ARTICLES

Principles without Principals? Reconsidering Unauthorised Agency on the Boundary of Contract: Implied Warranty of Authority and Ratification

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The related doctrines of implied warranty of authority and ratification were developed by English courts during the nineteenth century at a time when the modern principles of contract law were being identified and the formulary system of action by writ was coming to an end. The doctrines typically arise in the context of commercial agency. Unusually, each doctrine involves both orthodox contractual liability and sui generis elements. The doctrines remain controversial and their status in New Zealand law is unsettled. The question arises: are the doctrines historical relics, which have, like other obsolete and unprincipled doctrines of the legal past, been overtaken by the development of the modern law of obligations? The aim of this article is to suggest that New Zealand law would benefit from using the concepts of implied warranty of authority and ratification. The controversial elements of these doctrines must, however, be appropriately limited.

I INTRODUCTION

The aim of this article is to reconsider two controversial doctrines originating in English law: the doctrine of implied warranty of authority and, more briefly, the related doctrine of ratification. Both doctrines have attracted a certain amount of infamy in academic commentary.[1] Despite their significant age, neither doctrine's relevance nor value has been fully addressed by New Zealand courts.

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1 For academic comment on warranty of authority, see Tom Faulkner "Breach of an Agent's Warranty of Authority: An Altogether Anomalous Cause of Action" (2000) 74 ALJ 465; and Hugh Evans "Warranty of authority in litigation" (2010) 26 PN 98. Regarding ratification, see Eugene Wambaugh "A Problem as to Ratification" (1895) 9 Harv L Rev 60; and compare Warren A Seavey "The Rationale of Agency" (1920) 29 Yale LJ 859; Aaron D Twerski "The Independent Doctrine of Ratification v The Restatement and Mr Seavey" (1968) 42 Temp L Q 1; Floyd R Mechem "The Effect of Ratification as between the Principal and the Other Party" (1906) 4 Mich L Rev 269; and Philip Mechem "The Rationale of Ratification" (1952) 100 U Pa L Rev 649.

Both doctrines arise in the context of the law of agency and it is generally accepted that both create contractual liability. Generally, an implied warranty of authority is said to be a contractual promise that an agent is authorised to act on behalf of another.[2] Ratification involves the authoriser retrospectively creating the kind of authority that the agent wrongly promised to possess. Accordingly, ratification can "resurrect" an earlier unauthorised bargain. Although ratification typically applies to contractual bargains, it is a doctrine of more general effect.[3] The focus of this article, however, is on ratification in its usual context of contractual bargains, as well as in relation to implied warranty of authority liability. A full inquiry into the different forms of ratification is beyond the scope of this article.

Despite the purported orthodoxy of the doctrines, it is also often accepted that each doctrine is somehow sui generis. Sceptics and critics of one or both doctrines use this tension to suggest or insist that the doctrines cannot be fully reconciled with contractual principles. Dissenters suggest that the doctrines endure in their present form because there is insufficient value placed on consistency between the doctrines and overarching legal principles. These criticisms reference the concept of "fiction" as a kind of jurisprudential expletive. Implied warranty of authority has been derided as "[o]ne of the most brilliant and successful fictions of the Common Law",[4] a "quasi-contract" and even a tort in disguise.[5] Ratification has been similarly criticised — on at least one iteration concerning the ratification of bargains — as an embarrassing fiction akin to a corpse, which the legal community should strive to bury.[6] Nevertheless, few criticisms of the doctrines have made their way into case law, subject to some notable exceptions.[7]

This article assesses these claims against the development of these two doctrines in the hope of clarifying their principled application in New Zealand law.

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2 See, however, the discussion of the appropriate quantum for breach in this article regarding the exact characterisation of the term.

3 For example, some torts may be retrospectively justified as lawful acts. See *Hull v Pickersgill* (1819) 1 Br & B 282, 129 ER 731 (Comm Pleas); *Whitehead v Taylor* (1839) 10 Ad & El 210, 113 ER 81 (QB); and, famously, *Buron v Denman* (1848) 2 Exch 167, 154 ER 450, where a naval officer's torts became an exercise in sovereign defence. The principal (the retrospective authoriser) can become personally liable for some limited torts. See Peter Watts and FMB Reynolds (eds) *Bowstead & Reynolds on Agency* (19th ed, Thomson Reuters, London, 2010) at [2-054]. Procedural defects can be cured. See *Westpac Securities v Kensington* [1994] 2 NZLR 555 (CA).

4 Frederick Pollock *The Expansion of the Common Law* (Stevens and Sons, London, 1904) at 136.

5 Percy H Winfield *The Province of the Law of Tort* (Cambridge University Press, Cambridge, 1931) at 178; and Lee Aitken "Warranty of Authority and the Errant Solicitor" [2012] L Soc J (NSW) 36.

6 Simon Fisher *Agency Law* (Butterworths, Chatswood, 2000) at [6.5.7].

7 See, most notably in relation to ratification, *Davison v Vickery's Motors Ltd (in liq)* (1925) 37 CLR 1 per Isaacs J dissenting. This was supported more recently in *Hughes v NM Superannuation Pty Ltd* (1993) 29 NSWLR 653 (SC). In relation to warranty of authority, see *FBN Holdings Ltd v Kim* (2010) 11 NZCPR 296 (HC); *Lee v Irons* [1958] VR 436 (SC); *Boulas v Angelopoulos* (1991) 5 BPR 11477 (NSWSC); *Hyundai Auto Canada v Computer Associates Canada Ltd* [1999] OJ No 384 (Ct J (Gen Div)); and, containing the supplementary reasons, *Hyundai Auto Canada v Computer Associates Canada Ltd* 2000 CarswellOnt 949 (Ct J (Gen Div)) [*Hyundai Auto Canada* (Supplementary Reasons)] particularly in relation to the proper quantum/damages.

II A PLAN FOR REHABILITATION

The thesis of this article is that the substance, if not the form, of implied warranty of authority liability and ratification is sound. This is so even though the criticisms of the doctrines have some truth. The doctrines can usefully contribute to private law obligations, if appropriately clarified. This article suggests why this is the case and what ought to be done to clarify the scope and application of the doctrines.

In relation to implied warranty of authority it is argued that:

(a) The primary liability that arises can be substantially reconciled with the key elements that support contractual liability: contractual intention and consideration (although there is need for care).

(b) The limits or difficulties of this reconciliation, insofar as contract principles are concerned, indicate that the quantum usually awarded by courts needs re-examination. In many cases, quantum should be lower than the current conventional quantum.

The focus of the ratification argument is the English Court of Appeal's interpretation of ratification in *Bolton Partners v Lambert*.[8] This vision of ratification is problematic when combined with direct agency, the principle underpinning much of the common law of agency that one person can directly alter the legal position of another, typically because they have "antecedent authorisation": a consensual agreement to act.[9] The *Bolton Partners* formulation ignores events that have occurred after the unauthorised action. Denying these events cannot be permitted if doing so would conflict with important rights or principles. It is argued that:

(a) The critics are correct that the English approach unjustifiably and too rigorously insists on the equivalence between retrospective and antecedent authority. There is no apparent justification to apply ratification if its retrospective effect would clash with important rights or legal principles.

(b) The related "third party non-withdrawal" rule in *Bolton Partners*,[10] which follows from this insistence,

8 *Bolton Partners v Lambert* (1889) LR 41 Ch D 295 (CA).

9 See Robert Stevens "Why do agents 'drop out'?" [2005] LMCLQ 101; OW Holmes Jr *The Common Law* (Macmillan & Co, London, 1882) at 232 as cited in Seavey, above n 1, at 859: "[T]he characteristic feature which justifies agency as a title of the [common] law is the absorption *pro hac vice* of the agent's legal individuality in that of [the] principal" and *Laws of New Zealand* Agency (online ed) at [24]–[36].

10 The rule is that the "third party" who agrees to a bargain via an unauthorised agent is to be treated as always having been bound to that invalid bargain if ratification occurs.

unjustifiably violates the principle of consensus ad idem.

(c) The fact of the third party's agreement with the agent means, however, that (subject to subsequent contrary indications by the third party) ratification need not violate the principle of consensus ad idem. Rather, the "subsisting consent" of the third party can preserve the principle, which is already extended by the existence of direct agency.

Finally, if these propositions are accepted, a related issue is the potential role of implied warranty of authority liability in providing an alternate justification for the "non-withdrawal" rule. This article concludes by suggesting that that may be possible. In any event, any ratification against the will of a third party must be justified, if at all, by something more than *Bolton Partners* ratification itself.

III INFAMY DEFINED

Implied Warranty of Authority

1 The Decision in Collen v Wright

The 1857 decision of *Collen v Wright* is said to have created the doctrine of implied warranty of authority.[11] The case was decided when modern principles of contract were being identified in the context of 19th century liberalism, while the formulary system of action by writ was coming to an end. In *Collen v Wright* a land agent and valuer had innocently exceeded his authority when attempting to secure the lease of a farm. It was held that the agent had impliedly promised in contract that he was authorised to act in that manner (or, on an alternative reinterpretation, to have promised to pay if he was not). The Court of Exchequer Chamber awarded damages for the plaintiff's losses, which resulted from the land agent's assertion of authority (and the principal's refusal to perform).[12]

A series of decisions in the early 1800s established a general rule that an agent who makes a contract in the principal's name will be personally liable for the bargain if that agent lacks authority, although the principal will

11 *Collen v Wright* (1857) 8 EL & BL 647, 120 ER 241 (Exch Ch) [*Collen v Wright* (Exch Ch)] affirming in all respects *Collen v Wright* (1857) 7 EL & BL 301, 119 ER 1259 (QB) [*Collen v Wright* (QB)].

12 In the *Collen v Wright* litigation, above n 11, the contract that was "lost" was a lease of a farm on Soham Fen. The plaintiff had incurred considerable expenses in preparing the farm for cultivation, as well as in legal costs in a fruitless attempt to enforce the lease agreement in Chancery proceedings. These losses were held to be recoverable. The plaintiff was not, however, awarded the value of the lease, which he had expected to obtain, or the profit he might have expected from it. Following the suggestion of the High Court, the plaintiff abandoned his claim for loss of bargain damages.

not be liable.[13] English courts rejected this proposition by the 1850s as inconsistent with the requirement of contractual intention.[14] *Collen v Wright* avoided falling foul of precedent by finding that an agent could be liable on a contractual promise other than "on" the contract itself.

In any particular case it remains possible for an agent to be liable as a party to a contract along with, or in lieu of, the principal on the same terms — that is, to be liable "on" the contract — but liability requires strong evidential indicia.[15] The Court in *Collen v Wright* found the agent's liability arose from what was essentially a collateral contract, rather than from the main, unauthorised and therefore invalid contract, and in doing so implicitly endorsed a form of contractual liability on a lower evidential standard.[16] The logic is that where an agent purports to conclude a contract on behalf of a principal, it is acceptable (or, at least, presumed) that the agent has personally guaranteed or indemnified his or her authority to act in some measure.[17] English law's long-standing aversion to liability for innocent misrepresentation meant that this liability was not a realistic alternative in the same circumstances.[18]

2 *Guarantee or Indemnity?*

The dominant commentary on implied warranty of authority seems to conceive of the implied promise as an implied guarantee. Under a guarantee it is a "fact" that is promised; the agent declares, "I am authorised". There is no accompanying reference to the scope of damages if the promise is breached, so expectation damages presumably apply. A guarantee promisor is typically liable to put the third party in the position that the party would have been in had the warranted fact been true.[19]

But in the absence of an explicit promise of fact, it is difficult to see why this kind of contractual liability is any more likely to be intended than an indemnity of some kind. For example, an indemnity could involve an

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13 *Wilson v Barthrop* (1837) 2 M & W 863, 150 ER 1008 (Exch) at 1009. The classic authority is *Thomas v Hewes* (1834) 2 C & M 519, 149 ER 866 (Exch).

14 See *Collen v Wright* (QB), above n 11, at 1261 and 1263. Lord Campbell CJ said at 1263, "I always thought the notion of suing the agent as principal absurd". This comment is illustrative of the departure from the general rule, if overstated.

15 For example, the presumption that an agent making a pre-incorporation contract promises to be liable has been enduring: *Marblestone Industries v Fairchild* [1975] 1 NZLR 529 (HC) at 259; and Peter Watts "Company Law" [1993] NZ Recent Law Review 265 at 265–267 discussing *Walker v Carter* (1993) 6 NZCLC 68,376 (CA). See now Companies Act 1993, s 183.

16 *Collen v Wright* (Exch Ch) at 245 per Willes J. See *SEB Trygg Liv Holding AB v Manches* [2005] EWCA Civ 1237, [2006] 1 WLR 2276 at [60] where Buxton LJ explained that Willes J in *Collen v Wright* (Exch Ch) was describing "what we would now call a collateral contract". It was initially suggested that *Collen v Wright* (Exch Ch) was an exception to the general rule against liability for innocent misrepresentation. However, this position was repudiated by Bramwell LJ in *Dickson v Reuter's Telegram Co Ltd* (1877) 3 CPD 1 (CA).

17 This is also usually the final effect since the application of the rule is defined by the absence of express intention. Compare the dissent of Cockburn CJ in *Collen v Wright* (Exch Ch) on the basis that only liability as principal and not an implied promise was principled.

18 *Derry v Peek* (1889) 14 App Cas 337 (HL), confirmed by *Heilbut, Symons & Co v Buckleton* [1913] AC 30 (HL).

19 *Lion Nathan Ltd v CC Bottlers Ltd* (1995) 5 NZBLC 103,681 (CA).

implied statement by the agent: "if I am not authorised, I will make good (at least some of) your loss".

The distinction between guarantee and indemnity liability, the former of which is "secondary" and the latter "primary", depends on constructing the parties' intentions based on the evidence.[20] Yet indicative evidence is, of course, missing in implied warranty of authority cases. The distinction between the two bases of liability will be considered in relation to the quantum of damages for implied warranty of authority.

3 An Expansion of Implied Warranty of Authority Liability?

Subsequent cases have expanded on the relatively constrained ratio of *Collen v Wright*, holding that:[21]

> (a) Since the implied warranty of authority creates a contract, an "expectation measure" of damages follows.
>
> (b) It is not necessary for liability that the agent purports to conclude a bargain with the plaintiff on behalf of the principal. The agent will be liable for any loss caused to a third party who relies on the agent's authorisation (assuming there is a warranty).

The definition of "warranty of authority" in the leading agency text *Bowstead & Reynolds on Agency* reads:[22]

> (1) Where a person, by words or conduct, represents that he has actual authority to act on behalf of another, and a third party is induced by such representation to act in a manner in which he would not have acted if that representation had not been made, the first-mentioned person *is deemed to warrant that the representation is true*, and is liable for any loss caused to such third party by a breach of that implied warranty, even if he acted in good faith, under a mistaken belief that he had such authority.
>
> (2) Every person who purports to act as an agent is *deemed by his conduct to represent* that he is in fact duly authorised so to act, except where the purported agent expressly disclaims authority or where the nature and extent of his authority, or the material facts from which its nature and extent may be inferred, are known to the other contracting party.

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20 *C Czarnikow Ltd v Koufos* [1966] 2 QB 695 (CA) at 725; *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL) at 349; and *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep 595 at [9].

21 *Yonge v Toynbee* [1910] 1 KB 215 (CA) at 227. See also *Firbank's Executors v Humphreys* [1886] 18 QBD 54 (CA) at 60; *Oliver v Governor and Company of the Bank of England* [1902] 1 Ch 610 (CA) affirmed in *Starkey v Bank of England* [1903] AC 114 (HL) and cited with approval in the dicta in *Firbank's Executors*; *Fernée v Gorlitz* [1915] 1 Ch 177 (Ch); and *British Russian Gazette Ltd and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 (CA).

22 Watts and Reynolds, above n 3, at [9–060] (emphasis added, footnotes omitted).

Although this definition addresses "warranty of authority" generally, it is mainly relevant to implied warranty of authority. While "warranty" has been described as "one of the most ill-used expressions in the legal dictionary",[23] it does not appear controversial in this context. The agent may expressly promise, orally or in writing, that he or she has actual authority to act for another. This liability is contractual. Equally, it is open to the agent to expressly disclaim such liability. The controversy of *Collen v Wright*, as with this definition, is that the minimum evidence required for liability is simply that the agent claimed to have authority to act for his or her principal. The apparent effect of this summary is that whenever a person purports to "act as an agent", the agent is deemed to: (1) represent; and (2) warrant (or promise) that he or she is authorised. That effect is only defeated if the third party has actual or constructive knowledge that an agent is unauthorised. This definition reflects the relative unimportance of an actual representation, which is deemed to arise based on nothing more than the agent acting as an agent. Unexceptionally, the definition's requirement of inducement appears to reflect the general requirement of causation for contractual loss.

4 Objections to the Current State of Implied Warranty of Authority

Critics of the doctrine contend that contractual liability in *Collen v Wright* and its case law progeny exists only because negligence liability was a "bundle of frayed ends" at the time of the decision.[24] Presented with a situation where a no-fault mistake caused loss, the critics contend that the law inappropriately shifted the burden of loss onto the agent "but for" whose actions no loss would have occurred. This suggests that the doctrine, and in particular its "expanded" element, makes "pseudo-agents", unlike other persons, liable at common law for damages arising from innocent reliance on conduct not giving rise to statutory liability.[25] The decision creates a doctrine of detrimental reliance: a right at common law to damages for reliance even though no consideration has been requested or given by the plaintiff, no responsibility has been meaningfully assumed and no equities have been engaged.[26] What is more, this unprincipled doctrine imposes liability on the contractual expectation measure of damages.

Collen v Wright has been raised, usually peripherally, in only a handful of cases in New Zealand.[27] In England and Scotland the full force of the expanded doctrine has been repeatedly applied to professional agents,

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23 *Finnegan v Allen* [1943] KB 425 (CA) at 430.

24 Percy H Winfield "The History of Negligence in the Law of Torts" (1926) 42 LQR 184 at 185 as cited in Allan Beever *Rediscovering the Law of Negligence* (Hart Publishing, Oxford, 2007) at 1. See also Faulkner, above n 1, at 471.

25 *Jones v Still* [1965] NZLR 1071 (SC).

26 Nevertheless, detrimental reliance may have to be reasonable and foreseeable. For a judicial perspective of this position in the context of collateral warranties, see generally *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA) at 817 per Lord Denning MR.

27 See, however, the endorsement of the Court of Appeal of the doctrine (albeit in the context of an interlocutory appeal) in *Kavanagh v Continental Shelf Co (No 46) Ltd* [1993] 2 NZLR 648 (CA).

particularly solicitors, who were themselves the victims of fraud.[28] The full scope of the doctrine was also recently affirmed in Australia.[29] Leading English agency academic Professor Francis Reynolds QC suggests is that it is now too late for England to turn back from the doctrine, whether it is principled or not.[30] The High Court of New Zealand has, nonetheless, recently doubted the doctrine, but only in passing, referring to adverse academic comment in the leading contract law text.[31]

Ratification

1 Background

Ratification is an exception to the rule that an agent who lacks prior authority has no power to alter a principal's legal relations with a third party. In New Zealand *Body Corporate 192964 v Auckland City Council* (*Body Corporate*) summarised the applicable principles in the transactional context.[32] The core concept of ratification is that a principal's sufficient acts of approval convert an agent's unauthorised attempt to act for his or her purported principal into an authorised act. The doctrine rarely arises — third parties more usually seek to hold principals to unauthorised bargains under agency law. Nonetheless, the particulars of the doctrine will be critical when the unexpected occurs.

The doctrine of ratification was introduced into English law by medieval canon lawyers and may have its genesis in a conceptual error. The maxim *ratihabitio retrotrahitur, et mandato priori aequiparatur* (every ratification relates back, and is equivalent to a prior authority) was viewed as representing a Roman law doctrine that could be imported wholesale.[33] The lack of real direct agency in the Roman context means, however, that the Roman antecedents did not justify the doctrine. In fact, there has never been

28 See, for example, *SEB Trygg Liv Holding AB v Manches*, above n 16; *Cheshire Mortgage Corp Ltd v Grandison* [2011] CSOH 157; and *Cheshire Mortgage Corp Ltd v Grandison* [2012] CSIH 66.

29 *Commonwealth Bank of Australia v Hamilton* [2012] NSWSC 242 at [288]–[297]. The Supreme Court of New South Wales declined to accept the submission of counsel for the third defendant that the doctrine was limited to the "*Collen v Wright* principle" and that the "expanded" principles in *Firbank's Executors*, above n 21, *Starkey*, above n 21, and *Yonge*, above n 21, did not form part of the law of Australia. The Court considered, as the House of Lords had, that there was no real difference. The apparent acceptance of *Lee*, above n 7, by the New South Wales Court of Appeal the previous year in *Hearse v Staunton* [2011] NSWCA 139, [2011] NSW ConvR 56-283 at [5] was not noted by the Court.

30 FMB Reynolds "Breach of warranty of authority in modern times" [2012] LMCLQ 189.

31 *FBN Holdings Ltd v Kim*, above n 7, at [55]–[56]. Chisholm J cited the third edition of John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis NZ Wellington, 2007) at 529. The text finds that contractual liability for warranty of authority "smacks of a fiction and imposes too harsh a burden on the agent, particularly at the third party recovers the full benefit of the intended bargain with the principal". But see the Court of Appeal's endorsement of the doctrine (albeit in the context of an interlocutory appeal) in *Kavanagh*, above n 27.

32 *Body Corporate 192964 v Auckland City Council* HC Auckland CIV-2004-404-7207, 23 May 2005 [*Body Corporate*] at [35(a)]–[35(i)].

33 See EC Goddard "Ratification by an Undisclosed Principal" (1903) 2 Mich L Rev 25.

any explanation for the rationale, or even the possibility, of ratification's strict retrospective effect.[34]

2 Principles

The leading decision of the English Court of Appeal in *Bolton Partners* is contentious but regarded as good law in New Zealand (albeit often with little enthusiasm).[35] For more than a century there has been suspicion about *Bolton Partners* and its strain of ratification.

Bolton Partners stands for two related propositions. The first is a particularly strict interpretation of the generally accepted principle that ratification's retrospective effect is equivalent to antecedent authorisation.[36] Thus, ratification treats the agent's authority to act as always having existed, at least vis-à-vis the third party. The second proposition follows logically from the first. Where the agent has concluded an unauthorised bargain (as will be the case in practically all instances of ratification), any "withdrawal" by a third party prior to ratification will be ineffective. In *Bolton Partners*, the Court of Appeal accepted the argument that:[37]

> With respect to the question of ratification, the maxim *omnis ratihabitio retrotrahitur et mandato equiparatur* is applicable to this case. It is only a matter of evidence whether or not the agent had authority to make the contract. If the authority is proved it makes no difference at what time it is proved: *Brook v. Hook*. The Defendant argues that if a man makes a contract with an agent, there is a *locus pœnitentiæ* until the contract is confirmed by the principal; but there is no trace of any such doctrine in the law. He is bound, though the principal may not be. It may seem unfair upon him, but it is the law.

Accordingly, taking a simplified view of the facts, the respondent in *Bolton Partners*, Mr Lambert, was bound to a contract that the agent, who was acting managing director of Bolton Partners, had purported to make with him. This was so even though the agent was unauthorised to make that contract at the time and that Mr Lambert had afterwards disavowed the deal. The board of Bolton Partners had subsequently ratified the contract and sought specific performance. The Court of Appeal disregarded Mr Lambert's intervening withdrawal.

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34 OW Holmes Jr "Agency II" (1891) 5 Harv L Rev 1 at 13; Gualtiero Procaccia "On the Theory and History of Ratification in the Law of Agency" (1978) 4 Tel Aviv U Stud L 9; and Michael B North "*Qui Facit Per Alium, Facit Per Se:* Representation, Mandate, and Principles of Agency in Louisiana at the Turn of the Twenty-First Century" (1997) 72 Tul L Rev 279 at 284.

35 *Bolton Partners*, above n 8. In New Zealand, see *Shaw Savill and Albion Co Ltd v Timaru Harbour Board* (1887) 6 NZLR 456 (CA); *Harrison v Hayman* [1922] NZLR 545 (SC); *Finnigan v Butcher (No 2)* [2012] NZHC 2463; *Body Corporate*, above n 32; and John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis NZ, Wellington, 2012) at 626.

36 *Body Corporate*, above n 32, at [35(e)].

37 *Bolton Partners*, above n 8, at 304.

The Court of Appeal's decision, which did not refer to an earlier inconsistent authority,[38] has been subject to judicial criticism. The rule seems to offer unjustifiably favourable advantages to a principal in the bargain context. The principal, until ratification, will not be bound but may choose to adopt what has been done on his, her or its behalf. *Bolton Partners* also appears to be inconsistent with authority cited, but not discussed, in the case.[39] Two of the three judges that sat on *Bolton Partners*, Cotton and Lindley LJJ, did not endorse the decision when sitting in *Re Portuguese Consolidated Copper Mines Ltd* and the Privy Council, on appeal from New Zealand in *Fleming v Bank of New Zealand*, reserved the right to reconsider the case.[40]

3 Limits to Ratification

It may be difficult to justify limiting ratification is it is equated with prior authority. If ratification is the same thing as antecedent authorisation, why should there be any limits at all? Nonetheless, *Bolton Partners* is applied together with a body of case law setting rules or limits on ratification's application. These rules can be loosely divided into two sets, although there is some overlap.[41] While the scope of the first set of rules has involved controversy, the second set of rules has been marked by complexity and outright contradiction.[42]

The first set consists of what might be said to be absolute rules — essentially, preconditions. Although not comprehensively articulated, and subject to some argument, the rules appear to prevent any substantial advantage, other than a temporal concession, accruing to the principal from ratification. The principal rules are that: (1) only an identifiable individual; (2) on whose behalf the agent has purported to act; (3) who was in existence and competent to perform at the time the agent purported to act may ratify; and (4) where time limits have not expired and formal requirements are complied with.[43] In spite of this, the cases establishing these limits do not state why the concession as to time is appropriate, in addition to the spatial concession that is at the heart of direct agency.

The second set of rules or limits tends to be context-specific rather than absolute. The rules relate to the effect of ratification on others, rather than the status of the principal. For example, they provide that ratification is

38 *Mayor of Kidderminster v Hardwick* (1873) LR 9 Ex 13. Two of the three judges on the Court of Exchequer held that any ratification had come too late, as it had to have occurred after defendant third party had withdrawn from the transaction.

39 *Walter v James* (1871) LR 6 Ex 124.

40 *Re Portuguese Consolidated Copper Mines Ltd* (1890) 45 Ch D 16 (CA); and *Fleming v Bank of New Zealand* [1900] AC 577 (PC) at 587. Lord Lindley (who was on the panel that decided *Bolton Partners*) delivered the judgment. Their Lordships considered that *Bolton Partners* "presents difficulties" and reserved their discretion to depart from the decision in the future.

41 *Bolton Partners*, above n 8.

42 See Tan Cheng-Han "The Principle in *Bird v Brown* Revisited" (2001) 117 LQR 626. See also Roderick Munday *Agency: Law and Principles* (2nd ed, Oxford University Press, Oxford, 2013) at [6.26]–[6.47].

43 *Body Corporate*, above n 32, at [35(a)–(i)]; and *Owners of the ship 'Borvigilant' v Owners of the ship 'Romina G'* [2003] EWCA Civ 935, [2004] 1 CLC 41 at [66]–[79].

impossible if: rights have vested since the agent purported to act;[44] the principal communicates to the third party that there will be no ratification;[45] or ratification does not come within reasonable time.[46] As Associate Judge Faire noted in *Body Corporate*, the current thinking is that the limits represent ways in which "unfair prejudice" to the third party can arise.[47]

IV IMPLIED WARRANTY OF AUTHORITY

Liability

1 Is Implied Warranty of Authority Liability Unprincipled?

Contractual intention and consideration are the two fundamental concepts of contract law. Assessing implied warranty of authority's consistency with contractual principles depends primarily on its consistency with these two gatekeepers of contractual liability. While both concepts are controversial, this section seeks to identify principles without focusing on controversy. Rather, it will emphasise the elements that substantially justify, as well as limit, liability.

(a) Contractual Intention

Modern principles of contractual intention are a "complex amalgam" of subjective and objective principles used to test whether a defendant intended to assume responsibility in contract.[48] The court infers the objective intention of the parties by carefully weighing all relevant circumstances. It is now relatively uncontroversial that essential contractual terms and even entire contracts can be objectively "intended", as they are capable of being "inferred", "deduced" or "implied".[49] This applies in the absence of anything explicit, given sufficiently compelling circumstances.

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44 *Body Corporate*, at [35(g)]; and see Cheng-Han, above n 42.

45 *Body Corporate*, at [35(f)]; and see *McEvoy v Belfast Banking Co Ltd* [1935] AC 24 (HL) at 45.

46 *Body* Corporate, at [35(h)].

47 At [35(i)]. See also *Smith v Henniker-Major & Co (a firm)* [2002] EWCA Civ 762, [2003] Ch 182. Tan Cheng-Han's organising effort under "reasonable time" is very similar; and see Cheng-Han, above n 42.

48 *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919 at [123]. See also *Attorney-General v Dreux Holdings Ltd* (1996) 7 TCLR 617 (CA) at 632; *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 at [96]; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 as cited in *Trustees Executors Ltd v QBE Insurance (International) Ltd* [2010] NZCA 608, (2011) 16 ANZ Ins Cas 61-874 at [30]–[33]; and *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912–913. For commentary, see JP Vorster "A Comment on the Meaning of Objectivity in Contract" (1987) 103 LQR 274 at 287; David Goddard "The myth of subjectivity" (1987) 7 Legal Studies 263; and David McLauchlan "The Contract That Neither Party Intends" (2012) 29 JCL 26 at 32.

49 Michael Furmston and GJ Tolhurst *Contract Formation: Law and Practice* (Oxford University Press, Oxford, 2010) at [11.119]; and Brian Coote "Contract Formation and the Implication of Terms" (1993) 6 JCL 51 at 51–52. Medical contracts routinely contain no express terms: Andrew Robertson "The Limits of Voluntariness in Contract" (2005) 29 MULR 179 at 207, n 195.

(b) Consideration

The bargain theory of consideration — an embattled principle — requires that, at least objectively, a court determine that something has been given in return for a promise.[50] Objectively determining the presence of consideration requires courts to determine whether the alleged consideration has been given in return for a promise.

The doctrine of consideration has been subject to attacks from the bench, academia and law reformers, and it has been suggested that it is anachronistic.[51] It has also been alleged to be less relevant due to the development of other doctrines, particularly estoppel.[52] Underlying the discomfort with consideration are two distinct but related criticisms. First, any justification for restricting contracts to bargains is weakened given that the law of contract is not truly concerned with substantive bargains. Rather, contract is concerned with "nominal" bargains. Put another way, the requirement of consideration does not really ensure a bargain.

Secondly, it is argued that there is no reason why contract should be limited to "bargains". The Court of Appeal decision in *Antons Trawling Co Ltd v Smith* embraced this second criticism.[53] In the limited context of contractual variation, Baragwanath J replaced the requirement of consideration with reliance.[54] Although the Court of Appeal did not question consideration's role in contract formation, it did not explain why there should be any material difference between contractual variation and formation.[55] The decision challenges — and compromises — the doctrine as a whole.[56] This broader challenge to the doctrine of consideration could have been avoided by a more moderate finding that a promise to perform a pre-existing obligation could be good consideration.

While the criticisms of "bargain theory" appear to have validity, there seems to be a clear lack of enthusiasm to adopt a reliance test for contractual liability.[57] *Antons Trawling* did not clarify the reasons that necessitated a reform of the doctrine of consideration. Instead, it replaced one tool for limiting liability with another that is less well-defined. The decision risks a conceptual muddle between contract, tort and estoppel. This

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50 *Dunlop Pneumatic Tyre Co v Selfridge & Co Ltd* [1915] AC 847 (HL) at 855 as cited in *Attorney-General for England and Wales v R* [2003] UKPC 22, [2004] 2 NZLR 577 at [30].

51 *Pillans v Van Mierop* (1765) 3 Burr 1663, 97 ER 1035 (KB) per Lord Mansfield; Lord Wright "Ought the Doctrine of Consideration to be Abolished from the Common Law?" (1936) 49 Harv L Rev 1225; Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, Cambridge (Mass) 1981); and TM Scanlon "Promises and Contracts" in Peter Benson (ed) *The Theory of Contract Law: New Essays* (Cambridge University Press, Cambridge, 2001) 86.

52 See recently *Wilson Parking New Zealand Ltd v Fanshawe* 136 Ltd [2014] NZCA 407.

53 *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 (CA).

54 Karen N Scott "From Sailors to Fisherman: Contractual Variation and the Abolition of the Pre-existing Duty Rule in New Zealand" (2005) 11 Canta LR 201 at 216.

55 At 216.

56 At 202.

57 See, for example, Mindy Chen-Wishart "In Defence of Consideration" (2013) 13 OUCLJ 209; and Mark Giancaspro "Practical Benefit: an English Anomaly or a Growing Force in Contract Law?" (2013) 30 JCL 12.

leaves unanswered, under a different label, the same question that consideration addresses (at least in part): when should pure economic loss be compensable?

2 *Implied Warranty of Authority in the* Collen v Wright *Situation*

(a) Contractual Intention

Express and implied warranties of authority differ in their evidential threshold for liability, which in the latter case is not as easily met in the absence of a purported agent making express statements. Implied warranty of authority is based on having sufficient contextual factors. Liability under an implied warranty is broader than liability on the contract because the evidential standard is lower. The following loosely grouped factors, particularly the professional incentive of the agent, appear to be capable (in specific circumstances) of providing sufficient evidence to cross the elastic threshold between mere conduct and contractual intention:[58]

> (a) A direct or indirect benefit (although not necessarily technical consideration) contemplated by the parties that will accrue to the agent as the result of the agency. The most common example of this will be the agent's securing of the third party's agreement to be bound. At least in the case of a professional agent, the securing of willing counterparties for a principal has real value. In cases of unauthorised agency, the main contract is, by definition, missing. The unauthorised contract is, however, good evidence of contractual indicia (of intention and inducement, and also of consideration). It is reasonable that there is a benefit because the third party does not need to look to transact business elsewhere.[59] Thus, the difference between "entering" and "negotiating" or "agreeing to enter" would not appear to be significant. Evidence of an industry practice of requesting such consideration expressly (for example, for agents and third parties who conclude lock-out agreements) in return for agent liability would support the existence of an implied promise. Realistically, the agent can expect to have been implicitly prepared for personal liability, to some degree, in exchange for the third party's commitment.
>
> (b) The relative position of the parties and, particularly, any information asymmetry. Where the parties have equal means of ascertaining the facts, the common law's

58 PS Atiyah "Misrepresentation, Warranty and Estoppel" (1971) 9 Alta L Rev 347.
59 See, by analogy, the request for abstention in *Hamer v Sidway* 124 NY 538 (NYCA 1891).

> traditional individualism meant courts were disinclined to give relief to a representee. A constructive representation arises where a party who makes a statement of opinion has greater means of access to information concerning the subject matter of the opinion than the recipient of the statement. It does not arise where the parties have equal means of information.[60] The factor also has bearing on the possibility of treating a representation as a warranty (and, as a first step, a statement as a representation).[61]

More should be required for liability than the mere existence of an agency relationship and the absence of third party knowledge of the lack of authorisation. To automatically find a warranty of authority in those circumstances appears to imply a term in law that would offend against the principle of contractual intention. It is difficult to see why liability should exist in respect of a non-professional party who was not acting in close association with the principal, such as a gratuitous agent, family member or low-level employee. There is no reason for an agent to suspect that he or she may be liable if all that the agent does is provide information in response to an inquiry in a wholly disinterested manner.[62] It seems unlikely that a person, whether an unauthorised agent or not, who gives information without evidence of an assumption of responsibility for its veracity would be liable for financial loss either in contract or in tort. There is, of course, efficiency in the automatic implication of a warranty and inefficiency in a long-form answer to the question of "whether a warranty of authority has been given".[63] Thus, the exception to presumed liability should apply more broadly, to situations other than mere third party knowledge.

(b) Consideration

Like contractual intention, consideration's presence in cases of implied warranty of authority has been questioned. As noted, the bargain theory of consideration requires that, at least objectively, a court determine that something has been given in return for a promise. In *Collen v Wright*, Willes J made clear that he viewed the "entry" by the third party into the "contract" with the principal as the requested consideration: "[t]he fact of entering into the transaction with the professed agent, as such, is good consideration for the promise".[64]

The difficulty with *Collen v Wright* liability is that it is a case at the margins. The limits of the "doctrine" are defined by a lack of evidence one way or the other. In such circumstances, we simply do not know whether the

60 *Smith v Land and House Property Corp* (1884) 28 Ch D 7 (CA); and *Bisset v Wilkinson* [1927] AC 177 (PC).

61 *Krüger & Co Ltd v Moel Tryvan Ship Co Ltd* [1907] AC 272 (HL); and see Atiyah, above n 58.

62 *Pasley v Freeman* (1789) 3 Term Rep 51, 100 ER 450 (KB).

63 *Penn v Bristol & West Building Society* [1997] 1 WLR 1356 (CA) at 1363.

64 *Collen v Wright* (Exch Ch), above n 11, at 245.

parties saw themselves as being involved in an exchange of "this" in return for "that".[65] In analogous situations, in terms of contractual intention, the law errs on the side of liability and equivocal consideration is likely to be treated as having been "requested" for much the same reason. The "core" *Collen v Wright* situation is therefore (just) reconcilable with orthodox bargain theory.

3 Expanded Cases – a Limited Expansion?

The expansion of implied warranty of authority beyond the *Collen v Wright* fact pattern presents additional difficulties. Suggestions have been made that the expanded form is conceptually unjustifiable. In fact, in the United States, the *Restatement of the Law of Agency* limits liability to the *Collen v Wright* situation — the situation in which there is an asserted contract between third party and putative principal.[66] In contrast, the Supreme Court of New South Wales recently, despite earlier contrary precedent, rejected the argument that implied warranty of authority was limited to the *Collen v Wright* fact pattern.[67] Professor Reynolds suggests that "direct dealing" is required for liability in the expanded case (except in exceptional contexts — such as those concerning bills of lading, which are contracts transferrable by statute),[68] albeit that there need not be a "contract" with the agent's principal.[69] This requirement of "direct dealing" is convincing as it provides a strong evidential basis for the agent's presumed contractual intention.

The expanded cases use broad language. They refer to liability for loss caused by any transaction between the third party and a stranger;[70] any loss caused due to the agent's lack of authorisation; or for loss in respect of every transaction of business into which the third party enters relying on the agent's authorisation. As with the "core" *Collen v Wright* situation, in order to establish liability in the expanded situation, there must be a contract (or at least an assumption of responsibility) under which, by implication, the agent has given a promise concerning the agent's authority.[71] The contractual assumption of responsibility of *Collen v Wright* is "made" principally based on factors that do not provide relevant evidence of an assumption of liability for any other purpose beyond securing the bargain. This is doubly true in relation to the alleged assumption of responsibility to people the agent has not dealt with (or may not know of). When the evidential basis for liability

65 *Beaton v McDivitt* (1987) 13 NSWLR 162 (SC).

66 American Law Institute *Restatement of the Law of Agency* (3rd ed, St Paul, Minnesota, 2006) § 6.10.

67 *Hamilton*, above n 29.

68 In that context, the broader statutory relationship between the parties and shared knowledge of standardised commercial procedure meant that it was possible to find contractual intention. This is because an agent had to be taken to know that, in the ordinary course, others would read and rely on documents. See *V/O Rasnoimport v Guthrie & Co Ltd* [1966] 1 Lloyd's Rep 1 (QB).

69 Reynolds, above n 30, at 200. See also Mark West "Warranty of authority in solicitors' liability claims – Part 1" (2009) 25 PN 131; and Francis Reynolds "Warranty of authority in solicitors' liability claims – Part 2" (2009) 25 PN 142.

70 *Firbank's Executors*, above n 21, at 60.

71 *V/O Rasnoimport*, above n 68.

— the defendant's intermediary role — is removed, absent other evidence of the kind referred to by Professor Reynolds, no liability should follow.

The allowance in *Penn v Bristol & West Building Society* that consideration for the implied warranty can be provided "by acting in reliance on that promise" is an expansion that threatens the common law principle that, in contract or tort, there is no liability for innocent reliance per se.[72] More crucially, treating reliance as consideration in itself means the abolition of the requirement of consideration. As the older cases make clear, it is induced reliance that is necessary for contractual liability. The likelihood of a representee's reliance is important evidence of contractual intention when there is little other evidence to rely on. Nevertheless, "reliance" is not the same as consideration. Where there is no direct dealing it is difficult to see that there is any kind of request or inducement at all.[73]

In summary, in order to establish liability in the expanded situation, there must be a contract (or at least an assumption of responsibility) under which, by implication, the agent has given a promise. There can be no absolute distinction between the "core" and "expanded" sets of liability.[74] The additional difficulty in establishing liability in the expanded cases is that there is no invalid contract to provide evidence of contractual indicia. In the *Collen v Wright* situation, the agent purports to bind a third party. The "direct dealing" of third party and agent provides a strong evidential basis for the agent's presumed contractual intention. The same principles support analogous limitations to negligent misrepresentation liability.[75]

4 The Other Side of the "Boundary": Negligent Misrepresentation Liability

Although this article primarily puts the case that implied warranty of authority liability is correctly understood as arising from contract law, this categorisation requires some conceptual strain. As noted, it has been suggested that implied warranty of authority liability is actually non-contractual or, specifically, tortious. For example, Wild CJ in *Hawke's Bay Milk Corp v Watson* appears to have rejected the submission that implied warranty of authority is contractual, based on the alternative foundation for liability of an implied collateral guarantee (the orthodox view).[76] Even if there is some truth to the view that implied warranty of authority liability has tortious characteristics, those characteristics cannot be of a kind that would create significantly different primary liability. Implied warranty of authority resembles the "so-called tort of negligent misrepresentation".[77] Whether a

72 *Penn*, above n 63, at 1363. See also the similarly questionable "reliance" liability in solicitors' cases, as noted by Evans, above n 1.
73 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 509–511.
74 *V/O Rasnoimport*, above n 68.
75 See Beever, above n 24, at 293.
76 *Hawke's Bay Milk Corp v Watson* [1974] 1 NZLR 236 (SC) at 239.
77 See Beever, above n 24, at 305.

defendant can be taken to have assumed responsibility for "negligent misrepresentation" turns on identifying:[78]

(a) The objective interpretation of the relevant circumstances in a case; and

(b) Whether there is a central statement assuming responsibility or instead only relevant conduct where an assumption of responsibility is implied.

Negligent misrepresentation liability also has a good case for being a species of voluntary liability. This species of liability for economic loss in tort is itself somewhat anomalous because tort is typically concerned with imposed liability.[79] The purported material difference between those forms of liability, at least in terms of primary liability, is that, as a contractual promise, implied warranty of authority liability is "strict",[80] whereas tortious liability requires negligence.[81] Negligence arguably only plays a limited, non-essential role in negligent misrepresentation liability. Thus, it is contended that the essential basis for misrepresentation liability is agreement, not negligence.[82] Accordingly, given the loss-based measure of quantum in tort, it is argued below that the doctrines' similarities provide support for a lower quantum of damages in the case of implied warranty of authority liability.

Quantum

1 Orthodoxy

The orthodox view of the quantum payable by an agent on an implied warranty of authority is, with reference to general contract damages, said to be the expectation measure for breach of contract.[83] In practice, however, the amount awarded has been quite fluid. In the "core" cases, the third party is entitled to recover from the agent the damages that compensate that third party for not having a contract with the supposed principal. Generally, this is the value of that "contract". But in some of these cases the quantum has been more parsimonious. The third party will only be entitled to nominal damages if that party would have recovered less than the full bargain value in an action for non-performance against the putative principal because the principal was insolvent or did not exist. This is because the "warranty" of

78 At 287–298. Contrast *Attorney-General v Carter* [2003] 2 NZLR 160 (CA); and Allan Beever "All at Sea in the Law of Negligent Misrepresentation" (2003) 9 NZBLQ 101.

79 Mark P Gergen "Negligent Misrepresentation as Contract" (2013) 101 Cal L Rev 953.

80 Watts and Reynolds, above n 3, at [9–063]. This is in essence a reflection of a contingency the parties are presumed to contemplate.

81 Watts and Reynolds, at [9–063]. For tortious liability, see West and Reynolds, above n 69, at [34].

82 Beever, above n 24, at 305.

83 The general principle of contractual damages is to put the claimant in the position they would have enjoyed if the contract had been performed: *Robinson v Harman* (1848) 1 Exch Rep 850, 154 ER 363 (Exch Ch) at 365 per Parke B. Compare this article's position to Cynthia Hawes "Damages for Breach of an Agent's Warranty of Authority: Well Worth Flogging a Dead Horse" (2004) 10 NZBLQ 386.

"authority" is not typically accompanied by a warranty as to other matters, such as the principal's existence, solvency or capacity to perform the contract.[84] In contrast, agents in identical circumstances, who profess to act for solvent principals, will be liable for the full value of the purported bargain. It is worth noting that this limitation has not been comprehensively endorsed in New Zealand. The limitation may also be criticised for placing undue weight on an inflexible rule, rather than focusing on the contextual evidence of party intention.

Before turning to the objections to this state of affairs, it is necessary to refer to the terminology and nature of contract damages. Historically, "expectation" and "reliance" losses were seen as two forms of damages.[85] Yet there is mounting support in modern case law and commentary that "reliance" losses are a species of expectation loss,[86] and that the "heads" of damages are confusing and conceptually irrelevant terms. This development supports the view implicit in this section that formalistic reference to "expectation" loss has had an unfortunate effect on implied warranty of authority liability. Reference to the traditional heads is, nevertheless, useful to frame the issues that have arisen and so is included for that purpose.

The operation of ratification also has relevance to liability and quantum. The potential variations of the relationship are considered under the ratification section below. For the purposes of this section it is assumed that a claim for enforcement or breach of an implied warranty of authority is made when it is no longer possible for the purported principal to ratify.

2 Objections to the "Expectation Measure" Quantum

There are two potential objections to insisting on an "expectation measure" of quantum, particularly in relation to the "core" *Collen v Wright* situation. First, Mindy Chen-Wishart observes that the presence of consideration is the primary factor that distinguishes contract liability from negligent misrepresentation liability.[87] The presence of consideration is, however, weak in implied warranty of authority cases. Secondly, even if it is insisted that consideration is truly important to the question of quantum in implied warranty of authority cases, a presumption of "expectation loss" ought to be displaced in most of those cases. Primary liability for an implied warranty of authority exists where there is sufficient evidence indicating that the agent intended to assume some responsibility in contract for the authorisation to act. The liability is defined by the absence of any express words clearly identifying what or how much liability was intended. It is trite that, in making an express promise, a promisor can circumscribe his or her liability.

84 Watts and Reynolds, at [9–066].

85 See LL Fuller and William R Perdue Jr "The Reliance Interest in Contract Damages: 1" (1936) 46 Yale LJ 52.

86 See, for example, *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd* [2010] EWHC 2026 (Comm), [2010] 2 CLC 194, applying this view; and commentary in David McLauchlan "Reliance Damages for Breach of Contract" in Jeff Berryman and Rick Bigwood (eds) *The Law of Remedies: New Directions in the Common Law* (Irwin Law, Toronto, 2010) 33.

87 Chen-Wishart, above n 57, at 223 and 230.

In finding primary liability, what words ought we put (or rather, discover from the facts) in the mouths of agents?

In these cases, there is no direct evidence of whether or not any limitation of liability was intended. Should it be presumed that the agent intended to be liable, either on a guarantee or indemnity basis, for the full "expectation value"? The second objection answers "no" for a number of reasons.

The agent cannot presume to accept the expectation measure based on the following (non-exhaustive) objections:

(a) The distinction between agent liability on the contract and implied warranty of authority is based on the idea that an implied warranty of authority is more easily proven and, implicitly, less onerous. Contractual rights of enforcement balance agent liability on the contract. Where the agent has no such rights, it seems very unlikely that such a wide indemnity was intended in the absence of extraordinary circumstances. Such a result would (subject to any possibility the existing doctrine makes for an insolvent or otherwise delinquent principal) remove the distinction between the two kinds of agent liability.

(b) The agent must in most circumstances, either, on the "indemnity" approach, have intended to promise a limited indemnity, or, on a "guarantee" view, have intended to limit damages to a "non-expectation" amount. This is consistent with recent English authority emphasising the relevance of commercial background to remoteness of damages.[88] This view can be tested to some degree by asking if an agent making an express warranty of authority would reasonably promise to indemnify on an expectation measure or otherwise fail to limit liability in damages. The answer must be "no" if the expected bargain is of any significance in a situation where the agent is not the counterparty acquiring valuable rights under the main contract and is not receiving significant consideration for making the deal with the third party.[89] A contrary decision would make no commercial sense and is unlikely to have been intended.[90]

88 See *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] BLR 145 at [42]–[43] per Toulson LJ explaining *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48, [2009] 1 AC 61; and *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37.

89 Unlike, for example, a transaction advisor assuming responsibility in relation to a deal on the basis of detailed and limited representations.

90 *Vector*, above n 48, at [12], [22] and [24].

(c) Many of the losses that typically accrue to a third party result from decisions made in reliance on the existence of agent authority (including attempting to enforce the unauthorised bargain and other business opportunities that might have been pursued). If these losses are not "independent of the breach of warranty", that is, they are foreseeable consequences of breach, then they will be recoverable.[91] Lost expectations can accordingly be incorporated into a "reliance" measure in appropriate cases.

(d) It is notable that other implied collateral warranties are not always on the expectation measure.[92]

(e) In the expanded case, particular difficulties apply to the calculation of an "expectation" measure, since there is no proposed or expected transaction/performance interest. To the extent that any primary liability can in fact be justified, the foreseeable extent of reliance and the breadth of reliance for which responsibility is assumed ought to determine the extent of liability (again, in essence a "reliance" basis of quantum).

(f) There are apparent similarities between the basis and circumstances in which implied warranty of authority and negligent misrepresentation liability arise. This is supported by the (arguably misguided) conclusion in New Zealand that a negligence action is not possible where implied warranty of authority liability arises.[93] It would seem odd that a "reliance" measure is appropriate for one and an "expectation" measure for the other.

This "reduced expectation" position is not without precedent even though the orthodox dialogue has not picked it up.[94] In *Hyundai Auto Canada v Computer Associates Canada Ltd*, Cullity J in the Ontario Court of Justice found a commercial agent liable on an implied warranty of authority but imposed a reliance measure of damages, explicitly declining to apply the "traditional" measure of damages.[95] As Cullity J noted, a "non-expectation"-based solution was the one chosen in *Collen v Wright* itself more than 150 years ago. In most cases where implied warranty of authority liability ought

91 *Habton Farms Ltd v Nimmo* [2003] EWCA Civ 68 at [128]–[130]. See Fuller and Perdue, above n 97.

92 *Esso Petroleum Co Ltd*, above n 26.

93 *Kavanagh*, above n 27.

94 *Hyundai Auto Canada*, above n 7. See Tan Cheng-Han "Implied Warranty of Authority — Authority, Identity and Damages" (2013) 30 JCL 92, responding to the recent decision of *Knight Frank LLP v Aston Du Haney* [2011] EWCA Civ 404. The author concludes "the law should re-examine whether expectation loss is the proper measure of damages" and suggests that it is not.

95 *Hyundai Auto Canada*, above n 7; and, in particular, *Hyundai Auto Canada* (Supplementary Reasons), above n 7, at [6]–[11] and [17].

to apply, a reduced measure is, for the above reasons, the appropriate measure.

V RATIFICATION

Creating Principals without Principles?

As indicated, this article contends that:

(a) Bolton Partners is too strict in its view of retrospective effect. There is no apparent justification for ratification to operate where its retrospective effect would clash with important rights or legal principles.

(b) An important legal principle that conflicts with ratification is consensus ad idem. Nevertheless, ratification does not have to offend against this principle in the transactional context. There is no conflict if a third party is allowed to withdraw before ratification (although the separate question of whether other factors, including an agent's implied warranty of authority, may make withdrawal impossible is explored below).

Not all common law legal systems share *Bolton Partners'* insistence on the strict equivalence of ratification with antecedent authority. United States courts began at the other extreme, holding that ratification of an unauthorised bargain only became effective if the third party consented to it afresh, meaning that there was really no ratification at all.[96] The position in the United States is now similar to that in some civil law jurisdictions — a third party may withdraw in defined circumstances prior to ratification.[97]

Secondary limits on ratification arise from the particular ways in which it may cause "unfair prejudice".[98] This is a positive but incomplete development. The conceptual unification of a second set of rules does not

96 *Dodge v Hopkins* 14 Wis 630 (SCW 1861). The ability of principals under United States law to enforce bargains made by agents with apparent authority reduces, however, the importance of the doctrine.

97 See, for example, the German Civil Code (Bürgerliches Gesetzbuch) § 178; Martin Schmidt-Kessel and Ana Saide "Unauthorised agency in German law" in Danny Busch and Laura J Macgregor (eds) *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge University Press, New York, 2009) 110 at 122; Danny Busch "Unauthorised agency in Dutch law" in Danny Busch and Laura J Macgregor (eds) *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge University Press, New York, 2009) 136 at 157 (rights of withdrawal in Dutch and German law); and David Yuill "Unauthorised agency in South African law" in Danny Busch and Laura J Macgregor (eds) *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge University Press, New York, 2009) 300 at 323–324 (academic comment that South African courts are likely to favour this approach).

98 *Henniker-Major & Co*, above n 47; and see Howard Bennett *Principles of the Law of Agency* (Hart Publishing, Oxford, 2013) at [5.33] and [5.38]–[5.40].

explain why "unfair prejudice" is the watchword for limiting *Bolton Partners*. It begs the question: unfair prejudice in relation to what? The limits are still not anchored to a central principle and this is because no central principle for ratification's operation has been explicitly identified. The assertion in *Bolton Partners* that ratification is equivalent to antecedent authority is questionable as the existence of an exception (of unfair prejudice) indicates that it is less than equivalent to the rule.

Chief Judge Goddard considered the problems associated with equating ratification with antecedent authority: "[o]bvious conceptual difficulties besiege the significance of the contractual penumbra between agreement and ratification and of steps taken in the dark during it".[99] In fact, the deemed existence of agent authority from the outset will affect all the subject matter of the ratification and any steps taken regarding the subject matter by anyone "in the dark" between the agent's action and ratification. As noted, ratification has been held to undo torts.[100] In the transactional context, ratification might transfer the right to sue in tort where, for example, a stranger trespassed against goods subject to sale under a purported bargain.

Even in the context of unilateral ratification, where the issue of consistency with consensus ad idem does not arise, explaining why this legal "deeming" is permissible is required to justify the doctrine. It is not clear that such a statement has ever been satisfactorily made. Consequently, it would appear that ratification should not be possible where there is a strong reason against altering the status of the subject matter. For example, ratification should not be possible where anyone — not just the third party — would be unfairly prejudiced. The rule that ratification cannot occur after property rights have vested in a stranger may be an example of this, although there are many conceivable limitations.[101] Thus, the actual basis of the doctrine would be that ratification is allowed where it provides a practical benefit and there is no real downside. This position provides the indulgence that authority was in fact supplied beforehand. It asks, "what should it matter that authorisation only comes later?"

The most obvious principle in the transactional context that clashes with ratification is the principle of mutual contractual intention. Where an agent is authorised, the principal has agreed to be bound to the third party (and has not withdrawn that authority). The third party has also agreed to be bound to the principal. The agent is an intermediary but the manifestations of consent are still meaningful. *Bolton Partners* insists that the third party's explicitly revoked intention can be matched by the principal's subsequently formed intention to be bound. On the rule in *Bolton Partners*, there is no meeting of the minds.[102] This is the example of a clash between retrospective effect and consensus ad idem, which is a principle that ratification should not

99 *New Zealand Engineering Union Inc v Shell Todd Oil Services (New Zealand) Ltd* [1994] 2 ERNZ 536 (EmpC) at 547.
100 See the comments above at n 3.
101 See Cheng-Han, above n 42.
102 *Vickery's Motors Ltd (in liq)*, above n 7, per Isaacs J dissenting.

override. If ratification's retrospectivity cannot reach back once rights have vested, why should it reach back past the revocation of contractual animus?

The clash of ratification with consensus ad idem can be avoided, however, if a third party is allowed to withdraw before ratification. The reason is that the third party's purported agreement can be treated as continuing until the time of ratification. What amounts to withdrawal will be fact-specific. The third party's manifested assent is the same or similar to a subsisting offer to be bound (as long as the passage of time or subsequent behaviour of the parties does not negate this view) or the non-countermanding of an agent's authority to contract.[103] This could be said to be a fiction or a permissible extension (but preservation of) the principle of consensus ad idem, as is agency itself under the principle of authorisation. This "subsisting consent" theory is consistent with the first set of limits (that were briefly discussed above in Part III).

The only concession that ratification should provide is one of time and, even this, only where there is no unfair prejudice resulting from the concession. Arguably, a restrictive interpretation of the second set of limits also implicitly reflects this position. The extent to which ratification could come after a third party has resiled from a bargain but be within a reasonable time or not cause unfair prejudice is questionable. That result would appear to legally privilege a person who acts through an agent over one who does not. While agency confers practical advantages on principals, it ought not to create legal privilege.

Ratification and Implied Warranty of Authority

The orthodox view of the interface between ratification and implied warranty of authority (assuming *Bolton Partners* is correct) has received limited attention. It appears that until ratification, the third party may initiate proceedings against the agent, although the third party may not "withdraw". If the principal ratifies (assuming that ratification is still possible given the stage of the proceedings), the agent is largely or completely absolved of liability for fulfilling the third party's expectations (a contract with the principal). Even so, some obligation to pay damages, such as litigation costs, may remain.

Adopting a "subsisting consent" theory, outlined in the previous section, creates the following implications:

(a) If a third party takes sufficient steps to sue an agent, the third party's consent no longer "subsists". There is no longer consensus ad idem and ratification cannot follow.

(b) If the third party "withdraws" before the principal has a chance to ratify, this arguably should provide the agent with a general defence, perhaps subject to nominal

103 This view is supported by Isaacs J dissenting in *Vickery's Motors Ltd (in liq)*, above n 7; and *Hughes*, above n 7.

> damages. This appears to be the position adopted in German law and appropriately reflects the third party's abandonment of any interest in performing the contract.[104]

If the *Bolton Partners* rule against withdrawal is not justified in itself, it does not necessarily follow that the third party may in all cases be able to withdraw prior to ratification, for one of the following reasons:

(a) It could be argued that it is an implicit part of the agent's implied warranty of authority (if there is one) that the giving of the warranty is conditional on the third party's non-withdrawal from the putative contract while ratification is possible.

(b) Policy considerations that justify limiting contract law. For example, the absence of good faith or third party market advantage.[105] The fact that a third party would on ratification "get what they (initially) wanted" does not, however, seem like a strong reason to prevent withdrawal if they were not in fact bound or entitled under a contract.

In any event, on this analysis a change of focus is necessary. A ratifying principal should have to demonstrate that a third party who seeks to withdraw in fact fettered his or her autonomy, either in connection with the agent's implied warranty or otherwise. The fact of ratification itself is, on the argument presented, not a justification to prevent third party withdrawal.

VI CONCLUSION

The doctrines of implied warranty of authority and ratification evolved to close gaps in the common law that emerged as a result of the development of direct agency. Each doctrine is in need of some taming. Despite its arcane reputation, the doctrine of implied warranty of authority is essentially a shorthand rule of evidence indicating that an agent has assumed responsibility for being authorised on particular facts. Yet care must be taken to ensure that this tool is not elevated into something unprincipled. There is some danger, particularly in the expanded cases, that implied warranty of authority imposes liability on agents for innocently caused loss. In the absence of any clear acceptance of a broader principle of liability for innocently caused economic loss, implied warranty of authority should

104 German Civil Code (Bürgerliches Gesetzbuch) § 179; and Schmidt-Kessel and Saide, above n 97, at 125.

105 Danny Busch and Laura McGregor "Comparative law evaluation" in Danny Busch and Laura J Macgregor (eds) *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge University Press, New York, 2009) 385 at 410.

predominantly be limited to the *Collen v Wright* situation. The most unprincipled area of the doctrine as it stands relates to the quantum of damages that result from the warranty. The expectation measure cannot accord with evidential indicia, including the parties' presumed intentions, in most cases. Therefore, the expectation measure is arguably unjustified as a default remedy.

It appears that the doctrine of ratification lacks any justification greater than commercial expediency. While limits to ratification's application are nothing new, they should be rationalised on the basis that ratification is a "permissive" doctrine. There appears to be little wrong with allowing the doctrine to operate. Nevertheless, it should not apply if its retrospective rewriting of events would conflict with important rights or principles. In the transactional context, this clash can largely be avoided by the application of a subsisting consent principle, based on the agent and third party's bargaining. This is similar to a subsisting contractual offer. To the extent that *Bolton Partners* ratification purports to strictly equate ratification to antecedent authority, it goes too far and is in direct conflict with the principle of contractual intention (which has already been extended by direct agency). It may be possible to preserve a rule against third party non-withdrawal but *Bolton Partners* can no longer provide that justification. A shift of focus is required because the doctrine of ratification contains no inherent justification for its retrospective effect, particularly regarding the rule that any prior third party withdrawal will be deemed ineffective when ratification of an unauthorised bargain made by the agent occurs. The agent's implied warranty of authority appears to provide the most tenable alternative basis for non-withdrawal. These conclusions frame a potential new direction for the doctrines, focused in all cases on consent.