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# "Apparent Servants" and Making Appearances Matter: A Critique of *Bagot v. Airport & Airline Taxi Cab Corporation*

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# "Apparent Servants" and Making Appearances Matter: A Critique of Bagot v. Airport & Airline Taxi Cab Corporation

## **Abstract**

Minnesota law has long recognized the agency law principle of apparent authority. Minnesota law also provides that an agent is liable for the contractual obligations of an undisclosed or partially disclosed principal. Both of these well-recognized principles provided a basis for the plaintiff's suit in Bagot, and both ought to provide a basis for similar suits in the future.

## **Keywords**

agency law, apparent authority, Bagot, partially disclosed principal, undisclosed principal, agent liability

## **Disciplines**

Agency | Business Organizations Law | Commercial Law

**“APPARENT SERVANTS” AND MAKING APPEARANCES  
MATTER: A CRITIQUE OF *BAGOT V. AIRPORT & AIRLINE  
TAXI CAB CORPORATION***

Daniel S. Kleinberger<sup>†</sup> and Peter Knapp<sup>††</sup>

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I. INTRODUCTION – THE *BAGOT* SCENARIO

Your adult son, though employed, is mentally handicapped. Ordinarily, you drive him to and from work, but over the next several weeks you will be out of town for a number of days. You decide to have a particular taxicab company fill in for you, and you make the necessary arrangements through a telephone call to the company’s dispatcher.

You believe the cab company employs cab drivers as well as dispatchers, and your belief comes from the company’s trade name, trade dress, advertisements, signage, and published

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telephone numbers. This appearance plays a role in your decision to have this particular company dispatch drivers to transport your son.

In due course, you leave town and the cab company dispatches cabs to transport your son. Unfortunately, one of these cabs is involved in an accident, the driver is at fault and your son is injured. Only when you seek compensation from the taxicab company for your son's injuries do you discover that the company does not in fact employ the drivers. Contrary to appearances, the drivers in those distinctively marked cabs are all independent contractors. The taxicab company denies any legal responsibility for the driver's negligence and for your son's injuries.

Addressing precisely this scenario, the Minnesota Court of Appeals concluded that the plaintiff could not proceed against the taxicab company.<sup>1</sup> In *Bagot v. Airport & Airline Taxi Cab Corp.*, the court concluded that (1) the cab driver was an independent contractor; (2) the taxicab company did not owe a non-delegable duty of care to the plaintiff; and (3) Minnesota does not recognize, through apparent authority, ostensible agency, or any other legal doctrine, any basis for plaintiff's claim against the defendant cab company.<sup>2</sup> One judge dissented,<sup>3</sup> and the Minnesota Supreme Court granted the plaintiff's petition for further review.<sup>4</sup> The parties subsequently settled the case,<sup>5</sup> and the Supreme Court then dismissed the appeal.<sup>6</sup>

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1. *Bagot v. Airport & Airline Taxi Cab Corp.*, No. C1-00-1291, 2001 WL 69489, at \*1 (Minn. Ct. App. 2001). The trial court granted summary judgment for the defendant taxicab company, and the plaintiff appealed. The introductory scenario is based on the facts accepted as true by the district court for the purpose of the summary judgment motion. Although the appellant "argue[d] that the district court made inappropriate findings of fact," the court of appeals ruled that "[t]he facts presented to the district court were not disputed by the parties." *Id.*

2. *Id.* at \*3-5.

3. *Id.* at \*6 (Klaphake, J., dissenting).

4. *Bagot v. Airport & Airline Taxi Cab Corp.*, No. C1-00-1291, 2001 WL 69489, at \*1 (Minn. Ct. App. 2001), petition for review granted, (Minn. March 27, 2001). The Supreme Court then took the unusual step of soliciting *amicus* briefs from the three law schools then operating in Minnesota, and the authors of this article filed a brief urging reversal of the Minnesota Court of Appeals decision.

5. Letter from Charles T. Hvass, Jr., counsel for Petitioner/Appellant, to Daniel S. Kleinberger and Peter B. Knapp (May 11, 2001) (on file with the William Mitchell Law Review).

6. *Bagot v. Airport & Airline Taxi Cab Corp.*, No. C1-00-1291, 2001 WL 69489, at \*1 (Minn. Ct. App. 2001), dismissed, (Minn. May 15, 2001).

## II. THE IMPORTANCE OF *BAGOT*

The issues raised by *Bagot* transcend both the case itself and the taxicab situation. In our modern economy, more and more service businesses present themselves to the marketplace as economically integrated enterprises while using independent contractors rather than traditional employees to provide the actual service.<sup>7</sup> Consider, for example, a scenario from the world of health care.

A parent is considering whether to take a seriously ill child to a free standing urgent care clinic or to the Emergency Room of the region's leading children's hospital. The parent thinks, “The ER staff is part of the hospital. They must be top notch.” That thought helps the parent decide to entrust the child to the ER. Unbeknownst to the parent, however, the hospital has “subbed out” the ER function to a group of independent contractors. Nothing in the hospital's publicity, advertising or signage has disclosed this fact. If the ER staff treats the child negligently, is the hospital unaccountable *as a matter of law* for the appearance it created and the role that appearance played in the parent's decision to bring the child to the ER?<sup>8</sup>

Whatever the type of business, the actual relationship among the parties is likely to fall within one of the following three structures:

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7. The phenomenon has caused problems in other contexts. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (en banc) (holding that ERISA benefits were available to workers whom the defendant claimed were independent contractors), *appeal after remand sub nom. Vizcaino v. United States Dist. Court for W. Dist. of Wash.*, 173 F.3d 713 (9th Cir. 1999), *op. amended on denial of reh'g sub nom. In re Vizcaino*, 184 F.3d 1070 (9th Cir. 1999), *cert. denied*, 528 U.S. 1105, (2000). The phenomenon also occurs with businesses selling goods, but that context is beyond the scope of this article. In such a context, liability typically arises from breach of contract rather than negligence. Where liability sounds in negligence, the doctrines of *respondeat superior* and apparent servant (discussed here) are central to the liability analysis. Those doctrines are inapposite to breach of contract claims.

8. *See, e.g.*, *Jackson v. Power*, 743 P.2d 1376, 1380 (Alaska 1987) (citing RESTATEMENT (SECOND) OF AGENCY § 267 (1957)); *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46 (Ohio 1994).

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Structure 1. Direct Service Provider is acting as servant employee of Apparently Integrated Business:

<u>Customer</u>	<u>Direct Service Provider</u>	<u>Apparently Integrated Business</u>
Parent in <i>Bagot</i>	Cab Driver	Taxicab Company
Parent of ER Child	ER Staff	Hospital

Structure 2. Direct Service Provider is acting in non-servant relationship (independent contractor) with Apparently Integrated Business:

<u>Customer</u>	<u>Direct Service Provider</u>	<u>Apparently Integrated Business</u>
Parent in <i>Bagot</i>	Cab Driver	Taxicab Company
Parent of ER Child	ER Staff	Hospital

Structure 3. Apparently Integrated Business is serving as a mere intermediary to arrange a relationship between Customer and Direct Service Provider:

<u>Customer</u>	<u>Apparently Integrated Business</u>	<u>Direct Service Provider</u>
Parent in <i>Bagot</i>	Taxicab Company	Cab Driver <sup>9</sup>

Which structure fits a particular situation is both a question of fact<sup>10</sup> and a crucial legal characterization. Where Structure #1 applies, the Apparently Integrated Business is the “master” of the Direct Service Provider and under the doctrine of *respondeat superior* is automatically and inescapably liable for any negligence of the Direct Service Provider which occurs “within the scope of employment.”<sup>11</sup> Where Structure #2 applies, *respondeat superior* has

9. Although arguably the situation in *Bagot*, this structure does not plausibly fit the ER scenario.

10. See, e.g., *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981) (stating that in a case determining whether an agent for an undisclosed principal, such relationship may be shown by circumstantial evidence); *North Face Exteriors v. Comm’r of Jobs & Training*, 457 N.W.2d 778, 780 (Minn. Ct. App. 1990) (“Cases distinguishing between employees and independent contractors are often factually close.”); *Hagen v. Burmeister & Assoc., Inc.*, No. CT-95-3634, 1999 WL 31130, at \*4 (Minn. Ct. App. Jan. 26, 1999) (stating that a factual determination is an essential element on retrial in determining apparent authority).

11. *Schneider v. Buckman*, 433 N.W.2d 98, 101 (Minn. 1988); RESTATEMENT

no role and the Apparently Integrated Business will be liable to the Customer only if the Business has itself breached some duty.<sup>12</sup> Where Structure #3 applies, *respondeat superior* is again inapplicable and liability *vel non* for the Apparently Integrated Business again turns on whether the Business owes and has breached a direct duty to the Customer. If the Customer was unaware that the Business was serving as a mere intermediary, the Business will have the liabilities applicable to an agent of an undisclosed principal.<sup>13</sup>

The dismissal of the *Bagot* appeal resurrected the Minnesota Court of Appeals decision, which, though unreported, is still quite dangerous. Although unreported decisions lack precedential value,<sup>14</sup> they can be influential.<sup>15</sup> The potential for influence is especially strong when the court announces that it can find no Minnesota precedent to support an important principle of law. The majority in *Bagot* made just such an announcement, rejecting as without precedential foundation the appellant’s effort to hold the taxicab company accountable for the appearances the company had purposefully created.<sup>16</sup>

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(SECOND) OF AGENCY § 219 (1957 Main Vol.). See generally DANIEL S. KLEINBERGER, AGENCY AND PARTNERSHIP: EXAMPLES AND EXPLANATIONS § 3.2, at 82–95 (1995) [hereinafter KLEINBERGER, AGENCY AND PARTNERSHIP]. “Scope of employment” can itself be a thorny issue, especially in cases of intentional torts. See, e.g., Hagen v. Burmeister & Assoc., Inc., 633 N.W.2d 497, 504 (Minn. 2001) (“The general policy, then, is that we will not impose such liability unless there is some connection between the tort and the business such that the employer in essence assumed the risk when it chose to engage in the business.”); see also KLEINBERGER, AGENCY AND PARTNERSHIP, §§ 3.2.5 & 3.2.6, at 88–95. In cases like *Bagot*, however, scope of employment is typically clear. That is, if the cab driver had been indeed the servant of the cab company, driving a customer would have been indisputably within the scope of employment.

12. See KLEINBERGER, AGENCY AND PARTNERSHIP, *supra* note 11, § 3.3.1, at 96 (explaining that if principal owes a direct duty of care to a third party, an agent’s negligence may result in the principal’s breaching that duty of care); § 4.4.1, at 145-147 (explaining principal’s duty to properly select and use agents); § 4.4.2, at 147-148 (non-delegable duties imposed by other law); § 4.4.3, at 148 (duties assumed by contract).

13. See discussion *infra* Part VII.

14. Minn. Stat. § 480A.08 subd. 3 (2001).

15. See Daniel S. Kleinberger, *Guilty Knowledge*, 22 WM. MITCHELL L. REV. 953, 954 (1996) (stating that “unpublished opinions . . . routinely influence both lawyers and judges” and noting that “the Minnesota Court of Appeals sometimes cites its own unpublished decisions, and even the Minnesota Supreme Court occasionally discusses unreported cases”) (footnotes omitted).

16. *Bagot v. Airport & Airline Taxi Cab Corp.*, No. C1-00-1291, 2001 WL 69489, at \*5 (Minn. Ct. App. 2001).

### III. PURPOSE OF THIS ARTICLE

This article takes fundamental issue with *Bagot* and seeks to demonstrate that:

- (i) the agency law doctrine of apparent authority provides the proper framework for understanding *Bagot*-type situations; and
- (ii) Minnesota has well-established principles of apparent authority that support applying that doctrine to such situations.

This article also presents an alternate theory of agency law for resolving *Bagot* itself – namely, the liability of an agent for the contract duties of a partially disclosed or undisclosed principal.

### IV. APPARENT AUTHORITY AS THE ANALYTIC CRUX

The parties in *Bagot* jostled as to whether the cab driver was an independent contractor, whether the taxicab company owed the passenger a non-delegable duty of care and whether the cab driver and the cab company were a joint enterprise.<sup>17</sup> As to the latter two issues, the court's focus was misplaced. Once it sustained the trial court's finding that the cab driver was an independent contractor,<sup>18</sup> the court should have decided the appeal according to the doctrine of apparent authority.<sup>19</sup>

Apparent authority is a principle of agency law which attaches consequences to the appearances created by a person's conduct. When an "apparent principal" makes "manifestations" to a third person so that the third person believes the "apparent agent" is actually acting on the apparent principal's behalf, the apparent agent has "the power . . . to affect the legal relations of [the] apparent principal with respect to [the] third person."<sup>20</sup>

Apparent authority is a fundamental part of the common law of agency<sup>21</sup> and has an undeniable pedigree in the common law of

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17. *Id.* at \*1-\*5.

18. *Id.* at \*2-\*3.

19. As discussed in Part I, *infra*, the court did consider Restatement (Second) of Agency, section 267 and Restatement (Second) of Torts section 429, but summarily rejected both sections as without precedent in Minnesota law.

20. *Sauber v. Northland Ins. Co.*, 87 N.W.2d 591, 598 (Minn. 1958) ("Apparent authority is the power of an apparent agent to affect the legal relations of an apparent principal with respect to a third person by acts done in accordance with such principal's manifestations of consent to such third person that such agent shall act as his agent.").

21. KLEINBERGER, AGENCY AND PARTNERSHIP, *supra* note 11, § 2.1.2, at 17 (stating apparent authority is one of five major theories for determining a person's



Minnesota.<sup>22</sup> The doctrine’s modern foundation is the Restatement (Second) of Agency, section 8,<sup>23</sup> which has been repeatedly cited and used by both the Minnesota Supreme Court and the Minnesota Court of Appeals.<sup>24</sup>

When the apparent principal creates the appearance of an employer-employee relationship, the applicable concept is that of “apparent servant.”<sup>25</sup> In the Restatement (Second) of Agency, this aspect of apparent authority appears in section 267:

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.<sup>26</sup>

Section 267 suffices to give plaintiffs like Bagot a cause of action,<sup>27</sup> but the Minnesota Court of Appeals rejected section 267 as unprecedented in Minnesota: “[A]ppellant supplies no authority for the application of section 267 to Minnesota theories of recovery

power to create legal obligations for another person).

22. *E.g.*, *Truck Crane Serv. Co. v. Barr-Nelson, Inc.*, 329 N.W.2d 824, 827 (Minn. 1983); *McGee v. Breezy Point Estates*, 166 N.W.2d 81, 87-89 (Minn. 1969); *Hockemeyer v. Pooler*, 130 N.W.2d 367, 375 (Minn. 1964); *Sauber v. Northland Ins. Co.*, 87 N.W.2d 591, 597-98 (Minn. 1958); *Am. Parkinson Disease Ass’n v. First Nat’l Bank of Northfield*, 584 N.W.2d 437, 441 (Minn. Ct. App. 1998).

23. RESTATEMENT (SECOND) OF AGENCY § 8 (1957). “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.” *Id.*

24. *E.g.*, *Associated Lithographers v. Stay Wood Prods., Inc.*, 279 N.W.2d 787, 790 (Minn. 1979); *Duluth Herald and News Tribune v. Plymouth Optical Co.*, 176 N.W.2d 552, 555 (Minn. 1970); *Lindstrom v. Minn. Liquid Fertilizer Co.*, 119 N.W.2d 855, 861-62 (Minn. 1963); *Sauber v. Northland Ins. Co.*, 87 N.W.2d 591, 598 (Minn. 1958); *Lyman Lumber Co. v. Three Rivers Co.*, 400 N.W.2d 811, 813 (Minn. Ct. App. 1987).

25. KLEINBERGER, *AGENCY AND PARTNERSHIP*, *supra* note 11, § 3.3.4 at 98.

26. RESTATEMENT (SECOND) OF AGENCY § 267 (1957). *See infra* note 35 and accompanying text for the tort law formulation of the rule.

27. RESTATEMENT (SECOND) OF AGENCY § 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.

*Id.* § 267 cmt. a, illus. 1.

and we have found none.”<sup>28</sup>

The research was deficient. The principles underlying section 267 have been part of Minnesota law since 1914<sup>29</sup>, when the Minnesota Supreme Court decided *Jewison v. Dieudonne*.<sup>30</sup> In that decision the court stated:

Where there is a holding out of a . . . relation concerning the control of a place where business is transacted and an invitation extended, under such circumstances of publicity as to warrant the inference that a person subsequently injured therein through the negligence of an employee of those in charge must have had the right to believe that those extending the invitation were in control of the premises, a recovery may be had without regard to the actual existence of the . . . relation.<sup>31</sup>

*Jewison* concerned the appearance of a *partnership* relation, but the same principle applies when the appearance is that of master and servant. In 1939, the Minnesota Supreme Court expressly connected *Jewison* and section 267, citing section 267 as an established exception to “the ordinary personal injury case [in which] the injured person does not rely upon authority of any kind in getting hurt” and describing *Jewison* as involving liability from “the continued use of defendant’s name in conduct of the business.”<sup>32</sup>

Thus, to invoke section 267 for cases such as *Bagot* is to *apply* rather than to *create* precedent. Moreover, section 267 does not stand alone within Minnesota’s common law. Section 267 is merely a particular application of the fundamental principle stated in Restatement (Second) of Agency, section 8.<sup>33</sup> Indeed, section 8 contains an example that could have been derived from

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28. *Bagot v. Airport & Airline Taxi Cab Corp.*, No. C1-00-1291, 2001 WL 69489, at \*5 (Minn. Ct. App. 2001).

29. Considering the plaintiff’s claim under section 267, the majority in *Bagot* wrote, “appellant supplies no authority for the application of section 267 to Minnesota theories of recovery and we have found none. We decline to extend Minnesota law by applying section 267 as requested by appellant.” *Id.* at \*5.

30. *Jewison v. Dieudonne*, 149 N.W. 20 (Minn. 1914).

31. *Id.* at 20.

32. *Schlick v. Berg*, 286 N.W. 356, 358 (Minn. 1939) (citing RESTATEMENT (SECOND) OF AGENCY, § 267).

33. KLEINBERGER, AGENCY AND PARTNERSHIP, *supra* note 11, § 3.3.4 at 98 (characterizing section 267 as an area where the doctrine of respondeat superior meshes with the law of apparent authority). As for the prominence in Minnesota case law of Restatement (Second) of Agency section 8, *see supra* note 24.

Appellant’s view of the facts of *Bagot*:

The Ace Taxi Company employs no drivers but merely receives orders from prospective passengers and puts “Ace Taxi Company” on cabs owned and operated by independent drivers. One of these drivers collides negligently with another automobile, damaging one of his passengers who reasonably believed the Taxi Company to be the employer. The Taxi Company is liable to the passenger but not to the owner of the other vehicle.<sup>34</sup>

#### V. RESTATEMENT (SECOND) OF TORTS SECTION 429

In *Bagot*, the Court of Appeals also considered whether plaintiffs could proceed against the taxicab company under section 429 of the Restatement (Second) of Torts. That section states:

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.<sup>35</sup>

The section 429 theory met the same fate as the section 267 theory: “Minnesota has not explicitly or implicitly adopted section 429. Plaintiff has failed to articulate a case to extend current Minnesota law, and as such, the [c]ourt finds that section 429 of the Restatement of Torts is inapplicable.”<sup>36</sup>

Although on this point the Minnesota Court of Appeals correctly characterized Minnesota precedent, the absence of precedent is immaterial. Section 429 is merely tort law’s analog to section 267 of the Restatement (Second) of Agency.

Section 429’s wording does differ somewhat from the wording of section 267, but the difference disappears when the sections are applied. Section 267 makes apparent agency the product of affirmative manifestation by the apparent employer, imposing

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34. RESTATEMENT (SECOND) OF AGENCY § 8 cmt. e, illus. 11. (1957).

35. RESTATEMENT (SECOND) OF TORTS § 429 (1965).

36. *Bagot v. Airport & Airline Taxi Cab Corp.*, No. C1-00-1291, 2001 WL 69489, at \*5 (Minn. Ct. App. 2001).

liability on “[o]ne who represents that another is his servant,”<sup>37</sup> while section 429 looks to the service recipient’s state of mind, imposing liability when that person accepts those services “in the reasonable belief that the services are being rendered by the employer or by his servants . . . .”<sup>38</sup>

However, courts applying section 429 routinely insist that the plaintiff demonstrate that the “ostensible principal” took some action to create the plaintiff’s “reasonable belief.” For example, in *Osborne v. Adams*,<sup>39</sup> the court considered the liability of a hospital for the actions of doctors, who were independent contractors working in the hospital’s neonatology unit.<sup>40</sup> Having cited section 429 as the basis for a claim of apparent authority or ostensible agency, the court then examined each element of a three-part test of liability.<sup>41</sup> The third element considered whether the plaintiff had a reasonable belief that the services received were provided by the hospital.<sup>42</sup> The first element, however, was characterized by the court as “holding out.”<sup>43</sup> Under this element the court performed a section 267 type inquiry and examined the hospital’s marketing efforts and other representations which gave rise to the plaintiff’s belief that the services received were provided by the hospital.<sup>44</sup> The second element of the test was whether the plaintiff looked to the hospital, rather than the individual physician to provide services.<sup>45</sup>

In essence, *Osborne* infused a section 267 concept into a section 429 case. In general, cases applying sections 267 and 429 yield essentially indistinguishable rules and results. Indeed, one Texas decision inadvertently reflected this jurisprudential amalgam by citing the Restatement (Second) of Torts section 267.<sup>46</sup>

The amalgam is more purposefully reflected in a recent Indiana Supreme Court opinion, decided in the health care

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37. RESTATEMENT (SECOND) OF AGENCY § 267.

38. RESTATEMENT (SECOND) OF TORTS § 429.

39. 550 S.E.2d 319 (S.C. 2001).

40. *Id.* at 319.

41. *Id.* at 321-22.

42. *Id.* at 322.

43. *Id.*

44. *Id.* at 322.

45. *Id.* at 322; *see also* *Simmons v. Tuomey Reg’l Med. Ctr.*, 533 S.E.2d 312, 322 (S.C. 2000).

46. *Valdez v. Pasadena Healthcare Mgmt., Inc.*, 975 S.W.2d 43, 47 n.2 (Tex. Ct. App. 1998).

context:

Courts that have held hospitals liable for the negligence of independent contractor physicians under apparent agency have sometimes referred to or adopted [s]ection 267, [s]ection 429, or both, and sometimes have not referred to or adopted either [s]ection 267 or [s]ection 429. While the language employed by these courts sometimes varies, generally they have employed tests which focus primarily on two basic factors. The first factor focuses on the hospital’s manifestations and is sometimes described as an inquiry whether the hospital “acted in a manner which would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital.” Courts considering this factor often ask whether the hospital “held itself out” to the public as a provider of hospital care, for example, by mounting extensive advertising campaigns. In this regard, the hospital need not make express representations to the patient that the treating physician is an employee of the hospital; rather a representation also may be general and implied. The second factor focuses on the patient’s reliance. It is sometimes characterized as an inquiry as to whether “the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.”<sup>47</sup>

In sum, the lack of Minnesota precedent for section 429 is immaterial to cases like *Bagot*. The principles of section 267 parallel the principles of section 429, and section 267 is amply supported by Minnesota precedent.

#### VI. APPARENT AUTHORITY AS GOOD POLICY

Applying the doctrine of apparent authority in *Bagot*-type circumstances is more than merely consistent with precedent. The apparent servant concept allows Minnesota’s common law to respond appropriately to changing economic realities and is therefore good policy.

The resilience of the common law comes, in part, from applying established principles to changing circumstances. In our

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<sup>47</sup> *Sword v. NKC Hosp., Inc.*, 714 N.E.2d 142, 150-51 (Ind. 1999) (citations omitted).

modern economy, more and more businesses present themselves to the marketplace as economically integrated enterprises while substituting independent contractors for traditional employees. The common law makes no objection to this development, which is said to increase economic efficiency.<sup>48</sup> The common law does, however, apply its doctrine of apparent authority to link economic efficiency with social responsibility.

That link is proper and has implications far beyond claims of passengers against taxicab companies. Consider, for example, the hospital emergency room scenario presented at the beginning of this article.<sup>49</sup> That scenario reflects an increasingly common arrangement in modern health care.

For example, in *Boyd v. Albert Einstein Medical Center*,<sup>50</sup> the court considered whether an HMO was liable for the alleged negligence of independent contractor physicians. Citing comment (a) of section 267, the court stated:

In our opinion, because appellant's decedent was required to follow the mandates of HMO and did not directly seek the attention of the specialist, there is an inference that appellant looked to the institution for care and not solely to the physicians; conversely, that appellant's decedent submitted herself to the care of the participating physicians in response to an invitation from HMO.<sup>51</sup>

*Petrovich v. Share Health Plan of Illinois, Inc.*,<sup>52</sup> involved a similar situation. The court used a reliance test that, though not expressly tied to section 267, was identical: Could the plaintiff demonstrate "justifiable reliance?"<sup>53</sup> The defendant HMO argued that the plaintiff could not establish justifiable reliance because she did not choose the HMO.<sup>54</sup> The court ruled that "where a person has no choice but to enroll with a single HMO and does not rely upon a

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48. Walter Kiechel, *How We Will Work in the Year 2000*, FORTUNE, May 17, 1993, at 38; see Bradford D. Ducea, *The Employee/Independent Contractor Classification: Do Loan Officers Working with California Mortgage Brokers Qualify as Statutory Independent Contractors?*, 32 SAN DIEGO L. REV. 895, 901-02 (1995).

49. See *supra* Part II.

50. 547 A.2d 1229, 1235 (Pa. Super. Ct. 1988).

51. *Id.* at 1235.

52. 719 N.E.2d 756 (Ill. 1999).

53. *Id.* at 768-69.

54. *Id.* at 769.

specific physician, then that person is likewise relying upon the HMO to provide health care.”<sup>55</sup>

Holding “apparent principals” responsible for the appearances they create is neither radical<sup>56</sup> nor burdensome. To avoid the rule’s impact, a business need only avoid creating misunderstanding in the minds of its customers. In the *Bagot* case, for example, the following words would suffice, if voiced consistently by the company’s employee dispatchers as well as by the independent contractor drivers: “Taxicab company is just a dispatch service. The cabs dispatched are independently owned and operated.”<sup>57</sup>

#### VII. THE LAW OF PARTIALLY DISCLOSED AND UNDISCLOSED PRINCIPALS AS AN ALTERNATE SOLUTION TO THE TAXICAB SCENARIO

The taxicab company in *Bagot* characterized itself as acting as an intermediary between customers and drivers by charging a fee to

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55. *Id.*

56. *See, e.g., Rhone v. Try Me Cab Co.*, 65 F.2d 834, 836 (D.C. Cir. 1933) (holding that a taxi passenger injured by negligence of the cab driver could recover from the independent registered owner of cab and from the non-profit corporation who advertised the cab as its own and citing a preliminary version of what became section 267 of the first Restatement of Agency); *Middleton v. Frances*, 77 S.W.2d 425, 426 (Ky. 1934) (holding taxicab company liable for independent cab owner negligence because owner permitted “to cruise” displaying taxicab company’s name).

57. In *Petrovich*, the defendant HMO relied upon a disclaimer contained in its subscriber certificate, which stated that the HMO physicians were independent contractors. *Petrovich*, 719 N.E.2d at 767. The court held that the HMO was not entitled to summary judgment of the apparent agency claim on the basis of this disclaimer alone. *Id.* First, there was a factual issue as to whether the plaintiff had received this information. *Id.* at 763, 767. Second, in light of evidence that the HMO held itself out as the provider of health care, the court ruled that the trier of fact “must therefore be permitted to weigh the conflicting evidence and decide this issue based on the totality of the circumstances. Only a trier of fact can properly determine whether plaintiff had notice of the physicians’ status as independent contractors, or was put on notice by the circumstances.” *Id.* at 767. One of the more recent cases touching on the efficacy of language disclaiming apparent authority involves a claim brought against the provider of a for-profit legal services plan. In *Gonzalez v. American Express Credit Corp.*, 733 N.E.2d 345 (Ill. Ct. App. 2000), the court affirmed the dismissal of plaintiff’s claims sounding in apparent authority in part because of the existence of disclaiming language in a handbook provided to plaintiff. *Id.* at 353. That language stated that the participating attorneys in the plan were independent contractors and not employees of the plan. *Id.*

the drivers for arranging contracts of transport.<sup>58</sup> The Minnesota Court of Appeals accepted that characterization.<sup>59</sup> In such situations, agency law provides a separate basis for holding the taxicab company accountable for the actions of the cab drivers it dispatches: the liability of an agent for a contract made for an undisclosed or partially disclosed principal.

Restatement (second) of Agency section 322 provides: "An agent purporting to act upon his own account, but in fact making a contract on account of an undisclosed principal, is a party to the contract." Restatement (Second) of Agency section 321 similarly provides: "Unless otherwise agreed, a person purporting to make a contract with another for a partially disclosed principal is a party to the contract."

Given the facts assumed by the trial court for the purposes of summary judgment,<sup>60</sup> a contract may well have been predestined when Mr. Bagot, Sr. telephoned the taxicab company to arrange rides for his son.<sup>61</sup> If, as the taxicab company contended, "[a]ny contract, i.e., payment of a fare in exchange for transportation to a location, was between the driver and the passenger,"<sup>62</sup> then, when the taxicab company accepted Mr. Bagot Sr.'s call and later dispatched cabs, the company was acting either as:

1. a partially disclosed principal,<sup>63</sup> if Mr. Bagot Sr. realized that the taxicab company was merely an intermediary acting for an

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58. See, e.g., Airport's Reply to Plaintiff's Response to Its Summary Judgment Motion at 1, Petition for Review, App. at 93, *Bagot v. Airport & Airline Taxi Cab Corp.*, No. CI-00-1291, 2001 WL 69489, at \*2 (Minn. Ct. App. 2001) (stating that Airport provided insurance and dispatching to Ronald Brake in exchange for his weekly payment).

59. *Bagot*, 2001 WL 69489, at \*2 ("Brake entered into an oral agreement with Airport Taxi requiring Brake to pay \$230 per week in exchange for dispatch service and insurance under Airport's commercial insurance policy as an 'additional insured.'").

60. See *supra* note 1 and accompanying text.

61. The corporation's own view at least does not contradict this construction. See, e.g., Airport's Reply to Plaintiff's Response to Its Summary Judgment Motion at 3, Petition for Review, App. at 95, *Bagot*, 2001 WL 69489 (stating that "[a]ny contract, i.e., payment of a fare in exchange for transportation to a location, was between the driver and the passenger and not specifying the moment at which that contract formed") (copy on file with the authors).

62. *Id.*

63. See RESTATEMENT (SECOND) OF AGENCY § 4(2) (1957). "If the other party has notice that the agent is or may be acting for a principal but has no notice of the principal's identity, the principal for whom the agent is acting is a partially disclosed principal." *Id.*



unspecified number of cabs “in the available mix of cabs;”<sup>64</sup> or

2. an undisclosed principal,<sup>65</sup> if — as seems more likely — Mr. Bagot Sr. believed that he was making an agreement with the taxicab company itself.

In either case, the taxicab company would be liable on the contract with the taxi driver. To the extent the driver owed a contractual obligation of safe driving to the customer, the taxicab company would be liable for any breach of that contract.<sup>66</sup>

Both the rule and its rationale are simple. An agent for a partially disclosed or undisclosed principal is liable on the principal’s contract with a third party. The third party is entitled to hold accountable to the contract the only person whose identity the third party knows at the time the contract is formed. Minnesota law has recognized this principle for over 100 years,<sup>67</sup> and modern decisions show that the principle remains good law.<sup>68</sup>

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64. Airport’s Reply to Plaintiff’s Response to It’s Summary Judgment Motion, Affidavit of Craig Allen Den Hartog at 7, Petition for Review, App. at 100, *Bagot*, 2001 WL 69489 (Copy on file with authors).

65. RESTATEMENT (SECOND) OF AGENCY § 4(3) “If the other party has no notice that the agent is acting for a principal, the one for whom he acts is an undisclosed principal.” *Id.*

66. RESTATEMENT (SECOND) OF AGENCY §§ 321, 322. The Minnesota Court of Appeals did not consider, and it is beyond the scope of this article to address, whether the taxicab driver owed his passenger a contractual duty of safe driving in addition to the tort law duty to avoid negligence. There is at least some support for finding such a contractual duty. *See, e.g., Gradin v. St. Paul & D.R. Co.*, 30 Minn. 217, 219 14 N.W. 881, 882 (1883) (“Undoubtedly, in the ordinary carriage of passengers, there is a contract express or implied, involving the obligation as a matter of contract to carry safely and any negligence causing injury to the passenger is a breach of the contract and gives a right of action upon it.”); 10 AM JUR 24, CARRIERS § 949.

67. *Kerr v. Simons*, 207 N.W. 305, 307 (Minn. 1926) (“One acting for an undisclosed principal binds himself.”); *Gay v. Kelley*, 123 N.W. 295, 295 (Minn. 1909) (“Where one party to a contract deals with another as principal, and afterwards discovers that such party was in fact an agent for an undisclosed principal, he may enforce the contract against such agent . . . .”), *overruled on other grounds by Englestad v. Cargill, Inc.*, 336 N.W.2d 284, 285 (Minn. 1983); *Amans v. Campbell*, 73 N.W. 506, 507 (Minn. 1897) (“[A] person acting as agent for another will be personally responsible if, at the time of making the contract in his principal’s behalf, he fails to disclose the fact of his agency; that by reason of such failure he becomes subject to all the liabilities, express or implied, created by the contract, in the same manner as if he were the principal in interest.”).

68. *E.g. Haas v. Harris*, 347 N.W.2d 838, 840 (Minn. Ct. App. 1984) (“[W]hen the agent acts for a partially disclosed principal or on his own for an undisclosed principal, the agent is a party to the agreement and is liable on the contract.”) (citing RESTATEMENT (SECOND) OF AGENCY §§ 321, 322).

Applying this precedent to economic entities such as the taxicab company in *Bagot* will neither cause injustice nor work any practical hardship. If the taxicab company had wished to avoid this type of responsibility, it merely needed to make clear to its customers that, “We are just an intermediary and are not responsible for the quality of service. Your contract will be with whatever cab driver shows up at your door.”

#### VIII. CONCLUSION

Minnesota law has long recognized the agency law principle of apparent authority. Minnesota law also provides that an agent is liable for the contractual obligations of an undisclosed or partially disclosed principal. Both of these well-recognized principles provided a basis for the plaintiff's suit in *Bagot*, and both ought to provide a basis for similar suits in the future.