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CINDERELLA'S SLIPPER: AGENCY

by R. Wayne Estes*

INTRODUCTION

One has to travel no further than the nearest kindergarten to discover the frustrations that the prince faced in connection with Cinderella's beautiful slipper. The problem, of course, was to get the foot of one of the candidates to fit into the diminutive shoe. It is no secret that the persistent prince was ultimately successful in finding a perfect fit, and some, at least, of the characters in the story lived happily everafter.

In recent decades legal scholars and judges have faced a task not totally different to that of the prince in their effort to fit rather large and dissimilar sectors of the field of law commonly described as "agency" into rather confining principles and maxims. Just when it appears that the almost magical foot of Cinderella has been found, out will pop a legal appendage and the general discomfort of the fit becomes apparent.

The consolidation of varied legal concepts into a single principle of more general application is, of course, commendable. However, such generally laudable efforts by writers, judges and the Restatement in the area of agency, upon careful analysis, may have produced a result diametrically opposed to the usual objective of such efforts. Rather than clarifying and facilitating the legal analyses necessary for correct conclusions, the amalgamation of certain of these concepts may have led to confusion.

The extent of generalization in any area of the law is virtually limitless if enough provisos, qualifications and exceptions are provided. The secret of applying an overly generalized principle to any fact situation lies in selecting the proper qualifications. Superficial understanding of the scope of such principles can, and does, lead at times to faulty conclusions. Granted, proper judicial solutions sometimes are reached even upon faulty analysis and reasoning. However, such proper conclusions are far from reassuring in view of the fact that others may be misled to improper destinations by faulty comprehension of such decisions. Such overly generalized principles may be a distracting rather than a helpful influence in solving related legal problems.

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It is submitted that a more basic and fundamental approach to certain areas of the field of agency, by recognizing the historical and theoretical bases of the component elements being forced into an overly broad principle, might provide real utility to students, bar and bench alike. To illustrate the currency of the problems encountered, several agency cases decided within recent years are noted. This article is based on the thesis that overgeneralization of the similarities between the tort and contract aspects of agency has clouded the obvious distinctions indicated in the growth and development of agency.

While the primary purpose of this article is not a historical treatment of the field of agency, a brief review of the area and its development is essential to understanding the problems created by certain aspects of the current state of this field. Although modern writers have sought to weld agency into a single body of jurisprudence, no one would disagree that it does consist of components that are basically contract in nature and those that have their foundation in the law of torts. Fundamentally, these concepts deal with (1) the power of one person (an agent) to bind another person (a principal) in contractual matters and (2) the vicarious liability of one person (a master) for certain of the acts of another person (his servant) as seen in the doctrine of respondeat superior. Each of these concepts finds its origin deep in the history of the common law.

HISTORICAL PERSPECTIVE

Early Developments

While the field of agency has been described as developing within the last two hundred years, some of its primary components are much older. The power of one person to bind another in contractual matters dates back as far as the Year Books. Pollack and Maitland spoke of the law of agency being in its “infancy” in the thirteenth century. It must be noted, however, that the “agency” spoken of was that of the mercantile type dealing with contractual relations. The agent was able by his act of consent, to transfer his principal's property, to oblige his principal, and otherwise to bind him in legal transactions. In order that the agent's acts be effective, it was necessary that the agent have authority.

The doctrine of respondeat superior also has an ancient, although distinct, history. Wigmore traces the development of this principle from about 1300 to 1850, with the doctrine crystalizing about 1800. The varying social and legal bases of this concept are well known and documented. This doctrine is younger than the concept that one person can be bound by the authorized act of his agent. More important than the relative ages of these legal principles is the fact that they developed quite independently of each other. One has its origin in the law of torts, the other in the law of contracts.

In the early days, the master was held liable in cases where he had commanded his servant to do the wrong. Later, the master's command was implied if the servant did the wrong while he was about the master's business. In the final stage the master came to be held liable for the servant's acts regardless of any actual or implied command. It came to be simply a question of whether the servant was acting in the scope of his employment and in the execution of his service. Then about the year 1800 the doctrine became established that a master who was in no wise remiss and who had not commanded the wrongful act was nevertheless responsible for it.

The Holmesian Influence

If there is a "father" of modern agency, it is likely Justice Oliver Wendell Holmes. While a professor at Harvard Law School, Justice Holmes delivered two lectures dealing with the field of agency. Eight years later in 1891, these lectures were reprinted in the Harvard Law Review. No review of the current status of the field of agency can omit attention to these lectures, for they influenced the course that the field was to take in the following few decades.

The basic thrust of Justice Holmes' lectures was to defend, or perhaps even establish, agency as a "proper title in the law." His purpose was primarily to show that certain legal doctrines could and should be combined into a separate and distinct area of law. Holmes saw agency as a body of law rife

with fictions, anomalies, and departures from usual legal rules.\textsuperscript{11} He readily admitted that these characteristics were at times at war with logic and common sense.\textsuperscript{12} In a typical Holmesian approach he divorced his comments from "the strict senses" of agency and described the "agency" he discussed as "embracing everything of which I intend to treat."\textsuperscript{13}

The aspects of the field of "agency" that justified its existence, as Holmes viewed it, were what has been described by a more modern writer as its "variants."\textsuperscript{14} Basically, these concepts included rules that found (1) a master liable for the acts of a servant even though the master had forbidden them; (2) an undisclosed principal binding another person who did not even know of the principal's existence at the time he made the contract; and (3) a man, by a few words of ratification, making a contract his own even though he had no part in it. Holmes felt that concepts recognizing \textit{respondeat superior}, the undisclosed principal, and ratification were enough to make agency a proper title in the law. He readily recognized the differing origins of the concepts.\textsuperscript{15}

The nearest concept that Holmes found to be a permeating general, basic principle to all of "agency" as he defined it was his contention that fundamentally "agency" flowed originally from the law growing out of the ancient family (including its slaves) and later the basic law of master-servant.\textsuperscript{16} Holmes seemed to find the "oneness" of the field in the areas in which one person was feigned to be another for purposes of the law. Certainly Holmes recognized the basic tort/contract differences in the area involved. Indeed, his first lecture dealt with the tort aspect,\textsuperscript{17} his second, with the contract.\textsuperscript{18}

At the time of Holmes' lectures on agency, the field largely dealt with the contract aspects of the commercial world in which an agent had authority to bind his principal. The master and servant aspects of the Holmesian view of agency were then treated separately—not as an aspect of agency.\textsuperscript{19} Holmes saw a larger, although not totally integrated, area of subject matter.\textsuperscript{20}

\textsuperscript{11} Id. at 345-46.
\textsuperscript{12} Id. at 346; Holmes, \textit{Agency—II}, 5 HARV. L. REV. 1, 14 (1891).
\textsuperscript{13} Holmes, \textit{Agency}, 4 HARV. L. REV. 345, 346 (1891).
\textsuperscript{14} W. Seavey, \textit{The Law of Agency} 3 (1964).
\textsuperscript{15} Holmes, \textit{Agency}, 4 HARV. L. REV. 345, 348 (1891).
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 345.
\textsuperscript{18} Holmes, \textit{Agency—II}, 5 HARV. L. REV. 1 (1891).
\textsuperscript{19} Holmes, \textit{Agency}, 4 HARV. L. REV. 345, 364 (1891); 5 HARV. L. REV. 1, 5-6 (1891).
\textsuperscript{20} For a thorough, well documented history of the development of the field of agency see Conard, \textit{What's Wrong with Agency?}, 1 J. LEGAL Educ. 540 (1949).
Eventually casebooks and fields of study in law schools, as indicia of the concepts (or scopes of concepts) of law at any given time, reflected the impact of Holmes' thought. Casebooks in 1893 and as late as 191121 still expressly excluded the master and servant tort relationship from the study of agency. However, in 1896, Eugene Wambaugh, a member of the Harvard law faculty, published Cases on Agency22 which followed largely Holmes' view of the field. Wambaugh included the tort aspects of the master-servant relationship on an equal footing with the contract aspects involving principal and agent.23

The first quarter of the twentieth century saw the development of the modern concept of agency embodying Holmes' concept, including not only contract matters but also the vicarious liability of the master and servant relationship. It was noted in 1924 that the field of agency was then "in the throes of active evolution" and that the current state of this area of law was "plastic."24 By 1928, virtually all leading law schools in America included a course dealing with agency as such, and the great majority included the tort liability of a master for his servant's acts.25 Thus, early in this century, the basic formation of modern agency came into being as a distinct field of basic legal study, although it was an infant by any standard.26 It remained only for the American Law Institute to give the new field its formal recognition in the first Restatement of Agency.27

Restatement

While different writers and editors of the period varied their treatment of the "principal/agent" aspect of agency as opposed to "master/servant," the virtual abolition of the "master/servant" distinction as a separate but equal component of agency took place in 1933, when the Restatement of Agency indicated that "master and servant" was really a species of the larger

21. F. MECHEM, CASES ON AGENCY (1893); E. GODDARD, CASES ON AGENCY (1914).
22. E. WAMBAUGH, CASES ON AGENCY (1896).
23. It should be noted that at this time the terms “principal” and “agent” were still firmly implanted as terms used relative to contract concepts as were “master” and “servant” in connection with tort matters.
27. RESTATEMENT OF AGENCY (1933).

In the Second Restatement historical bases supporting recognition of the field are cited. These comments recognize the basic “principal-agent” and “master-servant” distinctions. RESTATEMENT (SECOND) OF AGENCY, Introductory Note § 218 (1958).
category of “principal and agent.” Although the first Reporter for the Restatement in 1926, Professor Floyd R. Mechem, recognized that “principal and agent” were distinct, fundamental and basic concepts from “master and servant,” the distinction was eliminated in the final draft which became the first Restatement in 1933. It should be noted that Professor Warren A. Seavey became Reporter following Professor Mechem’s death in 1928.

It was not the aim of Justice Holmes to eliminate the basic conceptual and historical differences between “master and servant” and “principal and agent.” It was merely his thesis that aspects of both should be considered as a part of a single sector of law: agency. However, it is likely that his analysis and argument for forging the single branch of law set in motion the forces that led to the merger of the two areas conceptually and to seek generalized rules covering both aspects. The recognition of the new area of law called for fresh, scholarly analysis to reconcile the components of the field into a broader principle, capable of wider application. Thus, the “master and servant” relationship was relegated to a subclassification of the broader category of “principal and agent.” This method of classification has been recognized by many subsequent legal authorities.

**If the Slipper Fits**

*Varying Agency Approaches*

The exact rationale of the field of agency has been viewed differently by various legal writers. Once the area was recognized as an entity, the need for a single underlying theme was deemed helpful, if not essential. Agency has been seen as a necessity “in order to enable a person to utilize the services of others and thereby accomplish what he could not achieve alone.” A basic consensual arrangement coupled with an underlying fiduciary relationship has been noted. It has been viewed in an essentially commercial setting although not limited to such. One authority, the Restatement (Second) published in 1958, provides the following definition:

1. Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other

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shall act on his behalf and subject to his control, and consent by the other so to act.

(2) The one for whom action is to be taken is the principal.

(3) The one who is to act is the agent.\textsuperscript{35}

The field of agency has been described as "a title knitting together the whole subject of the employment of one man by another, whether for one job or for life, and whether on commission or on payroll."\textsuperscript{36} It has been viewed as a basic constituent of the general law of business organizations.\textsuperscript{37} This conception of agency has been troubled by its very scope. If it is basically the law dealing with the employment relation, where are its outer limits?

Modern legislation has broadened the total scope of the employment relation far beyond that which existed under the common law. Should legislation (state and federal) involving employer's liability, workmen's compensation, collective bargaining, Social Security, minimum wages, anti-discrimination, job safety, etc., be included in the field? Generally, the tendency to include these varied but related areas of regulations has been resisted, probably because of their unwieldy scope. An exception has been an occasional inclusion of workmen's compensation.\textsuperscript{38}

The broadness and widespread application of agency principles undoubtedly contribute to its varying treatments in law school curricula. The essential application of the rules of agency in the functioning of partnerships has been noted widely and the study of agency is frequently joined with that of partnerships. A larger view of agency finds itself frequently as a part of law school courses entitled "Business Associations."\textsuperscript{39} A still broader approach has envisioned agency as a part of enterprise organization.\textsuperscript{40} A recent scan of 98 law school catalogs reveals that "agency" as such is taught in only six schools. Agency and partnerships were combined in a single course in 35 schools. Business Associations is taught in 36 schools and Business Organizations in 13 schools. Eight schools used other varying course titles. Legal scholars have speculated that the

\textsuperscript{35} Restatement (Second) of Agency § 1 (1958).
\textsuperscript{36} Conard, What's Wrong with Agency?, 1 J. Legal Educ. 540, 548 (1949).
\textsuperscript{38} See Restatement (Second) of Agency, Scope Note 3 (1958); W. Seavey, The Law of Agency 3 (1964); Conard, What's Wrong with Agency?, 1 J. Legal Educ. 540, 548-49 (1949).
\textsuperscript{39} Conard, What's Wrong with Agency?, 1 J. Legal Educ. 540, 544, 546 (1949).
\textsuperscript{40} For a brilliantly edited casebook treating employment, agency, partnerships, and corporations see A. Conard, R. Knauss, & S. Siegel, Enterprise Organization (1972).
creation of the field of agency as a separate title of law may have been the result of convenience and scheduling considerations by legal educators. The already plenary first year courses of contracts and torts had little room to take on the respective contract and tort aspects of agency. The very difficulty of the rules of agency have been seen as a reason for it not being included in the first year law curriculum. If this speculation has foundation, it presents the interesting picture of law school curricula influencing a basic area or title of law rather than the reverse. With the exact approach to agency being so varied as it is integrated into legal study, it at least opens for analysis parts of the structure of the so-called “general” principle that supposedly permeates the field.

A Return to Basics

A more frank recognition of the contract and tort aspects of the field would be helpful in analysis of problems involving features of agency. Especially, it would be worthwhile to be more careful and accurate in describing the principal actors in the agency scenario. The blurring of the “principal and agent” relationship with that of “master and servant” seems to be particularly troublesome. Such generalization of principles may be helpful in integrating the field of study, but it is a hindrance in analysis and solution.

“Principal” and “agent” are words firmly implanted in the historical background of the contractual aspect of agency. As has been noted, the broadening of these terms to include tort facets of agency is of relatively recent origin. Likewise, “master” and “servant” are terms that historically imply a tort application in the area of law currently described as “agency.” For purposes of discussion here, the more classical (or at least historical) terminology of “principal and agent” in contract related situations and “master and servant” in tort application will be used.

Dean Ferson has pointed out that some of the basic differences between the agency aspects of the vicarious tort liability of a master for certain acts of his servant and the contractual responsibility of a principal for certain acts of his agent include: (1) the manner of incurring the liability of contractual responsibility, (2) the kind of acts done by servants as opposed to agents and (3) the character of the changes that are wrought by ser-

41. Conard, What's Wrong with Agency?, 1 J. LEGAL EDUC. 540, 560 (1949); Mechem, What's Wrong with Agency?—A Comment, 2 J. LEGAL EDUC. 203, 206-07 (1949).
42. Mechem, What's Wrong with Agency?—A Comment, 2 J. LEGAL EDUC. 203, 207 (1949).
vants and agents upon the legal position of their counterparts.\textsuperscript{43} As to the first difference, Ferson states that the comparison between what it takes to create a master's "liability" and what it takes to create "power" in an agent comes to this:

One who procures or accepts the services of another and the right to control the worker has a master's "liability" thrust upon him. The risk the master takes is imposed upon him regardless of his consent to bear it. But in order to create power in an agent to bind his principal, it is necessary to have the consent of the principal. The principal can impose such conditions and limitations as he may choose in creating the agent's power just as an offeror can impose such conditions and limitations as he may choose in creating the power of his offeree to accept.\textsuperscript{44}

Concerning the second distinction, it must be noted that the acts of servants are not acts of consent to be bound in a legal transaction, such as a contract. These acts are nonjuristic, therefore, necessitating mere employment of a servant in order to make his master liable. Conversely, acts of agents are acts of consent that his principal should be bound. These juristic acts necessitate authorization by the principal so as to allow the agent to bind his principal.\textsuperscript{45}

Finally, as to the third point of contrast, when an agent exercises his power there occurs a divestment of "primary" rights or a creation of "primary" duties. However, there is no encroachment upon the existing rights of other persons and thus no incurring of liability to suit. By contrast, when the servant acts, he does nothing concerning the shifting or creating of primary rights. Rather, the servant, under the doctrine of \textit{respondeat superior}, violates the primary rights of a third person. This is characteristic of what can happen under a master's liability.\textsuperscript{46}

Perhaps the connotations of the words "master" and "servant" influence their subjugation to less than primary designations as merely a subclass of "principal" and "agent." Indeed, few people today would relish the title "master" and even fewer the appellation "servant."\textsuperscript{47} However, the law is replete with archaic, or at least noncontemporary, terminology. The courts and legal writers have been willing to retain such words in usage where they serve a useful purpose. It is submitted that the words "master" and "servant" still provide utility in initial and

\textsuperscript{43} M. FERSON, PRINCIPLES OF AGENCY 12 (1954).
\textsuperscript{44} Id. at 21.
\textsuperscript{45} Id. at 23.
\textsuperscript{46} Id. at 29.
\textsuperscript{47} "People who are described in common parlance as 'servants' have become notoriously scarce, and those known as 'masters' completely extinct. ('Massa's in de cold, cold ground.')" A. CONARD, R. KNAUSS & S. SIEGEL, ENTERPRISE ORGANIZATION 103 (1972).
basic analysis of agency related problems since they are apt
t words to set the stage for an application of respondeat superior.

The fact that a single person can be, and frequently is, both
a servant and an agent should not compel the merger of the two
concepts. Single individuals frequently are capable of function-
ing in multiple legal capacities. The manager in a retail store
may have authority to bind the store’s owner and at the same
time meet every requirement for being a servant and being
capable of bringing vicarious tort liability upon the owner.

Current Misapplication of the Basics

A fundamental problem arises from the use of “principal”
and “agent.” In one setting “principal” and “agent” may mean
an overall generalized classification; in another, the words may
be used as a subclass of a general classification related to contract
matters. Again, “principal” and “agent” are frequently used
synonymously with “master” and “servant.” The result of this
loose and nonuniform use of terms is that the words themselves
frequently do not provide any guide for understanding the legal
principles involved. The words “principal” and “agent” can only
be understood in connection with the fact situation involved and
the meaning attached by the court due to the dual usage of the
terms.

Frequently, the courts use principal-agent terms in tort cases
involving vicarious liability without bothering to recognize the
master-servant relationship even as a subclassification. On

Supp. 871, 872 (D.D.C. 1974); Holly Sugar Corp. v. Perez, 508 P.2d 595,
571, 573, 499 P.2d 185, 187 (1972).

49. See Dillard Dep’t Stores, Inc. v. Stuckey, 256 Ark. 881, 883, 511
S.W.2d 154, 155 (1974) (in an action for false imprisonment, an off-duty
police officer employed as a department store guard is an agent of his
employer if he arrests someone in performance of his duties as a guard);
McLaughlin v. Chicken Delight, Inc., 164 Conn. 317, 322, 321 A.2d 456,
459 (1973) (A franchisee of defendant had negligently killed plaintiff’s
decedent. Plaintiff sought to recover for the tort from Chicken Delight.
The court discussed general agency theory and did not comment upon
the obvious existence of a master-servant relationship. The court stated
that only in the clearest of situations may a factual determination of no
agency be overturned.); Turner v. Williams, 257 So. 2d 525, 526 (Miss.
Sup. Ct. 1972) (Physical control over another’s act of cutting plaintiff’s
timber establishes principal-agent relationship.); Sullivan v. Josephine
County, 18 Ore. App. 432, 434, 525 P.2d 1071, 1073 (1974) (In a negligence
action, the court found that a private pilot was an agent though the
degree of control was in fact a master-servant relationship.); Gramm v.
Armour & Co. v. Varnes, 132 Ill. App. 2d 1011, 1013, 271 N.E.2d 52, 54
(1971). (No liability on part of principal on theory of respondent supe-
rior unless the agent is also liable.); See also Dart Drug, Inc. v. Linthi-
cum, 300 A.2d 442, 444 (D.C. Ct. App. 1973); Brown v. Wisconsin Nat-
ural Gas Co., 59 Wis.2d 334, 349, 208 N.W.2d 769, 777 (1973); Leary v.
other occasions the courts accurately define a “servant,” but only refer to an “agent.” Such judicial terminology leaves the reader without guidance as to the real theoretical basis of the court's decision.

In Dillard Department Stores, Inc. v. Stuckey, the Arkansas Supreme Court observed simply that a “principal is liable for his agent's torts” while referring to the Restatement section dealing specifically with the master-servant relationship. Similarly, the United States Court of Appeals for the Fourth Circuit talked about an “agent” being in the service of two “principals” while making reference to the Restatement section dealing with a person being the servant of two masters at one time. The Connecticut Supreme Court, in McLaughlin v. Chicken Delight, Inc., cited the broad Restatement Section One definition of agency, and floundered in general agency language. Never having squarely recognized the master-servant relationship, the court observed that “[a]n essential factor in an agency relationship is the right of the principal to direct and control the performance of the work by the agent.”

In reviewing the digests, it is the careless and superficial searcher who would consult only cases listed under either “principal and agent” or “master and servant” to the exclusion of the other category. It is necessary to investigate both categories, regardless of one's initial analysis of the case, to assure adequate research. The courts' usage is so loose and inconsistent that there seems little basis for expecting pertinent precedents to be either under one or the other categories.

The following case from an agency related casebook illustrates the point. The plaintiffs were injured while riding in the defendant's car being used by the defendant's son and being driven by a friend of the son. Initial analysis appears to indicate a rather standard tort case involving the liability of a master for the acts of a servant. No family car doctrine was involved. The court approached the tort problem from a contractual basis, using terminology of “principal” and “agent.” In addition, the court referred to the son's minority as creating an “agency” which would consequently be voidable, but not void. This garble of contract/tort analysis is not unusual in agency cases.

54. Id. at 322, 321 A.2d at 459.
The interchangeability of use of "principal and agent" and "master and servant" has also caused confusion of ancillary terminology. "Authorization," a term that is connected with contract situations, and "employment," a term best used in tort situations involving vicarious liability, are frequently confused and used interchangeably. The same is true of "limits or scope of authority" (contract) and "scope of employment" (tort). The misuse of such terms, although radically different in meaning, further serves to confuse the rationale and analysis of agency problems.\(^5\)

In *Sullivan v. Josephine County*,\(^57\) the Oregon Court of Appeals recognized the phrase "scope of authority" as the equivalent of "scope of employment" in applying the *respondeat superior* doctrine. Also, in a case involving an "apparent servant" issue, the Delaware Supreme Court discussed "apparent authority" as set out in Section 8 of the Restatement in describing the manifestations envisioned in Section 267 of the Restatement, indicating the court’s lack of discernment of the basic distinctions of the two sections.\(^58\)

The basic difference of the master/servant (tort) and principal/agent (contract) relationships has been recognized by numerous legal writers.\(^59\) Even if the master/servant relationship is considered as a species of the larger, more general principal/agent relationship, ultimately the difference between the contractual and tort aspects of the application of agency principles must be considered. Professor Phillip Mechem, in the fourth edition of the classical *Outlines of the Law of Agency*,\(^60\) notes a trend away from such distinctions but indicates they can be useful in analysis and classification and recognizes the historical and theoretical differences between the principal/agent and master/servant relationships. "The distinguishing characteristics of the agent is that he represents his principal contractually . . . . A servant is one who works physically for another, subject to the control of that other, who is called the master."\(^61\) Contrary to this view, the Restatement minimizes the importance

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of the "master-servant" distinction as not being helpful in solving problems and leading to a useless repetition in stating rules. 62

Several Illinois courts provide a wide spectrum in agency terminology and approaches. The Third District Court of Appeals in Burnett v. Caho, 63 recognized that the terms "agent" and "servant" are not wholly synonymous but observed that "it is generally agreed that no basic or fundamental distinction is to be drawn between the liability of the principal for the tort of the agent and the liability of the master for the tort of his servant." 64 This same court earlier discussed respondeat superior simply in the terms of "principal and agent." 65 The Fifth District Appellate Court of Illinois observed that "the right to control or supervise determines if the relationship of principal and agent exists." 66 Finally, in Gomien v. Wear-Ever Aluminum, Inc., 67 the Illinois Supreme Court stated without basic recognition of the tort basis of respondeat superior that "a master is liable for the acts of his servant committed within the scope of employment . . . a principal is liable for acts of his agent performed within the scope of the agency; but neither is liable for acts of independent contractors . . . ." 68

The basic problems of agency nomenclature and lack of preciseness in meaning are generally recognized: "[T]he courts and writers sometimes use the same word to designate different types of persons or associations." 69 "In Agency, key words have been used by the courts and text writers in so many different senses that it is especially important to state the meanings assigned to them . . . ." 70 "The meanings assigned are not always the same as the meanings given to the words by the courts, since the courts have used every word herein defined in a variety of ways . . . ." 71

RESTATEMENT'S IMPACT

The American Law Institute has frequently served to consolidate the diverse sectors of an area of legal study and to make more uniform related terminology. Without question, the

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63. 7 Ill. App. 3d 266, 285 N.E.2d 619 (1972).
64. Id. at 275, 285 N.E.2d at 626.
67. 50 Ill.2d 19, 276 N.E.2d 336 (1971).
68. Id. at 21, 276 N.E.2d at 338.
71. RESTATEMENT (SECOND) OF AGENCY, Introductory Note § 1 (1958).
Restatement of Agency has exerted a profound influence in the general field of agency. The fact that there have been few major agency texts published in recent years has increased this influence. "Agency has attracted very few writers. There are few law review articles and, aside from the Restatement, no very recent texts."\textsuperscript{72} Probably the most recent text is by W. Edward Sell, Dean of the University of Pittsburgh School of Law.\textsuperscript{73} In his preface, Dean Sell notes that agency has, in recent years, been placed in a secondary role in many law school curricula and that the purpose of his text is to "provide a vehicle for the law student to study the fundamentals of agency law on his or her own initiative where no course is available."\textsuperscript{74}

Particularly, the courts have turned repeatedly to the Restatement for guidelines in applying respondeat superior. Ample citations indicating judicial use of the Restatement can be found in the appendix to the second edition of the Restatement. These efforts of the Restatement to aid in unifying and clarifying agency analysis and reasoning deserve recognition. In all candor, however, it should be noted also that the influence of the Institute in merging, at least for the purposes of classification, the tort and contract aspects of agency is at least a contributing factor in some of the problems and confusion still seen in the field of agency.

The Restatement in seeking a more generalized analysis and statement of agency principles, describes agency as a fiduciary relation created when two persons consent that one should act on the other's behalf.\textsuperscript{75} The Restatement is clear in its use of "principal" and "agent" as broad categories which include the historical "master" and "servant." The word "principal," therefore, includes both persons who are masters and persons who are principals exclusively.\textsuperscript{76} Thus, the Restatement candidly recognizes the existence of the status of a "servant," but only as a subclass of an "agent."\textsuperscript{77} It also indicates that the "words

\textsuperscript{72} Preface to W. SEAVEY, THE LAW OF AGENCY at ix (1964).
\textsuperscript{73} W. SELL, AGENCY (1975). The text largely covers the field of law as treated in the Restatement.
\textsuperscript{74} Preface to id. at vii.
\textsuperscript{75} RESTATEMENT (SECOND) OF AGENCY § 1 (1958).
\textsuperscript{76} RESTATEMENT (SECOND OF AGENCY § 1, comment (2) (1958). The basic distinction, however, is recognized: "For many purposes it is immaterial whether or not one who is an agent is also a servant." RESTATEMENT (SECOND OF AGENCY § 1, comment (3) (1958).
\textsuperscript{77} (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
(2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
RESTATEMENT (SECOND OF AGENCY § 2 (1958).
master and servant are herein used to indicate the relation from
which arises both the liability of an employer for the physical
harm caused by third persons by the tort of an employee and
the special duties and immunities of an employer to the em-
ployee.\textsuperscript{78}

This is not intended as a criticism of the mechanical utility
of the design of the Restatement approach. If the circuitous
routes and definitions so meticulously set out are followed, one
can scarcely doubt that the proper destination will be reached.
Theoretically, these standards and methods can be followed pre-
cisely by the courts, bringing uniformity in both terminology and
solutions to agency related cases. It appears that day has not
yet arrived, and it is doubtful that it ever will.

In almost any agency question involving vicarious liability,
analysis will ultimately require the determination of whether a
person is a “servant” for legal purposes. The classification first
as an “agent,” then as a subclassification of an “agent”—a “ser-
vant”—may aid in describing and generalizing the overall agency
field, but it is of scant assistance in analyzing fact situations.
Such a route multiplies the chance of error in analysis and
theoretical application.

By all views, the factual formula for identifying a “servant”
is different from that of an “agent.” The types of acts performed
by each are basically different. The outer limits of liability for
each are different in nature and definition in terms of scope of
employment versus extent of authority. The results of the acts
of each are hardly similar. Errors in analysis growing out of
misapprehension of any of these factors can easily lead to faulty
conclusions. Is there a better approach?

THE SLIPPER ABANDONED

It is submitted that a less slavish recognition of the field
as “agency” would be helpful in approaching related problems.
It is predicted that recognition of the field of agency per se is
waning and will cease to exist except as a theoretical distinction
in a few years. This development is forecast by the contempo-
rary treatment of the field in legal education which minimizes
the recognition of the field of “agency” as such. Also, many
jurisdictions do not list “agency” as a field to be tested in bar
examinations.\textsuperscript{79} Yet one would hardly suppose that concepts

\textsuperscript{78} Restatement (Second) of Agency § 2, comment (a) (1958).

\textsuperscript{79} National Assoc. for Law Placement, BEFORE THE BAR (1975).
Only thirty-one states still list “agency” as a subject specifically tested
on their bar exams. These states are: Alaska, Arizona, Connecticut,
Delaware, Washington D.C., Georgia, Illinois, Indiana, Kansas, Maryland,
such as *respondeat superior* and contractual authority are eliminated from the areas to be tested in bar examinations in these states. These factors alone indicate that current American jurisprudence may not be as impressed with the combined concept of tort and contract principles in the field of agency as was Justice Holmes.

Such trends should make it less distasteful to look at “agency” situations for what they really are: tort or contract problems. Departing from the over-generalized “agency” concepts, one should be able to better analyze what basic distinctions have to be made. Is the act involved one that causes the vicarious liability of *respondeat superior* to come into play? Is the act one that binds contractually the principal because of authority granted (express or implied)? Such basic analysis should eliminate confusion of tort and contract terminology and theories. Basic theoretical analysis of the factual situation will set the stage for proper application of the correct principles.

**CONCLUSION**

While the components of “agency” have proved their usefulness and soundness, it is time to reexamine the utility and appropriateness of the existence of the field as such. Such a reexamination should result in at least an abandonment of the Restatement’s hodge-podge generalized classification approach. Such a fresh look at the field should result in a reemphasis of theoretical analysis in connection with the basic components of the field of agency. The Restatement’s analytical approach which attempts to crowd too many basically different legal concepts into too few generalizations has done little to aid in clearing analysis and legal thinking in connection with agency related questions. The super-generalizations’ primary contribution has had little in the way of constructive influence, outside of helping to establish the existence of the contemporary field of “agency.” The net effect of the Restatement’s approach has been to confuse rather than to clarify and to create generic concepts which war within themselves.

Serious attention should be given to ceasing to recognize agency per se as a field of law that serves a contemporary legal need. If the field is continued, its components should be analyzed from the basis of theoretical content and its meaningless generalizations should be abandoned. As the Restatement

Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, Wyoming.
Reporter well observes, "[w]ords are the tools of lawyers. They should be clean and polished. Ambiguity makes them ineffective to convey the intended thought. As far as possible, they should have a single meaning. Unfortunately, the literature of agency is filled with terms which are used in a variety of senses." It is time to shed Cinderella's slipper. It never fit very well in the first place.

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