Louisiana Law Review

Volume 56 | Number 3
Spring 1996

Ruminations on Independent Fire Insurance Co. v. Able Moving and Storage Co.: Principal's Vicarious Tort Liability for Negligent Acts of an Agent's Servant

Wendell H. Holmes
Louisiana State University Law Center

Ruminations on *Independent Fire Insurance Co. v. Able Moving and Storage Co.*: Principal's Vicarious Tort Liability for Negligent Acts of an Agent's Servant

Wendell H. Holmes[*]

For decades, there has been no more bedrock principle of Louisiana agency law than this: the mere existence of an agency relationship does not impose upon a principal vicarious tort liability for the negligent acts of his agent, even if the acts were committed in connection with the agent's responsibilities. Rather, vicarious liability attaches only where the relationship between the parties is also that of master and servant. The master-servant relationship, in turn, exists only where the agent's physical activities are subject to control by the principal, and the agent has a close economic relation to the principal. Absent control, there could be no liability. The Louisiana Supreme Court has, on numerous occasions, recited this mantra![1]

The Louisiana Supreme Court has now, however, articulated what may become a far-reaching exception to this heretofore sacrosanct rule. In *Independent Fire Insurance Co. v. Able Moving and Storage Co.*,[2] the court held that a principal could, under certain circumstances, become vicariously liable for the acts of servants of the *principal's agent*, based upon the doctrine of apparent

---

* Liskow & Lewis Professor of Law, Louisiana State University Law Center. B.A. 1974, Millsaps College; J.D. 1977, Tulane University.

1. *See, e.g.*, Rowell v. Carter Mobile Homes, Inc., 500 So. 2d 748 (La. 1987); Blanchard v. Ogima, 253 La. 34, 215 So. 2d 902 (1968). The master is liable, of course, only for acts committed in the course and scope of the servant's employment. Reed v. House of Decor, Inc., 468 So. 2d 1159 (La. 1985); McLain v. Safeway Ins. Co., 662 So. 2d 837 (La. App. 2d Cir. 1995).

Vicarious liability of the master finds its codal basis in La. Civ. Code art. 2320:

> Art. 2320. Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.
>
> Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.
>
> In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.
>
> The master is answerable for the offenses and *quasi*-offenses committed by his servants, according to the rules which are explained under the title: *Of quasi-contracts, and of offenses and quasi-offenses.*

The "might have prevented" clause has, of course, effectively been read out of the article by the jurisprudence. *See Blanchard*, 253 La. at 34, 215 So. 2d at 902. For general background on Louisiana doctrine, see, e.g., John S. Odom, Jr., Comment, *Master's Vicarious Liability for Torts Under Article 2320-A Terminological "Tar-Baby,"* 33 La. L. Rev. 110 (1972). Classic treatments of vicarious liability include O.W. Holmes, *Agency*, 4 Harv. L. Rev. 345 (1891); Harold J. Laski, *The Basis of Vicarious Liability*, 26 Yale L.J. 105 (1916); Young B. Smith, *Frolic and Detour*, 23 Colum. L. Rev. 444 (1923).

2. 650 So. 2d 750 (La. 1995).

authority. Following its recent predilection in agency cases,[3] the court relied on the common-law *Restatement (Second) of Agency* to expand apparent authority beyond the boundary of contracts.

Part I of this "Rumination" discusses the *Able Moving* opinion. Part II analyzes it in the light of two earlier cases, one from the United States Court of Appeal for the Fifth Circuit, the other from the Louisiana Supreme Court. Part III offers some thoughts as to the impact this decision may have in the future.

I. THE OPINION

The facts of *Able Moving* are simple, even mundane. In need of a mover to rearrange furniture in her home for a party, one of the individual plaintiffs consulted the yellow pages and found an advertisement for "Bekins," a national mover which has only interstate moving authority from the Interstate Commerce Commission.[4] At the bottom of the advertisement[5] in "small light type" was the name "Able Moving & Storage Co.," a local mover with only Louisiana intrastate authority.[6] The plaintiff testified that she could not read the fine print and thought she was dealing with Bekins; the advertisement merely said "Call Bekins today."[7] She called the number listed and, according to the court, "nothing indicated she had reached Able's office."[8] The plaintiff hired "Bekins" for the job.

Two men performed the work; their van, caps, and shirts had a Bekins logo. The van and shirts also had an Able logo. Upon completion of the job, the plaintiff delivered a check for $175.00 payable to Bekins, which was endorsed "BEKINS" and deposited, although Able's manager testified that Bekins never received any revenue from the check. In any case, later in the day after the workmen left, a fire broke out in the house. In the face of conflicting testimony, the trial court concluded that the fire was most probably the result of a cigarette ember or butt left by one of the workmen, whom the plaintiff observed taking frequent smoke breaks.

Suit was filed against both Able and Bekins. By the time of trial, however, Able had ceased operations due to a fire which destroyed its warehouse. On the basis of its finding as to the fire's cause, the trial court returned a verdict against both companies on the theory that the advertisement created the impression that "they were one and the same."[9] That verdict was reversed by the Louisiana

---

3. *See* Woodlawn Park Ltd. Partnership v. Doster Constr. Co., 623 So. 2d 645 (La. 1993); Tedesco v. Gentry Dev., Inc., 540 So. 2d 960 (La. 1989).

4. The headnote of the opinion lists the actual defendant as "Bekins Real Estate Sales, Inc."

5. The actual advertisement is, perhaps unfortunately, not reproduced in the opinion.

6. 650 So. 2d at 751.

7. *Id.*

8. *Id.* It would perhaps be useful for analysis, however, to know just how the telephone was answered.

9. *Id.*

First Circuit Court of Appeal in an unpublished opinion.[10] The Louisiana Supreme Court's opinion, however, states that the court of appeal's theory was that Bekins had no control over the employees of Able.[11] The supreme court, in turn, reversed the court of appeal and reinstated the verdict.

The supreme court began its analysis with the question of Able's authority to act for Bekins. With little discussion, the court concluded that Able had both actual authority[12] and, citing Section 8 of the *Restatement (Second) of Agency*,[13] apparent authority manifested by the advertising and Able's use of Bekins' name.[14] This much of the opinion is unsurprising.

Bekins, however, argued that it had no control over Able or its employees, as previously noted;[15] therefore, it could not be liable for their acts. Bekins further argued that absent control, neither Able nor its employees could be servants of Bekins for whose torts it must answer.

Bekins' arguments were unsuccessful. The supreme court found a novel basis for distinguishing its earlier opinions in Section 267 of the *Restatement*:

---

10. Independent Fire Ins. Co. v. Able Moving & Storage Co., 642 So. 2d 327 (La. App. 1st Cir. 1994), *rev'd*, 650 So. 2d 750 (La. 1995).

11. 650 So. 2d at 751.

12. Actual authority has been characterized as "a contract between the principal and agent caused either expressly or by implication." AAA Tire & Export, Inc. v. Big Chief Truck Lines, Inc., 385 So. 2d 426 (La. App. 1st Cir. 1980). The Restatement (Second) of Agency characterizes it as "the power of an agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." Restatement (Second) of Agency § 7 (1958). Actual authority, then, exists by virtue of either words or conduct which the *agent* could reasonably interpret as meaning that the principal desires him to act on the principal's account. *Id.* § 26.

13. That section provides:

> Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.

Restatement (Second) of Agency § 8 (1958).

The court also cites, without clarifying its relevance, Section 8 B on agency by estoppel:

> (1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if
>
> (a) he intentionally or carelessly caused such belief, or
>
> (b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts.
>
> * * * *
>
> (3) Change of position, as the phrase is used in the restatement of this subject, indicates payment of money, expenditure of labor, suffering a loss or subjection to legal liability.

Id. § 8 B. The relationship between Sections 8 and 8B is discussed *infra* notes 32-48.

In a more puzzling move, the court also noted that "federal law recognizes a principal's possible liability under the doctrine of apparent authority," 650 So. 2d at 752 (citing 49 U.S.C. § 10934(a) (1995)) (dealing with household goods agents). This reference appears utterly gratuitous since, as the court acknowledges, the transaction at issue was not under the jurisdiction of the ICC.

14. 650 So. 2d at 752.

15. *See supra* text accompanying note 1.

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.[16]

Based upon this authority, the court summarily concluded that the rule in *Rowell*[17] and *Blanchard*[18] "does not apply when third parties act to their detriment on the basis of an agent's apparent authority."[19]

Here, in the court's view, Bekins had paid for and published an advertisement giving the erroneous impression that third persons actually dealing with Able were dealing with Bekins. The plaintiff so believed, relying upon both that representation and the other indicia of Bekins' presence to her detriment. Thus, the court concluded that since the plaintiff "reasonably relied on the representations that she was dealing with Bekins, *Bekins is responsible for the fault of its agent's servants.*"[20] That proposition, clearly, is new to Louisiana jurisprudence.

II. TWO CASES FOR COMPARISON

Although *Able Moving* represents the first reported opportunity for a Louisiana state court to plumb the meaning of Section 267, it is not the first time that a litigant has urged its incorporation into the laws of Louisiana. The United States Court of Appeals for the Fifth Circuit considered that in a 1980 opinion, *Arceneaux v. Texaco, Inc.*[21] *Arceneaux*, indeed, was a more dramatic case: a father drove his pickup truck, accompanied by his wife and three children, into a Texaco service station and asked the attendant to fill the tank. Apparently, the attendant lit a cigarette while doing so and ignited the gasoline, whereupon he proceeded to spray flaming fuel into the cab. The wife eventually died as a result, and the rest of the family was seriously injured. Understandably seeking a deep pocket, the plaintiff sued Texaco as well as General Motors, the manufacturer of the truck.[22] The claim against Texaco was, obviously, based upon the negligence of the attendant. Texaco's response was that the station was independently owned and, thus, it was not liable for the attendant's fault. The jury found for Texaco.[23]

---

16. Restatement (Second) of Agency § 267 (1958).
17. Rowell v. Carter Mobile Homes, Inc., 500 So. 2d 748 (La. 1987).
18. Blanchard v. Ogima, 253 La. 34, 215 So. 2d 902 (1968).
19. *Able Moving*, 650 So. 2d at 752.
20. *Id.* at 753 (emphasis added).
21. 623 F.2d 924 (5th Cir. 1980), *cert. denied*, 450 U.S. 928, 101 S. Ct. 1385 (1981).
22. The jury rejected the faulty design claim against GM. *Arceneaux*, 623 F.2d at 926.
23. *Id.* at 925-26.

Writing for the court, the late Judge Rubin first analyzed the plaintiff's apparent authority theory for imposing liability. He acknowledged that Louisiana courts had theretofore recognized vicarious liability for torts only in the master-servant context, and that while Louisiana jurisprudence obviously recognized apparent authority, the recognition had been limited to contractual relationships. Thus, he noted, it was not clear whether Louisiana courts would make the leap of faith required to impose vicarious liability for torts based solely on apparent authority.[24]

Nonetheless, Judge Rubin assumed, without deciding, that Louisiana courts would embrace the common law rules of apparent authority in tort cases as formulated in the *Restatement*. Citing Section 267 and the more general rule in Section 265,[25] Judge Rubin observed that both require that the injured person establish some *reliance* upon representations by the principal as an indispensable element for imposing vicarious liability. It was that element which, in turn, proved fatal to the plaintiff's claim, because in Judge Rubin's view he offered no evidence of *his* belief that Texaco operated the service station. In fact, the plaintiff had testified that he chose the station for convenience only: he needed gas and it was the most accessible station. Thus, the court concluded that the trial judge properly excluded evidence of a false impression, created by Texaco's advertising, that Texaco was responsible for service at Texaco stations, because the plaintiff neither alleged nor proved his reliance on the false impression.[26]

Able Moving, of course, now resolves Judge Rubin's doubts as to the applicability of apparent authority in tort cases in Louisiana. Judge Rubin's careful parsing of the *Restatement* rules, however, stands in marked contrast to the rather conclusory analysis of the supreme court in *Able Moving*. The supreme court seems to base liability under Section 267 upon the plaintiff's *belief* that the employees of Able were actually employees of Bekins. The comments to Section 267 make it clear, though, that *belief* is not the same thing as *reliance*. Rather, reliance means a *choice between alternatives*:[27] the

---

24. *Id.* at 926.

25. Restatement (Second) of Agency § 265 (1958) provides:

> (1) A master or other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent's apparent authority.
>
> (2) Unless there has been reliance, the principal is not liable in tort for conduct of a servant or other agent merely because it is within his apparent authority or apparent scope of employment.

26. 623 F.2d at 927.

27. *See* Restatement (Second) of Agency § 267, cmt. a (1958):

> The mere fact that acts are done by one whom the injured party believes to be the defendant's servant is not sufficient to cause the apparent master to be liable. There must be such reliance upon the manifestation as exposes the plaintiff to the negligent conduct. The rule normally applies where the plaintiff has submitted himself to the care or protection of an apparent servant in response to an invitation from the defendant to enter into such relations with such servant. A manifestation of authority constitutes an invitation to deal with such servant and to enter into relations with him which are consistent with the apparent authority.

plaintiff dealt with the negligent person because of the principal's representations. Thus, in *Arceneaux*, the plaintiff lost because he could not prove that he chose the Texaco station because of Texaco's representations.

Perhaps more importantly, to the extent liability is based upon Section 267, it demands that the choice be made on the basis of "*the care or skill of the apparent agent.*"[28] Stated another way, the connotation is that the third party assumed that agents or servants of that particular principal would be selected or trained to act with skill or care, and that assumption in turn induced the choice. Consider the following illustration to Section 267:

> P, a taxicab company, purporting to be the master of the drivers of the cabs, in fact enters into an arrangement with the drivers by which the drivers operate independently. A driver negligently injures T, a passenger, and also B, a person upon the street. P is not liable to B. If it is found that T relied upon P as one furnishing safe drivers, P is subject to liability to T in an action of tort.[29]

Applying this to *Able Moving*, if the plaintiff chose "Bekins" as opposed to other movers[30] solely because it offered the lowest rate,[31] then the imposition of vicarious liability under Section 267 may have been inappropriate. It is, of course, possible that the plaintiff chose Bekins as opposed to other movers operating in Baton Rouge because of a reputation for safety which it enjoyed. Or perhaps it would be enough to establish that she called a national, rather than purely local, mover because she believed national movers, such as Bekins, to be more careful and reliable. The opinion, however, suggests neither possibility. Given the potentially high stakes in such cases, one hopes that future courts applying *Able Moving* will look more to the plaintiff's *reliance* than her mere *belief*.

From the standpoint of purely Louisiana agency law, there is another puzzling aspect of *Able Moving*. In discussing the general doctrine of apparent authority, the court characterizes it as "an *estoppel* principle which operates in favor of third persons seeking to bind a principal for unauthorized acts of an agent. When the apparent scope of an agent's authority, the indicia of authority, is relied upon by innocent third parties to their detriment, the principal is liable."[32] There is no question that, historically, Louisiana courts have generally described apparent authority as a species of estoppel.[33] The long-standing

---

28. *Id.* § 267 (emphasis added).

29. *Id.* at illus. 1.

30. The opinion, unfortunately, does not disclose whether she contacted any others before selecting "Bekins."

31. That inference could be drawn from the court's opinion. *See* Independent Fire Ins. Co. v. Able Moving & Storage Co., 650 So. 2d 750, 751 (La. 1995) ("[p]leased with the quoted price, she called back and hired Bekins for the job").

32. *Id.* at 752 (citing Broadway v. All-Star Ins. Corp., 285 So. 2d 536 (La. 1973)).

33. *See, e.g.*, Boulos v. Morrison, 503 So. 2d 1 (La. 1987); *Broadway*, 285 So. 2d at 536; Stewart v. Parrazzo, 560 So. 2d 579 (La. App. 5th Cir. 1990); Genina Marine Servs., Inc. v. Mobil

recognition of apparent authority in the jurisprudence has, indeed, been unimpeded by the ostensible foreclosure of apparent authority by Articles 3010 and 3021[34] of the Louisiana Civil Code.

However, in a 1989 case, *Tedesco v. Gentry Development, Inc.*,[35] the Louisiana Supreme Court departed from its traditional posture and suggested, without expressly so holding, that it would thereafter recognize two separate concepts, one of apparent authority and another of agency by estoppel. *Tedesco* involved an attempt to obtain specific performance of a contract to sell immovable property executed by the defendant's president. Although the corporation had given the president no written authority to sell the property, the trial court found the contract enforceable on the theory that the president had apparent authority based upon various manifestations by the corporation.[36] Both the court of appeal[37] and supreme court held that the doctrine of apparent authority does not apply to transactions in immovable property; therefore, the *Tedesco* contract could not be binding because the "agent" lacked written authorization.[38]

Exploration Prod. Southeast, Inc., 506 So. 2d 922 (La. App. 1st Cir. 1987); Collins Dozer Service, Inc. v. Gibbs, 502 So. 2d 1174 (La. App. 3d Cir. 1987); National Bank of Bossier City v. Nations, 465 So. 2d 929 (La. App. 2d Cir. 1985).

34. La. Civ. Code art. 3010 provides:

> The attorney can not go beyond the limits of his procuration; whatever he does exceeding his power is null and void with regard to the principal, unless ratified by the latter, and the attorney is alone bound by it in his individual capacity.

In addition, La. Civ. Code art. 3021 provides:

> The principal is bound to execute the engagements contracted by the attorney, conformably to the power confided to him.
>
> For anything further he is not bound, except in so far as he has expressly ratified it.

35. 540 So. 2d 960 (La. 1989), *noted in* R.G. Passler, Tedesco v. Gentry Development, Inc.: *Apparent Authority Without Detrimental Reliance Equals No Sale*, 64 Tul. L. Rev. 976 (1990).

36. *See* 540 So. 2d at 962 & n.5. As the supreme court noted in its opinion, that conclusion seems, on the facts given, obviously wrong. All of the "manifestations" were made only to the president himself or to the realtor who listed the property, not the plaintiffs. *Id.* at n.6. Indeed, if the president had "authority" at all, the only plausible theory would have been *implied* authority, which is based upon the *agent's* reasonable inferences drawn from the principal's statements to him. In effect, implied authority embraces those acts necessary and proper to effectuate the agent's *express* authority from his principal. La. Civ. Code art. 3000; Broadway v. All-Star Ins. Corp., 285 So. 2d 536 (La. 1973); AAA Tire & Export., Inc. v. Big Chief Truck Lines, Inc., 385 So. 2d 426 (La. App. 1st Cir. 1980). Since the corporation in *Tedesco* was organized to develop real estate, one could easily assume that its president might reasonably believe that he had the authority to sign contracts of sale—particularly since the corporation's board of directors *had* approved other sales previously made by the president. *See* 540 So. 2d at 961-62.

37. Tedesco Gentry Dev., Inc., 521 So. 2d 717 (La. App. 2d Cir. 1988).

38. 540 So. 2d at 964-65. The court based its conclusion on La. Civ. Code art. 2440, requiring that contracts for the sale of immovables be in writing; La. Civ. Code art. 2996, requiring that power to alienate must be express; and La. Civ. Code art. 2997, requiring express power to sell or to buy. *Id.* at 964. While nothing in the latter two articles necessarily demands *written* express authorization, the court followed earlier appellate decisions making that extrapolation. This is sometimes referred to as the "Equal Dignity Rule." *See, e.g.*, Harold G. Reuschlein & William A. Gregory, Handbook

In the course of the opinion, however, the court, after acknowledging the traditional equating of apparent authority and estoppel, very carefully delineated the distinctions between apparent authority, as defined in Section 8 of the *Restatement*,[39] and agency by estoppel as defined in Section 8 B.[40] As the court noted, apparent authority is a corollary of the objective theory of contracts: having made manifestations to a third party that, reasonably construed, create the impression that an agent is empowered to act for him, the principal is bound regardless of his actual, subjective intent.[41] Conversely, agency by estoppel is a tort-based theory grounded in the principal's fault:[42] having intentionally or negligently caused a third person erroneously to believe a transaction was effected for him, or having failed to clarify the true facts after gaining knowledge of that belief, the principal becomes liable for damages incurred by a third party who has *changed his position* as a result thereof. "Changed his position" is defined as a "payment of money, expenditure of labor, suffering a loss or subjection to legal liability."[43]

As the court noted, bifurcating apparent authority and agency by estoppel is not merely an academic exercise: different results may obtain if apparent authority is detached from estoppel.[44] For example, while apparent authority under the *Restatement* requires manifestations by the principal, from the third party's perspective it demands only reasonable belief in the agent's authority, *not* a "change of position." Thus, a contract is formed between the principal and third party immediately, without the need for the third party to prove detrimental

---

on the Law of Agency and Partnership 31 (1979). The rule has, however, generally been abandoned at common law absent a statute requiring authorization in a specific form. *See* Restatement (Second) of Agency §§ 26-27 (1958). Whatever arguments might be made against it, however, the rule is now firmly entrenched in Louisiana law. A subsequent case has extended it to suretyship contracts. Fleet Finance, Inc. v. Loan Arranger, Inc., 604 So. 2d 656 (La. App. 1st Cir. 1992).

39. *See supra* note 13.

40. Restatement (Second) of Agency § 8 B (1958) provides:

> (1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if
>
> (a) he intentionally or carelessly caused such belief,
>
> (b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts.
>
> (2) An owner of property who represents to third persons that another is the owner of the property or who permits the other so to represent, or who realizes that third persons believe that another is the owner of the property, and that he could easily inform the third persons of the facts, is subject to the loss of the property if the other disposes of it to third persons who, in ignorance of the facts, purchase the property or otherwise change their position with reference to it.
>
> (3) Change of position, as the phrase is used in the restatement of this subject, indicates payment of money, expenditure of labor, suffering a loss or subjection to legal liability.

41. *Tedesco*, 540 So. 2d at 964.

42. *Id.*

43. Restatement (Second) of Agency § 8 B (1), (3) (1958).

44. *Tedesco*, 540 So. 2d at 964-65.

reliance. On the other hand, while agency by estoppel requires detrimental reliance, it is not based upon affirmative manifestations by the principal, but on broader notions of fault. Finally, in the precise situation posed in *Tedesco*, the court raised, without deciding, the possibility that agency by estoppel could be applied to compensate a third party for damages for his *reliance* interest in a contract for the sale of immovable property notwithstanding the lack of written authorization. Since the plaintiff in an agency by estoppel action is not seeking enforcement of the *contract*, but rather reliance damages, the court suggested that those damages might be awarded in an appropriate case.[45] Thus, it is clear that distinguishing apparent authority from agency by estoppel would have the effect of broadening what the court refers to as an agent's "unprivileged power"[46] under Louisiana law.

Oddly though, while *Able Moving* quotes both Sections 8 and 8 B of the *Restatement*,[47] the court also returns to its previous characterization of apparent authority as an estoppel-based principle.[48] One is left to wonder whether this is an implicit repudiation by the court of its *Tedesco* opinion, or merely loose dictum used without conscious regard to its meaning. Louisiana law would be better served if the latter case is true, but only subsequent decisions can tell that story.

III. *ABLE MOVING*'S IMPACT: WHERE DO WE GO FROM HERE?

The most obvious ramifications of embracing the Section 267 theory are in the franchisor-franchisee setting. Suppose I pull into the nearest McDonald's for coffee but, as the attendant at the drive-in window hands me the cup, she carelessly drops it in my lap with the top askew. Have I now acquired a tort action against the national franchisor, as well as the local franchisee, under Section 267? Must I prove that I selected McDonald's instead of, say, Burger King or Wendy's because I believed that McDonald's trains its employees to exercise greater care and skill than other fast-food chains? The fact that a number of Section 267 cases have involved franchising illustrates that these are not idle concerns.[49] At a minimum, franchisors should consider whether their

---

45. Since the plaintiffs in *Tedesco* sought only enforcement of a purely executory contract, and could show no "change of position," the court was not compelled to decide the issue. *Id.* at 965.

46. *Id.* at 963. The term originated with Professor Warren Seavey. *See, e.g.*, Warren A. Seavey, *The Rationale of Agency*, 29 Yale L.J. 859, 861 (1920).

47. *See* Independent Fire Ins. Co. v. Able Moving & Storage Co., 650 So. 2d 750, 752 (La. 1995).

48. *See supra* text accompanying note 32.

49. *See, e.g.*, Crinkley v. Holiday Inns, Inc., 844 F.2d 156 (4th Cir. 1988); Drexel v. Union Prescription Ctrs., Inc., 582 F.2d 781 (3d Cir. 1978); Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir.), *cert. denied*, 404 U.S. 829, 92 S. Ct. 65 (1971); Billops v. Magness Constr. Co., 391 A.2d 196 (Del. 1978); Shadel v. Shell Oil Co., 478 A.2d 1262 (N.J. 1984). For more general discussions of potential franchisor tort liability, see, e.g., William M. Borchardt & David W. Ehrlich, *Franchisor Tort Liability: Minimizing the Potential Liability of a Franchisor for a Franchisee's Torts*, 69 Trademark

liability insurance is broad enough to cover the acts of employees of franchisees.[50] On the other hand, at least one court has rejected a Section 267 claim against Chevron, a national oil company, on the basis that any belief that Chevron owns a local station was unreasonable as a matter of law because it is commonly known that the corporate logo was used by independent dealers simply selling Chevron's products.[51]

There is, however, a less obvious line of cases that has developed under Section 267. Those cases seek to impose vicarious liability on hospitals for the alleged medical malpractice of independent physicians using the hospital's facilities. A very significant number of cases have recognized the cause of action,[52] although some deny recovery on the basis that apparent authority was not established.[53] While these cases have engendered spirited academic debate,[54] courts have clearly been receptive to the argument that patients should not be bound by unknown clauses in a hospital-physician contract. Significantly, the Louisiana Supreme Court (in a case involving prescription and the *contra non valentem* doctrine) has previously indicated that hospitals bear no vicarious liability for the acts of independent contractor physicians.[55] There can be no

---

Rep. 109 (1979); Michael R. Flynn, Note, *A Critique of Franchisor Vicarious Liability*, 1993 Colum. Bus. L. Rev. 89.

50. The classic justification of vicarious liability in tort was, indeed, that it imposes the risk of loss on the person (i.e., the "master") who is in the best position to distribute the loss throughout the community by the acquisition of insurance. The best-known article is probably Smith, *supra* note 1, at 456-63. For a more recent economic analysis see Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231 (1984).

51. Chevron, U.S.A., Inc. v. Lesch, 570 A.2d 840 (Md. 1990). The extent to which such presumptions should be applied should depend, however, upon the precise industry involved. Many franchisors operate company-owned stores as well as doing business through franchisees.

52. *See, e.g.*, Walker v. Winchester Memorial Hosp., 585 F. Supp. 1328 (W.D. Va. 1984); Jackson v. Power, 743 P.2d 1376 (Alaska 1987); Street v. Washington Hosp. Ctr., 558 A.2d 690 (D.C. 1989); Orlando Regional Med. Ctr. v. Chemielewski, 573 So. 2d 876 (Fla. App. S. Dist. 1990), *review denied*, 583 So. 2d 1034 (Fla. 1991); Brown v. Coastal Emergency Servs., Inc., 354 S.E.2d 632 (Ga. Ct. App.), *aff'd*, 361 S.E.2d 164 (1987); Gilbert v. Sycamore Municipal Hosp., 622 N.E.2d 788 (Ill. 1993); Paintsville Hospital Co. v. Rose, 638 S.W.2d 255 (Ky. 1985); Mehlman v. Powell, 378 A.2d 1122 (Md. 1977); Hardy v. Brantley, 471 So. 2d 358 (Miss. 1985); Mastell v. St. Charles Hosp., 523 N.Y.S.2d 342 (1987); Capan v. Divine Providence Hosp., 430 A.2d 647 (Pa. Super. Ct. 1981); Brownsville Medical Ctr. v. Garcia, 704 S.W.2d 68 (Tex. Ct. App. 1985); Pamperin v. Trinity Memorial Hosp., 423 N.W.2d 848 (Wis. 1988); Sharsmith v. Hill, 764 P.2d 667 (Wyo. 1968).

53. *See, e.g.*, Albain v. Flower Hosp., 553 N.W.2d 1038 (Ohio 1990).

54. *See, e.g.*, William C. Anderson, III & Marilee Clausing, *The Expansion of Hospital Liability in Illinois: The Use and Abuse of Apparent Agency*, 19 Loy. U. L.J. 1197 (1988); Keith Phoenix & Anne L. Schleuter, *Hospital Liability for the Acts of Independent Contractors: The Ostensible Agency Doctrine*, 30 St. Louis U. L.J. 875 (1986); Gregory T. Perkes, Note, *Medical Malpractice—Ostensible Agency and Corporate Negligence—Hospital Liability May be Based on Either Doctrine of Ostensible Authority or Doctrine of Corporate Negligence*, 17 St. Mary's L.J. 551 (1986); Note, *Theories for Imposing Liability Upon Hospitals for Medical Malpractice: Ostensible Agency and Corporate Liability*, 11 Wm. Mitchell L. Rev. 561 (1985); Marian S. Alexander, *Recent Decisions*, 55 Miss. L.J. 879 (1985).

55. *See In re* Medical Review Panel of Howard, 573 So. 2d 472 (La. 1991).

doubt that the court will be offered the opportunity to revisit this issue under the newly mined theory in *Able Moving*.

IV. CONCLUSION

With its decision in *Able Moving*, the Louisiana Supreme Court has made a potentially major expansion of the doctrine of apparent authority by opening its application to the field of torts. As this Rumination has suggested, though, subsequent courts might consider more closely the issue of reliance, which is an integral element of the Section 267 theory, than *Able Moving* itself does. In any case, a new judicial acorn has been sown, and franchisors, hospitals, and others now await the coming oak.