of tortious interference with contract, the supreme court decision in *9 to 5* has once again shifted the boundary between contracts and torts by increasing judicial regulation of commercial behavior and by reducing the freedom of action on the part of persons who may find it in their interest to cause someone else not to perform his contracts. Whether this particular step in moving the border between contracts and torts is a good or bad one is, like most policy choices, open to debate. But the supreme court has made a conscious choice in this case that is both legitimate and reasonable, and which, while creating a new tort, still recognizes that tort law ought not be permitted to displace the law of contracts entirely.

If other courts would take this type of approach in drawing the contract/tort boundary—making well-considered, careful adjustments—while also making their choices between contract and tort law more

---

55. *9 to 5*, 520 So. 2d 1276 (La. App. 5th Cir. 1988), rev'd, 538 So. 2d 228 (La. 1989); *Hemphill-Kunstler-Buhler*, 516 So. 2d at 402; *Scariano Bros.*, 428 So. 2d at 564. Several courts have recognized the need to interpret Canter v. Koehring Co., 283 So. 2d 716 (La. 1973), in context. See Unimobil 84, Inc. v. Spurney, 797 F.2d 214 (5th Cir. 1986); Fine Iron Works v. Louisiana World Exposition, Inc., 472 So. 2d 201 (La. App. 4th Cir.), writ denied, 477 So. 2d 104 (1985); Donnelly v. Handy, 415 So. 2d 478 (La. App. 1st Cir. 1982).

56. The holding of *Fryar*, 479 So. 2d 883 (La. 1985), as opposed to some of its unfortunate language, may be much narrower. The case may be interpreted to have held simply that the conduct of the out-of-state bank officer was sufficient, constitutionally, for Louisiana to exert personal jurisdiction over him in order to determine whether his conduct rendered him liable in tort law to a Louisiana-resident plaintiff.

57. *9 to 5* confirmed this, for even as it provided some limited protection against intentional, unjustified interference with contract, it also explicitly rejected the theory of negligent interference with contract. 538 So. 2d at 232, 235. Accord, *PPG Indus., Inc.*, 447 So. 2d at 1061-62.

explicit, later courts would not be as likely to end up, as did the courts in some pre- and post-*Canter* cases, *inadvertently* changing the law in a way that is *not* defensible as a reasonable shift in policy.