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LIABILITY OF EMPLOYERS FOR MISREPRESENTATIONS MADE BY "INDEPENDENT CONTRACTORS"

MERTON FERSON *

INTRODUCTION

There are two ways of getting a job done. The person who wants it done can do it himself by his own efforts, management and hired help; or he can bargain with someone else for the desired result. When he hires personal services and retains the management of the enterprise he is called a "master," the person hired is called a "servant," and the master is liable for what the servant does in the master's behalf. But when one bargains for a given result he does not then become a master, the person bargained with is called an independent contractor, and he does not act in behalf of the employer.¹ The well known doctrine of *Respondeat Superior* does not apply in this latter situation.²

Let us notice in some detail the factual differences between these two methods of getting things done, and then let us compare the liability of one who employs a servant with the liability of one who bargains with an independent contractor.

There is a definite and factual difference between the behavior (*i.e.*, the acts and efforts) of a person, and the results which he attains by his behavior. There is a corresponding difference between hiring the behavior of a person and buying the results of his endeavor. For instance, the behavior of a man in building a carriage is something different from the carriage he produces. There is nothing astute in drawing a distinction between the hiring of services to be used in building a carriage, and buying a carriage—the product of services.

In some transactions it is not easy to make out whether services have been hired or the result of services has been bought. The result aimed at and bargained for with an independent contractor is not always a tangible thing, as it was in the carriage illustration; it may be something that has no tangible form. The salesman, for instance, goes about persuading persons to buy this or that. It often is a nice question whether the employer has hired the serv-

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1. The word employer is here used in a sense that includes one who bargains for a result as well as one who hires services.

2. HARPER, TORTS § 292 (1933).

ices of the salesman or has bought a result—*vis.*, a persuaded customer. The readiness of such a customer to sign on the dotted line is a result distinct from the services that brought it about; it can be bought from an independent contractor.³

The factual distinction between "servants" and "independent contractors" does not appear in the literal meaning of the respective terms. The servant is usually a contractor; by contract he sells his services. The independent contractor on the other hand may not be a contractor. The broker, for instance, does not usually contract to do anything. He merely has an offer looking forward to a unilateral contract whereby the employer will become bound if the broker procures a customer.⁴ The broker is not obligated either before or after he effects a sale. Thus we have "independent contractors" who are not contractors, and we have "servants" who are contractors.

What is it that marks the difference between a servant and an independent contractor—and the corresponding difference between a master and one who bargains with an independent contractor? It is this: the master has a right to control the acts of his servant, but the person who bargains with an independent contractor has not a right to control in detail the acts of his independent contractor. This generalization will not be further developed for the reason that it is fully expounded in numerous textbooks and judicial opinions.⁵ No attempt is made here to defend the control test. It is simply accepted.

The control test marks the difference between servants and non-servants. The independent contractor is a non-servant. He is like a servant, however, in that his work is instigated by an employer; and he is generally paid by his employer. For these reasons, it is more difficult to distinguish him from servants than it is in the cases of other non-servants.

The terms "servant" and "independent contractor" are convenient and they are so imbedded in the law that they must be used. A word of caution, however, may not be amiss. It cannot be assumed that when a worker has been called "servant" or "independent contractor" his status has been perma-

3. *Barton v. Studebaker Corp.*, 46 Cal. App. 707, 189 Pac. 1025 (1920). Speaking of an automobile salesman who was not subject to control by his employer with respect to the manner in which he did his work, the court said: "He was as much engaged in business for himself when prosecuting the work called for by his contract with the corporation as is the contractor who engages to construct a building for a stipulated sum of money." Numerous decisions to the same effect are collected in Notes, 61 A. L. R. 223, 229 (1929); 107 A. L. R. 419 (1937); 17 A. L. R. 621 (1922); 29 A. L. R. 470 (1924); 54 A. L. R. 627 (1928).

4. *Elliott v. Kazajian*, 255 Mass. 459, 152 N. E. 351 (1926); *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669 (1890); *Patton v. Wilson*, 220 S. W. 2d 184 (Tex. Civ. App. 1949); *Roberts v. Harrington*, 168 Wis. 217, 169 N. W. 603 (1918).

5. *Aldritt v. Gillette-Herzog Mfg. Co.*, 85 Minn. 206, 88 N. W. 741 (1902); *Flori v. Dolph*, 192 S. W. 949 (Mo. 1917); *Lake v. Bennett*, 41 R. I. 154, 103 Atl. 145 (1918); *Cunningham v. The International R. R.*, 51 Tex. 503 (1879); *Stagg v. Taylor's Adm'rs*, 119 Va. 266, 89 S. E. 237 (1916); HARPER, TORTS § 292 (1933); HUFFCUT, AGENCY 9 (2d ed. 1901); PROSSER, TORTS 473 (1941); RESTATEMENT, AGENCY § 2 (1933); see Note, 19 A. L. R. 226, 235 (1922).

nently fixed. The behavior of one who is employed cannot be treated as a unit. Some segments of his behavior are done within and some outside his employment. He steps back and forth from one role to another. We call one and the same person "servant" when he is doing one act, "agent" when he is doing another and "independent contractor" when he is doing another. A person sent out to sell and repair washing machines, for example, could be an independent contractor in getting from one customer to another; he could be a servant in demonstrating or repairing machines; and he could be an agent in making contracts for his company.⁶ He cannot be branded as with a scarlet letter that fixes and proclaims his status in everything he does.

The factual difference between a servant and an independent contractor has been noted. What legal consequence depends on the distinction? It is simply this: the doctrine of *Respondeat Superior* applies when the act in question is done by a servant; it does not apply when the act is done by an independent contractor. It will be noted presently that an employer may be liable for what his independent contractor does, but such liability must rest on something other than the doctrine of *Respondeat Superior*. The doctrine of *Respondeat Superior* is accounted for historically as a doctrine appertaining to personal service.⁷ It is rationalized on the basis of holding the entrepreneur.⁸ It is defined and limited in scope by the "control test"⁹—*i.e.*, it does not apply unless the employer had a right to control the employee. By these tokens the doctrine of *Respondeat Superior* does not apply to acts done by an independent contractor.¹⁰

The difference between a servant and an independent contractor is blurred by a double use of the term "employment." That term and the phrase

6. "This change of dress from 'servant' to 'agent' is not alone so disquieting. It, of course, has long been possible for the 'independent contractor', without causing undue comment, to appear also in the guise of an 'agent', as witness the factors, brokers, banks and other similar organizations which act to change the contractual relations of their employers by buying or selling goods or stock or collecting commercial paper, and yet which are *solely* responsible not only for the wages of their employees, but for their torts as well." Steffen, *Independent Contractor and the Good Life*, 2 U. OF CHI. L. REV. 501, 514 (1935) (italics added). An "agent" is distinguished from both "servants" and "independent contractors" by the fact that an agent does juristic acts for his employer while a servant or independent contractor does non-juristic acts for his employer. See Ferson, *Agency to Make Representations*, 2 VAND. L. REV. 1 (1948); FERSON, *THE RATIONAL BASIS OF CONTRACTS* 227-42 (1949).

7. Holmes, *Agency*, 4 HARV. L. REV. 345, 5 *id.* 1 (1891).

8. TIFFANY, *AGENCY* 100 (2d ed., Powell, 1924). See also Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L. J. 584 (1929); Note, 20 COL. L. REV. 333 (1920). Professor Harper, speaking of independent contractors, says: "It is the contractor rather than the contractee who is the entrepreneur and who should ordinarily carry the risk." HARPER, *TORTS* § 292 (1933).

9. *Aldritt v. Gillette-Herzog Mfg. Co.*, 85 Minn. 206, 88 N. W. 741 (1902); HARPER, *TORTS* § 292 (1933); HUFFCUT, *AGENCY* 9 (2d ed. 1901); 1 MECHEM, *AGENCY* § 40 (2d ed. 1914); PROSSER, *TORTS* 473 (1941).

10. "Social policy would seem to afford a justification for the application of the rule of respondeat superior to cases of injuries caused by all independent contractors and their servants. . . . Such a rule, however, we do not have nor are we likely to have it immediately." Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 IND. L. J. 494, 499 (1935). And see *infra* p. 6.

"scope of employment" are commonly used in speaking of servants, but courts sometimes use the same language in speaking of independent contractors.¹¹ The common practice of digesting the independent contractor cases along with the servant cases, under the general heading of Master and Servant, also tends to blur their difference. We should not be misled into the idea that the theoretical basis for the employer's liability is the same in both types of cases.

GENERAL PRINCIPLES REGARDING LIABILITY
OF EMPLOYERS FOR ACTS OF
INDEPENDENT CONTRACTORS

Several authors have ably marshaled the cases that deal with the liability of employers for acts of their independent contractors; and, have found in those cases some general principles. It will be shown later that these principles are applicable when an independent contractor has made representations for his employer. Let us first note in brief outline what the studies made by these authors reveal.

Dean Prosser says,¹² "For the torts of an independent contractor, as distinguished from a servant, it has long been said to be the general rule that there is no vicarious liability upon the employer." But, he adds, "The American courts . . . have whittled away at the rule of non-liability with exceptions, to the point where it is not easy to say that any 'general rule' remains." Then he notes the following exceptions to the general rule: (a) where the employer is negligent in connection with the work to be done, *e.g.*, where he does not use care to select a competent contractor; (b) where the employer is under a non-delegable duty to the person who later is injured by the contractor; and, (c) where the work to be done is "intrinsically dangerous." This last exception, says he, "seems to be limited to work in which there is a high degree of risk, or some rather specific danger to those in the vicinity, recognizable in advance as calling for definite precautions." He adds that the employer is not liable for "collateral" or "casual" negligence on the part of the contractor.

Professor Harper's statement¹³ regarding an employer's liability for acts of his independent contractor is substantially like the one made by Dean Prosser. He also uses the negative-with-exceptions form of statement.

Mr. Stephen Chapman formulates the duty of one who employs an independent contractor like this: "If I am under a duty to a person or a class of persons and I fail to perform that duty, whereby damage results, I am liable . . . and I cannot evade that liability by delegating the performance

11. *Woodburn v. Standard Forgings Co.*, 112 F. 2d 271 (7th Cir. 1940).

12. PROSSER, TORTS § 64 (1941).

13. HARPER, TORTS § 292 (1933).

of the duty to an independent contractor. . . . In other words, the whole test is whether I am under a duty which has not been performed, and it matters not whether that duty is one imposed by statute or by contract or by common law in tort."¹⁴

American writers conservatively and accurately follow the form of statement that appears in the cases. They say that the employer of an independent contractor is not liable for what the independent contractor does. Then they follow this negative rule with large exceptions. "Indeed," says Chief Justice Gallager of the Supreme Court of Minnesota,¹⁵ "it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions."

This negative-with-exceptions form of statement is inapt. In the first place it is circuitous. In the second place it makes it appear that the employer's non-liability (so far as it exists) for acts of his independent contractor is an exception from the doctrine of *Respondeat Superior*. But the employer's liability—or lack of it—for what his independent contractor does is no part of the doctrine of *Respondeat Superior*. It has a foundation of its own that is separate and apart from the doctrine of *Respondeat Superior*.

Mr. Chapman does not use the negative-with-exceptions form of statement and he decries its use by others. Says he: "[S]uch a method of dealing with the subject is misleading and unscientific. The statement of law in which it results may or may not be broadly accurate, but no sort of principle emerges which can be taken as a test, in varying circumstances, of whether or not a person is liable for the negligent acts of an independent contractor. . . . It seldom conduces to clarity to start with a negative proposition and then graft onto it positive exceptions."¹⁶ It seems more simple and forthright to discuss the liability of employers of independent contractors from the positive side and to note its independence of the doctrine of *Respondeat Superior*.

LIABILITY NOT VICARIOUS

An employer's liability for what his independent contractor does is not vicarious in the sense that the employer is being held for acts that were done by his vicar or substitute. And his liability is not vicarious in the sense that he is made to pay for injuries that he had no part in bringing about. Let us run down the list of "exceptions." We note that the employer is held: when he does not use due care in selecting his independent contractor; when the plans he furnishes call for an unreasonable risk; when his supervision is inadequate; and, when, by contract or otherwise, he is under a non-delegable

14. Chapman, *Liability for the Negligence of Independent Contractors*, 50 L. Q. REV. 71, 75 (1934).

15. *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 201 Minn. 500, 277 N. W. 226, 228 (1937). See also Harper, *supra* note 10, at 500.

16. Chapman, *supra* note 14, at 71, 75.

duty. The reason for holding him in these cases is clear. Now we come to the "exception" whereby he is liable if the work he bargains for is "inherently dangerous." "The principle seems to be limited to work in which there is a high degree of risk, or rather some specific danger to those in the vicinity, recognizable in advance as calling for definite precautions."¹⁷ Mr. Chapman limits the employer's liability to cases where he is under a duty to a person or class of persons and he fails to perform that duty. Says he: "The whole test is whether I am under a duty which has not been performed."¹⁸ It seems clear from the statements quoted, and others, that if the employment creates a special risk to particular persons or groups of persons the employer is held if the injury that he should have apprehended occurs. When, however, the point is reached where the special and foreseeable risk that the employer has bargained to have created comes to an end, his liability ends. His liability beyond that point would be vicarious and, accordingly, "the employer is liable only for risks inherent in the work itself, and not for 'collateral' or 'casual' negligence on the part of the contractor."¹⁹

LIABILITY NOT ABSOLUTE

The liability of an employer, as outlined above, falls short of being "absolute liability." Says Professor Harper, "In the case in which the contractee is held liable for wrongs of the contractor, the former is liable only when the contractor or his servants have been guilty of some misconduct."²⁰ And Mr. Chapman, after referring to a number of explanations of cases where employers were held for what independent contractors had done, says that these explanations "are to a certain extent misleading in that they suggest that it is only where there would be an exceptionally stringent, even absolute, liability on a person acting himself that he is liable for the acts of an independent contractor. It is submitted respectfully that this is not so: there is nothing in the passages above cited to suggest that the duties there referred to were intended only to mean absolute or even exceptional duties; on the contrary, even the comparatively low cast duty to take reasonable care is said to be sufficient."²¹

The employer's liability for what his independent contractor does in these exceptional situations falls short also of holding him to the same extent as though he were a master. Servants and independent contractors are different. A proposition to identify them in the eyes of the law, "cannot," says Parke, B., "be maintained to its full extent without overturning some decisions and producing consequences which would, as Lord Tenterden observes,

17. PROSSER, TORTS 488 (1941).

18. Chapman, *supra* note 14, at 75.

19. PROSSER, TORTS 488 (1941).

20. HARPER, TORTS 651 (1933).

21. Chapman, *supra* note 14, at 74.

'shock the common sense of all men' . . . the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness whilst passing along the street."²² And, we may add, if the doctrine of *Respondeat Superior* were applied in all cases where one employs an independent contractor it would seem to make the person who hires a taxicab liable for carelessness of the driver. It would seem to make the sender of a telegram liable for carelessness of the delivery boy as he rides along the street on his bicycle carrying the sender's message.

RATIONAL BASIS

It has been noted that the employer of an independent contractor is liable in many instances for acts that are done by the hand of another. But the basis and qualifications of that liability are not found in the doctrine of *Respondeat Superior*. In some of the "exceptions" (*i.e.*, cases where he is liable) the reason is obvious. The employer has been remiss. Can we account for his liability in cases where the injury resulted from bungling by the independent contractor or his servants? Suppose that *A* hires *B* as an independent contractor to break neighbor *Y*'s window. *A* would be liable to *Y*. Suppose that *A* hires *B* to create a particular and obvious risk that *Y*'s window will be broken. It is rational that *A* should be liable to *B* if the foreseeable injury occurs. And so when *A* hires *B* as an independent contractor to blast stumps in the vicinity of *Y*'s window *A* is liable if the operation as carried out, breaks *Y*'s window.²³ The difference is small between hiring *B* to break the window and bargaining for the creation of an obvious and special risk that the window will be broken.

Suppose further that *A* hires *B* as an independent contractor to defraud *Y*. *A* would be liable for the injury to *Y*. And if *A* hires *B* as an independent contractor to work on *Y* and persuade him to buy a piece of property, he bargains for the creation of a particular risk that *Y* will be defrauded. *A* should be, and by cases to be cited later is, held liable if *Y* suffers the foreseeable injury. It seems rational that the person who bargains for the creation of such a risk should be liable when the foreseeable injury occurs.

REPRESENTATIONS BY INDEPENDENT CONTRACTOR

Now where do representations made by an independent contractor fit into the general picture of an employer's responsibility for what his independent contractor does? Since representations are often mistaken for

22. *Quarman v. Burnett*, 6 M. & W. 499, 510, 151 Eng. Rep. 509, 514 (Ex. 1840).

23. *J. C. Carland & Co. v. Burke*, 197 Ala. 435, 73 So. 10 (1916); *Giem v. Williams*, 222 S.W. 2d 800 (Ark. 1949); *City of Chicago v. Murdock*, 212 Ill. 9, 72 N.E. 46 (1904); *Freebury v. Chicago M. & P. S. R. R.*, 77 Wash. 464, 137 Pac. 1044 (1914).

juristic acts—such as the making of a contract—it is well to recall that they are definitely non-juristic acts. Unlike juristic acts, they are not an exercise of autonomy. They are not made with an intent to bind the speaker (or anyone) in contract, to transfer his property or otherwise to subtract from his legal position. Their legal effect is imposed by law regardless of any real or apparent consent to be bound.²⁴ The physical aspect of a representation and the act of blasting a stump are so different that it may seem queer to compare the two; but a little reflection will reveal that they both are non-juristic acts. And both fall within the purview of the general principles stated above with regard to an employer's liability for the acts of his independent contractor. When an independent contractor is hired to make representations in order to persuade the person addressed to do this or that, it creates a special, peculiar and obvious risk that the person so addressed may be fooled by a misrepresentation and so injured. It is a "specific danger recognizable in advance." A broker, for example, is sometimes hired to sell (*i.e.*, persuade a customer to buy) a piece of property; he is rewarded when by his representation he attains that result. A physician is sometimes hired to make representations to an injured employee and thus to induce him to settle. A telegraph company is sometimes hired by an offeror to make a representation to the offeree for the purpose of getting the offeree to act. These illustrations will be amplified later. In all such cases there is a special and obvious risk that the representations may not be truly and accurately made, and that harm to the particular addressee may be the result.

Should an employer be held responsible when his independent contractor carelessly or willfully bungles the job of making a representation? That is the question here being discussed. What the legal consequences of charging him with a misrepresentation should be is a separate question.²⁵ Such consequences are varied. When, for example, an offer is made by telegraph and the telegram as delivered to the addressee is different from the telegram delivered for transmission, the sender may be bound by the terms of the proposal as contained in the telegram delivered to the addressee. That is, the sender may be estopped to deny that the terms of the offer he made were in accord with the message delivered. In the newspaper cases the person who procures a representation to be made by a newspaper publisher may be held for libel if the representation as made is libelous. In the physician cases the employer may be held in tort if the victim was misled to his harm by the physician's false representation. And, in the broker cases the employer may be held for deceit, or else the injured party may be allowed to rescind the transaction if false representations are made by the broker. We are here con-

24. For fuller exposition see FERSON, RATIONAL BASIS OF CONTRACTS 60-83, 225-42 (1949).

25. For similar distinction see Ferson, *Agency to Make Representations*, 2 VAND. L. REV. 1 (1948); FERSON, RATIONAL BASIS OF CONTRACTS, c. 12 (1949).

sidering broadly whether the employer should be charged in one way or another with misrepresentations made by his independent contractor.

Let us check the foregoing theory against the cases where employers have procured representations to be made by such independent contractors as telegraph companies, physicians, brokers and newspaper publishers.

THE TELEGRAPH CASES

The facts in one case²⁶ will serve to illustrate a problem that has come before the courts time and again.²⁷ In this illustrative case, Mr. Ayer, a would-be seller of laths who lived in Bangor, Maine, filed a telegram with the Western Union Telegraph Company addressed to his correspondent in Philadelphia. The message read as follows: "Will sell 800 M. laths, delivered at your wharf two ten net cash. July shipment. Answer quick." The message that was delivered to the addressee in Philadelphia read like this: "Will sell 800 M. laths delivered at your wharf two net cash. July shipment. Answer quick." It will be seen that the important word "ten" in the statement of price was omitted from the message delivered. The Philadelphia party, relying on the message he received, accepted the proposal and later insisted that he was entitled to the laths at \$2.00 per thousand. This raises the question of whether the sender of the message should be held according to the version that was delivered to the addressee.

Stating the case more analytically, Mr. Ayer filed a telegram with the Western Union Company and thus did two things: (1) He offered to sell laths at \$2.10 per thousand—*i.e.*, he indicated his consent that he should become bound to sell at that price; (2) he said to the Company; "You tell my correspondent in Philadelphia that I offered to sell him laths at \$2.10 per thousand." The message delivered to the Philadelphia party was a misrepresentation. It stated the price to be \$2.00 per thousand. Should Mr. Ayer be estopped to contradict the terms of the message that was received by the addressee after the addressee has accepted in reliance on those terms?²⁸ The answer to that question, as given by the courts and legal writers, is not clear. The conflict among the authorities is well described by Judge Ailshire. He says, "We have made a very careful and somewhat extended examination both of the text writers and the court decisions on this question, and emerge

26. *Ayer v. Western U. Tel. Co.*, 79 Me. 493, 10 Atl. 495 (1887).

27. The question generally comes up in cases where a sender of a message has sued the telegraph company for the damages he claims to have suffered owing to the faulty transmission of the message. The amount of recovery in such a case depends on whether the sender was bound according to the message delivered to the addressee.

28. If the addressee, in such a case, should have known that the message he received was a misrepresentation of the terms of the offer he was not reasonably misled, and cannot hold the offeror to the terms stated in the garbled message. *Germain Fruit Co. v. Western U. Tel. Co.*, 137 Cal. 598, 70 Pac. 658 (1902).

from the investigation fully convinced that the authorities are irreconcilable on the question."²⁹

Courts commonly approach the problem as though its solution depends on whether there was a master and servant relation between the sender of the message and the telegraph company or its employees.³⁰

It is demonstrable that the sender does not stand in the relation of master, either as to the telegraph company or as to its employees. "As a matter of fact," says Judge Hoke of the North Carolina Supreme Court, "we know that neither the sender nor the addressee has any control over the operations of the company or its methods."³¹ And says Judge Folkes of the Tennessee Supreme Court, "The parties who resort to this instrumentality . . . have no opportunity, and no power, to supervise or direct the manner or means which the company use in the discharge of their duties to the public in the transmission of messages for particular individuals."³² Some courts bolster the idea that the telegraph company is an independent contractor by noting

29. *Strong v. Western U. Tel. Co.*, 18 Idaho 389, 109 Pac. 910, 917 (1910). See also 2 U. OF CIN. L. REV. 105 (1928); 18 COL. L. REV. 364 (1918); 27 YALE L. J. 932 (1918).

30. *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. 815 (1902); *Strong v. Western Union Tel. Co.*, 18 Idaho 389, 109 Pac. 910 (1910); *McKee v. Western Union Tel. Co.*, 158 Ky. 143, 164 S. W. 348 (1914); *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119 (1901); *Holtz v. Western Union Tel. Co.*, 294 Mass. 543, 3 N. E. 2d 180 (1936); *Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030, 18 So. 425 (1895); *Mt. Gilead Cotton Oil Co. v. Western Union Tel. Co.*, 171 N. C. 705, 89 S. E. 21 (1916); *Pegram v. Western Union Tel. Co.*, 100 N. C. 28, 6 S. E. 770 (1888); *Harper v. Western Union*, 133 S. C. 55, 130 S. E. 119, 42 A. L. R. 286 (1925); *Pepper v. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783 (1889); *Hulme v. Levis-Zuloski Co.*, 149 S. W. 781 (Tex. Civ. App. 1912); *Henkel v. Pape*, L. R. 6 Ex. 7 (1870).

"If the telegraph company becomes the agent of the sender for the purposes of the message, then under the legal maxim, *qui facit per alium facit per se*, he is responsible for all the errors of the company and is bound by the terms of the message as received." Tiedeman, *Contracts By Telegraph*, 12 CENT. L. J. 365 (1881).

"Was there here a *consensus*? *Consensus* may be by the parties themselves or by their authorized agents. Here there was . . . no consent unless the telegraph officers are to be considered as authorized agents of the sender." Lord Neaves, in *Verdin Brothers v. Robinson*, 10 Sess. Cas. (3d ser.) 35 (Scot. 1871).

31. *Mt. Gilead Cotton Oil Co. v. Western Union Tel. Co.*, 171 N. C. 705, 89 S. E. 21, 22 (1916).

32. *Pepper v. Tel. Co.*, 87 Tenn. 554, 560, 11 S. W. 783, 784 (1889). See also *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119 (1901); *Holtz v. Western Union Tel. Co.*, 294 Mass. 543, 3 N. E. 2d 180 (1936); *Henkel v. Pape*, L. R. 6 Ex. 7 (1870).

"[T]he relation between the sender and the telegraph company is not that of principal and agent in the usual sense of those terms but rather that of employer and independent contractor. . ." *Western Union Tel. Co. v. Cowin & Co.*, 20 F. 2d 103, 107 (8th Cir. 1927). See also *Strong v. Western Union*, 18 Idaho 389, 109 Pac. 910 (1910); *McKee v. Western Union*, 158 Ky. 143, 164 S. W. 348 (1914); *Shingleur v. Western Union*, 72 Miss. 1030, 18 So. 425 (1895); *Barnett v. Western Union Tel. Co.*, 287 S. W. 1064 (Mo. App. 1926); *Pegram v. Western Union*, 100 N. C. 28, 6 S. E. 770 (1888); *Eureka Cotton Mills v. Western Union Tel. Co.*, 88 S. C. 498, 70 S. E. 1040 (1911); *Verdin Brothers v. Robinson*, 10 Sess. Cas. (3d ser.) 35 (Scot. 1871). And cases cited *infra* note 35.

that it renders a public service.³³ It is compared with railroads and characterized as a "carrier of intelligence."³⁴

Many courts after finding that the telegraph company is an independent contractor hold that the sender of a message is not liable for mistakes made in its transmission.³⁵ The reasoning is that the sender is not a master. The doctrine of *Respondeat Superior*, therefore, does not apply, and so that ends the matter. If there is no theory other than that of *Respondeat Superior* on which the sender can be held, the result reached by these courts seems inevitable.

A considerable number of decisions, however, hold that one who makes an offer by telegraph is responsible for the version of the message that reaches the offeree.³⁶ One author says, "The weight of American authority and the better view make the sender responsible for the mistake of the Telegraph Company."³⁷ Since the telegraph company is so obviously an independent contractor, how can the sender be held liable for its mistakes? By what theory and on what considerations do courts reach that result?

The theoretical basis for this "American doctrine" holding the sender has been variously stated. Some courts, undeterred by the sender's lack of control over the company and its servants, have deemed the company an "agent" of the sender.³⁸ Other courts have vaguely supported these decisions

33. *Holtz v. Western Union Tel. Co.*, 294 Mass. 543, 3 N. E. 2d 180 (1936); *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660 (1889).

34. *Western Union Tel. Co. v. Cowin & Co.*, 20 F. 2d 103, 106 (8th Cir. 1927); *Strong v. Western Union Tel. Co.*, 18 Idaho 389, 109 Pac. 910 (1910); *Harper v. Western Union Tel. Co.*, 133 S. C. 55, 130 S. E. 119 (1925), 42 A. L. R. 286; *Eureka Cotton Mills v. Western Union Tel. Co.*, 88 S. C. 498, 70 S. E. 1040 (1911); *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660 (1889).

35. *Western Union Tel. Co. v. Cowin & Co.*, 20 F. 2d 103 (8th Cir. 1927); *Strong v. Western Union Tel. Co.*, 18 Idaho 409, 109 Pac. 910 (1910); *Postal Tel. Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119 (1901); *Holtz v. Western Union Tel. Co.*, 294 Mass. 543, 3 N. E. 2d 180 (1936); *Leigh v. Western Union Tel. Co.*, 190 N. C. 700, 130 S. E. 728 (1925); *Mt. Gilead Cotton Oil Co. v. Western Union Tel. Co.*, 171 N. C. 705, 89 S. E. 21 (1916); *Harper v. Western Union Tel. Co.*, 133 S. C. 55, 130 S. E. 119, 42 A. L. R. 286 (1925); *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783 (1889); *Henkel v. Pape*, L. R. 6 Ex. 7 (1870).

36. "When . . . the offer is made by telegraph, and the telegram as delivered to the addressee is materially different from the telegram delivered for transmission, the sender is bound by the terms of the proposal as contained in the telegram delivered to the addressee." *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. 815 (1902). See cases cited *infra* notes 38, 39, 40 and 41.

37. Note, 27 *YALE L. J.* 932, 933 (1918).

38. *Des Arc Oil Mill v. Western Union Tel. Co.*, 132 Ark. 335, 201 S. W. 273, 6 A. L. R. 1081 (1918); *Brooke v. Western Union Tel. Co.*, 119 Ga. 694, 46 S. E. 826 (1904); *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. 815, 817 (1902); *Butler v. Folly*, 211 Mich. 668, 179 N. W. 34 (1920); *Price Brokerage Co. v. Chicago, B. & O. R. R.*, 199 S. W. 732 (Mo. App. 1917); *Hamubelt Bros. v. Rea & P. Mill Co.*, 77 Mo. App. 672 (1899); *New York & Washington Printing Tel. Co. v. Dryburg*, 35 Pa. 298, 302 (1860); *Hulme v. Levis-Zuloski Mercantile Co.*, 149 S. W. 781 (Tex. Civ. App. 1912); *Sherrerd v. Western Union*, 146 Wis. 197, 131 N. W. 341 (1911); *Saveland v. Green*, 40 Wis. 431 (1876).

The telegraph company is, of course, an agency in the sense of a means used to transmit messages. But it is not an "agent" or "servant" in the technical sense. A similar confusion of the terms "agent" and "agency" appears in an opinion of Judge Scott Ladd, where he was considering the post office as well as a telegraph company. *Lucas v. Western Union Tel. Co.*, 131 Iowa 669, 109 N. W. 191 (1906).

by resorting to "public policy,"³⁹ "commercial expediency"⁴⁰ and an "admixture of justice and natural equity."⁴¹ Judge Phillips, speaking of two leading cases which hold the sender says: "It will be noted that neither of these opinions predicates the conclusion reached upon any definite principle of law."⁴²

These ingenious explanations that have been resorted to indicate a feeling on the part of judges that one who makes an offer by telegraph should be held according to the version of the message that is delivered. But when a candid view of the facts has revealed that the doctrine of *Respondeat Superior* did not apply, it has seemed to leave the desired result without a solid theoretical basis.

There is a doctrine, however, that affords a solid theoretical basis for holding the offeror. Let it be conceded that the telegraph company is an independent contractor. The cases here being discussed fall within that extensive area where an employer is liable for acts procured to be done by his independent contractor. The offeror has procured a representation to be made to a specific person and for the very purpose of inducing him to act. The employer has thus bargained for the creation of a risk that the addressee may be misled to his injury. The situation is within the purview of the general doctrine stated above⁴³ with regard to the liability of employers for acts of their independent contractors.

39. "It is evident that in case of an error in the transmission of a telegram either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is that, as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, that any other rule would now be impracticable." *Ayers v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495, 497 (1887).

40. Jackson, C. J., of the Georgia Supreme Court says, "Whether the telegraphic operator be the agent of the sender of a dispatch, so as to bind him, is a debatable question in the courts, the English authorities being to the effect that he is not; and the American mainly that he is. We agree with the American doctrine, at least to the extent that commercial transactions being now conducted to so great an extent through the telegraph, a merchant would lose business and credit if he did not settle in accordance with the offer actually made, though by mistake of the agency he used to convey it, and when he does so settle in good faith, and is induced to do so by the negligence of the telegraphic company, through its servants, that company should respond to him in damages, whether absolutely bound by his contract or not." *Western Union Tel. Co. v. Shotter*, 71 Ga. 760, 767 (1883).

41. Judge Cobb of the Georgia Supreme Court in upholding a decision that the sender should be held responsible, justified his position in these words: "It may be said, however, that the decision, though possibly subject to the criticism that it is not entirely consonant with established principles of law, does have for its foundation an admixture of justice and natural equity." *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. 815, 818 (1902).

42. *Western Union Tel. Co. v. Cowin & Co.*, 20 F. 2d 103, 104 (8th Cir. 1927).

43. *Supra* p. 4.

THE PHYSICIAN CASES

Is a physician in the practice of his profession a servant or an independent contractor? That question is of no importance in the common case where the employer is the patient. The same degree of care and skill on the part of the doctor would be required whether he is a servant or an independent contractor. But when an employer hires a doctor to work on a third person, the employer's liability may depend on whether the doctor is a servant or an independent contractor.

The question posed above has come up in different types of cases. It is almost uniformly held that the physician is not a servant of the person or company that employs him.⁴⁴ In a Tennessee case⁴⁵ the circumstances were that an employing company called in a physician to attend an employee who had been injured. The physician thus brought in was alleged to have been negligent and to have harmed the employee. Said Beard, J.: "Plaintiff in error insists that the defendant in error is liable for the mistakes or malpractice of the surgeons in question; that their employment by the railroad created the relation of master and servant. . . . We do not think so. . . . They were not employed to do ordinary corporate work, but to render services requiring special training, skill and experience. To perform these services so as to make them effectual for the saving of life and limb, it was necessary that these surgeons should bring to their work not only their best skill, but the right to exercise it in accordance with their soundest judgment and without interference."⁴⁶

In a Massachusetts case⁴⁷ the facts were these: the plaintiff had been injured in an accident and had sued the defendant company; and the defendant sent a doctor to examine the plaintiff. The doctor told the plaintiff to "try standing on his leg." The plaintiff tried it, fell and was seriously injured by the fall. "The doctor," said Holmes, C. J., "was not an agent or servant of the defendant in making his examination. He was an independent contractor. There is no more distinct calling than that of the doctor, and none in which the employé is more distinctly free from the control or direction of his employer. In this case the doctor was informing himself, according to the suggestions of his own judgment, in order to advise and perhaps to testify for the defendant. We must assume, in the absence of other evidence than his profession and his purpose, that what he should do and how he should do it

44. *Boring v. Chicago & E. R. R.*, 185 Ind. 46, 110 N. E. 545, 113 N. E. 294 (1915-16); *Pittsburg, C., C. & St. L. Ry., v. Sullivan*, 141 Ind. 83, 40 N. E. 138 (1895); *Atchison, T. & S. F. R. R. v. Zeiler*, 54 Kan. 340, 38 Pac. 282 (1894); *Haggerty v. St. Louis, K. & N. W. R. R.*, 100 Mo. App. 426, 74 S. W. 456 (1903); *Quinn v. Kansas City, M. & B. R. R.*, 94 Tenn. 713, 30 S. W. 1036 (1895).

45. *Quinn v. Kansas City, M. & B. R. R.*, 94 Tenn. 713, 30 S. W. 1036 (1895).

46. *Id.* at 716, 718, 30 S. W. at 1037.

47. *Pearl v. West End St. Ry.*, 176 Mass. 177, 57 N. E. 339 (1900).

was left wholly to him."⁴⁸ And where a company maintains a hospital and employs physicians as part of a relief program, the physicians are not deemed to be servants of the company.⁴⁹ It has been held in a good many cases where hospitals have employed physicians to care for the hospital's patients that the physicians are independent contractors.⁵⁰

It thus appears that a physician, hired to render professional service, does his work as an independent contractor—not as a servant. The reason for this is that it is incompatible that the physician can have freedom to practice his art and at the same time be subject to the control of his employer.

The next question is whether one who employs a doctor—an independent contractor—to work on a third person shall be charged with the doctor's negligence or lack of skill. The employer's liability in these cases should depend on the same considerations as are applicable generally to an employer's liability for acts of his independent contractor. He is, of course, liable when he—the employer—is careless in the selection of the physician.⁵¹ And he is liable in case he is under a non-delegable duty to the third person which duty is violated through the maltreatment administered by the physician. Hospitals, for example, are under a non-delegable duty to their paying patients and so are generally liable for the carelessness or lack of skill on the part of doctors hired by the hospital to care for such patients.⁵² Employers also are in some situations under a non-delegable duty to care for their employees.

In other cases the employer's liability depends on what he hired the doctor to do. Hiring a doctor to treat the ailments and improve the health of a third person does not render the employer liable for the negligence or lack of skill on the part of the doctor.⁵³ But suppose the physician was hired to examine a patient, and thus to procure information for his employer. Such an examination involves a special and foreseeable risk to the particular patient. That risk is created for the benefit of the employer—not for the benefit of the patient. Is the employer liable if the doctor in making the examination

48. 57 N. E. at 339.

49. *Union Pac. Ry. v. Artist*, 60 Fed. 365 (8th Cir. 1894); *Tutino v. Ford Motor Co.*, 111 N. J. L. 435, 168 Atl. 749 (1933). See also *Atlantic Coast Line R. R. v. Whitney*, 62 Fla. 124, 56 So. 937 (1911).

50. See Note, *The Standard of Care Owed by a Hospital to Its Patients*, 2 VAND. L. REV. 660, 671 (1949).

51. *Id.* at 669.

52. "The said defendant cannot absolve itself from the obligation it owed to the plaintiff patient to furnish him proper treatment, on the claim that the physicians who treated him, at its instance, were independent contractors." *Vaughan v. Memorial Hospital*, 100 W. Va. 290, 130 S. E. 481, 482 (1925). And see *Valentiu v. La Societe Francaise*, 76 Cal. App. 2d 1, 172 P. 2d 359 (1946); *Brown v. La Societe Francaise*, 135 Cal. 475, 71 Pac. 516 (1903); *Gilstrap v. Osteopathic Sanatorium*, 224 Mo. App. 798, 24 S. W. 2d 249 (1929); *Treptau v. Behrens Spa, Inc.*, 247 Wis. 438, 20 N. W. 2d 108 (1945).

53. *Supra*, note 44. See also *Rosane v. Senger*, 112 Colo. 363, 149 P. 2d 372 (1944); *City of Miami v. Oates*, 152 Fla. 21, 10 So. 2d 721 (1942); *Black v. Fischer*, 30 Ga. App. 109, 117 S. E. 103 (1923); *Iterman v. Baker*, 214 Ind. 308, 15 N. E. 2d 365 (1938); *Stacy v. Williams*, 253 Ky. 353, 69 S. W. 2d 697 (1934); *Stuart Circle Hospital Corp. v. Curry*, 173 Va. 136, 3 S. E. 2d 153 (1939).

carelessly injures the patient? There is some difference of opinion about this question. In the Massachusetts case discussed above,⁵⁴ the doctor was making the examination, as Chief Justice Holmes said, "in order to advise and perhaps to testify for the" employer. The Chief Justice then proceeded to emphasize that the doctor is an independent contractor; and he deemed that to be sufficient ground for deciding the case against the injured patient. He took no account of the possibility that an employer might be liable for acts of his independent contractor.

Other courts, however, have charged the company when its doctor, while serving the purpose of the company, has injured a patient. In a Minnesota case⁵⁵ the plaintiff had been injured while in the service of the defendant company. The company's manager took the plaintiff to a physician who made an X-ray picture of the plaintiff's sacroiliac joint—the part affected—and in doing so burned the plaintiff. The court held the defendant company liable for the injuries inflicted by the physician. Bunn, J. says: "There can be no doubt that defendant wanted the picture for its own purposes, probably as evidence in case plaintiff should bring suit against it to recover for the injury received in the accident. . . . The doctor was the servant of defendant . . . the rule of respondeat superior applies."⁵⁶ In this case the doctor was called a "servant." That led to the desired result. The same result could have been reached by sounder reasoning—*viz.*, the doctor was an independent contractor, as most decisions indicate, but, considering the employer's purpose in hiring the doctor to make the X-ray picture, the employer should be held.

In a West Virginia case⁵⁷ it appeared that the plaintiff had suffered an injury and was seeking to recover from the defendant insurance company on an accident policy. The company sent its medical adviser to examine the plaintiff. The plaintiff's leg was in a cast. The doctor removed the cast in order to make the examination and left without replacing the cast. Serious injury resulted. The company was held liable on reasoning similar to that used in the Minnesota case cited above.

Closely related to the cases where an employer hires a physician to examine a patient and get information for the employer are cases where the doctor is hired to make representations to the employee and thus induce the employee to settle a claim against the company. Here also is created a peculiar risk to the patient. It is a risk that the patient may be misled by a misrepresentation. In this group of cases the employer is generally charged with the doctor's misrepresentations. The question has often arisen in cases where an employee has released the company because of representations made by the

54. *Pearl v. West End St. Ry.*, 176 Mass. 177, 57 N. E. 339 (1900).

55. *Jones v. Tri-State Telephone & Telegraph Co.*, 118 Minn. 217, 136 N. W. 741 (1912).

56. 136 N. W. at 741.

57. *Tompkins v. Pacific Mut. Life Ins. Co.*, 53 W. Va. 479, 44 S. E. 439 (1903).

company doctor. Such representations are ground for avoiding the release.⁵⁸

The evidence in a case that was brought in a United States District Court was to the effect that a company physician misrepresented to an injured employee the extent of his injuries, and that, on the strength of what the physician said, the employee delayed filing his claim for compensation under the Indiana Workmen's Compensation law until it was too late under the provisions of the Statute. The District Court held that the company could be charged with these representations made by its physician. The District Court was upheld by the Circuit Court of Appeals.⁵⁹ The defendant contended that it was not bound by the representations made by its physician because the physician was not its servant. Judge Treanor concedes that as a rule a physician is an independent contractor. "But," says the Judge, "the facts of the instant case do not bring it within the foregoing rule. . . . [W]hen making representations to an injured employee respecting his physical condition the doctor is acting within the scope of his employment and performing a duty of the employer; and false representations are imputed to the employer under the law of respondeat superior. The test is not whether the doctor was specifically authorized to make fraudulent representations, but whether the false representations were made within the scope of his employment. It is rarely true that an agent is authorized to perform an act for his principal in a wrongful manner to the injury of a third person."⁶⁰ The opinion is not quite consistent in branding the physician as an independent contractor and then relying on the doctrine of Respondeat Superior. But the decision itself is consistent with the idea that an employer should be held liable for representations it procures to be made for its own benefit by its independent contractor.

It can be said by way of summation of the physician cases that a majority of the cases deem that a physician in the practice of his profession is an independent contractor; and the liability of the employer of a physician depends

58. *Tatman v. Philadelphia, B. & W. R. R.*, 10 Del. 105, 85 Atl. 716 (1913); *Haigh v. White Way Laundry Co.*, 164 Iowa 143, 145 N. W. 473 (1914); *Nason v. Chicago, R. I. & P. Ry.*, 140 Iowa 533, 118 N. W. 751 (1908); *Nelson v. Chicago & N. W. R. R.*, 111 Minn. 193, 126 N. W. 902 (1910); *Carroll v. United Rys.*, 157 Mo. App. 247, 137 S. W. 303 (1911); *Bunker v. Great Falls Mfg. Co.*, 84 N. H. 84, 146 Atl. 529 (1929); *St. Louis & S. F. R. R. v. Richards*, 23 Okla. 256, 102 Pac. 92 (1909); *Kitchen v. Miller Bros. Co.*, 115 Pa. Super. 141, 174 Atl. 919 (1934); *Duncan v. Texas Employers' Ins. Ass'n*, 105 S. W. 2d 403 (Tex. Civ. App. 1937); *Missouri, K. & T. Ry. v. Maples*, 162 S. W. 426 (Tex. Civ. App. 1913); *Gulf, C. & S. F. Ry. v. Huyett*, 49 Tex. Civ. App. 395, 108 S. W. 502 (1908); *Vialett v. Consolidated Ry. & P. Co.*, 30 Utah 260, 84 Pac. 496 (1906); *Pattison v. Seattle R. & S. Ry.*, 55 Wash. 625, 104 Pac. 825 (1909).

The statement of an honest opinion by the doctor may fall short of being a representation and for that reason will not affect the validity of a release. *Nason v. Chicago, R. I. & P. Ry.*, 140 Iowa 533, 118 N. W. 751 (1908); *Carroll v. United Rys.*, 157 Mo. App. 247, 137 S. W. 303 (1911); *Traders & General Ins. Co. v. Cole*, 108 S. W. 2d 864 (Tex. Civ. App. 1937). If, however, a physician employed by the company falsely represents that he entertains a stated opinion, this may be fraud and, if so, may be charged to the company. *Tattershall v. Yellow Cab Co.*, 225 Mo. App. 611, 37 S. W. 2d 659 (1931); *Yeager v. St. Joseph Lead Co.*, 223 Mo. App. 245, 12 S. W. 2d 520 (1929).

59. *Woodburn v. Standard Forgings Co.*, 112 F. 2d 271 (7th Cir. 1940).

60. *Id.* at 274.

on the principles applicable generally to the liability of employers for acts of their independent contractors. One feature, especially pertinent to the present discussion, is that an employer who, in order to serve his own purpose, hires a physician to make representations to a third person is charged in case the representations turn out to be misrepresentations.

THE BROKER CASES

Consider the broker.⁶¹ In some instances he is an individual who could act as a servant for a master, or he could act independently of the employer's control and thus be an independent contractor. In many cases the broker is a corporation having servants and agents of its own. Such an organization cannot be a servant to the employer. And persons within the broker's organization are not subject to control by the employer of the broker; they are not his servants. But, conceding that a person who employs a broker is not liable under the doctrine of *Respondeat Superior*, is he liable on other grounds for misrepresentations made by the broker or the broker's servants?

The broker is employed to do one or both of two kinds of acts—*vis.*, (1) juristic acts, such as executing transfers or contracts to transfer property; and (2) non-juristic acts, such as exhibiting property and persuading customers to buy it. Our chief concern here is with the latter kind of acts—*i.e.*, with representations made in persuading customers to buy.

An appalling number of cases have come before the courts where the purchasers of land have sought to charge sellers with misrepresentations made by persons that were employed by the sellers to procure buyers. There is great diversity of holdings among these cases. Some of the decisions can be reconciled by differences in the facts involved. And courts sometimes make a distinction that depends on the kind of relief being asked for by the persons who have been misled by the misrepresentations. After making all possible allowances, however, many decisions on this question are flatly contradictory. Many hold the employer;⁶² and many let him out.⁶³

61. Factors, banks and collection agencies should, perhaps, be put in the same category.

62. *Turner v. Brewer*, 298 Fed. 685 (D. C. Cir. 1924); *Cortes Co. v. Thannhauser*, 45 Fed. 730 (C. C. S. D. N. Y. 1891); *Brennen v. Kent*, 206 Ala. 561, 90 So. 790 (1921); *Cady v. Rainwater*, 129 Ark. 498, 196 S. W. 125 (1917); *Mitchell v. Coleman*, 127 Ark. 373, 192 S. W. 231 (1917); *Vaught v. Paddock*, 98 Ark. 10, 135 S. W. 331 (1911); *Henrich v. Norton*, 219 Ill. App. 86 (1920); *Duiguid v. Coldsnow*, 76 Ind. App. 545, 132 N. E. 659 (1921); *Day v. Merrick*, 158 Iowa 287, 138 N. W. 400 (1912); *Rush v. Leavitt*, 99 Kan. 498, 162 Pac. 310 (1917); *Rhoda v. Annis*, 75 Me. 17 (1883); *Purdum v. Edwards*, 155 Md. 178, 141 Atl. 550 (1928); *Dzuris v. Pierce*, 216 Mass. 132, 103 N. E. 296 (1913); *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14 (1890); *White v. Sawyer*, 82 Mass. (16 Gray) 586 (1860); *Chaffee v. Raymond*, 241 Mich. 392, 217 N. W. 22 (1928); *Smith v. Michigan Realty & Const. Co.*, 175 Mich. 600, 141 N. W. 635 (1913); *Ballard v. Lyon*, 114 Minn. 264, 131 N. W. 320 (1911); *Connecticut Mut. L. Ins. Co. v. Carson*, 186 Mo. App. 221, 172 S. W. 69 (1914); *Millard v. Smith*, 119 Mo. App. 701, 95 S. W. 940 (1906); *Green v. Worman*, 83 Mo. App. 568 (1900); *Wolfersberger v. Miller*, 327 Mo. 1150, 39 S. W. 2d 758 (1931); *German Centennial Bldg. & L. Ass'n v. Googer*, 117 N. J. Eq. 532, 176 Atl. 395 (1935); *Thrams*

The decisions are not usually made to turn on the question of whether the person who made the representation was a servant or an independent contractor. "Although there seems reason for making a distinction between real estate brokers and regular agents, such a distinction is very infrequently made; the great majority of the cases consider brokers the same as other agents."⁶⁴ While the courts find no practical advantage in distinguishing the two types of cases it is obvious that there is a different theoretical basis for holding the employer in cases where the misrepresentation was made by his servant, and in cases where the misrepresentation was made by a broker acting as an independent contractor. When the representation has been made by his servant, the doctrine of *Respondeat Superior* applies. But, where the broker is an independent contractor, the employer's liability depends on another principle—his duty, when he procures a representation to be made to a prospective buyer to have it truly and accurately made. These broker cases afford another important illustration of the idea that when an employer to serve his own ends procures an independent contractor to make a representation that will likely be acted on by the person addressed, he should be

v. Block, 43 N. Mex. 117, 86 P. 2d 938 (1938); Sandford v. Handy, 23 Wend. 260 (N. Y. 1840); Bunting v. Creglow, 40 N. D. 98, 168 N. W. 727 (1918); Firebough v. Bentley, 65 Ore. 170, 130 Pac. 1129 (1913); Copeland v. Tweedle, 61 Ore. 303, 122 Pac. 302 (1912); McNeile v. Cridland, 168 Pa. 16, 31 Atl. 939 (1895); Sutton v. Morgan, 158 Pa. 204, 27 Atl. 894 (1893); Caughron v. Stinespring, 132 Tenn. 636, 179 S. W. 152 (1915); Sargent v. Barnes, 159 S. W. 366 (Tex. Civ. App. 1913); Martin v. Ince, 148 S. W. 1178 (Tex. Civ. App. 1912); Kleine Bros. v. Gidcomb, 152 S. W. 462 (Tex. Civ. App. 1912); Wimple v. Patterson, 117 S. W. 1034 (Tex. Civ. App. 1909); Farris v. Gilder, 115 S. W. 645 (Tex. Civ. App. 1908); Yarnall v. Knickerbocker Co., 120 Wash. 205, 206 Pac. 936 (1922); O'Daniel v. Streeby, 77 Wash. 414, 137 Pac. 1025 (1914); Smith v. Gray, 52 Wash. 255, 100 Pac. 339 (1909); Nelson v. Title Trust Co., 52 Wash. 258, 100 Pac. 730 (1909); Shepard v. Pabst, 149 Wis. 35, 135 N. W. 158 (1912); Stelting v. Bank of Sparta, 136 Wis. 369, 117 N. W. 798 (1908); Gunther v. Ullrich, 82 Wis. 220, 52 N. W. 88 (1892); McKinnon v. Vollmar, 75 Wis. 82, 43 N. W. 800 (1889); Mullens v. Miller, 22 Ch. Div. 194 (1882).

63. Nupen v. Pearce, 235 Fed. 497 (8th Cir. 1916); Janeczko v. Manheimer, 77 F. 2d 205 (7th Cir. 1935); Light v. Chandler Improvement Co., 33 Ariz. 101, 261 Pac. 969 (1928); Mortimer v. Young, 37 Cal. App. 2d 164, 98 Pac. 2d 1061 (1940); Mayo v. Wahlgreen, 9 Colo. App. 506, 50 Pac. 40 (1897); Dellwo v. Petersen, 32 Idaho 172, 180 Pac. 167 (1919); Ringer v. Wilkin, 32 Idaho 330, 183 Pac. 986 (1919); Ellison v. Stockton, 185 Iowa 979, 170 N. W. 435 (1919); Harrigan v. Dodge, 216 Mass. 461, 103 N. E. 919 (1914); Luff v. Nevins, 106 N. J. Eq. 386, 150 Atl. 834 (1930); Austin J. Waldron, Inc., v. Cutley, 105 N. J. Eq. 586, 144 Atl. 447 (1929); National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331 (1868); Montague v. Bank for Savings, 43 N. Y. S. 2d 321 (Sup. Ct. 1943); Friedman v. N. Y. Telephone Co., 256 N. Y. 392, 176 N. E. 543 (1931); Hodson v. Wells & Dickey Co., 31 N. D. 395, 154 N. W. 193 (1915); Dieterle v. Bourne, 57 N. E. 2d 405 (Ohio App. 1943); Mutual Home & Sav. Ass'n v. Westgerdes, 35 N. E. 2d 882 (Ohio App. 1941); Freyer v. McCord, 165 Pa. 539, 30 Atl. 1024 (1895); Loma Vista Development Co. v. Johnson, 142 Tex. 686, 180 S. W. 2d 922 (1944); Lemarb v. Power, 151 Wash. 273, 275 Pac. 561 (1929); Gudmundson v. Commercial B. & T. Co., 138 Wash. 355, 244 Pac. 676 (1926); Johnson v. Williams, 133 Wash. 613, 234 Pac. 449 (1925); Samson v. Beale, 27 Wash. 557, 68 Pac. 180 (1902).

64. Note, L. R. A. 1917F 962. The writer of a later note also says: "Cases are included where the person acting as a broker is referred to as a broker, and also where he is referred to as an agent. In this regard no distinction is made, unless it is made in the particular case." 57 A. L. R. 111 (1928).

charged in case the independent contractor carelessly or willfully turns it into a misrepresentation.

What about the justice and expediency of charging the employer with false representations made by his broker acting as an independent contractor? The representation is made for the benefit of the employer just as surely as though it were made by the employer's servant; and a false representation is equally damaging to the person addressed whether made by a servant or an independent contractor. The employer should not be allowed to insulate himself from liability by the simple expedient of hiring an independent contractor instead of a servant to make representations for him.⁶⁵ "[I]t would," says Dunbar, J., "tend to encourage fraudulent misrepresentation if such owner were allowed to escape responsibility through the subterfuge of having the sale made by a sub-agent."⁶⁶

An employer, of course, is not liable for a misrepresentation unless it fell within the scope of the employment of the person who made it. In some cases it has been found that the broker was not employed to "sell," in the sense of persuade a customer.⁶⁷ The court, in such a case, said that the broker was merely a "discoverer or finder."⁶⁸ That is, he was to seek a potential buyer and bring him and the seller together—when, presumably, they would make their own representations.

Courts have been influenced in a good many cases against holding the employer for a broker's misrepresentation because they looked to find "authority" in the broker instead of looking to find "employment."⁶⁹ Failing to find such authority, they have held that the employer was not liable.⁷⁰ Why do courts look to find authority? Because they fail to note the distinctness between (1) the acts that a servant or independent contractor does by way of persuading a customer to buy, and (2) the act of an agent in transferring or

65. Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 IND. L. J. 494, 498 (1935); Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1934).

66. *Nelson v. Title Trust Co.*, 52 Wash. 258, 100 Pac. 730, 731 (1909).

67. *Montague v. Bank for Savings in City of N. Y.*, 43 N. Y. S. 2d 321 (Sup. Ct. 1943); *Friedman v. N. Y. Telephone Co.*, 256 N. Y. 392, 176 N. E. 543 (1931); *Lansing v. Colman*, 58 Barb. 611, 619 (N. Y. 1871); *Dieterle v. Bourne*, 57 N. E. 2d 405 (Ohio App. 1943).

68. *Montague v. Bank for Savings in City of New York*, 43 N. Y. S. 2d 321 (Sup. Ct. 1943).

69. *Woodburn v. Standard Forgings Co.*, 112 F. 2d 271, 274 (7th Cir. 1940) ("It is rarely true that an agent is authorized to perform an act for his principal in a wrongful manner to the injury of a third person."); *Janeczko v. Manheimer*, 77 F. 2d 205 (7th Cir. 1935); *Ellison v. Stockton*, 185 Iowa 979, 170 N. W. 435 (1919); Note 57 A. L. R. 111, 112 (1928) ("The result of sustaining the authority often is to impose upon the owner a burden clearly beyond that which the agent had either actual or ostensible authority to impose by any contract with the purchaser of the land. . . . Even where the measure of damages is the difference between the contract price and the actual value of the land, it cannot be said that the agent had either the implied or ostensible authority to bind his principal for this amount.")

70. *Light v. Chandler Improvement Co.*, 33 Ariz. 101, 261 Pac. 969 (1928); *Loma Vista Development Co. v. Johnson*, 142 Tex. 686, 180 S. W. 2d 922 (1944); *Lemarb v. Power*, 151 Wash. 273, 275 Pac. 561 (1929).

contracting to transfer the property. Both types of acts are called "selling" and there is a tendency to lump them together. But persuading a customer to buy is a different kind of an act from executing a contract or transfer. The former is a non-juristic act and calls only for employment of the servant or independent contractor. The latter kind of act is juristic; it calls for authority from the constituent.⁷¹ It may seem pedantic to make this distinction. But lumping the two kinds of acts that are so utterly dissimilar gives only an illusion of simplicity. In the long run it conduces to simplicity and clarity to make the distinction and note its implications. It should be remembered that the binding effect of a transfer or contract derives from the principal's manifested consent that he should be bound; while an employer's liability for misrepresentations made by his servant or independent contractor is—like other tort liability—imposed upon him regardless of his consent.

A few courts have taken the position that the employer should not be held liable for a misrepresentation where the broker is employed only to procure a buyer.⁷² How, it may be asked, is he to procure that buyer? Surely the making of representations constitutes a large part of the work he is employed to do.

As noted above,⁷³ there is contrariety of opinions in this group of cases. It would seem, however, to be rational, expedient and just that when a misrepresentation has been made by a broker, hired by the seller to procure a customer, the seller should be charged with it.

Insurance brokers frequently represent the insured. In such a case the representations of the broker are imputable to the insured,⁷⁴ and representa-

71. Employment and authority alike derive from the consent of the constituent, *i.e.*, the master or principal. But his consent is, and needs to be, more extensive in the creation of authority than it does in the creation of employment. In the case of employment the constituent simply consents that the servant or independent contractor shall do this act or class of acts for him. He need not consent to be liable for what the servant or independent contractor does. That liability is thrust upon him regardless of his consent. In conferring authority, however, the constituent consents (a) that the agent can do such and such an act for him and (b) that he, the constituent, shall be bound when (*i.e.*, on condition that) the agent does the specified act. For a more detailed discussion of this distinction, see *PERSON, RATIONAL BASIS OF CONTRACTS*, c. 12 (1949).

72. "Their authority was simply to make a sale, or *procure* a purchaser who was ready, able, and willing to buy." *Ellison v. Stockton*, 185 Iowa 989, 170 N. W. 435, 437 (1919) (*italics added*). In *Johnson v. Williams*, 133 Wash. 613, 234 Pac. 449 (1925), an owner authorized a broker to "find a purchaser." The broker's salesman, Vincent, was alleged to have made false representations regarding the quality and earning power of the property. The court held no recovery; the "authority of Coonse, Taylor & Bond, and Vincent, their salesman, was nothing more than their authority to find a purchaser." In *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180 (1902), it was held that, since the broker had no power to convey, his representations would not bind the employer. Says Hadley, J., "The effect of the above decisions establishes the rule in this state that such authority as was shown in the case at bar goes no further than to authorize the finding of a purchaser. Representations made by an agent under such circumstances are not binding upon the principal." 68 Pac. at 184.

73. See notes 60 and 61, *supra*.

74. *Young v. Newark Fire Ins. Co.*, 59 Conn. 41, 22 Atl. 32 (1890); *Rosedale Securities Co. v. Home Ins. Co.*, 120 Kan. 415, 243 Pac. 1023 (1926); *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502 (1877); *Standard Oil v. Triumph*, 64 N. Y. 85

tions by a broker who represents the insurer can be charged to the insurer.⁷⁵ Representations made by a collection agency may estop the employer of the agency.⁷⁶

An insurance company is surely not a servant of the insured, and servants of the company are not servants of the insured. With that in mind, consider the case of *Hayes v. Gessner*.⁷⁷ The plaintiff had been injured by an automobile driven by the defendant. The defendant carried liability insurance and by the terms of the policy gave the insuring company the sole right of settlement and defense. One Murdoch, an employee of the insuring company, made false representations to the plaintiff whereby he was persuaded to delay bringing suit until after his claim had become barred. The court held that the defendant was estopped by these representations that had been made by Murdoch, servant of the insuring company.

NEWSPAPER CASES

There are a few pertinent newspaper cases which need to be considered.

In a Wisconsin case⁷⁸ the evidence tended to show that the defendant, having written an article in English, sent it to the proprietor of a German newspaper for publication. He thus procured to be made in German representations about the plaintiff, a member of the State Senate. The proprietor of the paper had the article translated into German "by a person whom he [the proprietor of the paper] kept in his employ for such purposes." The translation thus made was published. It was not a correct translation of the original copy. The article as published defamed the plaintiff. The defendant sought to escape liability on the ground that he could not read, write, speak or understand the German language and that he should not be held responsible for a publication that differed in substance from the article he sent in for publication. The court took the view that this was not a defense. "We see," said Lyon, J., "no valid reason why the maxim *Respondeat Superior* should not be applied here. That an agent may be employed to translate written productions from one language to another, and to publish the same as translated, seems too clear for argument; and if this may be done, on what theory can we say that the legal incidents which attach to the relation of principal and agent in other cases, do not attach in this case? The doctrine that the principal is liable to third persons for all damages sustained by them by the negligence or unskillfulness of his agent in the course of his employment, is elementary and of universal application."⁷⁹

(1876); *Cole v. Germania Fire Ins. Co.*, 99 N. Y. 36, 1 N. E. 38 (1885); *Wolowitch v. National Surety*, 152 App. Div. 14, 136 N. Y. Supp. 793 (1st Dep't 1912).

75. *Riddle v. Rankin*, 146 Kan. 316, 69 P. 2d 722 (1937).

76. *Rock v. Security National Bank*, 53 N. D. 718, 207 N. W. 487 (1926).

77. 315 Mass. 366, 52 N. E. 2d 968 (1944).

78. *Wilson v. Noonan*, 27 Wis. 598 (1871).

79. *Id.* at 608.

The court seems right in holding the author to account. But was either the proprietor or his translator really a servant of the defendant? He had no right to control either one; it would seem to follow that neither one was his servant. The relation of the proprietor to the defendant was that of an "independent contractor." The court seems to have stretched and warped the concept "servant," to reach the desired result of holding the author who procured the representation to be made. A more rational basis for the decision would seem to be this: The defendant procured the representation to be made in German. He did this for reasons of his own and without the consent of the plaintiff. It is rational that the defendant should be under a duty to the plaintiff, about whom the representation was made, and whose reputation was at stake, that the representation should be carefully made. The fact that the author procured an independent contractor to make the representation should not excuse him.

In another newspaper case⁸⁰ the author sent an item for publication which would have been innocent if properly located in the paper. In this case, however, the publisher or his servant placed the item in a certain column where, because of its association with other items, it became libellous. The author who sent in the item was held liable even though neither he nor any servant of his had anything to do with the placement of the item. That was done by the independent contractor or his servant.

CONCLUSION

The association of the above groups of cases may be unusual. It can be seen, however, that there is one thread that runs through all of them. In the telegraph cases the representation with regard to an offer may induce the addressee to "accept"—*i.e.*, to transfer property, assume obligation or otherwise change his position; it is procured to be made for that purpose. In the physician cases the representation about the patient's condition may persuade him to reduce or give up his claim against the employer for compensation. In the real estate broker cases the representation may induce the person addressed to part with his money in exchange for land; the representation is procured to be made for that purpose. In the newspaper cases the representation about another person may defame him.

A broad view of the cases reveals a rugged and sensible principle to this effect: A person who, for his own benefit, procures a representation to be made to someone, or about someone, is under a duty to the person likely to be affected that the representation shall be carefully made. Such an employer is, accordingly, chargeable with the representation as it is actually made.

80. Zier v. Hoffin, 33 Minn. 66, 21 N. W. 862 (1885).

An independent contractor who has made a misrepresentation is sometimes called a "servant" although the employer had not a right to control his behavior. He is sometimes called an "agent" although the employer gave him no authority to make the representation. There has been a fancied need that the independent contractor must be called "servant" or "agent" in order to charge the employer with his misrepresentations. There is no real need for such a pretext. The general principles developed by many writers⁸¹ relative to the employer's liability for acts of his independent contractor amply cover the groups of cases discussed above. One of the main principles brought out by these writers is to the effect that an employer who bargains with an independent contractor to have created a special and foreseeable risk that certain persons or groups of persons may be injured is liable if the foreseeable injury occurs. That general principle seems especially apposite when an employer, for his own benefit, procures representations to be made to a third person with a view to influencing the third person's conduct. The particular person is contemplated; indeed he is the target. There is not only a chance he may be affected; that is the purpose. The risk that he may be misled is not dim or collateral; it is clear and inherent in the enterprise.

81. HARPER, *TORTS* § 292 (1933); PROSSER, *TORTS* § 64 (1941); RESTATEMENT, *TORTS* §§ 416-29 (1934); Douglas, *Vicarious Liability and Administration of Risk*, 38 *YALE L. J.* 584 (1929); Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 *IND. L. J.* 494 (1935); McCleary, *Liability of an Employer for the Negligence of an Independent Contractor in Missouri*, 18 *ST. LOUIS L. REV.* 289 (1933); Morris, *The Torts of an Independent Contractor*, 29 *ILL. L. REV.* 339 (1934); Smith, *Collateral Negligence*, 25 *MINN. L. REV.* 399 (1941); Steffen, *Independent Contractor and the Good Life*, 2 *U. OF CHI. L. REV.* 501 (1935).