TRANSFERRED AGENCY IN INSURANCE LAW : A FRAMEWORK FOR THE INSURED'S PROTECTION IN PROPOSAL FORM CASES

by

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A Thesis
Submitted to the Faculty of Graduate Studies
in Partial Fulfillment of the Requirements
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ABSTRACT

This study is directed towards reconciling the general principles of agency law with the concept of "transferred agency", as developed in insurance law. The insured, in many of the cases of a transfer of the incidence of agency, is losing the indemnity sought in the insurance coverage on unjustifiable grounds. Also, there is no consistency in applying the concept to strip insureds of indemnity. This demands a consistent protective devise for insureds, produced in this study. The study is based on a literature review of the concept of transferred agency. The review is done extensively on the transfer where an agent completes application forms for applicants. The comparative aspect of the study is on the growing tendency of other Common Law jurisdictions to emulate the transfer.

The study relates the literature review with the realities of the insurance industry. There is advocated a line of thought that gives protection to the average policyholder and this is found in the "reasonable expectation" of the insured. In molding the reasonable expectation to suit the context of transferred agency and examining the events flow thereafter, a conclusion is reached. The conclusion summarizes the study as having produced a framework for the protection of an average policy-holder dealing with an insurer's agent in contracting for insurance coverage.

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CHAPTER I

INTRODUCTION AND STATEMENT OF PROBLEM

The Agency Relationship

Agency is defined as a fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf, and the other of whom similarly consents so to act or so acts.[1] Fridman sees agency as

> "a relationship which exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property."[2]

Fridman's definition did not attempt to show agency relationship as a consensual relationship. This, however, is the presentation of Seavey who defines agency as a consensual relationship in which the agent holds in trust for and subject to the control of another, the principal, a power to affect certain legal relations of that other.[3] This blend of words

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[1] Reynolds F.M.B. and Davenport B.J., Bowstead on Agency, (London: Sweet and Maxwell, 1985) page 1.

[2] Fridman G.H.L., The Law of Agency (London: Butterworths, 1983) page 9.

[3] Seavey W.A., "The Rationale of Agency" (1920), 29 Yale L.J. 859 at 868.

to emphasise the importance of control and consent was also made in the American jurisdictions where agency is seen as a fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.[4]

The association of the agency relationship with consent has been made in Garnac Grain Co Inc. v. H.M.F. Faure and Fairclough Ltd.[5] where Lord Pearson said that the relationship of principal and agent can only be established by the consent of the principal and the agent. This same view, Sell adopts with the view that the agency relationship can arise only when there is mutual consent between the two parties that it should arise.[6]

The use of consent as a sole determinant of agency has been criticized by Fridman that though consent may be a relevant factor in identifying agency relationship, it is not completely satisfactory to base agency upon consent.[7] Fridman

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[4] Section 1, American Law Institute Restatement of the Law of Agency, Second, (2d) Volume 1, (Minnesota: American Law Institute Publishers, 1958).

[5] (1967) 2 All E.R. 353 at 358 (H.L.).

[6] Sell W.E., "Agency" (New York: The Foundation Press, Inc., 1975) page 8.

[7] Fridman G.H.L., op. cit., page 12 - 13.

is of the view that agency should not be of mechanical determination but, rather, the law should be made to determine what is agency on the basis of the factual arrangements between the parties. The criticism was buttressed with the existence of situations where the agency relationship is created though the parties have not truly consented to it.[8] Fridman thus received consent as an important feature of agency but with a caution not to overemphasise it in the arrangement.

Having regard to the argument that agency is as much a fiduciary relationship as a consensual one and that some of the obligations incumbent on an agent are imposed irrespective of agreement, the astuteness of Fridman's contention cannot be ignored. The authors, Markesinis and Munday, too opine that consent will not provide a universal criterion for determining whether there exists an agency relationship since, often, the existence and the incidence of agency derive from the law.[9]

The use of control in this instance is an attempt to distinguish agency and master- servant relationship. Fridman

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[8] Reference was made to Boardman v Phipps (1967) 2 A.C. 46 (H.L.) where it was held that agency existed between the parties though no consent was shown on the part of the principal. In the case, the agents were treated as self-appointed agents.

[9] Markesinis B.S. and Munday R.J.C., An Outline of the Law of Agency (London: Butterworths, 1986) page 5.

asserts that agency is a relationship that has meaning and importance in the fields of contract and property while the master-servant relationship has importance for purposes of vicarious, tortious and criminal liability.[10] Reuschlein and Gregory, while hinting the possibly determining role of the right to control, state that the real distinguishing characteristic of an agent is the representation of a principal contractually. They assert further that the principal will not normally incur liability for torts of the agent.[11]

Seavey regards the difference between an agent and a servant as one lying in the degree of control exercised over the person rather than in the acts performed. Seavey's view, however, accords more with a distinction of a relationship of a servant-agent from a non servant-agent. Seavey sees a servant as an agent under more control than is a non-servant. In stating the difference on the degree of control, Seavey sees the servant selling primarily his services measured by time and the agent the ability to produce results.[12]

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[10] Fridman G.H.L., op. cit., pages 26 - 31.

[11] Reuschlein H.G. and Gregory W.A., Handbook on the Law of Agency and Partnership" (Minnesota: West Publishing Co., 1979) page 99.

[12] Seavey, "The Rationale of Agency" (supra) page 866.

It suffices to say, at this juncture, that the difficulty of sufficiently distinguishing between the relationship of master and servant and a principal- agent relationship has been existing since the notion of agency was introduced into the Common Law.[13] This apparently necessitated the emphasis on the control exercised over the agent. Conant brought this emphasis into focus that in England and in a large group of American states, the distinction between agent and servant is still maintained as proof of actual control of method. Conant states that the courts, in elucidating the agent's freedom of control, emphasise the agent's authority to choose the method of selling and the hours of work.

For this reason, Conant concludes that the prime behavioral characteristic of a servant is a legal presumption that the servant has no discretion in choosing the physical method of performing the entrusted services. Agents, on the other hand, are delegated discretion to devise the best method of effecting contracts for their principals within the scope of the delegated authority.[14]

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[13] Fridman asserts that the notion of agency was introduced into the Common law in Boson v Sandford (1690) 2 Salk 400 where Holt C.J. said "whoever employs another is answerable for him and undertakes for his care to all that make use of him". See Fridman G.H.L., op. cit., page 6.

[14] Conant M., Liability of Principals for the Torts of Agents: A Comparative View, (1968), 47 Nebraska L.R. 42 at 49.

Conant's view on the subject may have been shaped by the American Restatement of the Law of Agency which provides in subsection (2):

> "a servant is an agent employed by the master to perform services in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control by the master."

In sub-section (3) it is provided :

> "an independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right of control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent".[15]

These arrangements represent the set of conditions needed to view the agency relationship at Common Law and provide guidance in identifying a relationship as an agency relationship.[16]

In the Civil Law province of Canada, agency is given expression in the identical concept of mandate. Article 1701 of the Civil Code of Quebec,[17] provides that :

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[15] American Law Institute Restatement of the Law of Agency, (supra) page 12.

[16] Manitoba, like the other Common Law Provinces in Canada, has its principles of Agency law shaped after the English Common Law. The same could be said of countries like Australia, New Zealand and Nigeria where Agency Law derive inspiration from the Common Law of England.

[17] "Civil Codes of Lower Canada and Quebec", (Montreal: Wilson & Lafleur Itee, 1989). Hereafter referred to as "Quebec Civil Code".

> "mandate is a contract by which a person, called the mandator, commits a lawful business to the management of another, called the mandatary, who by his acceptance obliges himself to perform it."

The similarities in the two concepts become increasingly apparent with the implicit need for consent in mandate. The agent here called the mandatary, must manifest an acceptance of the committal made by the principal of a lawful business. The authors, Franklin and Franklin too have expressed the similarities in the usage of the two concepts in stating that mandate is the Quebec term for agency.[18] This opinion is shared by Castel too though he is of the view that mandate is more restrictive in coverage than agency.[19]

Creating the Agency Relationship

At Common Law, the relationship of a principal and an agent may be created by vesting authority in the agent to act for the principal. The vested authority may be a prior one which arises where the parties agree to the state of the agency. The agreement on the state of agency may be express or implied from the course of their conducts. The authority to act, however, is granted prior to the agent's act on behalf

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[18] Franklin M. and Franklin D., Introduction to Quebec Law (Toronto: Copp Clark Pitman Ltd,1984) page 129.

[19] Castel J. G., The Civil Law System of the Province of Quebec (Toronto: Butterworths, 1962) page 135.

of the principal.

The consent of the parties in this regard becomes emphasised and it may be expressly given or inferred from the course of their conduct. This observation is what makes the agency a consensual relationship but not necessarily a contractual relationship. The manifestation of the intent to act as the agent or be acted for as the principal is imperative while the agency may be gratuitous. Being capable of being created without consideration, agency thus is not necessarily a contractual arrangement.[20]

The vested authority in the agent may alternatively be given subsequent to the agent's involvement in the arrangement. This feature of agency is called ratification and retrospectively creates the agency. The agent initially acts on behalf of another without the other's authority but the latter subsequently adopts the act, thus, making it binding.

Ratification has the effect of a previous command and applies with equal force to a situation where the agent has exceeded the vested authority. The excesses of the agent may

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[20] In Quebec Civil Law, agency is always a contract though it may be gratuitous. Article 1702 of the Quebec Civil Code makes the contract a gratuitous one unless there is an agreement or an established usage to the contrary.

be adopted by the principal.[21] The ratification may be express or implied such as where the principal by conduct shows an adoption of the agent's activity. It is necessary, hereunder, for the principal to be in existence at the time the agent commits the unauthorized act and the agent must have contracted for the principal subsequently ratifying the act.

In creating agency, however, attention must be paid to the one area where the proposition that agency is strictly a consensual relationship is belied. Hereunder, the agent has purportedly acted on behalf of a person and the law holds that person estopped from denying the agency relationship. This may arise where the person, now the principal, has allowed a third party to believe that a state of agency exists.

Where the third party deals with the agent in reliance on the impression given by the principal of the agency, the principal will not be allowed to repudiate the relationship. Fridman states in respect of this form of creating agency that since its design is the protection of third parties, it is semantically and juristically correct to employ the language of estoppel.[22]

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[21] Article 1720 of the Quebec Civil Code makes a mandator bound for the ratification of the acts of the mandatary done in excess of the limits of the given powers.

[22] Fridman G.H.L., op. cit., page 105.

Though the use of the phrase "agency by estoppel" seems appropriate in this context, it has been criticized by academic writers. Powell regards it as being entirely misleading since it does not create the relation of principal and agent. Powell opines that it only affects the relation of a principal and a third party.[23] Stoljar too adopts the position that no such thing as agency by estoppel exists. Stoljar appraises the phrase an unreliable guide in identifying agency.[24]

By whatever means an agency relationship is created, the purpose of the arrangement is an induced convenience to the principal. At Common Law, the capacity to do any thing by means of an agent is co-extensive with the capacity of the principal to do the particular act. The agency thus relieves the principal only of the obligation to engage in the transaction personally. Being a mere instrument of the principal to effect certain purposes, the agent does not bear the risk of any inadequate representation.

The current general expectation in relation to the agent's position has been stated as far back as the nineteenth

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[23] Powell R., The Law of Agency (London: Issac Pitman & Sons Ltd., 1961) pages 68- 72.

[24] Stoljar S.J., The Law of Agency (London: Sweet and Maxwell, 1961) pages 30- 36.

century when Wright J. expressed:

> "there is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal, the contract is the contract of the principal and not that of the agent."[25]

With the principal being the only person to sue on the contract and who may be sued, the principal must have capacity to enter into the contract with the third party. The agent does not have any legal right in the contract so created. The agent's duties and rights in the arrangement are owed to the principal. The agent is obliged to obey the instructions of the principal and exercise due care and skill in executing such instructions.

The agent is entitled to be paid, among other things, remuneration usually in the form of a commission when engaged in any work with a promise of payment. The commission is paid by the principal and this too may be decisive in identifying the parties to the agency. The agency may be created with an understanding that the agent is to receive no remuneration. Where the agreement of the agent and the principal is made without any attention to remuneration, the right to commission may be inferred from the contract or from the conduct of the parties.

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[25] Montgomerie v U. K. Mutual S. S. Assn. Ltd (1891) 1 Q. B. 370 at 371 (Q.B.).

These Common Law set-up are not an exclusive prerogative of the Common Law Provinces in Canada. In the Civil Law province of the country, where an agent has acted with the authority of the principal and discloses the agency, the principal becomes bound by the act. In Chartwell Shipping Ltd v Q. N. S. Paper Co. Ltd[26] this established principle of law was reaffirmed that an agent is not liable on a disclosed agency. The case also dispels the uncertainty that seemed to hang on the issue of partially disclosed agency in the Quebec Civil Law by stating its applicability in Quebec.

This concept, however, depends on the disclosure of the principal for whom the agent acts. Without a disclosure of the principal for whom the agent acts, the agent is at a risk of personal liability on any transactions made thereby. On a discovery of the agency, the third party may proceed in remedy against either the agent or the "discovered" principal. This possible liability of the agent, however, is possible only where the agent fails to disclose the agency. Article 1715 of the Quebec Civil Code provides:

> "the mandatary acting in the name of the mandator and within the bounds of the mandate is not personally liable to third parties with whom he contracts ... "[27]

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[26] (1989) 62 D.L.R. (4th) page 36 (S.C.C)

[27] Article 1716 of the Quebec Civil Code makes the mandatary liable to third parties with whom he contracts in

This approach in the Civil Code is noteworthy with the introduction of the phrase "within the bounds of the mandate". As indicated earlier, mandate is the Civil Law inclination towards agency but, here, it represents the Common Law idea of "authority".

The agent is usually expected to have acted with the authority of the principal. The authority, where expressly vested, is referred to as actual authority. At Common Law, in general agency usage, this authority signifies the total commitment of the principal and usually, problems are infrequent with the use of this form of authority. Where the agent acts though divested of this actual authority, the law has introduced a concept of apparent or ostensible authority. This form of authority, introduced basically in the interest of third parties dealing with the agent, gives protection where the agent appears clothed with authority and acts under this guise.

The principal may be held bound by the agent's act done with the apparent or ostensible authority. Where there is a limitation on the actual authority of the agent, but such is not communicated to the third party, it creates an apparent

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his own name but without prejudice to the right of the third party against the mandator.

authority in the agent and is not binding on the third party.

This run-through of the general law of agency can hardly lay claim to exhaustiveness but suffices for the purpose of identifying the key factors in creating the agency relationship. There must be "consent" to create the relationship except for the anomalous situation where the law infers an agency from the arrangement. These, coupled with the concept of disclosed agency, form the pivoting factors in establishing the agency relationship. The right to control the agent's involvement and a payment of remuneration may also be used to clear any vagueness in the arrangement of parties. The insurance agent may thus be seen in this role and identified with these pivoting factors.

The Insurance Agent

The Insurance Act of Manitoba[28] defines the insurance agent as:

> "a person who for compensation solicits insurance on behalf of any insurer or transmits for a person other than himself, an application for or a policy of insurance to or from such insurer or offers or acts or assume to act in the negotiation of such insurance or in negotiating the continuance or renewal of other than life insurance contracts."[29]

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[28] R.S.M. (1987) c. 140. Hereafter referred to as the "Insurance Act of Manitoba".

[29] section 1.

The Insurance Acts in the other provinces in Canada all echo these main properties of the Manitoba framework.[30] The focus of the Acts, with the various regulatory mechanism, is on the person acting as an agent of the insurer.

The definition in its elaborate manner, has sought to distinguish the agent from other insurance intermediaries such as the adjusters, consultants and the brokers. The Act has categorized an agent as a person acting for an insurer and has clearly indicated that a broker is not an agent for the purposes of the Act. In stating that there is a fundamental difference between the agent and a broker, Lush J. viewed it in Norwich (Horsham) Fire Insurance Society Ltd v Brennans Property Ltd[31] as a difference between a person, firm or company which carries on an independent business of placing insurance upon the instructions of clients and whose basic relationship of agency is with the client, and the insurance agent whose function is to procure persons to insure with the principal, the insurer and whose basic relationship of agency is therefore with the insurer.

The difference between an agent and a broker is also

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[30] See, for example, R.S.O. 1980 c. 218 section 1; R.S.Q. 1988 c. A-32 section 1.

[31] (1981) V. L. R. 981 at 985 (Vict. S.C.).

evidenced in the Act which does not require brokers to be sponsored by insurers for purposes of registration.[32] The absence of any sponsorship by the insurer for the broker shows the relative independent status of the broker. For an agent, there must be a formal agency agreement with a licensed insurer on an application for a license.[33]

This is seen as a more acceptable criteria of distinction between the two than the mere statement of a person in the employment of the insurer or paid commission as remuneration. The broker, like the agent, is paid commission by the insurer based on a percentage of the premiums received. The possible dual roles performed by the broker for the insured and the insurer also lend credence to a distinction based on an absence of insurer's sponsorship.

Insurance agents have been variously classified. Classification of the agent may be into the general, limited, special, local or soliciting agent categories. There is also a class of insurance agents distinguished basically on the subsidiary position occupied. These are the insurance salesmen who are in the employment of insurance agents. These delegates

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[32] Section 381, Insurance Act of Manitoba.

[33] See infra, Chapter III.

may also be recognised by the Insurance Acts.[34] The various terminologies used to denote the relative degree of the agent's status in the insurer's hierarchy are apt to confuse, however, as the various labels used do not indicate in each particular circumstances what the agent is authorized to do. It is possible for an agent to be vested by the insurer with more or less authority than the label used indicates. Thus, hereafter, the sterile labelling of persons as special, limited, local, general or exclusive agents is abandoned in determining responsibility for an agent's error.

There should be a reliance on the situation to determine agency and for our purposes, here, the insurance agent will include any person, by whatever name called, who deals with the public on behalf of insurers. There may be an added statutory agency which can occurs where a statute specifically provides that any person who transacts certain types of insurance business are agents of the insurer.

Creating an insurer-agent relationship is not at much variance with the creation of an agency relationship in the law of agency and it is safe to state that an agency relationship in insurance law may be created in any of the ways in which an agency may be created generally. In

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[34] See, for example, Section 347(1) Insurance Act of Ontario, R.S.O. 1980 c. 218.

appointing insurance agents, insurers generally secure written agency agreements from the agent. Without this, however, a presumption of agency may be made with the possession by a person of all the relevant documents of the insurer.

The Insurance Setting

In stating "agency" to be the most abused word in law, the mirror image of the position in Insurance Law may be presented. Hasson, in stating that the English Law of Insurance is very oppressive to the insured, asserts that the reasoning of transferred agency in the language of contract makes nonsense of the law of agency.[35]

An agent, as shown, is a person authorized by another to deal with a third party on behalf of the other for certain purposes. A fair and reasonable view is that such other should be responsible for all the conducts of this agent introduced into this state of affairs. This is the general position in the Law of Agency. The agent acting in the name of the principal binds the principal with any act done in the course of the agency with an authority from the insurer.

This position, theoretically, is the base from which any

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[35] Hasson R. A., The Special Nature of Insurance Contracts: A Comparison of the American and English Law of Insurance" (1984) 47 M.L.R. 505 at page 514.

agency issue is to be dealt with in any aspect of law. In insurance law, this position has been recognised by the courts in viewing agency. However, in certain instances, this seemingly settled statement of agency law may be applied in an unclear manner that makes it necessary to review the position and attempt to justify this variance. The variance may arise out of a transfer of the incidence of agency between the parties to the contract of insurance.

In the normal insurance setting, the parties are the insurer and the insured. Any of these two parties may act through agents and since insurers are by and large corporate entities, it is not unusual for insurers to transact business through agents. The agent of the insurer thus become involved as the first point of contact with the insurer. The agent would have been authorized by the insurer to act in a particular way. Where the agent acts beyond the scope of this delegated power and commits some mistakes that fundamentally affect the contract made, which rules should govern the transaction?

This subject of errors of insurance agents has been deliberated upon by many courts in Canada. There have been unquestionable acceptances of the dominant view on agency. The principal is held responsible for the errors of the agent. In applying this rule, however, the agent has sometimes been

treated as standing between two principals. As the authors, Brown and Menezes put it, the question now is which of the insurer and the insured should bear the consequences of particular errors as the principal.[35] The approach has shifted from who bears the entire burden as the principal. This has been done in a way that may invite a conclusion of "blunder". There is not much concern on the implication of the relationship. In all such cases there is an undenied responsibility on the principal for the errors of the agent. The sphere to which a misapplication of agency principles may be ascribed is in identifying who the principal is for the purpose of liability.

The courts have treated the agency problems as being resolved with a segmented method of identifying the principal. In the application of the method, however, there is no consistency in reaching a conclusion. The salient feature in many of the cases is that there could be a division in the agent's activity and the principal for each activity identified. This approach of seeing the agent's involvement, not as a continuous relationship but as a chain of disjointed relationships is what has introduced transferred agency in insurance law.

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[35] Brown C. and Menezes J., Insurance Law in Canada (Toronto: The Carswell Co. Ltd., 1982) page 43.

The agent's involvement in the contract of insurance may be seen at different stages of the contract. It could be at the initial stage of contract between the insurer and the insured. It could arise when the contract is being negotiated and it may be subsequent to the completion of the contract. At the initial contract stage, the agent may have some contact with the insured and convince the insured of the need for insurance. The agent may furnish the insured with the proposal form, intimate the insured with the services of the insurer and identify himself with the insurer. Most often, at this stage, the distinctive presentation of the agent as a competent representative of the insurer would have been made.

The next stage is the negotiation stage. When assistance is required, either to establish the acceptable procedure or to identify the appropriate coverage, the prospective insured will most often turn to the agent. The need for specific guidance here is necessitated by the lack of opportunity to shop around among insurers and evaluate the differences in the available insurance contracts. This fact alone will undoubtedly prompt the public to rely on the agent.

The agent may need to assess the applicant's needs so as to advise on the coverage needed. It is here that an agent may create this relationship of potential liability. The agent may undertake to procure insurance for the applicant. The offer

for insurance is usually made by the insured through the medium of the proposal form. The proposal form, being the written means by which insurers elicit information from the insured regarding the proposed risk, necessarily has to be completed. The common involvement of the agent may also come into being here. The agent may complete the form for the applicant or advice on what goes into the form. When the form is completed, it is transmitted to the insurer through the agent.

Before the proposal is accepted and a policy is issued, the agent may issue a binder sometimes called "cover-note" which is a temporary coverage offered to the applicant. Such a coverage is not issued in life insurance. In acting, however, the agent may exceed the authority given in this respect. It is equally possible for the agent to give a coverage to the insured though the proposal form has not been accepted by the insurer. The policy is transmitted back to the insured on issue, usually through the agent. It is on this footing that notices of loss or any change in the risk is communicated to the insurer through the agent.

With the involvement of the agent at these different stages, problems will inevitably arise. The frequent instances of wedlock are on errors contained in the application form. However, any of these stages could be of potential litigation.

In insurance law, these problems at the different stages have been tackled differently. Some have been dealt with on normal agency principles. Others have been treated as transferred agency situations. For the purpose of the agent's involvement with the insured, the law may regard the incidence of agency transferred to the insured. This transfer is the concern of this paper.

The transferred agency view, if accepted, provides sufficient grounds for the consequential observations. The insured is now the principal and responsible for the agent's error. The insured has no claim against the insurer where a non-disclosure or misrepresentation that materially affect the contract is shown. Insurance contracts are contracts uberrimae fidei and the parties are expected to deal with each other in utmost good faith. A misrepresentation or non-disclosure evidences bad faith and entitles the other party to repudiate the relationship. Given the rationale for the good faith requirement, one readily sees the fairness structure of the rule in insurance law. It is contended that the fairness is of general application in the contract. This demands a consideration of the insured's position in the light of the transfer done here.

Hasson echoes the dangers of playing with abstracts without considering the social importance of what the

abstracts do. Hasson concludes that one must always consider the economic sphere of particular transactions.[37] Sight must not be lost of the whole idea of insurance which is the protection of the insured from an apprehended loss. This is the basic notion of insurance as a contract by which one person, for consideration, assumes the risk of an uncertain event.

The protection sought by the insured is the distribution of the risk of loss to reduce its strain. The risk distributing notion equally provides a rationale for exercising restraint in applying rules which may remove the protection. Transferred agency, in application, is tantamount to stripping the insured of the much needed coverage and should be made only on justified grounds. In transferred agency contexts, are there such defensible and justified grounds for stripping the insured of protection?

It seems the courts have overlooked the basic principles of agency which govern the transaction in identifying the principal of the agent. On the surface look, it seems that the courts have not subjected the concept of transferred agency, as developed, to the basic tests of "control" and "consent"

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[37] Hasson R. A., "The Special Nature of Insurance Contracts: A Comparison of the American and English Law of Insurance" (supra) at page 514.

in determining agency. This is an issue this paper addresses.

Specific Objectives of Study

The main goal of the study will be evaluating the contexts of transferred agency. In the evaluation, the study will identify the possible instances of transferred agency and how the specific instances affect other cases of transferred agency. The design of the paper will be observing how each instance of transferred agency has been handled by the courts and the appropriateness of these various treatments of transferred agency.

The study will attempt recommendations on areas where improvements are possible and find a way by which the average policyholder can be adequately protected in any insurance transaction involving agents. To achieve this end, the study will seek to find a regulatory method which involves the parties to the insurance contract and as a complement to the existing mechanisms of control in Manitoba.

Assumption Underling The Study

The structure of the paper and the attendant recommendations in it are based on the following assumptions:

1. That an average policyholder is the weaker of the parties

to the contract of insurance, which fact necessitates an increasing protection offered to guard the interest of such persons. In the present day insurance transaction, the insurer is usually a corporate body whose financial position can hardly be assailed by an average policyholder. On the other hand, in consumer insurance, the insured is an individual with little hope of security unless the Law intervenes to offer the protection.

2. That on the occurrence of the risk assumed by the insurer, the financial loss to the insured may be monumental and a failure of coverage may have dire consequences.

3. That insurance agents are professional agents with competence and expertise in the business of marketing insurance and that, usually, contracts of insurance are effected through the agents.

4. That the classification of insurance agents into categories is necessary for the purposes of identification only and does not determine the extent of the authority vested in an agent in acting for an insurer.

5. That insurers have agency agreements with their agents and have uncurtailed discretion on the choice of individuals to sponsor for licensing as insurance agents.

6. That the ability to control another in any expressed arrangement is an aspect of "human resources" which may

advantageously be employed by a party to the contract of insurance.

7. That the mutual exchanges of ideas between jurisdictions in the form of "legal transplant" is needed and necessary to conserve resources. This will reduce the cost of legislation by dispensing with the duplication of efforts on basic researches.

Expected Outcome Of The Study

Insurance is basically a risk distributing devise and finding an approach that fairly, smoothly and justifiably distributes the risk of losses will be the main object of the study. In this regard, the solution offered will be purposive. With the current position reflecting a need and desire to protect the interest of policyholders, the solution will have a significant consequence in unambiguously stating the end as a reasonable expectation of the insured.

The historical trend of placing reliance on the knowledge of the agent will be involved to put in place a secured protection for the insured. This will be the basis for the continuing vitality of the solution offered which will advocate prevention of any inverse relationship in the arrangement of parties.

In terms of the outcome, an adequate protection for the

insured will be found in a mould of the reasonable expectation of the insured with the already existing protection found in the Insurance Act of Manitoba. The addition of the knowledge acquired by the agent as another arm of this protection is expected to produce a comprehensive model to protect the interest of the insured.

Methodology of the Study

The study is based primarily on literature review and unstructured interviews with some insurance agents. It examines the basic principles of agency, determines how far these have been applied in the contexts of transferred agency and identifies the problems solved with the concept of transferred agency. The respective positions of the insured and the insurer are assessed in apportioning responsibility. It is also noted that the personal liability of the agent is increasingly becoming an aspect of the theories of liability in insurance law.

It is undeniable that an agent may be properly held responsible for the errors on his part. There is, however, a difficulty of finding a coinciding point between the denial of liability by the insurer and affixing such with the agent.

In as much as this possibility is sufficient to preclude the end for which the agent's personal liability is designed,

it suffices to state the need for another way by which the risks of losses through an agent might be reduced. This, the paper will attempt to do. The paper will attempt to evaluate the background factors involved in this aspect of insurance law, reduce it from a heap of conflicting views to a structured blend of workable rules to solve the conflict of interests.

The paper will encourage the two alternative ways through which dependence on the insurance agent could be tackled. The first is in finding content for the traditional transferred agency context and assessing its effectiveness as a risk distributing devise. The second is in anchoring a protection for the insured, by challenging the functional utility of the traditional approach, on a more effective flowing analysis.

Though the focus of this paper is primarily Canadian, the perspective is not. This arises from the connotation of uniformity of the problems in the jurisdictions to which references will be made.

Limitations of the Study

The suggestions made in this paper will be a product of an attempt to provide a comprehensive model suitable for use in any Common Law jurisdiction. This attempt to make the suggestions applicable within and outside the particular

societies mentioned is the first hinderance to the effective use of this study. It may be found too general in some specific areas.

The attempted comprehensiveness has equally been attempted without any quantitative analysis in support. This makes its application weak until tested out and found effective in the mentioned jurisdictions. Though a quantitative analysis is seen as having little bearing on its comprehensiveness, its application in the particular societies can not be guaranteed without a retrospective case study analysis.

The absence of the facilities, the resources and the time to carry out any empirical study on the subject may be stated as the major cause of the untested propositions in the paper. With a more fully equipped manpower and adequate resources, testing of the suggestions in the province of Manitoba is encouraged. The same is advised of any jurisdiction seeking its application.

In addition, the research effort in this paper has been limited to the available resources as instruments of protection. This is because of the difficulty of conceptualizing any alternative arrangement without a case study analysis.

The important role of the Superintendent of Insurance in

regulating the insurance industry is appreciated but less emphasis has been placed on this role. This deliberate underscoring has been done because of an equally effective regulation of insurance agents through insurers. The separateness of the office of the Superintendent makes it an onerous burden to be made the sole regulator of all aspects of the insurance industry.

Organization of the Thesis

The thesis is divided into five chapters and the chapters are arranged in the following order:

Chapter I: This is the introductory part of the thesis. It identifies the agency relationship generally and reviews the specific method of creating agency. This part is followed by an identification of the insurance agent. The chapter ends with the format of the thesis.

Chapter II: This chapter introduces the reader into the context of transferred agency by placing emphasis on the most problematic aspect of the concept. It reviews the form of transferred agency where an agent completes proposal form for the applicant, historically, and attempts to reconcile the various means by which transferred agency through filling proposal forms have been done in Canada. References are made

to the position in other jurisdictions to show the likeness of problems on the transfer of agency and the legislative activities in these jurisdictions.

Chapter III: This chapter focuses on the other aspects of transferred agency and identifies the treatments given to these separate aspects of transferred agency. The chapter identifies the four areas where transfer of agency can be operationalized and reviews these areas of potential litigation. The chapter makes an effort to deduce the key factors involved in these possible instances of transferred agency and relates these factors to the problem of agents completing proposal form.

Chapter IV: With little problems emerging in the areas identified in Chapter three, this chapter emphasis the common instance of transferred agency. This is done by reviewing again the context of agents filling proposal forms. It seeks to find expressions for the two alternative ways the agency issue has been dealt with in this instance. In this, an observation is made on how effective the two are as risk distributing devises. The chapter also proposes an approach for the courts in dealing with transferred agency and examines the appropriateness of the suggested approach.

Chapter V: The chapter comprises the recommendation and the conclusion. Recommendations are made along the line of the

reasonable expectation of the insured. Because of the developments on the issue in the Australian jurisdiction, the section advocates a legal transplant to Manitoba with an adaptation to embrace the existing protection in the Insurance Act of Manitoba. The recommended comprehensive protection lulls the conclusion which sums up the paper as having achieved the goal of finding an adequate protection for the average policyholder.

CHAPTER II

TRANSFERRED AGENCY : FILLING PROPOSAL FORMS

Introduction

The agency relationship, with the focus on its consensual character, is the relationship which exists between the insurer and the agent. The relationship may be created in any form but, most often, it will be a product of formal contractual assents of the insurer and the agent in the form of an agency agreement. The explicit creation of agency relationship between the insurer and the agent becomes difficult to reconcile with the pure legal concept of agency transfer in instances of agents completing proposal forms. This new creation seeks to redefine the position of the contractual and consensual relationship by replacing the insurer with the insured in the agency agreement.

The concept, a legal fiction made determinative of factual issues, involve the initial creation of the agency relationship between the insurer and the agent. However, during the continuance of the agency, for the purposes of completing the application form, the agency is transferred as between the insurer and the agent, to the interaction of the agent with a third party. This position in insurance contexts is occupied by the insured who may be oblivious of the

possible creation of any agency between him and the agent.

This transfer of the incidence of agency has traditionally been a judicial privilege made use of in certain cases to dispense a seemingly just solution to the problems arising in the course of the agent's execution of his duties. It has however, been taken advantage of by insurers ambitiously seeking an escape from any liability arising through the faults and errors of the insurer's appointees. Thus, now, transferred agency may arise by the agreement of the insurer and the insured on a change of the status quo or by virtue of a judicial pronouncement on their position.

The Problem :

The problem sought to be dealt with, where the agent completes the application form for the applicant, is whether the applicant should be held to have adopted the answers inserted in the application form by the insurer's agent. A frequent occurrence is that the insurer's agent completes the application form for the applicant but instead of inserting in the form the answers given by the insured, the agent might insert some other answers, which false answers give rise to the insurer's right of rescission.

Conflicts thus arise. The insured has signed the application form as the truth and the basis of the contract with the insurer. On the other hand, the answers which are alleged to be false are those inserted by the agent and might

not be the answers given by the insured. There is then a problem of who is to be regarded as having the agency relationship with the agent and thus take the fault for this error of the agent. The statement of the problem in this respect has been put as follows:

> "it is quite natural that when an applicant for insurance is informed that it is necessary that an application shall be filled out in accordance with the rules of the insurer, he should permit the representative of the company with whom he is negotiating insurance to prepare the application for his signature. The questions are numerous, and the answers to be written, from considerations of space alone, must necessarily be general; and it is not unreasonable for the insured to look to the agent, supposed to be skilled in such matters, to fill out the blanks in such a manner as will be satisfactory to the company, from the information that is given him by the insured. It sometimes happen- whether through inadvertence, mistaken judgement, or fraud- that the agent, although receiving correct information from the insured, writes incorrect statements in the application. This gives rise to a dispute as to whether the agent, in filling out the application to be signed by the insured, is acting for the insured or for the insurer."[1]

Sometimes, the agent's act of completing the proposal form is done with the express authorization of the insurer.

Where there are material misstatements in the proposal form filled by the agent, the misstatements may give rise to the right of the insurer to repudiate the contract.[2] However,

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[1] Vance W.R., "Handbook on the Law of Insurance" (Minnesota: West Publishing Co., 1951) page 461.

[2] The contract of insurance, being a contract uberri mae fidei, requires the parties to make a full disclosure to each other of all material circumstances affecting the proposed risk. At Common Law, any failure by the insured to make a full disclosure entitles the insurer to avoid the policy.

here, the misstatement arose out of the error of the agent. The agent is an agent of the insurer. Should the insurer have a right to avoid the contract for mistakes which properly may be attributed to the insurer?

I

Transferred Agency - A Judicial Creation

A. Agent for whom: The Early Common Law Stand

The Common Law position on this issue has not been fixed and the decisions hereof made irreconcilable by the different considerations by the court. The early view at Common Law regarded the agent as acting for the insurer throughout the transaction and some cases were decided on this basis. A case on this point is Brewster v National Life Insurance Society.[3] The action in the case had not been to enforce the policy but was for a return of the premiums paid under the policy. However, the decision is indicative of how the English courts approached the issue in the early days.

In the case, the policy was effected through an agent who made a mistake in filling up the proposal form. The true facts were revealed to the agent by the insured. Bowen L.J said:

"... the policy was not void; for the agent filled up the

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[3] (1892) 8 T.L.R. 648 (Eng. C.A.)

> proposals, and it would be most unjust to allow the company to take advantage of any mistake of his to get rid of the policy." [4]

The earliest case where, despite the misstatement, enforcement of the policy was sought is Bawden v London, Edinburgh and Glasgow Assurance Co.[5] There, the assured, a one-eyed illiterate, effected an insurance with the defendant company through an agent of the defendant against death or accidental injury. In a statement contained in the proposal form, the assured stated that he had no physical infirmity although he had lost the sight of an eye. The fact that the insured had lost one eye was known to the agent but this was not communicated to the defendant company. The agent completed the proposal for the insured. The answers to the questions in the proposal were dictated by the insured and they were written down by the agent. The insured signed the proposal.

During the term of the policy, the insured lost the use of the other eye and claimed against the defendant company for the total loss of vision. It was held that the facts known to the agent of the defendant company could be imputed to the company and thus the company could not repudiate liability on the ground of misrepresentation of facts. Lord Esher, M.R., said:

> "The first question was what was the authority of such an agent as this. The authority must be gathered from his

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[4] ibid. at page 649.

[5] (1892) 8 T.L.R. 566 (Eng. C.A.)

> employment. [The agent] was an agent of the company. He was not like a stranger who went to the company with a proposal for insurance and asked for a commission for obtaining it. He was an agent of the company before the proposal was made, an agent to negotiate and settle the terms of the proposal ... it was a proposal made by a one eyed man. The proposal must be construed in the light of those facts, and in this sense the knowledge of the agent was the knowledge of the company."[6]

With the knowledge of the agent imputed to the company, the proposal is taken to have been completed with a one- eyed man. Having accepted the premium from the insured, through the agent, with knowledge of the defect in the transaction, the insurer becomes estopped from denying the contract on grounds of such defects.

The decision in Bawden v London, Edinburgh and Glasgow Assurance Co.[7] displays the overlap between the act of the insurer's agent in filling the proposal form for the insured and the knowledge acquired by the agent in the course of his acting for the insurer. Lindley L.J. approached the problem thus:

> "... and it was admitted that he was their agent for the purpose of obtaining proposal. What does that mean? It implies that he sees the person who makes the proposal ... He obtains a proposal from a man who is obviously blind in one eye and Quin sees this. This man cannot read or write except that he can sign his name and Quin knows this. Are we to be told that Quin's knowledge is not the knowledge of the company? Are they to be allowed to throw over Quin?[8]

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[6] ibid. at page 566.

[7] (supra), footnote 5, Chapter 2.

[8] ibid. at page 540.

Merkin states that it seems fairly clear the Court of Appeal assumed that it was dealing with a case in which the agent's actual authority included obtaining all relevant information on behalf of the insurer. Merkin further submits that the decision is one decided on estoppel since there was no real evidence of the extent of the agent's authority to act for the insurer before the court and that the court was prepared to assume that actual authority existed for the policy reason of preventing the insurer from transferring the burden of its agent's breach of duty on the insured.[9]

This overlap in the two considerations, filling the proposal forms and knowledge of the agent, worked out admirably in favour of the insured and the insurer was not allowed to deny the agency of the agent who fill proposal forms for the insured. The decisions thus, ensured the proponent of the support of the law in dealing with the incidence of the agency relationship between the parties.[10] The estoppel raised against the insurer effectively took care of the problems that may arise from the errors of the agent in filling proposal forms.

The principle of estoppel as elucidated here was

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[9] Merkin R.M., "Transferred Agency in the Law of Insurance" (1984) Anglo- American L. Rev., Vol 13, No. 3 page 33 at 37.

[10] This approach was followed in the cases of Holdsworth v Lacanshire & Yorkshire Insurance Co. (1907) 23 T. L. R. 521 and Thornton- Smith v Motor Union Insurance Co.(1913) 30 T. L. R. 139.

used by the High Court of Australia in Western Australia Insurance Co. v Dayton.[11] There, the agent hurried the insured into signing a blank proposal form promising to fill up the blanks later. The insurer sought to avoid the policy on the ground of some true facts not communicated to the insurer or the agent. The court rejected the contention and in considering the implications of the relationship between the insurer and the agent concluded that an agent sent out to procure insurance proposal must have, in the absence of express or necessarily implied restriction, all the implied powers necessary to accomplish that purpose. Issacs J. said:

> "the agent had induced the insured into believing that it was useless and unnecessary to read the proposal form and hurried him to sign a blank form, not for the insured's purpose or as his agent, but for the purposes of the company in so far as the securing of business was concerned. The insurer knew that it was its agent's handwriting that was on the form and after receiving several premiums was estopped from avoiding the policy."[12]

His Lordship explained the application of the principle of estoppel:

> "Estoppel by representation is neither mysterious nor arbitrary nor technical. It is nothing else than justice of the Common Law intervening to prevent a lawful and righteous claim or defence being defeated by misrepresentation; and it has the effect notwithstanding the elaborate and artificial barriers construed for the purpose of excluding inquiry."[13]

Here, the knowledge that the agent and not the insured filled

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[11] (1924) 35 C. L. R. 353 (Aust. H.C.).

[12] ibid. at page 372.

[13] ibid. at page 372.

the proposal form could be imputed to the insurer and the implication of such will be significant in deciding if the insured concealed some information or made a material misstatement. Such knowledge coupled with the acceptance of premium from the insured raises the defence of estoppel against any right of avoidance sought by the insurer. The authority of the agent was considered in the cases. The conclusion drawn by the courts is that of an implied authority in the agent to do all that is necessary to accomplish the purpose of obtaining completed application forms.

It should be noted here that the estoppel identified here is not to create the agency but rather, it is to identify who should bear the risk of loss. This accords with the contentions of Powell and Stoljar that no such thing as agency by estoppel exists and estoppel affects only the relations of the principal with third parties.

B. Subsequent Common Law Development

The cases decided after this apparently paid little attention to the overlap between the two considerations which shaped the decisions in the earlier mentioned cases. The trace of dissent first reared its head in Levy v Scottish Employers Insurance Co[14]. There, the insurer's agent obtained from the plaintiff an application for insurance against accident. The incorrect figures in the application were inserted by the

[14] (1901) 17 T.L.R. 229.

agent who approached the plaintiff to make the contract. The proposal form contained a "basis of the contract" clause[15] and another stipulation that "no verbal statements made to the agent ... shall be binding on the company." The agent assured the plaintiff that if nothing is heard from the insurer within fourteen days, the insureds should treat the insurance as being in force.

The proposal was rejected by the insurer on receipt but this was not communicated to the plaintiff until after the occurrence of the accident which was the subject of the claim. The court distinguished the case of Bawden v London, Edinburgh and Glasgow Insu. Co[16] as one turning on the special terms of the contract and decided, inter alia, that the agent had no authority to make a verbal contract which was in different terms from those of the written documents forming the basis of the negotiation. It was held that the misstatement in the application avoided any liability. The knowledge of the agent on the truth was not viewed as material in view of the clause in the proposal.

Biggar v Rock Life Assu. Co.[17] came to be decided after this. In this case, the proposal form was completed by an insurance agent and many of the answers inserted by the agent

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[15] See infra, page 121, on the basis of the contract clause.

[16] (supra), footnote 5, Chapter 2.

[17] (1902) 1 K.B. 516 (K.B.).

were false in material respects. The applicant had no knowledge of the insertion of false answers in the form and did not authorize them. The applicant signed the proposal form without reading it. Wright J. held that the insured was bound by the false answers incorporated into the proposal by the insurance agent on the twin grounds that the insured accepted all the statements contained in the proposal form by signing it and that the agent having no authority to complete the proposal form could only have done so as the agent of the insured.

Wright J. said further:

> "it is plain that the policy is prima facie avoided, for some of the particulars and statements in the answers, the correctness of which was a condition precedent to the validity of the policy, were false."[18]

This approach by the court rests solely on the contract of insurance as made in the policy and its incorporated proposal form. In this case, there was an express limitation on the authority of the agent to receive any information not reduced into writing in the proposal. This clause was not referred to by the court in coming to its conclusion but instead the court placed reliance on the decision of the United States Supreme Court in New York Life Insurance Co. v Fletcher.[19]

Merkin states that the fundamental defect in the reasoning adopted in Biggar v Rock Life Assurance Co is its

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[18] ibid. at page 524.

[19] (1885) 117 U.S. 519 (U.S. Circuit Crt, Missouri).

concentration on authority to complete the proposal form rather than authority to receive information. The estoppel, discussed earlier, relates to the authority of the agent to receive information for the insurer and this is the footing of the decisions that the insurer can not deny knowledge of the facts known to the agent. Merkin states further that the insurer is to be taken as indicating to the insured that the agent may advise on what goes into the application by the agent having possession of and giving blank forms to the insured.[20]

Merkin's barrage of criticism of the decision in Biggar v Rock Life Assurance Co. did not end there. Merkin concedes that Wright J. was perfectly correct to look at the actual authority of the agent to complete the proposal as a preliminary matter since finding such authority will strongly imply the authority of the agent to receive information. Merkin then says that Wright J's error "was stopping at that point and not considering the further question of authority to receive information arising out of estoppel".[21] As stated earlier, the clause limiting the agent's authority was not considered since it was rendered insignificant by the line of reasoning adopted by Wright J. The clause might have been significant had the kind of argument Merkin raised been addressed but the lack of such a review makes it impossible

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[20] Merkin R. M., loc. cit.

[21] Merkin R. M., op. cit., page 38.

to know what conclusion Wright J. might have come to if the clause had been considered. Thus began a restructuring of the law in a deep sea of uncertainty.

With the decision in Biggar v Rock Life Assurance Co., the concept of transferred agency became introduced into the law where an agent completes proposal form. The court did not mince words in stating this as an emerging point of law. It was said:

> "it seems to me, if the [agent] is allowed by the proposer to invent the answers and to send them in as the answers of the proposer, that the agent is the agent, not of the insurance company, but of the proposer."[22]

The notion became accepted that it is possible for agents of insurers to act for and be treated as agents of insureds in filling out applications for insurance. The implication of the rule thus summarizes as follows:

> "it is irrelevant to inquire how the inaccuracy arose; or whether the agent acted honestly or dishonestly; or whether the agent had forgotten or misunderstood the correct information he had given; or whether the answers were a mere invention on the part of the agent; if the result is that an inaccurate information is given on material matters, or that a contractual stipulation as to accuracy or adequacy of any information given is broken, it is the proposer who has to suffer".[23]

The use of the concept of transferred agency was made in Newsholme Brothers v Road Transport and General Insurance Co. Ltd[24] where the English Court of Appeal not only blessed the

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[22] ibid. at page 524.

[23] Halsbury's Law of England, 3rd Edition, Volume 22 at page 204.

[24] (1929) 2 K.B. 356 (Eng. C.A.).

reasoning in Biggar v Rock Life Assurance Co. but also espoused other grounds for denying the insured any defence in a problem of this nature. There, the applicant firm made a proposal for insurance and the proposal form was signed by a partner in the firm. The answers to questions in the proposal were written down by the insurer's agent who was given the true answers by the partner who signed the proposal. The reason why the agent failed to put down the true answers given by the partner was not indicated but, clearly, the error was that of the agent in writing down in the proposal form wrong answers to the questions asked.

The arbitrator to whom the matter was referred awarded that, notwithstanding the misstatement, the insurer acquired, through the knowledge of the agent, full knowledge of the true facts and having accepted premiums from the insured with such knowledge, was liable under the policy. The arbitrator found in the award that the insurer did not authorize the agent to fill proposal forms and could not find that the insurer was aware of such act by the agent. The arbitrator then decided the issue on the knowledge of the agent acquired when told of the true facts. This approach adopted by the arbitrator is the language of estoppel, the type advocated in the earlier cases, and would been a sound threshold upon which a decision could be reached. The Court of Appeal decided, however, to channel another course therein and develop a new approach to the determination of this legal problem.

The court held that the knowledge of the agent cannot be imputed to the insurer and that the insurer could avoid liability. One of the basis of the decision of the court is the apparent notion of transferred agency. Scrutton L.J. said:

> "whichever alternative is the truth, [the agent] was writing the answers as the amanuensis of [the insured], whose answers they were to be; and after [the agent] had written the answers, [the insured] signed the proposal, and must be taken to have promised the truth of what he signed. I do not understand how in receiving the information as to the answers and in writing those answers [the agent] can be taken to be anything else than the agent of the person whose answers they are to be, and he must be taken to have written them and promised they were true."[25]

Scrutton L.J. stated further that the agent of an insurance company cannot be treated as their agent to invent the answers to the questions in the proposal form. This denied any defence to the insured for any deliberate error of the agent even where the insurer authorized the agent to complete the application form. Newsholme thus became authority for the view that any error or omission of the agent made in the course of completing application forms for the applicant for insurance is the responsibility of the insured whether such act was authorized by the insurer or not and regardless of any fraudulent intent on the agent's part. This decision in Newsholme has far reaching effects in as much as it excludes any consideration of the authority of the agent to act as done. As Merkin points out, this is an area where the decision

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[25] ibid. at page 372.

in Newsholme differs from the reasoning of Wright J. in Biggar. The decision in Biggar could have been authority for the view that where there is an express authority for the agent to fill the proposal form on behalf of the insured, the insured could contend that any fault is that of the insurer's agent. This possibility was explicitly denied by Scrutton L. J. in Newsholme by stating that even if such authority exists, the agent cannot be treated as the agent of the insurer to invent answers to the questions.

This rule elucidated from the Newsholme decision has not been spared by Merkin in an evaluation of the decision. Merkin points out that such a rule is "repugnant to common sense" and "legally unsupportable."[26] The conclusion reached by Merkin appears justified. It is inconceivable that the second arm of the Newsholme rule could be made a determinant of a legal issue. It will be opening the door for possible fraud in the law to regard the agency as that of the insured where the agent errs deliberately in the execution of the duties authorized by the insurer. It will also tend to undermine the trust and confidence the insuring public have in insurers and their agents. The proposition fails to draw a distinction between cases where the insured participated in the fraud of the agent[27] and cases where the fault is solely

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[26] Merkin R. M., op. cit., page 40.

[27] An instance of this is Dunn v Ocean Accident & Guarantee Corp. Ltd. (1933) 50 T. L. R. 32 (Eng C.A.)

that of the agent in inserting untrue answers.[28]

As Merkin points out, both Wright J. and Scrutton L.J. relied heavily upon the decision of the United States Supreme Court in the case of New York Life Insurance Co v. Fletcher[29] in reaching their conclusions because the case concerned the effect of a clause denying the agent's authority to receive information for the insurer. In Fletcher's case, it was stated that the law imposed a duty on the insured not only to answer all questions correctly but also to see that the questions were correctly written. The court saw that a fraud could not be perpetrated by the agent alone; the aid of the proposer either as an instrument or as an accomplice is said to be essential. The court concluded that the insured has the power to prevent such falsehood while the insurer has not. It is because of this that a duty to prevent such falsehood was imposed by the court on the insured and implied was a right of the insurer to presume that the insured has performed the duty. The court then laid down the principle applicable in the event of a fraud by an agent on the principal on the ground that :

> "to hold the principal responsible for [the agent's] acts, and assist in the consummation of fraud would be monstrous injustice."[30]

The case is considered as dealing more with the fraud of an

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[28] Such examples of which are found in Newsholme v Road Transport and General Insurance Co. (supra) and Bawden v London, Edinburg and Glasgow Insu. Co. (supra).

[29] (supra), footnote 55.

[30] ibid. at page 533.

agent and in Newsholme, there is no suggestion of fraud against the agent or the applicants. It is not within the power of the applicants to prevent any fraud here since no fraud has been conceived. Even, if the only basic point of interest is the denial of the agent's authority to receive information the lack of bearing between it and the justice of Newsholme is obvious. In Newsholme, the only clause signed by the insured is that of the application form forming the basis of the contract. There was no denial of the authority of the agent to receive information. The "basis of the contract clause" was used in the case to delimit the authority of the agent to receive information for the insurer.

In Biggar,[31] Wright J. too placed reliance on Fletcher and while recognising that there could be an implied authority in the agent to complete the proposal form, made further divisions in cases where there is such implied authority. Wright J. said:

> "the agent may have been an agent ... to put the answers in the form; but I can not imagine that the agent of the insurance company can be treated as their agent to invent the answers to the questions in the proposal form."[32]

With this, a division is made between cases where the agent invents answers to the questions and cases where the agent does not invent answers to the questions. In the former, the agency is to be transferred to the insured by reason of the invention of the agent. The dictum by Wright J. may be taken

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[31] (supra), footnote 17, chapter 2.

[32] ibid. at page 524.

as suggesting that in the latter, the agency remains with the insurer.

Biggar's case may be read in several ways. It may be taken as suggesting liability on the insurer where there is an express authority in the agent to complete proposal forms. It could also be taken as following the reasoning in Bawden that there could be an implied authority in the agent to complete the proposal form. The only qualification of the previous Common Law position made by Biggar is that where the agent invents some answers to the questions in the proposal form, the insured is to bear the brunt of such inventions. The basis of that conclusion seems to be that the proposer has allowed the agent to invent such answers and send them in as those of the proposer. This too might be taken as indicating that there will be no transfer of agency where the proposer can be shown to be in no position to prevent the falsehood. In such cases, the proposer can not be said to have allowed what could not be prevented. All these postulates are denied in Newsholme.

The other obvious flaw in the "Newsholme proposition" is the failure to recognise that the agent can not be the agent to two principals with conflicting interests for the same purpose and at the same time. While the scope of the agent's authority covers filling the proposal, the agency with the insurer is retained and it might be preposterous to ascribe any agency to the relationship with the insured in this respect.

Thus Newsholme should not to be taken as standing for the proposition that even where actual or apparent authority to act for the insured by filling application forms exists, the agent is to be treated as an agent of the insured and not an agent of the insurer. Such a proposition cannot be supported by any logical form of reasoning and is undoubtedly giving an undue advantage to insurers. The second arm of the proposition, where there is no actual or apparent authority in the agent to complete the proposal form for the insured, is in line with the reasoning adopted by Wright J. in Biggar v Rock Life Assu. Co.[33] and this has been adopted by some courts in reconciling the conflict of the insured's and the insurer's interest in this respect.

It should be noted here that other grounds, apart from "authority", exist for the decision in Newsholme Brothers v Road Transport and General Insurance Co.[34] One of these is put by Scrutton L.J. as follows:

> "I have great difficulty in understanding how a man who was signed, without reaching it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true, and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."[35]

This statement obviously will be of use where there is a "basis of the contract clause" in the proposal form signed by

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[33] (supra), footnote 17, chapter 2.

[34] (supra), footnote 24, chapter 2.

[35] ibid. at page 376.

the insured. Insurance contracts are noted for this and proposals for insurance usually contain this clause in the form of a declaration which the insured is required to make.[36]

The basis for denying the insured relief under these circumstances is the supposed negligence in signing a document containing erroneous information without reading it. This "inexcusable negligence" was also identified in Fletcher's case as signing the application without reading it. This shows that it may be inapplicable where the insured is induced to sign a blank proposal form which the agent subsequently fills up with erroneous facts, or where after the insured has filled the form, the agent inserted other facts. It indicates further that a duty is being imposed on the insured to read what is signed or to put it simply, for the insured to check on the agent to see to the correct execution of what the agent undertook to do.

The court in Fletcher's case saw it as a duty within the power of the applicant by reasonable diligence to defeat any fraudulent intent of the agent. This might be taken as imposing a duty on the applicant to guard against a fraudulent intent on the part of the agent in all cases and to check effectively against this fraud.

Any proposition based upon an allegation of negligence

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[36] There was such a clause in Bawden v London, Edinburgh and Glasgow Assurance Co.(supra) and the policy in Brewster v National Life Assurance Society (supra) too was made upon the footing of the proposals. The proposal in Biggar v RockLife Assurance Co.(supra) also contained a declaration in which the applicant agreed that the statements in the proposal should form the basis of the policy.

on the part of the applicant is arguably unrealistic. It assumes that the insured has requested the agent to complete the proposal on his behalf, "which is normally the reverse of the truth." Merkin indicates that the insured may not be given a real chance to read the proposal after filling it if merely told by the agent "to sign on the dotted line."[37] Merkin says that even if the proposal is read, errors may be missed[38] or regarded as trivial or within the agent's discretion.[39]

The unfair operation of this "negligence" approach in cases of illiterate applicants and insurance arranged over the telephone are also to be noted since there is no indication in Newsholme that the rules differ in those two circumstances. In such cases, as Merkin states, negligence cannot be a factor.[40] Heighington too states that by reason of the assured in Bawden being an illiterate, the principle enunciated in Newsholme is inapplicable to the facts of Bawden[41]. The decision reached in Newsholme and the basis for such decision do not show that any distinction should be made in cases of illiteracy; and in so far as the rule fails to recognize any of such disparity, it fell short of adequately providing

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[37] This is exactly what happened in Stone v Reliance Mutual Insurance Ass. (1972) 1 Lloyds Rep 469. (Eng. C.A.)

[38] As in Smith v Cooperative Fire and Casualty Co (1977) 1 W. W. R. 638. (Alta. D. C.)

[39] Merkin R.M., op. cit., page 38.

[40] Merkin R. M., loc. cit.

[41] Heighington A. C., "Insurance Law- Vexed Question of Knowledge of Agents settled" (1939) 8 C. B. R. 308.

justice in general terms.

The other shortcoming with the "negligence approach" is the wide latitude it gives to insurers to take advantage of their agent's errors and omissions. The agent has made a mistake in the execution of his duties and such errors should not be shifted over as the responsibility of the insured merely by reason of this alleged negligence in not reading the document before appending a mark to it. A better approach to the issue is that stated by Lord Halsbury L.C. in Bloomenthal v. Ford[42] that:

> "It is hopeless to contend that after a representation made by the company for the purpose of inducing a man to act upon it by parting with his money, it is competent for them to turn around and say "You should have inquired. You should have observed certain circumstances..."

The insured deals with the agent in the belief, as the agents are presented, that the agent is a representative of the insurers competent in the affairs and matters of the insurer. There is a lack of comprehensiveness in the presentation of the agent as a professional representative of the insurer and this obnoxious duty of checking on the agent as fashioned out in Newsholme.

A consideration of this presentation of the agent as a professional will make it possible to refute a denial by insurers of liability for the agent's error. This is especially so in the light of the observation made by Scrutton L.J. that:

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42 (1897) A.C. 156 at 161 (H.L.); cited in Western Australian Insurance Co. Ltd. v Dayton (supra) footnote 11.

> "It is inevitable in such a course of business that the agent employed to get proposals will sometimes fill in or assist in filling in the answers on the form ...."

The participation of the agent in contract making is inevitably forced on the insured and this approach seeks further to make the insured responsible for any errors and omissions arising from the "helping hand" imposed on the insured. Merkin argues that any signature of the insured is overridden by an implied undertaking of the agent's competence given by the insurer.[43] How far this had been adopted remains yet to be seen but the strict application of the "negligence proposition" continued in the subsequent years.

Another ground for the decision in Newsholme is revealed in the judgement of Greer L.J., namely, the insurance contract with the proposal incorporated into it cannot have any of its written terms varied by an oral agreement or communications to the agent by the insured. Greer L.J. stated that:

> "it does not seem to matter whether the verbal statements which are relied upon are made to a person in the position of [the agent], or are made to the director of the company. In either case they could not affect the contract which is wholly contained in the policy of insurance with its incorporated proposal form."[44]

This approach is an evidentiary one which simply disregards the incidence of the agency between the insured, the insurers and the agent. It does not have any bearing on the authority of the agent either to fill the proposal form or to receive information on behalf of the insurer. Anything not incorpor-

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[43] Merkin R. M., loc. cit.

[44] ibid. at page 380.

ated in the proposal form is not momentous.

This would have sounded a quintessence of a solution to the conflicting interests sought to be protected. However, the defect of the reasoning grew out of an attempt to justify the decision in Bawden under the rule as an exception to it. Greer L.J. stated:

> "the court is entitled to take into account the surrounding circumstances, and the surrounding circumstances may be such as to enable the court to put a special meaning on the words used in the contract."[45]

Merkin says the argument amounts to an assertion that the policy is to be the entire contract when the court thinks fit, effectively an absolute discretion clothed in legal principle and concludes that it is clearly a nonsense to decide any issue in this way.[46] This sounds a potent argument against a qualification of the rule. However, an unqualified statement of this evidentiary rule renders incomprehensible the decisions in some earlier cases where disclosure to agents were held to be disclosure to the companies though the answers in the proposal forms were incorrectly stated.[47]

Unlike Biggar, the issue of the knowledge of the agent acquired while filling the proposal form for the insured was considered in Newsholme case. The judgment of Scrutton L.J.

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[45] ibid. at page 381.

[46] Merkin R.M., "Transferred Agency in the Law of Insurance" (supra) at page 39.

[47] Such were the decisions in Golding v Royal London Auxiliary Insu Co. (1914) 30 T.L.R. 350 (K.B.); and Ayrey v British Legal and Provident Assurance Co. (1918) 1 K.B. 136 (K.B.).

is also instructive on this. His Lordship said:

> "in my view, the important question for the decision in this case is whether the knowledge of the agent, acquired in filling up the proposal for the assured, is to be taken as the knowledge of the company;"[48]

but the approach to the issue is remarkably different from the line of reasoning in Bawden. Scrutton L.J. said further :

> "If the person having authority to bind the company by making a contract in fact knows of the untruth of the statements and yet takes the premium, the question may be different. Even then I see great difficulty in avoiding the effect of the writing signed by the proposers that the truth of the statement is the basis of the contract. But where the person contracting for the company has no actual knowledge, but only constructive notice, the difficulties of the proposer are greater. In commercial matters, the doctrine of constructive notice is not favoured ... where knowledge is to be imputed to an artificial person, in the first place it must be the knowledge of the directors who deal with the company's rights, and in the second place, the knowledge of a person who acquires it in a breach of duty, and is guilty of a breach of duty in respect to it, is not to be imputed by a company to whom, from the hypothesis, he would be unlikely to disclose it in fact."[49]

It was further stated that:

> "the decision in Bawden's case is not applicable to a case where the agent himself, at the request of the proposer, fills up the answers in purported conformity with information supplied by the proposer. If the answers are untrue and he knows it, he is committing a fraud which presents his knowledge being the knowledge of the insurance company. If the answers are untrue and he does not know it, I do not understand how he has any knowledge which can be imputed to the insurance company."

Using this as a basis, the court thus disregarded the contention of imputation of the agent's knowledge to the insurer.

The presented conflict of interests continued with an

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[48] ibid. at page 373.

[49] ibid. at pages 373 and 374.

increasing reliance on the reasoning in Newsholme.[50] In reviewing Newsholme, Heighington says that it disposes "of a difficulty which has been standing in the way of insurance companies by reason of the decision in the Bawden case and the widespread inclination of the courts to agree with the contention that the knowledge of the agent is the knowledge of the company." Heighington regards it as "clearly defining the principles applicable to a question which has caused a great deal of difficulty."[51] This shows an acceptance of the principles in Newsholme but how clearly the principles are defined still remains to be seen, especially in the light of the decisions which followed the reasoning.

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[50] In Dunn v. Ocean Accident & Guarantee Corpn. Ltd. (1933) 50 T.L.R. 32 (K.B.), it was held that where material facts are not disclosed in a proposal for insurance, the knowledge of those facts by the insurance company's agent does not render the company liable on the policy. There, the insured had been secretly married to the insurer's agent though the fact of this was not disclosed in the proposal and there were some other material misstatements and misrepresentations. The court relied on Newsholme and then stated that the agent, acting in defiance of duty to the insurer cannot authorize the insured to forgo her duty of disclosure. The court was prepared to make this a general statement and this may easily be discerned from the statement that:

> "it is not a question of insurance law alone, but of the law in every case where the agent acted not only not in accordance with his duty to his principal, but in defiance of it"

The question of what would have been the position if the agent was actually authorized to so act as he did was left unconsidered. The decision reached could have been justified on ground of a collusion between the insured and the agent, which fact was obvious. The court did not consider this collusion in the particular case and held on the authority of Newsholme that the agent is to be considered the agent of the insured.

[51] Heighington A. C., "Insurance law- Vexed Question of Knowledge of Agents settled" (1939) 8 C. B. R. 308.

In O'Connor v B.D.B. Kirby & Co.[52], the same English Court of Appeal restated the duty on the proposer for insurance to ensure that the information given in the proposal form is correct. However, Davies J., in accepting the principle form Newsholme stated that :

> "it would be different if the assured was unable to read or was in some degree illiterate."[53]

This is outside the scope of the rule propounded in Newsholme. By adopting the reasoning in Newsholme subject to such qualification, the court has indicated that Newsholme has not laid down a definite applicable rule in all proposal form cases.

Stone v. Reliance Mutual Ins. Ass.[54], another English case which went before the English Court of Appeal in 1972, shows that the principles entrenched in the English law by Newsholme has done little in establishing definite applicable rules to resolve the conflict of interests between insureds and insurers. There, the insured's wife received an unsolicited visit from an inspector, employed by the insurer, whose function was to achieve reinstatement of lapsed insurance policies. The proposal here was completed by the inspector without asking the wife any questions. The inspector then asked the wife to sign which was done after being shown where to sign. The insured's wife did not read them and the wife

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[52] (1971) 2 W.L.R. 1233 (Eng. C.A.)

[53] ibid. at page 1239.

[54] (1972) 1 Lloyds Rep. 469. (Eng. C.A.)

was not warned of any duty to disclose. The inspector here gave evidence that it is the insurer's policy that the questions be put to applicants and the answers written down by the agent. There were some non-disclosure and the insurer sought to avoid the policy on this ground but the Court of Appeal unanimously rejected the plea.

The case was treated as one turning on its own special facts since the inspector, unlike the agent in Newsholme, had actual authority to complete the proposal. In treating the case as being excepted from the established principles in Newsholme, the court regarded neither party guilty of any fraud and noted the mistaken insertion of wrong answers in the proposal. Lord Denning said further:

> "whose mistake? Clearly Mr. O'Shea's mistake; because he did not ask [the insured] the questions; and he inserted the answers out of his own head without checking up from her ... whether they were true or not. No doubt it was [the insured] mistake too. She ought to have read through the questions and answers before she signed the form; but she did not do so. Her mistake was, however, excusable, because she was of little education, and assumed that the agent would know all about the previous policies and that there had been claims made under them..."[55]

Obviously, Lord Denning implies here that there is a duty on the insured to read the proposal before signing it and also that, depending on the circumstances, this duty might be excused. The reasoning is quite in line with the decision in O'Connor that the rule in Newsholme will not apply where the insured is of little education. Lord Denning gave further another reason for excusing the non-performance of this duty:

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[55] ibid. at page 474.

> "the agent by his conduct impliedly represented that he had filled in the form correctly and that he needed no further information from her. Relying on this implied representation, she signed the form which he put before her."

The decision seems to lend credence to the earlier quoted conclusion of Merkin that any signature of the insured is overridden by an implied undertaking of the agent's competence given by the insurer. Lord Denning said:

> "the society seek to repudiate liability by reason of the untruth of two answers in the proposal form. They seek to fasten these untruths onto the insured. They do so by virtue of a printed clause in the proposal form. They make out that it was the insured who misled them whereas the boot is on the other leg. The untrue answers were written down by their own agent. It was their own agent who made the mistake. It was he who ought to have known better. It was he also who put the printed form before the wife for signature. It was he who thereby represented to her that the form was correctly filled in and that she could safely sign it. She signed it trusting to him ..."[56]

Lord Denning then went on to say that the misrepresentation here is an innocent misrepresentation of the insurer which in the case disentitled the insurance company from relying on the printed clause in the proposal to exclude their liability. Lord Denning viewed the misrepresentation of the insured, which arises by signing the form containing false information, overridden by a misrepresentation of the insurer's agent that the form had been correctly filled. He said:

> "Their agent represented that he had filled in the form correctly: and having done so, they cannot rely on the printed clause to say that it was not correctly filled in."

Despite the decision in the case, that the insurer is liable

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[56] ibid. at page 475.

on the policy, the basis of the decision may be seen as still along the same line as Biggar and Newsholme which clearly is that of a transferred agency. By regarding the false information in the form as misrepresentations of the insured, the incidence of the agency has been transferred at that point to the relationship between the insured and the agent. Though a well articulated route was found to prevent the insurer from escaping liability on the policy, the misrepresentation of the agent that the form is correctly filled, the transferred agency reasoning cannot be denied in the dictum of Lord Denning.

Apart from tacitly recognising transferred agency in the agent's act of completing proposal forms, the case also serves to illustrate the conflict in Common Law in dealing with the issue. In Newsholme the view was expressed that even where there is actual authority on the part of the agent to complete the proposal form, it would not affect the defence of the insurers. The defence of the insurer was made an absolute one. However, the judgments of Megaw L.J. and Stamp L.J. in the Stone case tend to give a contrary view.[57] By treating the Stone case on its own special facts in that the inspector had actual authority to complete the proposal, they were indicating a different conclusion where the agent has an actual authority from the insurers to complete the proposal form for the insured. The judgment of Denning L.J. too was based on

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[57] ibid., pages 475 to 477.

the actual authority of the agent.[58] These represent a contradiction to the view in Newsholme that the actual authority of the agent can not affect the defence of the insurer.

Merkin has indicated the in-road made by the decision in Stone to the reasoning in Newsholme. It was opined:

> "Scrutton L.J.'s wide formulation of transferred agency rule, resulting in its application even where the agent has express authority to complete the proposal, can not stand with Lord Denning's approval of Bawden as turning on actual authority."[59]

While it cannot be said that many agents would have this kind of actual authority, where such exist, a clear case of a muddle-up in the English cases on the position is presented. The agency has been transferred to the insured but that is where the uniformity in the reasoning of the courts ends. Thereafter, it is a serious distortion of the principles in order to accommodate a particular conclusion. The lack of an encompassing guide to approaching this issue makes it open to serious doubts whether the concept of transferred agency is indeed sound, necessary or designed to serve a social need.

The narrowness of focus in considering the monumental weight of the burden placed on the innocent applicant dealing with the agent also compounds the doubts. The narrowness of consideration here is evidenced by a total disregard of how the insured is to determine the extent of the express authority of the agent. How is the insured expected to know whether

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[58] ibid., page 474.

[59] Merkin R. A., "Transferred Agency in the Law of Insurance" (supra) at page 41.

the agent has actual authority to complete the proposal form? Whereas, where the actual authority does exist, what social need would the transferred agency serve in the context?

In trying to formulate a rule from Newsholme, not much is left when it is viewed along with other cases. Biggar and Stone have indicated that the decision may turn in favour of the insured on the actual authority held by the agent. O'Connor has indicated a different rule applies where the insured can not read or is in some degree not literate. The rule thus left is that where the agent has no express authority to fill the proposal, and the insured is literate, there is to be a transfer of agency. It may be assumed that this is what to balance against Bawden and Brewster in determining which approach the court should adopt in such cases.

However, a consideration of the rule left in Newsholme after Stone raises further doubts. The basis of holding the insured responsible is the clause that is signed to the effect that the proposal is correct and is to be the basis of the contract. It is in respect of this rule that Stone has introduced an "innocent misrepresentation" qualification. There is no limitation on the use of this innocent misrepresentation rule to cases of illiteracy. The insured need not be an illiterate to be availed protection with Stone. The rule in Stone might be taken to mean that where the alleged misrepresentation made by any applicant in signing the basis of the contract clause is an innocent one, such as where the applicant does not give the wrong information or the agent has

represented that the form was properly completed, then Newsholme will not apply.

C. A Bait for Foreign Courts

i. The Canadian Position

This temptation of reasoning introduced into the Common Law principles of England engulfed the Canadian courts right from the early years. The courts started placing emphasis on the actual authority of the agent and not on the knowledge of the agent. In Bastedo v British Empire Insu Co.[60] , the agent filled the proposal form for the insured and the insured signed the form. The insurer denied liability because there was a false information in the form concerning the value of the insured horse. The insured had told the agent how much was paid for the horse but the agent decided to put "got in trade". The insured knew that the agent had not inserted the actual amount but did not insist that the agent fill the form in any particular way. The trial judge found as a fact that there was no important fact withheld by the insured. The insured's only fault was in not insisting that the agent be more accurate in filling the proposal form.

The Court of Appeal treated the answer "got in trade" as that of the insured by reason of an implied consent and held that the insured could not recover. Irving J.A. said:

"The answers are the answers of the applicant and I do

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60 (1913) 4 W. W. R. 905 (Alta C.A.).

> not think the company is to be held to have a knowledge of the truth when the applicant and the local agent arrange together that the truth shall be suppressed in order that the insurance may be effected."[61]

Martin J.A. too stated that:

> "the statement ... is untrue and was concocted by the company's agent to the knowledge of the plaintiff, who thereby became a party to the deception, the result of which would be to stifle inquiry on a material point."[62]

The case of Biggar v Rock Life Assurance Co.[63] was applied to conclude that, in such cases, the insurer is not responsible for the inventions of its agent. It is difficult to agree with the appellate court on the collusive intent of the insured in view of the finding of the trial judge. The stand adopted by the trial judge, on the knowledge acquired by the agent, seems more defensible having regard to the possible exercise of discretion by the agent in filling the proposal form and the lack of control over the agent on what goes into the form.

The knowledge that the agent acquired, that of the actual value of the horse, should have been held to be notice to the insurer.[64] Furthermore, the discretion exercised by the agent in rephrasing the answer of the insured and not com-

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[61] ibid. at page 906 - 907.

[62] ibid. at page 907.

[63] (supra), footnote 17, chapter 2.

[64] A relevant case was Wing v Harvey (1854) 5 De G.M. & G 265; 43 E.R. 872. In the case, a policy was subject to a condition making it void if the assured went beyond certain limits without licence. An assignee of the policy on paying premium to the agent informed the agent that the assured was resident beyond the prescribed limits. With that knowledge, the agent received the premium. It was held that the insurer was precluded on insisting on the forfeiture.

municating the knowledge acquired to the insurer ought not be attributed to the insured. The agent was an agent of the insurer in receiving information about the value of the horse. The stand of the appellate court, treating the answers as those of the insured, indicated a transfer of the agency relationship from that with the insurer to the insured. By treating the agent's inventions as those of the insured and holding that the insurer is not responsible for such, the court denied the incidence of the agency relationship as one with the insurer.

Newsholme came to be decided after Bastedo. The principles in Newsholme were quoted with approval in Rocco v. Northwestern National Insurance Co.[65] In reaching a decision in the case, the Ontario Court of Appeal stated that:

> "notice to or knowledge of an agent is not notice to or knowledge by the company unless that circumstances are such as to justify the opinion that the agent would be likely to communicate the information to those in charge of the affairs of the company."

This widens the scope of the principle in Newsholme and makes it a general rule that the knowledge of an agent acquired while completing the application form is not to be imputed to his principal and the company may escape liability thereunder. This may even be used to attempt explaining the decision in Bastedo that the insured knew the information will not be communicated to the insurer.

The decision in Rocco is one turning on the particular facts of the case. The agent and the applicant both knew that

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[65] (1929) 64 O. L. R. 559 (Ont C. A.)

the submitted application contained wrong answers and this makes it different from Bastedo. The case could have been disposed of on the sole ground of fraud of the agent and the applicant. This court, however, dealt with it on grounds of the authority of the agent and the court held that knowledge of the agent of the falsity of an answer in the application cannot be imputed to the insurer. The insurer was held entitled to treat the contract void for misrepresentation.

The trend in the decisions in consistently following the rules in Newsholme and aggravating that pathetic status continued in Canada. In Sleigh v. Stevenson[66], the agent completed the proposal which the insured signed without reading. There were some misrepresentations in the form and the insurer sought to avoid liability. The trial judge found as a fact that the statements were untrue and to the knowledge of the insured at the time of the application. Though the correct information was given to the agent, they were never disclosed to the insurer. The trial judge held the insurer entitled to rely on the application in the form in which it reached the insurer and on the statements therein. Though there was a basis of the contract clause in the case, the court did not rely on it in coming to a conclusion. The court placed reliance instead on Comer v Bussell[67] where it was observed that:

"even if insurer's agent were apprised of the real facts

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[66] (1943) 4 D. L. R. 433 (Ont. C. A)

[67] (1940) 1 D.L.R. 97 (Ont. C.A.).

> it would not be assumed that the insurer was so informed."

The case went on appeal and in dismissing the appeal and holding the insurer entitled to avoid liability, Kellock J.A. said:

> "the question therefore would appear to be whether these misrepresentations in the application were made knowingly by the appellant. If [the agent] was the agent of the applicant in filling the application, as I think he was, the answers are her answers and she knew, as she admits, that they were not correct."[68]

The applicant was held to have authenticated the statements in the form. In assessing this case, certain difficulties are presented. The first is the lack of evidence on the extent of the agent's authority. Furthermore, the court was concerned with the interpretation of a statute.[69] It is in the context of the interpretation that the applicant was held responsible for the errors of the agent. The court adopted the language of Greer L.J. in Newsholme but did not make reference to it in reasoning its points. However, following Rocco, the admitted knowledge of the applicant of the untruth in the application form may justify the decision.

The missing evidence on the authority of the agent in Sleigh v Stevenson was provided in Salata v Continental Insurance Co.[70] where the same court came to the same conclusion. The application form was filled in by the agent and

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[68] ibid. at page 441.

[69] section 191, Insurance Act R. S. O. 1937 c. 256.

[70] (1948) 2 D.L.R. 663; (Ont C.A)

signed by the applicant. There was no evidence before the court on whether the applicant read the form. The appellant gave uncontradicted evidence that at the time when the application was procured, there was a full disclosure of relevant facts to the agent. The court observed that the agent had no authority to make a contract of insurance but had the authority to solicit insurance. The court then referred to Newsholme and decided to follow it in holding that knowledge cannot be imputed to the insurer of the falsity of the representation in the application.

The case is difficult to justify because the evidence did not show any collusion between the agent and the insured. There was no evidence that the insured knew that the correct information given to the agent would not be communicated to the insurer. The case displays the total acceptance of Newsholme to the detriment of the particular facts of the case. The exhibition of the lack of a detailed understanding of the cases by some Canadian courts in their determination to follow Newsholme was again made in Bonneville v. Progressive Ins. Co. of Canada.[71]

There, the insured had effected insurance through a vendor and the vendor completed the application form for insurance. The insured signed without reading the content of the form. Though there was a full disclosure of relevant fact to the vendor, the vendor inserted some false statements giving rise to the right of the insurer to avoid the policy.

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[71] (1955) 2 D.L.R. 779 (Ont. C. A)

The court showed an approval of Biggar and Bawden in its judgement and held the agent as an agent of the insured. The resort to Newsholme was nothing more than an adulterated use of principle in the case. The case could have been disposed of on the sole ground of the vendor not being an agent of the insurer. Incidentally, this was considered by the court. Laidlaw J.A. said:

> "it is plain to me that [the agent] was not an insurance agent and he did not at any time profess to act in that capacity in his dealings with the respondent. He had no insurance licence as required by law; he did not engage in the practice of selling insurance; he had no arrangement with the insurer to act for it; he had no dealings with or instructions or authority from the appellant; and he did not receive any compensation arising out of the business of insurance."[72]

Having made this observation, the court then went on to consider the unrelated case of Newsholme. The court reached the right conclusion but with a wrong consideration.[73] A circumstance quite similar to Bonneville was in Reid v. Traders Gen. Ins. Co.[74] and the same conclusion of absence of an agency with the insurer was reached. The reasoning of the court in this case seems more logical since it was dealt with on the basis that the insured knew that the person completing the form was merely a salesman for a vendor and not the insurer's agent.

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[72] ibid. at page 781.

[73] In Whitelaw v Ransom & Wellington Fire Insurance Co.(1958) 15 D.L.R. (2d) 504 at 512 (B.C.C.A.), Sheppard J., while dissenting, also quoted freely with approval passages from the judgement of Scrutton L.J. in Newsholme.

[74] (1963) 41 D.L.R. (2d) 148 (N.S.S.C.)

The principle enunciated by the court is sound when applied to cases of this gender but ceases to be of general use in the context of Newsholme. The forms in the cases were completed by persons who were not agents of the insurers and who were known by the insureds not to be. To make the principle a general statement applicable in all cases where the proposal form is filled by an agent for the applicant will make it grossly inadequate as a sound principle of law. The agency relationship between the insurer and the agent must be taken into account in so far as the authority of the agent to act for the insurer in the particular transaction is needed to make a finding of liability against the insurer.

The adoption of the Newsholme principle in cases involving insurer's agents continued still in Canada as evidenced by Le Blanc v. Co-operative Fire and Casualty Co.[75] There, the agent of the insurer completed the proposal form which insured signed. The agent untruthfully inserted a wrong answer without bringing the item to the attention of the insured and without communicating this to the insurer. The agent acted fraudulently but the insured did not participate in the fraud. Bissett J. quoted from General Accident Assurance Co. v Button[76] to the effect that:

> "a person making a proposal for insurance can not avoid the effect of the section when the proposal is untrue by saying that while he signed it he was not aware of the contents of the application."

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[75] (1964) 46 D.L.R. (2d) 79 (N.S.S.C.).

[76] (1954) 3 D.L.R. 552 at 557 (N.S.S.C.)

The court said that by signing the form, the insured authenticate the statements contained therein even if the insured had no knowledge of the content of the form. The case followed Newsholme in holding the agent a type of secretary for the insured as the agent knew the answers were untrue and "he was committing a fraud which prevented his knowledge being the knowledge of the insurance company". The court then applied the basis of the contract clause to void the policy.

Apart from the undiscriminating adoption of Newsholme in this case, with the observation that the insured did not participate in the fraud of the agent, it is difficult to attribute fault to the insured. The agent is an agent of the insurer and the question is whether there is any reasonable basis for affixing the insured with the fault for the fraud of the agent. The reasoning in Newsholme was adopted and the unreasonable duty thus imposed on the insured to guard against the fraud of the agent which is not even known to the insured.[77]

Newsholme continued to rear its head. This time, in Manitoba. In Blair et al. v. Royal Exchange Assurance.,[78] the Queen's Bench placed reliance on the case of Newsholme in reaching its decision. Hunt J. said that, in completing the

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[77] Baker v. Judgment Recovery(1967) 64 D.L.R. (2d) 442 (N.S.S.C.), was decided after this. There was no question of fraud in the case as the agent only failed to recollect a previous conversation in which the disclosure were made. The court opined that where the agent's authority is limited to receiving applications, the knowledge of the agent could not be imputed to the insurer.

[78] (1968) I.L.R. 1- 197 (Man. Q.B.).

application form, the agent was not the agent of the insurer but an agent of the applicant. It was then held that the insurer was not charged with the knowledge of the misrepresentation.

Commenting on the cases which adopted the Newsholme reasoning in Canada, Hill states that they indicate the tendency on the part of the courts in Canada to place a heavy onus and responsibility on those who take out insurance and who entrust insurance agents with the task of completing the necessary documents. Hill observes that in a great many cases, it is the agent who has approached these people about the possibility or doing business with the insurer through the agent. Hill then concludes that a maxim such as "he who signs must pay the price" is characteristic of the way the Canadian legal system has treated this area of insurance law.[79]

In Boutilier et al. v. Traders General Insurance Co.,[80] the applicant signed the proposal form in blank after giving the true answers to a car dealer. The form was completed later by an employee in the dealer's office. Some facts were not disclosed in the form. The dealer gave evidence that he was not an insurance agent, not certified to sell insurance or licensed to do so and has no authority from the insurer to

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[79] Hill D., Insurance Papers : Omissions and Misrepresentations Caused by Insurance Agents, A publication by the Legal Research Institute of the University of Manitoba, (1974) at page 6.

[80] (1968) 1 D.L.R. (3d) 379 (N.S.S.C.).

sell insurance. The court dealt with the case on the authority of the agent to sell insurance for the insurer. The court observed that the form was supplied to the car dealer only as a convenience to the public and the evidence clearly showed that the dealer was not acting as an agent of the insurer. Although this case does not lie in the province of transferred agency, it demonstrates how far the courts will go in ensuring compliance with the unrelated Newsholme principle. The court said:

> "the principle has been well established that a person who completes on behalf of the applicant for insurance, an application of the kind in question in this case, is acting not as the agent for the insurance company, but as agent for the applicant." [81]

A hypocritical circumvention of the implication of the rules established by the cases in Canadian Law was made in Blanchette v. C.I.S Insurance Ltd.[82] There the applicant signed the form for one type of insurance. The applicant then requested the agent to apply for another type of coverage by completing a blank section in the form already signed. The agent, in doing so, made some material misrepresentation. The majority held that the insured was not bound by the misrepresentation since the agent was acting as the agent of the insurer in completing the blank sections.

Ritchie J., dissenting, said that the reasoning of transferred agency against the insured as laid down in

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[81] ibid. at page 386.

[82] (1973) 36 D.L.R. (3d) 561 (S.C.C.).

Newsholme applies with equal force to an applicant who gets someone to fill in the form after he has signed it. His Lordship said:

> "In my opinion an applicant for insurance who declares that the statements made in his application are true and correct and that the contract is to be based thereon and who later seeks additional insurance and authorizes the agent by telephone to fill in a part of the application which had been left in blank over his signature is in the same position in law as an applicant who has signed a form without having read the answers which have previously been entered upon by an agent." [83]

Ritchie J. then said the Common law provinces in Canada have their laws developed in conformity with the reasoning of Lord Justice Scrutton in Newsholme. Pigeon J., speaking for the majority, stated:

> "when the insured signs after the answers have been entered by the agent, he has the opportunity of reading them. On the assumption that he is under a duty to verify before signing that the agent has properly filled in the form. I can understand how he can be said to be negligent if he does not do so." [84]

This dictum obviously shows a favouring of the negligence approach in Newsholme where the applicant signs the form after the agent had inserted the answers. Where the insured signs after the form is completed, there could be negligence in not ensuring the accuracy of the answers. This has made the answers that of the insured and a recognition of transferred where the signature is subsequent to the completion of the proposal form.

In respect of issues arising where the form is completed

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[83] ibid. at page 569.

[84] ibid. at page 577.

before the insured signs, the court did nothing to resolve the existing conflict in the law. The court sought to distinguish the facts before it from the general position established in the cases because the involved applicant "had no means of verifying the correctness of the form as completed". Pigeon J. distinguished cases of applicants signing already filled proposal forms and cases in which the agent inserted the incorrect answers after the applicant's signature.

The other factor which helped the court in reaching a conclusion is the authority of the agent. The court found an apparent authority in the agent to make commitments for the insurer and complete proposal forms. This was used by the court to find against the insurer. The court had the opportunity to make a pronouncement on the applicable rules and correct any fault in the Newsholme reasoning but the court entirely begged the issue. For cases where the insured signs the form before it is filled, a protection is offered. But for other cases where the completion of the proposal precedes the signature, the dispute is left as it was before the case.

Suffice it to say that the logic behind the majority decision is sound, the gain in the decision is patently illusory. The basic problem in the law is in the knowledge of the agent acquired in the process as against the applicant's supposed negligence in not checking the excesses of the agent. The issue of blank proposal forms signed is an anxilliary question in the law. As Merkin notes on a similar form of reasoning, it leaves a significant number of cases outside

legal protection.[85] In as much as the court avoided this issue, the decision has added little in resolving this state of conflict between "knowledge" and "authority".

The old strict attitude to the subject as demonstrated by the earlier decisions continued. The court in Edwards v Kent General Insurance Corporation[86] held that the insured in the case should have known that the agent was not writing down answers the insured gave and held that the insured should have taken the trouble to read the answers. There, the agent filled out the form and the insured subsequently signed the form. There were some misrepresentation in the insured's driving record and the insurer denied liability. The court held that the insured adopted the answers by signing the application and had knowingly misrepresented because of the knowledge of the fact different from those in the application.

Highlights of the advantages of this bias in favour of the insurer in Canadian law did not end there. In Van Schilt v Gore Mutual Insurance Company,[87] the insured took out an insurance policy with the insurer through the insurance agency and the form was filled by the agent. There was a misrepresentation in the policy to the effect that the insured has made no previous claim upon any insurer. The insured signed the form with the statement that there has been no previous claim. The form contained a basis of the contract clause which makes

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[85] Merkin R. M., op. cit., page 42.

[86] (1986) 29 C.C.L.I. 317 (N.B.Q.B.).

[87] (1988) 29 C.C.L.I. 181 (B.C.C.A.).

the contract with the insurer based on the truth of the statements in the application. The trial judge found that the insured had no mischievous intent towards the insurer and may have "obliquely informed" the agent of the previous claim against another insurer. The judge then held the insured bound by the misrepresentation. Drake Co. Ct. J., said:

> "he says that [the agent] filled in the blanks in the form: [the agent] agrees that she did so. He says he did not read it in any detail: and I accept that. In filling up the blanks, she acted as his agent;[88] and he is bound by the representations made in the application."[89]

The insured appealed. The appellate court did recognise the issue as who is to bear the consequences of the incorrect answers respecting the previous claim. Carrothers J.A. said:

> "I have not resolved in my mind how the respondent, notwithstanding that the respondent was the author of the blank application, can be held vicariously responsible for any such warranty [that the application was correctly completed] by the agency. However, I do not need to decide this as I am of the opinion that the trial judge was correct in finding [the agent] to be the agent of the appellant in physically completing the application form in accordance with the appellant's instructions."[90]

The appeal was dismissed as the court found that in filling up the application, the agent acted as an agent of the insured. Respectfully, it is submitted that this decision introduces a confusing line on the remainder of transferred agency in the law of insurance.

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[88] emphasis added.

[89] Van Schilt v Gore Mutual Insurance Company (1986) 25 C.C.L.I. 267 at 273 (B.C. Co. Ct.).

[90] Van Schilt v Gore Mutual insurance Co. (1988) at page 187.

There was no reference to Newsholme in the case. It suggested, however, that the court followed the reasoning in Newsholme. Though the court referred to Biggar the court did not apply its principles. Biggar has been referred to as laying down that where the agent has authority form the insurer to complete application form for insurance, there will be liability on the insurer. The formulation in Biggar is applicable where the agent lacks any authority from the insurer to complete proposal forms. In the Van Schilt case, there was only one misrepresentation. This misrepresentation is found in a separate area of the proposal headed "BROKER/AGENCY REPORT".

Addressing the facts of the case, it is the submission here that the title of the area where the error is found suggests that the insurer vested authority in the agent to fill the proposal form, or at least that portion of the form. The insured will not be expected to complete the area of the form clearly indicated as the agent's report on the application. Furthermore, the insured can reasonably be expected not to concern himself with the content of the area since it demands nothing on the part of the insured. As the evidence in the case revealed, the insured in the case saw the heading of the section but did not concern himself with the contents thereof.

With this, authority in the agent for filling the proposal form could have been found by the court and the reference to Biggar can only lead to a conclusion of liability

against the insurer. However, this the court failed to do. The court found support for its conclusion in the fact that the insured signed the application with a basis of the contract clause and put on the insured an onus of proof. Carrothers J.A. said:

> "the onus is on him to establish that, despite the actual wording of the application form, he did not, in fact, give the answers written down and attributed to him. The appellant has not established this."[91]

Where the law is that a person who signs a basis of the contract clause is bound by the content of the document, a proposition which the Court of Appeal obviously subscribed to, what use would the onus on the insured serve here? Simply put, if the insured discharges the onus imposed by showing that he did not give the answers attributed to him, does this afford him a defence in view of the basis of the contract proposition.

Further difficulties are presented on the meaning of the inscriptions in the proposal form. The insured warranted the truth of the statements in the proposal and that the contract is to be based on the truth of the statements. Is this to be interpreted as meaning that the insured warrants the truth of the report presented by the agent to the insurer? The insured can only be taken here to have warranted the truth of the statements that is made by the insured. In respect of other statements in the application which are not made by the insured, the warranty can not arguably be relied on by the

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[91] Van Schilt v Gore Mutual insurance Co. (1988) at page 188.

insurer. This is the warranty, however, that the court apparently relied on in coming to its decision in the case. Whichever way the judgement is viewed, the court was determined to adopt the Newsholme reasoning though this is not stated in the judgement. The traditional view based on the strict interpretation of the contract as made, which the court followed in the case, may be balanced against the more liberal approach of the knowledge that the agent acquired in completing the proposal form. The agent had been given the correct information on the question of a previous claim against another insurer. The general position of the Law is that the knowledge of the agent acquired in the course of duty may be imputed to the principal. However, here, the insured is regarded as the principal and any argument on the line of "knowledge" is thus made ineffective against the insurer.

However, this appears to be the state of the law. It is in the light of its recency that an understanding of transferred agency in the Canadian Insurance law has to be considered. Where the insured signs an application form before it is completed, Blanchette has indicated the rules applicable. In Van Schilt and Edwards, an approach of transferred agency has been shown where the insured signs the form after it was completed by the agent. These cases have paid little attention to the apparent authority of an agent. Blanchette has however adopted the reasoning in Stone to the effect that where the agent has authority to act as done, the insurer may still be liable. This authority position Van

Schilt has rendered insignificant. In the case, authority could have been found in the agent to complete the section tilted "Agency Report". Any other observation on this is repugnant to good construction. With this observation, if made, Blanchette could have provided support for a conclusion against the insurer. This was not made in Van Schilt and there is doubt on where the Canadian insurance law stands on the authority of the agent. With the courts overlooking the "innocent misrepresentation" espoused by the court in Stone, one may be tempted to conclude further that this rule in Stone does not form part of the Canadian Insurance Law. Like the position in English Law, there has not been any expressed content for transferred agency in an all embracing fashion. Many of the rules have been treated differently by the court in Van Schilt and Blanchette has found it more convenient to avoid the controversy.

Having attempted an examination of a Canadian position in order to provide the necessary background, it becomes relevant to consider how this English Law development shaped the attitude of the courts in some other jurisdictions. This is especially so in the light of the differences in the background of the jurisdictions and the inapplicability of the Newsholme stereotyped reasoning in certain cases.

ii. Comparison of the Nigeria Position

The case that first raised the issue in this juris-

diction is Northern Assurance Co. Ltd. v. Idugboe[92]. There, the insurer had a commission agent who was to canvass for applications. The insured allegedly dictated to the agent answers to questions in the proposal form and informed the agent that there was a previous third party policy on the car. The agent said that it was not material. The insured also informed the agent that there were policies on other vehicles with the same insurer and some other insurers. The insurer denied liability on the ground that the insured failed to disclose a previous decline to give a comprehensive cover. The trial judge found that the plaintiff was an illiterate and did disclose these facts to the agent. It was held that the agent's knowledge was that of the insurer and that the failure to communicate these could not absolve the insurer.

On appeal, the Supreme Court of Nigeria held that in filling proposal forms and inserting incorrect answers, the agent was the agent of the insured and it was therefore wrong to impute the agent's knowledge to the insurer. On the question of the insured's illiteracy, the Supreme Court said:

> "the plaintiff is an illiterate and some of the expressions used by Scrutton L.J. such as reference to allowing the agent to invent the answers, and signing a document without reading it, are not applicable without qualification to every illiterate proposer, but there is no suggestion here that the answers given were not in accordance with the plaintiff's wishes and we need not consider a hypothetical case. In this instance, the plaintiff's illiteracy is no ground for not following Newsholme case." [93]

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[92] (1966) 1 All N.L.R. 88 (Nig. S.C.).

[93] ibid. at pages 93 - 94.

The decision may be criticised in that the facts of the case are more akin to Bawden's case and should have been followed since the contention of the proposer was that there was a disability, that of the illiteracy. This view is shared by Oretuyi who says that, in as much as the insured could neither read nor write, it is difficult to see how there could have been a detection of the wrong answers inserted by the agent.[94] Oretuyi further states that Nigerian courts should realise that in view of the high degree of illiteracy in the country, insurance agents are bound to play a bigger role in the explanation of and filling proposal forms.

The court's error was not in failing to realise the difference in the background of the two countries. The court obviously addressed its mind to the illiteracy of the insured. The unpardonable error of the court lies in the conclusion of the court that the illiteracy is no ground for not following the rule in Newsholme. It is surprising indeed that the court failed to press this observed differences to its logical conclusion. The decision shows the extent the court was prepared to go in abiding with this obnoxious rule in Newsholme. Oretuyi's concludes, in respect of this blind acceptance of the Newsholme reasoning, that, with Newsholme appearing to be firmly entrenched in the Nigerian judicial system, it will require legislative intervention to uproot it.

The court in American International Insurance Co. Ltd.

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[94] Oretuyi S.A., "Legal Status of Insurance Agents" (A paper presented at the Faculty of Law, University of Ife, 1987) page 18.

v A. E. Dike[95] approached the issue no differently from the reasoning of the previous decade. Agoro J. said:

> "there can be no doubt that the defendant in the present case is an illiterate ... there is no suggestion that some of the answers recorded by Mr Okoro [the agent] in the proposal form were not in accordance with the information supplied by the defendant. It seems to me also that the defendant was negligent in signing without requesting Mr Okoro to read the answers to him after filling the form. The word "negligence" in this connection has no special technical meaning. It only means carelessness. In my view, the defendant's illiteracy is no ground for granting relief ..."[96]

Despite the absence of many cases in this area of Nigerian Law, it seems that the legal status of an insurance agent is not significantly different from what operates in Canada. The Newsholme reasoning is still regarded as valid and it is still an open issue whether there will be the legislative intervention that Oretuyi calls for to correct the inappropriateness of this rule adopted by the courts.[97]

iii. Comparison of the Australian Position

This viewpoint, representing a very extreme view in defining the relationship of the parties, was adopted by the Australian High Court in Jumna Khan v. Bankers & Traders Insurance Co. Ltd.[98] This was a claim by an illiterate who

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[95] (1977) 7 C.C.H.C.J. 1505 (Lagos H. C.).

[96] ibid. at page 1516.

[97] The Nigerian Law Reform Commission has advocated legislative intervention which would make the agent an agent of the insurer unless there is clear evidence to the contrary. See the Commonwealth Law Bulletin (April 1987) at page 590.

[98] (1925) S.R. (N.S.W.) 422 (Aust H.C.)

insured a house against fire. The insured dealt with the agent of the insurer and signed a blank proposal form at the request of the agent. The agent, without asking the insured question, filled up the proposal form. A disclosure was not made of a material fact and the insurer sought to repudiate liability. The Supreme Court of New South Wales held the insurer entitled to repudiate liability. Street C.J. said:

> "the plaintiff's illiteracy did not in any way relieve him from the duty of taking every reasonable means that he could to ascertain what his obligations were, and to see that no untrue statements were put before the company. It afforded no excuse for his carelessness or indifference. [The] proposition that where an insured company has affected a policy through an agent, who has authority to receive a proposal, it cannot rely on concealment or misrepresentation to avoid the policy, if this is due entirely to its agent, is not borne out by the cases and cannot be supported if it is intended to cover the case of an applicant who does not take the trouble to acquaint himself with the contents of his proposal form as filled in by the agent."[99]

This decision was upheld by the High Court on the ground that:

> "the agent was an agent to receive proposals, not to fill in proposals on behalf of persons desiring to insure."

The court treated the answers here as those of the insured and the implication is that the agent has been taken as acting for the insured in completing the proposal form. The reasoning behind transferred agency as borne out by the English cases on the point can thus be seen here.

In this case, the illiteracy of the applicant was not regarded as material and this is a fundamental defect in the reasoning. It is submitted that it is highly inappropriate to

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[99] ibid. at page 426 - 427.

apply rules without regard to the circumstances surrounding particular cases. Furthermore, the decision obviously did not address the earlier decision of the same court in Western Australian Ins. Co. Ltd. v. Dayton.[100]

D. An Oasis of Relief : Judicial Attempts At A Change

It has not always been a case of a passive acceptance of the concept of transferred agency. A large body of case law has opposed the principle and context of transferred agency. However, many of these cases fall short of the proper approach to the issue as they only seek to distinguish the cases form the established principles. The concept, plagued as much as it is with criticisms, still exists and awaits use by any insurer willing to take advantage of it.

i. Emerging Canadian Attitude

Perhaps a convenient starting point in assessing the judicial attempts to avoid the concept of transferred agency in the law of insurance is Graham v. Ontario Mutual Insurance

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100 (supra), footnote 48. The harsh treatment meted out to unsuspecting applicants dealing with insurers' agents found its way into New Zealand. The reasoning of "negligence" was made use of in some cases to deal with the issue. In Rokkyer v. Australian Alliance Insu. Co.(1908) 28 N.L.R. 305 (N.Z.S.C.), the court regarded it an "inexcusable negligence" on the insured's part to allow the insurer's agent to fill the proposal form for him. The negligence led to a denial of a defence. The same result was reached in Nicholas v New Zealand Insurance Co. (1930) N.Z.L.R. 699 where it was held that a limitation on the agent's actual authority makes the agency that of the proponent where the proposal form is completed by the agent.

Co.[101] There, the insured had procured insurance through the insurer's agent who completed the application form. The insured informed the agent of the existence of a mortgage on the property but the agent told the insured that it was not an encumbrance within the terms of the proposal. The insurer sought to avoid the policy for non disclosure of an encumbrance. The question thus, was whether the disclosure to the agent of the previous mortgage was enough disclosure to the insurer.

In that case, there was a comprehensive clause denying the agency if the agent filled any part of the proposal and limited the authority of the agent in respect of receiving information not stated in the proposal. The error of the agent was viewed as a "stupid" act and the majority found for the insured. In doing so, Rose J. said the insurer, through the agent having misled the insured should not be permitted to avoid the policy on any technical grounds. With regard to the clause denying agency, the court simply held it not to be effective. Cameron C.J., observed that the provision does not "meet the case" and said the principle of estoppel may be invoked to prevent the insurer setting up a defence.

This may be taken as setting up a general ground to defeat clauses transferring agency and limiting the authority of the agent to receive information. However, the main body of the case law has not embraced this a general approach. The cases have been contented with just distinguishing the facts

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[101] (1887) 14 O.R. 358 (C.A.)

of the cases before the court.

The court in Graham referred to Chatillon v Canadian Mutual Fire Insurance Co.[102] where the agent completed the application form and the court held the insurer restrained from setting up the act of the agent to avoid the policy. It is apparent on the facts of the case however, that the court in Chatillon sought to protect the insured by reason of the insured being an illiterate. The court indicated that it reached its decision under the circumstances because the misstatement of the agent made without authority and knowledge of the illiterate insured can not be binding on the insured. This may be read as a limitation on the usefulness of the case to cases where there is a disability by reason of illiteracy. The attempt is seen by the authors Brown and Menezes as a long standing precedent for providing special relief to applicants who are under exceptional disability, illiteracy or language difficulties.

The stand of the court in Chatillon was advanced further in Carlin v. Railway Passengers Assurance Co.[103] There, the insured applied for insurance against his liability as an employer. It was shown that the agent was aware of the need to use explosion in road construction and the intention to use such was actually communicated to the agent. The insured completed and signed the application leaving blank the space for the question "Are machinery, boilers or explosives to be

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[102] (1877) 27 C.P., 40 Vic., 450.

[103] (1913) 14 D.L.R. 315 (B. C. S. C.)

used?" The insured told the agent that of the need to use explosives but that there was no intention of using any machinery or broilers. The agent was asked to fill up the answers correctly. The agent inserted "no" and submitted the application to the insurer without further explanation. The truth of the answers was expressed to be the basis of the contract and the insurers denied liability on a claim arising out of the use of explosives. Hunter C.J.B.C., said:

> "I can not see that there has been any misrepresentation, either active or passive, on behalf of the insured]. He has signed a blank form and the answer to the material question -at all events, the answer to the question complained of was not filled in by him, or by his instructions, but by the agent of the company."[104]

His Lordship then went on to recognise that where the insured signs a document after it had been filled in by another person with the insured's consent, the insured is bound in exactly the same way as if filled up by the insured. He said:

> "I do not see how that principle has any application to this case we have here. The document is altered by the agent of the company after it was signed and authenticated by the applicant for insurance. If the agent, having a personal knowledge of the facts - as I find in this case - fills in that answers according to his judgment, he is not the agent of the party applying for the insurance, he is the agent for the purpose of that transaction of the company."[105]

Having made such a division in the rules applicable based on the time of signing, Hunter C.J.B.C. showed sympathy for the cause of the insured and said:

> "an applicant for insurance is entitled to consider an

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[104] ibid. at page 317.

[105] ibid. at page 317.

> agent is not a rogue, and will not insert something on the policy which is not authorized"[106]

The court here placed emphasis on the knowledge of the agent and recognised the discretion exercised by the agent in not putting down the answers as given as an issue "to be fought between the agent and the company and not between the company and the assured." Where the agent deliberately completes the application wrongly, then the case is of immense benefit but not so when the error is not known to the agent at the time of completing the application. If the agent has knowledge of the true facts at the time of completing the proposal and negligently or mistakenly fills in wrong answers, on the dictum of Hunter C.J.B.C., the insurer can still escape liability.

The case further introduces into a division in the applicable rule which may be of potentially great magnitude, that of the time the proposal is signed by the insured. The agent was asked by the insured to complete a portion of the proposal and using the authorities in the preceding part, it may be said that the agency is that of the insured for such purpose. The court has denied this, but in so doing has limited its application to only cases where the insured signs before the incorrect answers were inserted by the agent.

Knowledge may be applied in two ways here. The first is where the agent has a knowledge of the true facts in the case and does not disclose such to the principal. This has been the

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[106] ibid. at page 318.

approach of the courts in the cases referred to above. The knowledge of the true fact may be imputed to the principal and with the knowledge of the truth, the insurer can not set up any defence of non disclosure or misrepresentation. There will be no question of materiality as adequate communication of the true facts has been made to the insurer through the agent. The duty of acting in good faith on the insured would have been satisfied and nothing can defeat the insured's claim.

The use of knowledge in this first sense is further demonstrated in Gabel v. Howick Farmers Mutual Fire Insurance Co.[107] There, the insured had an apprehension of incendiarism and made a disclosure of this to the agent. The proposal was first signed by the insured and then completed by the agent. The agent omitted to fill in any answer in relation to the incendiarism and the disclosure was not communicated to the insurer. The court held the agent as acting for the insurer and imputed notice of the incendiarism to the insurer.

In that case there was a basis of the contract clause and the clause further stipulated that the agent taking the application was for that purpose an agent of the insured. In dealing with the clause, the court held that the provision or any other provision contrary to the holding, that of a disclosure to the agent being a disclosure to the insurer, is "unreasonable and therefore ineffective".[108] It should be noted that the decision of the court was reached on the facts

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[107] (1917) 38 D.L.R. 139 (Ont. S.C.)

[108] ibid. at page 144.

of the case. The insured signed the application form before the agent completed it. The court still recognised transferred agency in other cases. The court observed:

> "It must be understood that my holding in this regard is based upon the facts of this particular case, and is not a general ruling that the last clause of the application is under all circumstances unreasonable.[109]

The use of knowledge in the second sense is demonstrated by Whitney v. Great Northern Insurance Co.[110] There, the policy was on a horse for which the insured had paid $800. The application form, filled by the agent, erroneously stated that $1500 was paid. The insured gave evidence that the agent had not asked what had been paid for the horse but at what amount the insured valued it. The agent then gave the insured an assurance of the form being "all right" and asked the insured to sign. The insured signed the form without reading it. The insured's claim against the insurer was allowed. Stuart J. observed that notice to the agent is notice to the principal where there is a duty on the agent to communicate the fact to the principal. Having observed that the agent did not know the value of the horse, Stuart J. said further:

> "It would at any rate lie upon the plaintiff to prove knowledge in [the agent] of that fact, and this was not done. But the facts that [the agent] did know were that he had never asked the plaintiff what he had paid for the horse, that he had filled the answers up himself and that the plaintiff had signed without reading them upon his assurance that they were all right."[111]

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[109] ibid. at page 144.

[110] (1917) 11 W.W.R. 1159 (Alta S.C.)

[111] ibid. at page 1163.

This shows the other trend that the courts are ready to follow, that of knowledge of the agent that the insured did not complete the application form. Here, even though no actual knowledge of the agent of the actual value of the horse could be found, the court invoked the agent's duty to communicate to his principal all the material facts surrounding the obtaining and filling up of the application. It was said:

> "it is the duty of an agent when he forwards an application which he knows has not been read over by the applicant before signing it, which he has in fact signed simply because the agent told him it was alright, to communicate these facts to his principal ... In the circumstances I think the knowledge of [the agent] must be imputed to the company and the company must be taken to have known (1) that the plaintiff had not been asked what the horse cost (2) that he had not read the application at all, and (3) that he had signed it upon the agent's assurance that it was all right."[112]

Knowledge of these three things were imputed to the insurer. With the knowledge, the insurer took premium from the insured and allowed the insured to think that the policy was regularly issued. This was used by the court to hold the insurer had waived the materiality of the question and also be estopped from insisting upon the transfer of agency to the insured.

This represents another's approach to the issue as the agent's knowledge acquired in the execution of duties of the trade. This is particularly useful, as in the present case, where the agent did not acquire any knowledge of the actual position on the facts which contradict those filled in the application form. This represents a base for an expanded knowledge-oriented theory.

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[112] ibid. at page 1164.

The court did not hide the approval of the transfer of agency in other cases, however. There was a clause in the form transferring the incidence of agency to the insured. Stuart J. said in respect of this:

> "Where an applicant allows the agent to fill in the answers and signs the application without taking the trouble to read it to see if the answers are correct it would appear to be just that to that extent the agent should be treated as the agent of the applicant."[113]

The court had indicated the general rule and then distinguished the facts of the case from the general approach to the issue. Another commendable attempt to distinguish, but not to depart from, the general principles of transferred agency is the case of Istvan v. Continental Casualty Co.[114] There, the insured had signed a proposal completed by the agent without reading the answers inserted. The insured did not understand English, the language of the proposal. The insurer sought to avoid liability on the ground that the insured was bound by the signature on the proposal. The Court rejected this argument because the applicant, being an illiterate, did not have the false answers explained in any way to make the misrepresentation an intentional one. The court distinguished cases in which the applicant could have read the proposal and might be taken to have adopted it.[115]

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[113] ibid. at page 1162.

[114] (1941) 2 W.W.R. 515 (Alta S.C.)

[115] It should be noted, here, that the decision of the court in this regard, might have been shaped by section 210 of the Alberta Insurance Act (1926 c. 31) which raised a presumption against a transfer of agency to the insured.

The court in Peter Rezanoff v. Wawanesa Mutual Insurance Co.[116] tried to rationalise the cases in which the decision favoured the insured as cases involving special circumstances. There, it was said that the knowledge of the agent is not the knowledge of the insurer if the contract is a written proposal with the falsity known to the agent, unless there are special circumstances such as illiteracy of the applicant which may make the insurer responsible for the agent's act. The case seems suggestive that the courts should consider factors such as the applicant's educational background in resolving the conflict.

Respectfully, it is submitted, however, that this notion should not be taken as a general trend by the courts. The knowledge of the agent should be imputed to the insurer unless special circumstances demand otherwise. Resolving the conflict here with a knowledge-oriented method will serve little purpose if such a limitation as the educational background of the applicant is introduced as a yardstick. This is however the approach adopted by many courts in deciding the issue and thus far, a concise theory of liability based on the knowledge of the agent could not be shaped out. Where the insured is literate, the knowledge acquired by the agent may not be imputed to the insurer.

In George Lewis v. The Northern Assurance Co. Ltd. of London,[117] after making reference to the educational status

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[116] (1937) 4 I.L.R. 227 (Sask. D. C.)

[117] (1956) I.L.R. 1-221 (Ont. SC)

of the insured, Spence J. said:

> "whatever has been said in cases as to the insurance agent or clerk being an amanuensis for the applicant, and not the agent of the insurer when these applications are made out, the fact does remain that when a carpenter ... who did not know anything about insurance, comes into an insurance office and there sees a person obviously as experienced as [the agent] was, and watches her complete a form which she appears to have completed ... he could do nothing but leave to [the agent] the proper filling of that application."[118]

The circumstances were used to shape a conclusion of knowledge of the insurer based on the agent's knowledge.

The reasoning is commendable in so far as it is an attempt to salvage the insured's expectation from a seemingly hopeless position it has been put by the earlier authorities regarding the agent as the insured's amanuensis. However, the reasoning fell short of the desired standard as it is only attempts to relieve the involved insureds from the reasoning of the past ages. It did not in any way deny the general principles of transferred agency and sought only to avoid the conclusion of the earlier authorities.

The educational status of an applicant has rightly been made a relevant consideration in the decision as it identifies the conflict in the interest of the parties, justifies the insured's reliance on the agent and may be used to infer authority in the agent to act for the insured. However, making it a sole determining issue will necessarily limit the effectiveness of "the knowledge acquired by the agent" argument. The educated insured would have been precluded from

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[118] ibid. at page 51.

this possibility. Furthermore, where the insured is not educated or ill-educated but the insurer could show the shrewdness of the insured by other means such as a course of past dealings with insurers, the illiteracy ceases then to afford a good argument against the insurer's defence.

Moreover, cases abound where though the insured is of little or no education, the insurer was able to repudiate liability on grounds of such errors by the agent. In Sikorski v. Continental Insurance Co.,[119] the inability of the insured to read English did not prevent the insurer form repudiating liability on the terms of the policy. This reinforces the conclusion that the poor educational status of the insured is not, by itself, conclusive in resolving the conflict. Furthermore, the existence of an agency relationship should not be made contingent on the educational status of the parties.

As Hill points out, the distinction developed by a court with regard to illiterate applicants is most illogical since the relative merits of the applicant's character should not determine the party for whom the insurance agent acts.[120] Hill opines further that:

> "reference to degrees of education simply tend to cloud the true relationship involved between a principal and his agent. And where are the courts going to draw the line between the average intelligence and "limited" intelligence or even illiteracy? It would seem to be just as reasonable for a person with average intelligence to assume that the agent before him has the

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[119] (1933) 2 W.W.R. 388 (Sask. C.A.)

[120] Hill D., op. cit., page 7.

> necessary authority and experience to fill up the application form."

Hill concludes that such a factor as the intelligence or lack of it by the insured should not be the yardstick employed by the courts to determine when an agent's knowledge of the true facts should be imputed to this insurer.

Another case regarded as an attempt to find ways around the hardship which Newsholme has placed on applicants for insurance is Blanchette v C. I. S. Ltd[121] The court relied on the company's policy for the agent to fill out the application form and thus refused to adopt Newsholme. The insurer was held unable to rely on the erroneous answers inserted by the agent as the insured had no means of verifying the correctness of the proposal as completed.

Commenting on the decision, Baer views Blanchette as having restricted the application of the doctrine of transferred agency but stopped short of abolishing it altogether. Baer concludes that the vestigial doctrine seems to apply only when the agent has no authority to complete the proposal, the insured is educated, not suffering from any emotional or intellectual handicap, has had an opportunity to verify the accuracy of the application form and has asked the agent to complete the proposal form.[122]

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[121] (1973) 36 DLR (3d) 561; I.L.R. 1-532 (S.C.C.)

[122] Baer M. G., "Recent Developments in Canadian Law: Insurance Law" (1985) 17 Ottawa L.R. 631 at 639.

ii. Abolishing Transferred Agency?

In Great West Life Assurance Co. v. Paris,[123] the agent also completed the application form. Though the case does not seem to deal with the knowledge of the agent but rather on an interpretation given by the agent to certain questions, the case was decided on the mandate given to the agent by the insurer. The court was able to use this authority of the agent to reach a conclusion favourable to the insured. This is suggestive that where the agent has such authority to act, the agency might still be retained by the insurer.

In Burgess v Economical Mutual Insurance Co.[124], the agent had completed the application for the insured. The agent inserted false answers in the proposal though the insured gave the correct facts to the agent. The court found in favour of the insured placing reliance on the authority of the agent to act for the insured. In disapproving of the Newsholme principle, the court was heavily influenced by the fact that the agent involved has an authority more than that of a mere intermediary.

Smith v Co-operative Fire and Casualty Co.[125] is another case where the insured signed an application form without reading it and on the evidence before the court, the insurer could not repudiate liability for an incorrect answers inserted in the proposal. The insured had explained the

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[123] (1959) I.L.R. 1-339 (Que. Q.B.)

[124] (1976) 15 NBR (2d) 1 (N. B. C. C.)

[125] (1977) 1 W.W.R 638 (Alta D. C.)

attempts to obtain insurance with other insurers to the agent and the court held that the knowledge acquired by the agent in this respect is binding on the insurer. The insurer was held estopped from saying it was misled by the misrepresentation in the proposal.

The court in Moxness v Co- operative Fire and Casualty Co.[126] also upheld the position of the insured in view of the proven facts of the case. There, the insured had disclosed to the agent some previous driving convictions. The application was prepared by the agent and the insured signed without reading it. The application did not make reference to the driving convictions and the insurer sought to avoid liability. The court resuscitated the reasoning in Stone v Reliance Mutual Insurance Society Ltd.[127] and held the insurer bound by the agent's implied representation that the application form was properly completed. With a reference to Bawden's case, the court treated the knowledge of the agent on the previous driving convictions as that of the insurer.

The temperate approach based on the knowledge of the agent without regard to some special circumstances continued in Gallant v Sun Alliance Insurance Co[128] The insured had signed the application form in the case with some incorrect answers inserted by the agent. The insurer sought to avoid indemnity. The court held that the insurer had sufficient

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126 (1979) 95 DLR (3d) 365 (Alta S.C.)

127 (supra), footnote 54, chapter 2.

128 (1983) 4 C.C.L.I. 249 (N. B. Q. B.)

information about the communication complained of to put it on notice. Apart from this, the court noted that the agent of the insurer had full knowledge of all essential circumstances. The court held that the insurer, by and through the agent, had full knowledge of all essential circumstances and information, accepted the risk and the premium and thereby became bound under the policy.

In Gilmore Farm Supply Inc. v Waterloo Mutual Insurance Co. et al.[129] the knowledge acquired by the insurer's agent was also made determinative of the issue without any restriction in its application to cases of illiteracy. In this case, there was no application form used and the court held the agent to be the application form of the insurer. The agent was aware of the material fact alleged undisclosed to the insurer and it was held that the agent received this information as an agent of the insurer.

The decision in Weldon et al. v Commercial Union Assurance Co. PLC et al.[130] may be seen as an attempt to keep this new trend solely within the bounds of courts. The court held there that the involved agent is an agent of the insurer but simply stated that the circumstances of the case are different from those where the courts held otherwise. If this is taken as the general rule, it provides an unsupervised devise for finding an agency relationship.

These cases have indicated a shift from the reasoning

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[129] (1984) 3 C.C.L.I. 221 (Ont. S.C.)

[130] (1984) 11 C.C.L.I. 165 (B.C.S.C.)

of transferred agency in certain cases. Some have even attempted to dispense with the transfer in its entirety. This voicing of strong caution in the use of the adopted concept of transferred agency and the ancillary attempts to depart from the reasoning of the concept on the basis of the injustice thriving on it has not been a peculiar effort of Canadian courts. Some courts in other jurisdictions too have attempted to effect the change through their decisions.

iii. The Nigeria Position

The case of Ogbebor v Union Insurance Officers Ltd.[131] was decided on the principle of estoppel. The contract for insurance there was negotiated through an agent before the insured bought the car. Since the insured was then in a hurry he merely signed the proposal form and gave it back to the agent after showing the agent the relevant documents. The insured vehicle was damaged and the insurer denied liability. The insured contended that the agent had a full knowledge of all the material facts and that this must be imputed to the company and that the insurer was estopped from denying liability on grounds of false misrepresentation. The insurer were held liable and in doing so, Irikefe J. (as he then was) said:

> "what emerges from this is that [the agent] knew about and was in fact shown by the plaintiff his learner's permit ... which remained valid until 9th August, 1966. Such knowledge would be imputed to the principal of the agent ... I would therefore hold that the defendants

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[131] (1967) 3 A.L.R. Comm. 166 (Nig. Mid West H.C.)

> are estopped from relying on the fact that the plaintiff had a learner's permit as a false representation going to the root of the contract thus rendering it null and void."[132]

The court regarded the agent as the agent of the insured in filling the application form but still held that the knowledge acquired by the agent thereby could be imputed to the insurer. A reconciliation of this is hardly possible since any knowledge acquired in filling the application form is that of the principal and the court found an agency relationship between the insured and the agent. Irikefe J. said:

> "where an insurance agent, after the proponent signs the proposal form in blank inserts in it false statements without the proposer's knowledge, then even though he is acting on behalf of the proposer in filling the form, the latter is not bound by the false statements. An insurer will be estopped from relying on it to nullify the contract."[133]

iv. The Australian Position

The conflict existing in the usage of the concept of transferred agency has not been evident only in Canada and Nigeria. The decisions in Australia too show some irreconcilable differences in the approach to the issue. The court

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[132] ibid. at page 176.

[133] ibid. at page 176. In the Sierra Leonine case of Zabian v New India Insurance Co. Ltd (1964) 1 A.L.R. Comm 4 (Sierra Leone S.C.), the court found that the agent had been told the truth concerning the application but wrote down untrue answers and failed to read it over to the proposer. Judgement was given against the insurer on the ground that the knowledge of the agent is that of the insurer.

in Jumna Khan v Bankers Traders Insurance co Ltd.[134] held an agent completing proposal form an agent of the insured. The basis of the decision could be seen as an absence of an actual authority in the agent to complete proposal forms for applicants. This actual authority to complete proposal forms, though lacking from the insurer, was viewed as being immaterial on the issue of transferred agency in Deaves v C. M. L. Fire and General Insurance Co. Ltd[135] where Stephen J said:

> "while the agent may have lacked the authority from [the insurer] to fill up the proposal on behalf of [the insured], he nevertheless received, as part of his function as a representative of [the insurer], information ... relevant to the risk. Having received such information, and the signed proposal being contradictory to it, [the insurer] is to be treated as itself possessing that knowledge; an applicant having made a disclosure to the insurer's agent, has a right to expect that the agent will transmit to the insurers all that he has been told, and that the agent will do so accurately"[136]

Merkin's observation on Deaves are to be noted. While recognising that actual authority becomes irrelevant on the propositions in Deaves, Merkin states the important matters in the language of estoppel and apparent authority. Merkin identifies though, some analytical errors with Deaves. One is the limiting of its application to cases of non - disclosure only. The estoppel identified is confined to cases in which the error is not contradicted in the proposal form. Where there is a misrepresentation, Merkin contends that Deaves

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[134] (supra) footnote 98, chapter 2.

[135] (1928) 23 A.L.R. 539

[136] ibid. at pages 560 - 561. Underlining supplied.

might not apply.

Merkin further contends that Deaves might have been wrongly decided in principle since the proposal form therein contained a statement depriving the agent of authority to receive any information other than that appearing on the proposal. Merkin observes that such a clause might have negatived estoppel.[137]

Despite these observed analytical errors, the decision is a contradiction to the previous stand of the court in Jumna Khan and thus represents another attempt in yet another jurisdiction to change the content and application of transferred agency.[138]

II

Transferred Agency : An Agreement Of Parties

In reviewing the cases dealing with transferred agency in Insurance Law, two clauses assume significance in the evaluation. These two clauses are the "basis of the contract clause" and the clauses transferring the incidence of agency. It is not uncommon to find these two clauses embodied in a single document, usually the proposal form. But for our

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[137] Merkin R. M., op. cit., page 42.

[138] The courts in New Zealand too have had occasions to uphold the apparent authority of the agent to receive information for the insurer as against the actual authority of the agent. See Blackley v National Mutual Insurance Life Ass. of Australia Ltd. (1972) N.Z.L.R. 1038 (N.Z.S.C.).

present purpose, the two clauses are treated separately.

A. Clauses Transferring Incidence of Agency

The issue of problems arising on the agent completing the proposal form predates the present century. In dealing with the relationship of the insured vis a vis, the agent and the insurer, some early courts refused to make a finding of transferred agency against the insured.* By finding the agent still to be an agent of the insurers, the courts have settled the responsibility of the errors and omissions of the agent on the insurer.

In some of these cases, the basis for the refusal to recognize the transferred agency is usually the reality of the authority of the agent to complete the proposal form for the insured. Furthermore, many of the cases dealing with transferred agency have been dealt with on the lack of actual or apparent authority by the agent to so act for the insurer in completing the proposal. With this approach of placing much reliance on the "authority" reasoning, insurers resorted to a practice of denying the authority of the agent to act for the insurer or in the alternative transfer the incidence of the agency to the insured for the purposes of completing the proposal form.

i. Nature of the Agreement

Where the incidence of agency relationship is transferred by the agreement of the insured and the insurer, it may

take two distinct forms. The first is where there is a clause in the proposal stating that any person or agent who completes the proposal does so as an agent of the insured. The clauses may take the form of the following :

> "I ... declare that in so far as any part of this proposal is not written by me the person who has written same has done so by my instructions and as my agent for the purpose."[139]

It may be worded differently such as:

> "the particulars set forth in the proposal form shall in all cases be deemed to be furnished by or on behalf of the insured"

or worded as follows:

> "the proposer is responsible for the accuracy of all information supplied, whether or not it is in his/her handwriting."

By appending a signature to a clause of this nature, the applicant is agreeing to be responsible for the errors of the person who completes the proposal form, whether such person happens to be an appointee of the insurer or not. Thus the agency existing between the insurer's appointee and the insurer for this purpose is transferred to the insured.

There is a shift from the actual authority of the agent to complete the proposal form, to an agreement between the insured and the insurer that, for such purposes, the agency is that of the insured. This is a short means of denying the authority of the agent, though done in an indirect way.

Sometimes, insurers have found it necessary to deny the authority of the agent expressly in the proposal. The denial

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[139] Blanchette v C.I.S. Ltd (supra) at page 577.

of authority may be as to the authority to complete the proposal form[140] or authority to receive any communications for the insurer. Some insurers have found it more expedient to use a combination of the two. In Gabel v Howick Farmers Mutual Fire Insurance Co.,[141] part of the declaration in the application reads as follows:

> "... the said applicant also agrees that the agent taking this application is to be considered his agent for the purpose of making this application, and not the agent of the company, and that the company shall not be bound by any statement made by or to such agent not contained in the foregoing application."[142]

This attempt, still having a bearing on the authority and knowledge considerations, seeks to deny the existence of such authority and specify that the knowledge of the agent is not imputable to the insurer. Unless made a written part of the application, the communication to the agent is agreed not to be binding on the insurer. The limitation, where relative to authority to receive information for the insurer, may also state that information conveyed to the agent but not passed on to the insurer and acknowledged in writing is ineffective against the insurers. This too is designed to divest the agent of any authority to receive information.

The limitation may also take the form of a restriction - on the authority of the agent to make representation for the insurer such as:

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[140] As in the example above.

[141] (supra), footnote 107, chapter 2.

[142] underlining supplied.

> "no statement made or promises or information given by an agent shall be binding unless reduced to writing, endorsed on the proposal and accepted by the company."

These ingenious attempts at sidetracking the reasoning and wisdom of some early decisions in this area of insurance law have not been without controversy. In the early years, to bring these terms of their agreement to the notice of the insured, insurers were in the practice of inserting them in the policy. The clauses must be brought to the notice of the insured to be sufficiently ad idem on the clause. To achieve the purpose of the innovation, and having regard to the policy as evidencing the contract of insurance, the clauses denying the authority of the agent and transferring the incidence of the agency came to be inserted in the policy. The policy states the terms of the contract and the clauses became part of the terms of the contract which the court had to interpret in determining the right of parties.

ii. A Binding Agreement?

The validity of these provisions has been the subject of litigation and some courts have upheld them on the ground that the courts are not to rewrite the contract of the parties and must deal with the contract as it is found. As said in the American case of Rohrbach v. Germania Fire Insu. Co.,[143]

> "we must take the contracts of the parties as we find them, and enforce them as read. By the one before us the plaintiff has so fettered himself as to be unable to retain ... the real essence of his agreement."

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[143] (1872) 62 N.Y. 47 at page 63-6 20 Am. Rep. 451 per Folger J.

These clauses found in the policy have been rejected by other courts and held to have no binding effect. The underlying reasons for this attitude were put in Kausal v. Minnesota Farmers' Mutual Insurance Assn.[144] as follows:

> "It would be a stretch of legal principles to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matters in hand, could be affected by notice, given after the negotiations were completed, that the person with whom he dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter."

The court further said:

> "To hold that, by a stipulation unknown to the insured at the time he made the application, and when he relied upon the facts that the agent was acting for the company, he could be held responsible for the mistakes of such agent would be to impose burdens upon the insured which he never anticipated. Hence we think that if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued."

The clauses inserted in the policy may be regarded as an effort by covenant to get the benefits and profits which agents bring the insurers, at the same time repudiate the relationship the agents sustain to the insurer and to set up that relationship with the insured without the insured's knowledge and consent.

Thus, clauses transferring the incidence of agency found in the policy of insurance tend to be unenforceable on the

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[144] (1888) 31 Minn. 17, 33, 16 N.W. 430, 47 Am Rep 76.

plausible ground of inadequate communication of it to the insured before the contract is made. After this early years determination, insurers changed their arsenal of missiles on the insured's coveted position in these matters. The objectionable clauses placed in the policies found their ways into proposal forms. By making it part of the application process, it could be argued to have been sufficiently brought to the notice of the applicant before the contract is made. In signing the application form, the applicant may be taken to have consented to the terms of the clauses seeking to establish the transfer of agency. This dispenses with the objection that the clause has not been brought to the notice of the applicant before the contract is made. In some instances, the approach was upheld and the clauses held to have binding force and thus the area where the insurer is responsible for the errors, omissions or misrepresentations of the agent is narrowed.

iii. A Difference In Wordings ?

In using clauses to limit the responsibility of the insurer for the errors and omissions of the agent, two methods or devices are stated usually employed. One is the express transfer of the agency to the insured where the agent completes the proposal form and the other is by limiting the authority of the agent to receive information on the insurer's behalf. Both these devices have been made use of and they are commonly found in proposal forms to give notice of the

limitations therein to the insured.

The facade that contractual transfer of agency takes in the nature of the second clause is regarded as "a legitimate right" of a principal to define the authority of his agent. The espoused view is that as long as the limitation is brought to the attention of the third party before the contract is made it is undoubtedly effective.[145] By regarding it as a "legitimate right" of the insurer, there is an attempt to distinguish this clause from the clause transferring the incidence of agency since that clause is obviously an exclusion clause.

This, as a distinction between the two clauses, is shown in Overbrooke Estates Ltd. v. Glencombe Properties Ltd.[146] where Brightman J. held that it is open to a principal to draw the attention of the public to the limits of the agent's authority. Thus, an express limitation on the authority of an agent could not be described as an exclusion clause as the limitation is a right of the principal. This shows that in English law, the two clauses are regarded as being different. However, as Merkin argues the distinction between exclusion clauses and limitation clauses is unrealistic and damaging, and the courts should treat both attempts to evade obligations in the same way.

The wordings of the limitation clause may induce a conclusion that the courts are justified in interpreting the

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[145] Merkin R.M., op.cit., pages 47 - 50.

[146] (1974) 3 All E.R. 511 (Ch.D).

clause not as an exclusion of the liability of the insurer for the acts falling within the agent's authority, but as narrowing the authority given to the agent to act for the insurer. However, in so far as the consequences of such a clause would include excluding liability of the insurer for certain acts of the agent, Merkin's contention seems reasonable that the two clauses should not be treated differently since they have the same effect.

The effect of the limitation clause is still that where the agent acts outside the scope of the actual authority given by the insurer, then the agency is not that of the insurer. The responsibility of errors will still be borne by the insured, being the third party in the arrangement. Since the objectives of the exclusion and limitation clauses are similar, if not identical, they should be both regarded as one attempt to avoid the consequences of the agency between the insurer and the agent and they should be submitted to the same test in their interpretation. This is particularly relevant in view of the fact that a declaration may embody both the limitation and exclusion clauses and it will be difficult to subject this single declaration to two different interpretations.

Merkin states that transferred agency clauses are unashamedly intended to protect insurers from the consequences of doing business through agents paid by commission and not fully trained in insurance law. The two clauses here, exclusion and limitation, are primarily designed to protect

insurers from the consequences of the agent's actions and in so far as they both have this protective orientation, they should both be treated as exclusion clauses.

iv. Interpretation of the Clauses

The use of clauses to exclude the liability of the insurer has done little to resolve the conflict that exist in this area of the law. There is still the conflict between protecting the insured's interest in the insurance contract and the need not to overlook the logicality of the insurer's position. The use of clauses of this nature tends to visit on the insured the burden of the errors of the insurer's agent instead of visiting such on the appointor. The insured is the weaker of the two parties to the contract of insurance and there is the need to evaluate these clauses and see how far they have further erode the insured 's claim. It is the commendable attempts to reverse the trend of judicial opinion on the concept and find in favour of the insured that led to the agency being transferred by agreement.

The remarkable persistence of the clauses in proposals is surprising in view of the judicial attitude to their construction. On many occasions the courts have shied away from making any pronouncement on the clauses. Many decisions were reached simply disregarding the effect of the clauses. In Ayrey v. British Legal and United Provident Ass. Co. Ltd.[147] the court was faced with a situation which makes a

[147] (supra), footnote 47.

pronouncement on the clause possible. The court simply disregarded by the clause in reaching a decision. Also the court in Stone v. Reliance Mutual Ins. Ass.[148] made no mention of the clause transferring agency to the insured. This shows an increasing disregard for the clause in the interpretation of insurance contracts.

The basis for this attitude of some courts is probably as indicated by Stuart J. in Whitney v Great Northern Insurance Co.[149] where it was said:

> "The learned trial judge took the view that the plaintiff was not bound by the stipulation in the application to the effect that the agent having filled up the application was to be deemed the agent of the applicant in as much as the clause has not been brought to the attention ... indeed it would seem that the situation would have been the same even if the clause had not been there. Where an applicant allows the agent to fill in the answers and signs the application without taking the trouble to read it to see if the answers are correct it would appear to be just that to that extent the agent should be treated as the agent of the applicant."[150]

This dictum makes superfluous the inclusion of clauses transferring the incidence of agency in view of the judicial trend to hold the agent an agent of the insured. The series of formulation made as a result of Newsholme may be taken as still holding without the clauses.

But it is to be noted that on some occasions where the courts have made mention of the clauses, it is to rule out their enforceability. This attitude of declaring the clause

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[148] (supra), footnote 54, chapter 2.

[149] (supra), footnote 110.

[150] ibid. at page 1162.

nugatory is prevalent in the American jurisdictions and it is not surprising that the courts in Canada are increasingly adopting that attitude. Merkin indicates that this attitude of disregarding a clause apparently agreed to by signature is alien to English Common Law. Merkin indicates the different stand of the court in Commissioners of Customs and Excise v. Pools Finance (1937) Ltd.[151] where it was held that rules cannot be used to alter facts. Lord Denning said:

> "the rule contradicts facts and is, to that extent, invalid ... the conditions cannot, under the cloak of contract, be allowed to speak that which is false. They cannot assert that black is white and expect the courts to believe it. [The rules] presume to define the relationship of the parties and to prescribe their rights and liabilities. This is no doubt, to a large extent, permitted by law, but it is subject to important safeguards. The conditions cannot alter the relationships of the parties, and they are subordinate to any terms expressly agreed between them ... the rules cannot alter the fact."[152]

The two clauses were considered in Graham v Ontario Mutual Insurance Co.[153] and the court was prepared to hold the clauses ineffective. Rose J indicated the unjust and unreasonable operation of the clause in the particular circumstances of the case and possibly generally too.[154] This same conclusion was reached by the court in Gabel v Howick Mutual Insurance[155] where the court held a similar clause ineffec-

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[151] (1952) 1 All E. R. 775 (Eng. C.A.)

[152] ibid. at page 786.

[153] (supra), footnote 101, chapter 2.

[154] ibid. at page 365.

[155] (supra), footnote 107, chapter 2.

tive on the facts of the case.

These clauses transferring agency have not been of much use in resolving the conflicts here. The wordings and the interpretations of the clauses yield different stands. In so far as there is no uniformity in the appearance and the construction of the clauses, they serve little purpose in the context of transferred agency.

B. Basis of the Contract Clause

The clauses transferring the incidence of agency either expressly or by limiting the authority of the agent have been variously interpreted by the courts. The literal interpretation given to the clauses in some cases and the attempts to displace the clauses are generally shaped by the attitude of the courts to the basis of the contract clause. In many of the cases referred to above, there were clauses of this nature and it is in the light of the basis clause that many of the courts' pronouncements were made.

Unlike the previously mentioned clauses, basis of the contract clauses do not adopt varying forms. The clause is usually in the form of a declaration that the statements in the application are true and shall form the basis of the insurer's liability. In Van Schilt v Gore Mutual Insurance Co., the clause was worded as follows:

> "All statements in this application are true and the applicant hereby applies for a contract of personal property insurance based on the truth of these statements."

This is basically the form that the clause takes. The clause

is often found in proposal but becomes incorporated in the policy with the proposal by reference.

Speaking of the effect of such a basis of the contract clause, Sutton puts it that any incorrect answer to any question in the policy is fatal to any claim by the insured under the policy.[156] However, before this effect can be achieved with the clause, there must have been a clear intention to create a warranty and the warranty must be made part of the policy by reference. Jess puts it that the clause has the effect of making every answers in the proposal a warranted answer and gives the insurer the right to repudiate liability once there is any breach.[157]

In insurance law, a warranty is a term of the contract made which entitles the insurer to repudiate liability on the contract once there is a breach of any of its terms.[158] Where a warranty is created, it becomes operative regardless of the materiality of the questions asked, the good faith of the insured and any other compelling circumstances which might otherwise affect the liability of the insurer.

Applied in the context of the cases that have been discussed so far, it becomes apparent that a division can be made between the clauses transferring the incidence of agency

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[156] Sutton K.C.T., Insurance Law in Australia and New Zealand (Sydney: The Law Book Co. Ltd., 1980) page 35.

[157] Jess D.C., "Insurance Law Reform Proposals" New Law Journal (July 1984) vol. 134 at page 635.

[158] Dawson Ltd. v Bonnin (1922) 2 A.C. 413 (H.L.).

and the basis clause. The basis clause has not sought to transfer the agency to the insured but may have consequences similar in result to cases of transferred agency. The compelling observation here is that with the basis clause, the incidence of agency becomes less significant. To make a finding of liability against the insurer in such cases, it becomes irrelevant who completes the proposal form. The insured may be taken as having contractually promised the truth of the statements and it is on the contractual promise that any obligation may be established. In effect, the basis clause may be treated as a warranty and if so treated, dispenses with the recourse to the question of agency.

In the context of transferred agency, however, it is apparent that this seemingly clear exposition has done little to resolve the conflicts identified but rather compounds the doubts on the applicable rules. The courts have not generally treated the basis of the contract clause as warranties and have given a somehow different meaning to the usage of the clause in this area of insurance law. In Van Schilt v Gore Mutual Insurance Co., there was a basis of the contract clause signed by the insured. The lower court found the wrong answers immaterial by reason of the basis clause. The learned judge said:

> "was this misrepresentation material to the risk? By certifying that it was true and his application was based on its truth, the plaintiff made it so. The truth of the representation is by this certificate made a condition precedent to he formation of the insurance contract ... Since it was not true, there is no contract."

With a reasoning along the line of warranties, the issue of materiality should not have come up for determination before the court. The case went on appeal and the appellate court saw the issue in a different light. It was said that an insured who has signed the basis clause is bound by the answers and that:

> "the onus of proof is on him to establish that despite the actual wording of the application form, he did not, in fact, give the answers written down and attributed to him. The appellant has not established this."

This may not be taken as a misstatement of principles. There have been cases in which such a viewpoint prevailed and an instance is Smith v Cooperative Fire and Casualty Co. There it was stated:

> "... where the assured has signed a proposal or warranted the accuracy of a declaration, the onus of proof is on him to establish that despite the formal appearances, he did not in fact give the answers written down and attributed to him. The proposal is itself prima facie evidence against him as to what he said to the agent. The plaintiff has met that onus and rebutted the prima facie case."[159]

With these dicta, it may be inferred that where the agent completes the proposal form for the insured, the basis of the contract clause does not create a warranty against the insured and only a presumption is thereby established. This presumption may be rebutted if the insured can show positively to the court that the incorrect answer has been the sole fault of the agent.

With the relegation of the status of the basis clause, some question arise. On proof of the sole fault of the agent

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[159] ibid. at page 644.

in inserting incorrect answers, does the insured get relief in the face of the basis clause? If the question is answered affirmatively, then it may be said that the basis clause is due for a decent burial in the context of transferred agency. The intendment of the clause is to make the absolute truth of the answers a condition precedent to the liability of the insurer. This obvious purpose is now being curtailed to lack force where the fault is not that of the insured. On the other hand, a negative response to the question kowtows the wisdom of these mentioned cases.

Fuelling a conclusion that, in this present concern, no conceptual purity can be found in the reality of the basis clause is the observation of Lord Denning in Stone v Reliance Mutual Insurance Association. As noted earlier, Lord Denning in the case seems to have endorsed the view that the implied undertaking of the insurer's agent may override the signature of the insured on the proposal. The court found an innocent misrepresentation involved in the case and thereby held the insurer unable to rely on the printed clause in the proposal to exclude liability. Does this observation have any bearing on the basis clause where the insured can lay claim to such an innocent misrepresentation? In England, the proposals of the Department of Trade and Industry issued on the Insurance Law Reform Bill provides that where the insurer is given any right in relation to warranties, the insurer is to be precluded from his right at general law for innocent misrepresen-

tations by the insured.[160]

It is pertinent at this juncture to recall that the basis clause has been another clause of age-long use. An analysis of the extent to which the clause affected the liability of insurers in the past might posit a concise implication of its use in this area of insurance law. It is in the search for some features of cohesiveness in its application that a resort is made to the early cases.

In Carlin v Railway Passengers Assurance Co.[161] the policy contained a clause making the application the basis of the contract and declaring the contract void if there were any misrepresentations in the application. The court found that there was no misrepresentation because the proposal was signed before the incorrect answers were inserted. This has patently eroded the meaning of the basis clause by introducing two new concerns, one relative to the time of signing the application and the other on the person who completed the application.

The unflattering treatment was again meted out to the basis clause in Gabel v Howick Farmers Mutual Fire Insurance Co.[162] There was a basis clause signed by the insured. The court gave consideration to the failure of the agent to properly carry out the subject of the given instructions. The court concluded that the disclosure to the agent of the

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[160] Jess D.C., "Insurance Law Reform Proposals" New Law Journal (July 1984) vol. 134 at page 636.

[161] (supra), footnote 103, chapter 2.

[162] (supra), footnote 107, chapter 2.

relevant information overrides any clause in the policy. The judgement used the knowledge of the agent to deny any effect to the basis clause.

Smith v Cooperative Fire casualty Co.[163] has been noted as indicating that the basis clause ceases to have any intended effect where the insured can discharge the onus on the incidence of the errors in the application. Sleigh v Stevenson[164] also demonstrates the tendency of the courts to overlook the basis clause in reaching decisions. There was a basis of the contract clause in the case but the court was more prepared to use other clauses in the application to reach the same decision.

These readings indicate an euphemistic attitude by some courts to the basis clause. This euphemism has not been shared by some other courts, however, and the central character of some of these decisions has been the hybrid use of the basis of the contract clause and a concept of transferred agency. In Bonneville v Progressive Insurance Co. of Canada[165], there was the usual basis clause. The court quoted passages from Newsholme on the question of agency and a declaration of the truth in the application. The court then held that the insured failed to disclose facts required to be stated in the contract and thereby loses the right to recover indemnity.

The hybrid reasoning was made in Le Blanc v Cooperative

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[163] (supra), footnote 125, chapter 2.

[164] (supra), footnote 66, chapter 2.

[165] (supra), footnote 71, chapter 2.

Fire and Casualty Co.[166] The court found the agent who completed the proposal form a secretary of the insured thereby making the answers in the application those of the insured. There were some incorrect answers, and since the truth of the application is made the basis of the contract, the contract was held void under the policy.

While dissenting in Blanchette v C.I.S. Ltd.,[167] Ritchie J. indicated the approach in this respect. The insured's case is taken as resting on the validity of the application without regard to the person who completed the application for the insured. Reference was made to Thompson v Maryland Casualty Co[168] where it was said :

> "the question is not whether the statements were made by the assured or were filled up by someone else, or whether they were made in good faith and without knowledge of their want of truth, but whether the policy was obtained and a contract entered into upon the basis of the statements. If they form a basis of the contract of insurance, they bind plaintiff when suing to enforce the contract."

This was put in St. Regis Pastry Shop v Continental Casualty Co.[169] that:

> "where an insurance policy has been obtained on the faith or representations in a written application, which are false, the policy is void whether or not those statements were made by or on behalf of the insured."

These cases in which the courts upheld the basis clause all follow a pattern. The issue of the agent completing the

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[166] (supra), footnote 75, chapter 2.

[167] (supra), footnote 121, chapter 2.

[168] (1906) 8 O.W.R. 598 at 601 (Ont. C.A.).

[169] (1929) 1 D.L.R. 900 (Ont. S.C.).

application form is usually considered first. On this, two different thoughts emerge. The first is that which adopts the transfer of the incidence of the agency to the insured. These are cases indicating the answers given as those of the insured. The second line of thought has simply adopted the "warranties" reasoning and held the issue of the agency immaterial. For the purposes of the contract, the issue of who completed the form is viewed irrelevant in the light of the declaration.

These two lines of thought, however, converge on the implication of the basis clause. They simply deny that there is any liability on the insurer since the truth of the proposal has been made a condition precedent to such liability. This, as an implication of the basis clause, is what Van schilt v Gore Mutual Insurance Co.[170] accepted as a governing principle but subjected to the "onus of proof" qualification. It is the implication of the basis clause that the case subjected to the onus of proof qualification and, in this sense, it is difficult to classify the case as following any of the two streams of thought on the basis clause.

Furthermore, other cases have subjected the basis clause as a whole to the agency test. The basis clause is deemed to assume importance only after the incidence of agency has been determined against the insured. These cases, however, upheld the innocent position of the insured and affixed the insurer with liability for the agent's error. With this approach, the

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[170] (supra), footnote 87, chapter 2.

basis of the contract clause becomes less important and might not even be considered by the court.

While the rationale of these reasoning are appreciated, judicial detailing of them have led to much dissatisfaction. There is no clarity on the issues which the courts address first and regard as of paramount importance in the circumstances. Where emphasis is placed by the court on the basis of the contract clause as an initial concern, the conclusion presents suffering and unsavoury effects on the insured. Whereas, an initial evaluation of the incidence of agency may lead to an entirely different conclusion. The basis clause has also been used with the concept of transferred agency in an incomprehensible manner.

A division and clarity of implication sought in the basis of the contract clause and the reality of the transactions thus become impossible. An observation of a rooting confusion become inescapable. Should the insured not be bound by a declaration of the truth of the proposal? On the other hand, should the insured suffer for what may be properly described as an error of the insurer? The latter question assumes importance where there is a consideration of the circumstances involved in each case. The insured may not know which declaration has been signed. The errors in the application may not be attributable to the insured and the agent may even have authority from the insurer to complete the proposal form.

It is between these two burning question that the case

law has been sandwiched in an argumentative manner. The legislature has thus become burdened to intervene and make a definitive stand possible.

III

Legislative Attempts At Reform

i. Canada

The first noticeable feature of the insurance industry in Canada is the division of the regulatory power over insurance. There is a division of regulatory powers between the Dominion and the Provincial governments. The judicial sanction to the divided legislative control over insurance was noted in Attorney General for Ontario v Policy-Holders of Wentworth Insurance Co.[171] and the observation is that in as long as the provinces are empowered to regulate the form and content of insurance contracts, the Dominion holds only the power to regulate companies by providing for their insolvency. Hall J. said:

> "the province has the sole power and responsibility to determine what degree of protection it will stipulate from insurers in favour of the insureds in the province ..."

The view is that the business of insurance is exclusively subject to provincial laws and the Provinces have exclusive jurisdiction to prescribe ways in which the business of insurance shall be carried on in the Provinces.

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[171] (1969) 6 DLR (3d) 545 (S.C.C.)

The various Insurance Acts in the provinces is evidence of this power and the effective use of it by the various provinces. Brown opines that with legislation governing the form and content of the various types of insurance contract, the insurance industry tends to be heavily regulated.[172] Brown asserts the design of this as a protection to vulnerable consumers of insurance. In the attempt to protect these consumers, the various Insurance Acts in force in the provinces have overhauled many of the previous unsatisfactory common law positions. Brown notes further that there has been considerable cooperation and coordination among the common law provinces in drafting and implementing insurance legislation. This includes legislation regulating contracts of insurance. This uniformity in the legislation led to the use of "uniform legislation" to refer to the legislation in the common law provinces. With respect to many aspects of the insurance law, there is a remarkable similarity in the legislation in force in the Provinces. However, the uniformity is not absolute.

The classification method adopted in the various legislative schemes divides insurance contracts into various categories for the purpose of regulation. As Brown states, the class into which a given contract falls determines which part of the legislation will govern it. The following represents the general classifications recognized in the various legislative schemes in the jurisdictions:

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[172] Brown C., "Restructuring The Insurance Act: The First Step to Insurance Law Reform In Canada" (1985) Canadian Business Law Journal Vol. 10 pg 386.

(a) life insurance;

(b) fire insurance;

(c) automobile insurance; and

(d) accident and sickness insurance.

There are other minor variations in the classification schemes such as weather insurance, livestock insurance and hail insurance but such variations do not come within the scope of the uniform legislation since they are not in use in all the provinces.

This marked characteristic of the uniform legislation, the classification of insurance contracts into various categories, has attracted a lot of criticisms. The main point listed by the critics is the incompleteness of consideration given to some aspects of insurance in regulation making. Brown lends support to the criticism by stating it unfortunate that the regulation of insurance contracts has been tackled in a piecemeal manner. The criticism is borne out by the different treatments of the isolated categories of insurance contracts.

Though the present regulations in Manitoba have attempted a comprehensive draft of governing rules in insurance law, the piecemeal regulation of insurance contract and the attendant incompleteness in cases of transferred agency has created doubts. Section 200 of the Insurance Act of Manitoba provides:

> "no officer, agent or employee of an insurer and no person soliciting insurance, whether or not he is an agent of the insurer shall, to the prejudice of the insured, be deemed to be the agent of the insured in respect of any question arising out of the contract."

The section, titled "presumption against agency", is read with section 148(1) which defines contract under the section to mean a contract of life insurance. This, as an attempt to tackle the problem of transferred agency has been reduced in scope to the class of life insurance contracts only.

How far is the provision applicable in other types of insurance apart from life insurance? Because of the restriction of section 200 to cases of life insurance only, it is necessary to consider the extent to which the provision has been made to apply as a general redress to the deficiencies of transferred agency. In respect of the accident and sickness insurance, section 230(19) provides in a similar vein:

> "no officer, agent, employee or servant of the insurer, and no person soliciting insurance, whether or not he is an agent of the insurer shall, to the prejudice of the insured, person insured or group insured, be deemed to be the agent of the insured or of the person insured or group of person insured in respect of any question arising out of the contract."

The Act exhibits a questionable departure from this provision in cases of fire and automobile insurance. Section 202 of the Act demonstrates the intended uniformity in the legislation in the provinces. It provides:

> "this part shall be so interpreted and construed as to effect the general purpose of making uniform the law of the provinces the legislature of which enact it."

Thus, it may be concluded that in life, accident and sickness insurance the uniformity in the regulation governing the contract is by design. The same could be said of fire insurance contracts though the uniformity in this respect is the oversight in providing such a presumption against agency.

Automobile insurance is an area of Insurance Law that has attracted a significant attention in Manitoba. This area of insurance classification is scourged with the same defect as the fire insurance in the legislative presumption against agency. Nothing in the Act, as presently understood, indicates any such presumption against agency in its scheme. Hill points out that the motive for such omission in this consideration by the legislature is open to question. Attempting to identify the cause of this omission, Hill states it to be the result of the nature of agents who deal with life and accident insurance.

Hill indicates that life insurance agents are employed by one company only whereas in general insurance, independent agencies as well as brokers are available to do business on behalf of a variety of insurance companies. Despite this, Hill submits that there is no logical reason why the Act distinguishes between the various types of insurance since similar problems and questions arise with respect to application regardless of the type of policy involved.[173]

Looking at the automobile scheme provided in the jurisdiction, one might be tempted to find a justification for the absence of the presumption in this instance. Automobile insurance is, in Manitoba, an area where there has been a marked governmental involvement. The main purpose of the no-fault automobile insurance is stated to be making compensation more widely and more swiftly available when

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[173] Hill D., op. cit., page 12.

personal injury or death is caused by a motor vehicle accident. This underlying reason for the government monopoly in the field makes it highly unlikely that the right of avoidance would be sought merely because of some traditional contract analysis.

Furthermore, as Hill points out, the application forms in automobile insurance are plainly and easily decipherable, the coverage is statutory and straight-forward, and the insurance can be handled through the mail without the assistance of an agent. This reduces the involvement of the agent in contract making. The reduced or absence of reliance on the agent here may have heavily influenced the omission of the presumption against agency provision from the part of the Act dealing with automobile insurance.[174]

Despite this contention, one should be sensitive to the observation by Hill that any reform in this area of insurance law, especially on the agent's authority to bind the insurer during the application stage, must also include the universal compulsory automobile insurance schemes that have developed. Hill premised this on the theoretical possibility that an

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[174] This is an area where there is no uniformity in the regulations governing the contract. In some provinces there are provisions dealing with such agency in automobile insurance The provisions read that no insurance agent or broker shall act as an agent of the applicant under the section. Hill points out that they might be construed to mean that an automobile insurance agent is not to be held the agent of the insured for the purpose of filling proposal forms. See Hill D., op. cit, page 14.

agent's act might still affect the claim where private agents handle the applications and submit them to the Manitoba Public Insurance Corporation. Hill observes that the agency issue could arise even under a system with considerably less agent involvement such as where the applicant relies on the agent's interpretation of the requirement for each category.[175]

Even though the involvement of an agent is not frequent here and thus there is a reduced chance of a problem arising thereby, there is still the need for a clear provision applicable in the event of such an occurrence. This issue become pertinent if one considers that an insured may effect additional automobile insurance and in such instance, the agent's involvement may become important. A decision of the status of the agent in respect of the compulsory automobile insurance coverage will definitely influence any decision on the additional coverage.

A most objectionable treatment of transferred agency in automobile insurance coverage is the provision in section 13 of the Automobile Insurance Act. The silence of the Act on the presumption of agency may be justified on the possibly removal of the conceptual difficulty involved through the removal of the participation of agents. However, where the problem arises, section 13 seems to have introduced further erosion in the skeletal protection available to the insured. Without any clean cut provision that the corporation shall be responsible for any such occurrence, section 13 provides:

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[175] Hill D., loc. cit.

> "no action or proceeding lies against any person other than the corporation for the purpose of enforcing any claim, or right in relation to the operations engaged in or carried on pursuant to this Act."

The practical difficulty arising with respect to the provision is noted by Hill with the question whether it was the intent of the provision to make the corporation responsible for the acts of all its agents or whether it merely takes away the right the insured may have against the agent. Hill observes, in addition, that it is always open to discussion whether section 13 applies to all private agents still engaged in the business to the extent of the supplemental coverage allowed in the compulsory automobile insurance scheme.[176]

This incompleteness in the legislative scheme cuts across Canada. In Quebec, this omission in the presumption against agency is equally glaring. It is against the backdrop of this hallmark of the incompleteness of the solution offered by the uniform legislation that we consider the implication of the presumption against agency offered in the Insurance Act of Manitoba.

The provision, presumption against agency, is intended to prohibit transferred agency. The use of the mandatory word "shall" makes it obvious that this effect is intended in the agent's act of completing the proposal form on behalf of applicants as well as in other aspects of the insurance contract. This opinion is shared by Hill who opines that the wordings of the section covers the application stages as it

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[176] Hill D., op. cit., page 12.

envisages "any question arising out of a contract".

Where this provision is effective, it makes the insurer liable for all acts of the agent and denies the right of avoidance of the contract based on any error arising from the agent's fault. The statement of the law here, being clear and unambiguous, seems the end of the consideration and the only issue seemingly remaining is the adoption of the provision in the omitted areas of classification. The provision introduced a form of supervision into the conflicts existing in the interest of the parties to the insurance contract. By stating that the presumption is to operate so that no agency will be deemed to the prejudice of the insured, it has introduced a measure of flexibility into the operation of its rule and provides a basis for tying together the facts and reasoning in every particular case.

The implication of the presumption against agency is borne out in Bird v New York Life Insurance Co.[177] There, the insurer's agent sought out the insured and succeeded in persuading the insured to apply for the reinstatement of a lapsed policy. The agent was told that insured had been suffering from rather acute indigestion. The agent then filled up the reinstatement application form in such a way as to conceal from the company officers the facts concerning insured's illness and medical attention. The near-illiterate insured was induced to sign the already filled form. In an action arising from the death of the insured, the court said:

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[177] (1920) 47 O.L.R. 510.

> "the company cannot be permitted, in the absence of fraud, to reopen the question as to whether or not the evidence upon which it acted in reinstating the policy was satisfactory. Having acted upon that evidence, obtained through the medium of its own agent and accepted as satisfactory, the company is estopped from afterwards alleging that, had it known more, the reinstatement would not have been granted..."[178]

It was further stated that:

> "It was also urged on behalf of the company that in filling in the answers to the questions [the agent] was not the agent of the company but of the insured. Evidence was given as to the nature and scope of [the agent's] authority; but, even if [the agent] exceeded the real authority by writing in untruthful answers to any of the questions, I cannot see that his doing so made him for any purpose [the insured's] agent..."[179]

The case was considered against the background of the Insurance Act of Canada.[180] Section 85 of this enactment provided a presumption against agency and the court made clear its reliance on it in reaching a decision. The case is an action on a life insurance policy and the finding of the court that the agency remains vested in the insurer may be seen as a direct consequence of the presumption.

The use of the presumption as a guide towards resolving the conflict of interests here was again made in Istvan v Continental Casualty Co.[181] The case involved a policy of accident insurance. Section 210 of the Alberta Insurance Act[182] provides for a presumption against agency and this

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[178] ibid. at page 518.

[179] ibid. at page 518.

[180] (1910), sections 84, 85, and 95.

[181] (supra)

[182] (1926) c. 31.

presumption was evidently used by the court in reaching a finding that the agency remains that of the insurer even though the agent completed the proposal for the insured.

ii. Nigeria

Insurance falls under the exclusive legislative list in the 1979 Constitution of this Federation. Thus, unlike the Canadian setting, it is within the competence of only the Federal legislature in the country to legislate on any aspect of insurance. The Insurance Act remains the most comprehensive legislation made to date on insurance and certain aspects of it touched on the marketing practices of the insurance intermediaries. Conforming with the traditional division of insurance business, the Act introduced some divisions in the Nigerian insurance market covering classes of insurance such as fire, life and accident.

However, with the vesting of insurance controlling authority in the jurisdiction on a single body, the federal legislature, the uniform legislation as we know it in Canada becomes removed. Furthermore, the interesting variation of the insurance scheme in Canada, the compulsory automobile insurance coverage, is not in existence in Nigeria as it does in a comprehensive manner in Canada.

In respect of automobiles, there is a compulsory insurance scheme introduced in 1945 with the Motor Vehicle (Third Party Insurance) Act. The Act, in section 3, requires every motor vehicle user to have in force a policy of insur-

ance in respect of third party risk. This is the only semblance of control exercised over automobile insurance as a separate aspect of the industry. There is no governmental controlled aspect of the insurance industry. There are a few insurance companies wholly set up and owned by the federal and the state governments but the structure of these companies is not different form that of private insurance companies.

No provision in the Insurance Act can be construed as having dealt with the problem of transferred agency and this is an aspect where the legislature has conspicuously overlooked the endeavours in other jurisdictions. There have been calls for a reform of this aspect of insurance law and it is the general consensus that this area of the law in the jurisdiction demands reform. Yet, with all the calls for reform of this aspect of the insurance industry, the legislature has been skilfully passive and thus left the issue of applicable principle a matter of pure conjecture.

CHAPTER III

TREATMENT OF OTHER INSTANCES OF TRANSFER

Transferred agency may arise at two stages in the agent's involvement with the insured. The first is in relation to the agent's acts done before the issue of the policy. The second is in relation to the agent's involvement after the issue of the policy. The first stage here reflects the involvement of the agent from the first contact with the applicant up to the time a completed application form is submitted on behalf of the latter. The previous chapter has identified the position where the agent effects coverage but in filling up the proposal, makes some material mistakes affecting the coverage granted. Hereunder, an attempt is made to identify other instances of possible transfer of the incidence of agency and how these areas of insurance law have been treated.

I

Instance of Potential Transfer

A. Agent Confirming Insurance Coverage

In insurance law, the dominant means of applying for a coverage is through the use of the proposal form. The insured completes the proposal form and submits it for acceptance to the insurer. In principle, this constitutes the offer for insurance which may be accepted by the insurer. Generally,

until an acceptance is made by the insurer, the contract of insurance is not complete. This theoretical position may be treated differently in the event of the agent's involvement. The agent may be given power to issue a temporary coverage to the insured after an application for insurance is made. This temporary coverage, often referred to as a "cover note" or a "binder" binds the insurer for the duration of its coverage. The superficial facade of acceptance of the proposal is sidetracked and the insurer may be liable for any loss occurring during the period of this temporary coverage.

Although normal contract procedures emphasise the need for an acceptance before there can be liability on the contract, the acceptance of the insurer is not needed for liability to run on the binder. Once the binder is issued by the agent, it constitutes a complete contract on which the insurer may be liable. However, for a liability under the binder, there must have been a vested authority in the agent to issue the binder.

Where the agent has the necessary authority and issues a binder, little difficulty is presented. The insurer will be liable, accordingly, on the authority vested. The potentials of litigation, in this connection, lie in the possibility of the agent exceeding this vested authority. The binder is a conditional coverage, usually for a temporary period. The agent may not have an authority to grant this coverage. Furthermore, where the agent has the necessary authority, the agent may grant an unconditional coverage to the insured on

behalf of the insurer. Where these occur, the contentious issue may be enforcing the coverage against the insurer.

In this concern, one may not hastily conclude on a similar treatment of the issues as in cases where the agent completes proposal forms. To operationalize the concept of transferred agency in this area, one may conclude that with no authority in the agent to grant coverage to the insured, it could have been done only as an agent of the insured. If so treated, the insured has no coverage and has no enforceable right against the insurer. Examining the concept closely, however, it manifests no comprehensible transfer context. The insured has done nothing to necessitate a transfer other than to trust the assurance of coverage given by the agent.

Agency has been stated as a relationship in which one person has control over another and in which the two are "ad idem" on their relationship as one of agency. In the present arrangement, the agent is subject to no form of control in granting a coverage to the insured. In acting, the agent has purported to act for the insurer and this negates any alleged consent on the part of the parties.

An application of the agency principles shows that no transfer of the incidence of agency can credibly be made here. The law has avoided the extraordinary difficulty in conceptualizing agency transfer in this instance. As Rendall

and Baer put it,[1] this is an instance of the application of more enlightened concept of agency power. The features of this enlightened system of treating a potential transfer have attained a goal- they have freed the insured from a ruinous position.

This enlightened system of treating a potential transferred agency context can be traced back to the case of Berryere v Firemen's Funds Insurance Co.and Murray.[2] In the case, the insurance agent was representing a number of insurance companies, including the defendant. The terms of the formal agency contract with the defendant evidence broad powers which included signing and delivering policies, binding the defendant and issuing cover notes. Like any typical policyholder, the insured did not know the terms of the agency contract with the insurer. It was understood that the insured had to wait for an acceptance from the insurer. The insured waited for this acceptance. Subsequently, the insured received a temporary coverage from the agent.

In giving the temporary coverage, the agent informed the insured that the application was approved by the insurer. This was not true. The agent had no express authority to give coverage to applicants and in doing so was acting contrary to

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[1] Rendall J.A. and Baer M.G., Case on the Canadian Insurance Law of Insurance (Toronto: Carswell Legal Publications,1988) page 378.

[2] (1964) I.L.R. 1-129 (Man Q.B.); affirmed in 51 D.L.R.(2d) 603 (Man C.A.)

the instructions of the insurer. The application was still being considered by the insurer and the insured had this binder in his possession when an accident occurred.

The court said on the extent of the authority of an agent:

> "as between the agent and his principal, the authority may be limited by agreement or special instructions, but as regards third persons, the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties."[3]

The court found that the agent had a wide authority to bind the defendant and this "abundant indicia of authority" binds the defendant to the commitment made by the agent. The agent was held to have the ostensible authority to represent the insurer's decision to the insured. The court stated further:

> "The rule would seem to be that assuming there is good faith throughout by the third party then, as between principal and the agent, it will be the agent's ostensible authority, not his actual authority, that will determine the extent to which he may bind the principal."[4]

The court found the insurer estopped from denying the agent's authority since the express authority of the agent will normally be supplemented by an implied authority. The agent had informed the insured that the application was accepted by the insurer, the agent had an apparent authority to make the representation and the insurer is bound by the

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[3] (1965) 51 D.L.R. (2d) 603 at page 609.

[4] ibid. at page 609.

representation that the insured was covered. The claim against the insurer succeeded.

This case established the relatedness of the agent's authority with questions of liability. The desirability of the approach lies, however, in the decentralization of "authority". There is no actual authority in the agent to confirm the coverage as done. The court applied a variation of actual authority which found expression in ostensible authority. This variation becomes crucial with its applicability even in the face of a limitation on the actual authority of the agent. The limitation is not effective against the insured. A protection of the interest of the insured can be seen in this and ostensible authority of the agent thus form part of the instruments available to deal with defences raised to a claim by insurers.

The subsequent prevalence of authority was shown in Jutras v Sun Alliance Insurance Coy et al.[5] There the agency too was acting as agent for a number of insurance companies. With an agency agreement, it has power to bind the defendant. The insured sought coverage from the defendant. A representative of the agency assured the insured that coverage was effective "as of that day". Evidently, there was no dispute on the power to bind the insurer. Before the issue of the policy, a loss occurred. In an action on the given assurance of coverage, the court held the insurer bound by the terms of the coverage assured by the agent. The court was

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[5] (1983) 4 C.C.L.I. 184 (N.B.Q.B.)

influenced by the fact that the parties had decided on the terms of the contract before the agent's assurance of coverage was given to the insured.

In this case, like in the preceding one, there was no actual authority in the agent to give a coverage when the application is still under consideration by the insurer. The decision has designed a mitigation of the problems confronting the insured on the available instrument of ostensible authority. The agent is seen as acting for the insurer and the confirmation of coverage becomes binding as an act of the insurer. The treatment of the issue here has not attempted to shift the consequences of the agent's errors to the insured. Instead, it has been dealt with on the usual role and presentation of the agent.

In Coyle v Ray F. Fredericks Insurance Ltd. et al.[6], the insured sought coverage on a replacement basis. In assuring the insured of coverage, the agent stated it to be on a replacement basis. In actual fact, the endorsement to the insured's policy provided coverage on the basis of the actual cash value of the insured boat. In claiming replacement cost from the insurer and the agent, the court held the insurer liable for the actual cash value of the boat and held the insurance agency liable to the insured for the balance of the replacement cost.

The treatment of the case is different from the others,

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[6] (1984) 7 C.C.L.I. 233 (N.S.S.C.)

though, it featured too the protection of the insured's interest. The decision may have been shaped by the fact that a policy was actually issued which covered part of the loss sustained by the insured. A more structured constraint in holding the insurer liable for the replacement cost may be found, however, in the court's observation that the agent undertook replacement cost coverage. Since it is an undertaking to provide a replacement cost coverage and not an actual confirmation of the coverage from the insurer, the insurer may not be held liable for the replacement cost.

The question of credibility may be seen as playing an important role in these decisions. Understandably, in these decisions, there were denials of such assurances of coverage. The witnesses had personal interests in the outcomes of trials and, thus variations in the given evidence may determine the slightly different approach of the court in Coyle v Ray F. Fredericks Insurance Ltd. et al.[7] In the cases, the courts had to choose between conflicting testimonies of the insured and the agent on the assurance given at that stage. Invariably, the evidence of the insured is usually favoured.

The issue of credibility also featured in Estavan Bricks v Gerling Global General Insurance Services.[8] In the case, the manager of the defendant was treated as an agent of the defendant. The manager gave an erroneous opinion on adequate coverage to the insured. The alleged oral assurance was denied

[7] (supra)

[8] (1984) 9 C.C.L.I. 229 (Sask Q.B.)

by the manager. The court found as a fact that the oral assurance was made by the manager, thus disposing of the issue of credibility. The oral assurance by the manager was treated as one emanating from the insurer and the issue was whether such an assurance was sufficient to preclude the insurer from denying liability.

The reasoning of this case accords with the earlier cases. There was no suggestion of any transfer of the incidence of agency. The court avoided the contentious issue of a transfer and the case was dealt with on the traditional approach of a dispute between the insured and the insurer. The agent was treated as an extension of the insurer's position. The case also shows an undertone of ostensible authority. The agent had some authority to act for the insurer and the particular act was seen as an adjunct of the actual authority. The apparent authority necessitated the language of estoppel in confronting the issue.

The court in Estevan Bricks v Gerling Global General Insurance Co.[9] saw the assurance by the manager as creating an "estoppel by representation", and quoting Bower and Turner,[10] said:

> "where one person(the representor) has made a representation to another person(the representee) in words or by acts and conduct, or (being under a duty to the

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[9] (supra)

[10] Bower G.S. and Turner K.A., The Law Relating to Estoppel by Representation (London: Butterworths,1966) page 4.

> representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.[11]

The insurer was held precluded from denying liability.

In dealing with agency issues, the courts have focused primarily on the protection of the vulnerable insured placing reliance on the insurer's representative. In doing this, the courts have relied on the authority of the agent. Where an actual authority can not be found in the agent, an apparent authority has been sought. With any apparent authority found in the arrangements of the parties, an estoppel is created which precludes the insurer from repudiating the responsibility for the agent's error.

B. Agent's Failure To Effect Requested Coverage

In relation to the agent's liability where there is a request to effect an insurance coverage and the agent fails to do so or effects a wrong type of coverage, the applicable rules have been established through the case law. The primary consideration is whether there is a relationship between the agent and the applicant to justify the imposition of liability on the agent. The basis of the agent's personal liability is

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[11] ibid. at page 231.

the special relationship between the agent and the applicant.

The treatment of this aspect of insurance law on the personal liability of the agent may be explained on the ground that the agent has not created any relationship between the insurer and the applicant. The agent has not involved the insurer in the arrangement and only gives the insured a promise to effect a certain coverage with the insurer. There is nothing connecting the insurer with the transaction and there could be no recourse to the insurer on a failure to effect the requested coverage. This fact alone makes the consideration here different from the preceding part.

The relationship needed to justify the personal liability of the agent here may be by contract, as a result of a fiduciary duty in tort or it may arise in equity. These as the various categories of the agent's personal liability have been enumerated in Fine's Flowers Ltd et al. v General Accident Assurance Co. of Canada Ltd. et al.[12] The case, in establishing the personal liability of the agent, has not attempted to conceptualize transferred agency as a basis for the imposition of liability. The concept of transferred agency could have been given effect by regarding the agent as an agent of the insured at the time the promise was made to effect coverage. The case has treated this issue differently, however, by removing it from agency context.

The liability of the agent arising in contract emanates

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[12] (1977) O.R. 529 (Ont C.A.)

from an undertaking by the agent to effect the coverage requested by the applicant. This undertaking is an issue between the agent and the applicant and does not involve the insurer. The undertaking may be expressly given or implied from the course of conduct of the agent and the applicant. It is on the basis of this undertaking that the liability is imposed on the agent. The undertaking become devoid of any agency consideration since it could have been made by any person irrespective of the status as the representative of the insurer. The undertaking is a promise on which reliance has been placed by the applicant and any detriment arising out of a default on the promise imposes liability. The liability is that of the agent, however, in so far as the promise is made by the agent without any reference to the insurer as the promisor.

Whether the issue of an agent failing to effect a requested coverage is seen as an agency or a pure contractual concern, the insurer is not involved in the arrangement. If the whole transaction is viewed as an agency question, it provides a basis for ascribing the incidence of agency to the insured. The transfer of the incidence of agency will enable the insured to seek indemnity from the agent as the principal for any fault in effecting the coverage. The interest of the insured may thus be protected.

This decorative approach has not been adopted by the courts, however. The cases have been treated as contractual

issues and thus avoided the contentions of agency transfer in the circumstances. As a contractual issue, the agent's undertaking is a contract with the applicant and the insurer becomes the uninvolved third party.

The basis of liability in tort may be related to this contractual approach. Though liability in tort predicates on negligence, there must have been an undertaking by the agent to use due care and skill before negligence may be identified. Necessarily, the liability of the agent arises from the action of the agent which is the failure to execute the subject of the undertaking with due care and skill. In Bell v Tinmouth et al. Mowatt et al.[13] Paris J. said in respect of a liability in tort:

> "Pursuant to an agreement with the plaintiff to act as his insurance agent [the agent] owed him a contractual duty to exercise reasonable care and skill in performing its services to him. The negligence by [the agent] which I have outlined constitutes a breach of that contractual duty and [the agent] is liable to the plaintiff for the damages which flow from that breach."

Making reference to Central Trust Co. v Rafuse,[14] the court stated the need for concurrent liability in contract and in tort. The undertaking by the agent to use due care and skill in procuring insurance, here, excludes any consideration of the insurer and liability must be examined as between the agent and the applicant only.

The third basis for imposing liability on the agent,

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[13] (1987) C.C.L.I. 184 at 196 (B.C.S.C.)

[14] (1986) 2 S.C.R. 147 (S.C.C.)

liability in equity arising from the special relationship between agents and applicants, has been criticized.[15] The criticisms are based on the special nature of equitable reliefs. But, even here, where liability is imposed, it arises because of the agent's individual involvement with the applicant. The fact of agency with the insurer is in no way determinative. The agent must be in a position that can be characterized a fiduciary one, which may be subject to a liability distinct from that in contract or negligence.

The same conclusion of the agent's personal liability applies where the agent effects an inadequate coverage or the wrong type of coverage. Usually, a claim on the requested coverage will not succeed against the insurer as the contract of the insurer is on the coverage effected and not on the intended coverage. Here, different rules may govern the situations but the basic trend is to find a distinct relationship between the agent and the insured. In Coyle v Ray F. Fredericks Insurance Ltd. et al.,[16] the insurer was held liable for the maximum amount on the policy issued. The agent was held liable for the remaining part of the claim. There was no suggestion of agency transfer.

In Chocian v Stony Plain Agencies Ltd,[17] the applicant

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[15] Tarr A.A., Australian Insurance Law (Sydney: The Law Book Co. Ltd., 1987) page 110.

[16] (supra)

[17] (1985) 12 C.C.L.I. 39 (Alta Q.B.)

sought insurance coverage through an insurance agency. The applicant was assured that the request "would be taken care of". The application was completed and the premiums on the insurance was paid. An insurance policy was issued to the applicants. On the occurrence of a loss, it was discovered that it does not cover the requested risks. The action to recover against the agency was allowed.

Reviewing these cases, the fact of a contractual relationship can not be denied in each instance. The agent had promised to procure a coverage and is expected to exercise due care in procuring the requested coverage. In the alternative, the agent is expected to inform the applicant promptly of the inability to effect the requested coverage. These provide adequate measures to protect the interest of the insured. There were no resorts to the agency transfer to absolve the insurers of liability. The whole transactions were viewed as products of different contractual agreements.

The language sometimes adopted by the courts in some cases might tend to cloud the statements made earlier about the position of Canadian insurance law on this subject matter. In Reardon et al. v Kings Mutual Insurance Co. et al; Gollan et al.,[18] the applicant had requested insurance on a hay barn. The insurer declined the risk and informed the agent accordingly. The agent did not communicate this fact to the applicant. The hay barn was destroyed by fire and was unin-

[18] (1981) 120 D.L.R. (3d) 196 (N.S.S.C.)

sured at the time. The court held that the insurer owed no duty to the applicant to advise him that the risk was declined since the applicant "was a customer of the insurance agent". The court found that:

> "... [the agent] is an insurance agent and [the applicant] was his principal with respect to the application for insurance ..." [19]

The beauty of the court's reasoning was in the application of agency principles. The court found the agent an agent of the insurer for other purposes of the insurance. The court noted that the insurer did not exercise control over the manner in which the agency is operated and said:

> " ... [the agent] worked for another insurer; he worked when he pleased and wrote business for whom he pleased; he had no quotas; he was paid only by commission by the two companies for whom he had acted and was not subject to the day-to-day control of [the insurer]. He was therefore not a servant so as to make [the insurer] liable for his failure to advise [the applicant] that the risk had been declined."[20]

It is surprising, though, why the court embarked on the elaborate voyage of holding the agent as acting for the applicant in failing to advise the applicant of the decline of coverage. The case could have been disposed of on the undertaking to procure the requested and the failure to do so. This same language, which may be read as suggesting agency transfer, was used in Kelly et al. v Wawanesa Mutual Insurance

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[19] ibid. at page 207.

[20] ibid. at page 213.

Co. et al.[21]

In that case, the insurance agent arranged for the issue of a homeowner's policy that excludes commercial use whereas the request of the applicant indicated commercial use of the property. The court held the agent, and not the insurer, liable to the insured for the subsequent loss. In holding the insurer not liable for the agent's negligence, the court said that the agent's acts as the agent of the insured in applying for a policy. It is worth noting the rationale of this decision. The application for insurance coverage was completed and initialled by the agent and thus the issue involved more than an undertaking to procure insurance coverage. The court said:

> " ... [the agent] was an agent of the appellant and not of [the insurer] in connection with the application for insurance. The appellants made a proposal for insurance by way of the application completed by [the agent]. The response to that proposal was the issuance by [the insurer] of the policy which set forth the terms and conditions upon which the proposal is accepted, one of which is that the policy does not cover loss or damage to any structure used in whole or in part for ... commercial purposes."[22]

This mixture of issues probably induced the language used by the court.

Where the agent fails to procure the requested coverage, there will be personal liability on the agent for the failure to exercise due care and skill. Where the agent attempts to

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[21] (1979) 98 D.L.R. (3d) 29 (N.S.S.C.)

[22] ibid. at pages 39 - 40.

procure the requested insurance but fails to satisfy the applicant's request, responsibility could be apportioned in a varying number of ways. There could be a personal liability on the agent for any consequential losses. Where a coverage is given by the insurer, but it is inadequate to satisfy the insured's need, the insurer may be held liable to the insured for the maximum on the policy as issued and the agent may be liable on the difference between the request and the issued policy.[23] The liability of the insurer arises from the issued policy and that of the agent from the undertaking to provide adequate coverage.

The design of this structure is apparently to safeguard the interest of the insured. To strengthen the insured's position, there is a possibility of rectification in the contract effected. Where the coverage effected by the agent is not the coverage requested by the insured, the insured may succeed in rectifying the policy issued by the insurer to coincide with the coverage requested.

In Piggott Construction (1969) Ltd. v Saskatchewan Government Insurance Offices,[24] the policy had been issued through an agent and excluded losses arising out of excavations. The loss which occurred was excluded from the ambit of the policy and the insured did not sue on the policy. The

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[23] Coyle v Ray F. Fredericks Insurance Ltd. et al. (supra).

[24] (1986) I.L.R. 1-2039 (Sask C.A.)

court found that an oral contract of insurance came into being between the insurer and the insured as a result of the undertaking by the agent. The court held that the contract was to insure the applicant against all customary builder's risks and to issue a policy in substantial conformity with the oral contract. The insured was held entitled to proceed on this oral contract of insurance. The court found that the agent acted generally as a representative of the insurer in the transaction. When the agent promised cover, an oral contract of insurance thus came to being between the applicants and the insurer.

The ending-line of these approaches is that the circumstances of the whole case will govern the approach by the court. The court could approach the issue as an agency issue and determine responsibility on the ostensible authority of the agent. Alternatively, liability could be made personal to the agent and where appropriate it could be apportioned between the insurer and the agent. The rectification approach is a moot point and the possibility of this in every individual case will depend entirely on the governing facts.

C. Payment of Premiums To Agent

In dealing with the issue of payment of premium, the courts have not been disposed to flouting the normal agency principles in the determination of the position where the agent receives premium for the insurer. Unlike the treatment

given to the position where an insurance broker receives premium,[25] it has not been customary to treat the agent as the agent of the insured for this purpose. The agent is the representative of the insurer with whom the public deals. As such representatives, premiums due on the insurance policy may be paid through the agents. Here, the payment may be made at the time of filling the proposal form or it may be made at a later date, after the issue of the policy. Where the agent receives the premium and misappropriates it, the now settled question is who is bound by the misappropriation.

Section 393 of the Insurance Act of Manitoba imposes an obligation on the agent to pay over to the insurer any premium received within fifteen days of the demand for such premium. This duty to pay over to the insurer any premium received by the insurance agent has also been imposed by legislation in the other provinces.[26] In Nigeria, an insurance agent must

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[25] In Norwich Winterhur Insu (Australian) Ltd. v Con-Stan Indu. of Australia Prty Ltd. (1983) 1 N.S.W.L.R. 461, it was held that payment of premium to an insurance broker did not relieve the insured of the need to make further payments to the insurer. This is the same position reached in Balent v National Insu Co. of New Zealand (1959) S.R. (N.S.W.) 275 where the court said that in the absence of an authority to receive such for the insurer, payment made to the broker can not be regarded as payment to the insurer. Tarr describes this as a logical outcome of the analysis of the parties' legal position as in the overwhelming number of cases, the broker will be acting as agent for the insured.

[26] This duty on the agent in the province of Ontario was considered in Phoenix Assu Co. of Canada v Bank of Montreal (1976) 9 O.R. (2d) 329 (Ont. H.C.) and it was said that section 355 of the Insurance Act of Ontario (1970) imposes a duty on the agent to hold in trust for the insurer premiums collected from the insured. Section 359(1) of the Insurance

transfer the premium received from the insured to the insurer within fifteen days of the receipt thereof.[27]

It is possible to distinguish the provisions in these two jurisdictions on the time of possible recovery of payments made to the agent. In Nigeria, the fifteen days is computed form the day the premium is received by the agent while the provision in Manitoba allows the agent to keep the premium until there is a demand for such and for fifteen days thereafter. Another distinguishing feature in the Insurance Act of Manitoba is the exclusion from its operation of contracts of life insurance.[28] There is no such restriction on the scope of the similar provision in the Insurance Act in Nigeria.

Where there is a breach of the provisions, is the principal bound by the payment made to the agent? It has been said that the consequence of the provisions above is that

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Act of Ontario (1980) still retains the provision of agent holding any premium in trust for the insurer and obligates the agent to pay it over to the insurer within fifteen days of a written demand for the premium. Section 340 of the Quebec Insurance Act provides "notwithstanding any agreement to the contrary, the insurance agent is the mandatary of the insurer when he collects premiums from the insured ..."

[27] section 26 Insurance Act (1976).

[28] This has been explained on the ground that the life insurance agent's authority is much more narrow and limited than that of other insurance agents. Thus, any agent who collects unauthorized premium does not bind the insurer by such receipt. Until the premium is actually accepted by the insurer, the contract of life insurance is not completed. See Firth v The Western Life Assu. Co.(1955) O.R. 56-72 (Ont. H.C.).

payment is received on behalf of the insurer even where this is not explicitly stated.[29] However, section 390 of the Insurance Act of Manitoba provides that payment in cash to an agent of the insurer of a premium due under the contract of insurance shall be deemed a payment to the insurer.[30] The section too made its provisions not applicable to life insurance contracts. While the section is restricted to payments made in cash to the insurance agent,[31] it may be argued that the section is applicable to a payment made with an honoured cheque.

The next concern is whether there is a time within which

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[29] Brown C. and Menezes J., "Insurance Law in Canada" (Toronto: Carswell Co. Ltd., 1982) page 54.

[30] In Australia, section 14 Insurance (Agents & Brokers) Act 1984 (Cth) provides that where a contract of insurance is arranged or effected by an insurance intermediary, payment to the intermediary is a discharge as between the insured and insurer of the liability of the insured to pay the premium.

[31] In Frank v Sun Life Assu. Co.(1893) 20 Ont App. Rep. 564, it was stated that prima facie, premiums are payable in cash. The reason for this is because of the conditional nature of a payment made with cheque. In Skey v Mutual Life Association of Australia (1894) 13 N.Z.L.R. 321 (Aust C.A.), it was established that payment with a cheque is only a conditional payment which revives the original liability of the insured in the event of a dishonour. Steinman v Snarey et al. (1987) 26 C.C.L.I. 78 (Ont. D.C.) has indicated, however, that the court may still hold the insurer liable where the payment of premium is made to the agent by cheque as it is still within the agent's implied authority to accept cheques. In the case, it was said that the agency agreement did not prohibit the agent from accepting a cheque payable to him personally since the agent is authorized to accept cash. Reliance was placed on Clay Hill Brick & Tile Co. v. Rawlings (1938) 4 All E.R. 100 (K.B.) and a conclusion was reached that where the agent accepts a personal cheque which is honoured, there is a payment in cash.

the payment of premium to the agent will bring it within the operation of the section. The section made use of the phrase "due in respect of a contract issued by the insurer", and a contention well accommodated thereby is that the section does not apply to premiums paid when the application for insurance is made.

The provision may be interpreted so as to create separate rules governing payments made at the time of the application but before the issue of any contract of insurance. This interpretation makes the application of the Act uncertain in respect of issues of this nature. It seems slightly unrealistic though, given the duty imposed on the insurance agent by section 393 of the same Act which apparently is not so restricted in its scope. Further, there is no rational basis for such artificial distinction on the time of payment. This is especially so in view of the case law in Canada that insurers may sue to recover any unpaid premiums from the insurance agent.[32]

In Nigeria, there is no expressed provision in respect

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[32] The cases of Guardian Insu. Co. of Canada v Gates (1984) 9 C.C.L.I. 131 (Ont. S.C.) and A.A. Mutual Insurance Association Ltd v Specialty Underwriting Services Ltd (1985) 9 C.C.L.I. 183 (B.C.S.C.) establish that the agent may be held accountable to the insurer for the premiums collected on behalf of the insurer. It should be noted that the former case was decided with reference to section 355 of the (1970) Insurance Act of Ontario which is similar to section 390 of the Insurance Act of Manitoba. The agent was held not liable in the case for the return of the premium collected by reason of the circumstances of the case and the fact that there was no contract of agency between the insurer and the agent.

of who bears the loss where the insurance agent misappropriates the premium. It will be unproductive, however, to be unduly critical of this omission in view of the numerous decisions on this point shaping the same conclusion. The same position ensured by statute in Manitoba may be worked out in the traditional case - by - case manner. In U. A. C. v Owoade[33] this was dealt with as a fraud of the insurance agent for which the principal is liable. There it was expressed that where the agent misappropriates any money collected on behalf of his principal, the principal is liable to any involved third party. The insurer is liable even though the premium was never received from the agent.

This traditional view of the courts on premium was restated in Onwuegbu & Anor. v African Insurance Co. Ltd.[34] where Kaine J. held that:

> "... if the agent misappropriates the amount which he collected on their behalf, it is their own lookout and not that of the insured."[35]

This liability of the insurer as the principal was again reaffirmed in Esewe v Asiemo & Anor.[36] There, the plaintiff had insured his car with the second defendant through the first defendant. The first defendant was an agent of the second defendant and premiums were paid to the first defend-

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[33] (1955) 2 W.L.R. 13 (P.C.).

[34] (1965) N.M.L.R. 248

[35] ibid at page 252.

[36] (1974) 4 U. I. L. R. 355.

ant. Upon a loss, the insurer denied liability on grounds including, inter alia, the non receipt of premiums paid by the insured. Atake J, held the insurer was bound by the action of the agent and that if an agent misappropriated the premium collected on behalf of the insurer, the insurer was still liable on the contract. Atake J. said further:

> "I have not been satisfied of this fraud alleged against [the agent] but assuming that he was fraudulent and that he did misappropriate the premium and thus commit a criminal offence, he was nonetheless the servant of the second defendant acting within the scope of authority in the execution of his master's business. U. A. C v Owoade is authority for saying that in such a case liability to a third party still lies with the master."[37]

Having regard to the relationship of the agent and the insurer, a conclusion of liability on the part of the insurer seems defensible here. Furthermore, payment of premium to the agent was made because of the authority that the agent has to receive such on behalf of the insurer. Being an agent of the insurer and having received the premium on behalf of the insurer, the agent has thus acted for the insurer and the conclusion is that the insurer has received such payment from the insured.

The next issue of interest here is whether this conclusion shows any appropriateness. Where a finding is made against the insurer and the insurer cannot claim such premiums from the insured, where does the insurer recover the premium? If an avoidance of the policy is sought as a result of non

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[37] ibid. at page 358.

payment of premium, does the insurer have a right against the agent for the loss sustained thereby?

A duty has been imposed on insurance agents to remit premiums to the insurer promptly and the insurer may have recourse against the agent for the enforcement of this duty. The premium is collected for the insurer and the insurer can sue the agent for the recovery of the premium. In INA Life Insurance Co. of Canada v Stoyles Insurance Services Ltd.,[38] the insurer brought an action against the agent to recover the premium it did not receive from the agent after it was paid by the insured. Part of the premium had not been forwarded by the agent in accordance with the arrangement of the parties and the insurer was held entitled to judgement for the sum less the commission of the agent.

Having the right to receive the premium from the agent, the insurer can not use the non payment of premium as a ground of avoiding liability under the policy. The conclusion of liability against the insurer is strengthened by the fact that this duty, which is enforceable and punishable under the Act, is owed to the insurer and not to the insured. Where the insurer has sustained any loss as a result of the failure of the agent to remit the premium paid within the stipulated period, it is the submission here that the insurer should have a cause of action against the agent for such losses arising out of the agent's breach of duty.

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[38] (1987) 26 C.C.L.I. 290 (Nfld. S.C.).

In holding the insurer responsible for the errors of the agent in respect of premiums, one should be mindful of the fact that liability here is implicitly based on the authority of the agent. Even where the agent lacks an actual authority to receive payment for the insurer, the presentation of the agent as a representative of the insurer vests in him an apparent authority to receive payment of premiums for the insurer. In the absence of any known limitation in this respect, the insurer becomes bound by the receipt through the agent.

D. Giving Notice Of Loss Through The Agent

Proof of the loss sustained is an important element of the right of recovery against the insurer and the liability of the insurer is contingent on the receipt of the notice of such loss. The policy may provide for the giving of notice of loss to insurers within a period after the loss. Where there is no provision in the policy governing the time for giving notice of loss, it is expected that notice will be given within a reasonable time.

Where the policy stipulates a time limit for giving notice of loss to the insurer, a strict compliance with the stipulation is necessary as a condition precedent to the liability of the insurer. In Royal Bank of Canada v Safeco Insurance Co. of America,[39] the insurer was able to avoid

[39] (1988) 33 C.C.L.I. 47. (Alta Q.B.)

liability by reason of the insured's failure to give notice of loss to the insurer within the period stipulated in the policy.

Stipulations as to the time of giving notice of loss have been upheld by the courts and the rationale is stated to be the prevention of fraud and deception upon the insurer. By receiving notice of loss within the stipulated time, the insurer has the opportunity to make investigation into the loss and determine the need to pay or defend the claim put forward by the insured.[40] In National Gypsum (Can) Ltd. v Acadia Insurance Co.,[41] the policy contained a provision that notice of the loss must be given to the insurer without delay while the applicable statutory provision provided that written notice of the loss was to be given forthwith in writing to the insurer. The court observed that by failing to give notice, the opportunity to inquire into the matter while the matter was still fresh was lost and this is of great importance to the insurer.

With the need to give notice of loss within the stipulated time or a reasonable time after the loss came the question of who is entitled to receive such notice of loss. Notice may be given to the insurer personally but it is not in all cases that such notice is required to be given to the

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[40] Appleman J.A. and Appleman J., Insurance Law and Practise (St. Paul, Minn.: West Publishing Co., 1981) Volume 3, section 1391.

[41] (1955) 18 D.L.R. (2d) 179 (N.S.S.C.)

insurer personally. The duty on the insured may be discharged by giving notice of loss to a duly authorised agent of the insurer. This brings in again the question of the authority of the insurance agent.

Where the agent has authority to receive notice of the loss, a notice given to the agent is valid and effective against the insurer, even if the notice is not communicated to the insurer. Where the agent has no authority to receive such notice of loss, but such notice is given to the agent, the notice is effective where it is actually communicated to the insurer. The problem of transferred agency may arise, however, where the agent lacks authority to receive notice of the loss from the insured and on receiving such from the insured, fails to communicate it to the insurer. In effect, the agent may be seen as acting contrary to the instructions of the insurer and doing so in this instance, by receiving notice of loss, could only have been done as an agent of the insured.

A problem of the same gem may arise where there is a specified means of giving notice in the policy of insurance. The question here is whether the notice of loss given to the agent is enough compliance with the provisions of the policy. In the absence of information tending to establish the contrary, an insured has been held entitled to assume that the agent through whom the contract of insurance is negotiated has authority to receive notice of the loss. The insured is not

affected by any absence of actual authority to receive such in the agent. Notice given to the agent is binding on the insurer even where the agent has ceased, without the knowledge of the insured, to be the agent of the insurer before the happening of the loss.

In Marsden v City and County Assurance[42], the policy of insurance was effected through a local agent of the insurer. The policy provided that in the event of a loss, an immediate notice is to be given to some known agent of the insurer. After the issue of the policy, the local agent ceased to be an agent of the insurer, but this was not known to the insured. Notice of a loss was given to the agent and this was held to be sufficient notice within the policy. Erle C.J. said:

> "no notice, however, was given to the plaintiff of the transfer, or that Lewis [the agent] has ceased to be the defendants' agent. I think that under the circumstances, the defendants are not entitled to contend that notice to Lewis was not a notice to them"[43]

The case threads a way in the area of transferred agency in respect of giving notice of loss. It has prevented contentions on the incidence of agency where the two elements involved are the failure to communicate notice of loss directly to the insurer and the involved agent was known in the course of the transaction as an agent of the insurer.

Where the agent is the person through whom the contract

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[42] (1865) L.R. 1 C.P. 232.

[43] ibid., at page 239

was effected, in the absence of actual knowledge of lack of authority to receive such, the insured is entitled to give notice of the loss to the agent. This implies that notice to a known agent of the insurer with an apparent authority to receive such for the insurer, is valid in the absence of anything to the contrary. The agent has an option of letting the insured know of the lack of authority and the failure to do so will result in the liability of the insurer.

The second consideration is the position where there is a specified means of giving notice of loss. The policy may provide that notice must be given to the insurer at its head office within a certain period of time. If notice is given to the agent in this circumstances, such will be valid if the agent duly transmits it to the insurer within the stipulated period.[44] If the agent fails to transmit the notice to the insurer or fails to transmit it within the stipulated period, the position is that no valid notice is given to the insurer. As Appleman puts it, "oral notice to the agent is not sufficient compliance by the claimant with the policy requirement."[45]

This position is brought out in the case of Brook v Trafalgar Insurance Co. Ltd.[46] which has become authority for

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[44] Gill v Yorkshire Insurance Co. (1913) 24 W.L.R. 389.

[45] Appleman J.A. and Appleman J., Insurance Law and Practise (St. Paul, Minn.: West Publishing Co., 1981) Volume 3, section 1449.

[46] (1947) 79 Ll. L.R. 365

the view that a local agent has no usual authority to waive a condition concerning the giving of notice of loss to the head office of the insurer within a certain period. There, the policy provided that notice of an accident or loss must be given in writing to the insurer at its head office within seven days of the loss and that failure to do this will result in the forfeiture of benefits under the policy. A loss occurred and this was reported to the insurer's provincial agent. The insured was given a claim form which was returned to the agent sixteen days later. It was held that the claim was out of time and that there was no evidence that the agent had authority to waive an express condition of written notice being sent to the insurer's head office.

Any criticism of the reasoning of this case has to be done with great caution in as much as the insured even defaulted in giving a written notice to the agent within the stipulated period of time. However, the hackneyed question here is whether the notice given to the agent can override the consistent failure of the insured to communicate such notice to the head office of the insurer as required in the policy. The express provision of the policy has denied any authority of the agent in respect of receiving notice of loss. The earlier observation is that knowledge of an insurance agent may be imputed to the insurer. How does this contention affect the conclusion reached in this case? Notice of the loss was given to the agent within the stipulated time and consider-

ation of a possible imputation of knowledge of the agent to the insurer might be helpful here.

In making any categorical statement, much will depend on the knowledge of the insured on the extent of the agent's authority to receive the notice of loss. If the insured had knowledge of the policy provision as to the means of giving notice, then there is a known limitation on the authority of the agent to receive such. No imputation of the knowledge of the agent will be made where the insured knows or has reason to believe that the information will not be communicated to the insurer and such knowledge is evidenced by a knowledge of the lack of authority in the agent to receive notice of loss. The question thus, will be whether the insured has knowledge of the defect in the authority of the agent or the policy provision dealing with the notice of loss. This is a question of fact to be determined according to the circumstances of each case.

How does this generous approach to the issue of notice of loss fit into the general overview so far presented? Where there is authority in the agent to receive the notice of the loss, the agent receives such notice and fails to communicates it to the insurer, the conclusion is that the insurer is liable to the insured on the policy as if the insured actually communicates it to the insurer in person. The insurer may then seek an indemnity for such liability from the agent and the agent may have an errors and omissions insurance coverage to

fall back on in the event of an insolvency.

Where the agent lacks an authority to receive such notices but does so on behalf of the insurer, the position has been identified as depending primarily on the kind of agent involved and if there is any policy provision in respect of this. If the agent is the same agent through whom the insurance was effected or a known agent of the insurer, then the insurer may be affixed with such notice and held liable on the policy. The insurer may still have a recourse against the agent.

Where there is a policy provision known to the insured, on the means of giving notice of loss, any notice given to the agent is ineffective against the insurer. The agent too may not be held liable since there is nothing indicative of fault on his part. The fault lies solely with the insured. The moot point here is whether the insured may be held to be at fault if he does not know that notice of loss may only be effectively given to the insurer at the head office. The lack of frequency in the occurrence of this as an event makes it a very minor consideration but it is suggested here, that in such circumstances, a duty should be imposed on the insurance agent to communicate such notice to the insurer within the term of the policy, or to inform the insured promptly of the need for actual communication of such notice to the insurer at the head office.

Where the insured does not have knowledge of the means

of giving notice as provided in the policy,[47] the duty on the agent to enlighten such insured may play a paramount role. On informing the insured of the need to communicate directly with the insurer, the insured has an opportunity of doing so. Without such information, many insureds will rely on the communication to the agent as being sufficient. Where there is no such knowledge and no enlightenment by the agent on the proper way of giving notice, the view is that the agent should be made liable for any loss arising thereby on the policy.

In making the agent liable, however, two problems are presented. The first is on the solvency of the agent to meet the insured's claim and the second is on the basis of the liability of the agent to the insured. There is presently no duty on the insurance agent to enlighten members of the public on how to give notice of loss. Failure to do this by an insurance agent may not result in liability for any loss arising thereby. Yet the consequences may be of importance to the insured.

These problems may be met by imposing liability on the insurer. The basis of the liability will be the lack of knowledge of the extent of the authority of the agent. In adopting this, however, two areas have to examined carefully.

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[47] This kind of claim may be made by people of little education who may have little or no opportunity of knowing the provisions in the policy. Considering the literacy level in Nigeria and some other third world countries, this is a claim that should be protected in the law.

The first is how to ensure that the approach is not used to achieve an otherwise unjust claim. The second is how to protect the interest of the insurer in respect of such liability. The approach is necessary to protect the interest of the insured in the event of no fault on his part. The need for fairness may be balanced against the envisaged problems by making it a strict duty on the insurance agent to inform the insured promptly of the absence of authority in him to receive such notices.

Where the insured claims to have no knowledge of the policy provision, if the duty imposed on the agent is well performed, the agent will inform the insured of an absence of authority to receive the notice. This will prevent reliance by the insured on such communications to the insured as having satisfied the need under the policy of insurance. Where the agent fails to do this, the responsibility for the error will be on the insurer and for this, the breach of the duty to communicate absence of authority to receive notices, the insurer may have a cause of action against the agent.

It is observed that it is possible for insureds to claim always a lack of knowledge of the policy provisions in respect of giving notice of loss. This will depend on a lot of personal factors such as the literacy level and the shrewdness of the insured. However, this kind of claim will be prevented where such duty is imposed on the insurance agent and the duty is well performed.

II

The Scope of the Agent's Authority

Insurance agents have been given various descriptions depending on what the agent primarily does. There are classifications of agents as general, exclusive, local, special, recording and even soliciting agents. As stated earlier, the agency relationship is that whereby the agent is able to affect certain legal relations of the principal by making contracts. The extent to which an agent can affect the legal position of the principal does not depend on the label given to the agent but rather on the authority given by the insurer to the agent to act.

The general rule in agency law is that the principal is bound by any acts of the agent done within the scope of the vested authority. Authority in this sense, refers to actual authority vested in the agent. In insurance law, this may be stated as the general position too. In the instances identified in this chapter, where an actual authority for the act done is found, the insurer will be responsible for the errors of the agent in executing the subject of instructions. Where the error itself consists of the subject of instructions, the fault or error can easily be shifted to the concerned party.

In the previous chapter, attempts have been made to see how far this position has been respected in cases of agents completing proposal forms. In cases such as Van Schilt v Gore

Mutual Insurance Company[48] there could be found in the arrangement of the parties an actual authority in the agent to complete part of the proposal form. Despite this, a transfer was made in the event of the agent completing the form. Some of the cases on agents completing proposal forms followed an approach that can easily lead to a conclusion that actual authority is immaterial to the issue of transfer.

Though these cases have not recognised the importance of the authority vested in the agent, other cases have given the deserved importance to the subject. With the actual authority found, a transfer of the incidence of agency is prevented. The principal is liable and the insurer can not escape responsibility. The liability of a principal for the agent's acts may also arise in another related manner. It could be on the basis of the agent's ostensible or apparent authority. This form of authority has been used by some courts in reaching decisions on agency transfer.

The liability of the principal may also be a product of a deliberate assumption of responsibility. This is the case where a principal chooses to ratify the previously unauthorized acts of the agent. Though the act does not fall within the scope of the agent's authority, the principal is enabled to take advantage of them. By adopting the acts, liability arises. In insurance law, and especially in the context of transferred agency, this form of liability does not form part

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[48] (supra).

of our interest. This is because the issue of agency transfer would have been avoided from the onset if the insurer has adopted the unauthorized act.

Liability may also be imposed on the principal where a statutory provision infers an agency relationship. The parties, though not intending the relationship, have voluntarily entered into a set of arrangements which the statute has designated as an agency relationship. The authority found here, not being actual or ostensible authority, is of interest in our context. In insurance law, such may be of prime importance as it may dispense with the various distortions presently found in the application of agency principles. The authors Brown and Menezes, refer to this form of authority as "statutory authority".[49] Since the statute does not bind the principal and the agent to each other and only gives certain recognition to their already existing relationship, the authors opine that the contradiction between agency as a consensual relationship and a statutory authority is very superficial.

A. Actual Authority of the Agent

This form of authority is that which is explicitly created by the principal on the agent. The extent to which the

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[49] Brown C. and Menezes J., Insurance Law in Canada (Toronto: Carswell Co. Ltd, 1982) page 53.

agent can act has been shown and any act of the agent within the express limitation is binding on the principal. There must be evidence that the principal delegated the power to act either by express words or express writing to the agent. This is consistent still with the expressed view that since there is no formal requirement for the creation of agency, any authority vested either expressly in writing or orally is binding on the principal.

In insurance law, this actual authority too may be evidenced in writing or orally. In most cases, however, there will be a formal agency agreement between the insurer and the agent. This shows the actual authority of the agent to act for the insurer. The issue of note here is that such agency agreements do not show the extent of the authority of the agent to act for the insurer. It is evidence of the existence of an authority to act for the insurer but is not indicative of how far the agent is authorized by the insurer to go in acting for the insurer.

At the time the application for licensing of the agent is made, the authority vested in the agent may be spelled out in the agreement but this is not conclusive of the arrangement between the insurer and the agent. The agreement is only to be taken as an indication of the existence of an authority to act and not as indices of the extent of the authority vested. To determine the nature and the extent of the authority vested in the agent, there must be a resort to the facts and circum-

stances of the cases. The agreement is useful primarily for the purposes of registration and determining the existence of authority.

Hereunder, the question may arise on how to determine the extent of the agent's authority where reliance can not be placed on the agency agreement. How do we identify those acts of the agent for which actual authority is given? In vesting the authority to act, the insurer would have indicated the specific acts to be done by the agent. This actual authority given to the agent may be seen as necessarily involving authorizing any act needed to execute the agent's express authority. Where an agent is expressly authorized to effect a contract of insurance with an insured, necessarily, the authority covers the interpretation of questions in the proposal form.

This way of identifying actual authority may be confusing with the possibility of the authority being labelled an implied one. Implied in this sense because it is incidental to and implied in the grant of explicit powers to the agent as defined in the express instructions. In using the phrase "implied authority", it is necessary to make a distinction between the use of the term as in the restrictive sense and the looser use of it. The latter may be described as an aspect of ostensible authority.

In the restricted use of the word, implied authority may be seen as a part of actual authority. A part that can not be

extricated. The agent has to obtain a completed application form from the applicant. To achieve this end, the agent may need to interpret the language of the application. This may be seen as a factual issue. The circumstances of the cases will be the identifying factors in determining the scope of the agent's actual authority.

B. Usual Authority of the Agent

This is an uncommon form of authority which may be of importance where the agent has no express instructions to act for the insurer. In the absence of any express authority and the inability to infer any, the position of the agent as a representative of the insurer may dictate the form of authority. This authority which is applied to enable the agent to act in the interest of the principal has been recognised with the suggestion of Laskin C.J. in Guardian Insurance Co. of Canada v Victoria Tire Sales Ltd.[50] that usual authority forms an additional category of authority. The authors Brown and Menezes have shown, however, that this would change the position of a third party very little. This is because of the present use of apparent authority in insurance law.

The recognition of this "usual" authority of the agent may cut down the extent of the agent's personal liability to the insurer for the unauthorized act but a third party will have a more protected cover with the ostensible authority of

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[50] (1979) I.L.R. 1-1154 (S.C.C.)

the agent. With the existence and implication of "apparent authority", the insured's position is in no way affected by the introduction of this new form of authority. However, this may provide a more objective test in determining fault as the consideration here is what will be usual in the trade having regard to the position of the agent.

Under this head of consideration, there will be an assessment of the situation, the position occupied by the agent as a representative and the previous course of conduct of the agent. These may shape a conclusion that the agent may act in the manner so done without a prior instruction from the principal. This is particularly useful where the agent is involved with a third party on a more frequent basis. In our context here, however, little gain will result from the use of this form of authority. In most cases, the agent will not have frequent contact with the insured and only extrinsic evidence may show the usual course of conduct of the agent. The only recourse in finding support for the insured's position where actual authority is lacking may thus be the ostensible authority found in the agent.

C. Ostensible Authority of the Agent

It has been repeatedly stated that the insurer is bound by the acts of the agent within the scope of an ostensible authority. The word "ostensible" here may be used interchangably with an apparent authority and as the word itself con-

notes, vests in the agent an authority that may apparently be seen created. In determining the existence of this authority, there is an assessment of any conduct of the principal as reasonably understood by particular third parties transacting business with the agent. In finding expression for liability under this head, it is to be noted that the lack of an actual authority does not relieve the insurer of any obligation. There could be full liability on the ostensible authority as found.

Tarr identifies ostensible authority on the basis of estoppel and states that it arises where a principal by words or conduct has represented or permitted to be represented that an agent has an authority to act.[51] The representation, where relied on by third parties, operates as an estoppel preventing the principal from denying any liability arising from the agent's act.

The authors Brown and Menezes, on the other hand, argue that apparent authority should be based on an objective consent of the principal. The contention is that apparent authority historically predates estoppel. Stating that estoppel owes its origin to the law of torts, they identify the fact that estoppel can not give rise to a cause of action. The authors state that the objective consent concept of apparent authority establishes a safeguard against abuses by

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[51] Tarr A.A., Insurance Intermediaries - Some Recent Legal Developments (1984) 5 N.Z.L.J. 154 at 155.

insurers that is as good as estoppel.[52] This is seen as an advantage by establishing such safeguards while "preserving a necessary measure of control by the insurer over its agency network".

Seen either as an objective consent or identified on the basis of estoppel, apparent authority results from the principal's conduct which causes a third party to reasonably believe the existence of an authority to act. Some acquiescence on the part of the principal is necessary for the agent to act on behalf of the principal. In this regard, the same mechanism of manifesting the actual authority of the agent may evidence the apparent authority. The difference between the manifestation of actual and apparent authority may be stated as resting on the person to whom the manifestation is made. In the case of an actual authority, the manifestation is made to the agent while for an ostensible authority, the manifestation is made to the third party or is made by someone with the principal's acquiescence to the third party. Jerry states that to establish apparent authority, it must be shown that the principal has knowingly permitted the agent to exercise the authority in question, or in some manner manifest its consent that such authority be exercised.[53]

Brown and Menezes have sought to identify apparent

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[52] Brown C. and Menezes J., Insurance Law in Canada (1982) pages 46-47.

[53] Jerry R., Understanding Insurance Law (1987) pages 160 - 161.

authority with the actual authority vested the agent. Making it clear that apparent authority cannot exist without actual authority, it was opined that where the actual authority granted is extensive, the apparent authority becomes thereby enlarged. This is seen as a result of the ease to establish a reasonable belief of the agent's wide powers with an extensive actual authority. Conversely, where the agent has only a "narrow and specific" authority to establish a belief in a broad apparent authority may be difficult.[54]

This may be seen as the same observation made in Appleman that, prima facie, the powers of an insurance agent are commensurate and co-extensive with the business entrusted to the agent's care.[55] This does not provide, however, a justification for categorizing agents into classes by having regard to their employment. The scope and extent of the agent's authority is not shown by the label used but rather on the entrusted business.

The reliance of the insured on the agent's act or representation must have been a reasonable one. It will not be reasonable where the insured has knowledge of an absence of actual authority to act for the insurer. Where there are restrictions in the agent's powers not communicated to the insured, the limitation will be irrelevant between the insured

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[54] Brown C. and Menezes J., Insurance Law in Canada (1982) page 48.

[55] Appleman J.A. and Appleman J., Insurance Law in Canada (1981) Volume 16, section 8674.

and the insurer. With an apparent authority in the agent, it is immaterial that such limitation has been put in operation.

With an observation on the scope of the agent's authority, two questions become relevant. The concept of ostensible authority has been applied in dealing with the possible instances of transferred agency. The agent completing the proposal form for applicants present a problem of the same gem. Why has it been difficult to apply the same concept of ostensible authority to cases of agents completing proposal forms? Furthermore, an application of the agency principle will achieve which results in the state of affairs?

III

The Theories of The Agent's Liability

Holding insurance agents personally responsible for the errors and omissions occasioned by them is not a recent invention. As far back as 1912, a personal liability of the agent arising in contract as well as in torts has been recognised. In Rudd Paper Box Co. v Rice,[56] there was an action against an agent and the liability of the agent was found in a breach of a duty owed to the insured to ensure that the issued policy covers the requested coverage. The agent was seen as having contracted to procure valid insurance for

[56] (1912) 3 O.W.N. 534 (Ont. C.A.).

valuable consideration and a failure in this regard imposes liability.

Shibley argues that where an agent gives an undertaking to procure effective insurance, the want of insurance would incur liability regardless of the care used in acting. On the other hand, it was argued, where the agent merely contracted to use due care and skill to procure an effective insurance, then there is liability only on a negligence or fraud. Shibley suggests as a test under this head, whether the contract is one by which the agent agreed to take reasonable steps to procure an effective insurance or one in which the agent undertook to procure an effective insurance.[57]

Although the meaning of this approach seems clearly to be a distinction between an ordinary undertaking and one merely to use all reasonable steps, the approach is not necessarily determinative of which view is to prevail. The liability of an agent for breach of a duty to carry out the functions attached to the post with care and skill will necessarily arise out of a contractual duty.

Where the liability of the agent is found in contract, it arises out of the undertaking by the agent to act for the insured in a certain way. The undertaking may be express or implied but mostly will be inferred form the course of dealings between the agent and the insured. The agent and the

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[57] Shibley R.E., Actions Against Agents and Brokers (1962) Law Society of Upper Canada Lectures pages 241 - 242.

insured must be ad idem on the nature of the undertaking before there can be liability under this head. With this, it is difficult to articulate a duty under the distinction made by Shibley. The product of the consensus of the agent and the insured may not be easily discernable as one to use reasonable care in procuring insurance or as one to procure insurance. An integrated part of the undertaking to procure insurance is an assumption of using reasonable steps in procuring it. Furthermore, as far as the applicant is concerned, the undertaking is the same whichever way it is viewed. In so far as it is a distinction that may properly be made only where the undertaking is being viewed retrospectively, it is difficult to clarify issues on this basis introduced by Shibley.

The obligations of the agent in this respect can only be determined with reference to the matters on which the agent and the insured reached a consensus. Thus, the knowledge of the particular elements of the coverage sought must be known to the agent.

Having identified the fundamental requirements for success under this head, it is necessary to examine the enforcement of the undertaking. The agreements between the insured and the agent may be seen as being gratuitous. This as a misleading impression has been corrected in Menna v Guglietti[58] where it was held that the premiums paid for a

[58] (1970) 10 D.L.R. (3d) 132 (Ont. H.C.).

policy of insurance constitute the consideration between the agent and the insured. In Fine's Flowers Ltd. et al. v General Accident Assurance Co.of Canada et al.[59], Fraser J. too opined that an agent is not acting gratuitously where the insured is paying a substantial premium out of which the agent is paid a commission.

Whilst Jerry identifies the contract here on the ground that it was exchanged for the applicant's promise to pay the premium for the policy ultimately obtained,[60] it is good to observe here, the implications of a misfeasance on even a gratuitous undertaking. Where the agreement between the agent and the insured is gratuitous, as is the case in the unlikely event that the agent is not paid any commission from the premium, if the agent proceeds to perform the undertaking and negligently performs the undertaking, there will be liability. There is already a performance of an undertaking voluntarily assumed. Where only a nonfeasance is evidenced by the inactivity there will be clearly no liability on the gratuitous undertaking.

Liability for the errors of the agent may be founded alternatively in tort. This predicates on a supposition of negligence on the agent's part. This is particularly useful where the agent has contracted to use due care and skill in

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[59] (supra).

[60] Jerry R.H. II, Understanding Insurance Law (New York: Matthew Bender and Co., 1987) page 165.

the execution of the duties. The fundamental requirement for success in this area is akin to what is needed to find liability in contract. There must be an underlying agreement by the agent to carry out a particular subject of instructions with care and skill. Liability here is warranted on the twin grounds of an undertaking and a representation of professional expertise. In Fine's Flowers, it was expressed that if an agent holding himself out as competent in the enterprise is not found liable under the general law of negligence, there will be a genuine basis for disquietude with the ability of the law to develop its concepts with the realities of commerce.

With the undertaking of the agent assuming a paramount role under each of these heads of liability, it should come as no surprise that an act may constitute both a breach of contract or a breach of duty. This probably led Jerry to conclude that whether the breach of duty is viewed as a tort or as a breach of contract will make very little difference in most cases. One wonders why an aggrieved insured will make a claim in tort where there is the need to prove both the undertaking and a negligence. This has been addressed by Jerry who says that a wider array of potential consequential damages are available to the applicant in tort.

With the decision of the Court of Appeal in Fine's Flowers, the liability of an agent arising from the breach of a fiduciary relationship was made possible in equity. Since

there must be a relationship between the agent and the insured to justify liability, the court emphasised the need for a fiduciary relationship before liability can be identified in this instance. In the case, Estey C.J.O. could not find a contract in the relationship of the parties because of the different concepts in the minds of the insured and the agent. With the lack of an "animus contrahendi" and the insufficient meeting of the mind, Estey C.J.O. preferred to avoid the complex line of reasoning necessary to lead to a liability in contract. He favoured liability in negligence by reason of the special relationship arising in equity. The finding by Estey C.J.O. created another legal tool in the varieties available to address the liability of insurance agents for breach of duty. This may be regarded as another ingenious attempt at finding justice where the existing tools prove inadequate in establishing the personal liability of the agent.

The identification of a possible liability in equity has been criticized. Tarr asserts that equity comes into play appropriately where some allegations of dishonesty is made against the agent. This will be cases where questions of loyalty, fidelity, honesty and the likes are raised by the principal seeking to avoid payment of commission or to obtain an accounting by the agent of any secret profit.[61] This criticism assumes significance in view of the sketchy articulation of the this head of liability and its application. Even

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[61] Tarr A.A., Australian Insurance Law (1987) page 110.

where this is the position, the conclusion may be reached that the theories of liability in contract and in tort are enough to deal with issues arising from the relationship of the agent and the insured.

It is emphasised that the liability indicated under the theories above are correlative in their application. The existence of a remedy under one theory does not debar the enforcement of rights under another theory of the agent's liability. Jerry refers to this as the "electing theory" and opines that the existence of a remedy for breach of contract does not preclude the enforcement of an equitable obligation.[62] Fairbrothers v Dawson et al.[63] also demonstrates that actions may be brought under these theories as alternatives. As Turner says, the question of liability is one that can not be pigeon-holed thus, it is necessary to keep a mind on the evolving theories of liabilities. Turner notes that it is only naturally logical to turn first to contractual concepts but sight must not be lost of the trend which is to widen the field of the agent's liability.[64]

Where there is a fault occasioned by the fault of the agent, the measure of damages will depend on the amount the

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[62] Jerry R.H. II, Understanding Insurance Law (1987) page 165.

[63] (1954) O.W.N. 128 (H.C.).

[64] Turner T., Insurance : Duties and Liabilities of Agents, Brokers, Adjusters and Lawyers (1981) Issac Pitbaldo Lectures 79 at 84.

insured would have claimed from the insurer if the agent had carried out the subject of instructions. This necessitates the ancillary question of whether the insured may be held contributory negligent under any of these theories of liability. The question becomes imperative in view of the findings in a number of cases that the insured was contributory negligent and the awarded damages were reduced accordingly. In Grove Service Ltd. v Lenhart Agencies[65], the plaintiff was held contributory negligent to the extent of fifty per cent of the loss which occurred and such finding was also made in Wallace v Cooperative Fire and Casualty Co et al.[66]

There is equally a lack of precision in articulating the contributory negligence concept as the courts do not uniformly recognise that it can reduce an applicant's claim against the agent. In Cosyns v Smith et al,[67] the issue was considered. The appellate court held that there was no basis in law for any kind of contributory negligence. The decision is commendable as it does not insulate insurance agents against responsibility for fault. In Elliot et al v Ron Dawson & Associates (1972) et al.,[68] the court too noted that there is no onus on the insured to read the policy as delivered as the insured has every right to trust the agent. In Ataya v Mutual

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[65] (1979) 10 C.C.L.T. 101 (B.C.S.C.).

[66] (1981) I.L.R. 1 - 1303 (Sask. Q.B.)

[67] (1983) 1 C.C.L.I. 101 (Ont. C.A.).

[68] (1982) I.L.R. 1- 1564 (B.C.S.C.).

of Omaha Insurance Co. et al.,[69] the agent was found liable in failing to inform the insured of the extent of the coverage procured. The Supreme Court of British Columbia said further, that, the fact that the policy contained the exclusion clause to be read did not assist the agent.

The court in Peter Unruh Ltd. v Kelly-Lucy Ltd. and Swift Insurance.[70] too did not allow the agent to throw off the bonds of the trust by finding fault with the insured. It was held that the fact that the insured did not read the policy does not exonerate the agent from liability where there is a breach of a duty to procure coverage requested. The duty to be certain the issued policy gives the sought coverage is not avoidable by imputing negligence to the insured.

The personal liability of the agent to the insured may thus be taken as a solution to the problems arising in insurance law and involving the agent. It has been made use of where the agent fails to fulfil an undertaking on effecting a requested coverage. This may shift the focus from the insurer where the agent is involved in the contract and errors are made by the agent affecting the insured's position. The issue, however, is how far this position has been extended to deal with problems in other cases of the agent's involvement in the contract. In particular, in the context of the agent completing proposal forms, how far does this posit affect the

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[69] (1988) I.L.R. 1- 2136 (B.C.S.C.).

[70] (1976) 4 W.W.R. 419 (Alta. S.C.).

insured and how effective are the schemes here in apportioning fairly the risk of losses though the agent's involvement.

IV

Statutory Regulation of Insurance Agents

As noted earlier, the regulation of insurance agents by statute has been another feature of the protection offered to the insured in respect of transferred agency. Sections 390 and 393 of the Insurance Act of Manitoba have been referred to as preventing a transfer of the incidence of agency where there is a payment of premiums to the agent. It should be emphasised, however, that these provisions form only a part of the measures put in place by the Act to protect the interests of policyholders.

The Insurance Act of Manitoba provides that no person shall act, or offer or undertake to act as an agent in the province without first having obtained a licence under the Act.[71] The purpose of the provision may be stated to be regulating the conduct of the agents and protect the public by requiring a professional standard of competence on the part of the agents. In this way, there is a safeguard of the interest of those dealing with the agents.

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[71] section 369(1), Insurance Act of Manitoba.

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[71] section 369(1), Insurance Act of Manitoba.

Incidentally, the regulation of the industry in this way may be seen as not being primarily protective in as much as there are economic benefits to be derived. The issue of a licence is upon the payment of a prescribed fee[72] and this raises the question of the main purpose of the regulations. Viewing the extensive nature of the attempts at regulation,[73] and the fact that the licence does not of itself create any private right in the agent, the design of the regulations may be stated to be protecting the public rather than a revenue securing devise. The licence, when issued, is regarded as a privilege and may not be used by the agent as a protection against competition.[74]

The Insurance Act of Manitoba stipulates the need for a licence application.[75] There is needed an identification of the agent with certain insurers to be represented. The application may be made by any person, firm or corporation and there could be an issue of the licence to these various groups of persons on compliance with the statutory requirements. Sections 371 (3) and (4) make possible the issue of a licence

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[72] Section 371(1) Insurance Act of Manitoba. The prescribed fee is to be determined having regard to the area of operation of the applicant for a license.

[73] The whole of Part Fifteen of the Insurance Act of Manitoba (sections 369 - 396) is directed towards regulation of the agents.

[74] Standard Insurance Coy. v Sturdevant (1977) 566 P. 2d 52 at pg. 55 (U.S. Montana S.C.).

[75] section 370(1).

to a corporation and this is borne out in Vita Credit Union Ltd. v Stotski[76] where it was held that a corporation may be licensed as an insurance agency under the express provisions of sections 371(3) and 380 of the Act.

The conditions precedent to the issue of a licence have been prescribed by the Insurance Act of Manitoba. But in tightening the rein of control over the industry, the Act has introduced a discretionary power of refusal vested in the Superintendent of Insurance. The use of the controlling phrase "if he is satisfied" in section 371(1) dealing with the issue of a licence has indicated clearly that the issue is within the discretion of the Superintendent. Patterson opines that the use of the words of mental operation in statutes such as "in his discretion", "satisfied", "convinced" or other words of like import is an indicia of discretionary power. Section 370(1) of the Insurance Act of Manitoba has given force to this contention in Manitoba.

The issue of a licence being discretionary is equally attested to by section 371(2) which provides that:

> "where, for any reason, the superintendent is of the opinion that an applicant is not suitable person to be issued a licence, he may refuse him a licence."[77]

Though the courts may be hesitant in overruling the decision of the Superintendent in the light of the Superintendent's experience, the decision is still subject to review. Cases

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[76] 17 Man. R. 2d 48 (Q.B.)

[77] emphasis added.

such as Ardell v Superintendent of Insurance for the Province of Saskatchewan[78] and Alto v The Insurance Council of B.C.[79] have shown that despite the discretionary power given to the Superintendent, a review could still be made of his decision.

Does this guarantee that there would be sufficient compliance with the provisions of the Act? Patterson calls for an "imprisonment" provision as a sufficient deterrent for non compliance with regulations in the Act. This form of regulation is suggested by Patterson after doubting the efficacy of the civil penalty of a fine usually imposed on an erring agent.[80] This position is favoured in Nigeria where an agent could be liable on conviction for an offence of breaching the regulations to a fine, imprisonment for two years or both.[81] The penal consequences of a violation of the requirement of a licence is not stated in the Insurance Act of Manitoba. Section 369(1) provides:

> "no person shall act, or offer or undertake to act, as an insurance agent in [the] province without first having obtained a licence under the Act."

This underscores the offence intended by the section on a breach of its provisions. Furthermore, there is no imposed sanction of a penal nature on the agent acting as such without

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[78] (1981) I.L.R. 1-1317 (Sask. Q.B.).

[79] (1983) I.L.R. 1-1596 (B.C.S.C.).

[80] Patterson E.W., Insurance Commissioner in the United States (New York: Johnson Reprint Corp., 1968) page 170.

[81] section 26, Insurance Act of Nigeria, (1976).

the proper authorization. This is unlike section 346(22) of the Insurance Act of Ontario which provides:

> "every person who assumes to act as an agent without the licence required by this section, or while his licence as such is suspended, is guilty of an offence."

It should be noted that the offence here is seen in the agent's breach of the regulations. The insurer is not held at fault for dealing with the erring agent. A call for a stricter maintenance of adequate control on the agent was made in section 26 of the Insurance Act of Nigeria which makes it an offence for an insurer to recklessly and knowingly transact business with an unlicensed insurance agent. The insurer is liable on conviction to a fine and has to refund all funds collected by the agent.

The design of this is to make insurers participate more fully in the regulations of the agent's conduct. Presently, in Manitoba, the insurers are not so involved in the regulation of the insurance industry. The alternative adopted in Manitoba designed to guarantee compliance is the provision for a revocation of the licence of an insurer who transacts business through an unlicensed agent.

A feasible indirect sanction in respect of breach of regulations and also directed towards the agent has been established by the case law. The rule of construction adopted in Cope v Rowlands[82] is that the object of the legislature in enacting a statute is to determine if any contract made in

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[82] (1836) 150 E.R. 707.

breach of the regulations is enforceable. With an absence in Manitoba of any statutory provision making unenforceable any agreement to pay commission to an unlicensed agent, this rule of construction activates the necessary regulatory mechanism. There will be little incentive for acting as an agent, unlicensed, where the possibility of recovering commission is illusory. If the statute prohibiting unlicensed agents is meant as a mere revenue measure, the agreement made in violation of it is not invalidated and may be enforced. This view is based on a consideration of the revenue to the province with an increased number of practising agents.

However, where the statute is meant to protect the public by preventing unauthorized persons from carrying on the trade, the agreement for compensation becomes unenforceable. There will not be a recovery for anything done in violation of the Act. This view predicates on an assumption that all compensation contracts are prohibited necessarily along with the prohibition of unlicensed persons. Where the statute is designed to effect both of these objects, the compensation prohibition view will prevail as a dominant role is played by the protection sought for the public.

In Manitoba, the regulatory schemes may be seen as a combination of the rules above and support the view that any compensation arising out of the prohibited arrangement is unenforceable. However, where the agent fails to procure a licence before entering into the transaction, the contract of

insurance effected thereby does not become void. The policy issued is not rendered void nor is the insured prevented from recovery by reason of the agent's non compliance with the regulations. As between the insured and the insurer, the agent remains the agent of the insurer and the violation of the rules by the agent does not affect the insurance contract made.

As noted earlier, the punishment hereunder is directed towards the agent and even favours the insurer as there is no need to pay compensation to the agent on the agreement. With the regulations here, does the average policyholder become guaranteed of an efficient service? Will the provisions in the Act preventing transferred agency make any impact if applied to the situation of the agent completing proposal forms?

CHAPTER IV

MODELLING A FAIR RISK DISTRIBUTION (Filling Proposal Forms)

The concern in this chapter is the approach appropriate where the agent proceeds to effect the coverage sought, but in filling the application form for the applicant, makes some mistakes giving rise to a right of rescission of the contract effected in favour of the insurer. It is necessary to distinguish the position here from problems arising where there is a failure of an undertaking to effect insurance. This issue of an agent completing proposal forms has been a relic of an historical conflict of interest and the insurer's involvement with the problem makes it distinct from the issue of failure of coverage.

In the event of failure to effect a coverage, to the applicant, there is no contract of insurance made. Either no contract of insurance is made or the intended coverage is not effected. In the present issue, a contract has been made between the applicant and the insurer, and it is on the strength of the contract, with the insurer's involvement, that the rights are to be tested. Conceding here, too, that no solution can be offered to solve the problem arising presently that will not be a product of societal concern and values, might help to distinguish this position from the earlier stated ones.

In dealing with the issue of the agent filling proposal form for the applicant, there is no uniformity in the reasoning of the courts. Different emphases by different courts do not enlighten on a general applicable rule in this regard. The differences in approach by the courts may be classified into two. One, which is here called the "traditional contract analysis", relates to the reasoning leading to the denial of any claim to the insured under the insurance contract. The other, which for convenience is called the "protective analysis" seeks to protect the insured's claim under the contract. In many of the cases already identified, the approach the court followed in every case had been a matter of judicial discretion with no consistency in the application of rules and precedents. The present concern of this paper, is to follow these two analyses in their reasoning and logic and see whether any presents a suitable model for distributing risk in the present age.

I

Traditional Contract Analysis

A. The Lessons of Contract Analysis

In following this approach, the underlying consideration is that the parties are dealing on an equal footing. The equality of the parties' bargaining power is assumed and not regarded a pre-requisite for contracting. The lack of it is

therefore scorned in the assessment of the parties position. With the scorning, some principles flow and these are aptly set out in Newsholme Brothers v Road Transport and General Insurance Co.[1] They may be classified as negligence, authority and the parol evidence rule.

The negligence here is found in the applicant's act of signing a document which is known to be a proposal for insurance, containing a "basis of the contract" clause, without reading it. The negligence found here has been faulted but we proceed herefrom on an assumption of a finding of negligence against the insured. The result is that the insured is denied any claim against the insurer under the contract of insurance. The basic implication is that the insurer has a right to rescind the contract. The non- disclosure or misstatement in the proposal affords this right of rescission and the negligence of the insured in signing the documents without reading it debars any contention that the error is the insurance agent's error.

The other ground on which the traditional contract analysis may be upheld is the parol evidence rule. As stated by Greer L.J. in Newsholme Brothers v. Road Transport and General Insurance Co.[2] the insurance contract as made cannot have any of its written terms varied by an oral agreement or communication made to the agent. This arises from the written

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[1] (supra), footnote 24, chapter 2.

[2] (supra), footnote 24, chapter 2.

declaration that the proposal form is the basis of the contract, and any non- disclosure or misrepresentation avoids the policy. This, if accepted as a quintessence of the applicable rule, and the attempt by Greer L.J. to explain Bawden v London, Edinburgh and Glasgow Assurance Co.[3] as an exception overlooked, the same conclusion as reached under the negligence consideration may be adduced. The conclusion is that the insured will have his whole rights under the contract determined with the policy and the proposal form. Any misstatements, misrepresentation or non-disclosure in the proposal avoids the policy.

The third possible ground for using the traditional contract analysis is the nature of the authority held by the agent. As stated earlier, an agent may be vested with actual or ostensible authority. The class of usual authority does not affect the insured as against the insurer. Where the agent lacks actual authority to act for the insurer in completing the applicant's proposal form, Newsholme has also suggested the inference:

> "The agent of an insurance company cannot be treated as their agent to invent the answers to the questions in the proposal form."[4]

Bawden's case had laid down the foundation of the proposition that where actual authority to complete the proposal form does not exist, the agency is that of the insured. Thus, actual

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[3] (supra), footnote 5, chapter 2.

[4] (supra), footnote 60, at page 372.

authority presents another variance to the methods by which the traditional contract analysis may be used to deny the insured any protection. This approach simply denies any imputation of the knowledge acquired by the agent in the process of completing proposal forms to the insurer. Recurring to the general principles of agency, such a viewpoint is quite justified if the agent is held to be the agent of the applicant. The knowledge of the agent is to be imputed to the principal and the applicant is being taken, for this purpose, as the principal. Thus, no imputation of knowledge is to be made against the insurer where the applicant is regarded as the principal.

B. Experiencing The Contract Analysis

The reasoning of the courts following this approach is commendable if the premise is on the insurance contract alone and excludes other considerations which may challenge the functional utility of the bases of the inference. Anchoring the insurer's protection on any of the these as a base, a general overview of events is thus presented. Where the agent fills the proposal form, the agency is to be treated as that of the applicant and the insurer's right to avoid the contract for misrepresentation is unaffected.

But, beyond the immediate consideration of the insurer's right to avoid the contract, there is the need for a theory of liability to make this approach a model of distributing the

risk of loss. The insured came into the insurance contract seeking protection, usually in the form of an indemnity. How do we justify the removal of the claim against the insurer and parcel out the faults for such errors under the traditional contract analysis? The expectation of indemnity has been removed against the insurer and the insured might need to realize his security somewhere else.

Baer explains this further concern in a manner which ordinarily deserves applauding. To Baer,

> "insureds are no longer without a remedy when their expectations are defeated [as] insureds are frequently compensated for their defeated expectations by the imposition of liability on agents and brokers."[5]

Morse made a similar observation that the agent may be liable to the insured where the insurer is not liable.[6] This thus represents the next stage in the general overview of this approach. Where the insurer successfully denies liability under the contract by reason of a non- disclosure or misrepresentation, and such non-disclosure or misrepresentation arises out of the agent's error, then the insured may have recourse against the agent. The paucity of reported insurance cases in this respect denies us a categorical statement of the position of the law here. However, traces of this kind of reasoning may be found in Burgess v Economical Mutual

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[5] Baer M.G., "Recent Developments in Canadian Insurance Law" (1985) Volume 17 Ottawa L.R. 631 at 640 - 641.

[6] Morse P.S., "Relationship Between Insurers, Agents, Broker and Insured" (1966) Issac Pitbaldo Lectures 154 at 165.

Insurance Co.[7] where Jean C.C.J. said:

> "In any event if [the agent] would be found to be the agent of the plaintiff for the purpose of filling out the application, then vicariously [the agency] would be liable to the plaintiff for the amount of insurance he would have been entitled to under the policy"

The insured in that case had brought an action against the insurer and, in the alternative, against the agency.[8] In Bell v Tinmouth et al.,[9] the agency involved in the contract was also made liable to the insured for breach of a fiduciary duty. The possible shade of error cast on this as an emphatic statement of the law, in this instance, arises from the basis of such imposition of liability. On what ground will the agent be made liable to the insured here? What is the nature of the liability?

Baer's conclusion is based on the treatment of the agent here as the agent of the insured, rather than that of the insurer. Is it in all cases that such agency can be ascribed to the insured? Baer concedes that the courts are very reluctant to impose duties on the agent other than the duty to obtain adequate coverage.[10] Will there be a duty on the

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[7] (supra) at page 8.

[8] Actions against the insurer and in the alternative against the agent have been shown possible with decisions such as Weldon et al. v Commercial Union Insurance Co. PLC et al. (1984) C.C.L.I. 165 (B.C.S.C.) and System Management Ltd. v Royal Insurance Co of Canada et al. (1986) 16 C.C.L.I. 113 (N.B.Q.B.).

[9] (supra)

[10] Baer M.G., op. cit., page 641.

agent to complete the proposal form with diligence? Since any liability of the agent depends on proving the agency relationship with the insured, the need arises to subject their relationship to the test of agency. This brings back the contention previously thought settled. The agency has to be re-determined. This time, however, between different parties - the agent and the insured.

Baer's supposition is an assumption of the passive acceptance of such liability by insurance agents which may not work out in practice. As the law stands presently, the liability of the agent in such cases is not absolute. The need arises, therefore, to make the traditional contract analysis work admirably in any society, for an absolute liability of the agent here. The judgement of the court which pronounces the agent an agent of the insured may be taken as providing the relationship with the insured which will justify the imposition of liability on the agent. This is the only way a question of which party has the agency can be prevented from recurring intermittently.

This too is of importance, however, in view of the fact that the agent's error may be viewed as only creating a relationship between the insurer and the insured where none would have been. The insured sought a coverage from the insurer and it is on the basis of the proposal that the coverage is granted. The insurer has sought to avoid the policy for the misrepresentation or non-disclosure in the

proposal. The contention of the insurer is usually that the coverage would not have been granted if there had been a disclosure of the material facts. Where then is the loss for which the agent is to be made responsible?

If the agent had carried out diligently the subject of the instructions from the insured, now regarded as the principal, the policy may not have been issued by the insurer in the first place. In a situation where the coverage is likely to be refused by the insurer, for which loss will the insured claim against the agent? The observation, here, is that the insured might not be able to make any claim against the agent because of the difficulty in establishing a loss as a result of the agent's error. A finding of negligence against the agent will be of little use here as there may be no loss occasioned to the insured thereby.

As stated by Rendall and Baer, an agent is not liable if it can be shown that even if the policy had been enforced, the applicant would not have recovered upon it. As they observe, the agent can avail himself of every defence which the insurer might have set up in an action upon the policy.[11] Since the agent can deny that a loss has been sustained of the type for which the policy should have provided indemnity, how does the insured make a claim against the agent?

It might be possible to devise a means of imposing

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[11] Rendall J.A. and Baer M.G., Cases on the Canadian Law of Insurance (Toronto: Carswell Legal Publications, 1988) at page 389.

liability on the agent. This may be done by viewing the agent's error as having induced the insured to assume that there is an insurance coverage. It might be possible to make the agent liable to the insured for the reliance the insured placed on the agent's representation, and which induced the insured not to take measures to protect adequately the insured's interest. A finding in this respect could be that, but for the agent's error, the insured would have known of the failure of coverage and would have taken steps to protect the risk.

One other possibility overlooked in espousing this, the liability of the agent in the stead of the insurer, as a model is the position of the agent in relation to such liability and compensation. It has become customary to speak of the agent's liability. This creates a problem of the same stem as the basis of the liability of the agent. How capable is the agent to meet such compensatory claims? The insured may have suffered a loss before the contract is avoided by the insurer. Is the measure of compensation here the amount of the loss suffered by the insured?

This model, if the question is answered in the negative, fails to satisfy the purpose of its design and makes any liability on the agent ludicrous. If the question is answered in the affirmative, an assessment of the model leads to the consideration of the solvency of the agent. In Bell v Tinmouth

et al.[12] the court assessed damages on the actual loss the insured has suffered by reason of the agent's error.

Insurance agents may be individuals and an agency may be a body of persons. In most cases, especially in the developing countries, the agent will be an individual dealing with insurers. Though viewed as a professional, the individual may not be able to meet the financial strain that the compensatory scheme may provide in the event of a loss. The agent may not have enough personal fund to meet the demands of the claim. The existence and adequacy of an errors and omissions insurance coverage has been presupposed in this model as the ultimate remedy to the insured for the loss sustained in the event of an insolvency. Baer says that

> "to the extent that intermediaries have errors and omissions coverage or are otherwise capable of meeting the judgments, the insureds are protected."[13]

The recourse then, with the errors and omissions liability insurance coverage provided, is to seek the aid of this professional liability insurance. The insurance will cover the fault and from it the insured gets compensated.

This presents a theoretical route which deserves commendation in apportioning fairly the risk of loss in such instances. How viable the route is in practice is an open

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[12] (supra)

[13] Bear M.G., op. cit., page 641. Turner too said that the design of the coverage is the protection of the principal where the agent is held liable. See Turner, Insurance : Duties and Liabilities of Agents, Brokers Adjusters and Lawyers (1981) Issac Pitbaldo Lectures 79 at page 83.

issue. The errors and omissions insurance coverage is made part of the licensing requirement of insurance agents. Section 370(4) of the Insurance Act of Manitoba provides for the coverage and makes it incumbent on the Superintendent of Insurance in the province to accept only applications accompanied by proof of such coverage.[14] The first constraint to its effective implementation is that the office of the Superintendent does not seem to regard such a coverage an important part of the licence requirement.[15]

Furthermore, no minimum amount of the coverage needed is specified by the Superintendent presently to adequately protect the interest of the insured.[16] Where the legislation is not strictly enforced and agents are given a free choice on whether to effect the errors and omissions insurance coverage or the extent of the coverage, the flow of protection to all concerned in the insurance transaction is broken.[17]

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[14] Similar provision exist in the Insurance Acts of the other provinces in Canada. In Nigeria, the existence of the errors and omissions liability insurance coverage is not made a requirement of licensing.

[15] In Manitoba, presently, once an applicant has been recommended by the Association of Brokers and Agents, the licence will be issued.

[16] Kinsman states that the Insurance Agents Association of Manitoba has recommended a limit of $100,000 per occurrence for an individual agent and $500,000 for an agency. See Kinsman S.A.M., Insurance : Duties and Liabilities of Agents, Brokers and Lawyers Pitbaldo Lectures (1981) 93 at 94.

[17] An unstructured interview carried out with some insurance agents in the province of Manitoba showed that presently, in Manitoba, not all insurance agents carry the errors and omissions insurance coverage.

Where the agent is insolvent to meet the claim, has no errors and omissions liability coverage or has an insufficient coverage, under which scheme is the insured to realise the expected security?

The major shortcoming of the approach lies in the absence of any protective measure on the failure of an adequate errors and omission insurance coverage. There is no other means by which the insured may realise the expected security where the liability insurance coverage proves inadequate or illusory. Thus, there is needed an adequate and realistic professional liability coverage as the ultimate concern in protecting the parties. However, though fault could be apportioned in the event of such failure of liability coverage, there is no commensurate responsibility attached to the faults in ensuring the existence and adequacy of an errors and omissions liability coverage.

The contract analysis thus presents a pattern which bespeaks of disjunction in offering a fairly distributed risk of loss. The disjunction, here, may arise at any of three vital stages in the flow of this model analysis as a solution to the conflicts of interest. The first is the functional utility of the bases of the analysis, the second is on the basis and nature of the agent's liability to the insured and the third relates to the possibly illusory compensatory scheme adopted to protect the insured in the errors and omissions insurance coverage.

C. Conditioning The Contract Analysis

Where any particular scheme adopted by the law in the society is deficient in implementation, a reexamination of its rules is appropriate. It is the respectful submission here that a re-examination of the traditional contract analysis is needed to effect a more reasonable and workable rule instead. What form should the changes here take? How effective will the position be thereafter?

Two areas of changes readily suggest themselves. First, the liability of the agent to the insured may be made absolute. With the present state of the law, there is no assurance of a successful claim against an agent in this respect. The agency is to be proved and this can only be done by a resort to general agency principles. The resort to such principles may lead to a denial of the loss suffered and the insured may still be without the protection sought. Unless the liability of the agent is made an absolute one, no practical solution to the interest of all concerned is offered by a stream of thought along the traditional contract analysis.

Furthermore, there is the need to enforce strictly the provisions of sections 370(4) of the Insurance Act of Manitoba. The first step towards making a just distribution of responsibility in any given solution to the problem of transferred agency, in this context, is the strict implementation of section 370 (4). The errors and omissions liability

coverage has been stated as the ultimate loss bearer and it is only appropriate to guarantee its existence and adequacy. The Superintendent's office may be made more responsive to the duties in this respect and a penalty may be imposed for agents erring under the section. The existence and sufficiency of the errors and omissions insurance coverage is not to be compromised in this respect.

Alternatively, to make the traditional contract analysis efficient, there could be a fund from which the insured may draw compensation where there is an inability to affix the insurer or the agent with liability. The fund may take the form of a deposit by insurance agents. This will be a contribution towards such occurrence happening with an "uninsured and insolvent" agent. It may be a form of regulatory deposits made by all insurance agents into a common pool and from which any insured may draw compensation if a loss is sustained that cannot be proved against the insurer or the agent. This is particularly useful in view of the fact that some developing countries do not even have any errors and omissions insurance coverage provisions in their laws.[18] Such a fund, if established, could be run through the office of the Superintendent or any other body regulating the insurance industry.

The next concern here is the effectiveness of the approach with the implementation of the proposed changes. In

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[18] Nigeria has no such provision in the Act governing insurance and obtaining such is not a common practice among insurance agents.

respect of the pool fund proposal, it is doubtful if such a pool fund can be operated successfully. In one respect, it is baseless to have such pool if the errors and omissions insurance coverage is provided for and effectively utilized. Secondly, there is no justification for involving other insurance agents with the erring agent in any compensatory scheme. Not being at fault, they should not be made responsible merely by sharing the call of trade with the erring agent. Such a scheme is more likely to tie up unnecessarily the capital of insurance agents and make the proposals cumbersome. It may not even make any contribution to the overall working of the compensatory scheme.

Given that the premises on which the model here is based are articulate and valid, with some changes made in the nature of liability of the agent and the attitude to the errors and omissions insurance coverage, there should be a continuing flow of events which could lead to a just and fairly distributed basis for responsibility in the event of the agent's error. This supposition has been based, however, on the assumption that the premises are soundly formulated. The assumption may not be well founded in view of a common feature of the premises. They may be shown to be vestiges of the historical blunders epitomised by the decisions in Bawden v London, Edinburgh and Glasgow Assurance Co.[19] and Newsholme

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[19] (supra), footnote 5, chapter 2.

Brothers Ltd. v Road Transport and General Insurance Co.[20]

D. Evaluating Contract Analysis Premises

The bulk of the confusion introduced into the law with the contract analysis arose as a result of the decision in Newsholme. Though this is not the only instructive case on the issue, it is a landmark case in stating the traditional contract analysis. The consequence of the approach has been a steady erosion of the protection of the insured. However, in eroding the insured's claim, there is no indication that the courts do give serious consideration to the tests of agency and it is doubted if any of the early cases in this respect can stand the modern day tests of agency. The agency relationship has been identified and two important tests were identified. These are control and consent.

i. Control

As stated earlier, an agency relationship may be and is usually created expressly by a prior authority conferred on the agent. The principal confers on the agent an authority to act in any way that is appropriate to effect certain purposes of the principal. The principal thus has control over the agent for such purposes as the principal dictates the terms subject to which the agent is to act. This is the language of "control" used to distinguish agency from other relationships.

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[20] (supra), footnote 24, chapter 2.

The identification of agency with the "control" exercised over the agent or right to control in such instance was equally made use of in the American jurisdictions, though, the control need not be as to the actual physical method by which the agent carries out the duties assigned to him. The agent thus differs from a servant because the principal has the right of control over only what may be done in the course of the agent's employment but not how it is to be done. In as long as a measure of "right to control" is exercisable over the person as to what may be done, the test of agency may be satisfied.

Applying this test to insurance transactions, it is easy to identify the agency relationship with the insurer. The agency agreement is with the insurer and the insurer dictates the type of involvement that the agent is to have. By enlarging or limiting the authority of the agent beyond or within a certain scope, the insurer is exercising some measure of control over the agent. The control continues throughout the course of their relationship until the determination of such. With the concept of transferred agency, who has the right of control over the agent between the insurer and the insured at the moment the agency is supposedly transferred to the insured?

The primary function and objective of the agent in this respect is to obtain completed application form for the purposes of the insurer. The agent is still actively engaged

in the business of the insurer and executing the duties delegated by the insurer. The agent has a discretion, as an agent and not a mere servant, to devise the best method by which the principal's wish may be effected but the agent is still subject to the overall control of what is to do be done by the insurer. The discretion here only is as to how to do what has been mandated by the insurer. Where the agent completes an application form for the applicant, is the agent exercising a freedom to effect the principal's wish in a way he deems fit to effectively carry out the overall instruction of obtaining completed proposal forms or is the agent being subject to control by another person, here the insured?

Here, the agent is still subject to the insurer's control and for all purposes remains the agent of the insurer. The authority conferred on the agent might cover the particular activity of completing proposal forms; where it does not cover it, the insured can not be said to have exercised any control over the agent since the right of control still lies with the insurer. The agent has simply exercised a discretion on how to go about the physical performance of the insurer's wish. The agent is still subject to the overall control of the insurer not to effect insurance with any particular proposer or on certain terms. The test here is whether the agent would have got involved in the transaction if the intent is not to carry out the insurer's wish. Applied to the agent's involvement here, it is obvious that the agent intends to carry out

the insurer's wish of obtaining a completed proposal form and it is in furtherance of this intent that the proposal form is completed for the applicant.

Furthermore, the insured regards the agent as a person with expertise in these matters, practically relies on the agent for guidance and has in no way exercised any influence on the agent. The insured has left it to the agent to act as the agent has authority from the insurer to do. The insured can not compel the agent to fill the proposal form and in most cases, will be in no position to dictate what the agent does. In as much as this is the relationship of the agent and the insured, control is missing from the relationship and thus there is no agency which can be ascribed to the involvement of the two. The right to control, needed to establish the agency relationship, remains all along with the insurer and shows that the insurer and not the insured is the principal for the purposes of obtaining completed proposal forms from the applicant.

This opinion is also shared by Keeton who says that an agency relationship is based fundamentally on the principal's right of control of the agent and it is difficult to sustain a finding that the applicant has such a right in the face of the evidence of an inconsistent right of control in the company. Keeton concludes that the most common mistake leading to erroneous classification of a relationship as one of agency is overlooking the requirement of right of control over

performance that is an essential characteristic of agency.[21]

With Newsholme, it is obvious that the case would likely be decided otherwise if the test of control had been reverted to. The partner who signed the proposal form obviously lacked any form of control over the agent and to that extent does not create any agency. The court found an initial creation of agency with the insurer. This evidenced the control needed in the relationship. The court should have considered further, however, whether the control was retained over the agent by the insurer at the material time. This, the court failed to do. There is no evident vested right of control on the insured in the transaction thus, making the considerations by the court an unfinished business.

ii. Consent

The other test adopted to establish the agency relationship is that of consent. The relationship is described as a consensual one and thus each party must manifest an assent to what the other purports to do. The agent must assent to having the principal as a principal while the principal too must expressly or impliedly assent to the agent acting for him. Even where the agency comes about through the operation of the law such as under the doctrine of estoppel, there must have been a course of conduct between the two that the law will

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[21] Keeton R.E., "Basic Text on Insurance Law" (St Paul, Minn.: West Publishing Co., 1971) page 58.

regard as the agency relationship.

Between the insurer and the agent, especially in view of agency agreements that insurers and their agents usually have, the assent to the relationship can not be denied. The assent may equally be inferred from the furnishing of the agent with documents of the insurer such as proposal forms, cover note and so on. In the relationship of the insured and the agent, however, no agency by estoppel has been identified against the insured and thus an assent to the agency must be shown.

The issue of consent here, as regards the insured, may be related to the expectation of the insured. The insured may not know, as is usually the case, that any agency has been ascribed to him in such relationship and would not intend any agency. Where an agency is intended, it is most likely that the services of an independent agent will be secured. The insured deals with the insurance agent as the agent of the insurer who is acting for all purposes connected thereby as the agent of the insurer. The insured's expectation here, that the agent acts for the insurer, is indicative of the absence of any consent on his part to the agency sought to be established. Keeton said that in the general agency law, an individual can not act as the agent for both parties to a transaction without the informed consent of both.[22] This shows that the consent of the insured is imperative to any

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[22] Keeton R.E., Basic Text on Insurance Law (1971) page 58.

transferred agency here since the agent is still acting for the insurer and none can actually be inferred from the circumstances surrounding many of the cases in which such agency has been transferred.

The agent too, on the other hand, definitely will not assume the existence of such a relationship between him and the insured. The agent's act, obtaining the completed proposal form, is done for the insurer and on behalf of the insurer. It will be difficult to conceive of a situation whereby the agent accepts to act for the insured as a representative of the latter and not in the course of the duties to the insurer.

It is noted here that consent has been criticised as a sole determinant of the existence of agency[23] but the circumstances identified where consent is considered irrelevant are not in issue here. There can be agency by operation of law but that is where there are some factual arrangements that indicate the agency. In the absence of consent on the part of the agent and the insured to the agency relationship, absence of any other major consideration in the creation of the agency, it will be a stretch of the law beyond limit to assume agency by operation of law here.

Yet, without any consent of the partner and the agent, the court presumed transferred agency in Newsholme. This raises serious doubts as to the soundness of its rule. In a course of business that Scrutton L.J. himself recognised as

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[23] Fridman G.H.L., The Law of Agency (supra) page 12

an "inevitable part of business", wherein lies the consent of the insured to the agency relationship?

iii. Commission

Though this is not a major determinant of an agency, the fact of payment of commission to the agent and its receipt can aid the conclusion of agency, especially in relation to obtaining completed proposal forms. It shows assent on the part of the insurer and the agent to any agency ascribed to their relationship. Being paid by the insurer, in whom the right of control still lies, the conclusion is irresistible that the agent remains for all purposes an agent of the insurer.

This is an age when the question of who bears the risk of fault of an insurance broker regarding premiums is being answered in favour of the insured as against the insurer. With this, the conclusion that where the agent is paid by the insurer, any errors of the agent should be borne by the insurer seems not far fetched. In laying liability at the door of the insurer for errors of a broker instructed by the insured, support is placed on the fact that the insurer remunerates the broker and the imposition of liability is a way of ensuring that insurers pay commission only to representatives they can trust[24]. This can be applied to insurance

[24] Australian Law Reform Committee (Contract and Commercial) page 14. This same view of imposing liability on the insurer for the faults of the broker by reason of the

agents too.

The receipt of commission by insurance agents from the insurer evidence the allegiance of agents to insurers in all that is done to effect the insurance contract. This makes any supposition of an agency between the insured and the agent impractical for this purpose. However, rather than relying on this as another time tested determinant of the agency relationship, the court in Newsholme shied away from the issue of agency and considered other factors.

iv. Negligence

This was espoused by Scrutton L.J. in Newsholme Brothers v. Road Transport & General Insurance Co. [25] The negligence is in signing a document known to be a proposal form containing erroneous information without reading it. The unfairness and patently unjust operation of the rule in cases of illiteracy and insurance effected through the telephone have been noted. An ill-educated person who has no means of reading the document presented to him for signature can not be said to be negligent in signing the document without reading it. Moreover, the agent may not give the proposer an opportunity to read the document such as where the proposer

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remuneration given to the broker by the insurer is shared by Tompkins A.I.M. in Insurance - The Imputation of knowledge: Defence of a Summary Judgement Application (1986) N.Z.L.J. 227 at 228.

[25] (supra), footnote 24, chapter 2.

is asked to sign along some dotted line.

Furthermore, even where the applicant is not an illiterate, to impose such a restriction will be laying down a duty on the applicant for insurance to check on the agent. This is contrary to the earlier stated position of the law in that regard. There is no operative requirement as borne out by the cases that the applicant has a further duty to check the actions of the agent but this is exactly what the "negligence approach" in Newsholme establish. In imposing liability on the agent for his errors, such as failure to effect a requested coverage, the position of the law is that the applicant is not under any obligation to check on the agent to ensure the performance of the agent's duties. With this, there can be no justification for any imposition of a duty on the insured in a related case of the agent filling proposal form for the applicant.[26]

Insurance agents are presented to the public as professional intermediaries and the imposition of a duty to cross check on the agent does not support the supposedly professional status of insurance agents. In Luft et al. v. M.G. Zorkin and Co. Ltd. et al.[27] the court distinguished cases where it was held that the insured has a duty to cross check

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[26] See Cosyns v Smith et al. (1983) 41 O.R. (2d) 88 (Ont. C.A.) where Lacourciere J.A. held that in the absence of any evidence showing the insured that "something was amiss", he is entitled to rely on the agent and is not obliged to make further enquiries about the coverage.

[27] (1982) I.L.R. 1020 (B.C. Co. Ct.)

the agent as those in which some unusual things have happened such as a long period in which the insured has not received any premium notices or communication from the insurer. These cases, although not dealing with the filling of proposal forms by the agent, are indicative of the recent attitude of the law towards the imposition of a duty to check on the agent to ensure the efficient carrying out of specific instructions. These cannot be reconciled with the duty to check imposed on the insured in Newsholme.

In many instances, the insured deals with the agent as the agent of the insurer. To the insured, there is no difference, at least initially in the transaction, between the agent and the insurer. The insured deals with the agent as if the agent is the insurer, trusting him and relying on the agent for assistance. With such reliance, the extent and utility of any duty to check up on the agent here thus becomes difficult to fashion out. The applicant can only cross check effectively on the agent if he knows what is lacking and if he does, the reliance on the agent will not even arise. The agent is supposed to be an "expert" in such matters and the insured the "layman". Yet the "layman" is expected to guide the "expert" in making a choice of words or exercising his discretion in filling proposal form.

The negligence approach fails to see reality in the transaction of parties and on this ground is ineffective as any solution to the problem of conflict of interest created

here. The insured is wholly dependent on the agent as to the interpretation of questions in the proposal form, and the form of answers that is required. To every question in the proposal form, an applicant will usually have a "story" to tell and leaves it to the agents to fill up the form in an appropriate manner as required by the insurer. Are we now to assume that the applicant has been negligent in telling the agent "the truth" and expecting the agent to sift out whatever the insurer might find useful in the narration?

Furthermore, the exact scope of the negligence here is another consideration to be determined. Is it in not filling up the proposal form himself but rather relying on the agent to fill it up? Or is it only in not reading it over when the agent has completed the form?

Where the negligence relates to the first question alone, it falls short at any general rule by reason of the existence of circumstances where the applicant inevitably has to rely on the agent. Cases of such nature are the noted cases of illiteracy or where the answers provided by the applicant are either complex or numerous that the aid of the agent has to be sought. Such help by the agent may also arise by reason of the space provided for answers to the questions asked. Furthermore, such identification of negligence is belied by the increasing recognition the courts have been giving to the trust and confidence the insuring public has in insurance agents. Without necessarily destroying the trust and confi-

dence in the insurance industry, the negligence approach will not provide an aggregate solution to the problem.

Where the negligence relates to the second question, the contentions above are still valid. In addition, however, it will as a general rule facilitate the perpetration or fraud by unscrupulous insurers. Where the insurers has mandated the agent to fill or complete application form for the insured, to hold the insured negligent for allowing the agent to execute the subject of such authority without supervision will be aiding the fraud of any such unscrupulous insurers or agents. The rule, where it is to be upheld, would make nonsense of the whole concept of actual or ostensible authority of the agent where such exists to assist applicants in completing application forms.

It is observed here, that the stigma of negligence and its attendant consequences have been wrongly bestowed on the insured. Negligence should be limited and carefully reserved for a true display of carelessness or incompetence. It will not suffice here that the insured did not carry out a duty not hitherto imposed and not borne out by the cases. Moreover, negligence can only be a consideration but not the sole consideration in determining issues of this nature. Even where negligence is identified, the problem could still be dealt with in some other ways rather than using the negligence as a justification for a transaction that never existed. There is no agency relationship established by the negligence

alone. To establish the agency relationship, there are some identified test useful to determine it. Negligence can only go to reduce the amount the insured may claim or seek to defeat his expectation. It does not of itself create the agency and to create the agency, the appropriate tests must be considered.

It has been noted too that a contract of insurance may be created orally as well in writing though writing is the most customary form. Where the contract is effected orally, what will be the position of the law as regards negligence? The negligence relates to signing a proposal form without reading it. With no proposal form, no such negligence can arise. Does it mean that where there is no proposal form made use of, there will be no transferred agency? Yet Scrutton L.J. sought to lay down a concept of general application in insurance law. Where the insured signs, the agency becomes his but where he does not, the agency remains with the insurer. This might be introducing an unfounded distinction into the law. Though it is not a likely event that an oral contract of insurance will be entered into in the present age with the complexity of business, a solution to the problems arising from completing proposal form should be valid and effectual even where no proposal form is used.

v. <u>The Parol Evidence Rule</u>

Greer L.J.'s formulation that:

> "it does not seem to matter whether the verbal statement which are relied upon are made to a person in the position of [the agent] or are made to the directors of the company. In either case, they could not affect the contract which is wholly contained in the policy of insurance with its incorporated proposal form "[28]

forms the footing of the application of parol evidence rule to the relationships here. Merkin has been noted as criticizing this formulation by Greer L.J.[29] If the formulation is qualified to accommodate some of the earlier cases, it becomes what Merkin referred to as "an absolute discretion clothed in legal principle". There is no meaning left in the rule if such an in-road as the court's discretion can be left in the operation of the rule.

On the other hand, an unqualified statement of this as a rule makes nonsense of the decisions in some of the earlier cases such as Golding v Royal London Auxiliary Insu. Co.[30] and Ayrey v British Legal & United Provident Assu Co.[31] in each of which some answers in the proposal form had been incorrectly stated but the disclosure of the correct answers to the insurance agent was held binding on the insurer. Furthermore, the rule does not identify the agency relationship here and is in no way determinative of the issues. It only seeks to

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[28] Newsholme Brothers v Road Transport and General Insurance Co. Ltd. (supra) page 380.

[29] Merkin R.M., Transferred Agency In Insurance Law (supra) page 39.

[30] (1914) 30 T.L.R. 350. (K.B.)

[31] (1918) 1 K.B. 136. (K.B.)

impose the consequences of the error of the insurance agent on the insured. This is done by giving no consideration to the information communicated to the agent or which came to be acquired by the agent in the course of his duties since such is not a written part of the contract.

The statement of this rule of contract which excludes extrinsic evidence in the law of contract has been set out as follows: "where a transaction is recorded in a document, it is generally not permissible to adduce evidence of (a) its terms or (b) other items not included, expressly or by reference, in the document or (c) its writer's intended meaning".[32] The second aspect of the rule, as stated, is relevant for our purposes here as it seeks to exclude extrinsic evidence which is designed to add to, vary or contradict the written terms of the contract. The writing is taken as being conclusive.

The adoption of this rule will be patently unjust to the insured by disregarding an important part of the contract made with the insurer on the ground that it is not a written part of the contract. It falls short of a just solution in so far as it is not a product of mutual assent of the parties that the proposal form and the policy constitute the only records of the insurance contract. Before the rule can apply, the parties must intend that the terms of their agreement as

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[32] The Law Commission (Great Britain), "Law of Contract : The Parol Evidence Rule", Working Paper No. 70 (1976) page 2.

recorded be the only terms of the contract.

An exception to the parol evidence rule is when the parties do not have any intent that only the written terms of their contract shall be the agreement. This is true of insurance matters as the insured made communication to the agent on the assumption that such will form part of the contract to be made. It will be an exception to the rule, as stated, because the lack of the assent makes the general rule inapplicable. Under the exception, evidence may still be admitted of the other parts which was agreed orally and the communication to the agent will form such.

This exception to the parol evidence rule has been recognised with a conclusion that the exceptions to the parol evidence rule are so numerous and so extensive that the rule itself has possibly been destroyed.[33] It has been observed that the modern tendency is for courts to treat cases coming before them as exceptions to the rule.[34] It has been said that the courts have sought to adapt the parol evidence rule to take account of "the habits of mankind" and its scope has been progressively reduced until there is now considerable uncertainty as to where it will be applied.[35]

The rule is now regarded as serving no useful purpose as

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[33] The Law Reform Commission (Great Britain), "Law of Contract: The Parol Evidence Rule", (supra) page 13

[34] ibid. at page 20.

[35] ibid. at page 16.

it is a technical rule of uncertain ambit which only adds to the complications of litigation without affecting the outcome and prevents the courts from getting at the truth.[36] The final recommendation there was for the abolition of the rule. The criticisms levied against the rule, and the recommendations for its abolition, make us wonder if the formulation of Greer L.J. will still find content in a modern age insurance transaction.[37]

vi. Authority

The theoretical foundation for the deprival attitude of the courts in those olden days had been the extent of the authority of the agent. The view which prevailed then was that if there is no actual authority for the agent to act as done in filling the proposal, the agent acts as the agent of the applicant in filling the proposal form. This was however extended in Newsholme Brothers v Road Transport and General Insurance Co.[38] where the view was espoused that even if an authority to fill the proposal form for the applicant exists, the agent can not be treated as the agent of the insurer to invent answers to the question in the proposal form. While the

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[36] ibid. at page 25.

[37] See also The Law Commission (Great Britain), Law of Contract: The Parol Evidence Rule", No 154 (1986) at page 27 where it was said that evidence will only be excluded when its reception will be inconsistent with the intention of the parties.

[38] (supra), footnote 24, chapter 2.

scope of the agent's authority covers the filling of proposal form, any action done in respect thereof is done on behalf of the insurer and it is difficult to see the usefulness of the rule laid down in Newsholme's case.

Where there is no actual authority in the agent to fill in the proposal form for the applicant, the difficulty in assessing correctly the extent of the authority of the agent makes it unwise to hold the applicant negligent for allowing the agent to fill in the proposal form. There is no way by which the applicant can know the extent of the actual authority of the agent except through the printed materials in the proposal form and this will not even come to the attention of the applicant unless the proposal form is read and filled by the applicant himself.

Where there is an inability to read the proposal form such as where the applicant is an illiterate, limiting the scope of the authority of the agent in the proposal form will serve little purpose. This is especially so when the apparent authority of the agent may be seen as covering all that is incidental to effecting a contract for the insurer. The actual authority vested in the agent has little bearing on who has the incidence of agency at any given moment.

Properly seen, the extent of the actual authority of the agent can only come into consideration where the insurer is made liable for the excesses of the agent, and an action is brought against the agent by the insurer. There is no means

of making a useful application of a limitation on the scope of actual authority of an insurance agent in determining issues of this nature. The court in Newsholme made an important observation in disregarding the actual authority of an agent to resolve the issue of conflicts here. The fault with the observation of the court in the case, however, is on the use of this disregard to deny the claim of the insured.

Probably, the fear of the court in Newsholme was the natural tendency to expand "authority" to its outside limit. This fear does not justify the rather narrow and inconsistent views taken on "authority". The pronouncement made may have been out of a desire to minimize the risk insurers may be exposed to. Reading through the judgment of the court, it can be easily concluded that the court was more interested in affording insurers protection rather than deciding the incidence of agency. Nothing short of a concerted attempt to hobble the insured against the insurer can justify the denial of the insured's claim even when the agent has from the insurer authority to complete proposal forms. To achieve justice in cases of these nature, while disregarding the actual authority of the agent, any finding must be in favour of the insured by reason of the actual incidence of agency.

The particular decision in Newsholme is probably reflective of the societal concern of the period since the

approach was not followed in earlier cases involving agents.[39] With the present age insurer being the "almighty party" in the insurance transaction, there is no continuing need for any unjustified protective measures for the insurer.

E. Seeking An Alternative

The traditional contract analysis, with the numerous gaps to be filled before a continuing flow of events can be presented, fails to unfold a model for the fair distribution of responsibility in the event of the errors and omissions of insurance agents. The traditional contract analysis, as a model, does not show any possibility of a long term usefulness and has patently fallen short of generating conceivable theories of liability in offering a solution to the conflict of interest affected here.

While the traditional contract analysis seeks to strip the insured of all protection, it is observed that the "protective analysis" offers a more complete analysis for the fair distribution of responsibility in the event of such errors and omissions by the agent. The protective approach further generates conceivable theories of liability and

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[39] In Lloyds v Grace, Smith and Co. (1912) A.C. 716 (H.L.), a decision handed down by Scrutton L.J, the court was ready to protect a third party widow against the fraud of an agent of a firm of solicitors. The question of lack of authority of the agent to so act was overlooked.

provides a potential usefulness in the long run consideration. It is contended here that it provides a more logical basis for apportioning responsibility for errors and omissions of insurance agents.

II

An Alternative Model : The Protective Analysis

A. The Need For Fairness

i. A Good Faith Contract

In insurance law, the initial step in the making of the contract of insurance is deemed made by the insured when the application for insurance is made. Though the insurer and the insured may contract for the insurance coverage directly, there usually would have been some contact with a representative of the insurer before such applications are made. In effect, the parties contract through the agent. The agent, most often than not, will be the one to supply the applicant with the proposal form.

Lord Summer said in Yorkshire Insu. Co. Ltd. v. Campbell[40] that the proposal form "or part of it originally was the applicant's own statement to the underwriter; now though without any change in its language it becomes as to some of its content part of the underwriter's promise to the assured, and as to the other of its content, part of the

[40] (1917) A.C. 218 at 222 (H.L.)

assured's promise to the underwriter." The proposal form, where used, solicits particulars of the proposed insurance in the form of questions and answers.[41] There are questions on the name, address and occupation of the applicant, the applicant's experience with other insurance companies, any previous application made for insurance and any previous refusal to give insurance coverage. Also usually asked are questions on the previous acceptance of the risk proposed by another insurer at a higher premium and any previous claim on a similar policy. The applicant is also required to disclose anything tending to show that the risk is greater than usual.

Common clauses in the proposal form are clauses transferring the incidence of agency and the "basis clause". The latter is usually in the nature of a declaration which the applicant may be asked to sign, that the statements made in the proposal form are true and are to be the basis of the contract between the insurer and the insured. The parties are required to deal with each other with the utmost good faith and good faith in the context requires the disclosure of all fact material to the contract proposed. Though the statement of the rule is indicative of the duty of the two parties to this contract, the trend of judicial pronouncement on the requirement of good faith tends to put the burden of the duty more on the insured alone rather than on the two parties to

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[41] It should be noted that in as much as contracts of insurance may be made orally, there is no obligation on a prospective insured to fill a proposal form though it is the customary means of making an application.

the contract.

The reason for this may be understood if one considers the rationale for the requirement of good faith in insurance law. As Amissah J. said in the Ghanian case of Guardian Ass. Co. v. Tornye[42], contracts of insurance are known for establishing relations between the insurer who comes to the negotiation knowing nothing and the proposer who knows everything. It is to redress the imbalance in this initial state of relative knowledge of the parties that the law require the proposer to make a full disclosure of all material facts.

The rule is designed towards fairness. The fairness sought to be shown equally demands that it is not forgotten that there are two parties to the contract who must exercise good faith in the transaction. Good faith is also required of the insurer. In stating the rule, it may be said that good faith forbids either party from concealing what is privately known to draw the other into a bargain from an ignorance of that fact, and a belief in the contrary. However, the courts have tended to equate the duty of acting in good faith as only a duty of disclosure on the part of the insured.[43]

Thus the language of the court in Ogbebor v. Union

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[42] (1967) 2 A.L.R. (Comm) 92.

[43] See Rozannes v Bowen (1928) 32 L.R. 98 at 102 where Scrutton L.J. equated good faith to the duty of the insured to make a full disclosure to the underwriters without being asked of all material circumstances.

Insurance Office[44] that the right to have full disclosure to the insurer in insurance contract is an inherent right. An onerous burden is thereby placed on the insured. The insured first has to possess "near-clairvoyant" powers to discover what a reasonable and prudent insurer will regard as material and disclose such facts. But the pendulum does not stop swinging there, it continues against the insured.

There is the basis of the contract clause with which the insured may be lured into an arena where the hopes and aspirations to get indemnity in respect of the apprehended loss may be easily throttled. The insured becomes a sheared lamb, destitute of protection and seeks the mercy of the law. It is into this already deplorable situation that the concept of transferred agency has been introduced. What makes the adoption of transferred agency just in view of the already weak position of the insured?

ii. Contract of Adhesion

Insurance law is an extension of the law of contract and like any other contract, the parties must agree to be bound by certain terms. There must be an offer by one and an acceptance of the offer by the other. In the classical model contract, where freedom of contract is an essential feature, the judiciary is not to make the contract for the parties but only provide interpretation to the terms agreed upon by the parties. Each party is regarded as knowing the contract made

[44] (1967) A.L.R. (Comm) 166 (Nig M.W. H.C.)

and since assent is essential to the contract, the parties are bound by the manifestation of their assets.

A contract of adhesion is one in which a party is made to adhere to conditions imposed by the powerful will of the other party. The contracts usually have some peculiar characteristics, the most important of which is that the contract is made in general terms and addressed to a large number of people. Insurance contracts are usually couched in such general terms and made applicable to nearly all classes of people. The offer in contracts of adhesion relates usually to services or to the satisfaction of essential needs. That insurance contract is designed to satisfy an essential need - obtaining a promise of indemnity in the event of an apprehended loss, is not in doubt. The offeror usually has a monopoly in contracts of adhesion. In insurance contracts, the monopoly of the market may not be present but this does not affect the conclusion because there is little or no choice to the insured. With competitors in insurance business imposing similar clauses or terms, the contractual power of the insured is still limited.

Another essential feature of contracts of adhesion is the insertion in the contract, clauses not subject to discussion and in favour of the stronger party. In insurance contracts, basis of the contract clauses are common and so also are clauses transferring the incidence of agency in certain instances. Such clauses operate unfairly in favour of the insurer and are not subject to discussion between the parties.

A contract of adhesion must also be in a printed permanent form. The trend nowadays is for the policies of insurance to be mass produced and the conditions of each contract are just inserted in a printed permanent form of the insurer. These show that undoubtedly insurance contracts are contracts of adhesion.

The insurer, usually a big insurance firm is with a strong bargaining power and the insured, who is the weaker of the parties, is forced to accept whatever is being offered on the terms dictated by the insurer. It is not uncommon, during the initial stages preceding the completion of the contract of insurance, to find the proposed insured accepting temporary insurance coverage on terms and conditions to be communicated later. Where interim insurance is given to the insured on the usual terms and conditions of the company, the terms are usually unknown to the insured at that stage and the insured becomes acquainted with them only on the subsequent receipt of a policy.

Even if a power to disaffirm any of the terms is provided, such clauses defeat the whole basis of the contract as a voluntary contract since the insured has little choice but to acquiesced to the terms. Where then is the freedom of contract? The consent given here is fictitious as it is a classical case of a "take it or leave it" offer and the insured in need of an insurance coverage can not leave the offer. The insured is left with only an option, to accept coverage on the terms offered. Despite these, insurance

contracts have been held valid and binding on the assumption that the insured knew, understood and accepted all the clauses of the contract signed. Does this not provide a need for a measure of fairness in dealing with the position of the insured?

This needed fairness is what the traditional contract analysis denies the insured on the premise that courts should not interfere with the terms of private contracts derived from the consent of the parties. This is the "laissez-faire" attitude, an attitude ideal only where the parties are dealing on a relatively equal basis and each party is able to pursue personal interests in an arms length bargaining. Where each party is free to obtain the best possible exchange, the adoption of the "laissez-faire" attitude may be justified. But should this be the attitude of the court in a contract of insurance having regard to the peculiar circumstances underlying its formation?

Williston sums up the anomalous position of the insurance contract by writing:

> the established underwriter is magnificently qualified to understand and protect its own selfish interest. In contrast, the applicant is a shorn lamb driven to accept whatever contract may be offered on a take it or leave it basis if he wishes insurance protection.[45]

The insurance company is quite secured in its position since it dictates the terms of the contract and the insured's only hope of coverage is to accept those terms. Young and Holmes

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[45] Williston S., A Treatise on the Law of Contract (Mount Kisco, New York : Baker Voorhis and Co. Inc., 1957) page 900.

state it that[46]

> "the insurance company always stood as strong and firm as the rock of Gibraltar. The insurer stood by the rock as a weak and limp piece of plastic clay in contrast."

There is thus the need to protect the insured against some mechanism of the insurance contract as contracts of adhesion.

Should there not be regulations, judicial and legislative, to bring relief to the insured when the insurer is benefitting from the contract to the prejudice of the insured? The average policyholder is convinced of the necessity of insurance usually through the salesmanship of the insurance company's agent. The policyholder however may not know and will not usually be taught that the contract of insurance is essentially different from other types of contracts. The insured does not get to know the provisions of the policy until the completion of contract, does not know the rights and duties that flow from those provisions and that the law presently protects the insurer more than the insured.

Further, the insured does not seek legal advice to determine what constitutes insurance coverage and what rights are determined when a tortious event occurs, whereas the insurance contract is prepared by the insurance company with over two centuries of insurance experience. Does this still provide support for the contention that the insurer enters the contract of insurance knowing nothing? Young and Holmes conclude on these that the insured does not have the intellec-

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[46] Young W.F. and Holmes E.M., Cases and Materials on the Law of Insurance (Mineola, New York: The Foundation Press Inc., 1985) page 73.

tual equipment to meet the challenge.[47] They opine further, that the law, if it is to meet the needs of the family in the last quarter of the twentieth century, must adapt itself to those needs and the law must cease to embody a philosophy opposed to change.

The protective analysis provides the change with a model that paints a more complete picture of fair distribution of responsibility for the errors and omissions of insurance agents. The model, an equal protection one, is predicated on fairness which is required on the part of the two parties to this uberri mae fidei contract. The model may be explained on grounds of fairness which stems from the nature of the contract as one of adhesion and a contract of good faith. It may also be explained on the deep pocket theory, a ground not far removed from fairness.

iii. A Deep Pocket Theory

A deep pocket theory[48], a view that the courts adopt an increasing protective attitude towards the injured of the parties to a contract, provides an unveiled sympathy for the insured's expectation. The injured party here is the insured and not only is the insured injured, he is the weaker of the parties to the contract of insurance. The insured is forced to enter into the contract of adhesion with little choice if

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[47] Young W.F. and Holmes E.M., loc. cit.

[48] See Holman F.T., "Errors and Omissions for L.I.A.B.A. Members" Canadian Insurance, June 1988 26 at 27.

he wishes the coverage. The contract is not a product of individual bargaining and the insured is stuck with terms which he did not propose.

Furthermore the insured is forced to make use of the representative of the insurer since it is the agent and not the insurer that is seen and dealt with. The insured sees the agent as a professional person possessing special skills, knowledge and training, and whose expertise are employed in the services of the insurer. The contract with the insurer through the agent is made with an expectation that the agent acts for the insurer and there will be indemnified on the occurrence of the event insured against. The errors, most likely, will not be discovered until there is a loss of the insured risk and a claim is made. The insured has suffered an injury, the loss of the insured risk and to impose further burden on the insured by reason of some relationship the insured never intended or expected will be tilting the scale to the extreme against the insured.

The deep pocket theory offers a solution to the problem of the insured here. The theory, as stated here, implies that losses should be absorbed by those able to withstand the financial impact. The insured entered into the contract of insurance in the first place seeking financial security because he could not withstand the impact of the financial loss. The insurer is such professional loss bearer against whom such financial strain may be pushed. The insurer is in a better position to make good the loss and dispose of the

problem involved in this arena. Simply put, the insurer has the deeper pocket capable of taking the strain of loss.

This approach is basically one revolving round some social considerations. Hill points out that this is an era of consumerism where the legislators and the courts have gradually removed the onus that once existed for a buyer and replaced it with a corresponding duty on those involved in commercial matters to conduct their business in a certain manner and with a certain degree of concern and protection for the buying public. Because an average member of the public is no more knowledgeable of the concepts of insurance than with other items referred to as consumer purchases, Hill concludes that in keeping with the trend of the legal system today towards consumer protection, those people who purchase insurance policies should be afforded some safeguards in transactions with insurers and their agents.[49] This shows that a social consideration in this context, the deep pocket theory, is not entirely out of place.

iv. Burden - Benefit Theory

In the adoption of any solution as the mechanism by which the conflict may be resolved, care must be taken to ensure that it has all the badges of fairness. Fairness here not only to the "defenceless" insured but also to the "powerful" insurer. In treating the issue, fairness to the insurer may

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[49] Hill D., "Omissions and Misrepresentations caused by Insurance agents" (supra) at page 17.

be shown by the legal principle that "he who reaps the benefit of a situation that has been created should also bear the burden".

The statement of this as a theory predicates on the assumption that where an agency is created, some benefits must have accrued to the principal otherwise the agency would not have been brought about, whereas persons dealing with the agent seldom derive any benefit from the fact that the agent has been interposed between that person and the principal. This is called the burden-benefit theory,[50] and its application, here, shows that the insurer has a benefit to reap from the creation of the agency. The insurer has control over the agent since the right to dictate what the agent engages in lies with the insurer. The control over the agent is seen here as representing a benefit to the insurer.

The insurer has another benefit to derive from the situation. The completion of the proposal form by the agent has facilitated the making of the contract of insurance and thus increased the list of the insurer's policyholders. Where there is no mistake in the involvement of the agent and no problem arises, the insurer obviously will not repudiate the relationship between it and the agent. It should not therefore on this theory be allowed to repudiate the agency and its attendant consequences where an error is made.

On this theory alone, a protection may be afforded the

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[50] Law Reform Commission of British Columbia, "The Law of Agency: The Termination of Agencies" (1975) Part 1, page 7.

insured in this as a scheme of events. However, this consideration may not be enough as an instrument of such a protection to the insured. It may combine with the enumerated factors, as the bases from which the need for protection stem, to shape the expectation of the insured in the contract of insurance. The expectation itself could assume that paramount position in the determination of the issue by the court.

B. The Instruments of Protection

The factors identified above may provide justification for change. But do they suffice as instruments of such change? How effective are these going to be as change agents in the context of transferred agency? The factors may be seen as social considerations alone which are insufficient to deal with transferred agency. The instruments may be found in other factors which may be stated thus:

i. Application of Agency Tests

The imposition of liability on the insurer here, under the analysis, will not be a matter of social justice alone. There is an existing agency relationship between the insurer and the agent which makes the imposition of liability a matter of logical consequence of the relationship. At the time of completing the proposal form, the insurer has control over the agent and both consent to the agency relationship. The agent is not subject to control of the insurer on the manner in which the duties of the office are carried out and the completion of the proposal form for the insured in this

respect will form part of the agent's discretion on devising the best method to carry out his insurer's wish.

The recognition of this process, having the agent complete the application form for the applicant, as a basic service offered to the applicant by the insurer to facilitate the purchase of the insurance was also made by Hill who says it is simply another of the agent's business functions.[51] Applying the normal agency principles of control and consent, the conclusion is inevitable that the incidence of the agency is with the insurer though the agent completed the proposal form for the insured.

ii. The Agent's Ostensible Authority

The authority of the insurance agent may be seen either as actual or implied authority. Actual authority has been deliberated upon on many occasions by the courts but the courts seem to have placed too much emphasis on this form of authority. Where the agent has actual authority to complete proposal forms, the scope of the authority admits of the application of the agency principles to hold the insurer liable for such errors. In dealing with transferred agency, the view has been expressed that even with actual authority, where the agent completes proposal form for the applicant, the agency is transferred. The application of agency principles coupled with the actual authority makes unjust any resolution

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[51] Hill D., "Omissions and Misrepresentation Caused by Insurance agents" (supra) page 17.

based on this approach.

Where the agent has no actual authority to complete the proposal form but has authority to receive completed application forms for the insurer, there is to be implied an authority to carry out any other thing incidental to the carrying out of the subject of the actual authority. This will include completing the proposal form. This treatment of ostensible authority has been used in some other aspects of insurance law where transferred agency may be possible. The application of it in those instances prevented a transfer of the incidence of agency.

Ostensible authority could be applied as an instrument to prevent a transfer of the incidence of agency. In applying ostensible authority, it should be noted that the diverse approach to it by different courts might make reliance on it to protect the interest of the insured difficult. It could be seen however, as part of the factors that shape the expectation of an insured. Its existence can be seen from the presentation of the agent and this presentation that the agent has some form of authority to act for the insurer could shape such expectation.

iii. Imputation of Knowledge

The simple notion of this analysis being protective makes it just in the circumstances. It becomes productive too with a consideration of the implications of the knowledge acquired by the agent in the course of his duties. The position of the

law in contract generally is that knowledge of the agent is knowledge or notice to the principal. Insurance law is not treated differently. In insurance law, the general principle applicable is that the knowledge of the agent is knowledge of the insurer. This product of age-long reasoning should be adopted without qualification as to certain aspects in insurance law. Whether the agent completes the proposal form for the applicant or not, any knowledge acquired by the agent is to be deemed the knowledge of the principal who is the insurer.

There can be no founded justification for dividing the rule into two and treating knowledge of the agent, for the purposes of completing the proposal form, that of the insured; but for other purposes, that of the insurer. The knowledge of the agent acquired in the process of completing proposal forms, imputed to the insurer will thus serve as a basis for disregarding the supposed negligence of the insured in this matter and also the evidentiary rule espoused in Newsholme by Greer L.J.

Knowledge in this respect becomes important in as much as it can be applied without unnecessary restrictions as to its scope and content. As noted already, the knowledge may be as to the contents of the proposal form and the true uncommunicated facts, or it may be as to the fact that the insured did not complete the proposal form himself but that the agent did. In either case, it disposes of the contention raised by the basis of the contract clause. What the insurer seeks is a

disclosure of all the material facts which may affect the risk proposed to be insured and once this has been fully disclosed, either in the proposal form or to the agent, the duty has been satisfied and no clause can defeat the insured's claim.

A case illustrating the operation of the rule as stated is Edwards v A A Mutual insurance Co.[52]. The case was decided on section 10(2) of the New Zealand Insurance Law Reform Act 1977 which provides:

> "an insurer shall be deemed to have notice of all matters material to a contract of insurance known to a representative of the insurer concerned in the negotiation of the contract before the proposal of the insured is accepted by the insurer."

There, the proposal form had been completed by the insurance agent but signed by the insured. The agent inserted a wrong statement and the insurer repudiated liability. It was held that knowledge of the incorrectness would be imputed to the insurer by virtue of section 10(2). The imputation of knowledge resulted in the conclusion that the misstatement would not have influenced the judgement of a prudent insurer. The insured's claim was protected.

iv. Reasonable Expectation

In Manitoba, it is noted that these factors providing the instruments of protection have not been the subject of any legislation. The protection offered by the factors may be stated as judicial protection and in so far as these are

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[52] (1985) 3 ANZ Ins Cas 60- 668.

relative to the expectation of the insured, they may all lead to induce an expectation of the insured that the agent acts for the insurer. The application of the agency tests, principle of ostensible authority and the reasonable implication of the knowledge acquired by the agent all lead undeniably to the conclusion that the insured may reasonably assume the agent acts for the insurer.

The "reasonable expectation" of the insured has been stated to be one of the decisional methods by which the courts in the American jurisdictions deal with the problems arising in contracts of adhesion, the like of which are contracts of insurance. This was stated to be in addition to some other doctrines such as estoppel, waiver, public policy and unconscionability. Jerry says that it is impossible to state when exactly the doctrine of reasonable expectation emerged but that the doctrine was first developed as an interpretative tool and used to resolve any ambiguity in the insurance context.[53]

The seminal case in the evolution of the doctrine in insurance law is said to be Kievet v Loyal Protective Life Insurance Co,[54] a 1961 decision in New Jersey where the court said that when members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfil their reasonable expectations. Mayhew

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[53] Jerry R.H. II, "Understanding Insurance Law" (New York: Matthew Bender and Co., 1987) page 107.

[54] (1961) 170 A. 2d. 22 (U.S. New Jersey S.C.).

says that the major impetus in moving the doctrine of reasonable expectation beyond that of solely an interpretative rule was the 1970 work of Keeton which formulated the doctrine as "the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of a contract will be honoured even though a painstaking study of the policy provisions would have negated those expectations."[55]

Part of the proposition of Keeton is that "if the insured's expectations were objectively reasonable, those expectations then should be protected even if a close and detailed study of the policy by the insured would have defeated those expectations."[56]

Jerry states that this formulation makes even reading the policy unessential since an individual can have reasonable expectation of coverage that arises form other sources other than the policy language itself and such an extrinsic expectation can be powerful enough to override any policy provisions no matter how clear.[57] Thus, it is said that if a policy is so construed that a reasonable man in the position of the insured would not attempt to read it, the insured's reasonable expectation will not be delimited by the policy language, regardless of the clarity of one particular phrase, among the augean stable of print.[58]

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[55] Mayhem W.A., Reasonable Expectation: Seeking a Principled Application (1986) Vol. 13 Pepperdine Law Rev. 267 at 276.

[56] Keeton R.E., Insurance Law Rights At Variance With Policy Provisions (1970) 83 Havard L.R. 961 at 967.

[57] Jerry R.H. II, loc. cit.

[58] Jerry R.H. II, loc. cit.

Jerry states further, however, that there are other formulations of the doctrine. One is that the doctrine requires that an insurance contract provides the cover that an insured reasonably believed is purchased and under this formulation, if the insured read the policy and understood the limits of the coverage, no rights in the insured at variance with the policy language exists. Another formulation, as seen by Jerry, is that which require that an insurance contract provide the coverage that a reasonable person in the place of the insured would expect after reading the policy.[59]

Mayhem states that the doctrine evolved as a result of the many problems caused by the perceived harshness of certain insurance policy provisions and the court's desire to regulate those. Mayhem points out that at the centre of much of the judicial desire to employ unstated decisional reasons have been marketing processes by which insurance are sold.[60] This raises the question whether reasonable expectation could resolve the issues involved in the preceding discussion here.

The average applicant having a first dealing with an insurance agent will most likely take the agent as having been fully clothed with authority to act for the insurer. The applicant takes the agent as the insurer and the expectation is that the help, guidance and advice offered by the agent comes from or with the authority of the insurer. This expectation, in most cases, will be justified, such as where there

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[59] Jerry R.H. II, op. cit., page 108.

[60] Mayhem W.A., op. cit., page 267.

is an authority in the agent to so act or to obtain from the applicant a completed proposal form. The latter gives the impression of an authority to help in completing the form, if necessary.

Where such authority is lacking, the expectation of the insured that there could be reliance on the agent as the insurer's agent may still be reasonable. Depending on the circumstances, factors such as the literacy level of the applicant, the general impression of the insuring public as to the status of the agent, apparent authority for the agent to act for the insurer and other factors of the like, may be the basis of the reasonable expectation that the applicant has. Factors such as the knowledge acquired by the agent, absence of any agreement or intent to create agency between the agent and the insured, may also aid the reasonableness of the expectation.

Are these suggestive of the successful application of the doctrine of reasonable expectation in the circumstances described above? Would the doctrine of reasonable expectation as developed in the American jurisdictions, out of the desire to judicially regulate some aspects of the insurance industry or avoid injustice, be of any practical use in solving the problems already identified with transferred agency?

Jerry states that insurance law seems to have room for some sort of reasonable expectations doctrine since it is simply an extension of the more traditional doctrines of election, waiver, estoppel and reformation, which doctrines

are designed to achieve fairness in insurance transactions. The conclusion is that where the impact on the insured is harsh, protecting the reasonable expectation of the insured seems eminently sensible.[61] The unfair operation of the doctrine of transferred agency on the insured has been noted and going by this contention, the reasonable expectation doctrine may be the alternative that will ensure fairness in this instance.

The first consideration here may be the possible inadequacy of the scope of the doctrine of reasonable expectation. It is not wide enough as presently formulated to cover all cases of transferred agency. Reasonable expectation applies mostly to the interpretation of policy provisions[62]- while transferred agency arising by judicial pronouncement is not uncommon. Reasonable expectation, as formulated in the American jurisdictions, thus, may not be adequate to cater for the interests involved where there is transferred agency by judicial pronouncement. There is the need, therefore, to modify the concept and expand it to cover cases outside the interpretation of policy provisions before it can be applied successfully here.

Furthermore, the doctrine of reasonable expectation has not been spared by academic writers in criticism. Jerry states

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[61] Jerry R.H. II, op. cit., page 109.

[62] In Elite Builders Ltd. v Maritime Life Assurance Co (1985) 16 C.C.L.I. (B.C.C.A.) it was held that reasonable expectation is applied to insurance contracts where ambiguous policy language is found or limitations in the policy were not drawn to the attention of the applicant.

that the doctrine is not reducible to a concrete, mechanical formula and that the circumstances in which the doctrine has been applied are diverse with confounding results in many cases.[63] Mayhew regards it as a covert method of the court to reach a desired decision in insurance disputes. Mayhew says it is used because of the courts' discomfort with an express statement of the true basis for a decision. Mayhew regards it further as misleading because it will not give a true rationale for the decision.

> "Lawyers are trained to predict the results based on past decisions ... thus lawyers may rewrite contracts such as insurance policies to correct infirmities that the lawyer believes to be created by a particular decision. Where the perceived infirmity does not represent the rationale, additional litigation may well result in not only additional appellate opinions but also opinions that continue to base their decisions on covert methods."[64]

The criticisms against the doctrine seem defensible at first if one considers the reasons underlying the doctrine and the basis for seeking a protection for the insured. The main theme of giving consideration to the insured here seems to be the inequality of the position of the insured and the insurer. It has been held that the equality of bargaining power is not a pre-requisite for contracting and therefore the lack of it should be irrelevant in considerations of this nature. What is stated to be required to support a finding of unconscionability is special disability or disadvantage which materially impaired the complainant's ability to protect his

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[63] Jerry R.H. II, op. cit., page 108.

[64] Mayhem W.A., op. cit., page 269.

or her own interest in the transaction.[65] This as a traditional contract theory allow a contracting party to rely on the objective manifestation of consent reasonably interpreted to enforce the contract. The contention, therefore, could be the need for some other proper basis for depriving a party of their contract over and above considerations pertinent to the other contracting party.

There is also the need for an exactitude of expression and it is important to consider how the doctrine can be worded to give a protection to the insured dealing with the problems of transferred agency. It is of note at this juncture that there is no judicial precedent in the jurisdictions under consideration on the use of reasonable expectation as a protection against transferred agency. This makes it plausible to consider how receptive the court are likely to be to its reasoning. Legislation is imperative because the judiciary may be adept to its application. How far can there be a codification of the doctrine of reasonable expectation, especially in this insurance matter.

The first consideration here is the application of the doctrine of reasonable expectation to prevent the use of the transferred agency to defeat the insured's claim. This has been suggested as a modification of the rule of reasonable expectation as it presently stands to suit the context of transferred agency. The modification of the rule may be done

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[65] See Commercial Bank of Australia Ltd. v Amadio 46 A.L.R. 402; Moffat v Moffat (1984) 1 N.Z.L.R. 600.

in a way that will reduce it to the "concrete mechanical formula" sought for in its content. The express statement of the rule applicable in instances such as the one under consideration will dispense of the contention that it is a covert method of reaching a decision.

The inequality of the bargaining power of the parties to an insurance contract is not the main issue here and the inequality is not the tool for seeking a protection for the insured. However, it is quite useful a reference. It can make the courts mindful of the fact that the insured might be entering into the contract expecting some other gains and consideration other than the ones that the insurer is offering, and also make it easy for the courts to reach a conclusion protecting the interest of the insured. The inequality, not being an instrument of protection, is only a consideration on whether to use an instrument or not. Wherein then lies the instrument?

The possession of the relevant knowledge through the agent may be an instrument here to provide for depriving the insurer of the rights sought. This will be a consideration not pertinent to only a party to the insurance contract. The knowledge of the true facts, or even the fact that the insured did not fill the proposal form, makes it unconscionable for the insurer to enforce any right inconsistent with the knowledge it acquired through the agent. This is especially so when the insured is known to be under a disability. By not being able to complete the proposal form himself, the insured

thus lacks the ability to protect himself. The vulnerability to such errors by the agent, deliberate or otherwise, provide the unconscionability depriving the insurer of the enforcement of any right. Application of agency tests may be the instrument and this is also true of the implications of an application of ostensible authority to this area of insurance law. The instrument may equally be found in the "benefit- burden theory" since this is not a consideration pertinent to one party alone. The insurer has derived a benefit from the arrangement.

The reasonable expectation of the insured, as a factor in itself, may also be the instrument of deprivation as it affects essentially the contract being made. The assent of the insured is needed for any transfer of the incidence of agency to the insured. The assent here then must be a reasonable having regard to the insured's expectations. The expectations, on the other hand, will be determinable on the basis of the actual information communicated to the insured regarding the agency, the insured's background, education, training, knowledge and experience. However, such assent to any transfer of the incidence of agency will often be lacking. These factors obviously relate to the insured but are not pertinent to him alone. The insurer could ensure that the agent does not participate in the making of the contract of insurance, especially in view of these personal indiosycracies of the insured; or, alternatively, the insurer could ensure the efficiency of the agent when so involved. This is even

more plausible if it is recognised that these personal indiosycracies of the insured are not the cause of the right of avoidance sought by the insurer but rather the fault of the insurer's appointee.

Having regard to the reception that the doctrine is likely to gain in the courts on the issue, the lack of a judicial precedent in Manitoba makes it a possible concern that it will not gain a ready approval from the courts. Furthermore, even if it gains acceptance before the courts, there is the need for consistency in its application to achieve the desired end and this can only arise where the content, extent and expression of it are precisely stated. The precise statement of the reasonable expectation rule to show such consistency should be made by the legislature to prevent a possible mis-application of the rule and the formulation of its exact content. This leads to the other question of whether the rule can be the subject of a legislation.

The Australian Insurance (Agents and Brokers) Act of 1984 [66] is instructive on the issue of codification. The Act introduced reform of this aspect of insurance law in the language of expectation. It provides:

> (1) An insurer is responsible, as between the insurer and the insured or intending insured, for the conduct of his agent or employee, being conduct -
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> (a) upon which a person in the circumstances of the insured or the intending insured could reasonably be expected to rely; and
>
> (b) upon which the insured or intending insured in fact relied in good faith,

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[66] section 11.

> in relation to any matter relating to insurance and is so responsible notwithstanding that the agent or employee did not act within the scope of his authority or employment as the case may be.
>
> (4) An agreement, in so far as it purports to alter or restrict the operation of sub-section (1) or (2), is void.
>
> ...

The conclusion to derive herefrom is a defensible protection for the insured where an error or omission of the agent occurs. The first noticeable feature of this provision is its wide ambit. The provision relating to the conduct which the insured "could reasonably be expected to rely" covers such occurrence as the agent filling proposal form for the applicant. The test, therefore, will be the reasonableness of the reliance on the agent's conduct in the circumstances. However, the provision in the section goes beyond dealing with the proposal stage. It provides for other situations such as where the agent misleads the insured into buying the insurance policy by false statements as to its coverage. This is an attractive provision in as much as it tends to overrule such decisions which ascribe to the insured the agency when the agent fills the proposal form.

The Act is the brainchild of the Australian Law Reform Commission. The Commission aimed, with the provision, at rendering ineffective contractual clauses seeking to limit the liability of the insurer for the misrepresentations or other conducts of the insurer's agents. In this regard, the commission also aimed at extending the responsibility of the insurer to all matters connected with the proposal in which the

insured can show a reliance on the agent. The Committee recognised the provisions in the other jurisdictions which seek to presume against the transfer of agency but observed that these have not gone far enough in imposing liability on insurers.

The Committee thus sought an arrangement which will be within the knowledge and experience of many members of the public. This shaped the recommendation of the Committee on the provision of a section along the reasonable expectation of the insured. The Committee said:

> "What is within [the insuring public's] knowledge and experience is what an insurance agent represents to them as being within his authority. To place restrictions on an insurer's responsibility by reference to the agent's actual and apparent authority is necessarily to discriminate against those persons in the community who, by reason of their background, education and training, are lacking in knowledge, are most in need of advice and assistance and are most likely to rely uncritically on the advice of the insurer's agent."[67]

Speaking of the effect of the section, Tarr ascribes to the section a significant position that overrides the express terms of any agency document as far as the insured's reliance on the agent's conduct is concerned.[68] With the provision, the basis of the contract clause ceases to have effect the effect of a warranty in cases of transferred agency. Subsection (4) of the provision has made ineffective any such clauses.

This provision has not passed unscrutinized by legal commentators. Kercher and Thomas see difficulties in its leading to responsible marketing of consumer policies. Their

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[67] Australian Law Reform Commission Report on Insurance Agents and Brokers (No. 16, 1980), para. 37.

[68] Tarr A.A., Australian Insurance Law (1987) page 109.

contention is, inter alia, that "it does not require insurers to engage canvassers who understand the legal nuances of insurance and it does not require insurers to inform their staff as to the legal meaning of the policies they are marketing." [69]

The argument sounds naive in as much as it overlooks the implication of the responsibility imposed on insurers by the provisions. There can be no meaningful regulation, judicial or legislative, on the employment practice of insurers. Moreover, no legal purpose is served by such a requirement. The end result of the provisions is the imposition of liability on the insurer where the agent makes an error in the execution of his duties. It is left entirely to the insurer who to employ.

Kercher and Thomas argue further that the legislation does not provide any special mechanism by which consumers may test their rights under policies, or "purported policies of insurance".[70] This as an attempt at criticism seems defective in view of the lack of purpose in such an endeavour. There is no end served by testing rights under the policies of insurance where no loss has been suffered by the insured. The potency of the argument is removed by a consideration of the reason for the contract of insurance. The insured does not intend the risk insured against to happen. The risk of loss

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[69] Kercher B. and Thomas, The Reforms of Insurance Law: Caveat Emptor Survives (1987) Vol. 10 No.2 U.N.S.W.L.J. page 173.

[70] Kercher B. and Thomas, loc. cit.

is an "unwanted risk". It is most unlikely that any such testing of right under the policy can be made in good faith.

Another view expressed by Kercher and Thomas in concluding that insurer and their agents will be only marginally perturbed by the provision, is that consumers are still confronted with significant expenses if they contemplate contesting an insurance claim. This rests on the assumption that insurers can afford to wait, fairly secured in the knowledge that most consumers will be forced by the economic vagaries either to discontinue their actions or to settle it upon terms largely determined by the insurer.

Reliance was placed on Gates v C.M.L. Insurance Society Ltd.[71] where the insured had to resort to court on his policy rights. By the time the case reached the High Court, the insured was not legally represented. A solution offered is the giving of a statutory right to the insured under the section to seek recovery for the loss believed sustained. Simply put, "insurers must be required to indemnify [insureds] as if the policy ostensibly purchased has been issued".

It is noted that the expenses involved in litigation might sometimes make the resort to court for the enforcement of the policy right a worthless venture. However, this is a deficiency outside the scope of legislation in insurance matters. The solution offered by Kercher and Thomas has done little to express any value in this regard. Where a statutory

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[71] (1986) 60 A.L.J.R. 239 (Aust. H.C.)

right of recovery is given to the insured, the resort to litigation is not there by removed, especially where the insurer denies liability. Furthermore, the particular usefulness of the section lies in its flexibility to accommodate different situations. Where the liability of the insurer and the right of recovery is made statutorily absolute in all cases, the flexibility is removed.

Despite these observations, the section still afford a protection to the insured and makes possible the expression of this analysis as a model. The analysis is premised on a statutory protection to the insured. In expressing the analysis, it is significant to observe the need for the provision on the reasonable expectation of the insured. Such a provision will provide a statutory protection for the insured in place of the existing judicial protection found in "knowledge", "ostensible authority" and an application of agency principles. All these three can be subsumed under reasonable expectation as factors shaping the reasonable expectation of an insured.

The advocated statutory protection here has two aspects. The first is the reasonable expectation of the insured and such is guaranteed with an adoption of the similar provision in the Australian Insurance (Agents and Brokers) Act. Reasonable expectation represents the first aspect of this statutory protection. The second aspect of the statutory protection needed to express the analysis is offered by the legislature and is a presumption made against the transfer of the agency.

v. Presumption Against Agency

A presumption against agency has been made in section 200 of the Insurance Act of Manitoba. This presumption is however not complete in the insurance scheme. It is offered in relation to life and accident insurance only. The other classifications of insurance are thereby omitted. In the areas where the presumption is made available, the short notion of the presumption is a defence to the insured against the insurer in the general.

This presumption may be read also in the recommendations of the Australian Law Reform Commission as evidenced in their Report.[72] Section 12(1) of the proposals provided:

> "subject to this section, an insurance intermediary shall be deemed, in relation to any matter relating to insurance and as between an insured and an intending insured and an insurer, to be the agent of the insurer and not of the insured or the intending insured."

This provision is made general and the section applies in relation to "any question" arising out of insurance. With this provision, it might be said that the Australian Law Reform Commission has tackled effectively any questions arising respecting the incidence of agency. The provision is operative with section 11 of the Act which provides for the reasonable expectation of the insured. It is to be noted, in this provision, that there is no limitation as to the agent's

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[72] A.L.R.C. Report No. 16, Insurance Agents and Brokers.

authority. This is the diverging point between it and the similar provision in the New Zealand law on the transfer of the incidence of agency. The provision in New Zealand has been fettered with the limiting of its application to cases where the agent has an authority to act for the insurer in the transaction. The New Zealand Insurance Law Reform Act 1977[73] provides:

> "(1) A representative of the insurer who acts for the insurer during the negotiation of any contract of insurance, and so acts within the scope of his actual or apparent authority, shall be deemed, as between the insured and the insurer and at all times during the negotiations until the contract comes into being, to be the agent of the insurer."[74]

There is an attempt to avoid the limitation in this section by the subsequent provision that:

> "(2) An insurer shall be deemed to have notice of all matters material to a contract of insurance known to the representative of the insurer concerned in the negotiation of the contract before the proposal of the insured is accepted by the insurer.

The net effect of these two provisions is to provide a presumption against the transfer of agency where the agent completes the proposal for applicants for insurance. Though section 10(1) is restricted in scope to cases where the agent has actual or apparent authority to act, section 10(2) may be used in many cases to protect the claim by the insured.

It is still a moot point whether section 10(2) is to be read subject to the limitation is section 10(1) on the actual or apparent authority of the agent. It is the submission here,

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[73] Section 10.

[74] underlining supplied.

however, that such an interpretation will defeat the whole purpose of the section to operate as a presumption against the transfer of agency. In as much as the subsection is couched without the limiting phrase on "authority", it might be taken as intended that the subsection is not to be limited in scope to cases where the agent has authority to act for the insurer. Furthermore, if read otherwise, the section would have served very little purpose in its implementation. It would have effected no change in the law if made subject to an overriding phrase as the authority of the agent. Whereas, a desired change in the state of the law may be seen as having induced the provision.

This taken as the effect of the New Zealand section, the attempt by the legislature is commendable as another approach to the issue of transferred agency. In Nigeria, no presumption against the transfer of agency may be found either in the form or the content of any legislation governing insurance. This is an area where the legislature in the country has consistently failed to measure up to standard and the principle and context of transferred agency remains unabated in the jurisdiction.

C. A Model : A Framework For Insured's Protection

A model may be presented with an understanding that a contract of insurance may be entered into directly by the insurer and the insured without an agent's involvement. However, since it is not unusual for insurers to transact

business through agents, the model may proceed on an assumption that the insurer and the insured act with the agent as the linking mechanism by which the contract is effected.

In expressing this model, sight must not be lost of the fact that the contract made through the agent has always to be construed with the agency issue in the background. The agent necessarily becomes an adjunct, an awareness that will help immensely in resolving any conflict. This involvement and the obvious consequential allegiance to the insurer can not be overlooked in construing the contract of the parties.

At the heart of the consideration of the agent's involvement is an observation of a need for fairness. The insured has been forced to rely on the assistance and expertise of a supposed professional. This professional has been shown to hold allegiance to a party, the insurer. With this allegiance, there is thus a representative of the insurer knowledgeable in the insurance business to protect the interest of the insurer. The insured lacks such independent representative with a known intent to protect the interest of the insured and thus fairness is demanded in dealing with their positions.

Fairness in this context assumes a peculiar feature which can convincingly promote an atmosphere needed for protecting the interest of the insured. The contract is one of good faith and is also a contract of adhesion. The insurer has benefits to derive from the arrangement and equally has a "deeper pocket" capable of taking the strain of loss. These

considerations, viewed separately or connectively, provide basis for the demand that the insured be protected. Central to the theme of each of these is a need for fairness and a consequential demand for protection.

Thus seen, the demand is not an unjustified measure. It is made on logical grounds. Providing a protection for the insured's interest gives respite to instances where the transfer of the incidence of agency has caused financial ruins to the insured.

The protection demanded here is not a new introduction either. It has been legislated upon and used in the cases. The protection, presently, can be statutorily guaranteed or a judicially guaranteed protection. The statutory provision on the presumption against agency provides the first arm of the protection. The second arm is seen in the cases. This could be through an application of agency tests in construing the parties' position. It could be an application of the agent's ostensible authority. These two have not frequently been applied in assessing the position where the agent completes the proposal form for applicants.

The feature of this form of protection often seen in the case law, in this respect, is the knowledge of the agent acquired in the process of completing the proposal form. The diverse forms these could take make it prudent to bring them under an embracing head. This is found in the insured's reasonable expectation.

Further, the inconsistencies in the application of these

judicially guaranteed measures of protection make it necessary to find protection for the insured in a statutory form. This is found in the statutory provision on reasonable expectation which may be entrenched in the Insurance Act of Manitoba. This done in the insurance scheme, necessarily, a statutory protection with two arms would have been offered to the insured.

With this protection offered, the insured becomes guaranteed of indemnity in the event of the insured loss. The insurer is liable for the loss irrespective of the agent's errors. The agent's errors affect the insurer only and the insurer can seek indemnity from the agent in the event of an erroneous completion of the proposal form.

The secondary concern in this regard is how the insurer recovers on the payments made if the agent can not indemnify the insurer. As stated, the ultimate loss bearer is the errors and omissions liability insurance coverage. On an insolvency of the agent, the insurer can make a claim against the coverage. The issue is where the indemnity lies on the failure or inadequacy of the agent's errors and omissions insurance coverage.

Here, fault can be traced again to the insurer and the insurer thus bears the loss on this occurrence for having not ensured the existence and adequacy of the errors and omissions liability insurance coverage.

D. <u>The Fraudulent Insured</u>

These premises on which the protection of the insured is built are not absolute protection. They are not absolute in the sense that they make provisions for protecting the interest of the insurer where such is necessitated. On the issue of "knowledge", the knowledge of the agent is not imputable to the insurer where the insured knows or has reasons to believe that the information given to the agent will not be passed to the insurer.

Not all knowledge of the agent is imputable to the insurer. Only the knowledge acquired in the conduct of the business as an agent of the insurer will be imputed. This provides for cases where the insured has been guilty of an unethical behaviour. Where the insured assists in the consummation of the fraud, the first aspect of the analysis will offer no protection since it is to the insured's knowledge that the truth of his communications to the agent will not be passed to the insurer.

The reasonable expectation of the insured also provides the same leeway. Where the agent involved in a fraudulent activity, the insured can not have any reasonable expectation that the agency remains with the insurer for all such purposes. Using the Australian Act as a model of this premise, the agent has not acted in good faith and the absence of a reliance in good faith on the agent's act makes the consideration outside the scope of section 11.

The presumption against agency has also guarded against the possibility of fraud. The controlling phrase in the

provision is "to the prejudice of the insured". Where the insured is at fault, a fault attributable to fraud, the presumption of agency against him will not be to his prejudice. The inclusion of the phrase provides some flexibility for the courts in the interpretation of the sections and guards against any fraudulent practice by the insured.

E. Fair Distribution of Responsibility

Having made the insurer liable under one of the premises of the protective analysis, the next consideration is the remedy open to the insurer for such forced indemnity. The agency has been ascribed to the insurer and under this scheme, the insurer and the agent are not allowed to depart from the existence and continuity of the agency. The fault or error of the agent gave rise to the right of rescission. The insurer may then have a remedy against the agent. The possible liability of the agent to the insurer as the principal can not be denied. The nature of the liability, here, might be the loss which the insurer has been subjected to as a result of the errors of the agent[75].

By this approach, the interest of the insured will be well protected as there is the sought coverage in any event, short of fraud on the insured's part. On the occurrence of the risk assumed, the insured's claim is against the insurer. The

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[75] The error could be the failure to communicate information passed to him to the insurer, completing proposal forms contrary to the expressed authority or an involvement by the agent in a fraudulent practice.

insurer too has a protected interest. On every payment made to the insured, the insurer can make a claim for indemnity against the agent and there is thus a fair distribution of responsibility for such errors.[76]

The agent, having been responsible for the error, gets the ultimate financial responsibility for the loss caused thereby. Consideration of the solvency of the agent may still arise here. Hereunder, the insured's need for protection would have been satisfied without the need to resort to the errors and omissions insurance coverage where an insolvency exists. The insurer has a claim against the agent and if the agent is insolvent, the claim may be made against the errors and omission insurance coverage.

The coverage comes into consideration here because of its design to indemnify a person who suffers a loss by reason of a professional fault of the agent. As Hill proposes, it may be used to protect insurers from the acts of their agents, inadvertent or otherwise. Hill's proposal was for the licensing practices for all insurance agents being made to include an errors and omissions insurance policy for each agent as a necessary requirement of his employment.[77]

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[76] There is the need for clear governing principles here to prevent the kind of finding in Western Union Insurance Co. v R.H.C. Insurance Agencies Ltd. (1984) 5 C.C.L.I. 43 (B.C.S.C.). There the insurer made a payment to the insured on a claim with knowledge of the defects in the insured's claim. On a recourse against the agent for the sum, it was held to be a voluntary payment by the insurer for which the agent can not be responsible.

[77] Hill D., op. cit., page 15.

This has been attempted by legislation in some jurisdictions thus making the coverage not only a matter of prudence but a requirement of statute. The shortcoming here is on the issue of implementation of the rules. The law has marginally provided an opportunity for a fair distribution of justice in social terms. Where there is a failure of this insurance coverage, the insurer is responsible for the failure of the rules to achieve its objectives and this makes it fair to impose liability on insurers. This is better than leaving the insured to make an errors and omissions claim against the agent only to discover that the agent has no such coverage. This is especially so when it is a fact that not all insurance agents carry the errors and omissions insurance coverage.

The insured should never be left in a position where there has to be reliance on an uncertain consideration to effect the expected security. This is where the deep pocket theory becomes significant in resolving the conflict. The insured has no way of ensuring that the agent has an errors and omissions insurance coverage or has a coverage of sufficient cash value to protect the interests in the event of insolvency. It is within the power of the insurer to ensure such. Many applicants for insurance do not even know of the existence of such an errors and omissions insurance coverage for agents albeit their inquiring about the possibility of its taking care of their interests.

The errors and omissions insurance coverage is required as part of the registration and licensing process for insur-

ance agents.[78] However, not all insurance agents carry the errors and omissions insurance coverage. The Superintendent of Insurance is in a position to ensure that an agent without the coverage does not get licensed in the province. This may be seen as a fault. However, a greater fault lies with those insurers who transact business with "uninsured" agents in flagrant disregard of the provisions of the Act.

The contract of insurance between the insurer and the insured has been noted as a contract uberri mae fidei, one of the utmost good faith. Wherein lies the good faith which the insurer has shown in dealing with the insured? The insurer is in a position to know of the solvency or otherwise of the agent and would have failed in exhibiting the good faith required by transacting business with agents who do not carry the errors and omissions insurance coverage.

In construing the contract between the insured and the insurer, the insurer should be made to pay for any loss arising from the loss of the risk insured. Where the agent has an errors and omissions coverage, the insurer then may sue the agent for an errors and omissions claim. The right of the insurer as the principal to sue the agent for any loss arising out of a breach of duty has been noted and thus the insurer's interest will be protected.

Where the agent carries no errors and omissions coverage, or carries one of insufficient value, the insurer can not be said to have been treated unfairly since it lies within the

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[78] Section 370(4), Insurance Act of Manitoba.

power of such insurer to ensure that the agent has an adequate errors and omissions coverage before engaging the services of the agent. The absence of such a coverage in some cases indicates the attitude of some insurers to the insured's position and justifies a remarkable protection offered the insured. In treating the issue of problems arising from the agent's act of completing the proposal form as being of a slightly quaint miniature, the potential injustice and financial distress which is caused to the insured is overlooked and this may be of great magnitude depending on the interest involved.

Where there is no errors and omissions coverage, the fault of the insurer in not ensuring its existence and adequacy will be involved as part of the regulatory scheme. For this fault, the insurer bears the loss and the errors of the insurer is not shifted to the insured.

F. A Complimentary or Radical Measure?

In conclusion, hereunder, it is submitted that the second approach, the "protective analysis", provides a model which may be used to solve many of the problems arising in the course of the agency in insurance transaction. It generates in the model, testable and conceivable theories of liability on the agent, insured and the insurer in appropriate circumstances. This shows its prejudice to the two sides in appropriate circumstances and makes the observation of fairness suitable. It further provides a long term usefulness with

bases of functional utility and may be adopted over the traditional contract analysis, the type that Newsholme offers, as being useful over a relatively longer period.

This proposal as a solution, properly understood, is not a radical measure but one which indeed sought out a hope for avoiding much contentiousness which are by- products of some of the earlier approaches. The vestiges of this particular approach have long been present and borne out by the cases and some statutory provisions in some jurisdictions. The approach has only gone ahead of the vestiges, by giving a systematic consideration to the consequences of an improved alternative scheme.

In Manitoba, there is already in existence regulatory scheme for insurance agents. These have been introduced with the licensing requirements in the province for insurance agents. In dealing with the issue of the agent filling the proposal form for the applicant, the adoption of the traditional contract analysis will only involve an extension of such regulatory scheme to make the liability of the agent absolute and ensure the enforcement of the provisions of section 370(4) of the Insurance Act. On the other hand, if there is an adoption of the protective analysis, the extension will not be necessary as there will be in existence already other measures to guarantee the efficient operation of the approach as a model.

The insurer's liability will check efficiently the excesses of insurance agents, protect the insured's expecta-

tion and be accounted for under an existing errors and omissions insurance coverage. This shifts the burden of ensuring the existence of the errors and omissions insurance coverage on the insurer, rather than necessitating the legislature to enact any new laws in respect thereof, and checks the possible omission of the Superintendent of insurance in this instance.

There is already a presumption of agency provision in the Act and the "protective" approach is thus favoured for Manitoba. What is needed is the extension of its principle to cover all cases of insurance and not restricted to an aspect of the business. This will make for the uniformity in the rule governing such problems in all classes of insurance in Manitoba. The protective approach is easy to implement too in view of the existing section in the Insurance Act providing for the presumption. This will make its implementation involve less contentiousness in legislating an extensive provision in all insurance cases.

It is noted that any of these features of the second analysis may offer a protection to the insured. The adoption of the presumption against agency may be enough in Manitoba to deal with issue of transferred agency. This is especially so in view of the judicial trend of holding that the knowledge of the agent is that of the insurer. This might dispose of the need to legislate on the first aspect of the analysis.

However, an outright legislation on the knowledge of the agent acquired in the course of the agency might be helpful

here since many of the historical conflicts in the transferred agency cases revolve round the knowledge acquired by the agent. The two might be adopted and combined together in the Insurance Act as done in New Zealand and thus ensure that no problem of such nature arises again in the agent's act of filling the proposal form.

With this approach, a designed protection could be sought out for the insured in all cases of a possible transfer of agency. There are already protective devises where there is a payment of premium to an agent, notice of loss given through the agent or where the agent confirms erroneously an insurance coverage. The insured is equally protected where the agent undertakes to procure insurance. This approach has introduced a protection for the insured and thus gives the same treatment to the insured's position as the other aspects of insurance law.

CHAPTER V

RECOMMENDATIONS AND CONCLUSION

It is observed that the rules in Newsholme Brothers v Road Transport and General Insu. Co.[1] and the cases decided along the line of its reasoning all display an inherently faulty supposition. The rules are based on a misconceived idea that the habits of the average policyholder should be changed to conform with certain legal rules. The traditional contract analysis has attempted to introduce a remarkably high standard of diligence into the dealings of the insuring public with an agent.

The average policyholder, in effecting insurance through an agent, must start with an assumption that the agent is out to defraud and thus actively set about preventing such fraud. The policyholder must cross check what the agent does, must read any document signed, must inquire into the extent of the agent's actual authority and must be concerned with the content of any agent's report in the application form.[2] This is the basic form of reasoning underlying many of the cases under this head of the analysis.

Apart from this form of reasoning in the case law dealing

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[1] (supra), footnote 24, chapter 2.

[2] See, for example, Van Schilt v Gore Mutual Insurance Co., (supra), footnote 87, chapter 2.

with the issue, there is also displayed in the traditional contract analysis, an unfavourable disposition towards the effective use of "resources". The insured does not have the ability to determine the exact scope of the agent's authority and neither does the insured exercise any form of control over the agent. There is no expressed intent to form any separate relationship between the agent and the insured. On the other hand, the insurer will most often have an agency agreement with the agent. This indicates the consensual aspect of the relationship. The agent is subject to the control of the insurer and the insurer has the means of enlarging or limiting the ability of the agent to be involved in the transaction. These may be viewed as "resources" in the contract making, conferring advantages and within the reach of only one of the contracting parties, the insurer.

In order to ensure the effective utilization of these "resources" in reducing the risk of loss through the agent's errors, it is only fair that the insurer should be made liable for any consequential losses. Moreover, from a practical standpoint, the insurer is the one competent between the parties to ensure the existence and adequacy of an errors and omissions insurance coverage on the part of the agent. The ability to determine this and the expectation of prudence in dealing with only an adequately "insured" agent justify a conclusion that the rules should be made to suit the behavioral pattern of consumers of insurance and not vice

versa.

In assessing the position of an average insured, Knopf states that the policyholder seldom reads the policy and application, either because he can not understand its detailed and technical terms, or because of a failure to realise its importance. Knopf observes that the purchaser of insurance is merely interested in buying "protection" and relies on the good faith and skill of the insurer's agent who is presumably an expert in such matters.[3]

In recognising this pattern of behaviour and attempting a corrective change in approaching the issue, the Manitoba legislature has provided for a presumption against agency. This presumption is only provided for life and accident insurance.[4] The incompleteness of the scheme has left a gap in the protection offered and provides a ground for opposing the present form of protection the Act offers in relation to transferred agency.

The presumption, as an attractive provision in the Act is intended as an instrument of change. The effectiveness of such an instrument depends however on the construction given to its wordings by the courts. Assuming that the presumption is made applicable in all instances of insurance, life, fire, automobile insurance and others, is the protection offered by

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[3] Knopf H., New York Insurance Law : Effect of Insured's Failure to Read Application (1930) Vol. 16 Cornell Law Quarterly 235 at 239.

[4] See sections 200 and 230, Insurance Act of Manitoba.

the presumption an absolute one? An illuminating comparison of section 182(2) of the Manitoba Insurance Act[5] interpreted in Valgardson v Contigency Insurance Co.[6] is useful in this respect. The section provided that:

> "No person carrying on the business of financing the sale or purchase of automobiles, and no automobile dealer, insurance agent or broker, and no officer or employee of any such person, dealer, agent or broker, shall act as agent of the applicant under this section."

The court recognised that under the Manitoba law, the involved individual can not be the agent of the insured. With this observation, Maybank J. stated:

> "I shall continue consideration of the matters involved herein as if the application form in question has been completed entirely by the [insured] himself and shall disregard [the agent] entirely. From here forward, the examination is to be of a document that was made up by the [insured] alone by his own hand and without any help. it is his document; his application solely; his proposal." [7]

This is in effect negating the legislative intent to provide an embracing protection for the insured. Dicta like this, made glaringly in the face of a presumption may raise questions on the utility of the provision in section 200 of the Insurance Act of Manitoba in providing an embracing protection to the insured.

Viewing the presumption as an aspect of human "resources", it becomes capable of transfer. In effect, the

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[5] R. S. M. 1940, c. 103.

[6] (1955) 5 D.L.R. 649 at 652 (Man Q.B.).

[7] ibid. at page 653.

provision may be seen as an aspect of legal "technology" which may be transferred to another jurisdiction to effect workable rules in instances of transferred agency.

Watson identified this transfer as an important element of legal development though this role factor is seen by him as a "legal transplant".[8] Legal transplant, with the desirability and the practicality of borrowing, is seen as the most potent influence on Western legal development as a whole. This transplant is apparently what was made by the Australian legislature with the Insurance (Agents and Brokers) Act of 1984. The adoption of the presumption in the Insurance Act of Manitoba on transferred agency differs, however, from the "transplant bias" that Watson espoused.

Watson used transplant bias to denote a system's receptivity to a particular outside law and the readiness to accept it based on the origin of the rules. The crucial difference is in the fact that the receptivity of the presumption against agency in Australia was not merely because such idea has been in Canada. The borrowing is on the "form" and not the "idea" of protection. In carefully weighing the value of the presumption being borrowed, the Australian Law Reform Commission did observe the legislative activity in Canada but recommended the presumption as part of the Australian Act

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[8] Watson A., "Comparative Law and Legal Change" (1978) Camb. L.J. 313 - 336.

because of the possible potentials in the presumption.[9]

The Commission recognised the limited use of the presumption in the Canadian provinces. Though this particular presumption may not be seen as one founded on the concept of authority, the Commission noted that it has not gone far enough in imposing responsibility on insurers. The result is a modification of the applicable rules. The presumption against agency is retained, and an additional provision designed to complement it is introduced. This is the language of adaptation. Transplant of the presumption from the Canadian jurisdiction fuelled the search for an embracing protection, and an adaptation of it became an aspect of the statute to effect a needed social change.

As a basic underlying principle with any transfer of technology, be it mechanical or legal, there is the need to adapt the introduced concept to suit the context in which it is to operate. This is missing in the "transplant bias" elucidated by Watson.[10] The Law Commission in Australia did this after recognising that it is expedient to go further in searching for an embracing protection for the insured. The Commission introduced a much modified concept of reasonable expectation as a determining factor in transferred agency cases. Which contexts did the commission concern itself with

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[9] Law Reform Commission, Insurance Agents and Brokers (1980) A.L.R.C. No. 16 parags. 33 - 40.

[10] Watson A., loc. cit.

in introducing this uniquely stated expectation provision?

The Commission was concerned with the use of contractual devises to limit insurers' responsibilities for the agent's conduct.[11] This is seen as being against the spirit of good faith. The Commission also noted the over-optimistic form of the duties imposed on the agent to cross check information as recorded by an agent. The Commission recognised that this contradicts the behavioral pattern of policyholders. The Commission emphasised that most people do not read or understand many of the documents put before them for signature.

Further assessing the position, the Commission did not overlook the complete reliance that the public places on insurance agents and the mystifying forms of proposal forms which require interpretation and explanation. The Commission equally kept in mind that it is the insurer and not the insured who has control over the agent both in training and in supervision of conduct with the disposition that when supervision and control break down, the loss should be borne by the insurer. The Commission did not attempt to ignore "commercial and social reality" especially since many of the policyholders are lacking in knowledge or in an understanding of English language.

The Commission found it preferable for the cost of innocent errors to be shared by the insuring public than for it to be borne by some unfortunate individuals. With an errors

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[11] A. L. R. C. No. 16, parag. 36.

and omissions insurance coverage well put in place, the ultimate loss may not even be borne by the insurer but by the professional indemnity available. The Commission equally investigated developments based on the concept of authority and observed their impracticality.[12] The Commission then re-emphasised the need not to discriminate against those persons in the community lacking in knowledge, who by reason of their background, education and training, require the assistance of the agent.

These identify the reasons why the Commission magnanimously adopted the presumption against agency and added a refined concept of reasonable expectation. The instrument of change has been copied but adapted in such a manner that suits the Australian circumstances. The product, a highly placed form of protection to the insured in all the dealings with the agent.

These intertwined circumstances show that the very purpose of legislation here will be stultified with an half made measure. It is significant, here, that all these circumstances exist and operate in Manitoba. In Manitoba, the use of contractual devises to limit insurer's liability for the errors of the agent is not uncommon.

As identified in the course of the paper, this may be done in a varying number of forms. It could be an express transfer of the incidence of the agency to the insured where

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[12] A. L. R. C. No. 16, parag. 37.

the agent completes the proposal form. It may take the form of a limitation on the authority of the agent to act for the insurer in receiving information or making representations to the public. The basis of the contract clause, too, may be used as a devise of limiting the liability of insurers for the agent's conduct. These clause have on different occasions, in Manitoba, been used as tools for denying the insurer's liability for the agent's conduct. The situation analyzed by the Australian Law Reform Commission as being "against the spirit of good faith" thus exists in Manitoba.

The traditional contract analysis has attempted to change the behavioral pattern of policyholders and the existence of such an approach in the case law, in Manitoba, is evident in the various duties imposed on the insured in some cases. This is the basic "over-optimistic" form of duties imposed on the insuring public in Australia that the Commission identified as an error in presumption. Like the position in Australia, with the judicially noted trust and confidence that the public have in insurance agents, the duties in this respect are difficult to justify in Manitoba.

The Insurance Act of Manitoba, with the various provision designed to heavily regulate the conduct of insurance agents, has indicated the similar operation of the observed status of Australian insurers in Manitoba. In Manitoba, that insurers have control over the training and supervision of agents is not in doubt. For instance, the Insurance Act provides:

> "The application [for a licence] shall be approved in writing by at least one of the insurers to be represented, certifying to the good business reputation of the applicant and his qualifications for, and knowledge of, the business of insurance, and recommending the granting to him of a licence."[13]

The insurer may also have the licence of the agent cancelled on the termination of the agency contract between the insurer and the agent.[14]

The Australia Law Reform Commission recognised that errors could arise either by a lack of understanding of English Language or as a result of the pressure of time on both the agent and the insured. Manitoba is a multi -ethnic province. In a province which comprises nationals of different countries and languages, an observation of a similar language problem is not out of place. With the multi-cultural population of the province, there are bound to be policyholders who do not understand the English language or any other language of the proposal. For such individuals, the reliance on the agent is imperative for the quick conduct of business and the imposition of any duty to cross check the agent's activity is unfounded. The insured's only error may be in not understanding the langauge of the proposal.

Moreover, the issue of understanding and comprehending the contents of a proposal transcends the ordinary use of language. A perusal of most types of proposal forms will

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[13] section 370(2), Insurance Act of Manitoba.

[14] section 373(2).

clearly show that even to a legally trained mind, there could arise situations in which clarification or interpretation has to be sought on the language of the proposal.

The over used concept of authority vested in the agent has been the subject of interest in Australia. [15] In Manitoba, resolving the issue of transferred agency through the authority vested in the agent has not been a rare occurrence. This has been a source of concern. How does the average person in Manitoba get to know the extent of the authority vested in the agent unless it is actually communicated to the person? What are the methods of a possible communications of such restrictions? It may be communicated through the agent or through the medium of the proposal form. Any communication sought to be made through the policy is ineffective as an issue arising after the completion of the contract.

The method of communicating this through the proposal form has been the practice of insurers. In communicating this through the proposal form, however, a paradox is presented. Unless the insured completes the proposal form personally, there is no way of knowing such restrictions. Whereas, a personal action in completing the proposal will avoid entirely the brunt of the issue here. The communication may be made through the agent. Where the agent has set about in a fraudulent manner, an assumption which the cases tend to encourage, will such a restriction be communicated to the insured? Even

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[15] A.L.R.C. No 16., parag. 37.

where there is a communication of the restriction on the authority of the agent, given the trust and confidence that the insuring public have in the agents, will the average policyholder not place reliance on the agent still? Though aware of the restrictions, if the agent goes ahead to complete the proposal form, will the insured be expected to restrain the agent?

The Australian Law Reform Commission sought a protection which will be within the knowledge and experience of the insuring public. In as much as the actual authority vested in the agent may be outside the experience of the insuring public in Manitoba, the structure in the two jurisdictions may be likened. The uncritical reliance on the advice of agents by the large number of the public aided the conclusion of the Law Reform Commission in Australia to provide a protection for the insured in the language of reasonable expectation. This uncritical reliance cannot be overlooked in assessing the position in Manitoba.

The existing presumption against agency has been noted as being belaboured with an alarming incompleteness. It offers absolutely no protection to the insured in fire insurance and automobile insurance. In improving the present scheme, it is proposed that the legislature in Manitoba draws from the Australian experience. This is in effect transferring this refined concept of reasonable expectation to Manitoba.

The provision in the Insurance Act of Manitoba providing

presumptions for life and accident insurance may be retained. In fact, it will provide the basis for inferring the legislative intent on an embracing protection. The operation of the provision on reasonable expectation is not limited in Australia to certain classes of insurance and the legislature in Manitoba is encouraged to borrow from this outlook and make a more general provision available.

The knowledge oriented protection to the insured, is not moulded in as part of the Australian Code. It is made part of the New Zealand scheme, however.[16] In many of the cases referred to earlier, the knowledge of the agent, either as to the truth of the information sought or to the fact that the insured did not complete the proposal played an important role in defining the position of the parties. The cases show that the knowledge of the agent may not be left out in offering an embracing protection to the insured in respect of transferred agency.

This may be seen as a factor that shapes the expectation of the insured but the absence of any empirical point on which to base such a conclusion makes such an hypothesis difficult to justify. Furthermore, in view of the possible varied interpretations which the reasonable expectation provision may invoke, it may be expedient to make separate rules governing the use of the agent's knowledge in apportioning responsibil-

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[16] Section 10(2), New Zealand Insurance Law Reform Act 1977.

ity for losses. This position has been achieved mostly by case law, but of note is the fact that the core of the transferred agency problems revolve round the knowledge acquired by the agent. The diverging opinions of the courts on the use of the knowledge acquired by the agent make legislative intervention in this area desirable.

As observed by Watson, there can be no organised systematic development where the law has to wait upon a litigated event to develop. Watson notes too that such legislation will generally provide for the future and produce an explicit theoretical base for the development of law.[17] This theoretical base may be found in the knowledge oriented protection entrenched in the Act and possibly couched like the New Zealand section.

This too has potentials to effect changes in the rules to conform with the habits of the policy holders and may be tailored as an avenue for resolving some of the transferred agency problems. The New Zealand Insurance Law Reform Act of 1977 has attempted this with its section 10(2). The section has attempted to hold insurers responsible for any errors of the agent before the contract of insurance is made. This covers the instances of the agent completing proposal forms and the protection offered here is couched in the language of knowledge. A statutory protection in the langauge of knowledge is therefore advocated for Manitoba.

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[17] Watson A., loc. cit.

An issue of note in section 10(2) of the New Zealand Insurance Law Reform Act is that it has been restricted to a representative of the insurer concerned in the negotiation of the contract. This has taken measures to ensure that the information acquired by an agent of the insurer who is totally unconnected with the relevant transaction will not be imputed to the insurer. This position is justified and as noted by the New Zealand Contracts and Commercial Law Reform Committee,[18] it would be quite unfair for an insurer to be put at risk if one of its employees has some relevant knowledge but is unaware of the negotiation of the policy. In view of the sense of this observation, this part of the provision is welcomed and is advocated as part of the Manitoba scheme.

The interesting point about section 10(2) in New Zealand is that its language has implicitly shown that it is directed towards only transferred agency arising before the completion of the contract. The use of the phrase "before the proposal of the insured is accepted by the insurer" shows that it is not intended to cover cases of transferred agency arising after the issue of the policy. In as much as transferred agency may arise at the stage of notice of loss being given, and the knowledge of the agent at this stage may assume importance, it may be desirable to exclude this phrase from the section in adopting a similar statutory protection for

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[18] Report of the Contracts and Commercial Law Reform Committee, New Zealand, Aspects of Insurance Law (1), April 1975, parag. 25.

insureds in Manitoba in similar words.

Producing such a purposive approach to solving the problems arising from the agent completing proposal form provides a base for dealing with other traditional cases of transferred agency and justifies the increasing protection offered to the insured in these other cases. Where there is a payment of premium to the agent, it is as a result of the representative status of the agent as an agent of the insurer. The Act has imposed an obligation on the agent to pay such sum to the insurer within a certain period and has made a presumption of payment where the payment is made in cash to the agent. This presumption may be justified under the protective analysis.

Where the agent makes a representation to the insured which is wrong in fact and induces the insured into an unenvisaged position, the agent may still be regarded as an agent of the insurer. In this respect, the influence of the protective analysis may be felt. This is equally the position where a notice of loss is given to the agent and such is deemed received by the insurer. In these instances, the protective analysis is just a broadened devise of imposing liability on the insurer for the errors of the agent.

The protective analysis may thus be seen as a model of functional utility for protecting the insured. Errors are unavoidable in certain instances of the agent's involvement and the concern should be on a well distributed risk of loss.

This is more desirable since the insurer is at fault in not ensuring the adequacy of an errors and omissions liability coverage for the agent. For this fault, the analysis links the insurer with the agent's errors.

The advocated approach thus presents an immediate remedy in protecting the insured. The expectation of indemnity is realised without any loss to any party to the insurance contract. This latter statement needs elaboration to depict the creative function of the approach. Where there is an adequate errors and omissions insurance coverage protecting the agent, the insurer gets indemnified from the coverage and the agent's professional liability insurance becomes the ultimate loss bearer. Where the agent has no professional liability coverage or carries an inadequate one, the insurer bears the losses involved from the agent's insolvency. A natural check would thus have been put in place to prompt insurers into ensuring the existence and adequacy of the professional liability insurance.

In these latter stages, though, it is more of a judicial policy than a legislative function. When the three advocated provisions are coupled with the long standing judicial policy that an agent is liable to the principal for all the losses incurred through the agent's fault, necessarily, under the proposed model, an effective regulatory scheme designed to make agents more responsive to their duties would have been put in place. The scheme becomes more effective with the

involvement of insurers. Making the insurer accountable for the agent's errors will alter the behaviour of a significant number of insurance agents as it will constitute the insurers as regulators of the conduct of agents. In this respect, the proposed approach has long term effects

Traces of this outlook may be found in some of the judicial opinions on the subject of responsibility for the agent's errors. Whilst noting the blind confidence reposed in insurance agents by the insuring public in Pacific Faith Fishing Co. & Ors v Crown Life Insurance Co.,[19] Meredith J. said because insurers solicit business through agents who bear their banners, the insurer must ensure the accuracy of the information submitted by it to the licensing authority for its sake as well as the sake of the public. It was further opined that an insurer must be responsible for its agent's competence.

This approach, it is believed, is a more efficient mechanism for accomplishing the regulation of the conduct of this group of insurance intermediaries. It affects the source of the agent's involvement in the contract and it is only a natural reaction that any defect will be removed as soon as the agent's conduct becomes questionable to prevent any losses to the insurer. Where this natural reaction fails to be triggered off, there is an overlapping faults of the insurer and the agent and for which the loss should be apportioned

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[19] Unreported B.C.J. 9/6 1987.

between them.

As this area of overlapping faults is worked out, a number of points will necessarily arise for clarification. What happens to the limits on the authority of the agent to act for the insurer in certain ways? As observed by the Australian Law Reform Commission, the authority vested in the agent is beyond the knowledge and the usual experience of the insuring public.[20] It is necessary therefore, to regard such limitation as inconsequential in assessing the insured's position. This may be done with the reasonable expectation provision. Much depends, however, on the judicial interpretation given to the reasonable expectation provision. This same dependence on judicial interpretation provides the answers to questions on the remainder of the basis of the contract clause. Since these two are parts of the basic problems which the reasonable expectation provision is designed to deal with, it is more likely that an interpretation in this respect will be along the line of the legislative intent. In so far as the subsections of the reasonable expectation provision in Australia contain the following:

> "any agreement, in so far as it purports to alter or restricts the operation of subsection (1) or (2), is void"
>
> "an insurer shall not make, or offer to make, an agreement that is, or would be, void by reason of the operation of sub section (4)" [21]

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[20] A.L.R.C. No 16., parag 37.

[21] Section 11, subsection (4) and (5) respectively.

then the issue of the basis of the contract clause or any other clause contradicting this legislative intent seems settled. Thus, it may be safe to conclude here that the problems of transferred agency which arise as a result of the agreement of parties have been put to a final rest by the reasonable expectation provision. It is a matter of conjecture, in view of the absence any judicial interpretation yet on it, how far the provision will be taken as overruling the previous cases where transferred agency arose by judicial pronouncement.

Since legal rules regulate different groups of people without variations in their application to suit particular classes, the design of our structure is in consonance with the general law of agency. Agents as representatives are the machineries by which the principals' acts are effected and thus the principal is responsible for all involvements of the agent with no personal liability on the agent. This is a well entrenched concept at common law and it is equally applicable in the Quebec Civil Law.[22] With a disclosed principal, the agent does not incur any personal liability in the contract and the principal is responsible for any error of action by the agent. The principal may have recourse against the agent.

The influence of this concept is seen at force in our design. In as much as insurance agents are just another class of agents, there is no merit in giving them a separate status.

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[22] Article 1715, Quebec Civil Code.

Where the agent has acted for the insurer in the transaction, a fact which is known to the insured, the insurer should be responsible for any errors of action by the agent.

In view of the present legislative inactivity in Nigeria, it may be said that the above as endeavour to reduce malpractises in marketing of insurance policies to manageable proportions are desirable. The three aspects of the protective analysis may be combined in this jurisdiction to fashion out a protection to the insured that will be absolute in transferred agency cases. There is no statutory protection for the insured at present in the jurisdiction with respect to the problem and these omissions are contributing to an undercurrent of frustration that is gradually gnawing its way into the Nigerian insurance industry.

An amendment is necessary in the Insurance Act of Nigeria to arrest the negative perception and general form of apathy among the insuring public. It is the submission here that an addition of the three aspects of the protective analysis to the Act is necessary for a more vibrant regulation of the insurance industry. These will breath new life into the otherwise uninspiring piece of legislation. A changed perception will definitely stem from the convergence of these three factors in protecting the interest of the average policyholder.

To lend some sort of order into these observations, amendments to the existing Insurance Act of Manitoba in

accordance with these recommendations are now due:

1. (1) An insurer is responsible, as between the insurer and the insured or intending insured, for the conduct of his agent or employee, being conduct -

(a) upon which a person in the circumstances of the insured or the intending insured could reasonably be expected to rely; and

(b) upon which the insured or intending insured in fact relied in good faith,

in relation to any matter relating to insurance and is so responsible notwithstanding that the agent or employee did not act within the scope of his authority or employment as the case may be.

(2) An agreement, in so far as it purports to alter or restrict the operation of sub-section (1), is void.

2. An insurer shall be deemed to have notice of all matters material to a contract of insurance known to a representative of the insurer concerned in the negotiation of the contract.[23]

CONCLUSION

The design of this study is stated as finding a regulatory method which fairly distributes the risk of loss on the involvement of the agent in the insurance transaction. In this regard, it was proposed that the study will examine the basic principles of agency and see how these affect the

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[23] This same recommendation is advised in the Nigerian jurisdiction where, presently, there is no presumption against the transfer of the incidence of agency.

decisions on the transfer of agency as a single idea.

To find more support for transferred agency in insurance law, the study traced the specific instances where transferred agency can be possible. The study brought out that in these instances, no transfer has been done by the courts in reasoning out the insured's claim. The approaches of the courts, made on defensible grounds, thus provided impetus for finding a regulatory method of protecting the insured in cases of the agent completing proposal forms.

The study has attempted to express the two approaches of the courts in the past as ideal approaches and expressed favour for the protective analysis which offers a more secured protection to the insured. The protection to the insured on this aspect of the analysis can be found in statutory provisions on the insured's reasonable expectation and a presumption against agency.

These two as arms of the statutory protection are seen as securing a defensible protection for the insured. The reasonable expectation of the insured is viewed as an emerging form of statutory protection and its components are expressed as knowledge of the agent, ostensible authority of the agent and an application of agency principles. Other lesser factors such as the literacy level of the insured may also be considered. These are seen as judicial forms of protection but since a statutory protection is needed for the design, it is encouraged that this aspect of protective analysis be made the

subject of statutory provisions. The knowledge acquired by the agent in the process of completing proposal forms is seen as another instrument which could be helpful in assessing the parties' position. A recommendation is made on the adoption of this arm of reasonable expectation as an instrument of statutory protection to the insured.

The presumption against agency in the Insurance Act of Manitoba and the incompleteness of its scheme are observed. This shaped the encouragement of the other aspect of the statutory protection offered to the insured. The insured thus gets protection, or at least guaranteed of a form of protection. The paper's design is stated as finding a regulatory method by which the risk of losses can be easily apportioned between parties. The statutory protection offered to the insured was considered in relation to the insurer. The protection gives a right against the insurer in nearly all cases and an issue addressed was how the insurer recoups any loss arising thereby. This is seen as a flow of responsibility to the agent. The insurer makes a payment on the claim to the insured and seeks indemnity from the agent. The agent gets a protection from the errors and omissions coverage.

This is the flow of protection, guaranteed to all the parties. A break in the flow is possible, as seen, where the agent has no errors and omissions coverage. The solution for this is seen in holding insurers liable still for the losses. The insured is not at fault in the failure of such errors and

omissions coverage. The fault lies with the insurer. Thus, the insured still gets indemnity on the payment on the claim against the insurer. The insurer has the agent to hold accountable for the loss. Where insolvency occurs, the insurer bears the loss as the cause of the break in the smooth flow of the analysis as a fair risk distributor.

The analysis predicates on fairness. The fairness is shown in the nature of the contract as one of good faith and a contract of adhesion. The liability of the insurer here too may be related to the burden- benefit and the deep pocket theories, as expressed. Having a deeper pocket and having derived benefits from the arrangement, the insurer bears the losses and make the expression of this study possible as a fair and smooth distribution of the risk of losses.

Whether seen as properly expressive as a model, the analysis has sought out a way of distributing risk of losses which may be occasioned through the agent's involvement. It has not abused the word, usage and tests of agency and makes it safe to conclude that the study has adequately advocated the prevention of any inverse relationship in the arrangement of the parties.

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