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Recent Decisions - State and Federal: Growth of Vicarious Liability Checked

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the contractual relationship between the university and its students. 370 A.2d at 1366. The court indicated, however, that bulletin listings of projected tuition increases does not support finding a contractual obligation. *Id.* This examination must be made in light of principles of contract interpretation.

This construction must be made with an eye to the circumstances and to the *intent* of the parties. Terms of the document are to be given their common meaning. *Id.* at 1367. The court quoted from the RESTATMENT OF CONTRACTS §32 (1932):

> An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain.

Viewing the language of the *Bulletin* as a whole, and with a reasonable view toward the language surrounding the remarks concerning tuition costs, the court stated that "[t]hese words expressed an expectancy by the University regarding future increases. This is not a promise susceptible of enforcement." 370 A.2d at 1368.

In essence, the court found that the university attempted to provide rational guidelines for tuition costs. It had not intended to create an inflexible obligation on its part to maintain fixed tuition rates when the economic realities of operating a university medical school would defeat that attempt at price stability, and force the school to operate at a loss. Such an unknown economic variable did arrive on the scene when the federal government all but eliminated its support for medical/health educational programs in Washington by a decrease in funding through the District of Columbia Medical and Dental Manpower Act.

Growth Of Vicarious Liability Checked

by John Jeffrey Ross

When tort law assigns to an institution liability for the injurious acts of an individual, the role of the law of civil accountability as social engineering becomes especially clear. An important legal concept which assists this function is the theory of *respondeat superior*, where an entity actually remote from the transaction resulting in injury is held responsible because the acting defendant is, or appears to be, the agent of the party ultimately liable.

The Court of Appeals of Maryland recently considered the liability of the remote principal founded on apparent agency, but in reversing a judgment of the Court of Special Appeals, refused to assign responsibility beyond the immediate parties to the event. *B.P. Oil Corporation v. Mabe*, 279 Md. 632, 370 A.2d 554 (1977).

Claude Mabe drove into a service station because his car was low on fuel and water. He asked the attendant for water to fill the radiator, and the employee produced a can filled with a volatile liquid. When Mabe poured this into the hot radiator there was an explosion. Mabe was injured, and he sued.

The gas station was adorned with British Petroleum insignia: uniforms, gas pumps, a station vehicle, and a large sign exhibiting the BP letters and colors. Mabe had entered the station because he "... always buy[s] BP gasoline, always deal[s] with BP." 279 Md. at 636, 370 A.2d at 557. He therefore decided to deal with BP in court too, and named the corporation as a defendant, claiming that the injuries "stemmed directly from the negligent and tortious conduct of the defendants and their agents ..." 279 Md. at 634, 370 A.2d, at 556.

The jury returned a verdict for Mabe. As consumers they were apparently convinced that Mabe's reliance on the ample exhibition of BP insignia as indicative of good products and service meant that he thought he had entered a station under the competent direction of the defendant corporation. The trial court, however, entered a judgment n.o.v., "finding 'no agency of any kind. . . .'" 279 Md. at 634, 370 A.2d at 556. The Court of Special Appeals reversed, finding there was agency by estoppel. *Mabe v. B.P. Oil Corporation*, 31 Md.App. 221, 356 A.2d 304 (1976). *(See The FORUM*, Vol. VII, No. 2, p. 26)

After granting certiorari, the Court of Appeals examined two theories of action: actual and apparent agency. In considering the former, it found that the owner of the station, Faison, leased the premises from a third party, further leased the station to B.P. which in turn, by a reciprocal agreement, leased it back to Faison. The rents between B.P. and Faison were contingent on the amount of gasoline sold, payment for such fuel being the actual rental fee. Other facts dispositive of the actual agency theory were the lack of salary and commission from B.P., and absence of control by the corporation in the hiring and payment of the station's employees. It was found that Faison controlled the operation of the station and that B.P.'s role was limited to that of selling its products to Mabe (and only when he was able to pay for them).

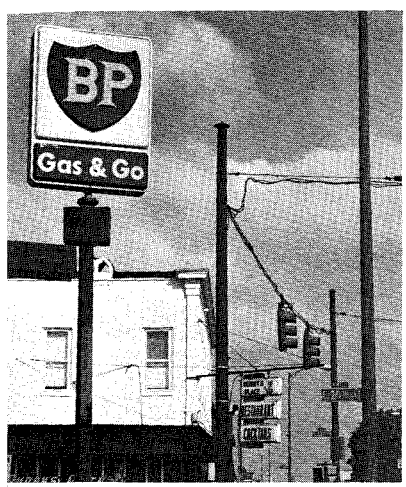

photo by George Martin Kripner

The court concluded that there was no direct control by B.P. over the operation

of the station such as to indicate an actual agency relationship. 279 Md. at 643, 370 A.2d at 560. *See Keitz v. National Paving Co.*, 214 Md. 479, 134 A.2d 296 (1957).

The law of agency by estoppel is expressed in RESTATEMENT (SECOND) OF AGENCY §267 (1958) as follows:

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

This reliance must be actual and on the part of the person injured. It is not sufficient that third parties direct the injured based on their faith in the apparent agency. 279 Md. at 644, 370 A.2d at 561.

In order for Mabe to recover, the record must show such reliance on his part: reliance on the *skill* of the apparent agent. It was insufficient to show attraction to the station merely because it offered British Petroleum products. 279 Md. at 647, 370 A.2d at 562.

After its examination of the record, the court concluded that such reliance on Mabe's part was lacking; he entered this station rather than others in the proximate area because it provided B.P. products. In its interpretation of the record, the court cited a number of cases which held that the presence of an oil company's insignia was insufficient to establish the agency relationship (*Levine v. Standard Oil Co.*, 249 Miss. 651, 163 So.2d 750 (1964) and that the corporation's representations were limited to showing the presence of its products. *See Sherman v. Texas Co.*, 340 Mass. 606, 165 N.E.2d 916 (1960).

In reversing the Court of Special Appeals and denying recovery, the court found Mabe's attraction to the station to constitute no more than choice of products. 279 Md. at 649, 370 A.2d at 564.

Judge Levine dissented vigorously. He noted that the court of Special Appeals sitting *en banc* had found the other way with only one dissent. The implication was that the solution of the case turned on an interpretation of the record, and that the evidence viewed in the light most favorable to Mabe was sufficient to support the jury verdict. Mabe had stated at trial that he not only bought B.P. products, but that he *always dealt with B.P.*

It is apparent that this case is solved by a point over which reasonable men differ, and that there is considerable justification for a new trial. Instead, we are left with a narrow view of vicarious liability in this area, with limits of responsibility closely drawn and tightly circumscribed.

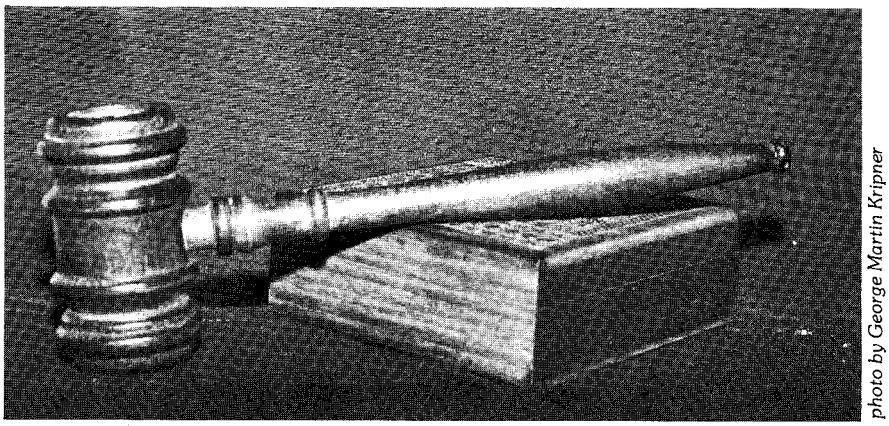

photo by George Martin Kripner

Trounced For An Ounce

by John Jeffrey Ross

Noting that the Eighth Amendment has generally been invoked to proscribe "barbarous methods of punishment," a federal judge recently called upon the flexible and dynamic nature of the Constitution to grant a petition for habeas corpus relief from two consecutive 20-year sentences. *Davis v. Zahradnick*, 432 F. Supp. 444 (W.D. Va. 1977).

Petitioner Davis had been incarcerated after convictions in a Virginia court for possession of marijuana with intent to distribute and for its actual distribution. The Virginia Supreme Court affirmed both the convictions and the sentences and Davis filed a petition for habeas corpus relief in the United States District Court pursuant to 28 U.S.C. §2254. In addition to his Eighth Amendment claims, Davis contended: that he was denied a trial by an impartial jury; that he was subjected to an illegal search and seizure; that the government failed to prove possession of marijuana beyond a reasonable doubt; and that the state failed to show that the substance involved was illegal contraband under the Virginia statute. 432 F.Supp. at 446-447.

The District Court rejected any arguments alleging error in the conduct of the trial, and the case turned solely on the Eighth Amendment claim that the 20-year sentence (plus a $20,000 fine) was constitutionally offensive in light of the nature of the offense.

After considering whether the length of a sentence can serve as a basis for "habeas relief," the court indicated that the disproportionality of the sentence in relationship to the offense constitutes excessiveness which is the "hallmark of cruel and unusual punishment." 432 F.Supp. at 450.

In granting the petition, the court considered four elements in its constitutional examination of the sentence. First considered was the nature of the offense. The fact that the amount of marijuana was less than nine ounces and the absence of any aspect of violence in the offense were crucial to the disposition of this petition.

Regarding the second factor, the legislative purpose behind the punishment, it was eminently clear to the court that the legislative frustration of the sale of a questionably harmful drug could be served by a less severe punishment.

Third, after an examination of punishment for the same offense in other jurisdictions, the court noted the relative excessiveness of the Virginia sentence.