NECESSITOUS INTERVENTION WITH SPECIAL REFERENCE TO PRESERVATION OF PROPERTY

By Lawson A.W. Hunter†

INTRODUCTION

Circumstances arise from time to time when human beings feel compelled, for moral, humanitarian or other reasons, to intervene in another's affairs without request to protect the other person's health, property or interests. The question to be discussed in this essay is whether such an intermeddler can claim recompense from the benefactor of his actions or does the law deny him recovery.

The Roman law of *negotiorum gestio* holds that "a volunteer, who believed in good faith that the interests of an absent friend were in danger of suffering by neglect, might act for him"[1] and recover his reasonable expenses. The English common law, however, is said to hold no such principle.[2] "Liabilities are not to be forced on people behind their backs . . . ."[3]

Are there any circumstances where the common law courts have recognized the principle of necessitous intervention; and, if so, what are they? Would the recognition of such a principle be a worthwhile addition to the law from a policy point of view? Are there any common law doctrines which could adapt the principle? These are some of the questions to be considered. In considering these questions special emphasis will be given to the cases where a benefit is conferred by the preservation of property.

---

† Lawson A.W. Hunter: LL.B., University of New Brunswick, LL.M., Harvard University, Executive Assistant to the Deputy Minister of Consumer and Corporate Affairs, Ottawa. This article was originally prepared for a seminar in Restitution given at the U.N.B. Law School, 1968-69. It has been updated and revised slightly.

1 M. Radin, *Handbook of Roman Law* (1927), at pp. 301-302.

2 G.H.L. Fridman, *The Quasi-Contractual Aspects of Unjust Enrichment* (1956), 34 Can. Bar Rev. 393, at p. 413.

3 *Falcke* v. *Scottish Imperial Insurance Co.* (1887), 34 Ch.D. 234, at p. 249. (C.A.).

THE PRESENT STATE OF THE LAW OF VOLUNTEERS

(1) *CONTRACTUAL SITUATIONS*

In Anglo-Canadian law a person intervening in the affairs of another will be responsible to the other party for any damage done as a consequence of such intermeddling but will derive no rights as a result thereof.[4]

This rather harsh doctrine was specifically laid down in *Falcke* v. *Scottish Imperial Insurance Co.*[5] where Bowen L.J. said:

> The general principle is, beyond all question, that work or labour 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.[6]

Let us look at the facts of this case.

Falcke held a mortgage on a life insurance policy owned by E. D., purporting to act for Falcke, agreed to sell Falcke's interest in the policy back to E. On this understanding E paid a year's premium on the policy to keep it alive. The policy was later sold by Falcke's representative to enforce the security. The court held that no contract existed between E and Falcke. Consequently, E's claim that he held a lien on the mortgage was rejected. Neither was he entitled to recover the premium he had paid from the proceeds of the sale.

Based on the facts and the method the Court used in disposing of the claim, the case is not clearly an example of necessitous intervention. E's claim to a lien on the mortgage was an effort to protect what he thought was his own property interest. He was not making the claim as a stranger or volunteer in a true sense. Thus, it may be argued that Bowen L.J.'s comments are mere *obiter*.[7] Another submission is that Bowen L.J.'s language in the *Falcke* case indicates that he was not talking in terms of quasi-contract but on the "straightforward principles of contract."[8] Therefore, the judgment should have limited application to the law of quasi-contract. Regardless of these arguments, the case has been followed in so many instances, both English and Canadian,

---

4 Ernest G. Lorenzen, *The Negotiorum Gestio in Roman and Modern Civil Law* (1928), 13 Corn. L.Q. 190.

5 *Falcke* v. *Scottish Imperial Insurance Co.* (1887), 34 Ch.D. 234 (C.A.).

6 *Ibid.*, at pp. 248-249.

7 R. Goff and G. Jones, *The Law of Restitution* (1966), at p. 239.

8 G.H.L. Fridman, *The Quasi-Contractual Aspects of Unjust Enrichment* (1956), 34 Can. Bar Rev. 393, at p. 419.

that it must be taken as the present statement of the law.[9]

The courts have allowed certain exceptions to the doctrine as stated in the *Falcke* case. The most obvious exception is the case of salvage at sea. Bowen L.J.'s explanation of this exception was:

> The Maritime law for the purpose of public policy, and for advantage of trade, imposed in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of merchantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances.[10]

With the development of alternate modes of transportation perhaps the economic arguments underlying the exception in the case of Maritime law could be extended to include these systems also. In this age is there a sound case for a distinction between the treatment of property on water and property on land[11] or in the air? It has been suggested the reason for the Maritime law exception is that the English law adopted the foreign law merchant with its doctrine of salvage, but never assimilated the corresponding foreign law containing the doctrine of *negotiorum gestio*.[12]

There are other exceptions to the general rule established by the *Falcke* decision. They are (1) the acceptance of a bill of exchange for honour,[13] (2) the performance of another person's duty,[14] and (3) the supply of necessaries to disabled persons.[15] There is some question in English law whether an intervenor can recover where he attempted to help an injured person. It is well settled in Canada,[16] however, that an intervenor who intends to charge for services, e.g. a professional man, may recover for

---

9 *Sorell* v. *Paget*, [1950] 1 K.B. 252, at p. 260 (C.A.).
Re *Chetwynds Estate*, [1938] Ch. 13 (C.A.).
Barish and Company v. *Rural Municipality of the Gap No. 39 AND Biss* (1925), 19 Sask. L.R. 560 (C.A.).
Fidelity Trust Co. v. *Fenwick* (1922), 64 D.L.R. 647 (Ont. S.C.).
Wheeler v. *Rosedale Apt. Ltd.*, [1959] O.R. 641.
Drager v. *Allison et al.* (1958), 13 D.L.R. (2d.) 204.

10 *Falcke* v. *Scottish Imperial Insurance Co.* (1887), 34 Ch.D. 234, at p. 249 (C.A.).

11 E.W. Hope, *Officiousness* (1929), 15 Corn. L.Q. 25, at p. 33.

12 Carleton Allen, *Legal Duties* (1931), 40 Yale L.J. 331, at p. 374.

13 *Vandewall* v. *Tyrrell* (1827), M. and M. 86, 173 E.R. 1090 (C.P.).

14 *Shall* v. *Wright* (1850), 12 Beav. 558, 50 E.R. 1174 (Rolls Court).

15 *Williams* v. *Wentworth* (1842), 5 Beav. 325, 49 E.R. 603 (Rolls Court).
Samilio et. al. v. *Phillips et. al.* (1968), 69 D.L.R. (2d.) 411 (B.C.S.C.) varied on other grounds, [1972] S.C.R. 201.

16 *Matheson* v. *Smiley*, [1932] 2 D.L.R. 787 (Man. C.A.).

his services.[17] Generally speaking, however, the law in Canada is very similar to that in England. The number of cases in point has not been great, but they tend to follow the decision in the *Falcke* case.[18]

There is one case decided by an Alberta court that deserves more careful consideration. In *Riddell* v. *McRae*[19] the court seemed inclined to extend the doctrine of necessitous intervention to allow the intervenor to recover, but rationalized the decision in another manner to achieve the same result. In that case the defendent and the deceased owned adjoining lots outside the Calgary city limits. The defendant did not occupy his lot and the deceased took possession of it. After the deceased died his executors paid taxes on the defendant's lot for nine years. When the executors discovered the true owner of the land, they sought to establish a lien on the defendant's property for the amount of the taxes paid.

The deceased had communicated with the defendant some years before his death. In these communications he claimed to be in possession of, and to have some claim to or against the defendant's land. There was no evidence that the defendant ever answered the deceased's letters or that he consented to the claim in any way. Nevertheless, the court upheld the plaintiff's action for a lien on the property.

Beck J. wrote:

> It seems a fair inference that he . . . must have been under the impression that the lot in question had become subject to taxation and that either someone, persumably the deceased or his representative, was paying the taxes upon it . . . . Under these circumstances I am of the opinion that the plaintiff is entitled to a lien upon the defendant's lot.[20]

Beck J. further stated as support for his decision the judgment of Cotton L.J. in the *Falcke* case. Cotton L.J. said:

> It is very true that if a man who has title to property sees another expending money upon it in the erroneous belief that he has title to it when if fact he has no title, there is an important doctrine of equity which will prevent the real owner from insisting on his title so as to deprive the person who was acting on the supposition of his title of the benefit of the expenditure.[21]

---

17 R. Goff and G. Jones, *The Law of Restitution* (1966), at p. 236.

18 *Arding* v. *Buckton* (1957), 6 D.L.R. (2d) 586 (B.C.C.A.).
Drager v. *Allison et al.* (1958), 13 D.L.R. (2d) 204 (Sask. C.A.).

19 *Riddell* v. *McRae* (1917), 11 Alta. L.R. 414 (App. D.).

20 *Ibid.*, at p. 415 (per Beck, J.).

21 *Falcke* v. *Scottish Imperial Insurance Co.* (1887), 34 Ch. D. 234, at p. 242 (per Cotton, L.J.).

However, in the *Riddell* case, the deceased did not believe he had title to the defendant's lot. He felt he had a claim against the lot, but he realized his right was not established. In addition Bowen L.J. stated in the *Falcke* case that there could be recovery for a contract to be implied. It would seem that *Riddell* v. *McRae* is in direct contradiction to the *Falcke* case. In both cases the intervenor was acting to protect what he at least thought was his property interest yet the results are different.

The tone of Beck J.'s comments in the *Riddell* case indicates that he felt there should be a change in the law. He referred to the *negotiorum gestio* doctrine of Roman civil law, but he did not say how far the Alberta court could go in establishing that doctrine. He felt the case came ". . . well within the most conservative statement of the principle of law referred to."[22]

However just the result of the *Riddell* case may be, it has not been followed on the question of a restitutionary claim in any subsequent Canadian case. A very similar fact situation came before the Saskatchewan Court of Appeal in 1925 and the court did not allow recovery.[23] More recent decisions of Canadian courts uniformly uphold *Falcke* v. *Scottish Imperial Insurance Co.*[24] In conclusion, the decision in *Riddell* v. *McRae* may only show that some Canadian courts are inclined to soften the English law of necessitous intervention just as the Manitoba Court of Appeal did in *Matheson* v. *Smiley*.[25]

A similar problem to necessitous intervention exists in the case where an agency of necessity arises. The agent may be placed in an emergency situation and in order to protect his principal's interest he exceeds his authority. Can he charge his principal for the expenses he incurs while acting beyond the scope of his authority? The principle is well established that in the proper circumstances he can recover.[26] The problem arises as to how far the court will extend the doctrine. There are strong opinions that the courts have already over-stepped the bounds of agency law and allowed recovery in cases which, in reality, are examples of neces-

---

22 *Riddell* v. *McRae* (1917), 11 Alta. L.R. 414, at p. 416 (App. D.).

23 *Barish and Company* v. *Rural Municipality of the Gap No. 39 and Biss* (1925), 19 Sask. L.R. 560 (C.A.).

24 *Arding* v. *Buckton* (1957), 6 D.L.R. (2d) 586 (B.C.C.A.).
Wheeler v. *Rosedale Apt. Ltd.*, [1959] O.R. 641.
Drager v. *Allison et al.* (1958), 13 D.L.R. (2d) 204.

25 *Matheson* v. *Smiley*, [1932] 2 D.L.R. 787 (Man. C.A.).

26 *Prager* v. *Blatspiel, Stamp and Heacock, Ltd.*, [1924] 1 K.B. 566, at pp. 571-73, (per McCardie J.).

sitous intervention.[27]

Over the years the courts seem to have confused the law of agency of necessity with necessitous intervention. Where the facts of the situation indicate that a just result would be to allow the so-called agent to recover his expenses and where the court can establish a pre-existing relationship between the principal and the so-called agent, English courts have implied an agency of necessity to allow recovery. It can be argued, however, that they have overstepped the traditional law of agency in providing recovery for such intervenors.

Prager v. *Blatspiel, Stamp and Heacock, Ltd.*[28] sets out four necessary conditions for an agency of necessity to arise.

(1) The agent must not have been able to obtain his principal's instructions.

(2) There must have been a necessity to justify the agent's actions.

(3) The agent must have acted in the best interests of the parties concerned.

(4) The action taken by the agent must have been reasonable.

It seems obvious from these conditions that ". . . it is a condition precedent to the existence of implied authority of necessity that the person exercising it must be the servant or agent of another."[29] It is extremely doubtful whether a principal can be bound by the act of a complete stranger.[30] The law of agency is part of the law of contract. Thus, the relationship between an agent of necessity and principal must be a contractual one. This, at least, implies that the two parties have consented to contract. But surely the agent can do no act which lies outside the usual and ordinary bounds of his agreement. Yet in some agency of necessity instances this ". . . so-called agent is not in any sense an agent. He has done an act in the interest of another without the latter's consent."[31]

There are examples where land carriers,[32] involuntary bailees,[33]

---

27 See below on agency of necessity and necessitous intervention.

28 *Prager* v. *Blatspiel, Stamp and Heacock, Ltd.*, [1924] 1 K.B. 566, at pp. 571-573, (per McCardie J.).

29 R. Powell, *The Law of Agency* (1961), at p. 410.

30 G.C. Cheshire and C.H.S. Fifoot, *The Law of Contract* (6th ed., 1964), at p. 407. *Jebara* v. *Ottoman Bank*, [1927] 2 K.B. 254, at p. 271 (C.A.).

31 R. Powell, *The Law of Agency* (1961), at p. 410.

32 *Great Northern Railway* v. *Swaffield* (1874), L.R. 9 Ex. 132.

33 *Sacks* v. *Miklos*, [1948] 2 K.B. 23 (C.A.).

consignees of goods,[34] and finders of lost property,[35] have been held to be agents of necessity. On the facts of many of these examples the supposed agent of necessity has acted entirely outside the usual scope of his employment. Since these "agents of necessity" have been able to recover their expenses, the principle of *negotiorum gestio* ". . . seems to have been introduced through the back door.[36] But no consent is necessary for the *gestor* to intervene; whereas, in agency, there must be consent, expressed or implied. It is a complete misapplication to use the law of agency of necessity in these situations. "There may be a necessity, but there is no agency."[37]

(2) *NON-CONTRACTUAL SITUATIONS*

So far we have considered cases primarily in a contractual or quasi-contractual context. There have been a number of cases dealing with volunteers, however, which have arisen in other areas of the law. Have the courts treated the volunteers in these cases with the same disdain they have shown in the contractual cases? It would appear there are inconsistencies in the law concerning volunteers.

The rescue cases in tort law are one example. There are a number of American cases[38] allowing recovery in rescue situations and at least one English decision.[39]

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences . . . . The risk of rescue if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have preseen the coming of a deliverer. He is accountable as if he had.[40]

There are also American cases dealing with the rescue of property where recovery was allowed.[41]

Another possible exception exists where the intervenor is a finder of lost or straying property. One early English authority would indicate that such an intervenor cannot recover reimburse-

---

34 *Tetley* v. *British Trade Corporation* (1922), unreported, but cited in 10 L1.L.R. 678.

35 *Binstead* v. *Buck* (1776), 2Wm. bl. 1117, 96 E.R. 660 (K.B.).

36 R. Powell, *The Law of Agency* (1961), at p. 424.

37 *Ibid.*, at p. 424.

38 *Dixon* v. *New York, New Haven and Hartford Railway Co.* (1910), 92 N.E. 1030 (Mass. Sup. Jud. Ct.).

39 *Brandon* v. *Osborn, Garrett and Company*, [1924] 1 K.B. 548 (K.B.).

40 *Wagner* v. *International Railway* (1921), 133 N.E. 437 (N.Y. Ct. App).

41 *Liming* v. *Illinois Central Railroad* (1890), 47 N.W. 66 (Iowa Sup. Ct.).

ment.[42] The main authority, however, is *Nicholson* v. *Chapman*,[43] where P noticed some logs carried a considerable distance by the tide and he voluntarily moved them to a place of safety. He would not give up the logs unless reimbursed his expenses, and he sought to establish a lien on the property.

In denying his claim Eyre C.J. said:

> This is a good office, and meritorous, at least in the moral sense of the word, and certainly entitles the party to some reasonable recompense, from the bounty, if not from the justice of the owner . . . perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, should depend altogether for their reward upon the moral duty of gratitude.[44]

This statement would seem to indicate that in some circumstances recovery should be available to a mere finder. It should be pointed out, however, that Eyre C.J.'s judgment was given during that period of English law when moral obligations were sufficient to raise legal liabilities, a concept which was overruled in *Wennall* v. *Adney*.[45] Nevertheless, some writers still hold that *Nicholson* v. *Chapman* only denies the action to establish a lien and is not necessarily dicta against recovery by a finder.[46]

Another interesting situation involving a volunteer arose in *Schneider* v. *Eisovitch*.[47] In that case a woman was injured in France in a car accident caused by the negligence of the defendant. In an action for damages she included the travelling expenses incurred by her brother-in-law who rendered necessary services to her while she was in the hospital. The plaintiff had not requested the services of the brother-in-law. They were strictly voluntary. Nevertheless, the court included them as part of the damages. "Strict legal liability is not the be-all and end-all of the tort-feasor's liability."[48] However, a later court held differently on a similar point[49] and it is unlikely that *Schneider* v. *Eisovitch* would be followed today in England or Canada.

Another inconsistency appears to arise in trust law.

---

42 *Binstead* v. *Buck* (1776), 2 Wm. Bl. 1117, 96 E.R. 660 (K.B.).

43 *Nicholson* v. *Chapman* (1793), 2 H. Bl, 254, 126 E.R. 536 (C.P.).

44 *Ibid.*, at pp. 257-259.

45 *Wennall* v. *Adney* (1802), 3 Bos. and Pul. 247, 127 E.R. 137 (C.P.).

46 Walter B. Williston, *Agency of Necessity* (1944), 22 Can. Bar Rev. at pp. 492, 503, 508.

47 *Schneider* v. *Eisovitch*, [1960] 2 Q.B. 430 at p. 490 (per Paull J.).

48 *Ibid.*, at p. 44.

49 *Gage* v. *King*, [1961] 1 Q.B. 188 (per Diplock J.).

> The law of trusts recognizes a limited kind of ***negotiourm gestio*** in the familiar principle that a trustee who has properly and reasonably paid money out of pocket for the preservation of the trust property is entitled to be reimbursed out of the estate . . .[50]

A similar principle applies to executors.[51] it must be recognized, however, that in both of these situations there is some form of pre-existing relationship between the parties.

The above examples are all cases where persons volunteered their services and were recompensed in tort law or trust law for those services. In each of the cases the volunteer acted with a good moral intention in what seemed a necessary and reasonable manner. Yet in none of the cases is there a contract or request for the specific services provided.

The case of the unintentional trespasser presents another inconsistency. If an unintentional trespasser removes something from another's property and adds to the value of the property removed by manufacture, he often will be allowed to keep the value he added.[52] Being a trespasser, he is inherently a wrongdoer and a tortfeasor. He has no intention of benefitting the plaintiff. In addition the unintentional trespasser is, in many cases, negligent. Nevertheless, the law considers the substantial and important thing to be the increase in value.[53] But if a necessitous intervenor enters another's property to save it from destruction, the law will not treat him as well as the trespasser, even though he intentionally trespasses. This is well established in English and Canadian law.[54] The result is that the unintentional trespasser, who, in fact, does not know what he is doing, will be allowed to benefit from his actions. But the necessitous intervenor, who does know what he is doing, will not.

These examples would indicate that the courts are not particularly consistent in their development of the law relating to volunteers. In the extreme case they have placed a tortfeasor in a better position than the necessitous intervenor.

Negotiorum Gestio

It has been suggested that the English courts have been inconsistent in accepting the doctrine of maritime salvage from the

---

50 *Re Leslie* (1883), 23 Ch. D. 552.

51 *Davey* v. *Cornwallis*, [1931] 2 D.L.R. 80 at p. 83 (Man. C.A.).

52 *Detroit Steel Cooperage Company* v. *Sisterville Brewing Company* (1914), 34 Sup. Ct. 753.

53 E.W. Hope, *Officiousness* (1929), 15 Corn.L.Q. 25, at p. 33.

54 *Cope* v. *Sharpe (No. 2)*, [1912] 1 K.B. 496 (C.A.).
Australasian Steam Navigation Company v. *Morse* (1892), L.R. 4 P.C. 272.

foreign law merchant while not accepting the equivalent "land" doctrine of *negotiorum gestio*. The doctrine has not been completely overlooked for it has been mentioned by the courts in a few of the cases dealing with volunteers. Perhaps it would be worthwhile to examine this doctrine, determine whether in effect, it differs substantially from the present English-Canadian law, and consider if such a principle should be accepted by our courts.

> Unlike his American counterpart, who is often contemptuously characterized as an officious intermeddler, the European volunteer who without request intervenes in another's affairs has been under this doctrine of *negotiorum gestio*, rewarded for his efforts and encouraged in his behaviour.[55]

This statement is also applicable to Anglo-Canadian law. One writer has outlined six conditions of *negotiorum gestio* in Roman civil law.[56]

(1) The agent must have carried on another's (the principal's) business in the interest of the principal.

(2) The business must have been done "voluntarily" by the agent.

(3) The act must have been done by the agent with the expectation of reimbursement for his expenses.

(4) The agent could not recover his expenses if his intervention was contrary to the express wish of the principal.

(5) The act done must have been advantageous to the principal, or would have been to the principal's advantage if successful.

(6) The circumstances under which the intervention took place must have been such that the intervention was reasonable.

It has been said that the doctrine as it originally developed was a combination of trust law and agency law.[57] Gradually, as the classification of bailment known as "mandate" developed, the doctrine of *negotiorum gestio* narrowed. Eventually it came to be principally concerned with the altruistic deeds of intervenors. Even though the doctrine has little to do with agency law as such, many express agency concepts still persist in the appli-

---

55 J.T. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler* (1961), 74 Harv. L.R. 817, 1073.

56 Ernest G. Lorenzen, *The Negotiorum Gestio in Roman and Modern Civil Law* (1928), 13 Corn.L.Q. 190.

57 S.J. Stoljar, *The Law of Quasi-Contracts* (1964), at p. 189.

cation of the doctrine.[58]

It has been suggested that, in reality, there is very little difference between the Roman law and our present law.[59] Indeed, it has been said that the only substantial difference has to do with the volunteer who preserves another's property.[60] And even there the consequences of the difference may be insignificant. In practice, cases allowing recovery in these situations are very rare, even in countries where the Roman civil law is followed.[61] The English rule denying recovery and imposing liability on the intervenor has proved to be equally unimportant.[62] As a consequence the inclusion or exclusion of the doctrine may have little practical impact on the law.

Nevertheless, there seem to be two principal and potentially practical differences between the two rules of law.

(1) *Negotiorum gestio* is a much more flexible rule to apply. It can adjust more readily to changing situations and allows more equitable decisions in favour of necessitous intervenors.

(2) The underlying principle of *negotiorum gestio* is a moral obligation that is translated into a legal duty. Perhaps the English-Canadian law does not sufficiently recognize the idea of mutual aid.

A Good Samaritan Duty?

Not since Lord Denman in *Eastwood* v. *Kenyon*[63] overruled Lord Mansfield's doctrine that a moral obligation was consideration to support a contract has English law recognized a Good Samaritan duty on the part of its citizens. ". . . As a general principle our law has shown itself extremely chary of imposing altruistic duties."[64] Should the law command as a positive duty the obligation to act in a highly moral fashion?

Bentham has written:

> A woman's head-dress catches fire, water is at hand. A man instead of assisting to quench the fire looks on, and laughs at it. A drunken man,

---

58 J.P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler* (1961), 74 Harv. L.R. 817, 1073 at p. 1127.

59 S.J. Stoljar, *The Law of Quasi-Contracts* (1964), at p. 194.

60 *Ibid.*, at P. 193.

61 J.P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler* (1961), 74 Harv. L.R. 817, 1073, at p. 1081.

62 *Ibid.*, at p. 1127.

63 *Eastwood* v. *Kenyon* (1840), 11 A. and E. 438, 113 E.R. 482 (Q.B.).

64 Carlton Allen, *Legal Duties* (1931), 40 Yale L.J. 331, at p. 367.

> falling with his face downwards into a puddle, is in danger of suffocation. Lifting his head a little to one side would save him. Another man sees this and lets him lie. A quantity of gunpowder lies scattered about a room; a man is going into it with a lighted candle; another man knowing lets him go without warning. Who is there that in any of these cases would think punishment misapplied?
>
> . . . In cases where the person is in danger why should it not be made the duty of every man to keep another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?[65]

The problems raised in the case of necessitous intervention are basically moral ones. Is it time we reconsidered Lord Mansfield's doctrine or accepted Bentham's proposition? European civil law jurisdictions support the doctrine of *negotiorum gestio.* They also recognize contracts without exchange as legally binding. Are these systems of law any less just or uncertain than the English common law? Do we sufficiently recognize the concept of good samaritanism? Progressive technological developments make us increasingly interdependent on our fellow man. The law should not stifle human nature.[66]

Paull J. said in *Schneider* v. *Eisovitch*[67] that the defendent's ". . . responsibilities could not be limited to reimbursing only strictly legal liabilities of the plaintiff."[68] In a recent Privy Council case[69] the court imposed on a landowner the obligation and responsibility of protecting his neighbour's land from hazards not caused by the landowner, but flowing from his land. These cases would suggest that the courts, at least in certain situations, are willing to, and are going to, require humanitarian conduct from the parties.

How far this trend will develop is unascertainable. Our concern is whether the law should adopt a more humanitarian and liberal approach to the interests of the necessitous intervenor. If a different approach is felt desirable, the law should be changed.

CONCLUSION

Before it can be said that a particular legal doctrine is wrong, or unjust, or anachronistic, and should be changed, it is necessary

---

65. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1823), at p. 148.

66 J.P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler* (1961), 74 Harv.L.R. 817, 1073.

67 *Schneider* v. *Eisovitch,* [1960] 2 Q.B. 430 (per Paull J.).

68 *Ibid.*

69 *Goldman* v. *Hargrave,* [1966] 2 All.E.R. 989 (P.C.); see Laurence W. Anderson, *Goldman* v. *Hargrave: Liability of a Bad Samaritan for the Natural Condition of his Land* (1967), 3 U.B.C.L.R. 211.

to consider the possible reasons or justifications for the rule, whether they are enunciated or not. The following are possible justifications for the present common law of necessitous intervention.

(1) Self determination is a mark of the English race. The Englishman distinctly wishes to "muddle through" in his own way.[70] Needless to say, this reason does not seem particularly relevant. One writer has called it "nonsense".[71]

(2) To allow the necessitous intervenor to recover would make a sham of the early and long enduring supremacy of the contract concept in the English law.[72] It has been pointed out, however, that European civil law systems have succeeded just as well as the common law without this sanctity of the contractual relationship.

(3) "The idealist may see in it an assertion of the lofty principle that the virtuous act should be its own reward . . ."[73]

(4) The cynic, however, may say that the man who chooses to give, rather than to sell his services, is but the more fool for it.[74] The mistrust shown by the Courts of Equity toward the "mere volunteer" supports this view.

(5) Granting recovery in such cases would encourage intermeddling. As already has been pointed out, this problem has not developed in those civil law systems where *negotiorum gestio* is a part of the law.

(6) There is an irrebuttable presumption of a gift when services are offered voluntarily. One commentator feels there should never be an irrebuttable presumption of gift except in case of services rendered by members of a family to one another.[75]

(7) The application by the courts of a broad test such as "unjust enrichment" would result in the decision in each case being reached through the subjective moral determination of the judge and not in accordance with predictable or objective rules of law.[76]

---

70 E.W. Hope, *Officiousness* (1929), 15 Corn.L.Q. 25.

71 S.J. Stoljar, *The Law of Quasi-Contracts* (1964), at p. 161, footnote 4.

72 E.W. Hope, *Officiousness* (1929), 15 Corn.L.Q. 25.

73 J.B. Milner, *Cases and Materials on Contracts* (1967), at p. 198.

74 *Ibid.*, at p. 375.

75 E.W. Hope, *Officiousness* (1929), 15 Corn.L.Q. 25, at p. 36.

76 W.S. Holdsworth, *Unjustifiable Enrichment* (1939), 55 Law Q.Rev. 37, at p. 51.

It should be pointed out, however, that ". . . law is also a conscious or proposed growth . . . and the judge is directed to the attainment of the moral end and its embodiment in legal forms."[77]

Finally, it has been said that the present state of the law of necessitous intervention is not the consequence of an unsympathetic judiciary, but rather ". . . because the courts have vainly tried to squeeze the facts of the cases before them into a frame which is wholly unsuited to their requirements."[78] The commentator, here, was speaking specifically of the court's flirtation with the doctrine of agency of necessity. This comment probably expresses most accurately the reason why the law is as it is today. The often sympathetic courts did not feel there were any existing legal forms which could have been adapted to accommodate the particular moral principles and decisions it wished to effect. Yet because the common law courts are adverse to openly recognizing their own short-comings, other reasons, some rational, some nonsensical, have been strewn in the flowery wake of judicial decisions and comment to obscure the true feelings of the court.

Is there a way out? Technically, a change could be made by the legislature or by the courts. We shall only consider the possibility of the courts accommodating the change within the common law. There are at least four judicial methods by which the doctrine of necessitous intervention could be introduced into Anglo-Canadian law.

(1) *Agency of Necessity*

The courts might imply an agent-principal relationship in two areas of the law which it now does not. First, where a stranger preserves another's property unofficiously and secondly, in the case of a finder. There is convincing evidence, however, that the legitimate bounds of agency have already been crossed.[79] Also, it is doubtful whether an agency relationship can or should arise where there is no pre-existing contractual agreement.[80] Even if the courts were to allow recovery in these extended areas, they would still be bound within the aegis of the law of agency which could restrict the development of flexible rules.

---

77 B. Cardozo, *The Nature of the Judicial Process* (1921), at p. 105.

78 R. Powell, *The Law of Agency* (1961), at p. 424.

79 *Ibid.*, at p. 424.

80 *Jebara* v. *Ottoman Bank*, [1927] 2 K.B. 252, at p. 271 (C.A.).

(2) *Tort Law*

Tort law could be extended along the lines of *Schneider* v. *Eisovitch*[81] and the rescue cases. Higher standards of conduct could be imposed as legal duties through the law of negligence. However, in any tort case, the intervenor could recover only if the defendant were negligent or a tortfeasor, giving rise to damages.

(3) *Acceptance of Negotiorum Gestio*

Many of the principles of *negotiorum gestio* are good and should be introduced into our law. There are two ways of doing this:

(1) by the courts developing a particular branch or branches of the law; or

(2) legislation.

Either of these methods would, of course, be acceptable, but the first is more likely. Some European countries have adopted appropriate legislation.

(4) *Restitution*

Many writers feel this is the best vehicle for introducing more just principles into the law of necessitous intervention.[82] "Roman law placed the problem correctly in quasi-contract . . ."[83] it is said. Through the principles of unjust enrichment the courts could establish fair and just guidelines for recovery by the necessitous intervenor.[84]

Where the intervenor has acted unofficiously and in good faith and in circumstances making the act necessary and reasonable, he should not be denied recovery if a benefit was conferred on the defendant and the act was not intended to be gratuitous.

---

81 *Schneider* v. *Eisovitch*, [1960] 2 Q.B. 430 (per Paull J.).

82 R. Powell, *The Law of Agency* (1961).
J.P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler* (1961), 74 Harv.L.R. 817, 1073.
E.W. Hope, *Officiousness* (1929), 15 Corn.L.Q. 25.
R. Goff and G. Jones, *The Law of Restitution* (1966).

83 E.W. Hope, *Officiousness* (1929), 15 Corn.L.Q. 25, at p. 30.

84 There are two recent cases in the area of restitution which seem to indicate a more liberal approach by the Courts. In *Samilo et al.* v. *Phillips et al.* (1968), 69 D.L.R. (2d) 29, the Court allowed the son of a mental incompetent to recover income tax fines and penalties he had paid in respect of his father's business even though the father was not aware that the payments had been made. The son was able to recover on the basis of the incompetency of his father as well as the provision of necessaries. However, the Court held in

addition that the law of necessitous intervention would support the son's claim. The case, however, may not be particularly helpful in the classic volunteer case since there obviously was a relationship, business or otherwise, between the son and the father prior to the volunteer act.

The second case, *Re Jacques* (1968), 66 D.L.R. (2d) 30, allowed neighbours to recover for benefits conferred on an old woman in ill health living alone on a farm. The Court held that the law of restitution could create an obligation on her estate to pay for the benefits received even though there was no intention on her part to pay. The editorial note in the case notes that "the real basis for these claims is simply the unofficious performance of beneficial services by one without gratuitous intent . . . ." Although the case seems to clarify the meaning of *Deglman* v. *Guaranty Trust Co. of Canada and Constantineau*, [1954] 3 D.L.R. 785, at p. 794; [1954] S.C.R. 725, a basis for the decision seems to be that the parsimonious old woman induced her neighbours to perform beneficial services for her. If the element of inducement is an aspect of the case, then it may not be of considerable help in a strictly voluntary situation where there is no pre-existing relationship between the parties.