THE SELF-AUTHORIZING AGENT

by G.H.L Fridman*

I

In this essay I want to take up and develop a problem which I noted in an earlier piece published in the pages of this journal.[1] The problem concerns the power of an agent to affect the scope of his authority and, in consequence, the liability of his principal. The earlier discussion was in the context of a written contract, containing an exemption or similar clause, in respect of which an agent or servant made some statement, the effect of which was to remove or alter the purport of such clause, resulting in the non-protection of the principal or master from liability when a breach of the contract occurred. Situations in which this has happened have raised the question of the power of some agents to enlarge their authority, or even to cloak themselves with authority, when they have not been empowered to do so by their principals.[2] However, the present discussion is not limited to the narrow issue of overruling exemption or similar clauses in contracts but is concerned with the wider question of the power of an agent generally to act in this way.

The issue is of considerable importance. Historically and conceptually, the position of the agent has been defined and limited by reference to the powers entrusted to him by the principal, as explained in terms of the agent's "authority".[3] This latter notion is an artificial one, invented by the courts for the purpose of explaining and, to some extent, controlling what an agent does, and the extent to which his actions can affect the legal situation of his principal. Whatever kind of "authority" may be invoked by a court to explain the scope of an agent's powers, the source of that authority, in the ultimate analysis, is some act or statement on the part of the principal. He may have set out in precise, express language what the agent may do; he may have indicated, by implication from the circumstances, or by the engagement of the agent in some well-established form of trade, business or occupation, what it is that the agent can do; he may have represented to the outside world what it is that the agent can do, in circumstances that give rise to an estoppel, whereby the principal is not permitted to deny or negate the appearance of authority with which his acts have invested the agent. All these instances of authority are well known and understood.[4] They are exemplified in many reported cases. Taken together, they point to the crucial importance of understanding and interpreting the *principal's* acts or statements in the explanation of the agent's legal position. It is not what the agent purports to do or say that governs his relationship with a third party, nor the latter's relationship with the principal. It is the effect of the principal's behaviour that determines such matters. To this there may be one important exception, which, in a sense, is not truly an exception. If an agent misrepresents that he has authority to act, or to act in a certain way, for a principal, the agent may be personally liable in deceit or for breach of the implied warranty of authority to the third party. In such instances, the principal is not bound at all. There is no agency. All that emerges is a personal liability of

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* Professor of Law, University of Western Ontario

1. Fridman, *Written Contracts with an Oral Element* (1977), 8 Man. L.J. 383 at 397-402.
2. But they have not satisfactorily dealt with the point: *see*, *supra* n. 1.
3. Fridman, *Law of Agency* (5th Ed. 1983) at 15-17 and authorities there cited; *Bowstead on Agency* (14th ed. 1976) at 4.
4. Fridman, *supra* n. 3, at 58-68, 105-115; Bowstead, *supra* n. 3, at 69-94.

the *soi-disant* agent (which, again, is not a liability that arises from agency, but from the tortious, or otherwise wrongful conduct of the agent).[5] Hence, although the rights and liabilities of the parties stem from the conduct of the agent, and not the principal, this is not a real exception to the general statement made earlier, because the situation is not really one of agency. If anything, it goes to emphasize the validity of the remarks made earlier by showing that the relevance of the agent's behaviour becomes apparent only when he is not validly acting as an agent.

Because of this, any suggestion that the agent, by his own acts or statements, can alter or affect the existence, nature or scope of his authority, and, by so doing, make significant changes to the character of his agency, is both startling and disquieting. If there is any truth or validity to such suggestion, then it must be concluded that a subtle and important change is taking place in the concept of agency. Admittedly, hints have been made to the effect that changes are occurring, or ought to be occurring, in the way in which the agency relationship is, or ought to be, regarded by the courts; and that more prominence should be given to the *agent's* position, as contrasted with that of the principal.[6] However, the idea that an agent can affect his authority, and therefore his powers, vis-a-vis his principal and a third party, is one that would seriously undermine the classical concept of agency. Not that there is necessarily anything sacrosanct about that concept. It may well be that changes are required if agency is to fulfill some of the requirements of a modern legal and commercial system.[7] However, to permit an agent to have such a far-reaching effect upon his legal position might be to change agency so radically as to lead, eventually, to the negation of the whole idea and purpose behind the relationship of principal and agent as it evolved in the common law.

What has given rise to the above comments, and to the ensuing discussion of recent decisions in England and Canada, is a *dictum* of Laskin, C.J. in the recent case of *Canadian Laboratory Supplies Ltd.* v. *Engelhard Industries of Canada Ltd.* In the course of his judgement, the learned Chief Justice uttered the following remarks, which disturb the present writer, and, perhaps, should be equally disturbing to others:

> ...I do not subscribe to the proposition, in so far as it purports to be a general statement of the law, that a representation by an agent himself as to the extent of his authority cannot amount to a holding out by the principal. It will depend on what it is an agent has been assigned to do by his principal, and an overreaching may very well inculpate the principal.[8]

What the learned Chief Justice meant or can be taken as having meant by his statement will have to be considered. It is the contention of the present writer that Laskin, C.J. misinterpreted the effect of certain cases (although it is not clear whether he relied upon them to support or found his remarks), and that his view of the law, if ultimately it prevails, would be illogical, against principle, and potentially disastrous in its practical consequences.

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5. Fridman, *supra* 3, at 212-217, Bowstead, *supra* n. 3, at 378-386.

6. Reynolds, *Agency: Theory and Practice* (1978), 94 L.Q.R. 224; Fridman, *The Abuse and Inconsistent Use of Agency* (1982), 20 U.W.O.L.R. 23.

7. Reynolds, *supra* n. 6, at 238.

8. (1979), 97 D.L.R. (3d) 1 at 10 (S.C.C.) (hereinafter referred to as *Can-Lab*). On this case *see also*, Fridman, *Annual Survey of Canadain Law: Commercial Law* (1981), 13 Ottawa L.R. 571 at 586-589.

II

A starting point for this discussion may be found in the following statements, which appear to be doctrinally correct and well-established in the case law:[9] (1) A principal is bound by what his agent has done, if the agent has been given express or actual authority to such effect by the principal; (2) A principal is bound by what his agent has done, if the principal has held out the agent as having authority to such effect; (3) A principal is not bound by what his agent has done if the agent had no authority to effect the act in question, or was limited in the extent to which he could perform such act, and this lack or limitation of authority was known to the third party with whom the agent dealt; (4) A principal is not bound by what his agent has done if, in respect of the particular act, the agent was acting as the agent of the third party, and not the agent of the original principal.

The corollary to these propositions may be spelled out in the following way: A principal will not be bound by what his agent has done if: (a) he has not pre-authorized such act, or ratified it *ex post facto;* (b) he has not held out the agent as having the requisite authority; (c) the agent has represented himself as having authority to act, but had no authority from the principal to make any such representation. Even the fact that the agent purported to act on behalf of the principal, and was acting on the principal's behalf (and not in his, the agent's, own personal interests) will not result in the principal's being bound if the conduct of the agent does not fall within the first two propositions set out above, but, instead, comes within the scope of the second two, or the corollary. However, it should also be noted that if what the agent has done falls within the first two propositions, despite the fact that he was acting in his own personal interests, and not for the benefit of the principal, the latter may still be bound. This is the case to such an extent that the same result may follow if the agent was acting contrary to the interests of the principal, and, perhaps, against a strict prohibition given him by the principal with respect to the act, or kind of act, involved.

The cases to be examined and discussed involve a variety of transactions. They arise out of the use of agents in different ways and for diverse purposes. Hence their relevance to, and importance in respect of the issue now being considered. They reveal that the problem of the "self-authorizing agent", to coin a phrase, is not confined to one particular type of situation or to the use of an agent in any particular transaction. Some of these cases were referred to in the earlier article, to which reference has been made. However, in the present context, they may have to be looked at once again.

One line of cases suggests that there may be occasions when an agent, without either express or apparent authority to do so, can make a statement that completely alters the relationship between the third party and the principal that would normally arise when the agent in question enters into a transaction with such third party on behalf of the principal. Those cases, such as *Curtis* v. *Chemical Cleaning & Dyeing Co.*[10] and *Mendelssohn* v. *Normand Ltd.*,[11]

9. *See e.g.*, the cases cited below n. 17-27, 30-38, 40-9, 57.

10. [1951] 1 K.B. 805 (C.A.)(hereinafter referred to as *Curtis*).

11. [1970] 1 Q.B. 177 (C.A.) (hereinafter referred to as *Mendelssohn*).

considered in the earlier article, involved someone who was more a "servant" in the traditional sense than an "agent" in the sense in which I have elsewhere defined and used that term.[12] However, in those instances the servant in question may have had some authority to act as an agent and make a contract with the third party; a contract for the cleaning of the goods in the *Curtis* case; a contract to park the car in the *Mendelssohn* case. What the court appears to have decided in those cases, without going into much detail as regards the reasons for its conclusion, is that the servant/agent in question somehow possessed the requisite authority to make the kind of representation that resulted in the ultimate liability of the principal, notwithstanding an attempt on the principal's part to exclude liability by an appropriate notice suitably, and perhaps prominently displayed, which was drawn to the attention of the third party at the time, or prior to his contracting with the principal through the medium of the servant/agent. Similarily, in cases involving insurance, of which more will be said later, decisions can be found in which it has been held that an insurance agent possessed authority to perform certain acts, such as to fill in or complete an insurance proposal form, in such a way as to bind the principal, the insurance company. In effect, what the courts held was that the agent in question possessed the authority to extend or enlarge the authority which had in fact been entrusted to him by the insurance company in each instance. It is possible, however, that there is an explanation for some, if not all of these cases without any reference to the idea that an agent may be empowered to enlarge or extend his authority. Indeed these cases may be the ones implicitly referred to by Laskin, C.J. in the passage quoted above, and may provide the seed from which grew the idea contained in that passage.

It is material to note that, in strong contrast with the cases referred to in the preceding paragraph, there are others in which a contrary conclusion has been reached; the agent in question could not confer upon himself an authority to which he was not entitled, never having been entrusted with it, nor could the third party argue that he had been misled into reliance upon the agent's acts or statements by anything said or done by the principal. Some of these cases were also the subject of comment in the earlier article: *Overbrook Estates Ltd.* v. *Glencombe Properties Ltd.*;[13] *Jensen et. al.* v. *South Trail Mobile Ltd. et. al.*;[14] *Cypress Disposal Ltd.* v. *Inland Kenworth Sales Nanaimo Ltd.*;[15] *Russo-Chinese Bank* v. *Li Yau Sam.*[16] These cases support the proposition that an agent can never enlarge or extend his authority merely by stating or pretending that he can, or has the principal's permission to do so in the way involved, e.g., by giving a warranty about property to be auctioned, by signing a document on behalf of a company. Other examples may be given. In some of the cases the third party was aware of the agent's lack of authority, or, phrasing this differently, of the limitations or prohibitions upon the agent's authority. In other instances the courts have held that the agent was acting for the third party, not the agent's original principal, when he acted in the material way that was

12. Fridman, *supra* n. 3, at 9.
13. [1974] 3 All E.R. 511 (Ch. D.) (hereinafter referred to as *Overbrooke*).
14. (1972), 28 D.L.R. (3d) 233 (Alta. S.C., App. Div.) (hereinafter referred to as *Jensen*).
15. (1975), 54 D.L.R. (3d) 598 (B.C.C.A.) (hereinafter referred to as *Cypress Disposal*).
16. [1910] A.C. 174 (P.C.)(hereinafter referred to as *Russo-Chinese Bank*).

allged to give rise to liability, or made the relevant statement upon which the third party was relying to hold the principal liable.

From this brief survey, it may be seen that courts have come to a variety of conclusions. Indeed, within the confines of a given case, there may be found different conclusions by different judges. Some have held, in dissent, that the principal could be bound by the agent's unauthorized statement or act; others, equally in dissent, have held that the agent could not bind the principal so as to make the latter resonsible for what the agent had done or said when he had no express, i.e. actual authority to do so, nor had he been held out by the principal as possessing such authority. The picture that emerges from these cases is a confused and confusing one. A possible source of, or reason for, such confusion may be that, while the principles of agency law (as set out earlier) are beyond debate and straightforward in their content and meaning, the application of those principles in any given instance may be a matter of some contention in relation to the particular facts of the case. Time and again, different courts, or different members of the same court, could arrive, and have arrived, at different conclusions as a result of their individual characterization of the material facts of the case. If the problem is truly caused by such divergent characterization of the facts, then probably there is little that the critic of the law of agency can do to clarify the situation and correct any errors of law that may have crept into the decisions. It is suggested, however, that what may be happening in such instances is that the judge or court in question is taking a particular view of the law, and then interpreting the facts so as to give effect to such individualistic view. If this is a valid objection, then it may be possible to achieve greater uniformity and consistency by pointing out where the courts have gone wrong in terms of the law, so that they can avoid any such misinterpretations of fact in the future.

III

The process of correcting what is alleged to be an erroneous view of the law must begin with an analysis of the different situations where, so it is suggested, an incorrect approach was adopted. For this purpose the cases must be analysed not in terms of the eventual result, i.e. liability or non-liability of the principal, but by reference to the type of fact situation or problem. Hence the following distinction between (a) cases involving insurance policies, (b) cases involving sales of goods, (c) cases involving a signature on a document, and (d) cases involving the payment of money.

In what I may call the "insurance" cases, the question has been whether an insurance company can be held liable on a policy of insurance made with a party seeking insurance, when such policy emerged from the acts of an insurance agent. The problem in such cases has been that the company was alleging that, for one of several reasons, the agent in question lacked the necessary authority to negotiate the policy in issue, or to bring it into existence in the manner in which it arose, so as to bind the insurance company. An early Canadian example of this is *Robinson* v. *London Life Insurance Co.*[17] The agent whose conduct resulted in the litigation was held not to have had the power to bind the company by issuing a policy of insurance. All the agent

17. (1918), 42 O.L.R. 527 (C.A.) (hereinafter referred to as *Robinson*).

could do was to issue a prospective assured with an application form, which could lead to a valid contract of insurance between the comany and the potential assured only after the application had been approved by a medical referee appointed by the company. As observed in a slightly earlier case,[18] the issuance of an application form by the agent of the insurance company is not an offer of a policy by the company (through its agent), which can be "accepted" by the potential assured, thereby becoming a contract of insurance. It is an invitation to treat. This leads to an offer by the potential assured, when he completes the application form, and that offer can be accepted or rejected by the company, acting on the advise of its medical referee. Nothing in the *Robinson* case appears to have turned upon whether or not the potential assured believed (whether reasonably or otherwise) that the agent with whom he was dealing had authority to enter into a contract of insurance with the potential assured on the company's behalf. That precise point seems to have emerged as an issue in more recent cases. For example, in *Berryere* v. *Fireman's Fund Insurance Co., Murray, Third Party*[19] the insurance company was held liable when its agent issued a "pink card" to the plaintiff. The agent had been held out by the company as having the necessary authority to issue such a card, therefore the plaintiff was entitled to believe that the agent possessed such authority. The majority of the Manitoba Court of Appeal (Schultz and Monnin, JJ.A.) held that the agent in this instance, unlike the agent in the *Robinson* case, was more than a mere soliciting agent. He had much wider powers. In effect, he could make "offers". Guy, J.A. dissented on the ground that the agent had more limited powers, and such limitations were known by the third party, the plaintiff, who was seeking the necessary insurance coverage. In view of the more recent remarks of Laskin, C.J., referred to above, it is instructive to note the following words of Guy, J.A.: "It would surely lead to chaos and confusion if the common law principles were modified to permit you to rely on the assurance of the man who has no power to give such assurance, and you know it".[20] He also noted that it was always unwise to tinker with or alter the basic priciples of the common law in an effort to accommodate victims of misfortune.[21] This, it may be said, is a warning that has sometimes been unheeded, and, as Guy, J.A. realized, always leads to unfortunate and, from the point of view of doctrine, disastrous results when not followed.

It seems clear from this case that a material factor in the majority's decision in favour of liability on the part of the insurance company was the fact that the company had made the agent appear to have authority to issue the "pink card" that was the subject matter of the dispute. From this it might be inferred that if an agent has possession of the requisite documents which have to be issued to a potential assured, or completed by such potential assured before any policy of insurance can come into existence, then such agent may have been entrusted with authority to contract on the company's behalf, by issuing the appropriate policy (or other contractual document). At the very least, he may be considered to have been held out by the company as possessing such authority. Indeed, the fact that the agent was not supplied with the

18. *Sharkey* v. *Yorkshire Insurance Co.* (1916), 37 O.L.R. 344 (C.A.) aff'd (1916), 54 S.C.R. 92.

19. (1965), 51 D.L.R. (2d) 603 (Man. C.A.).

20. *Id.*, at 618-619.

21. *Id.*, at 622.

necessary forms of policy, which might have carried the implication that such agent had authority to issue such a policy, was highly relevant in an earlier Canadian case, *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.*[22] In that case it was held that the agent had no authority beyond the authority to receive applications for a policy and to submit them to the company for consideration. Hence he had no apparent authority to issue a policy. To the contrary is a more recent English decision, *Stone* v. *Reliance Mutual Insurance Society Ltd.*[23], on which the Supreme Court of Canada relied in the subsequent case of *Blanchette* v. *C.I.S. Ltd.*[24] In the *Stone* case, Lord Denning, M.R. held that an agent who filled in an insurance proposal form bound his principal, the company, by his acts. He had authority to fill in the form, therefore the company was bound by the agent's implied representation that the agent had filled the form in correctly. However, it is not clear what were the reasons for this conclusion. One can only surmise that the Master of the Rolls considered that the possession of such forms by the agent meant something more, in that instance, than that the agent could receive a completed form and send it to the principal, the company, for approval or rejection. A similar result was reached, in a similar situation, in the Canadian case of *Blanchette*. In this instance, however, the court went to some pains to discuss why the circumstances could be interpreted to confer the requisite authority on the agent. Pigeon, J. suggested that the agent in the case before the court was not a mere soliciting agent, one who obtained business by inviting or persuading potential clients or customrs of the insurance company to apply for policies. The agent had some authority to bind the company (albeit that this might have been limited by the company). Therefore the company should be held to whatever authority the agent professed to exercise and was reasonably believed (by the potential assured) to have.[25] This looks very much like an argument in favour of enabling an agent with some authority to enlarge or extend his actual authority by virture of the agent's own representations or statements, as long as there are no grounds on which a reasonable man dealing with the agent would conclude that the agent's "self-authorization" was unjustified or would be repudiated or ignored by the principal. The judgement of Pigeon, J. in this case appears to be the strongest authority for the subsequent remarks of Laskin, C.J. in the *Can-Lab* case, to which reference has been made. However, it should be noted that Laskin, C.J. makes no reference to the *Blanchette* case in his own judgement. Furthermore Ritchie, J., in the *Blanchette* case, strongly dissented from the reasoning and judgment of Pigeon, J.[26], and thought that the decision in *Stone* did not justify the decision arrived at by the majority of the court in *Blanchette*.[27] The situation of the agent in both cases was much the same (as indeed was the situation of the agent in the earlier *Westminster Woodworking* case). Yet the court in the *Westminster Woodworking* case, and Ritchie, J. in *Blanchette*, thought that mere possession of the application forms was not enough to cloak the agent with authority to bind the insurance company by

22. (1915), 25 D.L.R. 284 (B.C.C.A.) (hereinafter referred to as *Westminster Woodworking*).
23. [1972] 1 Lloyds Rep. 469 (C.A.) (hereinafter referred to as *Stone*).
24. (1973), 36 D.L.R. (3d) 561 (S.C.C.) (hereinafter referred to as *Blanchette*).
25. *Supra* n. 24, at 576.
26. *Supra* n. 24, at 569.
27. *Supra* n. 24, at 572.

what the agent said or did. The English Court of Appeal and the majority of the Supreme Court in *Blanchette* took a different view either expressly or by implication. Does the real distinction turn upon whether the agent in question is, or agents of the class in question are, normally understood by members of the public to have the power to bind the principals? Has public experience or have public expectations changed in the years between 1915 and 1973? Can it now be said that insurance agents have a "usual" authority, to employ a phrase that has given rise to much uncertainty and controversy?[28] If so, then what is their "usual" authority? In particular, it may be asked, does such "usual" authority enable such agents to add to their actual authority simply by saying to a third party that he can do what he says he is empowered to do, or what he impliedly represents that he is empowered to do?

The answers to these questions are not easily discoverable in the cases. What the decisions do emphasize, however, as one might expect in view of the general principles of agency law set out earlier, is that an insurance agent will not be held to bind his principal, the insurance company, notwithstanding the agent's express or implied representations about his authority, where the potential assured knows that the agent in question lacks the requisite authority (presumably whether or not an agent of that class can be said to have "usual" authority to act in the manner in question and so bind his principal).[29] For this proposition reference may be made to an English and a Canadian decision. In *Wilkinson* v. *General Accident Fire & Life Assurance Corporation, Ltd.*,[30] the issue was whether an insurance company was liable to indemnify the plaintiff, who had been injured while in the alleged assured's car, under the terms of a policy of insurance issued to the assured by the insurance company's agent. The facts of the case involved two different cars. The owner of a car, in respect of which the company had issued a policy, changed his car and asked the agent to make appropriate arrangements to cover this change. The agent purported to issue a policy that would achieve such a result. However, as the owner of the car knew, the agent only had the power to grant or issue a temporary cover note. He had no authority to grant a policy of insurance entirely different from the one already granted or issued by the company to the owner. Under such circumstances, the agent's act did not bind the principal, and the principal was not liable. As Commissioner Heilbron stated: "if the limited nature of the agent's authority is known to the third party" then the principal is not bound.[31] In the Canadian case of *Dutch Sisters Inn (1969) Ltd. et al.* v. *Continental Insurance Co. et al.*,[32] the third party, with whom the insurance agent transacted, knew that the agent lacked authority to bind the insurance company without the latter's consent. Hence the company was neither bound by, nor liable upon the insurance policy issued or granted by the agent.

Furthermore, it seems to be clear that an insurance company's agent may become the agent of the third party, the potential assured, such that a misrepre-

28. *See e.g.*, Fridman, *supra* n. 3, at 59-65; *Bowstead on Agency*, *supra* n. 3, at 71-74.

29. For the recommendations of the Manitoba Law Reform Commission to the effect that anyone who solicits or negotiates a contract of insurance should be the agent of the insurer and his knowledge should be the knowledge of the insurer, *see Report on a Review of Certain Aspects of Fire Insurance Law in Manitoba, 1976, at 52-57*, referred to in Baer, Rendall & Snow, *Cases on the Canadian Law of Insurance* (2nd Ed. 1978) at 371-373.

30. [1967] 2 Lloyds Rep. 182 (Assize Ct.).

31. *Id.*, at 191.

32. [1978] I.L.R. 970 (Ont. S.C.).

sentation by the agent will not bind or affect the insurance company, but will affect the rights of the assured. This proposition was the basis for the dissenting judgment of Sheppard, J.A. in *Whitelaw* v. *Ransom & Wellington Fire Insurance Co.*,[33] relying on the English case of *Newsholme Bros.* v. *Road Transport & General Insurance Co.*[34] This situation arises where the insurance agent completes or fills in an insurance application form for and on behalf of the potential assured. In such circumstances, or at the very least in some such circumstances, the insurance agent changes his character; he ceases to be the representative of his employer, the company, and becomes, at least *quoad hoc*, the agent or representative of the assured. However, it may be that this approach is not relevant, for example, if the insurance company requires the agent to complete the application form, and the potential assured has to do nothing but sign the completed document. Several of the other cases mentioned and discussed earlier also involved the insurance agent's completing the form, yet the courts in such cases were able to hold that the insurance company was liable for what the agent had done, and accordingly, was bound by the contract of insurance.[35]

The insurance cases, therefore, offer a variety of possibilities. They appear to be saying that knowledge of the limited powers of the agent will affect the principal's liability, without making clear when and how such knowledge is attributed, or attributable to the third party said to be possessed of such knowledge. They also seem to be suggesting that, perhaps notwithstanding such knowledge, the acts or statements of the agent can outflank the commonly accepted principles of agency and can result in the liability of a principal even though the principal has not expressly authorized the agent to make such statements or do what the agent in fact said or did. What is more, they suggest that one possible way of resolving the problem is to find that the agent acted for the assured, not the company, with the result that, whatever the agent said or did, the company will not be liable. In consequence it is suggested that there is no convincing support to be found in the insurance cases for the approach hinted at by Laskin, C.J. in the *Can-Lab* case.

Turning to the second group of cases, those concerned with sales, it may be said that such support is also conspicuously lacking. The cases that seem to suggest that an agent's authority may be extended do not clearly base themselves upon any such proposition as is put forward by Laskin, C.J.; or may be explained on other grounds, as will be seen. Other cases, in which an agent has attempted to enlarge his authority, manifestly repudiate the idea that this can be done with the effect of binding the principal. Admittedly, some of the courts in which the problem has arisen fairly and squarely have been divided on the issue. Nevertheless, it may confidently be asserted that the majority view is along the lines argued in this essay, and against the proposition of Laskin, C.J.

In two earlier cases[36] in which a principal was held bound, the basis for such liability was that the principal had not informed the third party of the

33. (1958), 15 D.L.R. (2d) 504 (B.C.C.A.).

34. [1929] 2 K.B. 356: on which see the comments of the editor of *Bowstead on Agency*, *supra* n. 3, at 338. Cp. also Fridman, *supra* n. 3, at 311.

35. Note the Manitoba recommendations, *supra* n. 29.

36. *Farm Products Ltd.* v. *Macleod Flouring Mills Ltd.* (1918), 43 D.L.R. 770 (Alta. S.C.); *Reid & Keast* v. *A.E. Mckenzie Co. Ltd.* (1921), 61 D.L.R. 95 (Sask. C.A.) (hereinafter referred to as *Reid & Keast*).

agent's limited authority. Indeed, in *Reid & Keast* v. *A.E. McKenzie Co. Ltd.*,[37] the principal had armed the agent with forms for a contract to be entered into by a prospective vendor, and had given the agent full authority to act for him. It was held that the principal could not escape liability on a contract entered into by the agent by saying that he had orally imposed conditions and limitations on the agent's authority. The conditions in question included one by virtue of which any contract entered into by the agent would not be effective until the principal had approved samples of the goods to be bought on his behalf. In light of more recent cases to be discussed in due course, this decision is very instructive. It indicates the importance of the knowledge of the third party. Or, to put this slightly differently, it stresses by implication, the importance and relevance of what a reasonable third party, transacting with the agent, would expect would be the situation and would appreciate would be the position if and when he entered into a contract with the agent who was known to be acting for a principal.

More recently, there have been two decisions, one of the Supreme Court of Canada, in which much emphasis was placed upon the knowledge and belief of the third party. In *Calgary Hardwood & Veneer Ltd. et al.* v. *Canadian National Railway Co.*[38] an agent had no authority to contract on behalf of his principal in respect of the matter in issue. However, his official title, "industrial development officer", and his conduct, which was never repudiated or denied by the principal, legitimately led the third party to infer and believe that he possessed the power to offer to sell the railway's land. Under these circumstances, the majority of the Appellate Division of the Supreme Court of Alberta held that the agent had been held out by the principal as having the requisite authority to enter into the disputed contract. The doctrine of estoppel applied, and the principal could not deny the agent's authority to make an offer to sell land upon which offer the offeree, the third party, could be expected to rely. Prowse, J.A. dissented. His dissent was founded upon the idea that the agent's claim to possess an authority which he did not have was insufficient to bind the principal. The latter were not estopped from denying that the agent had such authority merely because of silence or inactivity in the face of the agent's assumption of power. The difference between the majority view and that of Prowse, J.A. seems to lie in their respective interpretations of the evidence. To the majority, the conduct of the principal in utilizing the services of the agent over a period of years, in the kind of function which he was exercising at the time of the disputed contract, was sufficient to amount to a representation that the agent possessed and continued to possess the sort of authority that was necessary if the principal was to be held bound by the contract.[39] To Prowse, J.A. the agent was only giving his, mistaken, view as to his authority; the third party was relying on the agent's representation, not the principal's. Therefore he lacked authority to contract. Insofar as the case may be put forward as supporting the views of Laskin, C.J., it is hardly very strong or helpful. The majority in effect ignored the agent's part in the process of "representation", and preferred to rely on the conduct of the principal. It was

37. *Reid & Keast, ibid.*

38. (1979), 100 D.L.R. (3d) 302 (Alta. S.C.).

39. In this respect the court relied heavily upon *Freeman & Lockyer (a Firm) v. Buckhurst Park Properties (Mangal) Ltd. (and Another)*, [1964] 2 Q.B. 480 (C.A.).

the dissenter who paid attention to what the agent had said and done; and the conclusion drawn from this was the agent's action could not endow him with an authority which he did not actually possess. Nor could it, of itself, involve the principal in any form of liability through the operation of the doctrine of estoppel. A principal can not be estopped by reason of something which his agent says or does, where the agent does not possess authority of any real or apparent kind to say or do whatever it was that is alleged to be the representation in question

In *Rockland Industries Inc.* v. *Amerada Minerals Corportation of Canada Ltd.*,[40] the agent in question had formerly possessed the authority to sell goods on behalf of the principal. By the time the agent negotiated the contract that was the subject matter of the litigation, however, his authority had been revoked by the principal. No notice of such revocation was given by the principal to the third party. Under those circumstances, the Supreme Court of Canada held that the principal had represented to the third party that the agent continued to possess the requisite authority. Hence the principal was liable for breach of contract in failing to deliver the contract goods. In the context of the present discussion, the following passage in the judgment of Martland, J., speaking for the whole court, is instructive:

> Surely there can be no stronger instance of representing an agent as having permission to act in the conduct of the principal's business with other persons than by permitting an agent to negotiate who is clothed with actual authority so to do....This is not a case of an agent, without authority, representing that he had an authority to deal which, in fact, he lacked.[41]

The inference from this last sentence, it is suggested, is that the position, and the result, would have been different had the agent represented that he had authority to act, rather than, as was the case, the principal, by his conduct, making it appear to the third party that the agent was endowed with such authority. Thus, even where courts have held that a principal can be bound by the acts of an agent who, in fact, lacked the necessary authority, it has been expressly or impliedly stated or suggested that the same result can not follow where the representation of authority is that of the agent, not that of the principal.

This is underlined by cases in which the principal's liability has been negated. Some of these were mentioned and discussed in the present author's earlier article. It is therefore unnecessary to go into detail with respect to the decision of the Privy Council in *Russo-Chinese Bank*[42] nor the judgment of Brightman, J. in *Overbrooke*;[43] nor the decisions of the British Columbia Court of Appeal and the Alberta Appellate Division in *Cypress Disposal*[44] and *Jensen*,[45] respectively. The crucial point in these cases would appear to be that the third party, with whom the agent was contracting, was aware of the limitation upon the agent's powers and authority. Such knowledge came to him because a material document contained language which expressly indi-

40. (1980), 108 D.L.R. (3d) 513 (S.C.C.).
41. *Id.*, at 521-522.
42. *Supra* n. 16.
43. *Supra* n. 13.
44. *Supra* n. 15.
45. *Supra* n. 14.

cated that the agent's authority was limited in the relevant way, or because, as a matter of business practice, the third party was familiar with the kind of authority which a agent of the type involved possessed. Admittedly, the judgment of Brightman, J. in the *Overbrooke* case distinguishes the earlier case of *Mendelssohn*[46] on very spurious grounds, by suggesting that the owner of the car had not received notice of the fact that no employee except the manager of the company had authority to bind the garage owner and accept resonsibility for the safety of the car's contents, notwithstanding the exemption clause which was posted in the garage. However, whether or not the distinction between the two cases can be supported factually, there is a clear legal differentiation between a case where the third party knows of the agent's limited authority and one where he does not. Two further cases merit some mention in this context. One is a decision of the Privy Council, the other is a more recent case from Alberta.

In *Attorney General for Ceylon* v. *Silva*,[47] the issue concerned the authority of a Crown agent to sell goods. In fact the goods had already been sold by the Crown to someone other than the party with whom the agent dealt, hence they could not be delivered to that party, who sued the Crown for breach of contract. This raised the question whether the agent with whom the plaintiff had negotiated possessed authority to make such a contract of sale. The Privy Council held that no binding contract had ever been entered into between the Crown and the plaintiff. The agent whose conduct was involved was not expressly authorized to deal with the goods in question. Nor was he endowed with any apparent or ostensible authority to make such a contract. The fact that the agent had purported to claim such authority did not suffice. As the Board said: "No representation by the agent as to the extent of his authority can amount to a 'holding out' by the principal".[48] This would appear to be as categorical a statement as one could wish. It states without qualification or equivocation that the agent could not enlarge his authority by his own act or statement. Neither the fact of occupation of office, nor that the agent usually performed certain tasks on behalf of the Crown could legitimately entitle a third party (or a court) to infer that the principal, the Crown in this instance, had held out the agent as having authority to sell the goods. In *Hollytex Carpet Industries Ltd.* v. *Canadian Acceptance Corporation Ltd.*[49] the buyer of a truck gave his agent express authority to buy a truck. The agent negotiated with the seller on the terms that the buyer would partially discharge an incumbrance on the title to the truck. When the principal discovered what the agent had done, the principal (i.e. the buyer) endeavored to repudiate liability. The seller argued that the buyer had either given the agent express authority to make the agreement that was involved, or had held him out, by a representation as to his powers, as having apparent or ostensible authority to do so. Kirby, J. of the Alberta Supreme Court rejected these arguments and held that the buyer was not bound by the contract made by the agent. Hence the buyer could recover the money that had been paid to the finance company to discharge the incumbrance that was involved. Once again, therefore, the mere fact that the

46. *Supra* n. 11.

47. [1953] A.C. 461 (P.C.) (hereinafter referred to as *Silva*).

48. *Id.*, at 479.

49. (1979), 16 A.R. 588 (S.C., T.D.)(hereinafter referred to as *Hollytex*).

agent (in this instance an agent with an express, if limited authority) purported to assert by his acts or statements that he had authority to do more than he was expressly authorized to do, was insufficient to cloak him with such authority.

Of the cases discussed above, involving sales of goods, two concern situations in which the third party had signed what he alleged was a contractual document, as a result of which the third party argued that the principal was bound, when the agent had no power to approve or assent to such contract. The agent's function was to remit the document to this principal, i.e., the head office of the company of which he was an agent, where the purported or intended contract would be approved or disallowed. Such was the function and duty of the agent in the *Jensen*[50] and *Cypress Disposal*[51] cases. As previously recorded,[52] in both cases there was a dissenting judgment, McDermid, J.A. in the Alberta case and Seaton, J.A. in the British Columbia case, preferring the view that the agent's act bound the principal, notwithstanding that the agent exceeded his authority and purported to enlarge his authority by his own act or statement to the third party. The majority of both provincial courts of appeal, however, adopted the more traditional attitude that the principal had not held out the agent as having authority to agree to the contract on his own; therefore the principal was not bound. McDermid, J.A. distinguished the *Silva*[53] and *Russo-Chinese Bank* cases.[54] McDermid, J.A. and Seaton, J.A. followed the *Berryere* case,[55] discussed earlier, in which the majority of the Manitoba Court of Appeal, over the strong dissent of Guy, J.A., held that the agent in that case was more than a mere soliciting agent, but did have the authority to issue a pink card which would amount to the issuance of an insurance policy to the third party. Even if that case was correctly decided in the context of insurance agency, it does not necessarily support the proposition that any agent who is armed with forms is possessed of authority to enter into a valid contract with a third party, without higher approval from another officer of the company. In any event, in both cases the third party was aware of the limitation on the agent's powers. He knew or was informed that the approval of some other officer of the company was needed for the contract to be valid and binding. It is true that in the *Berryere* case there appears to have been a similar knowledge on the part of the potential assured, but it may well have been that general insurance practice, or the common belief of the public, outweighed such knowledge in that case. Moreover, in the case of *Reid & Keast*,[56] a vital point was that the agent was given the necessary forms and no notice was given to the third party that the agent could only make a contract subject to the principal's approval of samples of the goods being bought. It would appear, therefore, that the minority judges in the *Jensen* and *Cypress Disposal* cases founded their opinions upon very insubstantial ground.

50. *Supra* n. 14.
51. *Supra* n. 15.
52. Fridman, *supra* n. 1, at 400-401.
53. *Supra* n. 47.
54. *Supra* n. 16.
55. *Supra* n. 19.
56. *Supra* n. 36.

Finally in a more recent decision, *Bank of Montreal* v. *R.J. Nicol Construction (1975) Ltd.*,[57] which concerned the validity of a payment, Krever, J. applied the notion that, as long as the defendant had paid the money owed to a company to the president of the company, who was made to appear to have authority to receive such payment on behalf of the company, the defendant could not be made liable to the bank, suing as assignee of the book debts of the company. It was not the acts of the president himself, even though the president was the sole director of the company, and even though the payment had been made by a cheque made out personally to the president/director, not to the company which was the defendant's creditor. The real issue in this case was whether there were any suspicious circumstances from which the defendant ought to have been alerted to the possibility that the president did not have authority to accept such payment, such that the payment would not become a valid discharge of the defendant's debt to the company. Krever, J. concluded, after an examination of the evidence, that there was nothing which should have put the defendant on his inquiry as to the authority of the president/director to receive payment on behalf of the company. Therefore, on that ground, the bank's action was dismissed. While this case is not altogether in point with respect to the matter now under consideration, it does at least emphasize that, before the doctrine of apparent or ostensible authority can be brought into operation, there must be some action on the part of the principal, not the agent, which reasonably entitles the third party to believe that the agent was possessed of the requisite authority (subject to the possibility that there might be attendant circumstances which should require a reasonable person in the situation of the third party to make enquiries as to the agent's true authority).

IV

From what has been said above, it can be seen that the proposition that a principal should be liable on a contract entered into by an agent who has extended his powers in order to effectuate the contract in question raises several doctrinal problems. By definition, such an agent lacks express authority to make such a contract, or to make the contract in issue on the terms, or under the conditions involved. This represents an immediate and obvious barrier to the potential liability of the principal. However, lack of express authority on the part of an agent will not necessarily preclude the liability of a principal, since the agent's express authority may be enlarged by implication from the circumstances, by custom, or by trade usage. Can it be said that, in any of the situations in which the problem of the self-authorizing agent has been involved, the enlargement of his authority was a necessary incidental to the agent's express authority, or could be justified by some custom operative in the trade, business, or profession of the agent concerned? Perhaps there is a hint of this, especially the element of custom, in some, if not all of the insurance cases. However, it is suggested that if there is such a hint it is the merest hint possible. No court appears to have made its judgment turn conclusively upon any inference of a custom, still less upon the possibility that the proper performance of the agent's undertaking was dependent upon his extension of his express authority. Another way in which an agent's express authority may be extended is by the notion that the agent has been held out as

57. (1981), 32 O.R. (2d) 225 (H.C.J.).

possessing such extra powers. Of the cases which have been examined earlier, some illustrate the utility of this notion. The decision that the agent bound his principal by his self-assertion of authority has stemmed from a finding that something said or done by the principal justified the third party in believing that the agent was acting within the scope of his authority, and not completely outside what he was employed to do or in a manner different from that in which he was empowered to act. Hence, where the third party was aware of the agent's limited authority, no such inference could be made. On the contrary, the judgment of the court was that the agent was acting on his own, and not in a way which could result in his principal's incurring liability. Cases where the doctrine of holding out was successfully invoked by a third party present no doctrinal difficulties. They conform to the normal incidents of agency. At the same time they do not justify any general proposition as to the liability of a principal for an agent's acts where the agent has purported to confer on himself the necessary authority to perform the act in question, in the way in question. If express, implied, customary, and apparent authority are ruled inapplicable to cases of this kind, there seems to remain no basis upon which an agent can bring about the involvement of his principal in a transaction negotiated by the agent. Indeed, to suggest that an agent can achieve such a result by his own, unsupported, unauthorized act, is to negate the very fundamentals of agency as it has been developed in what may be called "classical" common law. I have discussed elsewhere the prospect of some elasticity in the modern law of agency, in order to take into account possible uses of the concept in different, perhaps novel contexts.[58] Nonetheless, there are dangers in excessive flexibility. It is one thing to modify agency for the purpose of accommodating the agency relationship to resolve certain legal problems. It is quite another to alter the nature of that relationship to such an extent that a principal can find himself bound contractually beyond the limits of what he intended or foresaw, or, as a reasonable man, ought to be taken to have intended, or to have been able to foresee, as a consequence of the employment of another to perform certain functions or achieve certain ends. The failure to realize that this may be the result of permitting an agent to enlarge or extend his authority might promote changes that could lead to the obliteration of the unique and special character of the agency relationship.

It would also produce some practical problems. To begin with, there is the difficulty associated with the position of the principal. One who employs another to undertake certain tasks or fulfill certain functions for him necessarily accepts some degree of risk. The agent can seriously affect the legal situation of this principal. Where what occurs was intended by the principal or, at the very least, was foreseeable as a consequence of the employment of an agent in general, or the particular agent, it is reasonable and fair to make the principal accept and stand by what the agent has done. The principal has knowingly incurred the possibility that this would happen. Even where the principal had no intention of conferring a certain power upon an agent, but intentionally, negligently, or even innocently, represented to the outside world, or the particular third party who has been affected, that someone was the principal's agent, or was endowed with the kind of authority that was

58. Fridman, *supra* n. 6, at 51-52.

exercised by the agent, once again it is reasonable and fair to inculpate the principal. Beyond these limits, however, is it either fair or reasonable to expect a principal (or one who has been regarded as a principal by either agent or third party) to be bound? The law relating to the doctrine of the implied warranty of authority would appear to suggest that the law has not thought so, since the 1850's at any rate.[59] Why, then, should a principal be subjected to the possibility of finding himself contractually bound when he had no foreknowledge nor any intention that he would be so bund unless and until he was given the opportunity to decide, on some basis or another, whether or not he desired to be bound to the particular third party in the particular way that was involved? This is not a novel problem, as anyone familiar with the law of agency will realize. However, the attitude of the law has been to protect the principal from liability (in contract at any rate), except where the principal's own conduct can be said to have been the cause, or a major contributing cause, of the ultimate reliance of the third party upon the authority of the agent. In other instances, the law has been clear; the principal can avoid or escape liability for some conduct of the agent for which the principal cannot be held responsible, even though the agent may have been put in a position to expose the third party to potential loss or harm as a result of the principal's employment of the agent in such capacity.

As against this, however, there is the counter-argument in favour of providing the third party with the protection of the law, and giving him a remedy not only against the agent (which may be worthless in a given instance) but against the principal. Here the doctrine of estoppel has been crucial. Yet, even the doctrine of estoppel will not come into play unless or until there is some behavour on the part of the principal which entitles a court to invoke that doctrine. Third parties dealing with people they believe are agents, or have a certain authority, when in fact they are not agents or do not possess the authority in question, can not merely assert their beliefs, however reasonable, as a basis for holding the alleged principal liable. Something more must be proved to have taken place; there must be some positive, unequivocal connection between the reliance by the third party on the agency and the subsequent detriment that was, or will be incurred by the third party as a result, and the conduct of the principal. By definition, in the cases now under discussion, such connection was, or sometimes was, missing. In the absence of any such connection, there appears to be no rational basis, nor any foundation in elementary justice, for holding the principal liable to the third party.

Thus the problem of the self-authorizing agent raises yet again the familiar, but ever perplexing dilemma of choosing between two innocent parties; the principal whose agent has done more than he should have done, or done it in a radically different way, and the third party who has acted in good faith and in utter reliance upon the probity and validity of the character and actions of the one with whom he transacted. The logic of the law and the rationale of agency leads to one solution; the exigencies of everyday life to another.

In such a conflict between principle on the one hand and policy on the other, where there may be pressures to drive the law into new directions, it may

59. *See* the authorities cited *supra* n. 6.

be instructive to see what the law does in other situations which raise the same, or a similar, dilemma, and, from such a comparison, obtain some possible clues as to the proper way to approach the particular problem in hand. One such comparison can be made with the position of the undisclosed principal. The doctrine of the undisclosed principal may be anomalous, but, it is not amorphous. It does have limits and boundaries.[60] For instance, an undisclosed principal may not validly ratify *ex post facto* an unauthorized act of his agent,[61] even though such ratification is possible where the principal is disclosed.[62] Admittedly, there are some uncertainties as to the limits of an undisclosed principal's liablity where his agent acts without express authority but purports to act, or is asserted by the third party to have acted, within the ambit of some "apparent authority", a concept that is difficult to fit into the general pattern of undisclosed agency.[63] The classical dilemma is in evidence. The innocent third party or the ignorant undisclosed principal whose agent has overreached himself will suffer whichever way the law resolves the problem of the agent's acting outside his authority. Although it may be said to remain definitively unresolved, by and large the attitude of the law seems to be in favour of excusing the principal from liability unless his conduct can somehow be said to be responsible for the creation of the situation which misled the third party.[64] If this is the correct approach to adopt in the case of undisclosed agency, then, it is suggested, it would be consistent with both principle and practicality to deal with the position of the self-authorizing agent in the same way. To hold that such an agent may bind his principal, when unauthorized to do so, would not be congruent with what is done with respect to the agent of an undisclosed principal, which, in turn, is merely an application to a special anomalous case, of more generally operative rules which, themselves, are founded not only upon the internal logical structure of the law of agency, but also on sensible, reasonable, practical considerations.

Another comparison may be made with the position of a principal or master with respect to a tort committed by his agent or servant. The agent or servant may make his principal or master vicariously liable in tort when the agent or servant was not expressly authorized to do the act which involved the commission of the tort, if he was acting in what he thought were the interests of the principal or master and for the latter's benefit, even if he was performing his authority, or the task he was instructed to fulfill, in an unauthorized or uninstructed way.[65] Indeed, the law goes further, and holds that a servant (and possibly, an agent) may produce such vicarious liability when he does something which he was positively prohibited from doing (as long as what he did was a mode, albeit an unauthorized or uncommanded mode, of performing the task entrusted to him).[66] If one were to apply these ideas in the context of the

60. Fridman, *supra* n. 3, at 221-234; *Bowstead on Agency*, *supra* n. 3, at 256-264.

61. *Keighley, Maxsted & Co.* v. *Durant*, [1901] A.C. 240 (H.L.).

62. Fridman, *supra* n. 3, chap. 5; *Bowstead on Agency*, *supra* n. 3, at 37-63.

63. Fridman, *supra* n. 3, at 228-229.

64. Cp. *Watteau* v. *Fenwick*, [1893] 1 Q.B. 346 with *McLaughlin* v. *Gentles* (1919), 51 D.L.R. 383 (Ont. S.C., App. Div.).

65. Fridman, *supra* n. 3, at 267-281; Bowstead, *supra* n. 3, at 307-320.

66. *Salmond & Heuston on the Law of Torts* (18th Ed. 1981) at 440-441; *Rose* v. *Plenty and another*, [1979] 1 All E.R. 97 (C.A.); cp. as to the equation of agents and servants, *Heatons Transport (St. Helens) Ltd.* v. *Transport & General Workers' Union*, [1973] A.C. 15 (H.L.) (on which *see* Fridman, *supra* n. 6, at 42-47.

cases under discussion, a distinction might then be drawn between an agent who was acting in his own interests, e.g., an insurance agent who improperly misrepresented the qualifications of an intended assured for the purpose of making sure that a policy of insurance was issued so that the agent could earn his commission, and an agent who honestly, if erroneously, believed that what he was doing was for the benefit of his principal, even though the principal had not authorized him to do so (and, if asked, might not have given such authorization). An example of this latter situation would be the agent buying the truck in the *Hollytex* case[67], or selling the goods in the *Silva* case.[68] Most, if not all of the cases which have been considered earlier, raised situations in which the agent was purporting or endeavoring to act in what he imagined were the interests of his principal. Notwithstanding this, as already seen, courts have not been prepared to hold the principal liable without something more than simply on the basis that what was done was notionally for the principal's benefit. That is not to say that the courts could not have adopted such an approach. The fact that they chose not to do so, however, is indicative of their reluctance to adopt a view that has been thought to be appropriate where liability in tort was concerned, and to apply it to cases of contractual liability. Generally speaking, at least where resposibility for the acts of an agent is involved, there appears to be a distinction drawn between liability for torts and liability under contract. Despite the gradually increasing scope of vicarious tort liability, there seems to be no great willingness on the part of the courts to enlarge the scope of contractual liability for the acts of another person, not the party whose contractual liability is in question. In tort cases the courts have come down on the side of the innocent victim of the agent's or servant's acts, and against the principal or master who has become involved in liability against his will and without his prior knowledge or foresight of possible harm.[69] Is the law being inconsistent in this respect? While at first sight it may appear so, the answer is that there is no real inconsistency if the aims and purposes of the law of tort and the law of contract are kept distinct. Although some commentators have been arguing in favour of a less sharply drawn distinction between tort and contract (perhaps, even, the more radical approach of abolishing any such distinction, or the eventual merger of principles of tort and contract liability), such a view is not generally held; and it may never, and probably should never, prevail. That being so, there would appear to be good grounds for differentiating the somewhat broad vicarious tort liability from the narrower liability in contract, and making the latter depend upon the active conduct of participation of the party whose liability is in question, the principal, while the former may not require such positive involvement by the principal, as long as, causally speaking, some connection can be made between the employment of the intermediary, i.e., the agent or servant, and the ultimate harm to the plaintiff.

Such differentiation may not be necessary. There are indications that, in certain circumstances, even the law of tort is unprepared to hold a principal or master extensively liable for the acts of the agent or servant who has been

67. *Supra* n. 49.

68. *Supra* n. 47.

69. *But see* the discussion *infra* of *Kooragang Investments Pty. Ltd.* v. *Richardson & Wrench Ltd.* [1981] 3 All E.R. 65 (P.C.).

employed in a particular capacity. If the prospect of liability founded upon ostensible authority, or estoppel, is precluded by the facts, and the only possible basis upon which the principal or master could be bound is by finding that the agent or servant acted within the scope of some express authority, the courts will not always conclude that the particular act of the agent or servant was expressly authorized by the principal or master, even if the acts done were generally of a class which the agent or servant was authorized to do on the principal's or master's behalf. This was held to be the position, where the agent or servant had not dealt directly with the injured party, in *Kooragang Investments Pty. Ltd.* v. *Richardson & Wrench Ltd.*,[70] a decision of the Privy Council. The facts of that case raised a possible liability for negligent misrepresentation, in accordance with the decision in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[71] The point did not arise for determination in view of the holding that the principals or masters were not liable for the alleged negligence of the valuer employed by the defendants because he was not acting as the agent of the defendants when he gave the inaccurate valuations but as an employee or associate of another company, the defendants' client, and on the instructions of that client. The situation was somewhat far removed therefore from that which arose in the cases discussed earlier. However, the point is clearly made and strongly driven home by Lord Wilberforce, speaking for the Privy Council, that merely because an employee acts in accordance with his usual kind of employment does not mean that he is acting within the scope of his authority if, in fact, he was never expressly authorized to do what he has done (in the absence of any circumstances which might give rise to an argument based upon holding out and estoppel).[72] If the courts are willing to limit vicarious tort liability in this way, it might be thought that they would be equally, if not more willing similarly to limit possible contractual liability. That would mean that just because an agent was doing what he was employed to do by the principal, e.g., obtain policy holders for an insurance company, or sell a vehicle for the owner, he would not be acting within the scope of his express authority if he acted in a manner contrary to his express instructions, albeit that this fact was unknown to the third party. On principle, therefore, it would seem inappropriate to approve a statement of the law which suggested that the very opposite conclusion might be reached, and that a principal could be bound by a representation by the agent as to the extent of his authority when this was contrary to the agent's express instructions, as the agent well knew, even though the third party did not. As in a case which involved the possibility of tort liability, in a case of this kind, involving liability on a contract entered into by the agent with a third party, there would seem to be no scope for the application of the very broad principles of responsibility which were first enunciated by the House of Lords in *Lloyd* v. *Grace, Smith & Co.*,[73] and later elaborated and applied in *Uxbridge Permanent Benefit Building Society* v. *Pickard*,[74] a case that was cited and distinguished by the Privy Council in the *Koorangang Investments* case.[75]

70. [1981] 3 All E.R. 65 (P.C.).
71. [1964] A.C. 465 (H.L.).
72. *Supra* n. 70, at 69-71.
73. [1912] A.C. 716 (H.L.).
74. [1939] 2 K.B. 248 (C.A.).
75. *Supra* n. 70, at 70-71.

V

The statement by Laskin, C.J. in the *Can-Lab* case[76] can now be given fuller consideration. One interpretation of what the learned Chief Justice said is that he was intending to refer to nothing more startling or revolutionary than the doctrine of apparent or ostensible authority. His comment that the result depended upon what the agent had been assigned to do by the principal might be taken to mean that the liability of the principal depended upon the nature of the office or task entrusted to the agent. Undeniably, the employment of an agent in some office, position, or employment that usually carries with it the enjoyment of a certain power or authority also carries with it the risk that the principal may be liable on a contract made by the agent within the scope of such power or authority, even without any express authorization to such effect given by the principal to the agent. The classic modern case of *Freeman & Lockyer (a Firm)* v. *Buckhurst Park Properties (Mangal) Ltd. (and Another)*,[77] in which the law of ostensible or apparent authority was restated in more modern, and frequently cited terms, is a case in point. There, the employment of the second defendant as managing director of the company, with power to deal with the development of the property that was owned by the company, entitled the trial judge and the Court of Appeal to conclude that the second defendant, who had engaged the plaintiffs, was acting with such authority when he did so, thereby making the company liable on the contract. Thus, what Laskin, C.J. would be saying, if this were the correct interpretation of his language, would be that a court must investigate the nature of the office or duties given the agent to see whether such office or duties could be regarded as involving of necessity, or by way of custom or usage of the trade, business or profession concerned, the kind of authority that was involved in the particular instance. This would not be saying anything novel. However, it is suggested that what the Chief Justice was intending to say was that even without any conclusion as to apparent or ostensible authority, a court could find a principal liable where his agent, without express authority and without any holding out by the principal, had so conducted himself that the third party was able to infer that the agent had been authorized to act as he had. In appropriate circumstances, where the agent had been assigned certain functions by the principal, it would then not be necessary for a court to discover any act or statement on the part of the principal (other, perhaps, than the mere employment of the agent in the task in question) from which any holding out could be inferred. This, unquestionably, is a new proposition. It presents a view of the law of agency that is revolutionary and far-reaching in its effects.

The purpose of the foregoing discussion has been to establish that the governing case law does not favour the view as to the effect of representations by the agent that is put forward by Laskin, C.J. in the *Can-Lab* case. Nor do general principles of the law of agency seem to be a fruitful source of any such doctrine. Furthermore, from what might be called a practical point of view, the arguments in favour of the adoption of such an approach are not conclusive. There are good reasons for maintaining the opposite approach and rejecting the possibility that an agent can extend his authority by his own act or statement without reference to his principal, and without the principal's having said or

76. *Supra* n. 8.

77. [1964] 2 Q.B. 480 (C.A.).

done anything that might have misled the third party into believing that the agent could do what he has done. Laskin, C.J. did not refer to any case in this respect. Nor did he canvass the arguments that might be, and have been raised, in favour and against such a view of the law. Nor did he rely on any broad notions of agency to support or substantiate what he was suggesting. It almost appears that the learned Chief Justice was throwing out the idea wihout proper or adequate consideration of its effects or its validity. The statement by Laskin, C.J. was a mere *obiter dictum*, because the ultimate decision of the Supreme Court rested upon the finding that the rogue in the case had been held out by the principal as having authority to deal with the third party in the way that he did (fraudulent thought it was), although there was some dissension among the members of the court as to the precise date when the holding out ceased to have effect and the third party was, or ought to have been on notice that there was something suspicious and questionable about the agent's conduct. There was no difference of opinion, however, on the question whether, at any time, the third party was entitled to rely on the appearance of authority with which the fraudulent employee had been cloaked. Thus, nothing turned upon whether the third party had transacted with the agent because of what the agent had said or done. Admittedly, the position of the agent within the structure of the organization that was involved was a material consideration.[78] However, although Laskin, C.J. indicated that the functions of the agent, in the sense of the tasks assigned to him by the principal, might be of great importance in determining the power of the agent to enlarge his authority and bind the principal, he did not clarify, because it was not necessary for him to do so in the context of this case, what kind of agent, what kind of position, what kind of authority, or what kind of functions, might make a difference in any given instance. What Laskin, C.J. appears to be intimating is that a principal may sometimes find himself bound by what his agent has done because the principal has been responsible for what has occurred by reason of the fairly wide powers entrusted to the agent, or the breadth of the functions assigned or delegated to the agent. It is almost as if the Chief Justice was saying that a principal owes a duty to the outside world not to allow his agent to get into the kind of situation in which harm can be inflicted on a third party by the agent's acts, unauthorized though they might be, and that such a duty does not arise from, nor depend upon, any other representation made by the principal than the employment of the agent in the task or for the purpose in question.

If this is indeed what the Chief Justice was meaning to suggest, then, it is submitted, his Lordship was going far beyond the common law's attitude to the liability of a principal for the conduct of his agent. The idea that the principal may be liable because he can be said to owe a duty in some sort of way to those who might be affected by the principal's employment of a delegate or agent is one that has not been accepted, even though there are statements in the seventeenth and eighteenth centuries that suggest that such might have been the approach the common law could have (even should have) taken in the formative period of the law of agency.[79] The law did not develop in this way. It rejected such a broad basis for liability, which might have made a principal's liability turn upon his negligence in not supervising his agent, or even might

78. *See e.g.*, *supra* n. 8, at 24-25 (*per* Estey J.).

79. *See e.g.*, Holt C.J. in *Boson* v. *Sandford*, [1690] 2 Salk. 400; Ashhurst J. in *Lickbarrow* v. *Mason*, [1787] 2 T.R. 63 at 70.

have been founded upon notions of strict liability for the acts of an agent.[80] To the extent that the law of tort has been prepared to widen the scope of a principal's liability, it may be said that such liability has become more strict. In relation to contractual liability, however, there has been no equivalent movement of the law, notwithstanding attempts over the years to introduce such notions.[81] A comparison may be drawn between this situation and the one dealt with by the Ontario Court of Appeal in *Yepremiam et al.* v. *Scarborough General Hospital et al.*.[82] The majority of the court held that before a master or employer (in this instance the hospital) could be made liable for the negligence of its servant or employee (a doctor) it had to be shown (i) that the negligent employee was a servant within the technical meaning of the law, and (ii) that he was acting withing the course of his employment. The minority thought that this was not essential, because the liability of the hospital could be founded upon a duty directly owed by the hospital to the patient (whether this was a duty arising out of contract or tort), thereby making questions of vicarious liability largely irrelevant. The approach of Laskin, C.J. seems to be adopting a view that would hold a principal directly responsible for what his agent does, at least in certain circumstances, not dependent upon establishing that the agent was acting with some sort of authority and within the scope of such authority. That this is doctrinally incorrect, and is unsubstantiated by authority in the form of decisions that are either binding or persuasive, has been established beyond doubt. At least such is the hope of the present writer. That it would be an unfortunate doctrine were it to be accepted, would seem to be a matter of common sense.

It is not that I am against revision of what I have elsewhere termed the "received" doctrine of agency.[83] Unquestionably agency needs reassessment, if not rejuvenation, in the light of recent commercial and other developments. It may have to be adapted to meet new requirements of a practical kind. Such changes in the law, however, should be made consciously and deliberately, with full understanding of what is being done and the technical consequences of what is being done. They should not occur haphazardly, without due deliberation, and in despite of principle and authority. Moreover, they should occur only if they do not effectively destroy the true, essential nature of agency, and do not impede the proper function of the law of agency, nor make it less useful. This means that due regard must be paid to the practical effects of any such changes. It is my respectful contention that Chief Justice Laskin did not bear these points in mind when he uttered the almost casual words cited earlier. Had he done so, he might not have been so amenable to the prospect of greater and wider liability on the part of a principal by recognizing and giving effect to the acts of the "self-authorizing" agent. Such a creature should not be brought into being by the law. It would be a misshapen, outlandish, unnatural creation. Should this be the consequence of Laskin, C.J.'s remarks, then the learned Chief Justice would have fulfilled the role of Sir George Frankenstein — surely the kind of ambition that no judge could seriously avow or pursue.

80. *Farquharson Brothers & Co.* v. *King & Co.*, [1902] A.C. 325 (H.L.); *Central Newbury Car Auctions Ltd.* v. *Unity Finance Ltd. and Another*, [1957] 1 Q.B. 371 (C.A.).

81. Cp. Denning L.J. in *Central Newbury Car Auctions Ltd.* v. *Unity Finance Ltd.*, *supra* n. 80; Fridman, *supra* n. 3, at 245-247.

82. (1980), 28 O.R. (2d) 494 (C.A.); on which *see* Fridman, *Hospital Liability for Professional Negligence* (1980), 4 Legal Medical Quarterly 80.

83. Fridman, *supra* n. 6, at 24.