



A Study of the Agency of necessity with reference to Consensual Relation between the Agent and the Principal in Contract

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Abstract

The present paper provides an analysis of the doctrine of necessitous intervention through a legal relationship of a defendant as seen from the principle of agency of necessity's perspective. It well focuses the agency of necessity. Also, it considers the consensual relation between the principal and his agent thoroughly. The doctrine of the principals necessitous intervention is clearly explained with the principals liability for torts in agency. Finally, it well considers an overview of the Indian and European Perspective.

Keywords: Agency, law, necessitous, doctrine.

Introduction

Agency is based upon consensual obligations between the agent and the principal, but the emergent commercial community required judicial intervention to assist in achieving some desired objectives. As McCordie J. explained in *Prager v. Blatspiel, Stamp and Heacock Ltd* 'The object of the common law is to solve difficulties and adjust relations in social and commercial life. It must meet, so far as it can, sets of fact abnormal as well as normal. It must grow with the development of the nation. It must face and deal with changing or novel circumstances. Unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law¹⁻³. Agency of necessity also addressed the problem articulated by in *Munro v. Willmott* 'masters of ships who found themselves in foreign parts and unable to get immediate instructions from their owners when they needed money for expenses which had not been provided for'. This is also obvious that the Law of Agency is an important element of Commercial Law because companies can only transact businesses through agents, since they are only legal entities and not individuals^{4,6}. The aim of the law is to allow the agents to draw commercial parties into contractual relations in such a way as to render those parties, and not the agents, responsible. The agent only bargains on behalf of the principal. Accordingly, the law of agency has made the agent a fiduciary under strict obligations. Other key issues of the law include a safeguard and protection of the principal (the party from whom the agent obtains the authority) against misuse of power by the agent (the person that represents another); the protection of the third party with whom the agent has dealt; the protection of the agent against any liability incurred on behalf of the principal; and the rights an agent may have against the principal.

Agency can be made by contract – which might be expressed or implied, oral or written, or even ratified – given either to an act

made by a person who had no former authority to implement any act that transgresses the authority granted to an agent. It can also be made through estoppel which happens when a person permits another to act for him/her under such condition that a third party exists, who mainly held a belief that an agency relationship really existed. Another avenue for agency is through necessity, when a person acts for another in an emergency situation without clear or direct authority to do so. Hence the present work examines the most important part of the agency i.e. Necessitous Intervention which also has been specified under section 189 titled as 'agent's authority in an emergency'.

Agents and Principals' Relationship under the Indian and English Law: A consensual relationship created by contract or by law where one party, the principal, grants authority for another party, the agent, to act on behalf of and under the control of the principal to deal with a third party. An agency relationship is fiduciary in nature and the actions and words of an agent exchanged with a third party bind the principal. An agreement creating an agency relationship may be express or implied, and both the agent and principal may be either an individual or an entity, such as a corporation or partnership. Under the law of agency, if a person is injured in a traffic accident with a delivery truck, the truck driver's employer may be liable to the injured person even if the employer was not directly responsible for the accident. That is because the employer and the driver are in a relationship known as principal-agent, in which the driver, as the agent, is authorized to act on behalf of the employer, who is the principal. A voluntary, good faith relationship of trust, known as a fiduciary relationship, exists between a principal and an agent for the benefit of the principal. This relationship requires the agent to exercise a duty of loyalty to the principal and to use reasonable care to serve and protect the interests of the principal. An agent who acts in his or her own interest violates the fiduciary duty and will be financially liable to the principal for any losses

the principal incurs because of that breach of the fiduciary duty. For example, an agent who accepts a bribe to purchase only the goods from a particular seller breaches his fiduciary duty by taking the money, since it is the agent's duty to work only for the best interests of the principal. An agency relationship is created by the consent of both the agent and the principal; no one can unwittingly become an agent for another. Although a principal-agent relationship can be created by a contract between the parties, a contract is not necessary if it is clear that the parties intend to act as principal and agent. The intent of the parties can be expressed by their words or implied by their conduct. Perhaps the most important element of a principal-agent relationship is the concept of control: the agent agrees to act under the control or direction of the principal. The extent of the principal's control over the agent distinguishes an agent from an independent contractor, over whom control and supervision by the principal may be relatively remote. An independent contractor is subject to the control of an employer only to the extent that she or he must produce the final work product that she or he has agreed to provide. Independent contractors have the freedom to use whatever means they choose to achieve that final product. When the employer provides more specific directions, or exerts more control, as to the means and methods of doing the job—by providing specific instructions as to how goods are to be sold or marketed, for example—then an agency relationship may exist.

The English Law defines the fundamental role of an agent as the establishment of contractual relations between the agent and a third party on behalf of his principal. Once this is established, the agent 'drops out'. Not until 1994 was the agent's and principal's relationship subject to specific legislation in the United Kingdom, despite existence of such in most European countries over a long period of time. There was a feeling that the different levels of protection afforded to agents by the different systems of law within the European Community might be disadvantageous businesses in some areas of the EC or result in distortions of competition. This was followed by a rigorous discourse that led to a series of changes in the EC member states to modify their legal systems for the adoption of a uniform protection to commercial agents. From this, "The Directive" was derived, which was adopted in 1986. These regulations, together with the amended Commercial Agents Regulations of 1993, implemented the Directive into English Law. These regulations are very important because they form the turning point of the agency relationship. Specifically, the agent was given: i. Compensatory right or a right to an indemnity payment when an agreement comes to an end (irrespective of whether it is as a result of death, retirement of the agent or due to disability). ii. A right of commission despite a running contract between the principal and a customer (under some circumstances). iii. A right of commission on some transactions in circumstances where an existing agency agreement denies such a right to the commission. iv. A right of commission emanating from concluded transactions, despite the termination of agency agreement in some cases. v. A right to have a written statement specifying the terms of an agency contract. vi. A right to obtain material

extracts from accounting books of the principal to check for the commission due to him or her.

Relevancy of Principal's Consent

Undoubtedly, agency can only be valid when there is an established consent of the principal to the agent. They will be deemed to have consented if they are seen to have agreed to what amounts to such a relationship in the context of the law. Their recognition of this, or their disclaimer to it, is not relevant as long as an expressly or implied consent can be deduced from their words or actions (Lord Pearson in *Garnac Grain Co., Inc. v. H.M.F. Faure and Fairclough, Ltd.*).

Indeed, the idea of agency of necessity was primarily applicable for only those cases in respect to carriage of goods by sea, as the captain or master took action to save a ship or cargo in critical conditions. Then, the doctrine was extended to cover conditions and cases that are related to the carriage of goods by land.

According to *Stranger*, if there is a pre-existing legal relationship between the parties, the necessitous intervention will be different from the cases shown above, especially in the condition of an agency.

Principal's Liability for Agent's Torts: There is no ambiguity in the law of tort that the master is absolutely liable for a wrongful act of his servant, excluding a clear breach or mistrust, which creates or results in an injury to another party's reputation, property or any other item of value, for which the party is entitled to compensation. Similarly, "the principal is generally liable for the torts of an agent committed within the scope of his authority"⁷.

Principle of Necessitous Intervention: The origin of the principle of necessitous intervention rests in the idea of agency of necessity, where an agent exceeds his authority by acting on behalf of the principal in an emergency situation. As a result of the conditions of the necessity, especially the impracticality of the agent's contact with the principal, the courts were taking the role of the agent as if he had the authority to do what was logically necessary to safeguard the principal's property. If an agency of necessity was found, the agent could be compensated for the expenses resulting from rescuing or saving the principal's property.

There is an agency created out of necessity within peculiar circumstances. The agency is legally deduced by consenting to the agent's authority, to have the power over the principal, and to have acted the way he did to the extent necessary without an express, implied or ratified consent of the principal.

The theory used to be applicable only carriage of goods by sea involving a captain's action to save a ship on the high sea, or its cargo in precarious situations. However, the doctrine was extended to cover similar cases that involved comparable

carriage of goods on land, and extended to other forms of agent-principal relations. The whole time famous case is *The Great Northern Railway Co. vs. Puma Shoes*, when the company delivered a horse as contracted to a station and there was no one to take delivery. The horse was taken to a stable and charges paid months later. The defendant refused to reimburse the plaintiff. The claim was successful because of the extension of the doctrine of necessity from carriers of goods by sea to carriage of goods by land. There was established agency of necessity, since the plaintiff had no choice but to arrange for the animal's wellbeing.

According to Stranger, two main issues are undoubtedly clear in the principle of necessity. The first, as earlier stated, is the relationship between the plaintiff and the defendant; the second is the non-existence of such a relationship. The importance of the idea of necessitous intervention lies in the restitution principle, as in certain established conditions where the plaintiff is able to obtain restitution from the defendant via the necessitous intervention, even when there was no pre-existing relationship between the parties. Another case is one involving the burial of a dead person. If the person who is responsible for making the burial could not do his job, it is necessary that someone else do it on his behalf.

With this, the idea of necessitous intervention might be required on the condition of the provision of medical treatment. If the plaintiff had provided medical treatment to a victim of an accident who was in a critical condition, then the plaintiff could obtain compensation or restitution from the defendant responsible for arranging such service already provided⁸. This is similar to the plaintiff that arranged for a burial.

It seems to be clear that the problem of the reimbursement in conditions of the necessity that is based on the existence of a pre-existing legal relationship between the concerned parties is whether it really forms part of the law of restitution. The problem or the difficulty comes from the inevitability of the pre-existing relationship, whether it be agency or bailment or whatever. The effect of such doctrine is that the plaintiff's authority within such relationship is extended to have the reaction of emergency. It reflects that the doctrine is a part of the law adjusting and governing the pre-existing relationship. Such as the contract rather than the law of restitution, with the result that, if the plaintiff has a remedy, it will be contractual.

It is very clear that in cases of the necessitous intervention, the defendant is only responsible if the result of the plaintiff's intervention is that the property has been kept. Accordingly, the doctrine of the restitution will be based on the principle of necessity. Agency by necessity is also formed by operation of law (i.e. automatically). Thus the principal may be bound by a contract made on his behalf without authority and which he has refused to ratify. For agency by necessity to exist or arise, the following conditions must be satisfied: There should be a real necessity for acting on behalf of the principal.

The need to act must be out of emergency making it necessary for the agent to act as he did. It should be impossible to communicate and get instructions from the principal within the time available. The alleged agent should act in good faith and in the interests of the principal.

Agency by necessity arises in the circumstances where the agent exceeds his authority in good faith in an emergency e.g. where A consigns vegetables to B at Mumbai with directions to send them immediately to z at New Delhi. A may sell the vegetables at Mumbai if they will not bear the journey to New Delhi without perishing. In addition, where a husband improperly leaves his wife without providing proper means of her survival, the wife can pledge her husband's credit. The wife is the agent of the husband as a matter of necessity.

Requirements for Validity of Necessity: i. Communication with the Principal must have been impracticable or impossible. ii. The action must have been for the benefit of the Principal. iii. It must have been for the benefit of the Principal. iv. Competency of the person the agent is acting on behalf of must not be in doubt. v. Authority cannot be upheld where an earlier express contrary instruction of Principal was received.

This is explained by Evans J. in *Morton v Chapman* – 1843/11 MandW 534 that, 'the defendants' initial response was to say that they would sell the goods for the account of the plaintiffs. In reply, the sellers made it clear that they refused authority. The court did not regard the case as one where the buyers could claim to be acting as agents of necessity on behalf of the sellers.'

Modern Scenario: It is a liability of an agent in general, in an emergency, to do all works for protecting his principal from loss, as would be done by a person of ordinary prudence, in regard to his own case.

The doctrine of agent of necessity cannot be applied to a gratuitous bailment. But even if it does apply, it can be applied in case of real emergency necessitating the disposal of goods.

An agent or servant, through employed in a particular business only, is prima facie authorized to bind his principal by doing such subordinate acts as are necessarily or usually employed for duly carrying into effect the object of the principal power, whether such act are subsequently ratified by the principal or not⁹.

The doctrine's requirement that the agent has to be unable to secure instructions from his principal was clearly essential to limit the application to true cases of necessity, and thereby protect the principal. The corollary is that where authority is refused, agency of necessity cannot arise, as Evans J. explained in *Graanhandel T Vink BV*: "*Morton v Chapman* (1843) 11 M and W 534 ... the defendants' initial response was to say that they would sell the goods for the account of the plaintiffs. In reply, the sellers made it clear that they refused authority. ... the Court did not regard the case as one where the buyers could claim to be

acting as agents of necessity on behalf of the sellers". Given that the doctrine is intended to be applicable in extreme circumstances only, it is unsurprising that so many cases have turned on the failure to seek instructions. The problem is further compounded by technological advances. As Bowstead observes the impossibility of securing instructions is rare in the modern world. Markesinis and Munday similarly comment "With today's improved communications, it may be difficult for the agent to establish that communication was practically impossible"

Agency of Necessity in the Modern World: As agency of necessity was established some centuries ago, it is easy to argue that the basic principles applicable to the 'full' doctrine of agency of necessity and the 'more limited' doctrine relating to reimbursement of agent's expense characterize it as an anachronistic hang-over falling into disquietude. However, it must be remembered that much against the continuing prevailing ethos of agency, the doctrine of agency of necessity thrusts the validity of the agent's actions upon the principal. Accordingly, it is right that, to protect the principal and limit the doctrine only to instances where his property is truly endangered, the tests are strictly and narrowly interpreted have effectively facilitated global money transfer – the lack of which was a significant contribution to the growth of agency of necessity. Unsurprisingly, major academic commentators have all questioned the future of the doctrine on reasoning that modern communications have eliminated one essential criteria – the impossibility of obtaining instructions.

Ironically, analysis of the cases demonstrates that in agency of necessity the courts have struggled with the concepts of "emergency" and "necessity" rather than communication. So, the principal bar to the further application of the doctrine is not the existence of enhanced communication through advanced technology, but the strict and narrow test applied to identify the "necessity" of action¹⁰.

Criticism of the Doctrine of Necessity: The dichotomous dilemma of courts to approach this doctrine from a purely legal perspective or a philosophical one has been a serious subject of debate. Bowen L.J. explained in *Falcke v. Scottish Imperial Insurance* "The general principle is, beyond all question, that work and labor done or money expended by one man to preserve or benefit the property of another do not, according to English law, create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will".

The requirement of the doctrine to extreme situations of the inability of the agent to communicate with the principal is also under serious challenge by the 21st century's modern technology. Professor Friedman further suggests, "it must be impossible for the master to be able to communicate with the owners of the ship or cargo and ask for instructions (which seems severely to limit

the operation of this form of agency in the light of modern communications although it may be relevant where there are numerous cargo owners)."

With global improvement in financial services' provision by several private and public institutional bodies, not to mention the ever increasing competitive banking environment, the assertion of disposing goods to raise money for a justification of necessitous intervention will surely be put to rest. This is because the same ease of communication achieved in today's modern world is reflected in the speed at which money can now be freely transferred from one end of the globe to another. Vollans observed, "if communications have all but eliminated the impossibility of obtaining instructions, those communication systems have also facilitated global money transfer almost to the extinction of agency of necessity".

It is, therefore, not surprising that the agency of necessity is seen as a rare exception to the rule developed for policy reasons, which might eventually go the way of other similar exceptions, as seen in 'salvage and acceptance of a bill'.

Conclusion

We have seen the global importance of common law in solving difficult and complicated socio-economic relations among people. The expectations upon it are enormous in that it shapes and guides our collective behavior towards a just and free society. It is inevitable that the English Law has come to be integrated within almost all legal systems throughout the world. As a society is never static, the law needs to keep up with changing circumstances, or face an undignified loss of relevance. It is in response to this that the agency of necessity resolved issues pertaining to problems, as articulated by in *Munro v. Willmott*, where masters of ships found themselves in foreign parts and unable to get immediate instructions from their owners when they needed money for expenses which had not been provided for. While different jurisdictions were only able to handle the issue by extending implied authority in an emergency, the English law was able to adequately address the loop-hole through the doctrine of 'Agency of Necessity, an offshoot of the law of salvage, where sale of cargo or the pledging of a vessel to raise funds was permitted to enable a voyage to proceed. Whilst the courts sought for the establishment of existence of pre-existing contractual obligations between principals and their agents, and proof that the goods are perishable, instances abound that enabled the doctrine's application despite the absence of either (or both)'.

Nevertheless the doctrine "sought to accommodate commercial realism within the constraints of a strict legal doctrine; and consequently, the doctrine has, over the years, enwrapped a number of separate (and disparate) sub doctrines, some of which (such as the wife's agency of necessity) have been abolished."

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