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**MARTIN V. A-1 HOME APPLIANCE CENTER:
A CIVILIAN PERSPECTIVE ON RELIANCE-BASED
THEORIES OF RECOVERY**

Bogdan Buta*

I. INTRODUCTION

Recently, in *Martin v. A-1 Home*,¹ an apparently mundane case of personal injury (in which the victim sought to trigger the liability of a company that allegedly was in a master-servant² relationship with the tortfeasor) puts into question the practice of importing common law principles into matters governed by the Louisiana Civil Code.

Should a Louisiana court be able to look to established common law principles to render a final decision when there is no direct and clear norm from the Civil Code nor a direct line of *jurisprudence constante* on the issue? Does this equate to the legislative gap contemplated by article 4 of the Louisiana Civil Code?³ Is the *equity* mentioned in article 4 enough for a judge in

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1. *Martin v. A-1 Home Appliance Ctr., Inc.*, 12-784 (La. App. 5 Cir. 5/30/13), 117 So. 3d 281 [hereinafter *Martin*].

2. Though largely used in American literature, the language of “master” and “servant” should be replaced by the dichotomy “employer-employee,” thus also following the European trend in Tort Law. An example of such a transition can be seen in a recent Louisiana Tort Law casebook: JOHN M. CHURCH, WILLIAM R. CORBETT & THOMAS E. RICHARD, TORT LAW: THE AMERICAN AND LOUISIANA PERSPECTIVES 515-51 (Vandeplas Publ’g 2008).

3. LA. CIV. CODE art. 4: “When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.”

Louisiana to immediately look at the Restatement of the Law in order to find a solution?⁴

Apart from what may seem just a purely theoretical debate, a better understanding of existing civilian concepts could provide answers to these questions. This case note scrutinizes, in its first part, the flow of arguments used by the court, and, in its second part, offers an alternative theoretical system, consistent with the civil code, but with a different outcome from the decision rendered by the court in *Martin*.

II. BACKGROUND

The plaintiff, Mr. Martin, bought a refrigerator from one of the defendants, A-1 Home Appliance Center, Inc. (hereinafter A-1).⁵ After purchasing the refrigerator, the defendant's employee told Mr. Martin that, in exchange for a \$75 fee, they would deliver the product to the customer's home. The plaintiff agreed and paid this additional service. A couple of days later, Mr. Martin was called and informed that the refrigerator would be delivered the next day. That next day, the plaintiff was called again by a representative of A-1, indicating that they were in the area, ready to deliver the refrigerator. While trying to lift the refrigerator over the kitchen counter inside Mr. Martin's house, the deliverymen appeared to be losing control of the appliance. According to Mr. Martin's testimony, he voluntarily and uninvitedly stepped in and grabbed one side of the refrigerator, trying to rebalance the refrigerator and prevent it from falling over the counter. Once the plaintiff got hold of the refrigerator, its entire weight fell upon him and resulted in the tearing of his right bicep muscle.⁶ This arm injury required

4. Alain Levasseur, *Civilian Methodology: On the Structure of a Civil Code*, 44 TUL. L. REV. 693, 699 (1970). Addressing this issue, the author concluded that "in a codified system of law, whatever is not explicitly laid down in the articles will of necessity lie in the domain of uncertainty and controversy."

5. *Martin*, 117 So. 3d at 282.

6. *Id.*

several surgeries and a prolonged period of rehabilitation, and Mr. Martin sought to recover the cost of the damages incurred.

The plaintiff found out that the deliverymen were not A-1's employees as he initially thought,⁷ but that they were working for another company, Johnson Delivery Service (hereinafter Johnson); A-1 contracted with Johnson in order to make deliveries of its appliances. The plaintiff filed a personal injury action against both A-1 and Johnson, and their insurance companies.

III. DECISION OF THE COURT OF APPEAL

At trial, before the verdict was delivered, Mr. Martin settled with Johnson and its insurer for the amount of \$100,000. Additionally, the jury returned a verdict exonerating A-1, and finding only Johnson liable for the injury. The reasoning behind this decision originated from the fact that there was no indication of an employer-employee relationship between A-1 and Johnson, the latter being an independent contractor.⁸ Following the denial of Martin's motion for a new trial, the plaintiff appealed the decision.⁹

Mr. Martin argued that the trial judge erred in not instructing the jury that A-1 could be jointly liable for the acts of Johnson under the theory of "apparent authority."¹⁰ The plaintiff contended in his appeal that this is a second theory of recovery, distinct from the theory of vicarious liability.¹¹

The Fifth Circuit dismissed the appeal, reiterating the lack of any relationship between A-1 and Johnson, which would otherwise fall under article 2320, and also by distinguishing the fact pattern

7. *Id.*

8. *Id.* at 283.

9. *Id.* at 282.

10. *Id.*

11. LA. CIV. CODE art. 2320:

Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed. . . .

In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

in the present case from a Louisiana Supreme Court case, *Independent Fire Insurance Company v. Able Moving and Storage Company, Inc.*¹² The court found that the “apparent authority” theory was not applicable to the facts of *Martin*,¹³ and reaffirmed the challenged judgment.

IV. COMMENTARY

This commentary is divided in two parts. The first part follows the court’s reasoning in trying to establish whether A-1 is liable. The second part of the commentary suggests an alternative way of analyzing *Martin*, by using a reliance-based theory of liability derived from the Louisiana Civil Code (*la théorie de l’apparence*). This theory provides a different result for *Martin*, and, through its generality, might prove useful in establishing up a framework grounded in the Civil Code for future cases.

A. Re-Analyzing Martin Through the Lens of General Tort Law Principles

1. General Methodology

As a matter of principle, for every wrong done by a person to another, outside a contractual relationship, there is a private action with which the victim can recover the damages incurred.¹⁴ However, what the law designates as a “wrong”, and whether or not a victim has a cause of action, are questions dependent upon the existence of certain grounds, or foundations, for liability.¹⁵ It is a matter of “elementary justice” to recognize that, as a default rule,

12. 650 So. 2d 750 (La. 1995) [hereinafter *Able*].

13. *Martin*, 117 So. 3d at 285.

14. GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT. THE BASICS* 440 (Oxford Univ. Press 2005).

15. Peter Cane, *The Anatomy of Tort Law* in WALTER VAN GERVEN, JEREMY LEVER & PIERRE LAROUCHE, *CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL TORT LAW* 17 (Hart Publ’g 2000; published as part of the IUS COMMUNE CASEBOOKS FOR THE COMMON LAW OF EUROPE series).

everyone should “bear the ‘general risk associated with existence’”¹⁶ and that risk cannot simply pass to other individuals.¹⁷ Liability is an exception to this rule, and, therefore, without legal grounds, or a legal norm that sets out a certain conduct as being unlawful,¹⁸ a victim must bear her own loss.¹⁹ Hence, tort regulation involves a constant tension between protecting the legal interest of society at a given moment and the freedom of action of each individual.²⁰ This tension is incorporated in the normative process. It illustrates, or at least *should* illustrate, societal views on the kind of conduct generally considered to be unlawful at a given moment in time, and how such conduct ought to be deterred.²¹

The usual grounds for liability, fault-based liability and strict liability, would not have served the victim in *Martin*. A-1 committed no fault of its own when the acts of Johnson’s employee caused damage, therefore fault-based liability would not apply.

Things are not necessarily as straightforward when it comes to strict liability, and that is why the court focused in its discussion on one such heading of liability: vicarious liability.²²

2. Is A-1 Liable under Louisiana Civil Code Article 2320?

In *Martin*, the plaintiff raised the question of whether there was an employer-employee relationship between A-1 and Johnson. During the trial, the jury was duly instructed to answer this

16. Karl Larenz & Claus-Wilhelm Canaris, *Lehrbuch des Schuldrechts* in VAN GERVEN ET AL., *supra* note 15, at 15.

17. *Id.*

18. “Although every tort is a wrong, not every wrong is a tort.” JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 1* (Dennis Patterson series ed., Oxford Univ. Press 2010).

19. Cane, *supra* note 15, at 17.

20. Larenz & Canaris, *supra* note 16, at 15.

21. VAN GERVEN ET AL., *supra* note 15, at 330.

22. CHURCH ET AL., *supra* note 2, at 515-17. Also called imputed fault, vicarious liability “imposes liability upon one person for the fault of another.” *Id.*

question, having in mind the provisions of Louisiana Civil Code article 2320,²³ and the factors used by the Louisiana Supreme Court in determining the existence of such a relationship.²⁴ The jury established that Johnson was an independent contractor, and, therefore, that no liability should be imposed on A-1 for the tortious acts of Johnson, under this theory of recovery.²⁵ In the assignments of errors, the plaintiff did not dispute this finding.²⁶

Under article 2320, a victim has to prove two cumulative elements: (1) that there is an employer-employee relationship, and (2) that the negligent act of the employee could have been prevented by the employer.²⁷ Because the first element was not present, the court's analysis stopped there.

3. Is A-1 Liable under the "Apparent Authority" Theory?

Mr. Martin alleged that there was an "apparent authority" with which Johnson was clothed to act on behalf and in the name of A-1. He argued that the conversations he had on the phone were with A-1 representatives, and that he relied on the fact that A-1 would deliver his refrigerator to his home, in his decision to purchase the refrigerator. The plaintiff used the arguments from *Able*,²⁸ to support his assertion.

23. *Id.* at 530. In Louisiana, an employer is liable for the damages produced by her employee while in the exercise of the functions of said employment.

24. *Amyx v. Henry & Hall*, 79 So. 2d 483, 486 (La. 1955). The Fifth Circuit listed the factors, but did not use *Amyx* as a reference. However, analyzing the factors is not the purpose of the present note.

25. *Martin*, 117 So. 3d at 283.

26. *Id.*

27. WILLIAM CRAWFORD, 12 LOUISIANA CIVIL LAW TREATISE: TORT LAW 186 (2d ed., West 2009). Although the codal provision requires the second condition, the courts in Louisiana have consistently ignored it, and do not require the proof of negligence. Considering the doctrinal and jurisprudential dispute in this matter, it is of little importance for the study of *Martin* whether the liability under article 2320 falls under fault or no-fault liability. *See also* *Cox v. Gaylord Container Corp.*, 897 So. 2d 1 (La. Ct. App. 1st Cir. 2004) and *Doe v. East Baton Rouge Parish School Bd.*, 978 So. 2d 426 (La. Ct. App. 1st Cir. 2007).

28. *Able*, 650 So. 2d 750 (1995).

Before looking at the Fifth Circuit's reasoning with regard to this aspect, this commentary will make a short comparative review of agency law and the contract of mandate.

a. The Contract of Mandate

The contract of mandate is different from the concept of agency.²⁹ The concept of agency encompasses a larger pallet of legal effects than the contract of mandate does.³⁰ Louisiana's provisions regarding the contract of mandate were initially drafted in a manner similar to the provisions of the French Civil Code.³¹ Likewise, after the 1997 Revision of the Louisiana Civil Code, the conceptual and functional essence of the contract of mandate did not change.³²

The French Civil Code did not create a institution such as the common law's agency.³³ It defined the institution of mandate as a contract whereby one person (the principal³⁴) gives to another (the mandatary) the power to conclude, on his behalf, one or more juridical acts.³⁵ The mandatary represents the interests of the principal. Given the specifics of some activities (*e.g.*, some acts of commerce), the mandatary will have to execute not only juridical acts, but also material acts.³⁶ This distinction bears a great

29. PHILIPPE MALAURIE & LAURENT AYNES, 8 COURS DE DROIT CIVIL. LES CONTRATS SPÉCIAUX CIVILS ET COMMERCIAUX 268 (8th ed., Ed. Cujas 1994).

30. Jana L. Grauberger, *From Mere Intrusion to General Confusion: Agency and Mandate in Louisiana*, 72 TUL. L. REV. 257, 265 (1997).

31. A. N. Yiannapoulos, *Brokerage, Mandate, and Agency in Louisiana: Civilian Tradition and Modern Practice*, 19 LA. L. REV. 777, 780 (1959).

32. Wendell Holmes & Symeon C. Symeonides, *Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law*, 73 TUL. L. REV. 1087, 1158 (1999). Speaking about the changes that occurred in 1997, the authors conclude that "while being faithful to Louisiana's civil heritage, the new law recognizes the realities of contemporary transactional practice as well as the need for some uniformity with the law of the surrounding common law states."

33. Yiannapoulos, *supra* note 31, at 783.

34. *Mandant*, in French.

35. MARCEL PLANIOL & GEORGE RIPERT, 2.2 TREATISE ON THE CIVIL LAW 286 (Louisiana State Law Inst. trans., William S. Hein & Co. 1939). The same definition can be found in MALAURIE & AYNES, *supra* note 29, at 277.

36. MALAURIE & AYNES, *supra* note 29, at 272.

importance when it comes to liability. The French Civil Code chose to not expressly regulate the liability of the mandatary with respect to the material acts, opening the ground for the Court of Cassation to extend the interpretation and applicability of service contracts in this context (*contrat d'entreprise*).³⁷ In this regard, as a result of business practices, often times the contract of mandate becomes a mixed contract, creating ancillary obligations which do not stem from the traditional notion of mandate.³⁸ This is the legal technique by which the service contract is incorporated into the bigger and complex contract of mandate. Hence, the mandatary shall be held liable for the juridical acts according to the terms of the contract of mandate, and shall be liable towards the principal for the material acts according to the terms of the service contract. The principal is liable to third parties only according to the general theory of liability.

The borderline between these two concepts might be blurred, but no arguments can be offered to stand for the proposition that they are similar. Louisiana Civil Code article 2989 provides that “a mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal.”³⁹ The departure from the French Civil Code stands in that the notion of “affairs” encompasses both juridical and material acts. However, the Revision Comments for article 2989 warn the reader that most of the provisions regarding the contract of mandate have been construed with the juridical acts in mind.⁴⁰ Louisiana did not import *ad litteram* the concept of contract of mandate as prescribed by the French Civil Code.

37. *Id.* at 272 n.7, citing the decision of the Commercial Section of the French Court of Cassation. An equivalent English translation would be “service contract.” A definition of “*contrat d'entreprise*” could provide that it is a convention in which the contractor undertakes an obligation to make his talent available to the client through a compensation previously agreed with the other party. GÉRARD CORNU, *VOCABULAIRE JURIDIQUE* 357 (5th ed., Quadrigue/PUF 2004).

38. MALAURIE & AYNES, *supra* note 29, at 273.

39. LA. CIV. CODE art. 2989, cmt. (d) (1997).

40. LA. CIV. CODE art. 2989, cmt. (e) (1997).

Instead, the drafters might have thought that the problem regarding material acts could be simplified if they use the concept of “affair” to encompass the inclusion of both juridical and material acts.⁴¹

b. Agency

The attempt to find a satisfactory definition of agency is a rather difficult task.⁴² The basic hallmark of agency law is that the principal bears the consequences created by the fact that she chose to run her business through an agent.⁴³ This view embraced by the *Restatement (Third) of Agency* points out a rather minor difference between agency and the contract of mandate. That is, the right of the principal to control the agent’s behavior and to prevent any wrongdoing by the agent.⁴⁴ In a more complicated manner, but to serve the same purpose, the contract of mandate incorporates a service contract (*contrat d'entreprise*). This way, the Civil Code contemplates a method by which the principal has “control” over her mandatary’s behavior with respect to material acts. This design comes close to the control which agency law entails, but no degree of equivalence can be seen between the methods of how the

41. For further reading about the influence of the French Civil Code and doctrine, see Rodolfo Batiza, *The Actual Sources of the Louisiana Project of 1823: A General Analytical Survey*, 47 TUL. L. REV. 1, 5, 22-24. See also Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 11-12. For a different perspective, see Robert Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972). See also ALAIN LEVASSEUR, LOUIS CASIMIR ELISABETH MOREAU-LISLET: FOSTER FATHER OF LOUISIANA CIVIL LAW (LSU Law Center Pubs. Inst. 1996).

42. OLIVIER MORÉTEAU, *DROIT ANGLAIS DES AFFAIRES* 105 (Daloz 2000). See also Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495 (2011), for brief considerations regarding the attempts to find a proper definition.

43. The law of agency:

[E]ncompasses the legal consequences of consensual relationships in which one person (the principal) manifests assent that another person (the agent) shall, subject to the agent's acts and on the principal's right of control, have the power to affect the principal's legal relations through the agent's acts and on the principal's behalf.

RESTATEMENT (THIRD) OF AGENCY § 8.14(2)(b) (Am. Law Inst. 2006).

44. Dalley, *supra* note 42, at 513.

control is exerted.⁴⁵ The principal's control in a contract of mandate is limited to contractual obligations, while agency law assumes that the principal is empowered to control the facts concerning the agent's behavior, contractual or non-contractual.

This apparent theoretical distinction is important in cases where the agency relationship looks much like an employment relationship or projects an image that causes a third party to rely on the fact that the agent is working for the principal, because in such a case it might give rise to liability of the principal for the acts of the agent.⁴⁶ In agency law, by default, the principal has a broader authority to control the behavior of the agent.

The Louisiana Civil Code cannot contemplate such an interpretation, because the only available means of control the principal has over the mandatary are contractual in nature, and the mandatary enjoys more freedom than an agent in common law. The higher degree of control allowed to the principal over the agent in common law jurisdictions comes with heightened responsibility towards third parties. Despite the lower level of control a principal has over the mandatary, in Louisiana there have been cases where courts had to find a basis for imposing liability on a principal, when the equity of the case demanded it. Is the resort to the doctrine of "apparent authority" a solution?

4. A Short History of Agency Law Intrusion in Louisiana Law

This tendency of departing from the codal provisions with regards to contract of mandate is not new.⁴⁷ In accordance with the traditional view of the code, the courts have long supported the idea that vicarious liability and contract of mandate are

45. MALAURIE & AYNES, *supra* note 29, at 276.

46. Holmes & Symeonides, *supra* note 32, at 1097.

47. *Sentell v. Richardson*, 29 So. 2d 852, 855 (La. 1947). In interpreting the former language of article 2985, which provided the definition of the contract of mandate, the Louisiana Supreme Court decreed that the words "and in his name" are not essential to the definition of a procuration or power of attorney."

incompatible,⁴⁸ unless there is an employer-employee relationship. The first decision in which a court imposed liability on a principal for the negligent act of an agent was in *Blanchard v. Ogima*.⁴⁹ The Louisiana Supreme Court simplified the analysis to find out whether there is an employer-employee relationship. Following this decision, a federal court⁵⁰ dealt with the same question that was raised in *Martin*, related to “apparent authority.”⁵¹ The court acknowledged that it wasn't very clear whether it is possible under Louisiana law to impose vicarious liability on the principal for the negligent acts of his agent, but argued that as a federal court, they assume the future position of the courts, which should adopt this “apparent authority” theory.⁵²

In *Rowell v. Carter Mobile Homes, Inc.*,⁵³ in an opinion delivered by Justice Dennis, the issue was whether a bank (a principal), that authorized a mobile home dealer to act as an undisclosed agent⁵⁴ was liable for the injuries that were suffered by

48. Wendell Holmes, *Ruminations on Independent Fire Insurance Co. v. Able Moving and Storage Co.: Principal's Vicarious Tort Liability for Negligent Acts of an Agent's Servant*, 56 LA. L. REV. 571 (1996) [hereinafter Holmes, *Ruminations*].

49. 215 So. 2d 902 (La. 1968) “A master or employer is liable for the tortious conduct of a servant or employee which is within the scope of authority or employment.” *Id.* at 902.

50. *Arceneaux v. Texaco*, 623 F.2d 924 (5th Cir. 1980) [hereinafter *Arceneaux*].

51. The definition provided by the RESTATEMENT (SECOND) OF AGENCY § 8 (Am. Law Inst. 1958): Apparent authority represents “the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.” Apparent authority is different from actual authority, in the sense that it is created by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. *Id.* § 27.

52. “Louisiana courts have drawn freely from the common law and the Restatements of the Law in developing both tort and agency doctrine. We may assume for present purposes, without deciding, that they would proceed along the Restatement path and adopt the rule of apparent authority in tort cases.” *Arceneaux*, 623 F.2d at 926.

53. 500 So. 2d 748 (1987) [hereinafter *Rowell*].

54. Note that for an accurate use of legal terminology when discussing about the contract of mandate, the parlance involves the principal and the mandatary. See LA. CIV. CODE Title XV. Representation and Mandate. On the

the buyer of the mobile home, due to the negligent repair of the floor (which was performed by the bank's agent).⁵⁵ The court again simplified the legal analysis, to the extent of whether the agent was an employee for the principal or not, concluding that absent any physical control of the agent's activity within the scope of the mandate given, the principal was not liable for the tortious act of its agent.⁵⁶ This decision recited passages from *Blanchard*, but its approach remained faithful to the civilian doctrine.

5. Louisiana Supreme Court and "Apparent Authority"

In *Able*, the Louisiana Supreme Court held that, in the event that there is no employer-employee relationship, a principal could become vicariously liable for the tortious acts of its "agent", relying on the doctrine of "apparent authority."⁵⁷

The facts in *Able* are strikingly similar to those in *Martin*. The plaintiff used the yellow pages to find a transporter for her furniture. She found an advertisement for a national mover, called "Bekins". However, at the bottom of the advertisement there was a disclaimer informing the potential customers that the local operator of "Bekins" was a company called "Able Moving & Storage Co." According to the testimony heard during the trial, the plaintiff was under the impression that she had hired Bekins, and had no knowledge at any point that she had contracted with Able. The moving operations were conducted by two workmen. The plaintiff handed them a check indicating that the recipient of the payment was "Bekins." After Able's employees left, a fire consumed the plaintiff's house. It was later established that the fire was caused

other hand, in agency law the mandatary is referred as agent. Unfortunately, legal scholars, judges and lawyers are using agent and mandatary interchangeably, though they have different meanings.

55. Rowell, 500 So. 2d at 749.

56. *Id.* at 751. As a side note, the court tangentially touched on the issue of "control."

57. For a short exposé of the facts, see Holmes, *Ruminations*, *supra* note 48, at 572.

by a cigarette butt left there by one of the workmen.⁵⁸ While it was clear that the workman and Able were liable, the plaintiff raised the question of whether Bekins was liable, for creating the impression that she was dealing with Bekins.

The court resorted to the common law *Restatement (Second) of Agency* to motivate the application of apparent authority to a non-contractual relationship between the principal and the victim.⁵⁹ The court also distinguished *Able* from *Rowell*, and held that when a principal makes a representation to a third party, there is an agency relationship between said principal and the agent and, because of this representation, the third person justifiably relies upon the care or skill of such apparent agent, the principal is subject to liability to the third party for harm caused by the lack of care or skill of the party appearing to be her agent.⁶⁰

The language from the decision suggests that the court read the applicable provisions from the Civil Code, found no explicit rule to apply to the facts *sub judice*, and borrowed the doctrine of “apparent authority” from the Restatement,⁶¹ in order to create a legal basis for imposing liability on the principal for the acts of the agent. Nonetheless, the Louisiana Supreme Court confused the concept of “apparent authority” with the concept of “agency by estoppel.” In a previous case also decided by the Supreme Court,⁶² the court emphasized that the doctrine of “apparent authority” is based on a contract theory which says that a party ought to be bound by what she says and manifests, rather than by what she intends, and, therefore, the third party who contracts with the agent need only prove reliance on the appearance of authority

58. Abel, 650 So. 2d at 751.

59. Holmes, *Ruminations*, *supra* note 48, at 572. See also *supra* note 51.

60. *Id.*

61. RESTATEMENT (SECOND) OF AGENCY § 267 (Am. Law Inst. 1958):

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

62. *Tedesco v. Gentry Dev., Inc.*, 540 So. 2d 960 (1989).

manifested.⁶³ Agency by estoppel is based on tort principles of preventing loss by an innocent person. The third party has to prove reliance and a change in position,⁶⁴ which damaged the third party, and that it would be unjust to allow the principal to deny the existence of agency relationship.

Although there is no explicit language in the decision,⁶⁵ the rationale behind this solution could stem from Louisiana Civil Code article 4. Equally important to determine why the court resorted to this solution is the fact that an element of emotional sympathy could have weighed decisively in rendering the decision. Shortly after this incident, Able's headquarter was also destroyed in a fire, leaving the plaintiff without any possibility of recovering the damages.⁶⁶

6. Applying *Able* to the Facts in *Martin*

In Louisiana, matters pertaining to civil law which are not clearly resolved by the Code should not be solved by the courts with the doctrine of precedents, but rather resort to an established *jurisprudence constante*.⁶⁷

In *Martin*, the plaintiff based his entire theory of recovery on the rule established in *Able*. The court narrowed the spectrum of *Able*, focusing on the reliance element of the claim. The court essentially asked whether the victim's change of position was determined by her reliance on the representation made by A-1. Conversely, in order to trigger the liability of the principal, the victim needed to have changed her position because of her

63. *Id.* at 963-64.

64. RESTATEMENT (SECOND) OF AGENCY § 8B (Am. Law Inst. 1958), defines a *change in position* as "payment of money, expenditure of labor, suffering a loss or subjection to legal liability."

65. Nor in the previously mentioned decisions, in *supra* section IV.A.4.

66. *Able*, 650 So. 2d at 752-53.

67. Olivier Moréteau, *Francois-Xavier Martin Revisited: Louisiana Views on Codification, Jurisprudence, Legal Education and Practice*, 60 LA. BAR J. 475, 478. See also *id.* at 479 n.33 for a critique of the attempt to apply the theory of binding precedents to cases regulated by the Civil Code.

reasonable belief that she dealt with a “servant or other agent”⁶⁸ of the principal.⁶⁹ In *Martin*, the court stated that there were no facts to support the proposition that Mr. Martin relied on the apparent authority when he made the decision to purchase the refrigerator, or when he allowed the deliverymen to enter on his house.⁷⁰ Johnson’s truck had no sign on it, but the deliverymen were wearing Johnson uniforms. Although the court acknowledged that the rule in *Able* was correct, it distinguished *Martin* from *Able* in the sense that in the former case, there was no evidence that the plaintiff “would not have made the payment had he known the facts of the delivery process.”⁷¹ It is also possible that, since the plaintiff already recovered \$100,000 from Johnson, this might have had some influence on the decision.

B. A Civilian Alternative to the Doctrine of “Apparent Authority”

1. Reanalyzing Able

One author suggested with regards to *Able*, that the court “instead of looking to agency law and apparent authority . . . need only have looked to the Civil Code articles.”⁷² This approach is equally applicable to *Martin*. This part first overviews the effects of the rule stated in *Able*, and then proposes a theory of recovery based on the Civil Code.

The rule affirmed in *Able* has been regarded as a wrong decision by a small number of authors.⁷³ The scholarship on this

68. See RESTATEMENT (SECOND) OF AGENCY § 267 (Am. Law Inst. 1958).

69. *Able*, 650 So. 2d at 752.

70. *Martin*, 117 So. 3d at 284.

71. *Id.*

72. Graubeger, *supra* note 30, at 274.

73. *Id.* at 272-73. For an approach that salutes this step taken by the Supreme Court, see Holmes, *Ruminations*, *supra* note 48, at 576-77, 581. The author calls this decision “a potentially major expansion of the doctrine of apparent authority by opening its application to the field of torts.” See also Michael B. North, *Comment: Qui Facit Per Alium, Facit Per Se: Representation, Mandate, and Principles of Agency in Louisiana at the Turn of the Twenty-First Century*, 72 TUL. L. REV. 279 (1997).

matter has drawn attention primarily upon the unintended consequences on the franchisor-franchisee relationship.⁷⁴ It may seem that, in Louisiana,⁷⁵ the franchisor should guard against any negative outcome by extending their insurance policy to cover the acts of a franchisee's employees, as one author has suggested.⁷⁶ This uncertainty⁷⁷ stems from the poor language used by the Supreme Court, which comfortably reproduced the rule existing in agency law.

In 1997 (two years after *Able* was decided), the Civil Code was revised, and one of the changes involved Title XV, on the Contract of Mandate. The Louisiana Civil Code does not mention at any point "apparent authority" within Title XV (Representation and Mandate), or anywhere else, for that matter. The legislature probably intended to import the rule from the common law, and similarly to *Able*, into a codal provision, and therefore adopted article 3021 regarding the "putative mandatary."⁷⁸ It seems it was an attempt to introduce a reference to "apparent authority," but through a civilian-oriented approach and with civilian terminology. Nonetheless, the new language from article 3021 does not offer a solution to cases such as *Martin* or *Able*. Rather, it is an "old wine in new bottle",⁷⁹ because it does not apply to tort cases. Its applicability is limited to contractual issues, and it regulates how the principal is liable toward a third party in good faith.

74. Holmes, *Ruminations*, *supra* note 48, at 579. The author depicts a common example, when a McDonald's employee commits a tortious act. The question under the rule in *Able* is whether the victim should prove that she chose McDonald's from Wendy's or Burger King, relying on the skill and care of the agents, as contemplated by Section 267.

75. *Id.* at 579. See also the line of cases cited at 579 n.49, *id.*

76. *Id.* at 580.

77. Grauberger, *supra* note 30, at 259. The author contemplates this path as having "destructive effects of the introduction of common-law agency principles into the Louisiana legal system." *Able* also affects other business areas such as hospitals, and large retail chains.

78. LA. CIV. CODE art. 3021: "One who causes a third person to believe that another person is his mandatary is bound to the third person who in good faith contracts with the putative mandatary."

79. Holmes & Symeonides, *supra* note 32, at 1151.

In addition, the current language of article 3021 ought to be read in conjunction with the general rules laid down in the general law of obligations.⁸⁰ The second paragraph of article 1967⁸¹ has the character of a general norm, and article 3021 is a special provision. Two rules of interpretation apply to such a situation. First, *specialia generalibus derogant*—the special provision is applied with priority over the general rule, when the two come in conflict.⁸² Second, *generalia specialibus non derogant*—when the special rule is silent, the gaps can be filled by resorting to the general rule.⁸³

2. A Reliance-Based Theory of Liability

Seemingly, there is no direct and clear norm in the Civil Code for a situation like the one presented in *Martin*. There is a gap⁸⁴ in the legislation. In such a case, the court would have been entitled to proceed according to article 4. Many pages have been written

80. See Book III, Title 3 of the Louisiana Civil Code.

81. LA. CIV. CODE art. 1967:

A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.

82. FRANÇOIS TERRÉ, INTRODUCTION GÉNÉRALE AU DROIT 450 (7th ed., Dalloz 2006); BORIS STARCK, HENRI ROLAND & LAURENT BOYER, INTRODUCTION AU DROIT 131 (3d ed., Litec 1991).

83. TERRÉ, *supra* note 82, at 450.

84. LA. CIV. CODE art. 1: "The sources of law are legislation and custom." Articles 2 and 3 define "legislation" and "custom". Accordingly, LA. CIV. CODE art. 2, provides that: "Legislation is a solemn expression of legislative will." and LA. CIV. CODE art. 3 states that: "Custom results from practice repeated of a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation." For the purpose of this commentary, "custom" presents little interest because the confusion of treating the relationship between principal and mandatary as a agency relationship does not meet the two requirements of *longa consuetudo* and *opinio juris*. LA. CIV. CODE art. 3, cmt. (b) (1987).

with respect to this article.⁸⁵ Two lines of interpretation have been particularly relevant.

On one hand, Justice Dennis extrapolated this provision by setting up a methodology which would guide the judges who are faced with this kind of situation.⁸⁶ The author compared the judge to a “*legislator's helpmate*”⁸⁷ and advocated a constant devotion to the civilian doctrine.⁸⁸ In this interpretation, the judge should first try to deliver a solution according to the scope and meaning of the Civil Code, and only after this fails, should the judge use the liberty conferred by the “equity” of article 4. Regardless, the judge should not automatically look to common law for guidance in such circumstances.

On the other hand, Professor Palmer’s article argues that this permanent guidance of the Code should be read less strictly,⁸⁹ and that this legal provision leaves room for importing common law rules.⁹⁰ Based on this interpretation, ruling on “equity” prevails

85. For an extensive discussion of “equity” as referred in Louisiana Civil Code article 4, see Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7 (1994). See also Julio C. Cueto-Rua, *The Civil Code of Louisiana is Alive and Well*, 64 TUL. L. REV. 147, 169 (1989).

86. James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1 (1993).

87. Justice Dennis underlined the fact that “the judge does not have absolute discretion but is required to return again and again to the Code seeking its guiding values and adhering as closely to them as possible.” *Id.* at 17.

88. “When dealing with the civil law, the judge’s constitutional oath to support the law requires that he recognize that the Civil Code is the primary source of law.” *Id.* See also Grauberger, *supra* note 30, at 275. This author is of opinion that the courts are not allowed to import common law principles in the Louisiana Law because it is not consistent with the Constitution of Louisiana.

89. Palmer, *supra* note 85, at 19:

In a limited number of cases [the judges] proceed by analogy from the Code's other provisions, as good civilian judges are thought to do. Yet in others, they import and transplant concepts that have no analogy within the Code or within the civilian vocabulary. In other instances, they build from the prior precedents that they established in novel cases.

90. “In Louisiana today, practitioners do not readily recognize civilian connotations in the term ‘equity,’ but they rather easily associate that word with particular common-law doctrines absorbed within the fabric of the law.” Palmer, *supra* note 85, at 51.

without any other intellectual debates, and justice should be served regardless of the origin of the legal solution.

The Code as a system should not be treated as an “arbitrary and spontaneous product,”⁹¹ but rather as the result of the “labor of reason in the past centuries.”⁹² After reading the Louisiana Civil Code, it may appear that it does not provide a theory of recovery for the victim, with respect to the facts in *Martin*, but, after a closer look, by correlating multiple articles of the code, a theory of liability can be found within the spirit of the code.

In the common law, if a principal unreasonably fails to control an unauthorized agent and a third party relies on the agent to her detriment, the principal will be liable under the theory of agency by estoppel.⁹³ Similarly, civilian jurisdictions like France and Quebec have identified a new basis of liability in such situations based on a theory called “*la théorie de l'apparence*.”⁹⁴ Based on this theory, reasonable reliance can be a binding source of obligations, very similar to a situation where the equitable remedy of estoppel would apply.⁹⁵ Obligations are created for the benefit of a third party, who legitimately relied on a situation created or under the control of the obligor, and acted accordingly.⁹⁶ The theory draws its origins from the Roman Law principle of *error communis facit jus*,⁹⁷ but it is more developed and complex nowadays. French doctrine⁹⁸ and jurisprudence⁹⁹ developed the

91. Levasseur, *supra* note 4, at 697.

92. *Id.*

93. Dalley, *supra* note 42, at 514.

94. Theory of appearance, in English.

95. About how the common law estoppel completes the *théorie de l'apparence*, see Olivier Moréteau, *Revisiting the Grey Zone Between Contract and Tort: The Role of Estoppel and Reliance in Mapping out the Law of Obligations* in EUROPEAN TORT LAW 2004 at 78-79 (Helmut Koziol & Barbara C. Steininger eds., Springer 2005).

96. Jean-Francois Lerouge, *Uniform Computer Information Transaction Act: The Use of Electronic Agents Questioned under Contractual Law: Suggested Solutions on a European and American Level*, 18 J. MARSHALL J. COMPUTER & INFO. L. 403, 411 (1999).

97. A common error is a source of law.

98. JACQUES GHESTIN & GILLES GOUBEUX, *TRAITÉ DE DROIT CIVIL. INTRODUCTION GÉNÉRALE* 757-96 (3d ed., L.G.D.J. 1990).

theory starting from Geny's liberal interpretation,¹⁰⁰ but without resorting to "equity" or other rules not prescribed by the Code. It is considered to be a theory contained in the French Civil Code, despite the fact that it is not based on an explicit and clear norm.

This theory of liability can easily be fit into the framework of Louisiana Civil Code, and the articles regarding tort law (2315-2322). The Civil Code already has expressions of reliance-based theories of liability in contractual relations. Articles 1967 and 3021 create obligations in situations where an innocent victim relies on an appearance of facts to her detriment. The French *théorie de l'apparence* offers a framework for a more general basis for liability.

In order to impose liability on someone based on the *théorie de l'apparence*, there are two conditions that have to be met: (1) the apparent situation should be different from the real, objective situation;¹⁰¹ and (2) the victim should legitimately rely on the fact that the situation corresponds to reality—in other words the victim must be in error.¹⁰²

In *Martin*, this theory is connected to the allegedly false representation to the victim that Johnson was an "apparent employee" of A-1. Under the test laid down above, and considering the facts provided in the decision, A-1 should be

99. The French Court of Cassation has used the theory of appearance to lift the corporate veil and impose liability on shareholders, who were abusing the privilege of incorporation. William Tetley, Q.C., *Arrest, Attachment, and Related Maritime Law Procedures*, 73 TUL. L. REV. 1895, 1944 (1999).

100. See FRANÇOIS GÉNY, *METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVÉ POSITIF* 20 (Louisiana State Law Inst. trans., 2d ed., LSLI 1954) for an extensive counterargument to the exegetic French school of thought.

101. GHESTIN, *supra* note 98, at 784.

102. The current trend in the French doctrine is that the error should be legitimate, which regards the standard to be that a reasonable person, if they had been in the same situation, would have regarded the situation as real. Prior theories required error to be "common". The main difference is important as a practical matter, because with regard to legitimate error, the situation is analyzed *in concreto*, whereas the common error is scrutinized *in abstracto* (therefore more strictly). *Id.* at 771-74.

liable, because both conditions are met. Mr. Martin was in a legitimate error, mainly because he paid the delivery fee to A-1 and because at no point he did know he would have to deal with an independent contractor. It does not matter whether the plaintiff changed his position or not. Under the *théorie de l'apparence*, A-1 may be liable, and this approach also provides a better framework to guide courts in their approach to future similar cases.

V. CONCLUSION

When talking about the process of drafting the French Civil Code, Portalis said that it is virtually impossible to anticipate all situations and regulate them.¹⁰³ To that extent, the *Martin* case represents an *exempli gratia*.

In this author's opinion, the court in *Martin* had enough legal provisions in the Louisiana Civil Code to construct an argument in accordance with principles grounded in the civilian tradition. The resort to the common law concept of "apparent authority" was unnecessary, and the implementation of this concept, without taking into considerations the nuanced differences between the contract of mandate and agency, may create confusion in Louisiana jurisprudence.

Based on the *théorie de l'apparence*, the court may have reached a different result in *Martin*. By introducing this theory, this case note advocates for a civilian solution to the problems that spring from cases such as *Martin*¹⁰⁴ and *Able*.¹⁰⁵

Probably a more serious problem, discussed in passing in this note, can be identified in the treatment of the contract of mandate—in particular, the confusion created from equating mandate with agency. It has been argued that the codal provisions are behind the present business realities, and there is a need for

103. Alain Levasseur, *Code Napoléon or Code Portalis?*, 43 TUL. L. REV. 762, 768 (1969).

104. 117 So. 3d 281 (2013).

105. 650 So. 2d. 750 (1995).

harmonizing the rather complex doctrine of representation.¹⁰⁶ The 1997 revision of the law of representation tried to keep the civilian terminology and conceptual framework intact, but cases like *Martin* and *Able* show that, in order to respect this choice of the legislature, one has to look at the Civil Code as a whole¹⁰⁷ and interpret its provisions based on its spirit.

106. North, *supra* note 73, at 280.

107. LA. CIV. CODE art. 13.