ANNUAL SURVEY OF CANADIAN LAW

INSURANCE LAW

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I. INTRODUCTION

Insurance law continues to be one of the most litigated areas of the civil law, with over 125 Canadian superior court decisions reported each year. A high percentage of these cases are concerned with legal issues, although in a significant number the legal issue involves the construction of complex and obtusely worded policies. In addition, the superintendents of insurance meet annually with the industry to consider recommendations for uniform provincial legislation.[1] Each provincial superintendent also engages in a broad range of administrative functions which are not always widely publicized or subject to much public scrutiny.

In this survey[2] I have decided to concentrate on the recent case law for three reasons. First, I have found it impossible to cover more without being unduly superficial. Secondly, the case law may be in a far less accessible or digested state than the recent changes to uniform legislation. Thirdly, in a political climate of "deregulation" and "privatization",[3] there has been little legislative initiative in recent years, while there have been significant judicial developments in relation to several fundamental insurance doctrines.

The one significant legislative initiative in recent years has been the activity of the Select Committee on Company Law of the Ontario Legislative Assembly.[4] It is too early to predict whether much will come

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[1] The Association of Superintendents of Insurance of the Provinces of Canada perform the function of the Uniform Law Conference in the area of insurance law. A record of their annual meetings is published as the MINUTES OF PROCEEDINGS OF THE ASSOCIATION OF SUPERINTENDENTS OF INSURANCE.

[2] The survey covers the cases reported since the last survey was written until the end of 1979. For the last survey, *see* Baer, *Annual Survey of Canadian Law: Insurance*, 8 OTTAWA L. REV. 218 (1976).

[3] Often the words are used together as if one were an adjective.

[4] *See* THE INSURANCE INDUSTRY, FIRST REPORT ON AUTOMOBILE INSURANCE (1977); THE INSURANCE INDUSTRY, SECOND REPORT ON AUTOMOBILE INSURANCE (1978); THE INSURANCE INDUSTRY, THIRD REPORT ON GENERAL INSURANCE (1979);

of its reports. Much of the *Third Report on General Insurance* is a repetitive rationalization for any government "presence" in the industry at all.[5] The politicians' apparent retreat from public concern has not been relieved by the activity of provincial law reform commissions.[6] However, the deference of the commissions is probably based on practical considerations, such as the difficulty of getting the industry to co-operate, especially in supplying information, rather than on philosophical grounds. The situation is not the same in all North American jurisdictions. While it is beyond the scope of a survey of Canadian law, the New York recodification[7] of insurance law may have some effect on Canadian developments. That state's last systematic revision in the 1930s had a widespread influence throughout North America.

II. Case Law

A. *The Classification of Insurance*

Provincial legislation treats separately marine, fire, life, automobile, accident and sickness, livestock and weather insurance. Distinct provisions govern similar or identical issues. The explanation for this doctrinal disintegration probably lies in the fact that the insurance industry is split into casualty and property insurers on the one hand, and life and other kinds of personal insurers on the other, each with its own organization concerned with legislation. Moreover, the main types of insurance treated separately in the legislation came into widespread use at different times. Whatever the historical explanation, however, there are now no compelling reasons for the different treatment of similar

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THE INSURANCE INDUSTRY, FOURTH REPORT ON LIFE INSURANCE (1980). The Select Committee will study Accident and Sickness Insurance in 1981.

[5] A hands-off attitude towards the insurance industry is of long standing in the U.K. For a recent example of English law reform, *see* Insurance Intermediaries, Cmnd. 6715 (U.K. 1977) which recommends continuing self-regulation by the industry.

[6] There are some exceptions. *See* MANITOBA LAW REFORM COMMISSION, WORKING PAPER ON SOME SUGGESTIONS FOR THE REFORM OF FIRE INSURANCE LEGISLATION IN MANITOBA (1976); UNIVERSITY OF ALBERTA INSTITUTE OF LAW RESEARCH AND REFORM, GUEST PASSENGER LEGISLATION (1970); SASKATCHEWAN LAW REFORM COMMISSION, PROPOSALS FOR REFORM OF THE LAW AFFECTING LIABILITY BETWEEN HUSBAND AND WIFE AND RELATED INSURANCE CONTRACTS (1979). In other parts of the Commonwealth the situation is much the same. For exceptions, *see* AUSTRALIAN LAW REFORM COMMISSION, INSURANCE CONTRACTS, DISCUSSION PAPER 7 (1978); and ENGLISH LAW COMMISSION, INSURANCE LAW, NON-DISCLOSURE AND BREACH OF WARRANTY, WORKING PAPER 73 (1979).

[7] The recodification has been under study by the New York Law Revision Commission for several years. *See* REPORT OF THE LAW REVISION COMMISSION FOR 1979, N.Y. Leg. Doc. 65, reproduced in MCKINNEY'S SESSION LAWS OF N.Y. 1425 (1979).

issues. Yet the Association of Superintendents has no plans to integrate the various parts of the Act.

This lack of a systematic codification makes it critical to classify each insurance contract to see what part, if any, of the relevant insurance act applies to it. This task is made more complex by the fact that the insurance industry combines coverages in a way that does not correspond with the divisions made by the legislation. There is a growing trend by the industry to offer increasingly comprehensive policies which cover a variety of risks. While in some provinces, such as Ontario,[8] there is legislative authority for either the Lieutenant-Governor-in-Council or the Superintendent to define classes of insurance for the purpose of the Act, so far such administrative classification has only been done for the purpose of granting licences to insurers.[9] The task of deciding which part of the Act applies to a composite policy has been left to the courts. In the past there has been surprisingly little litigation. What cases there have been suggest two possible approaches. First, the court might classify the contract as a whole according to what is the primary as opposed to incidental coverage.[10] Secondly, the court could distinguish the various coverages found in a composite policy and hold each governed by its own relevant part of the Act.[11]

There are difficulties with both approaches. The first approach is adopted in the Fire Insurance Part which distinguishes between incidental and primary perils.[12] The distinction is also found in the definitions of fire and marine insurance.[13] The Act does not make clear when the peril of fire is incidental or primary. Since the classification adopted by the Act is sometimes based on the kind of property insured or an activity, instead of a hazard, the test cannot be one of causation. For example, in the case of a burnt automobile, the fire peril is considered incidental to automobile insurance, and yet automobiles do not cause fires.[14] If the relationship is not causal, what else can it be? In some cases, what is primary or substantial is the more generic coverage, but unfortunately this is not always so. Alternatively, primary and substantial might suggest what is the important coverage, but, if so, is this to be determined by the likelihood of the occurrence or the potential magnitude of the loss?

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[8] The Insurance Act, R.S.O. 1970, c. 224, s. 24(1).

[9] O. Reg. 13/72, *as amended by* O. Reg. 762/74.

[10] Staples v. Great American Ins. Co., [1941] S.C.R. 213, 8 INSUR. L. REP. (CCH) 98, [1941] 2 D.L.R. 1.

[11] Regal Films Corp. (1941) v. Glens Falls Ins. Co., [1946] O.R. 341, [1946] 3 D.L.R. 402 (C.A.).

[12] *See, e.g.*, The Insurance Act, R.S.O. 1970, c. 224, s. 117(1)(c). There are equivalent sections in the other provinces.

[13] *See* R.S.O. 1970, c. 224, ss. 1.22, 1.38, and the equivalent sections in the other provinces.

[14] In the same way, the death of livestock by fire is probably livestock insurance, not fire insurance.

The second approach reflects the view that insurers should not be able to escape the provisions of the Act simply by combining several coverages in one policy.[15] While there is no evidence that the industry's comprehensive policies are a deliberate strategem to avoid the statutory protection given to insureds, it does seem unfair to treat insureds who have suffered from the same hazards according to different statutory rules. However, this view results in a very complex situation which is probably inconsistent with the parties' expectations. The parties expect that they have one contract with a single set of rules covering formation, essential validity, the claim's process, *et cetera*. Yet this view treats the policy as evidencing several distinct contracts, each governed by different parts of the Act. The resulting differences might include something as fundamental as whether there is a valid contract at all.

While the number of reported cases[16] concerned with this problem of classification has greatly increased in recent years, the authorities remain divided in their approach. Three of the recent cases[17] involve the application of the one year limitation period found as Statutory Condition 14 in the Fire Part.[18] In all three cases the policy covered a variety of perils including fire, and in all three cases the insured suffered a loss from a peril other than fire. In spite of these similarities, the Statutory Condition was applied in New Brunswick, but not in Manitoba and Ontario.

In *Canadian Imperial Bank of Commerce v. Nickolievich*,[19] the plantiff's mobile home was destroyed by a windstorm. The Manitoba Court of Appeal relied upon section 138(4) of the Manitoba Insurance Act[20] to find that the plantiff's action was not barred by Statutory Condition 14. Section 138(4) provides:

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[15] This was the view of Chief Justice McRuer in Regal Films Corp. (1941) v. Glens Falls Ins. Co., *supra* note 11.

[16] In addition to the cases mentioned in note 17 *infra*, *see* Bryson v. Hartford Fire Ins. Co., [1976-78] INSUR. L. REP. (CCH) 949 (B.C.S.C. 1977); Gregg v. Pearl Assurance Co., [1976-78] INSUR. L. REP. (CCH) 1177 (Sask. Q.B. 1978). *See also* James Yachts Ltd. v. Thames & Mersey Marine Ins. Co., [1976-78] INSUR. L. REP. (CCH) 141 (B.C.S.C. 1976) where Ruttan J. seems to say that the Fire Part does not apply to a policy which is not purely one relating to fire. The judgment contains other bizarre notions such as the *dictum* that Statutory Condition 1, which allows the insurer to avoid the contract for fraudulent misrepresentation, does not rule out the common law rule for avoiding the contract on the ground of innocent misrepresentation. *Id.* at 143.

[17] Canadian Imperial Bank of Commerce v. Nickolievich, [1977] 5 W.W.R. 397, [1976-78] INSUR. L. REP. (CCH) 882, 77 D.L.R. (3d) 637 (Man. C.A.); Chiasson v. Century Ins. Co. of Canada, 21 N.B.R. (2d) 192, [1979] INSUR. L. REP. (CCH) 3936 (para. 1-1082), 86 D.L.R. (3d) 342 (C.A. 1978); Slijepcevic v. State Farm Fire & Cas. Co., 26 O.R. (2d) 566, [1980] INSUR. L. REP. (CCH) 4349 (para. 1-1165), 93 D.L.R. (3d) 698 (C.A. 1979).

[18] *See* R.S.O. 1970, c. 224, s. 122. There are equivalent sections in the other provinces.

[19] *Supra* note 17.

[20] R.S.M. 1970, c. 140. The equivalent section in Ontario is s. 118(4), and an equivalent provision is found in the other provincial statutes.

> Nothing in subsection (1) precludes an insurer giving more extended insurance against the perils mentioned therein, but in that case this Part does not apply to the extended insurance.

Both sides conceded that windstorm was an extended peril and the court held: "Reading the plain words of s. 138(4), I conclude that the appellant's argument is sound and that there is no statutory time bar in *The Insurance Act* with respect to the appellant's claim arising, as it does, out of an extended peril of windstorm."[21] With respect, while the words may be plain, they do not mean what the court said they did. The subsection refers to more extended insurance against the perils mentioned in subsection (1), *i.e.*, fire, lightning and explosion. Subsection (1) gives a limited meaning to these perils and this limited meaning is automatically part of any fire insurance policy. Insurers can extend the meaning of fire, lightning and explosion, however, and it is this extended coverage that is referred to in subsection (4) as not being governed by the Fire Insurance Part.

This limited application of the equivalent New Brunswick section was recognized by the trial judge in *Chiasson v. Century Insurance Co. of Canada*[22] where the plaintiff's claim under a homeowner's type policy for damage caused by rupture of a pipe and escape of water was found to be barred by the application of Statutory Condition 14 of the Fire Part. The plaintiff's alternative submission, that the New Brunswick equivalent[23] of Ontario section 117(1) restricts the applicability of Part IV to damage from the peril of fire, was rejected by the trial judge with the following statement:

> The Part applies not to damage but to *insurance* against loss or damage arising from the peril of fire. It is the character of the insurance rather than of the damage that determines whether the contract is governed by Part IV of the *Insurance Act*. A Homeowners Form Policy is primarily fire insurance and clearly falls within the language used in the opening paragraph of subsection 122(1).[24]

The Appeal Division[25] of New Brunswick Supreme Court, in upholding the decision of the trial judge, seems to approve both of his rulings.

Both of the arguments made in *Chiasson* (the first based on section 118(4) and the second on section 117(1)) were also made in *Slijepcevic v. State Farm Fire & Casualty Co.*[26] where the plaintiff's claim under a "Homeowners Policy" for loss by theft was held not to be governed by Satutory Condition 14. As to the application of section 118(4), the Ontario trial court[27] did not expressly find that the Manitoba Court of

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[21] *Supra* note 17, at 399, [1976-78] INSUR. L. REP. (CCH) at 883, 77 D.L.R. (3d) at 639.

[22] 19 N.B.R. (2d) 57, [1976-78] INSUR. L. REP. (CCH) 977 (Q.B. 1977).

[23] R.S.N.B. 1973, c. I-12, s. 122(1).

[24] *Supra* note 22, at 62, [1976-78] INSUR. L. REP. (CCH) at 978.

[25] *Supra* note 17.

[26] *Supra* note 17.

[27] 22 O.R. (2d) 595, [1979] INSUR. L. REP. (CCH) 3873 (para. 1-1069), 93 D.L.R. (3d) 698 (H.C.).

Appeal had misinterpreted the Manitoba equivalent. Instead, the court simply stated, "Since the case at bar does not involve extended coverage, that branch of the Manitoba case is clearly distinguishable."[28] Unfortunately, the Manitoba case is not easily distinguished, although it may be clearly wrong. The Ontario trial court also referred to the second argument made in *Chiasson* and after quoting the New Brunswick trial judge to the effect that "[a] Homeowners Form Policy is primarily fire insurance and clearly falls within the language used in the opening paragraph of subsection 122(1) . . . ",[29] the Ontario trial judge held:

> With great respect, this is too sweeping a generalization for there are an infinite variety of homeowner's policies. The Appellate Court restricted its concurrence to the "plaintiff's homeowners form policy". Certainly, the homeowner's policy before me is quite different. I, therefore, find this case distinguishable.[30]

The Court of Appeal[31] agreed that *Chiasson* did not apply because the policy and circumstances were different.

We must assume that the Ontario judges examined the two policies and found significant differences between them. It is a pity that they did not enumerate those differences. From my own experience, there is not an infinite variety of homeowner's policies, and the ones in use are remarkably similar. Whatever the differences in the two policies, it is difficult to imagine that fire coverage was any less important to the Ontario insured than it was to the New Brunswick insured. With the utmost respect, I doubt that the cases are really distinguishable on their facts. Instead, the courts differ in their legal test for when the Fire Part applies. While the New Brunswick court thought that it was the character of the insurance, rather than the character of the damage, that determined whether the contract was governed by the Fire Part, the Ontario trial judge thought that to apply the statutory conditions found in the Fire Part to a loss from theft "would not preserve the legislative intention to maintain Part IV as the fire part of *The Insurance Act*".[32] The Court of Appeal also interprets section 117 in such a way that different risks in the same policy will be governed by different parts of the Act.

A common feature of these composite homeowner's policies is that the statutory conditions from the Fire Part are incorporated and made applicable to all of the perils insured against. This raises the question of whether the insurer, even though it cannot rely upon the statutory limitation period, cannot at least rely upon the contractual limitation. The matter was not raised in *Chiasson* and the court held that the statutory limitation applied. The issue was raised in both *Nickolievich* and *Slijepcevic*. In *Nickolievich* the insured was held not to be bound by the

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[28] *Id.* at 598, [1979] INSUR. L. REP. (CCH) at 3875, 95 D.L.R. (3d) at 701.
[29] *Id.* at 599, [1979] INSUR. L. REP. (CCH) at 3876, 93 D.L.R. (3d) at 702.
[30] *Id.*
[31] *Supra* note 17.
[32] *Supra* note 29.

contractual condition because he had not agreed expressly or by implication to the inclusion of the statutory condition in the insurance contract. The insured was covered under an oral contract at the time of the loss, the policy not being delivered until two days later. In these circumstances, the court held that the insured could not be bound to a condition to which he did not agree and of which he had neither knowledge nor the means of knowledge.[33] In *Slijepcevic* the plaintiff made the same argument relying upon the *Nickolievich* case. The Ontario trial judge summarily dismissed the insured's argument.[34] However, since the court held that the limitation period was six years rather than one, it must have misunderstood the reasoning of the *Nickolievich* case. The issue was not whether the insured was bound by the statutory condition, but whether he was bound by the contractual one. The argument was not raised on appeal.

Unless the insured can rely upon the kind of argument which was successful in the *Nickolievich* case, there is no reason why he should not be bound by the conditions of the contract. There is no part of the Insurance Act applicable to theft or windstorm or other non-fire perils which would prohibit a one year limitation provision. Moreover, the argument which was successfully made in the *Nickolievich* case will be available to few insureds. While the court in the *Nickolievich* case left the matter open, it is doubtful that the insured would avoid the contractual conditions if the loss had occurred after the policy was delivered.

The question of when the peril of fire is an incidental peril was also considered in *Gregg v. Pearl Assurance Co*.[35] The plaintiff's home was damaged by water escaping from a public water main. In response to the insurer's claim that the plaintiff was under-insured and subject to a co-insurance clause in the policy, the insured invoked the red ink provision of the Fire Part. The defendant insurer argued that the Fire Part was not applicable because the policy was an all risk or multi-peril policy and that the peril of fire was only incidental. The court noted that the policy contained no breakdown of coverage and rates for various perils, which might have been a useful guide in assessing whether any risk was incidental. The court concluded: "There is no evidence from which I could conclude that the fire insurance coverage in this policy is only an incidental peril. Indeed, it strikes me that in all-risk policies of this type on residential dwellings the main risk insured against is fire."[36]

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[33] *Supra* note 17, at 400, [1976-78] INSUR. L. REP. (CCH) at 883, 77 D.L.R. (3d) at 640.

[34] *Supra* note 27, at 599, [1979] INSUR. L. REP. (CCH) at 3875, 93 D.L.R. (3d) at 701-02, where the court stated, referring to the *Nickolievich* case:

> The Court accepted the argument of the appellant that it should not be bound by the statutory conditions as he had never accepted them as part of the contract and the loss occurred before delivery of the policy. With great deference to the learned Court, I cannot agree and do not accept that argument as advanced before me.

[35] *Supra* note 16.

[36] *Id.* at 1180.

B. *Insurable Interest*

There are a variety of situations where one of several interested parties insures property on behalf of all. The contracting party may have a pecuniary interest (for example, as a joint owner, tenant or mortagee), or he may be acting solely in a representative capacity (for example, as an agent, trustee or bailee). In the case of a party with a pecuniary interest trying to insure on behalf of all, courts have been concerned with two issues, which have not always been kept distinct. First, there is the question of whether there has been full disclosure of all material facts. Since the personality of the insured and his relationship to the property affects the moral hazard, the identity of all insureds would normally be a material fact. Secondly, the courts have occasionally discussed the contracting party's insurable interest in the full value of the property, including the interest of others. They have often tended to obscure several issues by stating that a person with a limited interest has an insurable interest and can insure up to the full value of the property. In the event of loss, he holds the excess of his own interest on behalf of the others. The courts have not often recognized the named insured as acting in a representative capacity, his interest being that of the person he represents. Perhaps this is because, in many cases, the factual basis for an agency relationship or express trust does not exist.

In relation to the first issue of disclosure, the Fire Part of the provincial insurance acts has codified the insured's obligation. Statutory Condition 2 states:

> Unless otherwise specifically stated in the contract, the insurer is not liable for loss or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the contract.[37]

The *dictum* in the Ontario Court of Appeal,[38] which suggested a wide application of this condition, created a "modest flurry of misgivings" by commentators.[39] These misgivings should now be dissipated by the judgment of the Supreme Court of Canada in *Commerce and Industry Insurance Co. of Canada v. West End Investment Co.*[40] In this case the tenants of a hotel insured the building, as they had undertaken to do in the lease. The policies described Jeando Inc. (the tenant) as the insured and an endorsement entitled "Clause concerning mortgage creditors" read as follows:

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[37] R.S.O. 1970, c. 224, s. 122. There are equivalent sections in the other provinces.

[38] Marks v. Commonwealth Ins. Co., 2 O.R. (2d) 237, [1971-75] INSUR. L REP (CCH) 779, 42 D.L.R. (3d) 481 (C.A. 1973). *See* the discussion in Baer, *supra* note 2, at 246-47.

[39] *See* Kirsh, *Comment*, 52 CAN. B. REV. 305 (1974), and Brent, *Comment*, 52 CAN. B. REV. 604 (1974).

[40] [1977] 2 S.C.R. 1036, [1976-78] INSUR. L. REP. (CCH) 296 (1976)

> At the request of the insured, indemnity in the case of damage or loss under the terms of the present policy is payable to 1. Hector Charette; 2. West End Investment Co.; as their interests may appear. . . .[41]

Hector Charette was the landlord and West End Investment Co. the mortgagee of the hotel.

The Quebec Court of Appeal[42] affirmed a decision of the Superior Court condemning the insurers to pay West End the face value of the policies following the destruction of the hotel by fire. The insurers had raised two defences to West End's action: first, that Jeando Inc. had no insurance interest in the hotel; and secondly, that since Jeando Inc. was not the true owner and did not specify the true nature of its interest, the insurers were not liable because of Article 2571 of the Civil Code and Statutory Condition 10(*a*) of the fire insurance policy.
Article 2571 reads as follows:

> The interest of an insurer against loss by fire may be that of an owner, or of a creditor, or any other interest appreciable in money in the thing insured; but the nature of the interest must be specified.[43]

Statutory Condition 10(*a*) is based on Statutory Condition 2 found in the common law provinces and reads:

> The company is not liable for the losses following, that is to say:
> (a) For the loss of property owned by any other person than the assured, unless the interest of the assured is stated in or upon the policy. . . .[44]

The Supreme Court of Canada agreed with the Quebec courts that a tenant, especially one who has agreed to insure, has an insurable interest under the law of Quebec. No doubt the law is the same in the common law provinces.

In relation to the second defence, the Supreme Court of Canada held that Article 2571 was not a provision of public order, that an insurer could choose not to require the mention of the nature of the insured's interest in a fire insurance policy. They held that not only did the insurers use policy forms which did not provide for a description of the insured's interest, but in addition, they did not give an opportunity to supply this information by requiring an application for insurance to be signed.

The Court referred to the first statutory condition[45] which they held allowed "the insurer to plead the omission to declare a circumstance only if the latter is material, and if the company suffers prejudice thereby".[46] The Court noted that the insurers did not claim to have suffered any prejudice and concluded: "To give substance to their defence, the appellants should have shown that they believed Jeando Inc. to be the

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[41] *Id.* at 1039, [1976-78] INSUR. L. REP. (CCH) at 303 (translation).
[42] Unreported, Que. C.A., 11 Sep. 1974 (file no. 09-000459-72).
[43] QUEBEC CIVIL CODE, art. 2571 (1974).
[44] *E.g.*, The Insurance Act, R.S.O. 1970, c. 224, s. 122.
[45] Insurance Act, R.S.Q. 1964, c. 295, s. 240.
[46] *Supra* note 40, at 1042, [1976-78] INSUR. L. REP. (CCH) at 305.

owner, and that if they had known it was only a tenant, they would not have made the contract."[47]

The first statutory condition to which the Court refers is very similar to Statutory Condition 1 in the common law provinces. In requiring the insurer to show both materiality and prejudice (if these are different things), the Court seems to have miscontrued the condition. This is an important matter since the insurer may be able to prove materiality quite easily, but find the proof of actual prejudice more difficult.

In any event, it is not clear what application these arguments have in the common law provinces which do not have a statutory provision equivalent to Article 2571. In the common law provinces, the opening clause of Statutory Condition 2, "Unless otherwise specifically stated in the contract . . . ", may prevent the court from finding that the insurer had *impliedly* chosen not to require the mention of the nature of the insured's interest in a fire insurance policy. As a matter of principle, the requirement that the insurer show prejudice would seem to apply to the common law Statutory Condition 2 as well as to Article 2571. However, as we shall see,[48] unless the Court was departing from previous authority, this may be no more than a formal requirement.

The Supreme Court then considered Statutory Condition 10(*a*), noting that the statutory conditions for fire insurance were taken verbatim from the Ontario statute as it stood in 1897, without any coordination with the articles of the Civil Code which were simply ignored. The Court made no reference to the case of *Marks v. Commonwealth Insurance Co.*[49] Instead, the Court referred to its own judgment in *Wandlyn Motels Ltd. v. Commerce General Insurance Co.*[50] stating, "This Court unanimously agreed that all that is necessary to satisfy this condition is that the insured have an insurable interest."[51] With respect, this is not at all what the Court decided in the *Wandlyn Motels* case.

The Court also referred to the older case of *Keefer v. Phoenix Insurance Co.*[52] where an unpaid vendor was allowed to recover the full value of property destroyed and not just the amount still owing. The statutory condition was not discussed by the Court in *Keefer* and the insurer did not know the precise nature of the insured's interest.

This citation of the *Keefer* case with apparent approval may dispel recent doubts as to its authority.[53] Nevertheless, the *Keefer* case is hard

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[47] *Id.*

[48] *See* the discussion under the heading Materiality, p. 644 *infra*

[49] *Supra* note 38.

[50] [1970] S.C.R. 992, [1966-70] INSUR. L. REP. (CCH) 1017, 12 D.L.R. (3d) 605. The Court also found support in Ritchie v. Stanstead & Sherbrooke Fire Insurance Co., 7 INSUR. L. REP. (CCH) 41, [1940] 1 D.L.R. 241 (Ont. C.A.), which held that a lessee was an owner within the meaning of the statutory condition.

[51] *Supra* note 40, at 1044, [1976-78] INSUR. L. REP. (CCH) at 306.

[52] 31 S.C.R. 144 (1901).

[53] *See* the doubts expressed by the Alberta Court of Appeal in Imperial Oil Ltd. v. Commonwealth Constr. Co., [1975] 2 W.W.R. 72, [1971-75] INSUR. L. REP. (CCH) 1026, 46 D.L.R. (3d) 399, *rev'd on other grounds* [1978] 1 S.C.R. 317, [1976-78] INSUR. L. REP. (CCH) 331, 69 D.L.R. (3d) 558 (1976).

to reconcile with general principles and none of these difficulties are discussed by Mr. Justice Pigeon in the recent case. It may be that Statutory Condition 2 was not referred to in the *Keefer* case because the insured, as unpaid vendor, had the legal title, and at the time the word "owner" in the statutory condition was interpreted to mean "legal owner". Since then, however, the term has been interpreted to mean "beneficial owner". This may mean that either the legal or the beneficial owner can insure without disclosing the nature of his interest.

However, even apart from Statutory Condition 2, *Keefer* is hard to reconcile with general principle. The case seems to ignore the basic proposition that fire insurance is an undertaking, personal in nature, to insure an individual's interest rather than being an insurance on property, as in marine insurance, under a standard "for whom it may concern" clause. *Keefer* is also inconsistent with the general agency rules concerning when an undisclosed principal can take advantage of a contract made on his behalf. A principal can only do this if the personality of the contracting party is not relevant. At common law, the personality of the insured in fire insurance is always relevant.

The idea that the named insured can insure on behalf of others even without disclosure to the insurer comes, through *Castellain v. Preston*,[54] from marine insurance. In marine insurance the courts have allowed the uncommunicated intention of the insured to *limit* a broadly drawn "to whom it may concern" clause. What *Keefer* has done is to misapply this notion in fire insurance to expand the meaning of insured.[55] In spite of these difficulties and the doubts expressed by other courts, the *Keefer* case seems to be reaffirmed and Statutory Condition 2 interpreted in such a way as to deprive it of any significance.

Despite this decision of Supreme Court of Canada, the ability of the insured to act in a representative capacity without full disclosure has not always been recognized in the case of so-called sham transactions. Such sham transactions have been considered in two recent cases. In the first case,[56] a house trailer was transferred by a husband to his new wife in order to avoid potential claims by his ex-wife. The husband had insured in his own name and his claim was disallowed because, *inter alia*, he had no insurable interest. In the words of the court,

> [a] party should not be allowed to make it appear that a property is owned by another person when it is in fact owned by himself in order to avoid possible

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[54] 11 Q.B. 380, [1881-85] All E.R. Rep. 493 (C.A. 1883).

[55] In Hepburn v. A. Tomlinson (Hauliers) Ltd., [1966] A.C. 451, at 481, [1966] 1 All E.R. 418, at 431 (H.L.), Lord Pearce stated that the intention test of Castellain v. Preston created some difficulty. He held instead:

> A bailee or mortgagee . . . (or others in analogous positions), has, by virtue of his position and his interest in the property, a right to insure for the whole of its value, holding in trust for the owner or mortgagor the amount attributable to their interest. To hold otherwise would be commercially inconvenient and would have no justification in common sense.

[56] LeBlanc v. Cooperative Fire & Cas. Co., 19 N.B.R. (2d) 637, [1976-78] INSUR. L. REP. (CCH) 1160 (Q.B. 1977).

> attachment on the one hand while on the other hand be allowed to claim an insurable interest in the subject property when it becomes suitable to do so.[57]

Unless this means that neither party has an insurable interest following a sham transaction, it must mean that the court would not go behind appearances and that the wife would have an insurable interest. However, there is evidence that the court allowed the plaintiff's arson to muddle its thinking. His Lordship stated:

> I would however, in the absence of the plaintiff's obvious fraudulent intent and gross lack of forthrightness, have leaned towards adopting the seemingly more reasonable and conciliatory view adopted in the case of *Spencer et al. v Continental Insurance Co.*, [1945] 4 D.L.R. 593. In other words, I can easily imagine instances where a court would be justified in reaching an opposite conclusion.[58]

In the second case, *Wetston v. Commercial Union Assurance Group*,[59] a father who was in financial difficulties, with an outstanding judgment against him of $25,000, transferred a house to his son. The trial judge[60] invoked a presumption of gift to the son and held the son had an insurable interest. In referring to the Ontario case of *Marks v. Commonwealth Insurance Co.*,[61] the trial judge stated:

> The issue of presumption of advancement did not appear in the decision; whether it was raised, I do not know; but in view of the fact that the plaintiff was the wife of the persons the Court found to be the actual beneficial owners, it would appear the Court must have concluded that the presumption of advancement had been rebutted.[62]

In the instant case, the court held that the transfer from father to son was not a sham. However, even if it were a sham, the court was prepared to distinguish *Wolfe v. Oliver*[63] where the Nova Scotia Court of Appeal found that a mother who had registered her son's vehicle in her name had no insurable interest because the registration was a sham. The insurer did not know that the vehicle was really owned and operated by the son, who was a higher risk than was his mother. It was reasoned in *Wetston* that this materially different risk which must have influenced the decision in *Wolfe v. Oliver* was absent in the case at hand where there was little or no difference between the risk of the father and that of his son.

The trial judge also noted that there were no questions asked as to whether or not the plaintiff was the beneficial owner, and he held that

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[57] *Id.* at 644, [1976-78] INSUR. L. REP. (CCH) at 1164

[58] *Id.*

[59] 29 N.S.R. (2d) 271, [1979] INSUR. L. REP. (CCH) 4158 (para. 1-1132), 91 D.L.R. (3d) 434 (C.A. 1978).

[60] 28 N.S.R. (2d) 285, [1976-78] INSUR. L. REP. (CCH) 1128, 81 D.L.R. (3d) 518 (S.C. 1977).

[61] *Supra* note 38.

[62] *Supra* note 60, at 296, [1976-78] INSUR. L. REP. (CCH) at 1133, 81 D.L.R. (3d) at 526.

[63] 8 N.S.R. (2d) 313, [1971-75] INSUR. L. REP. (CCH) 1038, 46 D.L.R. (3d) 380 (C.A. 1974).

there surely must be some onus on the insurer or its agent, if it intends to set up this sort of defence, to ascertain if the person applying for the insurance is the beneficial owner. Moreover, the court doubted that the policy would have been issued in the father's name even if he had made full disclosure to the agent. The court noted: "As far as the average lay person is concerned, and this includes insurance agents, a person owns a property if he holds the deed to it."[64]

The appellate court[65] upheld the decision on the basis that there was ample evidence to support the finding that the son was the beneficial owner. The appellate court made no comment on the trial judge's views of the consequence if the transfer were a sham.

This apparent reluctance to characterize a transfer as a sham or to look behind it in property insurance should be contrasted with the court's willingness to ignore the registration and to look to the beneficial ownership in automobile insurance. A recent example is *Co-operative Fire & Casualty Co. v. Judgment Recovery (N.S.) Ltd.*[66] where a car was registered in a wife's name, although beneficially owned and insured by the husband. The court held that the husband's insurer had to defend an action brought by the victims of an accident which occurred while the wife was driving with the husband's consent.

C. *Form and Formation*

In no other area of contract law are questions of form and formation more important than in that of insurance. Yet in no other area is general theory more difficult to apply. This difficulty is largely created by the informal practices of the insurance industry. The practice of allowing agents or other intermediaries to hold out immediate or temporary coverage, either orally or through binders, makes it difficult to know when coverage commences and what its precise details are. These practices sometimes prevent courts from assuming that insurers make the critical underwriting decision, and hence accept the insured's offer, and that this acceptance constitutes a contract with the precise terms of the insurer's policy.[67] Uncertainty is also created by the informality surrounding renewal and the complexity of the law in relation to termination and cancellation.[68]

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[64] *Supra* note 60, at 300, [1976-78] INSUR. L. REP. (CCH) at 1135, 81 D.L.R. (3d) at 529.

[65] *Supra* note 59.

[66] [1976-78] INSUR. L. REP. (CCH) 555, 97 D.L.R. (3d) 191 (N.S.C.A. 1976).

[67] We are told by the English text writers that this is the normal rule. *See, e.g.*, E. IVAMY, GENERAL PRINCIPLES OF INSURANCE LAW 97-101 (4th ed. 1979).

[68] For recent cases concerning cancellation and termination, *see* Dick v. Allstate Ins. Co. of Canada, [1976-78] INSUR. L. REP. (CCH) 528 (Ont. H.C. 1976); Johns v. Guarantee Co. of N.Am., 12 O.R. (2d) 365, [1976-78] INSUR. L. REP. (CCH) 133, 69 D.L.R. (3d) 41 (H.C. 1976); Reicker v. Co-operative Fire & Cas. Co., 13 N.B.R. (2d) 82, [1976-78] INSUR. L. REP. (CCH) 194 (C.A. 1976).

In deciding whether there was an insurance contract in effect at the time of loss, an Ontario District Court Judge[69] has found that an agent has implied underwriting authority through the common practice of backdating coverage once the policy is issued. Judge Bernstein refused to accept the insurer's position that the contract did not come into effect until the policy was issued, because in that case it would be charging a premium for a period of time during which it was not subject to any possible risk. In the alternative, on the theory that the agent was acting for the insured, His Honour found that the insured was the offeree and applied the mail-box theory to find an effective acceptance.[70]

The same "common sense point of view", that an insurer should be bound when a full premium has been paid, has led the Ontario High Court to allow an insured to ratify a contract after loss.[71]

The uniform Life Insurance Part attempts to clarify when life insurance becomes effective.[72] The date determined by the statute will often be later than the commencement date mentioned in the policy, or the date on which there would be a concluded contract using common law principles. If the statute were literally applied, the insurer would seem to be able to collect the premium for a period of time during which it was not subject to any risk. The statutory provision was considered in *McClelland & Stewart Ltd. v. Mutual Life Assurance Co. of Canada*[73] in interpreting a standard two year self-destruction or suicide clause.[74] The policy stated that the "policy years date from January 23, 1968 . . . ", and that it was "signed and sealed . . . February 27, 1968". The court explained that the policy was backdated to give the insured the advantage of a lower premium associated with the life insured's age to the nearest six months. The life insured committed suicide on January 30, 1970. The court found "very persuasive the argument on behalf of the plaintiff that there is a difference between the date on which the policy became

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[69] Pearce v. Transportation Fire & Cas. Co., 18 O.R. (2d) 569, [1976-78] INSUR. L. REP. (CCH) 1206, 83 D.L.R. (3d) 259 (Dist. C. 1977).

[70] The learned judge applied the theory in spite of a national postal workers' strike. The notorious disintegration of the Canadian postal service as an effective and reliable system of communication has not yet been judicially noticed.

In many situations it is not strictly necessary to determine who makes an offer and who accepts. The dispute is really whether an oral agreement can be effective. The courts have frequently found such oral agreements to be binding. For a recent example, *see* Insurance Consulting Serv. Ltd. v. Pons Aqua Traders Ltd., 31 N.S.R. (2d) 398, [1979] INSUR. L. REP. (CCH) 4221 (para. 1-1146), 97 D.L.R. (3d) 766 (C.A. 1979).

[71] Goldshlager v. Royal Ins. Co., 19 O.R. (2d) 166, [1976-78] INSUR. L. REP. (CCH) 797, 84 D.L.R. (3d) 355 (H.C. 1977).

[72] In Ontario, *see* R.S.O. 1970, c. 224, s. 154.

[73] 17 O.R. (2d) 661, [1976-78] INSUR. L. REP. (CCH) 917, 82 D.L.R. (3d) 4 (H.C. 1977).

[74] The clause stated:

> If the life insured shall, whether sane or insane, die by his own hand or act
> (a) within 2 years of the effective date of this policy, or any reinstatement thereof, the liability of the Company shall be limited to an amount equal to the premiums paid. . . .

effective for purposes of coverage as opposed to the date on which it became effective for the purpose of determining the application of the exclusionary clause''.[75] However, the court seemed to rule that once the policy was issued and the risk accepted, the insurer could change the effective date of the contract for all purposes. The court found it difficult to understand that the premium would have been paid and accepted from January 23, 1968 and that the policy would only have been effective from February 27, 1968. This decision seems to leave open the possibility that if death had occurred between January 23 and February 27, 1968, there would be no effective insurance, but that once the policy was issued it would be dated retroactively. That is, the insurer would collect the premium for a time when it was not at risk.[76]

Even when the court can find a binding oral agreement, the question remains: what are its terms? Often the courts assume that the parties intended to agree on the usual terms of the insurer. Since there are no standard terms implied by law, this seems to be the only alternative to finding that the contract fails for uncertainty or lack of essential terms. However, occasionally the courts do find, as did the Manitoba Court of Appeal in the recent case of *Canadian Imperial Bank of Commerce v. Nickolievich*,[77] that the insured cannot be bound by a contractual condition to which he did not agree and of which he had neither knowledge nor the means of knowledge. In this case it should be noted that the disputed term was a limitation provision, not an essential term, and there was a statutory provision which would apply in the absence of agreement. Hence there was no question of the contract failing for uncertainty or lack of an essential term. The fact that the court may have felt bound to decide differently if the policy had been delivered before the loss, shows how artificial and unrealistic the relevant contract doctrine seems to be.[78]

D. *Agency*

1. *The Agent's Liability*

The most significant development in the period under review has been the exponential increase in the number of suits brought by insureds against insurance agents.[79] During the same period, the superintendents

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[75] *Supra* note 73, at 667, [1976-78] INSUR. L. REP. (CCH) at 921, 82 D.L.R. (3d) at 10.

[76] Of course, in this case this retroactive doctrine works in favour of the insured.

[77] *See* note 17 and accompanying text *supra*.

[78] *See also* Dolovich v. Mutual of Omaha Ins. Co., [1978] 4 W.W.R. 519, [1979] INSUR. L. REP. (CCH) 3819 (para. 1-1054), 88 D.L.R. (3d) 348 (Man. C.A.), where the court found that an offer to reinstate was a special offer not subject to the 10 day waiting period contained in the policy provision covering reinstatement.

[79] In the past four years there have been about 30 reported superior court decisions.

have applied increasing pressure to insure that all agents carry errors and omissions insurance. I do not know whether it is coincidental that these two developments have occurred at the same time or whether there is some exponible relationship between them. Since the superintendents' actions have not been widely publicized, it is unlikely that law suits have been generated by the creation of an insurance fund. In any event, insureds have had a good rate of success in these actions.

The insureds' complaints fall into several general categories. The largest group of cases involves the complaint by the insured that he requested the agent to provide suitable or adequate insurance coverage, and this the agent failed to do.[80] There is a second group of cases where the insured's complaint is that the agent misrepresented the nature of the insured's cover.[81] These categories can overlap and occasionally the court has described an insured's complaint as a failure of the agent to provide the coverage requested and a misrepresentation that he had.

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[80] Lester v. Philip Abbey Inc., [1976-78] INSUR. L. REP. (CCH) 327 (Que. S.C. 1975); Dawson v. Western Farmers Mut. Ins. Co., [1976-78] INSUR. L. REP. (CCH) 158 (Ont. H.C. 1976); Eedy v. Stephens, [1976-78] INSUR. L. REP. (CCH) 91 (B.C.S.C. 1976); Gardiner v. Clegg, [1976-78] INSUR. L. REP. (CCH) 324 (B.C.S.C. 1976); J. Bailey's Furniture Mkt. Ltd. v. Sigma Ins. Ltd., 21 N.S.R. (2d) 459 (S.C. 1975); Jean v. Maryland Cas. Co., 13 O.R. (2d) 336, [1976-78] INSUR. L. REP. (CCH) 231, 71 D.L.R. (3d) 38 (H.C. 1976); Peter Unruh Constr. Co. v. Kelly-Lucy & Cameron Adjusters Ltd., [1976-78] INSUR. L. REP. (CCH) 203 (Alta. S.C. 1976); Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada, 17 O.R. (2d) 529, [1976-78] INSUR. L. REP. (CCH) 894, 81 D.L.R. (3d) 139 (C.A. 1977); Marshall Printing Ltd. v. Christie-Phoenix Ltd., [1976-78] INSUR. L. REP. (CCH) 497 (B.C.S.C. 1977); Truman v. Sparling Real Estate Ltd., [1976-78] INSUR. L. REP. (CCH) 494, 3 C.C.L.T. 205 (B.C.S.C. 1977); Abbey Estates Ltd. v. Gordon Hansen Ins. Agencies Ltd., [1976-78] INSUR. L. REP. (CCH) 1258 (B.C. Cty. Ct. 1978); Collette v. Yvon J. Goguen Assurance Ltée., 23 N.B.R. (2d) 1 (Q.B. 1978); Dunlap v. Marsh & McLennan Ltd., [1976-78] INSUR. L. REP. (CCH) 1001 (Ont. C.A. 1978); Fairview Enterprises Ltd. v. United States Fidelity & Guarantee Co., [1979] INSUR. L. REP. (CCH) 3956 (para. 1-1088) (B.C.S.C. 1978); Fulton Ins. Agencies Ltd. v. G.M. Acceptance of Canada Ltd., 24 N.S.R. (2d) 114, [1976-78] INSUR. L. REP. (CCH) 1058 (C.A. 1978); McCann v. Western Farmers Mut. Ins. Co., 20 O.R. (2d) 210, [1976-78] INSUR. L. REP. (CCH) 1227, 87 D.L.R. (3d) 135 (H.C. 1978); Rockey v. Sutherland, 27 N.S.R. (2d) 504 (C.A. 1978); DeGroot v. J. T. O'Bryan & Co., [1979] INSUR. L. REP. (CCH) 4244 (para. 1-1152) (B.C.C.A.); Dormer v. Royal Ins. Co. & John McGlynn Ins. Agency, [1979] INSUR. L. REP. (CCH) 4197 (para. 1-1142) (Ont. H.C.); G. R. Young Ltd. v. Dominion Ins. Corp., [1979] INSUR. L. REP. (CCH) 4316 (para. 1-1157) (B.C.S.C.). In the last case mentioned, the court found that the insurer was bound by the agent's negligence. This eliminates the need for recourse to the agent's errors and omissions insurance.

[81] Huggins v. Monarch Life Assurance Co., [1976-78] INSUR. L. REP. (CCH) 127 (B.C.S.C. 1976); Sulyma v. H. Hargreaves Ltd., [1976-78] INSUR. L. REP. (CCH) 222 (B.C.S.C. 1976); Reid v. Dominion of Canada Gen. Ins. Co., [1976-78] INSUR. L. REP. (CCH) 689 (Ont. Cty. Ct. 1977); Thompson v. Sharpe, 16 O.R. (2d) 24, 77 D.L.R. (3d) 55 (C.A. 1977); Tynan v. Dextraze, [1976-78] INSUR. L. REP. (CCH) 1211 (B.C. Cty. Ct. 1977); Dutch Sisters Inn (1969) Ltd. v. Continental Ins. Co., [1976-78] INSUR. L. REP. (CCH) 970 (Ont. H.C. 1978); L. B. Martin Constr. Ltd. v. Gaglardi, [1979] INSUR. L. REP. (CCH) 3840 (para. 1-1061) (B.C.S.C. 1978); Thomson v. Guardian Ins. Co. of Canada, [1979] INSUR. L. REP. (CCH) 3994 (para. 1-1094) (B.C. Cty. Ct.).

There is a third group of cases where the insured complains that the agent has failed to perform some other duty, such as renewing the insurance[82] or informing the insurer that the insured has acquired a new automobile.[83] While the numbers may not be significant, the insureds' success ratio in the third group of cases has been very low. This may suggest that the courts will more readily recognize the agent's responsibility for failure to perform his central duties of providing the insured with suitable and adequate coverage. It may be more difficult to establish that the agent has undertaken other and more uncommon duties.

The judges have not always explained the basis of the agent's liability very clearly. Sometimes the courts have mentioned breach of contract or negligent misrepresentation — the latter, occasionally, even when the agent has said nothing. More often, the courts have found a breach of duty without being concerned with whether the duty is based on contract or tort.

An important exception to this usual dearth of analysis is *Fines Flowers Ltd. v. General Accident Assurance Co. of Canada*,[84] a case which courts throughout Canada already regard as the leading authority. The plaintiff's claim arose out of the failure of the heating system in his greenhouses which resulted in the destruction of his horticultural crops. The loss of heat was caused by the breakdown of two water pumps. When the boilers received an inadequate supply of water, they automatically shut down. The plaintiff's counsel conceded that the defendant insurance company was not liable under its boiler and machinery policy. The pumps were not insured under this policy and even if they had been, the policy excluded liability for any accident occasioned by "wear and tear". The evidence established that the pumps failed because of ordinary wear. In these circumstances, the plaintiff claimed against the insurance agent in contract or in negligence for failure to arrange insurance protection against this event.

The justices of the Ontario Court of Appeal discussed three bases for the agent's liability: breach of contract, negligence and breach of an equitable duty. The majority concluded that the agent had breached his contractual obligation to protect the plaintiff against all foreseeable insurable risks. In arriving at this conclusion they had to answer the agent's argument that, first, coverage for this accident could not be

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[82] Corrie v. Pool Ins. Managers Ltd., [1976-78] INSUR. L. REP. (CCH) 1360 (Ont. Cty. Ct. 1978); Lindholt v. Rochester Ins. Agency Ltd., [1976-78] INSUR. L. REP. (CCH) 1016 (B.C.S.C. 1978); Lawrence v. Roy V. Curtis Ins. Agency Ltd., [1979] INSUR. L. REP. (CCH) (para. 1-1090) (Ont. H.C.).

[83] O'Donnell v. Lumbermens Mut. Cas. Co., [1979] INSUR. L. REP. 3826 (para. 1-1057) (Ont. Cty. Ct. 1978). *See also* Katz v. General Accident Assurance Co., [1976-78] INSUR. L. REP. (CCH) 596 (Ont. H.C. 1977), where the insured complained that the agent failed to provide the insurer with a veterinarian certificate; and, Waldmans Fish Co. v. Anderson Ins., 25 N.B.R. (2d) 482, [1979] INSUR. L. REP. (CCH) 4215 (para. 1-1145) (C.A.), where the insured complained that the agent failed to notify the insurer of a changed condition.

[84] *Supra* note 80.

obtained since even if the pumps and motors had been insured, they would not have been covered for "wear and tear"; and, secondly, even if coverage were available, it would be extraordinary coverage, and in the absence of explicit instructions a reasonable interpretation of the plaintiff's direction to provide whole coverage would be that the agent should insure against normal risks. The first defence was met when the court adopted the finding of the learned trial judge that full protection was insurable. The court's response to the second defence was a finding that it simply was not open to the agent. Not having insured the pumps and motors at all, the agent could not argue that he had complied with the plaintiff's instructions as he understood them. This may not be a satisfactory response to the defendant's argument. It is only satisfactory if the defendant conceded that its contractual obligation was to place what it categorized as extraordinary coverage. Having conceded that, it could hardly argue that it had made a mistaken but reasonable attempt to fulfil its contractual obligation when it had made no attempt at all. However, the defendant's argument is not so easily met if it amounts to an assertion that its contractual obligation is only that which results from a reasonable interpretation of the plaintiff's instructions. Such a reasonable interpretation requires the agent only to place ordinary coverage. Since ordinary coverage would not have protected the plaintiff, the defendant's breach in failing to place it did not cause the plaintiff's damage.

In his separate judgment, Chief Justice Estey saw several difficulties in trying to establish the defendant agent liable in contract. To him there did not appear to have been any meeting of the minds on the meaning of the essential term "full coverage". Thus no contract arose between the plaintiff and the defendant agent to obtain the insurance coverage described by the plaintiff. Even if a contract did exist in the terms as found by the trial judge — *i.e.*, that the agent had an obligation to cover insurable risks — there was no clear evidence in the record that the insurance market afforded coverage against an accident occasioned by a failure of these pumps and motors due to wear and tear. For these reasons, the Chief Justice preferred to base the defendant agent's liability on either negligence or breach of an equitable duty. By basing the defendant's liability on negligence, His Lordship was able to finesse the question of whether this loss was insurable. He did this by finding that the defendant agent owed a duty to the plaintiff to report any gap in insurance. By failing to do so, the agent denied the plaintiff an opportunity to protect his business against this vital exposure by making other arrangements for the supply of heat to the greenhouses.

With the utmost respect, the critical issue in this case is much the same whether the agent's liability is founded on contract or negligence. The issue is not whether the agent made a reasonable attempt to fulfil his duty, nor is it one of strict liability versus a lack of reasonable care which often distinguishes contractual from tort liability. Instead the critical issue is to define the exact scope of the agent's duties. This depends in both contract and tort on giving some reasonable, objective meaning to

the request of the plaintiff and the promises or holding out of the defendant. In either case the question is whether or not the agent had the duty to obtain the coverage for this loss and report to the plaintiff if he could not do so.

All of the justices found an alternative ground for the agent's liability, namely his breach of an equitable duty (or, as it was alternatively put, his liability in equity for a breach of a fiduciary duty). The judgments are not entirely clear as to the consequences of this proliferation of legal concepts. In particular, it is unclear whether the fact that the agent is a fiduciary makes it unnecessary to define the exact scope of his duties or changes the nature of them. In finding the agent liable in equity, the court relied on *Laskin v. Bache & Co.*[85] where the Ontario Court of Appeal found an agent liable in equity as well as in contract and, in so doing, avoided the application of the common law remoteness of damages rules. In that case, the court cites no authority for the proposition that the test of remoteness does not apply to a claim in equity. Nor does it give any reason why this should be so.[86]

As long as the concept of fiduciary is narrowly defined, there may be good reasons for giving a more extensive remedy for breach of duty than for the breach of a normal contractual obligation. As well, if the limits on recovery are arbitrary, or no other theory of recovery is available at all, it is a familiar judicial process to invoke equity to avoid arbitrariness or gaps in the common law. But if a fiduciary duty is to be imposed in a wide variety of ordinary commercial relationships and equity used as an alternative to common law liability, some explanation must be given for jettisoning rules which generally are not in disrepute.

It may be that the court in *Fine's Flowers* had no appreciation of these consequences in finding the agent had breached "an equitable duty". In fact Chief Justice Estey found that in this case it made no difference whether the plaintiff's action was based on negligence or breach of a fiduciary duty. Perhaps the justices were merely indulging in the confusing, but harmless, pastime of testamentary draftsmen who never use one term when two will do.

Whatever may be the implication of finding the agent in breach of a fiduciary duty, there is no avoiding the central issue of defining the scope or extent of the agent's duty. In grappling with this issue, several courts have had to respond to the argument, made in *Fine's Flowers*, that the

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[85] [1972] 1 O.R. 465, 23 D.L.R. (3d) 385 (C.A. 1971).

[86] The decision parallels the decision of the English High Court in Wroth v. Tyler, [1974] Ch. 30, [1973] 1 All E.R. 897, which held that the common law rules concerning the measure of damages do not apply to a claim in equity. *See* Reiter & Sharpe, *Wroth v. Tyler: Must Equity Remedy Contract Damages?*, 3 CAN. BUS. L.J. 146 (1978). Contrast the more functional analysis in Asamera Oil Corp. Ltd. v. Sea Oil & Gen. Corp., [1979] 1 S.C.R. 633, [1978] 6 W.W.R. 301, 89 D.L.R. (3d) 1, where the mitigation principle was applied by Estey J., without regard to whether the plaintiff's claim was for common law or equitable damages. *See* Waddams, *Damages for Failure to Return Shares*, 3 CAN. BUS. L.J. 398 (1979).

loss was not insurable. Thus, it cannot be a breach of the agent's duty not to do what is impossible. Or put another way, the agent's duty is only to arrange coverage for reasonably foreseeable and insurable risks. On occasion this argument seems to be accepted, as in *Huggins v. Monarch Life Assurance Co.*[87] where the court distinguished *Fine's Flowers* on the grounds that the case only applied where, due to the agent's negligence, there was a gap in insurance coverage. In *Huggins* there was no gap in coverage since the insurance documents were "typical of the insurance industry". However, the usual response to this argument is that given by Chief Justice Estey in the *Fine's Flowers* case, *viz.* that the agent is under a duty either to procure such coverage, or to draw to the attention of the plaintiff his failure or inability to do so and the consequent gap in coverage.[88]

2. *The Agent's Authority*

In contrast to several appellate decisions noted in previous surveys,[89] some decisions have recently been reported which restrict the operation of the "amanuenses" doctrine.[90] For example, in *Noseworthy v. English & American Insurance Co.*,[91] the court held that there was no misrepresentation by the insured when accurate information was given to the agent by telephone and the agent incorrectly completed the application form. The insured was not held responsible for the agent's failure, even though the policy was received and could have been read by the insured before the loss occurred.[92] In *Moxness v. Co-operative Fire & Casualty Co.*,[93] the insured signed an application form which had been inaccurately completed by the agent. Nevertheless, the court held that the insurer was bound by the knowledge of the agent.[94]

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[87] *Supra* note 81.

[88] As discussed above, Estey C.J. had more difficulty with this argument in discussing the agent's contractual liability.

[89] Baer, *Annual Survey of Canadian Law: Insurance*, 4 OTTAWA L. REV. 497, at 511 (1971), 6 OTTAWA L. REV. 193, at 222 (1973).

[90] *See* the leading English case of Newsholme Bros. v. Road Transp. & General Ins. Co., [1929] 2 K.B. 356, [1929] All E.R. 442 (C.A.), where the agent was held to be the amanuenses of the insured in filling in the application form.

[91] 12 Nfld. & P.E.I.R. 296, [1976-78] INSUR. L. REP. (CCH) 1358 (Nfld. C.A. 1978). *See also* Burgess v. Economical Mut. Ins. Co., 15 N.B.R. (3d) 1, [1976-78] INSUR. L. REP. (CCH) 542 (Cty. Ct.); Smith v. Co-operative Fire & Cas. Co., [1977] 1 W.W.R. 638, [1976-78] INSUR. L. REP. (CCH) 473 (Alta. Dist. C.).

[92] Unlike Blanchette v. C.I.S. Ltd., [1973] S.C.R. 833, [1971-75] INSUR. L. REP. (CCH) 110, 36 D.L.R. (3d) 561, where the insured had no opportunity to read the application before the loss occurred. *See* Baer, *supra* note 2, at 234.

[93] [1979] 2 W.W.R. 436, [1979] INSUR. L. REP. (CCH) 3952 (para. 1-1087) (Alta. S.C.).

[94] Where there is no signed application form, courts continue to fix the insurer with the consequences of the agent's failure to communicate material information. *See* Goldshlager v. Royal Ins. Co., *supra* note 71, at 181, [1976-78] INSUR. L. REP. (CCH) at 806, 84 D.L.R. (3d) at 371.

Just as one doctrine is being restricted, however, other doctrines are being combined in new ways to fix the insured with responsibility for the agent's failings. In *Smith v. Wawanesa Mutual Insurance Co.*,[95] the Alberta District Court held that it was unnecessary to rule on the insured's contention that notice to the agent of a change in the location of the insured property was notice to the insurer. The court held that the insured's property "ceased to be covered by the policy as soon as it was permanently removed from the insured premises not because of the unnotified material change of risk but because it was then no longer within the description of the insured property".[96]

E. *Sue and Labour Clauses*

Insurers have an obvious interest in minimizing the loss which results from the occurrence of an insurance risk. For more than a century they have tried to do this by including a term in many policies requiring the insured to take reasonable steps after a loss has occurred to prevent further damage to insured property. As a further inducement, the insurers have contracted to contribute *pro rata* towards any reasonable and proper expenses incurred by the insured in trying to prevent such further damage. These widely used policy terms have been incorporated as Statutory Condition 9 in the Fire Part and as Statutory Condition 4(1)(*b*) in the Automobile Part.[97]

The scope and application of these policy terms and statutory provisions have been at issue in a number of recent cases.[98] The most important of these cases is the Supreme Court of Canada decision in *Hartford Fire Insurance Co. v. Benson & Hedges (Canada) Ltd.*[99] There are two ways in which these clauses can come before the courts. If the insured fails to act to reduce loss, the insurer could allege breach of this clause to deny or to diminish the insured's claim. Alternatively, the insured could try to collect the cost of protective steps taken by him, but thought to be unnecessary or unreasonable by the insurer. In either case, one might expect that the courts would be reluctant to use the benefit of hindsight to second-guess how the insured should have acted. One might expect that the insured would be given the benefit of the doubt in marginal cases, allowing him to recover the cost of protective steps, if they have been taken, and not penalizing him if they have not.

In fact, in many of the recent cases including *Benson & Hedges*, the question has been whether the insured can recover the cost of actions he

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[95] 5 A.R. 126, [1976-78] INSUR. L. REP. (CCH) 477 (Dist. C. 1977).

[96] *Id.* at 128, [1976-78] INSUR. L. REP. (CCH) at 478.

[97] *See, e.g.*, The Insurance Act, R.S.O. 1970, c. 224, ss. 122, 205(2).

[98] In addition to the cases mentioned in the following notes, *see* Suo v. Openshaw Simmons Ltd., 5 B.C.L.R. 370, [1976-78] INSUR. L. REP. (CCH) 1061 (S.C. 1978); Stad v. Fireman's Fund Ins. Co., [1979] INSUR. L. REP. (CCH) 3876 (para. 1070) (B.C.S.C.).

[99] [1978] 2 S.C.R. 1088, [1976-78] INSUR. L. REP. (CCH) 1101.

has taken to prevent further loss. In *Benson & Hedges* the insured was engaged in the brewing business under the name of Formosa Spring Brewery. It opened a new brewery near the city of Barrie in 1972. Shortly after the plant opened, a bottling tank ruptured or exploded causing the death of two employees, injuries to several others, and extensive damage to the premises. Following this mishap, the insureds retained the services of a firm of experts to determine the cause of the failure of the bottling tank. As a result of this investigation, it was concluded that faulty welding was the main cause of the rupture. The insured also retained the services of a second firm of experts to carry out a thorough inspection of all the tanks and related equipment throughout its facilities. This second investigation revealed defective welding in some of the other tanks.

As a result of this mishap, the insured took legal action against several insurers to recover almost $300,000. The trial judge gave judgment for the insureds for an amount of approximately $215,000, disallowing the amount claimed to investigate the rupture and the inspection of the unruptured tanks. These were the only amounts in dispute when the case reached the Supreme Court of Canada, and they were divided by the court into three categories as follows: first, work respecting the detection of the cause of the rupture of the bottling tank; secondly, work respecting the inspection of the unruptured tanks to determine the soundness or otherwise of their construction; and thirdly, work respecting the inspection of the rewelding of those tanks where faulty workmanship was found.

In the result, the Supreme Court of Canada by a four to three majority set aside the judgment of the Ontario Court of Appeal and allowed the insured only the cost incurred in detecting the cause of the rupture of the bottling tank. In disallowing most of the insured's claim under the sue and labour provisions,[100] Mr. Justice Pratte seemed primarily concerned with a question that was not before the Court: *i.e.*, what would be the consequence if the insured had not attempted to prevent further loss? No doubt the majority turned the question around and concentrated on hypothetical facts because they saw the insured's duty to labour and the insurer's obligation to pay for this labour as

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[100] *Id.* at 1099, [1976-78] INSUR. L. REP. (CCH) at 1103. Not all of the policies under consideration were subject to the same sue and labour clauses. Some contained the statutory condition, while one multi-peril subscription policy contained the following clause:

> In case of loss or damage, or threatened loss or damage under this policy, it shall be lawful and necessary for the Insured, their factors, servants, assigns, to sue, labour and travel for in and about the defence, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this insurance. The Insurers will pay the charges so incurred subject to the limit of liability stated elsewhere herein. The acts of the Insured or the Insurers in recovering, saving and preserving the property insured in case of loss or damage shall not be considered a waiver or an acceptance of abandonment.

correlative duties. The insurer only has to pay for those steps which the insured is required to make.

By addressing a hypothetical issue instead of the actual issue before the Court, the majority was diverted from considering whether the insured took the kind of protective measures which should be encouraged. Instead, the majority was concerned that sue and labour clauses not be interpreted so broadly as to impose a serious hardship on the insured. In effect, by turning the question around, the Court invoked a *contra proferentem* type of reasoning against the insured.[101]

In the context of the particular rupture or explosion that occurred, it is hard to appreciate the Court's concern. The explosion killed two men, injured several others and caused extensive damage to the premises. Since the insured discovered that the explosion was caused by defective welding, it does not seem unreasonably onerous to require the insured to inspect other tanks made at the same time.

The majority reached the conclusion that the insured's efforts were not required by Statutory Condition 9 by drawing a distinction between preventing further loss and preventing the occurrence of a different risk. Or, as it was alternatively stated, "The distinction essentially is as between the obligation to minimize a loss and the obligation to minimize a risk that has yet to materialize."[102] The essence of this distinction is not easy to grasp, but it flows from the Court's categorization of Statutory Condition 9 as the contractual expression of the common law duty of the insured to mitigate his loss. In the view of the Court, the obligation to mitigate does not oblige the insured to take steps to avert a loss before it has occurred but only to take steps to prevent a loss that would be the normal consequences of an event that has occurred. All of this does not take the reader very far, since in this case all of the steps taken by the insured followed the explosion in its plant.

The test used by the majority to define the extent of the insured's obligation under Statutory Condition 9 is not, I submit, quite the same as that used by the trial judge and mentioned by the dissenting judges in the Supreme Court of Canada. According to Mr. Justice Pratte, the insured's obligation is to prevent a loss that would be the normal consequence of an event that has occurred or results from the loss that has occurred. In other words, there must be a direct causal connection between the loss that has occurred and the further loss which the insured seeks to prevent. On the other hand, the trial judge defined the insured's obligation as a duty to prevent imminent danger. If all these tanks were manufactured by the

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[101] *Id.* at 1102, [1976-78] INSUR. L. REP. (CCH) at 1104, where Mr. Justice Pratte writes:

> In the absence of clear and unambiguous language, I cannot accept that sub-para. 1 of statutory condition No. 9 be construed so as to make the right of the Insured to recover an actual loss resulting from a peril that has come into operation conditional upon the Insured preventing the occurrence of another peril.

[102] *Id.*

same firm and welded by the same workers, it may be very likely that faults would be found in the welding of other tanks. In this sense, the danger of further explosions may be very imminent. The test of Mr. Justice Pratte, however, requires more than imminent danger. The further loss must be caused by the original explosion.

This distinction drawn by Mr. Justice Pratte may not be as simple as it first appears. It is explained by him in some puzzling passages of his judgment, as for example:

> The inspection of the unruptured tanks was intended to show whether the welding on these tanks was also defective and the risk of rupture real These inspections and tests did not reduce or extinguish such risk any more than it was created or increased by them. The risk of some of the other tanks exploding because of the faulty workmanship in their construction always existed: the work of Warnock and Independent served to surface the risk, to make its existence known to Insured and Insurers alike.[103]

With respect, His Lordship was either wrong or much too clever. In a very real and practical sense, the discovery of faulty welding in the other tanks greatly reduced the risk that they would explode. In fact, the cleverness of this passage suggests that the test of the insured's obligation is too refined and restrictive. As Mr. Justice Dickson argues in the dissenting opinion, the insured should be in an entirely different position once a loss has occurred. The insured should then take reasonable steps to eliminate or minimize the risk of damage to other insured property from a cause which has already resulted in damage to the property itself. Even this more expansive interpretation of the insured's duty would be arbitrarily limited. There would be no duty to avert loss before any insured loss has occurred and no right to recover the cost of such preventive steps.

Such an arbitrary limit was recognized by Mr. Justice Holland of the Ontario High Court in *Consumers Glass Co. v. Allendale Mutual Insurance Co.*[104] However, His Lordship's statements of the law were expressly disapproved in *Canadian General Electric Co. v. Liverpool & London & Globe Insurance Co.*[105] where the Ontario Court of Appeal recognized an independent common law doctrine which allows the insured to collect the cost of minimizing or averting an obvious and imminent peril. The court referred to several older English cases including *The Knight of St. Michael*[106] where insurers were held liable for a loss due to the discharge of cargo when, with constantly rising temperatures in the hold of a vessel, fire was a virtual certainty. The court accepted the trial judge's ruling that this common law doctrine was not restricted to admiralty cases. The court explained the doctrine by stating first that a *bona fide* and reasonable belief that the insured is in a situation of imminent peril is not enough, and secondly, that the risk

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[103] *Id.* at 1101, [1976-78] INSUR. L. REP. (CCH) at 1104.
[104] [1976-78] INSUR. L. REP. (CCH) 759 (Ont. H.C. 1977).
[105] 27 O.R. (2d) 401, 106 D.L.R. (3d) 750 (C.A. 1980).
[106] [1898] P. 30, 67 L.J.P.D. & A. 19 (1897).

covered by the policy must have already "begun to operate".[107] Given the court's disagreement with the statement of the law in *Consumers Glass Co. v. Allendale Mutual Insurance Co.*, this second requirement is very refined:

> [W]hat must precede the cause of the additional damage in order that it be recoverable is not an insured risk in the sense of an actual fire or explosion but an existing danger which, if nothing were done to avert it, would inevitably lead in the normal course to a fire or explosion.[108]

I predict that this nuance between an "existing danger", or a risk that "has already begun to operate", and a potential danger will generate elaborate judicial explanation.

It would, of course, seriously affect the insured if he was under an obligation to prevent loss even where none had yet occurred and none was imminent. This would preclude recovery resulting from the insured's negligence. Yet, Mr. Justice Dickson in his dissenting judgment in the *Benson & Hedges* case seems to adopt this extreme position in interpreting the insured's obligation under Statutory Condition 6.[109] Fortunately, this interpretation of the standard fire insurance policy has recently been rejected by the Supreme Court of Canada.[110]

In his majority decision, Mr. Justice Pratte gave an additional reason for disallowing recovery under the sue and labour clause contained in the multi-peril subscription policy. He quoted the following exclusion in the policy: "[T]his policy does not insure against: . . . (*b*) the cost of making good faulty materials, workmanship, construction or design but this exclusion shall not apply to damage resulting therefrom." In view of this exclusion, His Lordship concluded:

> If the cost of making good the defective workmanship of the tank is not covered by the policy it is quite clear to me that the expenses that were necessary to determine whether there was faulty workmanship or not cannot be recovered under the same policy; these expenses are but an accessory of those incurred to correct the defective workmanship.[111]

With the utmost respect, it is just as accurate to say that the inspections were undertaken to prevent explosion, which was a threatened loss insured under the contract.

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[107] The court adopted the explanation of the doctrine given by Lord Reading C.J. in Kacianoff v. China Traders Ins. Co., [1914] 3 K.B. 1121, at 1127 and refined by Rowlatt J. in Joseph Watson & Son, Ltd. v. Firemen's Fund Ins. Co., [1922] 2 K.B. 355, at 358.

[108] *Supra* note 105, at 410, 106 D.L.R. (3d) at 758-59.

[109] *See supra* note 99, at 1096, [1976-78] INSUR. L. REP. (CCH) at 1109, where His Lordship stated: "Of course, if the original loss or damage had occurred from the neglect of the insured, as for example from inadequate inspection which failed to reveal the danger, there would be a breach of Statutory Condition 6 which would preclude recovery in respect of this loss altogether."

[110] Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Inv. Ltd., [1976] 2 S.C.R. 221, [1971-75] INSUR. L. REP. (CCH) 323 (1975).

[111] *Supra* note 99, at 1105, [1976-78] INSUR. L. REP. (CCH) at 1106.

The Court's preoccupation with limiting the insured's obligation under sue and labour clauses may be prompted by the extreme consequences to the insured for any breach. The Court does not expressly discuss what these consequences would be. However, their Lordships' desire to limit the scope of the insured's obligation may indicate that they accept the position that this statutory condition is like any other condition, and a breach by the insured forfeits all of his claim, including the loss which occurred before the breach. This extreme position has previously been adopted in at least two Canadian cases.[112] On the other hand, by stressing that the statutory condition is only the contractual expression of the common law duty of the insured to mitigate his loss, the Court may have lent support to the notion that the insured will only fail to collect for the subsequent loss which he could have prevented. This is the position that was adopted by the New Brunswick County Court in *MacEachern v. Merit Insurance Co.*,[113] although the earlier Canadian cases were not referred to by the learned County Court Judge.

F. *Defining the Risk: Proximate Cause*

In recent years the courts have developed no new principles to help in the construction of insurance policies.[114] The ubiquitous principle of construing policies *contra proferentem* continues to vie with the courts' desire to give words their plain meaning. However, the recent Supreme Court of Canada decision of *L'Industrielle, Cie. d'Assurance sur la Vie v. Bolduc*[115] illustrates that, in theory, *contra proferentem* only comes into play if the words of the policy are ambiguous, and often judges find no ambiguity even though they cannot agree on meaning.

While no new principles of construction have been developed, two recent judgments of the Supreme Court of Canada written by Mr. Justice de Grandpré contain embryonic ideas which need to be more carefully considered before they are widely adopted by the courts. In both cases His Lordship buttressed his interpretation of the contract by reference to basic insurance principles and the general practice in the industry. I will discuss one of these cases in greater detail under the heading of Subrogation.[116] The other case, *Foundation of Canada Engineering*

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[112] Devlin v. Queen Ins. Co., 46 U.C.Q.B. (N.S.) 611, at 621 (1882); Parent v. La Providence, 36 Que. S.C. 377 (1909).

[113] 63 D.L.R. (2d) 642 (N.B. Cty. Ct. 1967).

[114] It may be that the courts are more willing to invoke the principle that the policy should be interpreted in such a way as to give efficacy to it. For example, in T.W. Thompson Ltd. v. Simcoe & Erie Gen. Ins. Co., 12 O.R. (2d) 184, [1976-78] INSUR. L. REP. (CCH) 90 (C.A. 1976), the Ontario Court of Appeal refused to accept the insurer's interpretation of an exclusion to liability insurance because it would make the insurance of little value to the insured.

[115] [1979] 1 S.C.R. 481, [1976-78] INSUR. L. REP. (CCH) 1325 (1978).

[116] Imperial Oil Ltd. v. Commonwealth Constr. Co., [1978] 1 S.C.R 317, [1976-78] INSUR. L. REP. (CCH) 331 (1976).

Corp. v. Canadian Indemnity Co.,[117] involved the issue of whether a liability insurance policy excluded coverage for liability arising from the defective design of a kiln building. His Lordship relied upon English and American authors and the testimony of the insurer's employee to find a "principle" and an industry practice that a general liability policy is not basically a professional liability one. His Lordship recognized the danger of "attempting to cast a mould meant to shape all future possibilities",[118] and that it was the contract in the instant case which had to be examined. Nevertheless, he did deduce specific exclusions from the type of policy under consideration. In doing so, he made no mention of the danger of relying upon foreign writers and the self-serving testimony of the defendant's employees to establish local practice. Nor is there any consideration of whether this practice was known to the insured.

The other cases reported in the period under review are most remarkable because of the large number concerned with the interpretation of words and phrases whose meaning has frequently been considered by the courts in the past. Even frequent consideration by the Supreme Court of Canada has not settled the interpretation of some words and phrases. The list includes "accident",[119] "vacant or unoccupied",[120] "liability imposed by law",[121] "carrying passengers for compensation or hire"[122] and "total disability".[123] I do not intend to discuss all of these cases in detail, but some of these phrases warrant further comment.

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[117] [1978] 1 S.C.R. 84, [1976-78] INSUR. L. REP. (CCH) 440, 74 D.L.R. (3d) 266 (1977).

[118] *Id.* at 91, [1976-78] INSUR. L. REP. (CCH) at 443, 74 D.L.R. (3d) at 270.

[119] *See* notes 124-29 *infra*.

[120] Lewis v. Economical Mut. Ins. Co., [1976-78] INSUR. L. REP. (CCH) 757, 73 D.L.R. (3d) 655 (N.B.C.A. 1977); MacLean v. Dominion Ins. Corp., 23 N.S.R. (2d) 158, [1976-78] INSUR. L. REP. (CCH) 1034 (S.C. 1977); Reichard v. Wawanesa Mut. Ins. Co., [1976-78] INSUR. L. REP. (CCH) 1293 (Que. S.C. 1977); Golob v. Dumfries Mut. Fire Ins. Co., 25 O.R. (2d) 65, [1979] INSUR. L. REP. (CCH) 4145 (para. 1-1126) (C.A.); Burke v. Campbell, 20 O.R. (2d) 300, 87 D.L.R. (3d) 427 (H.C. 1978).

[121] Interprovincial Pipe Line Co. v. Seller's Oil Fields Serv. Ltd., [1976] 3 W.W.R. 31, [1976-78] INSUR. L. REP. (CCH) 172 (Man. C.A.); T. W. Thompson Ltd. v. Simcoe & Erie Gen. Ins. Co., *supra* note 114; Pentagon Constr. (1969) Co. v. United States Fidelity & Guar. Co., [1977] 4 W.W.R. 351, [1976-78] INSUR. L. REP. (CCH) 674 (B.C.C.A.); Poole Constr. Ltd. v. Guardian Assurance Co., 4 A.R. 417, [1976-78] INSUR. L. REP. (CCH) 625 (S.C. 1977); Acadia Road Contractors Ltd. v. Canadian Sur. Co., 27 N.S.R. (2d) 605, [1976-78] INSUR. L. REP. (CCH) 1118 (C.A. 1978); Ocean Constr. Supplies Ltd. v. Continental Ins. Co., [1978] 5 W.W.R. 681, [1976-78] INSUR. L. REP. (CCH) 1289 (B.C.S.C.). Many of the cases are concerned with interpreting various exclusions to the liability coverage.

[122] *See* notes 166-67 *infra*.

[123] In addition to the cases listed under Limited Automobile Accident Insurance, *see* Brooks v. London Life Ins. Co., [1979] INSUR. L. REP. (CCH) 4083 (para. 1-1115) (Alta. C.A.); Silliker v. Aetena Life Ins. Co., [1976-78] INSUR. L. REP. (CCH) 96 (B.C.S.C. 1976); Pound v. Continental Cas. Co., [1976-78] INSUR. L. REP. (CCH) 458 (Que. C.A. 1977); Lefebvre v. C.N.A. Assurance Co., 20 O.R. (2d) 37, [1976-78] INSUR. L. REP. (CCH) 1197 (H.C. 1978).

1. *Accident*

Whether a loss has been caused by an accident or intentional conduct continues to be a fertile source of litigation. Many of the cases involve the question of causation. They continue to demonstrate that a loss may be caused by an accident, even though there are intervening factors such as hepatitis,[124] yellow atrophy of the liver,[125] heart attack[126] or exposure.[127] These cases illustrate the inevitable difficulties of applying long-standing principles.[128]

However, a second group of cases[129] illustrates how recent Supreme Court of Canada decisions have had an unsettling effect on the law. This group of cases is concerned with intentional conduct with undesired consequences. In these circumstances, at least three views for determining if a loss is the result of an accident or intentional conduct have vied for acceptance by the Canadian courts. The first view, which was supported by Welford, is that "[a]n injury which is the natural and direct consequence of an act deliberately done by the assured is not caused by an accident".[130] In this view, the issue is one of causation. While this view was supported by some earlier Canadian case law, it had fallen into disfavour before its apparent acceptance in *Sirois v. Saindon*.[131] The second view is expressed by Couch in the following terms: "Where the harm which befalls the insured is a reasonable and probable consequence of his volitional act, the harm, by definition, cannot be deemed accidental."[132] This view, which introduces the negligence test of reasonable foresight, has been widely rejected by Canadian courts, especially in the context of liability insurance. Canadian courts have

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[124] Lund v. Great-West Life Assurance Co., [1976-78] INSUR. L. REP. (CCH) 939, 81 D.L.R. (3d) 487 (Sask. C.A. 1977).

[125] Sillich v. Co-operative Fire & Cas. Co., [1976-78] INSUR. L. REP. (CCH) 636, 76 D.L.R. (3d) 762 (B.C.S.C. 1977).

[126] Robbins v. Travelers Ins. Co., 19 O.R. (2d) 279, 84 D.L.R. (3d) 727 (H.C. 1978).

[127] Bowering v. Mutual Life Assurance Co. of Canada, 7 Nfld. & P.E.I.R. 117, [1976-78] INSUR. L. REP. (CCH) 30 (Nfld. C.A. 1976).

[128] Some cases simply turn on the evidence and who has the burden of proof. *See, e.g.*, Robicheau v. Imperial Life Assurance Co. of Canada, 27 N.S.R. (2d) 643, [1979] INSUR. L. REP. (CCH) 4153 (para. 1-1130) (S.C.), and the suicide cases which are too numerous to mention.

[129] In addition to the cases mentioned in the following notes, *see* Oakes v. Sun Life Assurance Co. of Canada, [1979] INSUR. L. REP. (CCH) 3887 (para. 1-1072) (B.C.S.C.); Les Entreprises Cotenor Ltée. v. Travelers du Canada, [1976-78] INSUR. L. REP. (CCH) 657 (Que. C.S. 1977); C.N.A. Assurance Co. v. MacIsaac, [1979] INSUR. L. REP. (CCH) 4163 (para. 1-1134) (N.S.C.A.).

[130] A. WELFORD, THE LAW RELATING TO ACCIDENT INSURANCE INCLUDING INSURANCE AGAINST PERSONAL ACCIDENT, ACCIDENT TO PROPERTY AND LIABILITY FOR ACCIDENT 273 (2d ed. 1932).

[131] [1976] 1 S.C.R. 735, [1971-75] INSUR. L. REP. (CCH) 862, 56 D.L.R. 556 (1975). *See* Baer, *supra* note 2, at 224.

[132] G. COUCH, 10 CYCLOPEDIA OF INSURANCE LAW 43 (2d ed. R. Anderson 1962).

recognized that this test would deprive liability insurance of much of its efficacy. The third view is that a loss is not caused by an accident where there has been a deliberate or reckless courting of the risk. The arresting image of Candler balancing on the coping of a thirteenth floor balcony is the most often cited example of this.[133] The first two views were discussed in the recent Quebec Court of Appeal case of *L'Industrielle, Cie. d'Assurance sur la Vie v. Dupuis*.[134] The third view was applied in the recent Ontario High Court case of *Weldland Crane Rentals Ltd. v. Casualty Co. of Canada*.[135]

This problem has been examined once again by the Supreme Court of Canada in *Mutual of Omaha Insurance Co. v. Stats*.[136] The case involved the claim of a named beneficiary to the proceeds of an accident insurance policy. The insured and her companion were killed on a Sunday afternoon in June when they drove easterly on Craighurst Avenue in Toronto at fifty miles per hour, failed to stop at Yonge Street, and hammered into a brick building. An autopsy revealed that the deceased insured was grossly impaired from alcohol at the time.

The defences considered by the trial court[137] and the Ontario Court of Appeal[138] were twofold: first, that the death of the insured was not within the coverage of the insurance policy, *i.e.*, that her death did not result from "accidental bodily injuries"; and, secondly, that even if it were, it occurred while the insured was committing a crime and hence public policy prevented the beneficiary from recovering on the policy. The second defence was considered and rejected in an exhaustive judgment by Mr. Justice Blair in the Court of Appeal,[139] and was abandoned in the Supreme Court of Canada. Two-thirds of the majority judgment of the Supreme Court of Canada, which was written by Mr. Justice Spence, involves a discussion of the circumstances before the insured's death. In order to explain why the insured gave no appearance of impairment to any of the witnesses, His Lordship whimsically concluded:

> The impairment which, of course, must have existed, had not been plain to either the other witnesses or the late Mrs. Brown herself and the slight impact between her automobile and Mr. Green's automobile must have caused that impairment to surge up so that in the very few moments between the impact and the time of her death all the impairment which had previously existed became active and in truth seemed to deprive the late Mrs. Brown of any intelligence or judgment whatsoever.[140]

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[133] Candler v. London & Lancashire Guarantee & Accident Co. of Canada, [1963] 2 O.R. 547, [1961-65] INSUR. L. REP. (CCH) 537 (H.C.).

[134] [1976-78] INSUR. L. REP. (CCH) 1268 (Que. C.A. 1978).

[135] [1976-78] INSUR. L. REP. (CCH) 1252 (Ont. H.C. 1978).

[136] [1978] 2 S.C.R. 1153, 87 D.L.R. (3d) 169.

[137] 6 O.R. (2d) 734, 54 D.L.R. (3d) 29 (H.C. 1975).

[138] 14 O.R. (2d) 233, 73 D.L.R. (3d) 324 (C.A. 1976).

[139] This aspect of the case is discussed under the heading Public Policy, p. 640 *infra*.

[140] *Supra* note 136, at 1162, 87 D.L.R. (3d) at 181.

Whatever the scientific basis for His Lordship's understanding of physiology, he did express agreement with the conclusion of Blair J.A. who found that the learned trial judge was justified in describing the deceased woman's conduct as dangerous and grossly negligent, but that was far different from finding that the insured actually and voluntarily "looked for" or "courted" the risk of the collision that killed her.

In contrast with its careful review of the facts, the Court seemed impatient with the refinements that have developed in the law. The Court stated that "[t]he word 'accident' found in an insurance policy is to be given its ordinary and popular meaning. There is no technical definition of 'accident' to be applied."[141] The Court went on to summarize the authority in the following way:

> A variety of dictionary definitions have been attempted and text writers have used very astute and logical analyses of what would constitute an accident, but remembering that it is an ordinary word to be interpreted in the ordinary language of the people, I ask myself what word would any one of the witnesses of this occurrence use in describing the occurrence. Inevitably, they would have used the word "accident".[142]

This does not mean that the majority judgment is limited to such a folksy enquiry. First, the Court expressly rejected the submission that there was a distinction between a pure accident policy and an indemnity policy. Counsel had submitted that there was a distinction between the two kinds of policies. With an indemnity policy, there could be no liability against which the insured required indemnification unless there was negligence involved. Liability was based on negligence or deliberate action. On the other hand, an accident within an accident policy could and, he submitted, should, occur without negligence. The Court held that the word accident must be, apart from specific definitions and specific policies, similarly interpreted in both kinds of policies. Secondly, the Court quoted with approval the definition of accident given by Pigeon J. in *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.*[143] and by Lord McNaughton in *Fenton v. Thorley & Co.*[144] The Court concluded, "These two definitions would bring within the term 'accident' those which result from the negligence of the actor whose acts are being considered even if that negligence were gross."[145] Thirdly, the Court distinguished, rather than overruled, the *Candler* case[146] and found a distinction between gross negligence and conduct by a person who realized the danger of his actions and deliberately assumed the risk. Whether this distinction is really implied in the ordinary language of the people, I cannot say. The distinction, however, seems to turn upon what

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[141] *Id.*
[142] *Id.* at 1163-64, 87 D.L.R. (3d) at 182.
[143] [1976] 1 S.C.R. 309, [1975] 5 W.W.R. 510.
[144] [1903] A.C. 443 (H.L.).
[145] *Supra* note 136, at 1164, 87 D.L.R. (3d) at 182.
[146] *Supra* note 133.

was going on in the mind of the actor and in many of these cases the actor is dead. In the absence of direct evidence, the inferences drawn by the courts almost seem to be made in a circular way. The inferences made are often surprising because the more typical the facts and probably the more statistically predictable the consequences, the more likely the court is to find an absence of a deliberately assumed risk. On the other hand, the more unusual the facts, the less likely the court is to find an accident.

I believe that the Supreme Court of Canada decision in *Stats* represents a reapplication of the third view which I have described above and which was the prevailing view before the case of *Sirois v. Saindon*.[147] In addition, the judgment clearly rejects the suggestion that third party liability and first party accident policies should be interpreted differently. Unfortunately, unless the Alberta case of *Devlin v. Co-operative Fire & Casualty Co.*[148] is an aberration, both points may be lost on subsequent courts. In attempting to distinguish the case of *Sirois v. Saindon*, the Alberta court invoked the language of causation: "With regard to the *Saindon* case, the very act which caused the damage was the assault — the raising of the lawn-mower — an unnatural use of it. That was intended. The very act which caused the injury in the case at Bar was the collision — that was not intended."[149]

Of course, in the case at bar, the act of driving while intoxicated was a deliberate act. The court's distinction raises the question of how far back in the chain of events the court should go to find a deliberate act. In addition, the court observes that what is an accident within the meaning of an accident policy is not entirely relevant to the question of what is intentional conduct. Nevertheless, the court does seem to ignore its own *dictum* and attempts to reconcile *Stats*, *Saindon* and *Candler* on other grounds.

2. *Public Policy*

Some of the cases concerned with the meaning of accident and intentional conduct have also been concerned with the public policy which prevents an insured from benefiting from his crime. At common law, two complementary doctrines prevented an insured from collecting for a loss caused by his criminal conduct. First, there was, and still is, a rule of construction that, in the absence of express terms in the policy, the insurance contract will be interpreted to exclude coverage for such loss. Secondly, there was an absolute rule of law, said to be based on public policy, which prevented such coverage regardless of the parties' intention. Modern Canadian insurance acts have modified or repealed the public policy prohibition.[150] In relation to the statutory suicide provision

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[147] *Supra* note 131.

[148] 11 A.R. 271, [1976-78] INSUR. L. REP. (CCH) 1298 (C.A. 1978).

[149] *Id.* at 289, [1976-78] INSUR. L. REP. (CCH) at 1305.

[150] *See, e.g.*, R.S.O. 1970, c. 224, s. 92. There are similar provisions in the other provincial statutes. In contrast, the provincial Marine Insurance Acts provide that there

in life insurance,[151] case law has held that the repeal of the public policy prohibition does not remove the principle of construction.[152] While it is no longer contrary to public policy, if life insurance is to cover sane suicide, it must be expressly provided for in the policy. In relation to the more general statutory provision found in most provinces, the courts have tended to interpret it in the same way as they have the policy language of "accident" or "intentional" conduct.[153] Moreover, the repeal or modification of the public policy prohibition has not prevented insurers from expressly excluding coverage when the insured is engaged in criminal conduct.[154]

The exact scope of the public policy prohibition has recently been considered by two appellate decisions. While neither court mentions unruly horses, McGillivray C.J.A. notes that "public policy is an illusive and changing concept",[155] while Blair J.A. finds that "public policy must be applied with caution and restraint".[156] In the Ontario case, Mr. Justice Blair went beyond a summary of the precedents to ask, "What evil does the rule seek to prevent?" He found that "[t]he *rationale* of the rule is the denial by the Courts of a benefit accruing to a criminal from his crime . . . ", and that "[a]n alternative justification for the rule advanced in some earlier cases was that it was a restraint upon the commission of crimes."[157] Recognizing that the insured did not and could not benefit personally from the crime which caused her death, the court was bound by authority to find that this fact did not end the inquiry. It went on to inquire whether the beneficiary received the insurance money through the insured.

In spite of the court's apparent willingness to look to basic principles, the actual decision is technical and unconvincing. In distinguishing earlier authority such as *Beresford v. Royal Insurance Co.*[158] and *Deckert v. Prudential Insurance Co. of America*[159] and

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shall be an implied warranty that the venture insured is a lawful one and shall be carried out in a lawful manner. For a recent example of the breach of this implied warranty by operating a boat business contrary to the by-laws and regulations of a municipality, *see* James Yachts Ltd. v. Thames & Mersey Marine Ins. Co., *supra* note 16.

[151] R.S.O. 1970, c. 224, s. 162 and equivalent provisions in other provinces.

[152] Husak v. Imperial Life Assurance Co. of Canada, 72 W.W.R. 257, [1966-70] INSUR. L. REP. (CCH) 858 (Sask. C.A. 1969). *See* Baer, *Annual Survey of Canadian Law: Insurance*, 4 OTTAWA L. REV. 497, at 503 (1971).

[153] *See, e.g.*, the way s. 2 of the New Brunswick Insurance Act, R.S.N.B. 1973, c. I-12, was interpreted in Sirois v. Saindon, *supra* note 131. The equivalent provision of the Alberta Insurance Act, R.S.A. 1970, c. 187, s. 135(1), was considered in Devlin v. Co-operative Fire & Cas. Co., *supra* note 148. S. 92 of the Ontario Act, R.S.O. 1970, c. 224, was ignored by the Ontario Court of Appeal in *Stats*, *supra* note 138.

[154] *See, e.g.*, Wylie v. Mutual Life Assurance Co. of Canada, 19 O.R. (2d) 723, [1976-78] INSUR. L. REP. (CCH) 1151 (H.C. 1978).

[155] Devlin v. Co-operative Fire and Cas. Co., *supra* note 148, at 294, [1976-78] INSUR. L. REP. (CCH) at 1307.

[156] Stats v. Mutual of Omaha Ins. Co., *supra* note 138, at 240, 73 D.L.R. (3d) at 332.

[157] *Id.* at 241, 73 D.L.R. (3d) at 333.

[158] [1938] A.C. 586 (H.L.).

[159] [1943] O.R. 448, 10 INSUR. L. REP. (CCH) 211 (C.A.)

finding that in this case the beneficiary had an independent right of action, the court attaches too much importance to procedure and the various vehicles for estate administration. If the courts really believe that the possibility of leaving large sums to friends or next-of-kin encourages drunk driving (or even insulates the insured from the full effect of factors which would discourage drunk driving), one would have expected them to find that the more directly the money is left, the more obvious the social danger. Instead, social concern is apparently only aroused when the benefit passes through the hands of the insured according to legal metaphysics. I, for one, find it hard to believe that there is a greater temptation to commit suicidal "drunk" driving amongst those who have left their property (including insurance proceeds) by will, than amongst those who have named beneficiaries in their insurance policies. Needless to say, no evidence to suggest such different likelihoods of criminal conduct was before the court.

In drawing the distinction that it did, the court found it necessary to consider the effect of the concluding words in section 263(3) of The Insurance Act,[160] the section on which the court relied to give the beneficiary an independent right of action. The concluding words of this subsection provide that in a suit by a beneficiary under an accident policy, "the insurer may set up any defence that it could have set up against the insured or his personal representative". After reviewing the legislative history of this provision, the court held that it was intended to *preserve* defences and not to *extend* the scope of defences

> which have no connection with the policy conditions and to which the beneficiary would not be subject even if she were bound by the policy conditions. The rule of public policy is applied by the Courts quite apart from the requirements laid down as conditions in the insurance contract and the two should not be confused.[161]

At first sight, this hair-splitting appears to be too clever to be convincing. It does not explain why the beneficiary should be prejudiced by minor misconduct of the insured, such as failure to give notice of an accident, and yet be insulated from the insured's gross misconduct.

I think, however, that the distinction can be supported by using established notions. The legislature will allow the insurer and the insured to bargain for terms which will bind third party beneficiaries. While it may seem harsh or unreasonable to allow the insured's conduct to prejudice the beneficiary, the law has allowed this matter to be determined by the insurer. However, in applying a rule that is not a contractual term but is a creation of their own, the courts will not apply it where there is no need to do so. Nevertheless, I remain troubled by the question of what essential difference it would make if the substance of the public policy argument was added, as it sometimes is, to the boilerplate in the policy.

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[160] R.S.O. 1970, c. 224.

[161] *Supra* note 138, at 245, 73 D.L.R. (3d) at 337.

Similar reasoning was used by the Alberta court in *Devlin v. Co-operative Fire & Casualty Co.*[162] to allow a direct recourse action by a gratuitous passenger, even though the statute provides that the insurer may "avail itself of any defence that it is entitled to set up against the insured . . . ".[163] The court noted that public policy was not a matter of defence, but simply a matter of the court's refusing to permit recovery for reasons of public policy, and referred to Mr. Justice Blair's reasoning in *Stats* with approval. Once again, the court's explanation of why the third party should not be caught by the public policy argument, in a sense, proves too much. It amounts to an argument that the passenger should never be prejudiced by the insured's conduct.[164]

3. *Carrying Passengers for Compensation or Hire*

In the last survey,[165] I suggested that courts often fail to inquire as to what is the actuarial basis for this exclusion in the standard automobile insurance policy. I suggested that what conduct is material to the risk is tied to the interpretation of "gratuitous passengers" in the provincial highway traffic legislation. In theory, if an insured is only liable to gratuitous passengers for gross negligence or wilful and wanton misconduct, his potential liability and underwriting risk should be less than for an insured carrying passengers for compensation or hire. This connection has been rejected by the Supreme Court of Canada in *Co-operative Insurance Services Ltd. v. McKarney*.[166] The Court held that a finding that a passenger was not "a guest without payment" within the meaning of the Highway Traffic Act was of no assistance in determining the status of the passenger under the Insurance Act or the policy. The result was to award the passenger judgment against the insured without proving gross negligence, and to allow the passenger to enforce this judgment against the insurer without being caught by the exclusion in the policy of "carrying passengers for compensation or hire". No one will really deplore the result of the case, given the widespread criticisms[167] of these limitations which are said to be necessary to protect insurers from collusive law suits. However, I hope that if in a tort action a passenger is found to be "a guest without payment", and is able to prove gross negligence, no court would ignore that finding and determine the passenger was carried for compensation or hire, and hence had no direct recourse against the insurer.

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[162] *Supra* note 148.

[163] R.S.A. 1970, c. 187, s. 306(10)(*b*).

[164] In contrast, *see* Clarkson Co. v. Canadian Indem. Co., 25 O.R. (2d) 281, [1979] INSUR. L. REP. (CCH) 4107 (para. 1-1119) (H.C.), where the insured corporation was held to be inextricably involved in the illegal acts of its three controlling shareholders.

[165] Baer, *supra* note 2, at 228.

[166] [1978] 2 S.C.R. 1333, [1976-78] INSUR. L. REP. (CCH) 1109.

[167] *See, e.g.*, ALBERTA INSTITUTE OF LAW RESEARCH AND REFORM, GUEST STATUTE LEGISLATION, REPORT NO. 32 (1979).

G. *Devices for Controlling Insurers' Defences*

1. *Materiality*

There are increasing indications that, contrary to widely held belief, underwriting is a very inexact science.[168] This is especially so in many new fields of liability insurance. Not only are insurers influenced by marketing factors, but the dearth of claims experience makes predicting future losses a largely intuitive process. Moreover, there are now allegations that underwriting decisions are made for emotional[169] and even political reasons.[170]

So far there are no indications that these factors have been either pressed upon or accepted by Canadian courts. Yet, to the extent that they are true, they seriously undermine the already weak foundations of some extremely harsh legal doctrines and make the way these doctrines are usually applied seem unduly solicitous of the industry.

The importance of accurate information for sound underwriting is reflected in the doctrine of *uberrimae fidei* which acts, practically speaking, unilaterally on the insured, requiring from him full disclosure and no misrepresentation of material facts. A recent example of how little the courts test whether those facts which are identified as material facts are relevant and actually relied on is the Supreme Court of Canada decision of *Fidelity & Casualty Co. of New York v. General Structures Inc.*[171] This case involved the insurer's liability to respond to the claims brought against the insureds following the collapse of a prefabricated metal structure. The insureds, in their capacity as consulting engineers, had drawn up faulty plans and estimates. As a result, the structure did not withstand the weight of snow. Much of the decision is concerned with whether the trial judge or the Quebec Court of Appeal better understood the evidence — an all too frequent diversion for our ultimate Court.[172] In

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[168] *See, e.g.*, ONTARIO SELECT COMMITTEE ON COMPANY LAW, THIRD REPORT ON GENERAL INSURANCE, *supra* note 4.

[169] For an account of some of the racial overtones to insurance underwriting decisions in the United States, *see* K. ORREN, CORPORATE POWER AND SOCIAL CHANGE (1974). Such cases as Horne v. Poland, [1922] 2 K.B. 364, illustrate that underwriting based on racial and xenophobic reasons has been tolerated in England for some time.

[170] There are allegations that products liability insurance is over-priced as part of a campaign for "tort reform" which would limit tort recoveries. The "crisis" in the area of tort liability insurance, which has been described by Leslie Cheek, Vice President of the American Insurance Association, as "the psychology of entitlement gone wild", has been widely investigated by governmental bodies in the United States. The U.S. DEPT. OF COMMERCE INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT (1977), concluded that the product liability insurers appear to have engaged in "panic pricing". This and other American government reports are described in Schwartz, *Federal Action on Product Liability — What Has Occurred and What May Occur*, 14 THE FORUM 287 (1978).

[171] [1977] 2 S.C.R. 1098, [1976-78] INSUR. L. REP. (CCH) 404. *See also* DeGroot v. J. T. O'Bryan & Co., [1979] INSUR. L. REP. (CCH) 4244 (para. 1-1152), at 4281 (B.C.C.A.).

[172] See my comment on other recent Supreme Court decisions in Baer, *Non-Development in Insurance Law*, 1 SUPREME COURT L. REV. 347 (1980).

spite of this, the relevance of the misrepresented material facts remains somewhat obscure.[173] The case does re-affirm some previous tendencies in the Supreme Court. These include: first, the Court's deferential treatment of the insurer's evidence as to materiality;[174] secondly, the Court's failure even to require the insurer to make a case for materiality which sounds intuitively plausible, leaving the court to rely upon the witnesses' conclusions instead;[175] and thirdly, in the face of draconian consequences, the Court's apparent indifference to the plight of the insured in trying to fully appreciate what is critical to the insurer.[176]

While the courts rely on the insurer's evidence in defining materiality, they continue to give the insured the benefit of the doubt if he has been asked ambiguous questions. For example, in *Hudson v. Mutual of Omaha Insurance Co.*[177] the court held that there was no misrepresentation or failure to disclose that the insured was suffering from, or being treated for, a mental or nervous disorder. The evidence clearly established that the insured was under several doctors' care (and in fact was hospitalized for a time). However, the trial court found that since the experts could not agree as to whether the insured's condition could fairly be described as a mental or nervous disorder, there was no reason why the insured should have so characterized his condition. This was upheld on appeal.[178]

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[173] The misrepresentations do not relate to facts which, self-evidently, make the insureds less professionally competent and, hence, enhance the risk. I, for one, would have required more demonstrable evidence that the misrepresented information was required and acted upon than the mere assertion of the experts.

[174] On occasion, the evidence of the insurer's employees alone does seem fairly convincing. *See, e.g.*, James Yachts Ltd. v. Thames & Mersey Marine Ins. Co., *supra* note 16; Wynter v. Equitable Life Ins. Co. of Canada, [1976-78] INSUR. L. REP. (CCH) 149 (Ont. H.C. 1977); Smith v. Home Ins. Co., 21 N.B.R. (2d) 459, [1976-78] INSUR. L. REP. (CCH) 1344 (C.A. 1978).

[175] In contrast to the ready acceptance by the Supreme Court of the insurer's assertion of materiality in this case is the more probing enquiry by the Alberta court in Valley Forest Products Ltd. v. Reed Shaw Osler Ltd., [1976-78] INSUR. L. REP. (CCH) 272 (Alta. C.A. 1976).

[176] The length to which the court will go in accepting the unilateral assertion of materiality by the individual insurer is illustrated by Gore Mutual Ins. Co. v. Barton, Black & Robertson Ltd., [1979] INSUR. L. REP. (CCH) 4319 (para. 1-1158) (B.C.S.C.). An agent was held liable for failure to report that the insured mobile home had been moved to a new location in a commercial area. This was held to be a change material to the risk even though the insurer's evidence disclosed that the insurer had no "hard and fast rule" and no instructions had ever been issued to the agents that mobile homes in a commercial area were unacceptable. Moreover, the fact that the mobile home was insured at its new location by another insurer was not enough to rebut the insurer's evidence of materiality based on the insurer's own practice. The agent was not even able to rely on a similar case which had held that such a change would not be regarded as material by a reasonable insurer.

If the training and continuous contact with their principals is not enough to acquaint agents with the full scope of what is material, imagine the plight of the uninformed public!

[177] [1976-78] INSUR. L. REP. (CCH) 534, 74 D.L.R. (3d) 321 (B.C.C.A. 1977), *aff'g* [1975] W.W.D. 8, 51 D.L.R. (3d) 115 (B.C.S.C. 1974).

[178] *See also* Markey v. Co-operative Fire & Cas. Co., 15 N.B.R. (2d) 541, [1976-78] INSUR. L. REP. (CCH) 552 (Q.B. 1976), where the insured was held not to

Courts and legal counsel are so accustomed to regarding insurance policies as private contracts that they often overlook the important role of the provincial superintendents of insurance. For example, the standard automobile policy has been approved by the respective provincial superintendents. Moreover, underwriting decisions have become the subject of political debate in some provinces, and rating decisions have been "prescribed" by the government. In view of this public control, insurers do not have a free hand in determining what is material. Yet some courts have required evidence to demonstrate the materiality of the questions in the application form which have been approved by the provincial superintendents.[179] The important issue in these cases should be not whether the information is material, but whether the insurers have made sufficient effort to solicit the information from the insured and to emphasize its importance. This is particularly true when the contract is renewed.[180]

There is no general requirement[181] in Canadian law that insurance warranties be material, or limited in application to instances where they are material. From time to time this leads to some eccentric defences which courts can only overcome by a strained interpretation of the policy, or by a generous use of *contra proferentem*. See, for example, *Miller v. Gibraltar General Insurance Co.*[182] where the question arose as to whether keeping bees in the garage of a city home was an "unusual hobby", and accordingly within the policy's exclusion to the fire coverage.

In addition, the Canadian concept of materiality does not contain a requirement that the concealment or misrepresentation contribute to the loss. Nor in the case of a breach of warranty, where materiality is not a requirement, does the breach have to contribute to the loss. In other words, there need be no causal relationship between the insured's "improper" conduct and the loss. While sophisticated arguments can be made that this result produces a more equitable rate structure,[183] many courts, and at least some foreign legislatures, have avoided the extreme forfeiture which results from the seemingly unconnected conduct of the insured. The typical Canadian device is to interpret the policy as defining

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have sustained a "previous loss or claim" when an uninsured building had been destroyed by fire.

[179] Swinimer v. Corkum, 28 N.S.R. (2d) 484, [1979] INSUR. L. REP. (CCH) 241 (para. 1-1151) (S.C.).

[180] In contrast to *Swinimer*, *id.*, the court in Horsnett v. Western Union Ins. Co., [1979] INSUR. L. REP. (CCH) 3943 (para. 1-1084) (Alta. Dist. C.), held that there was no obligation on the insured to disclose that his driver's licence was suspended if he was not asked when the contract was renewed.

[181] In most provinces, there is such a requirement but it applies only to certain kinds of insurance. *See* R.S.O. 1970, c. 224, s. 98(5). The American law does have such a general requirement. *See* R. KEETON, INSURANCE LAW 381 (1971).

[182] 25 O.R. (2d) 182, [1979] INSUR. L. REP. (CCH) 4171 (para. 1-1136) (Cty. Ct.).

[183] R. KEETON, *supra* note 181, at 382.

the risk rather than as establishing a warranty. In addition, some courts have been able, through resourceful interpretation and the innovative use of the doctrine of *contra proferentem*, to find that a causal connection is required by the policy. See, for example, *Astro Tire & Rubber Co. of Canada v. Western Assurance Co.* where the Ontario Court of Appeal had to determine whether death was "caused directly or indirectly, wholly or in part . . . while the Person Insured is under the influence of intoxicants . . . ".[184] However, where these devices do not help, the insured continues to be harshly treated. Recent examples include the Supreme Court of Canada decision of *L'Industrielle, Cie. d'Assurance sur la Vie v. Bolduc*[185] where the insurer's exclusion operated capriciously, turning the double indemnity death benefit into a game of chance, and the British Columbia Court of Appeal decision in *DeGroot v. J.T. O'Bryan & Co.*[186] where the failure to have a proper survey of the ship was in no way related to the loss of the ship when it became grounded on an uncharted reef.

However laudable the result, a decision based on unpredictable canons of construction is less than satisfactory because it avoids the critical issue. No matter how clearly the policy is worded, a causal link between the breached condition and the loss should be a mandatory requirement of insurance contracts. If some pretext is needed to allow the courts to engage in such an outspoken innovation, I suggest it should be found in the long-standing legal policy against using insurance contracts to gamble. To my mind, any irrational limit on the insured's right to recover, no matter how clearly expressed, which operates in a random way to reduce the insurer's liability, turns the contract into a form of gaming. The time is past when irrelevant defences by the insurer can be excused on the grounds that they are a device to control the juridical hazard (*i.e.*, the risk that a tribunal will not give effect to the insurer's proper defences due to ignorance, mistake or prejudice) or to compensate for the insurer's difficulty in proving certain kinds of wrongdoing by the insured.

2. *Severability*

American text writers[187] have carefully distinguished and catalogued various devices which the American courts use to ameliorate the harshness of the common law forfeiture rules. One such device,

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[184] 24 O.R. (2d) 268, at 272, [1979] INSUR. L. REP. (CCH) 4003, at 4005 (para. 1-1098) (C.A.), where Mr. Justice Blair cites s. 1(c) of the Act. Mr. Justice Blair equates the doctrine of *contra proferentem* with the requirement that exclusionary clauses be strictly construed.

[185] *Supra* note 115 discussed in Baer, *supra* note 172, at 352.

[186] *Supra* note 171.

[187] E. PATTERSON, ESSENTIALS OF INSURANCE LAW 310 (2d ed. R. Blanchard 1957); R. KEETON, *supra* note 181, at 341.

which modern Canadian courts[188] have seldom used or identified by name, is the concept of the severability or divisibility of insurance contracts. The concept is similar to that found in other branches of Anglo-Canadian law, such as the rules governing instalment sales contracts. The basic idea is that the policy may be the written evidence of two or more distinct contracts. A breach of one of these contracts by the insured does not affect his rights under the other contracts.[189] American authority is divided as to the proper test to determine when an insurance policy is severable. According to Patterson,[190] the more recent authorities adopt the test of whether or not the breach of condition increases the risk as to any particular item insured. If the breach affects the risk on all items insured, the contract is whole; but if it only affects the risk on some items, the policy is divisible.

This concept of severability has been considered and rejected by a recent British Columbia case, but applied without identifying it by name in a recent Ontario case.[191] In *Kelowna Realty Ltd. v. Canadian Indemnity Co.*[192] the insured mortgagor submitted a fraudulent proof of loss covering the contents of the insured premises. The mortgagee argued that this should not affect its claim for the loss of the building. The court relied on such cases as *Sokolowsky v. Fire Association of Philadelphia*[193] to hold that in relation to the mortgagor's claim there could be no severance of the risk insured. In addition, the court held that in the absence of a mortgage clause, the mortgagee could be in no better position than the mortgagor. While individually each step of the court's reasoning may be supported by authority, each has questionable justification in itself. The cumulative result is very surprising in its solicitude for the insurer. The three steps in the court's reasoning were, first, that a breach after loss which does not increase the physical risk should result in the penalty of a complete forfeiture of the insured's

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[188] *But see* F. LAVERTY, THE INSURANCE LAW OF CANADA 74 (2d ed. 1936), which cites several nineteenth century cases which recognize the doctrine as part of Canadian law. The concept is embodied in Statutory Condition 1 of the Fire Part.

[189] The doctrine is just a variation of the widely accepted notion that in some cases a policy with loss payable to a mortgagee "as his interest may appear", may embody two distinct contracts: one between insurer and mortgagor and the second between insurer and mortgagee.

[190] E. PATTERSON, *supra* note 187, at 342.

[191] Kelowna Realty Ltd. v. Canadian Indem. Co., [1978] 4 W.W.R. 276, [1976-78] INSUR. L. REP. (CCH) 1173 (B.C.S.C.); Rankin v. North Waterloo Farmers Mut. Ins. Co., 25 O.R. (2d) 102, [1979] INSUR. L. REP. (CCH) 4155 (para. 1-1131) (C.A.), *rev'g* 19 O.R. (2d) 517, [1976-78] INSUR. L. REP. (CCH) 1093, 85 D.L.R. (3d) 586 (H.C. 1978).

[192] *Supra* note 191. *See also* Swan Hills Emporium & Lumber Co. v. Royal Gen. Ins. Co. of Canada, 2 A.R. 63, 2 Alta. L.R. (2d) 1, [1976-78] INSUR. L. REP. (CCH) 485 (C.A. 1977), where the fraudulent claim by the individual insured vitiated the claim of a company controlled by him.

[193] [1938] 3 W.W.R. 148, 53 B.C.R. 195, 5 INSUR. L. REP. (CCH) 332 (S.C.). This case was also relied on in the case of Swan Hills Emporium & Lumber Co. v. Royal Gen. Ins. Co. of Canada, *supra* note 192.

claim: secondly, that the evidence of increased moral hazard which the fraud demonstrates is relevant to the claim for the loss to the house — this enlarges the penalty beyond forfeiting the fraudulent claim; and thirdly, that the evidence of the mortgagor's moral risk should affect the claim of the mortgagee (keeping in mind that the relationship between the evidence of increased moral risk and the likelihood of fire is highly speculative). Moreover, in equating the position of the mortgagee to that of the mortgagor, the learned Justice turns what was at best a presumption in construing insurance policies into a general principle of insurance law so well known that the citation of authority was unnecessary.[194]

The court's mechanical approach should be compared with the more careful analysis of the Ontario Court of Appeal in *Rankin v. North Waterloo Farmers Mutual Insurance Co.*[195] The Ontario court correctly identifies the issue as one of construing the policy to determine whether the insurance was effected to cover separate interests or whether the proceeds of the policy were merely made payable to another. The court held that the named insured's claim was not lost even though the fire was deliberately started by his son, who came within the extended definition of the word "insured" in the policy.[196]

Also in stark contrast to the British Columbia decision is *McCann v. Western Farmers Mutual Insurance Co.*[197] where the Ontario court allowed partial recovery against an insurer under a policy which excluded coverage on any structures used for commercial purposes. Part of the insured building was used as a residence, and part for commercial purposes. Using the American test for severability, this insured's claim seems less meritorious than the mortgagee's in *Kelowna Realty*. Using any part of the building for commercial purposes probably increases the physical hazard on all parts of the building. However, the court made no reference to the American experience and did not identify the issue by name as one of the severability or divisibility of an insurance contract. Instead the court relied upon the Supreme Court of Canada case of *Ross v. Scottish Union & National Insurance Co.*[198] where partial recovery was allowed in an analogous situation.

3. *Unjust or Unreasonable Terms*

Canadian courts have not been as inventive and vigorous in applying common law devices to control insurer's defences as American courts,

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[194] *Supra* note 191, at 281, [1976-78] INSUR. L. REP. (CCH) at 1176. I have discussed some of the relevant authority in previous surveys. *See* Baer, *Annual Survey of Canadian Law: Insurance*, 4 OTTAWA L. REV. 497, at 522 (1971), 6 OTTAWA L. REV. 193, at 227 (1973).

[195] *Supra* note 191.

[196] I submit that where there is a mortgage the parties' intention to insulate one insured from the wrongdoing of the other should be even more obvious than in this case.

[197] 20 O.R. (2d) 210, [1976-78] INSUR. L. REP. (CCH) 1227, 87 D.L.R. (3d) 135 (H.C. 1978).

[198] 58 S.C.R. 168, 46 D.L.R. 1 (1918).

nor have they made extensive use of the statutory devices. For example, the Uniform Fire Part of the provincial Insurance Acts allows the courts to find that an exclusion, stipulation, condition or warranty is not binding upon the insured if it is unjust or unreasonable.[199] This section is seldom invoked by insurance counsel, perhaps because they anticipate it will be seen as an act of desperation by courts who are uneasy exercising such open-ended discretion. It was invoked unsuccessfully at the trial level in *Rankin v. North Waterloo Farmers Mutual Insurance Co.*[200] However, in *Hirst v. Commercial Union Assurance Co. of Canada*[201] the British Columbia Supreme Court found that the application of a standard thirty day vacancy clause would be unjust and unreasonable where there was no causal connection between flooding caused by a leaking toilet tank and the fact that the house was unoccupied at the time.

At least one Ontario County Court Judge has been able to come to the aid of the insured without relying expressly on the statute, but acting in a similar spirit.[202] He used the doctrine of *contra proferentem* because a literal reading of the exclusion would lead to an "absurdity". Of course, the callous niggardliness of the defendant insurers would shock even the most jaded insurance counsel.

4. *Relief from Forfeiture*

The consequences of the insured's failure to meet his contractual obligations are more serious than for any other contract breaker. Almost any breach results in the forfeiture of his claim under the policy. Moreover, the common law, in its desire to protect the actuarial soundness of insurance underwriting, has consistently resisted any suggestion that the insurer should be able to complain only if, and to the extent that, the insured's breach has prejudiced it. Nor has the general statutorily granted power of the court to relieve against forfeiture been used to aid the harshly treated insured. Requests for such help have been refused with some classic pronouncements concerning the sanctity of contracts. The more specific power to relieve against forfeiture found in the Insurance Act has been used sparingly. Yet requests for such relief seem to be on the increase. In the period under review, insureds have had occasional success,[203] but there have been some striking failures.

The failures which have been the least satisfactorily explained are those in which the insured has requested relief, having failed to

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[199] *E.g.*, R.S.O. 1979, c. 224, s. 125.

[200] *Supra* note 191.

[201] 8 B.C.L.R. 396, [1979] INSUR. L. REP. (CCH) 3885 (para. 1-1071) (S.C.).

[202] Shirk v. Pitts Life Ins. Co., [1979] INSUR. L. REP. (CCH) 4336 (para. 1-1162) (Ont. Cty. Ct.).

[203] Bernardi v. Guardian Royal Exch. Assurance Co., [1976-78] INSUR. L. REP. (CCH) 1002 (Ont. H.C. 1978); Moxness v. Saskatchewan Gov't Ins. Office, [1977] 3 W.W.R. 393, [1976-78] INSUR. L. REP. (CCH) 663 (Sask. Dist. C. 1977); Jensen v. Grenville Patron Mut. Fire Ins. Co., [1976-78] INSUR. L. REP. (CCH) 1261 (Ont. H.C.

commence an action on the insurance contract within the time period prescribed by the legislation. In the past three decades, a number of courts, mostly of first instance, have refused to assist such insureds.[204] Most often they purport to rely on the exact wording of the relief provisions in the insurance legislation, but seemingly read into the provisions a fundamental principle that the prescription period does not relate to the insurer's contractual obligations but only to the insured's right to enforce them. In other words, a limitation period does not bar any right, it only bars a remedy. While the distinction has often been observed by trial judges, few have attempted to explain why the legislature has only given them the power to relieve against a barred right and not a barred remedy. While this may not be an appropriate consideration, I do not think the distinction would pass the litmus test of being explainable to a lay person, including legislators with no legal training. As the cases illustrate, it is not based on the fact of more obvious and unavoidable prejudice to the insurer in the situation where the insured misses a limitation period. Often protracted negotiations have been going on between insurer and insured and occasionally the insured's lateness is only a matter of days.[205]

Unfortunately, two appellate courts[206] have recently treated the matter as either self-evident or too clearly established by lower courts to require explanation. What a pity that appellate courts should give their reasons for judgment in such conclusory terms as, "While none of the cases cited are binding on this court, their persuasive value is very great and I accept the conclusions reached."[207] This is especially so where the county court in this case had so succinctly identified the artificial nature of the distinction:

> It would seem to me, with due respect, that to distinguish between a remedy and right in this context is unreasonable. If one is barred from his remedy, he is thereby totally deprived of his right to compensation. He has no alternative remedy. Consequently, the insurer avoids its contractual obligation to compensate the insured.[208]

1978). *See also* Plaza Shoes Ltd. v. Prudential Assurance Co., [1976-78] INSUR. L. REP. (CCH) 170 (B.C.S.C. 1976), where the Justice did not give relief because it was not asked for, even though the insurer's conduct was "not the sort one would expect of a reputable company". *Id.* at 172.

[204] *See* CASES ON THE CANADIAN LAW OF INSURANCE 574 (2d ed. M. Baer, J. Rendall & H. Snow 1978). The recent cases include Webb Real Estate Ltd v. Canadian Sur. Co., 20 N.S.R. (2d) 616, [1976-78] INSUR. L. REP. (CCH) 175, 60 D.L.R. (3d) 738 (S.C. 1975); Roe v. Insurance Corp. of B.C., [1979] INSUR. L. REP. (CCH) 4042 (para. 1-1110) (B.C.S.C.); and the cases cited at note 206 *infra*

[205] *See, e.g.*, Chiasson v. Century Ins. Co. of Canada, *supra* note 17

[206] Chiasson v. Century Ins. Co. of Canada, *id.*, and National Juice Co. v. Dominion Ins. Co., 18 O.R. (2d) 10, [1976-78] INSUR. L. REP. (CCH) 890, 81 D.L.R. (3d) 606 (C.A. 1978).

[207] National Juice Co. v. Dominion Ins. Co., *supra* note 206, at 11, [1976-78] INSUR. L. REP. (CCH) at 892, 81 D.L.R. (3d) at 608.

[208] National Juice Co. v. Dominion Ins. Co., 13 O.R. (2d) 50, at 52, 70 D.L.R. (3d) 677, at 679 (Cty. Ct. 1976), *rev'd supra* note 206.

The distinction seems even more artificial in view of those recent cases[209] where the courts have relieved against the forfeiture that would result from the late filing of proof of loss. In both cases, the timeliness of notice or suit is designed to allow insurers to investigate and preserve evidence. The potential prejudice to insurers from tardiness is similar in both cases. And in both cases there may be many instances where no actual prejudice is suffered by the insurer from the insured's late action.[210]

Given the courts' reluctance to come to the aid of insureds who have inadvertantly forfeited their rights, it is not surprising that they have held themselves powerless to relieve against the consequences of a wilfully false statement or deliberate conduct.[211]

In two recent cases[212] the insureds had no greater success in arguing waiver or estoppel based on the insurer's participation in negotiation and offers of settlement. The courts' lack of sympathy for the insured is all the more striking because in neither case did the insurer deny liability completely. Instead, the insurers had withheld payment because of disagreements as to value and shortcomings in the proofs of loss. In fact, in the *Webb* case, communication between the insured's solicitor and the insurer's adjuster continued until the end of the limitation period. In these circumstances the courts must contemplate that the writs will or should be in preparation even while discussions with the insurer are going on, and before the insured is fully aware that there is an unresolvable dispute or even any substantive dispute at all.

Finally, although it is hard to imagine why this should be in doubt, the Ontario Court of Appeal has affirmed that the courts' power to relieve against forfeiture under section 103 of The Insurance Act is not confined to breaches of the statutory conditions, but extends to forfeitures created by breach of other contractual terms.[213]

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[209] Bernardi v. Guardian Royal Exch. Assurance Co., *supra* note 203. *See also* Jensen v. Grenville Patron Mut. Fire Ins. Co., *supra* note 203, where relief was granted when forfeiture resulted from the insured's submission of an incomplete proof of loss.

[210] Of course in some cases it would not be appropriate to relieve against a limitation period because actual prejudice to the insurer can be shown. *See* Beardy v. Manitoba Pub. Ins. Corp., [1979] 1 W.W.R. 390, [1979] INSUR. L. REP. (CCH) 4183 (para. 1-1138) (Man. C.A. 1978).

[211] *See* Swan Hills Emporium & Lumber Co. v. Royal Gen. Ins. Co. of Canada, *supra* note 192. *See also* Magnussen v. Insurance Corp. of B.C., 6 B.C.L.R. 193, [1976-78] INSUR. L. REP. (CCH) 1204, 88 D.L.R. (3d) 474 (Cty. Ct. 1978), where the court found it had no power to relieve against the forfeiture which resulted from the owner of an automobile falsely stating to the police that his friend was driving his car at the time of the accident — even though the statement was not material to the insurer's liability under the contract. Often the court is more concerned with the conduct of the insured than possible prejudice to the insurer. *See, e.g.*, MacDonald & Eedy Realty Ltd. v. St. Paul Fire & Marine Ins. Co., [1976-78] INSUR. L. REP. (CCH) 9 (B.C.S.C. 1975).

[212] Webb Real Estate Ltd. v. Canadian Sur. Co., *supra* note 204; Chiasson v. Century Ins. Co. of Canada, *supra* note 7.

[213] R.S.O. 1970, c. 224. *See* Minto Constr. Ltd. v. Gerling Global Gen. Ins. Co., 19 O.R. (2d) 617, [1976-78] INSUR. L. REP. (CCH) 1084, 86 D.L.R. (3d) 147 (C.A. 1978).

H. *Valuation*

1. *Factors Relevant to Actual Cash Value*

Two vexed questions involved in valuing the insured's loss have been the subject of recent litigation. The first question is to what extent factors unique to the insured should be taken into account in valuing the loss. In *Ziola v. Co-operative Fire & Casualty Co.*[214] the insured had built a new farm house close to an old one. At the time the old house was destroyed by fire, the insured's family had moved into the new house. After referring to several authorities and stating that the court should consider all evidence logically tending to show the actual cash value, the court stated:

> Ordinarily a farm dwelling is valued in conjunction with the farm land it services by providing a residence for the farmer and his family on the farm; and it is obvious from the evidence in this case that such a value in situ is greater than when it is severed and sold for removal from the farm. The actual cash value in this case is to be determined as the dwelling stood in situ on the farm at the time of its loss.[215]

The court did not agree with the argument of defendant's counsel that an amount should be subtracted from the loss for the cost of moving the house and building a new basement for it.

The court also considered the evidence of three experts, all of whom used replacement cost less depreciation, even though the court referred with apparent approval to *Schmidt v. Home Insurance* where Adamson J. stated, "Replacement value can only properly be taken as a guide to value when replacing is something that reasonable people would do."[216] The court noted:

> No reasonable person living in a new $28,000 home would, in my opinion, replace an obsolete, forty year old, partly modernized house he had just vacated and thus have a second house for which he had no use as a residence sitting on the farm for him to maintain and pay taxes and insurance premiums thereon.[217]

In spite of these comments, the court found the actual cash value to be very close to the average of the valuation of the three experts who based their opinions on replacement cost less depreciation. However, there is no indication of how the experts determined depreciation, *i.e.*, whether their opinions were based simply upon an assessment of the house's physical deterioration, or also included some element of obsolescence or extrinsic factors such as location.[218]

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[214] [1976] 6 W.W.R. 159, [1976-78] INSUR. L. REP. (CCH) 388 (Sask. Q.B.).

[215] *Id.* at 165, [1976-78] INSUR. L. REP. (CCH) at 390-91.

[216] [1933] 3 W.W.R. 285, at 286 (Man. K.B.), *aff'd* 41 Man. R. 537, [1934] 1 W.W.R. 187, [1934] 2 D.L.R. 78 (C.A.).

[217] *Supra* note 214, at 166, [1976-78] INSUR. L. REP. (CCH) at 391.

[218] In the end the judgment comes close to adopting the "educated guess" used in Zanzibar Cabaret Ltd. v. Brital Ins. Underwriters Ltd., [1979] INSUR. L. REP. (CCH) 3959 (para. 1-1089) (B.C.S.C.).

The second difficult issue which has recently been considered is to what extent future possible events should influence the actual cash value. In *Ziola* the plaintiff testified that he was considering moving the house to another farm he owned two miles away. The court held that the possibility that this move would enhance the value of the house and the other farm was not to be considered. The issue was also raised in *Cyrand Investments Ltd. v. Aetna Insurance Co.*[219] In this case the plaintiff owned two substantial old residences that had been converted into self-contained units. Anticipating a down-zoning of the property from commercial to residential, the plaintiff had applied for (but had not received) a permit to demolish both buildings. He had also applied for (but had not received) a building permit to construct an office building on the site. One of the buildings was destroyed by fire, and the second building was demolished three months later. Subsequently, an office building was erected on the site. The Court of Appeal found that the trial judge was wrong in finding that the plaintiff's intention to demolish the first building was relevant in assessing its value. The court referred to the plaintiff's submission which used the term "'intrinsic' value of the building", but did not otherwise indicate how value was determined. The result seems correct as long as the excluded future events were not bound to happen and the building had some value in its existing state.

2. *Appraisal*

It has always been a minor mystery to me why there are so many Canadian cases reported involving questions of valuation which make no reference to the statutory condition requiring disagreements as to value to be determined by appraisal.[220] The use of appraisers in insurance disputes is widespread in England and the fact that this deprives the insured of legal aid has been the subject of judicial comment.[221]

The role of the court in view of this statutory requirement has been considered in three recent cases. In *L & A Holdings Ltd. v. Prudential Assurance Co.*,[222] the plaintiff claimed against the defendant insurer for damages that occurred to his motor vehicle. The defendant argued that since the dispute involved the amount to be paid under the insurance contract, the matter should be determined by appraisal in accordance with the provisions of the Insurance Act and should not be the subject of legal proceedings. Without responding to this claim for such a broad ouster of the court's jurisdiction, the court held that the proper procedure had been followed in obtaining the appraisal and that the appraisers followed the proper principles for determining what the actual cash value should be. Thus, the court dismissed the plaintiff's action.

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[219] 8 R.P.R. 107, [1979] INSUR. L. REP. (CCH) 4148 (para. 1-1127) (Ont. C.A.).

[220] *See, e.g.*, The Insurance Act, R.S.O. 1970, c. 224, s. 122.

[221] *See* Fakes v. Taylor Woodrow Constr., [1973] 1 Q.B. 436, [1973] 1 All E.R. 670, [1973] 2 W.L.R. 161 (C.A.).

[222] 6 Alta. L.R. (2d) 125, [1976-78] INSUR. L. REP. (CCH) 1184 (Dist. C. 1978).

The Saskatchewan District Court found an even more limited role for the court in *Bashnick v. Saskatchewan Government Insurance Office*.[223] The action resulted from a dispute over the value of a stolen motor vehicle. The plaintiff alleged the car had a value of $2,325, while the statutory appraisal had resulted in a written award of $400. The court held that the award conclusively settled the dispute between the insured and the insurer, and that the court had no authority to enter into a consideration of the manner in which appraisers and the umpire came to make their award or whether it was a proper one. After referring to the specific provision in the Saskatchewan Arbitration Act giving the court the power to hear an appeal from an award and in some circumstances to remit the matter to the arbitrators for re-consideration,[224] the court noted there was no similar provision in the Automobile Accident Insurance Act. The court concluded:

> It follows that I could not set aside the award (or remit the matter in issue to the reconsideration of the appraisers or the umpire) even if the evidence during the trial were to establish that there was some manifest error leading to the award or that there was misconduct on the part of the appraisers or the umpire.[225]

However, the court left the door open for some relief to the insured by adding, "For present purposes it is unnecessary to express an opinion as to whether the plaintiff had some extraordinary remedies available to him in the event he could show some such manifest error or misconduct."[226] This seems to reduce the decision to a narrow one concerning the adequacy of the plaintiff's pleadings. In effect, the court has stated that the appraisal may be open to judicial review but this cannot be done in an action on the insurance contract.

A quite different attitude towards the application of the provincial arbitration act is found in *H.R. Runciman & Co. v. British Aviation Insurance Co.*[227] There, an application by the insurer to stay an action by the insured, pending an appraisal, was granted when it appeared that the only issue in dispute was the assessment of the value of the damaged aircraft. The court applied section 7 of the Arbitration Act,[228] which it held applied to consensual arbitration. The court interpreted section 7 to mean that it ought to stay the proceedings unless sufficient reason is given why the matter should not be referred to arbitration.

3. *Insurer's Election to Repair, Rebuild or Replace*

The consequences of the insurer electing to repair, rebuild or replace the property damaged or lost, instead of making payment, has been

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[223] [1976] 4 W.W.R. 271, [1976-78] INSUR. L. REP. (CCH) 243 (Sask. Dist. C. 1975).

[224] R.S.S. 1965, c. 106, ss. 14 and 9 respectively.

[225] *Supra* note 233, at 277, [1976-78] INSUR. L. REP. (CCH) at 245.

[226] *Id.* at 277, [1976-78] INSUR. L. REP. (CCH) at 245-46.

[227] 15 O.R. (2d) 806, [1976-78] INSUR. L. REP. (CCH) 600 (H.C. 1977).

[228] R.S.O. 1970, c. 25.

considered in two recent cases.[229] As long ago as 1928, the Supreme Court of Canada[230] decided that if the insurer elects to reinstate, certain provisions, such as those outlining the method of determining the amount to be paid in respect of lost property, have no application. In *Lepin v. Uniguard Mutual Insurance Co.*,[231] the insured argued that the insurer's election to reinstate created a new contract between the parties in which the obligation of the insurer to reinstate was not limited by the amount of the policy or lessened by the increased costs which were incurred because of compliance with current building codes. In accepting this argument, the Court quoted the following passage from *MacGillivray on Insurance Law* with approval:

> 1814 Reinstatement clause. The usual form of reinstatement clause gives the insurers an option to pay a money indemnity or to restore to the insured *in specie* the property damaged or destroyed. The alternative is not merely to lay out the insurance money in reinstatement as far as it will go, but to reinstate completely. If the insurers elect to reinstate, their liability is not limited either by the amount insured, the amount of the damage, or the assured's insurable interest.[232]

By basing the insurer's liability on an independent contract, not governed by many of the indemnity provisions in the insurance contract, the Court deprived the insured of both advantageous and disadvantageous endorsements in the policy, although the insured was, in general, better off.[233]

I. *Subrogation*

Previous surveys[234] have discussed a series of Supreme Court of Canada cases concerned with the question of whether a tenant can benefit from his landlord's insurance. All were cases in which the insurer, having paid the landlord's loss, had claimed to be subrogated to the landlord's right against the tenant under the lease. In two recent cases[235] the Supreme Court of Canada has disallowed the insurer's subrogated claim on the ground that the lease relieved the tenant from liability for the loss. Such an interpretation of these leases probably corresponds with the

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[229] Lepin v. Uniguard Mut. Ins. Co., [1976-78] INSUR. L. REP. (CCH) 265 (B.C.S.C. 1976); North West Electric Co. v. Switzerland Gen. Ins. Co., [1976] 6 W.W.R. 446, [1976-78] INSUR. L. REP. (CCH) 448 (Sask. Q.B.).

[230] Bulger v. Home Ins. Co., [1928] S.C.R. 436, [1929] 1 D.L.R. 47.

[231] *Supra* note 229.

[232] D. BROWNE, 2 MACGILLIVRAY ON INSURANCE LAW RELATING TO ALL RISKS OTHER THAN MARINE 874 (5th ed. 1961).

[233] The Saskatchewan case, North West Electric Co. v. Switzerland Gen. Ins. Co., *supra* note 229, is to the same effect.

[234] Baer, *Annual Survey of Canadian Law: Insurance*, 6 OTTAWA L. REV. 193, at 229 (1973), 8 OTTAWA L. REV. 218, at 242 (1976).

[235] Ross Southward Tire Ltd. v. Pyrotech Prod. Ltd., [1976] 2 S.C.R. 35, [1971-75] INSUR. L. REP. (CCH) 1235, 57 D.L.R. (3d) 248 (1975); T. Eaton Co. v. Smith, [1978] 2 S.C.R. 749, [1976-78] INSUR. L. REP. (CCH) 742 (1977).

landlord's and the tenant's expectations and has the desirable consequence of making it unnecessary for the parties to have duplicate and overlapping insurance coverage. However, in each case there has been a vigorous dissent on the grounds that an attempt in the lease to relieve the tenant from liability for negligent conduct is a disclaimer and ought to be strictly interpreted. The leading cases supporting such a restrictive interpretation are *Canada Steamship Lines Ltd. v. The King*[236] and *United Motors Service Inc. v. Hutson*.[237] On the other hand, Laskin C.J.C., writing for the majority in the recent cases, has taken the position that the courts should apply to the covenants in the lease "the ordinary test of reading [them] reasonably and in a business sense",[238] without the usual judicial hostility to disclaimer clauses.

Unfortunately, while making it clear they were adopting a different approach, the majority in these recent Supreme Court of Canada cases has not expressly overruled the principle of restrictive interpretation found in the *Canada Steamship Lines Ltd.* and *Hutson* cases. As a result, what is basically the same issue has repeatedly come before the Court. Whether the most recent decision of *T. Eaton Co. v. Smith*[239] will put an end to this type of appeal is impossible to predict. Once again, Chief Justice Laskin has stressed, "I do not think, strictly speaking, that it is correct to assess the question at hand by reference to the so-called 'exculpatory clause' cases. . . . "[240] Yet the vigorous dissent of Mr. Justice de Grandpré shows that not all members of the Court have accepted this principle of a more even-handed interpretation of the lease. Instead, the dissenting Justices demonstrate a willingness to engage in the kind of hair-splitting that would require every variation in the wording of a lease to be interpreted by the Supreme Court of Canada.

In the recent cases, the Justices of the Supreme Court, while recognizing that an insurer was claiming by way of subrogation, purported to be interpreting the lease. It is as if they thought that insurance considerations should be left at the courthouse door. Yet as practical businessmen, the landlord and tenant would only consider liability for fire loss by taking into account the impact of insurance. The extent to which some judges have insulated themselves from the parties' real concerns is illustrated by Mr. Justice de Grandpré's "last word":

> It seems to me that behind the legal façade, what appellants are really trying to achieve is a policy statement that actions in recovery by fire insurers should be kept to a minimum and only resorted to in case of a negligence that is extreme (I have used on purpose a word that is still neutral in legal parlance). Whether or not such a policy is to be adopted cannot be our concern.[241]

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[236] [1952] A.C. 192, 5 W.W.R. (N.S.) 609, [1952] 2 D.L.R. 786 (P.C.).

[237] [1937] S.C.R. 294, 4 INSUR. L. REP. (CCH) 91, [1937] 1 D.L.R. 737.

[238] Ross Southward Tire Ltd. v. Pyrotech Prod. Ltd., *supra* note 235, at 39, [1971-75] INSUR. L. REP. (CCH) at 1236, 57 D.L.R. (3d) at 251.

[239] *Supra* note 235.

[240] *Id.* at 756, [1976-78] INSUR. L. REP. (CCH) at 744.

[241] *Id.* at 768-69, [1976-78] INSUR. L. REP. (CCH) at 749.

Yet such a "policy statement" is a far more realistic inference of the landlord's and the tenant's intention than to interpret the lease as if the landlords were not insured and needed the protection of the exculpatory clause cases.[242]

The tendency to ignore the impact of insurance in determining contractual liability is illustrated by the recent Ontario case of *Falcon Lumber Ltd. v. Canada Wood Specialty Co.*[243] The case involved a subrogated action brought by the insurer of the owner of lumber against a dry kiln operator. The lumber was destroyed by a fire which the court found was due to the negligence of the defendant. The defendant relied upon the following clause:

> Our prices listed herein do not include insurance on customers' lumber, and/or property whilst on the Canada Wood Specialty Co. Ltd. premises. Furthermore, the Canada Wood Specialty Co. Ltd. is not responsible for damages or theft that may occur whilst customer lumber and/or property is on The Canada Wood Specialty Co. Ltd. premises.[244]

The court referred to the fact that "the legal authorities lay down a number of general rules to be applied in the construction of exempting clauses".[245] Amongst the authorities referred to is *Canada Steamship Lines Ltd. v. The King*.[246] Without referring to any of the recent Supreme Court of Canada cases concerned with leases, and after stating, "In my opinion, the placing of the insurance here is irrelevant to the issue of the liability of the defendant", the court concluded, "Here the words of the exempting clauses do not expressly exclude negligence and, while the clause speaks of the defendant as not being 'responsible for damages', it does not refer to the cause or origin of such damages."[247]

The attempt by contract to place all liability on the insured party is only one way to avoid the need for duplicate and overlapping insurance coverage. The same goal can also be achieved by having all interested parties expressly insured under one contract. There have been many cases in the past where the attempt by all interested parties to claim protection under one policy has failed because courts have not been convinced that it was the intention to insure all interested parties or because the identity of each interested party and the nature of his interest were not disclosed to the insurer. Where there is full disclosure, there may remain a question concerning the extent of coverage provided for each named insured. Until recently, this would have turned on the proper interpretation of the insurance policy. However, various statements in the recent Supreme Court of Canada judgment in *Commonwealth*

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[242] Contrast the far more realistic attitude adopted by the House of Lords, especially Lord Wilberforce, towards exculpatory clauses in Photo Prod. Ltd. v. Securicor Transp. Ltd., [1980] 1 All E.R. 556, [1980] 2 W.L.R. 283 (H.L).

[243] 23 O.R. (2d) 345, 95 D.L.R. (3d) 503 (H.C. 1978).

[244] *Id.* at 346, 95 D.L.R. (3d) at 504.

[245] *Id.* at 350, 95 D.L.R. (3d) at 509.

[246] *Supra* note 236.

[247] *Supra* note 243, at 350, 95 D.L.R. (3d) at 509.

Construction Co. v. Imperial Oil Ltd.[248] have introduced new confusion and uncertainty into this area of the law.

This case involved the following facts. Imperial Oil engaged a contractor to construct a new fertilizer plant at Redwater, Alberta. During the course of construction a fire took place which was found to be the responsibility of a sub-contractor, Commonwealth. The fire destroyed a small amount of property owned by Commonwealth and did over $100,000 damage to the rest of the project. The entire loss was claimed by and paid to Imperial Oil under a multi-peril subscription policy. This policy named as the insured "Imperial Oil Ltd. and its subsidiary companies and any subsidiaries thereof and any of their contractors and sub-contractors". In spite of the fact that the sub-contractors were named as an insured, the insurer brought a subrogated action against them.

The Alberta Court of Appeal allowed this subrogated action.[249] They reached this conclusion partly because they thought that the multi-peril subscription policy was property insurance. "[T]hat is to say, it indemnifies against loss of or damage to the interest of the insured in the property at risk, as distinct from indemnity against liability for the loss of or damage to property."[250] This assumption that property insurance does not cover liability for loss of or damage to property has been rejected by the Supreme Court of Canada in *Cummer-Yonge Investments Ltd. v. Agnew Surpass Shoe Stores Ltd.*[251] However, the Alberta court went on to reinforce its conclusion by narrowly interpreting the coverage provided by the policy. Commonwealth's coverage extended to property for which "it may be liable or assume liability prior to loss". The court held that this covered Commonwealth only in relation to property that it was responsible for before the loss occurred. It held that Commonwealth's liability did not exist before the loss, but only arose because of the loss and was therefore outside of the terms of the coverage provided in the policy. It is not clear whether this is the same thing as saying that the policy covered contractual liability, but not tort liability. It involves applying the qualifying phrase "prior to loss" to both "may be liable" and "assume liability". Since this narrow construction was largely influenced by the court's assumption that a property insurance contract did not include the risk of liability for negligence, it is not surprising that the Supreme Court of Canada allowed Commonwealth's appeal.

However, the Supreme Court of Canada did not simply give the policy wording a broader interpretation. Instead, the Court phrased the

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[248] [1978] 1 S.C.R. 317, [1976-78] INSUR. L. REP. (CCH) 331, 69 D.L.R. (3d) 558 (1976).

[249] [1975] 2 W.W.R. 72, [1971-75] INSUR. L. REP. (CCH) 1026, 46 D.L.R. (3d) 399 (Alta. C.A. 1974).

[250] *Id.* at 81, [1971-75] INSUR. L. REP. (CCH) at 1030, 46 D.L.R. (3d) at 406.

[251] [1976] 2 S.C.R. 221, [1971-75] INSUR. L. REP. (CCH) 1171, 55 D.L.R. (3d) 676 (1975).

issues in an entirely different way from the Alberta Court of Appeal, and made several general pronouncements which suggest that the wording of the policy is irrelevant.

Mr. Justice de Grandpré, in delivering the judgment of the Court, stated:

> There are two issues in this appeal, which I will venture to express in my own terms:
> 1) Did Commonwealth, in addition to its obvious interest in its own work, have an insurable interest in the entire project so that in principle the insurers were not entitled to subrogation against that firm for the reason that it was an assured with a pervasive interest in the whole of the work?
> 2) If Commonwealth was not such an insured, were the insurers entitled to take advantage of their basic right to subrogation considering
> a) the wording of the subrogation clause and of the policy as a whole;
> b) the contractual arrangements between Imperial, Wellman-Lord and Commonwealth?
> The Court of Appeal dealt at length with only the first issue.[252]

The Court goes on to say, "On that first issue, given the fact that the policy is property insurance and not liability coverage, the reasoning of the Court of Appeal may be summarized thus . . . ".[253] There follows a discussion of joint and several insurance. Mr. Justice de Grandpré went on to re-phrase the first issue in a number of ways, including, "Is the interest of the appellant in the entire project pervasive?" and, "The question is: in the context of the construction contract, did the various trades have, prior to the loss, such a relationship with the entire work that their potential liability therefore constituted an insurable interest in the whole?"[254] It is not clear from this whether the insurer's counsel changed the nature of his attack when he got to the Supreme Court of Canada or whether the Court simply misunderstood the issue that was before the Alberta Court of Appeal. In any event, it does not seem to have been doubted in the lower court that Commonwealth had an insurable interest. Instead the question was, did the insurance policy cover Commonwealth's interest (*i.e.*, their potential liability)? Mr. Justice de Grandpré's judgment is hopelessly confused perhaps because he, like the Alberta court, attaches too much importance to his characterization of the multi-peril policy as property insurance and not liability coverage. Of course Commonwealth has an insurable interest in its potential liability. The question is, did the multi-peril policy cover this risk? Perhaps Mr. Justice de Grandpré was trying to ask whether Commonwealth's potential liability was the kind of insurable interest covered in a property insurance policy. Having phrased the issue that way, one would have thought that the answer would be that it depends on the wording of the property insurance contract. There are, after all, no mandatory coverages

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[252] *Supra* note 248, at 320, [1976-78] INSUR. L. REP. (CCH) at 331-32, 69 D.L.R. (3d) at 560.

[253] *Id.* at 320-21, [1976-78] INSUR. L. REP. (CCH) at 332, 69 D.L.R. (3d) at 560.

[254] *Id.* at 322, [1976-78] INSUR. L. REP. (CCH) at 332, 69 D.L.R. (3d) at 562.

provided by statute. This would leave the Court to address the issue of whether the interpretation by the Alberta Court of Appeal of the words "may be liable or assume liability prior to loss" was correct.

Mr. Justice de Grandpré does examine the specific wording in the policy in the following way:

> In the description of the property insured, the words "assume liability prior to loss" are sufficient to define the interest of the general contractor. The words "may be liable" add another dimension and are wide enough, in my eyes, to recognize in all contractors (which term, I underline again, includes subcontractors) an insurable interest having its source in the very real possibility ("may") of liability, considering the close interrelationship of the labour performed by the various trades under their respective agreements. Of course, that very real possibility exists prior to the loss.[255]

This passage seems to suggest that a person can be given an insurable interest in property by an insurance contract. Since an insurable interest is a mandatory requirement defined by law, and not something insurers can waive or grant to their insureds by contract, we are driven to conclude that His Lordship was writing in a very idiosyncratic way. An appreciation of this may help to limit the impact of his conclusion that, "For these reasons I conclude that Commonwealth was an insured whose insurable interest extended to the entire works prior to the loss so that in accordance with the basic principles, the insurers had no right of subrogation."[256] At first sight this reference to "the basic principles" seems to suggest that insurers could not limit their coverage in the policy. This notion, that an insured is automatically covered to the full extent of his insurable interest without regard to the policy terms, would be a very startling departure from previous authority.

The conclusion that the wording of the policy may be irrelevant is also supported by Mr. Justice de Grandpré's discussion of the distinction made by the Alberta Court of Appeal between joint and several insurance. I must confess I do not fully understand this part of Mr. Justice de Grandpré's decision. The distinction between joint and several insurance was put forward by counsel in several English cases (referred to by the Alberta Court of Appeal) in the context of whether one insured's coverage would be prejudiced by the improper conduct of another insured. It was suggested by counsel that in the case of several insurance, each insured was insulated from the wrongdoing of the other. Even in the context in which it was originally urged on the English court, it was not accepted as being very helpful.[257] The relationship between these cases and the context in which the distinction was used in *Commonwealth* is not brought out by the Alberta Court of Appeal, and escapes me. In the Supreme Court, Mr. Justice de Grandpré refers to the distinction in the following way, after noting the basic principle that subrogation cannot be obtained against the insured himself:

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[255] *Id.* at 325, [1976-78] INSUR. L. REP. (CCH) at 333-34, 69 D.L.R. (3d) at 563.

[256] *Id.* at 326, [1976-78] INSUR. L. REP. (CCH) at 334, 69 D.L.R. (3d) at 565.

[257] *See* the observation of Lord Maugham in Central Bank of India v. Guardian Assurance Co., 54 L.L. Rep. 247, at 259-60 (P.C. 1936).

> In the case of true joint insurance, there is, of course, no problem; the interests of the joint insured are so inseparably connected that several insureds are to be considered as one with the obvious result that subrogation is impossible. In the case of several insurance, if the different interests are pervasive and if each relates to the entire property, albeit from different angles, again there is no question that the several insureds must be regarded as one and that no subrogation is possible.[258]

In the discussion which follows it turns out that whether the several insureds are to be considered as one is not determined by examining the contractual relationship between them. Instead, it is determined by examining the extent of Commonwealth's insurable interest. Since Commonwealth's interest was pervasive, in accordance with basic principles, the insurers had no right of subrogation.

The only possible way to salvage any consistency between this decision and previous authority is to infer that the insurable interest to which Mr. Justice de Grandpré is referring is the one recognized (*i.e.*, covered) by the insurance policy. In other words, the issue is, as it was expressed by the Alberta Court of Appeal and would be expressed by most of us, did the terms of the policy cover Commonwealth's potential liability?

In relation to the second issue (*i.e.*, whether the insurers were entitled to take advantage of their basic right to subrogation), His Lordship stated, "It is trite law that even if insurers in principle have a subrogation right in a given case, they may renounce that right."[259] This conclusion is consistent with the ruling by the New Brunswick Court of Appeal in *J. Clark & Son Ltd. v. Finnamore*,[260] although as recently as 1973, Lord Denning, in the English Court of Appeal,[261] stated that the right of subrogation was based on a principle of equity rather than an implied term of the insurance contract. Without referring to these cases, Mr. Justice de Grandpré found that this policy did not support the insurer's claim to subrogation. Since Commonwealth was a party to this contract, the Court was not presented with any problem of privity. However, in other circumstances it may be difficult for a third party beneficiary to rely upon the terms of the insurance contract to deny the insurer's right to subrogation.

J. *Third Party Claims*

1. *Automobile Accident Victims*

The provincial legislation which gives automobile accident victims a direct recourse against the tortfeasor's liability insurer has attempted to

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[258] *Supra* note 248, at 321, [1976-78] INSUR. L. REP. (CCH) at 332, 69 D.L.R. (3d) at 561.

[259] *Id.* at 327, [1976-78] INSUR. L. REP. (CCH) at 334, 69 D.L.R. (3d) at 565.

[260] 5 N.B.R. (2d) 467, [1971-75] INSUR. L. REP. (CCH) 461, 32 D.L.R. (3d) 236 (C.A. 1972).

[261] Morris v. Ford Motor Co., [1973] 1 Q.B. 792, [1973] 2 All E.R. 1084, [1973] 2 W.L.R. 843 (C.A.).

insulate the victim from the insured's wrongdoing. At the same time, if the tortfeasor has no liability insurance, the victim's claim is against the provincial unsatisfied judgment fund. Previous surveys[262] have discussed the numerous cases which have tried to distinguish circumstances where there was a liability insurance contract (even though the insured, through his wrongdoing, may have forfeited his rights under it) and circumstances where the insured's conduct would allow the insurer to say there was no insurance contract covering the event. To use the traditional language of the courts, the task has been to distinguish between the definition of the risk and a breach of condition. In the past, the courts have not expressly recognized that the distinction has no effect on the ultimate recovery of the accident victim. The issue is really whether the victim will be paid by a private insurer or the unsatisfied judgment fund. This failure to recognize which parties are ultimately affected by the dispute has prevented the courts from making a rational allocation of the loss and has driven them to find conceptual and semantic differences between similar kinds of wrongdoing by insureds.

A more accurate description of the true issue before the court has recently been given by Mr. Justice Pigeon in *General Security Insurance Co. of Canada v. Belanger*.[263] The case involved the failure of a Quebec automobile owner to notify his insurer that he had acquired a new automobile. The Quebec direct recourse provision[264] protects automobile accident victims by stating that the insurer cannot set up against them the defences of nullity or of lapse that might be set up against the insured. In spite of this broadly worded provision, the insurer argued that failure to notify it meant that there was no insurance on the newly acquired automobile. The Court noted that "[s]ince fourteen days are allowed for notification of a change of car, this implies that the insurance continues during those fourteen days. Thus it is a 'lapse' that occurs at the end of this time, by virtue of the condition."[265] However, the Court supplemented this narrow reasoning by placing the issue in the broader context of the statutory scheme for compensating highway victims. His Lordship stated:

> It should be borne in mind that, under the Act of Quebec, the insurers, as a group, maintain the Fund by assessments on premiums. The purpose of s. 6 is clearly to prevent an insurer from passing on to the group a risk for which he has collected a premium. Having to bear the consequences when a false statement by an insured results in his taking a lower premium that he would otherwise charge, a fortiori he should not be allowed to pass the liability on to the Fund because of an omission that caused him no prejudice. In the case at bar, the real dispute is between the insurer and the Fund. I see no reason for

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[262] Baer, *Annual Survey of Canadian Law. Insurance*, 6 OTTAWA L. REV. 193, at 223 (1973), 8 OTTAWA L. REV. 218, at 243 (1976).

[263] [1977] 1 S.C.R. 802, [1976-78] INSUR. L. REP. (CCH) 253 (1975).

[264] Highway Victims Indemnity Act, R.S.Q. 1964, c. 232, s. 6 (now L.R.Q. 1977, c. I-5, s. 6).

[265] *Supra* note 263, at 811, [1976-78] INSUR. L. REP. (CCH) at 257

> obliging the latter rather than General Security to indemnify the victims or their legal representatives.[266]

The wording of the Quebec direct recourse provision is different from that found in the common law provinces. Unfortunately, Mr. Justice Pigeon used that difference in wording to distinguish the Manitoba case of *Pascoe v. Treasurer of the Province of Manitoba*.[267] This creates the possibility that courts in the common law provinces might ignore the general statements by Mr. Justice Pigeon and interpret the statutory provisions in the common law provinces differently. Such an approach would be encouraged by Mr. Justice Pigeon's characterization of the Quebec Act as "broader in scope", and the fact that while reference is made to a 1971 decision of the French Court of Cassation, there is no reference to the numerous Canadian common law cases other than the *Pascoe* case.

Fortunately, courts in Ontario[268] and Nova Scotia[269] have recognized that, while the statutory clauses in Quebec are different from those in Ontario and Nova Scotia, they are similar in intent and effect. The courts in both common law provinces have applied Mr. Justice Pigeon's general comments to their local statutory schemes.[270]

Perhaps some courts have not recognized that the issue is who pays, rather than whether the victim will recover, because only the private insurer has been named as the defendant by the victim. Viewing the dispute as one between victim and private insurer has allowed some courts to come to the victim's aid by invoking estoppel against the insurer. See, for example, *Kettner v. Allstate Insurance Co. of Canada*[271] where the insurer had been added as a third party and, while denying liability, had also participated in defending the victim's tort action against the insured. How the private insurer's participation in the tortfeasor's defence without a non-waiver agreement had prejudiced the victim is not clearly specified by Mr. Justice Munroe,[272] although prejudice to the unsatisfied judgment fund might be easier to establish.

The extent to which the victim is insulated from the insured's conduct and the doctrine of estoppel have also been considered in a recent line of cases[273] involving the insured's failure to pay the insurance

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[266] *Id.* at 813, [1976-78] INSUR. L. REP. (CCH) at 257-58.

[267] 26 W.W.R. (N.S.) 640, 16 D.L.R. (2d) 300 (Man. Q.B. 1958), *aff'd* 66 Man. R. 367, 27 W.W.R. (N.S.) 393, 17 D.L.R. (2d) 234 (C.A. 1959).

[268] Ministry of Consumer & Commercial Relations v. Waterloo Mut. Ins. Co., 25 O.R. (2d) 355, [1979] INSUR. L. REP. (CCH) 4235 (para. 1-1150) (H.C.).

[269] Halifax Ins. Co. v. Judgment Recovery (N.S.) Ltd. (*sub nom.* Lane v. Yong), [1976-78] INSUR. L. REP. (CCH) 930, 77 D.L.R. (3d) 107 (N.S.C.A. 1978).

[270] However, note the return by the Supreme Court of Canada to a more technical approach to this problem in Highway Victims Indem. Fund (formerly Bouchard and Foster) v. Federal Fire Ins. Co. of Canada, [1979] 2 S.C.R. 289, [1979] INSUR. L. REP. (CCH) 4091 (para. 1-1117).

[271] [1976-78] INSUR. L. REP. (CCH) 251 (B.C.S.C. 1976).

[272] Perhaps it was assumed that the insured was prejudiced and that the victim could step into the place of the insured.

[273] Judgment Recovery (N.S.) Ltd. v. Home Ins. Co., 23 N.S.R. (2d) 42, [1976-78] INSUR. L. REP. (CCH) 1041, 79 D.L.R. (3d) 161 (C.A. 1977); *Re* Judgment

premium. It is the standard Canadian practice for insurers to send to their insureds, shortly before the insurance expires, a renewal notice, certificate of insurance, and an insurance card covering the renewal period. If the premium is not paid, insurers frequently treat the insurance as automatically extended for a grace period of fifteen days, but terminated at the end of that period.[274] The insurers frequently notify the insured that his insurance has expired, but they make no attempt to recover the certificate of insurance or insurance card.

In these circumstances, the Nova Scotia courts have disallowed the victim's direct recourse claim against the insurer as a result of an accident which occurred after the expiration of the contract. In *Judgment Recovery (N.S.) Ltd. v. Home Insurance Co.*,[275] the Nova Scotia Court of Appeal catalogued the ways in which the insurers' practice could mislead the victims and law enforcement officials. The court condemned the practice in the following terms: "I view as reprehensible the issuance of the pink card in the present case, especially its issuance without any attempt to cancel or retrieve it after the fifteen day period. It was an act contrary to the spirit and purpose of the statutory insurance schemes."[276] Nevertheless, the court concluded: "I cannot find, however, that the card was a policy containing all the particulars required by [the act]. It was merely 'evidence' or 'proof' or a 'certificate' of insurance, which became false and misleading upon [the insured's] non-payment of premium."[277]

The doctrine of estoppel did not help the victim because the court found that the insured was not misled by the issuing of the pink card and the third parties were not shown to have relied on it to their detriment. The court, however, seemed to have been prepared to find that the "Premium Due Notice" which accompanied the pink card was a policy which *prima facie* bound the insurer, and one which section 250(5) of the New Brunswick Insurance Act[278] barred the insurer from denying. Nevertheless, the court found that the insurer ceased to be obligated to third parties under that deemed policy once it was terminated or cancelled. The court held that the expiration notice mailed to the insured, although not in proper form and not sent by registered mail as required by

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Recovery (N.S.) Ltd. & Dominion Ins. Corp., 25 N.S.R. (2d) 42, [1976-78] INSUR. L. REP. (CCH) 1096, 79 D.L.R. (3d) 648 (S.C. 1977); Bordeniuk v. Co-operative Fire & Cas. Co., 9 Alta. L. R. (2d) 325, 16 A.R. 166, [1979] INSUR. L. REP. (CCH) 4069 (para. 1-1113) (C.A.); Judgment Recovery (N.S.) Ltd. v. Co-operative Fire & Cas. Co., [1979] INSUR. L. REP. (CCH) 4186 (para. 1-1139) (N.S.C.A.); Tetterington v. Clarke, 11 Alta. L.R. (2d) 125, [1980] INSUR. L. REP. (CCH) 4620 (para. 1-1216) (C.A. 1979).

[274] Although in *Bordeniuk*, *supra* note 273, the policy provided that the insured would only have uninterrupted coverage if the premium were paid during the grace period. If the premium were not paid, the contract lapsed at the beginning of the period.

[275] *Supra* note 273.

[276] *Id.* at 53, [1976-78] INSUR. L. REP. (CCH) at 1045, 79 D.L.R. (3d) at 167-68

[277] *Id.*

[278] R.S.N.B. 1973, c. I-12. There are equivalent subsections in the direct recourse provisions of the other provinces.

Statutory Condition 8(1),[279] was received by the insured and effectively terminated the deemed policy not later than fifteen days after its receipt. No policy or contract of insurance then remained in legal existence and effect which could be invoked by section 250 of the New Brunswick Insurance Act.

This conclusion leaves unclear the effect of section 250(5) of the New Brunswick Insurance Act. The court recognized that the subsection was clearly enacted to counter *Bourgeois v. Prudential Assurance Co.*[280] where it was held that a policy void *ab initio* for misrepresentation was no policy at all. The court's conclusion rejects the contention, made for the victim, that no difference exists between legal non-existence of a contract void for misrepresentation and legal non-existence because of non-acceptance of an offer, as in the present case. The court gives no explanation why the insurer should be prevented from setting up as against the victim some reasons for legal non-existence and not others. In fact, the reasoning of the court seems somewhat circular once it is recognized that the interpretation of the subsection raises the question of when the insurer is liable to the victim even though it is under no contractual liability to the insured.

The same kind of circular reasoning is illustrated by *Re Judgment Recovery (N.S.) Ltd. v. Dominion Insurance Corp.*[281] In this case, after the insurer had notified the insured by registered letter that his insurance coverage was terminated for non-payment, the insurer mistakenly issued two separate endorsements covering two consecutive substitute vehicles. After finding that the contract respecting the substitution of one vehicle for another on the policy was void as there was no subject-matter—there was no contract to amend—the court considered the effect of section 98(5) of the Nova Scotia Insurance Act.[282] The court, relying on the Ontario Court of Appeal decision in *Minister of Transport for Ontario v. London & Midland General Insurance Co.*,[283] held that in spite of section 98(5) the insurer could rely on the defence that there was no contract in existence.

If the subsection is not to be interpreted as a meaningless tautology or strictly confined to cases of misrepresentation, the courts must come to grips with the question of what kind of conduct by the insurer, *short of a binding contract with the insured*, makes it liable to the victim. The subsection refers to "an instrument issued as a motor vehicle liability policy." The recent Nova Scotia cases do not discuss the fact that the common industry practice, approved by legislation, is not to issue a

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[279] R.S.N.B. 1973, c. I-12, s. 230.

[280] 18 M.P.R. 334, 13 INSUR. L. REP. 1, [1946] 1 D.L.R. 139 (N.B.C.A. 1944).

[281] *Supra* note 273.

[282] R.S.N.S. 1967, c. 148, *amended by* S.N.S. 1966, c. 79, s. 4 (in force from 1 Jan. 1969). This is the direct recourse provision similar to s. 250 of the New Brunswick Act and s. 225 of the Ontario Act.

[283] [1971] 3 O.R. 147, [1971-75] INSUR. L. REP. (CCH) 134, 19 D.L.R. (3d) 643 (C.A. 1971).

motor vehicle liability policy. Instead the legislation typically mentions two distinct documents. The first is the "Insurance Card", commonly referred to as the pink card, which has been in use for some time. The second is the "Certificate of Insurance" which was introduced in the early 1970s as a substitute for the wasteful practice of issuing unread and unreadable standard form policies. The legislation typically allows the superintendents to approve the form of the certificate "which when issued is of the same force and effect as if it was in fact the standard owner's policy."[284] I do not know what form of certificate the Nova Scotia or New Brunswick superintendents have approved, but it is safe to assume that the insurers in these recent cases were following the standard approved practice, and that at least one of the slips of paper they sent to the insured was a Certificate and hence "an instrument issued as a motor vehicle liability policy".

In *Bordeniuk v. Co-operative Fire & Casualty Co.*,[285] the Alberta Court of Appeal recognized that once a policy had been issued the insurer could not contend that there was no policy because there was no contract. The court thus clearly rejected the circular type of reasoning found in the Nova Scotia cases. The court also recognized that the pink card required by The Highway Traffic Act is not the same thing as the certificate which under The Alberta Insurance Act takes the place of the policy. Hence, the insurer was not liable to the victim when the insurer had issued an Auto Renewal Notice and a pink slip but not a Renewal Certificate, which it was admitted would have been issued by the insurer had the premium been paid.[286]

While the distinction made by the court does correspond to the distinctions made in legislation, it may be more precise than the practices permitted by the superintendents in some provinces and certainly more refined than the knowledge of the public.[287] The fact that the insurer escaped liability, even though it had issued a pink card covering the time when the accident occurred, makes it hard to understand why the Alberta court[288] thought the criticism of this practice by Chief Justice MacKeigan of the Nova Scotia court did not apply.

The insulated position of the victim only extends to the minimum liability coverage required by the Act. For any coverage in excess of the limits mentioned in the Act, subsection 11 provides that the insurer can avail itself of any defence that it is entitled to set up against the insured.

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[284] *See, e.g.*, Insurance Act, R.S.N.B. 1973, c. I-12, s. 228(5).

[285] *Supra* note 273.

[286] The accident occurred within the grace period, but see the contract provision discussed in note 274 *supra*.

[287] In *Bordeniuk* it was admitted by the insurer that a separate Renewal Certificate would be issued once the premium was paid. However, how does one know in other provinces whether the superintendents have actually approved a separate certificate (apart from the "pink card") or have even turned their minds to the issue? In Ontario there is no universal practice of issuing a Certificate after the premium is paid.

[288] *Supra* note 273, at 332, 16 A.R. at 175, [1979] INSUR. L. REP. (CCH) at 4073 (para. 1-1113).

What this subsection means in a situation where more than one policy covers the tortfeasor was considered in *MacKinnon v. Canadian General Insurance Co.* The decision of the Nova Scotia Court of Appeal,[289] which found that the victims had an insulated claim for the statutory minimum against each insurer, was discussed in the last survey.[290] A divided Supreme Court of Canada has now upheld this decision.[291]

2. *Rights of Unnamed Insureds*

Through industry practice and legislation, insurance contracts which cover the interest of more than one insured are common. Sometimes each insured is specifically named, but often those covered are identified by description or class. Aside from the complex issues of insurable interest and subrogation, this practice has raised two other issues: first, who is insured; and secondly, does the wrongdoing of one insured affect the rights of the others? In many group policies the first question turns on the meaning of "employment" or "full-time employment". In automobile insurance it raises the sub-delegation problem.[292] The second question is a familiar one in the context of the rights of mortgagors and mortgagees. In other contexts, the issue seems to be approached in two ways, often in the same judgments. The first way is to treat the issue as being one of construing the policy. For example, the issue is often whether an exclusion or warranty which refers to the conduct of the insured means only the named insured or any insured.[293] The second approach is less obvious and often less satisfactorily explained in the judgments. This approach sees the issue as a question of law which is determined by the legal relationship between the parties. This appears to be the origin of the terminology of joint or several insurance.[294] What is not satisfactorily explained is why joint ownership, for example, should mean one insured is not insulated from the wrongdoing of the other. If it is based on the presumption that paying one joint owner will benefit the wrongdoer, it may not always be well founded. The wrongdoer would only benefit indirectly if the insurance proceeds were used to restore the insured property. Even in this case, the insurer would seem to be more than

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[289] 8 N.S.R. (2d) 534, [1971-75] INSUR. L. REP. (CCH) 965, 46 D.L.R. (3d) 427 (C.A. 1974).

[290] Baer, *supra* note 2, at 244.

[291] [1976] S.C.R. 606, [1976-78] INSUR. L. REP. (CCH) 11, 61 D.L.R. (3d) 1 (1975). The four dissenting judges would have restricted the victim's "far reaching and irrebutable statutory right" or "special rights" to one fund containing the statutory minimum.

[292] *See* Minister of Transp. for Ont. v. Canadian Gen. Ins. Co., [1972] S.C.R. 234, [1971-75] INSUR. L. REP. (CCH) 140, 18 D.L.R. (3d) 617 (1971). For a recent case, *see* Sulyok v. Carroll, [1976-78] INSUR. L. REP. (CCH) 816, 73 D.L.R. (3d) 417 (N.S.S.C. 1977).

[293] Rankin v. North Waterloo Farmers Mut. Ins. Co., *supra* note 191.

[294] *See* the discussion in the text accompanying note 257 *supra*.

adequately protected by limiting the recovery to the innocent insured's loss based on a notional severance of the property.

3. *The Rights of Mortgagees*

The significance of a so-called mortgage clause in insulating the mortgagee from the mortgagor's wrongful conduct is emphasized by the British Columbia decision of *Kelowna Realty Ltd. v. Canadian Indemnity Co.*[295] In the absence of such a clause, the court found, as a general principle of insurance law so well known that it was unnecessary to cite authority, that the insurer could set up against the mortgagee any defence it could have set up against the mortgagor. Even in the absence of a mortgage clause, certain statutory protection (requiring notice of cancellation) is given to mortgagees and other loss payees. However, this protection cannot be invoked by a replacing insurer in an attempt to gain contribution where there is no prejudice to the insured.[296]

4. *Beneficiaries of Life Insurance Policies*

There have been several cases reported in the past few years which involved the rights of beneficiaries under life insurance policies. The Manitoba Court of Appeal[297] has now affirmed that an annuity is not life insurance, contrary to the widely held belief of "leading insurance counsel".[298] The Supreme Court of Canada[299] has marked the end of almost a millennium of common law discrimination against bastards, but, surprisingly, not without dissent.[300] The Ontario District Court[301] has demonstrated the unfortunate results of the repeal of the statutory provision[302] that provided that divorce automatically revoked the designation as beneficiary in favour of the estranged wife. Courts in two

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[295] *Supra* note 190. The theory that a mortgage clause creates a separate independent contract between the insurer and the mortgagee was also accepted in Mah v. Zurich Ins. Co., [1976-78] INSUR. L. REP. (CCH) 165 (Sask. Q.B. 1975). *See also* Doblay Inv. Ltd. v. Amrit Inv. Ltd., 15 O.R. (2d) 584, 76 D.L.R. (3d) 250 (H.C. 1977), Kerim v. The Bank of Montreal, 21 O.R. (2d) 229, [1979] INSUR. L. REP. (CCH) 3990 (para. 1-1093) (H.C. 1978).

[296] Paw Paw Enterprises Ltd. v. Innes Ins. Ltd., 19 O.R. (2d) 292, [1976-78] INSUR. L. REP. 1046, 84 D.L.R. (3d) 604 (H.C. 1978).

[297] *Re* Beck, [1976-78] INSUR. L. REP. (CCH) 292, 70 D.L.R. (3d) 760 (Man. C.A. 1976).

[298] *See* discussion in Baer, *supra* note 2, at 248.

[299] Brule v. Plummer, [1979] 2 S.C.R. 343, (*sub nom.* Plummer v. Air Canada) [1979] INSUR. L. REP. (CCH) 3865 (para. 1-1068), 94 D.L.R. (3d) 481.

[300] *See* discussion in Baer, *supra* note 172, at 348.

[301] McLean v. Guillet, 22 O.R. (2d) 175, [1976-78] INSUR. L. REP. (CCH) 1315 (Dist. C. 1978).

[302] The Insurance Act, R.S.O. 1960, c. 190, s. 175(1), *repealed by* S.O. 1961-62, c. 63, s. 4.

provinces[303] have considered the effect of the transition provisions in the 1962 amendments: the Ontario Supreme Court has ruled in the *Zschogner* case that the new Life Insurance Part applies to any increase in the amount of insurance coverage after 1962, even though the original amount of the policy may be governed by the old Part. The Ontario Court of Appeal,[304] in step with widespread developments in the law of matrimonial property, has used the doctrines of resulting and constructive trust to supplement the designation of the father as beneficiary in a policy insuring a child, in order to give half of the proceeds to the mother.

K. *Limited Automobile Accident Insurance*

One of the major savings anticipated from the introduction of no-fault automobile insurance was the legal costs associated with the judicial determination of tort liability. Yet these savings have been partially offset by the deluge of cases involving the limited accident benefits.[305] Perhaps some of these cases were unavoidable, given the numerous restrictions placed on the coverage, the complex wording of the statutes, regulations and standard contracts, and the arbitrary nature of many of the limitations.

As in the past, the largest number of cases are concerned with the release provisions and the extent to which the victim can keep both accident benefits and other sources of compensation. With so many overlapping, yet incomplete and niggardly sources of compensation, it is difficult for the courts to express a general principle of integration. No consistent principle is suggested by the legislation as to whether the victim can accumulate different funds, must choose between them, or can look to only one.[306] However, even without consistent guidance from the legislature, the courts have not always been sensitive to the consequences which result from their interpretation of narrow and ambiguous legislation.

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[303] Birch v. London Life Ins. Co., [1976-78] INSUR. L. REP. (CCH) 248 (Man. Q.B. 1976); Zschogner v. Graham, 24 O.R. (2d) 503, [1979] INSUR. L. REP. (CCH) 4032 (para. 1-1106) (H.C.).

[304] Wilkinson v. Wilkinson, [1976-78] INSUR. L. REP. (CCH) 336, 67 D.L.R. (3d) 385 (Ont. C.A. 1976).

[305] There have been at least 40 superior court decisions reported in the past four years.

[306] For example, while a disability pension paid under the Canada Pension Plan, R.S.C. 1970, c. C-5, would not be deducted from Schedule E benefits, a retirement pension paid under the same Act would be. *See* Coombe v. Constitution Ins. Co., [1976-78] INSUR. L. REP. (CCH) 1283 (Ont. H.C. 1978). With this kind of hair splitting, it is not surprising that counsel seem unwilling to believe what the statutes say until a judge has said it is so. *See, e.g.*, Van Beurden v. Brackett, 16 O.R. (2d) 708, [1976-78] INSUR. L. REP. (CCH) 851, 79 D.L.R. (3d) 127 (H.C. 1977), where the court was asked to decide whether a tortfeasor was released even though he was not insured. The court held that he was.

A good example of the courts' failure to adopt a general principle is illustrated by their attempt to integrate workers' compensation with no-fault benefits. Schedule E of the Ontario Insurance Act provides that the insurer shall not be liable for bodily injury to or death of any person who is entitled to receive the benefits of any workers' compensation law or plan.[307] In *Chu v. Madill*,[308] the Supreme Court of Canada has rejected the argument that a victim is excluded from no-fault benefits only when a claim has been made and allowed by a Workers' Compensation Board. They have held that where the facts entitle an insured worker to benefits, he cannot elect (intentionally or inadvertently) to recover against the insurer rather than the board. The majority stated that to give the victim such an election

> would mean that the insurer's undertaking as contained in the insuring agreement could be varied adversely to its interest after the happening of the event insured against by the independent act of the insured and such a situation in my view runs contrary to the law normally applicable in interpreting such an agreement.[309]

This reasoning does not distinguish amongst three separate issues, namely:

1. Can the victim recover both workers' compensation and no-fault benefits under any circumstances?
2. If the victim cannot keep both, which fund is first loss coverage and which excess coverage?
3. What are the procedural rules governing who can claim from whom?

Even if it is clearly established that the insured cannot accumulate the funds, and one fund is ultimately first loss, this would not necessarily determine the procedure for sorting out the various parties' rights. In fact, the normal common law rule in a case where the insured had some alternative right to compensation for his loss, was to give the insured an election and to use the doctrines of contribution and subrogation to prevent double recovery and to sort out ultimate liability.

The reasoning of Mr. Justice Ritchie in *Chu v. Madill* seems to base the answers to the first two questions on the existence of a non-election principle found in the law normally applicable in interpreting insurance contracts. Unfortunately, the law normally applicable does give the insured an election.

The first two questions which I have identified were not necessarily at issue in *Chu v. Madill*. There is no suggestion that the plaintiff anticipated making a workers' compensation claim after collecting

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[307] An Act to Amend the Insurance Act, S.O. 1971, Vol. 2, c. 84, s. 26 (adding Schedule E to the principal Act).

[308] [1977] 2 S.C.R. 400, [1976-78] INSUR. L. REP. (CCH) 346, 71 D.L.R. (3d) 295 (1976). *See also* Ling v. Transamerica Commercial Corp., 15 O.R. (2d) 134, [1976-78] INSUR. L. REP. (CCH) 824 (H.C. 1977).

[309] *Supra* note 308, at 410, [1976-78] INSUR. L. REP. (CCH) at 348-49, 71 D.L.R. (3d) at 299.

no-fault benefits. Nor was the plaintiff concerned about whether, having collected the no-fault benefits, the insurer would have been subrogated to its workers' compensation claim. If the issue had been whether the victim could keep both workers' compensation and accident benefits, it would be bizarre to hold that this depended upon which was claimed first. Given the wording of the statute, it was not necessary for the Court to invoke any general principle of integration. The narrower issue which was before the Court, that is the procedural question of how integration was to be accomplished, gives rise to different considerations. In answering this more specific question, some guidance as to the legislative intention is found in the fact that the disputed words are found in the exclusions to coverage. This might have been buttressed by more general arguments against circuitous law suits. Of course, such a general attack on the doctrine of subrogation should consider the practical advantage to the insured of having immediate compensation while placing the trouble and expense of pursuing a claim (including in this case, perhaps, workers' compensation) on the insurer. However, the Court's decision cannot be supported by the absence of any statutory mechanism to prevent double recovery and to sort out ultimate responsibility. These mechanisms exist at common law. Nor can the decision be supported by the law normally applicable in interpreting insurance contracts.

This failure by the majority of the Supreme Court of Canada to isolate the narrow issue before the Court and to properly identify the normal insurance mechanism concerned with double recovery, makes it difficult to predict what general impact the case will have.

Some indication of why the common law gave the insured an election is illustrated by *Brown v. Bouwkamp*.[310] In this case an injured victim's claim for Schedule E benefits was rejected by his insured. In spite of this, the liability insurer submitted that the victim was "entitled to the benefit of insurance as provided in Schedule E" and that this entitlement should be deducted from his tort recovery. The Ontario Court of Appeal rejected this submission, relying on its own judgment in *Chu v. Madill* and adding: "Nor, in our opinion, can a person whose claim has been rejected be stated unequivocally to be a person who is 'entitled' to the benefits. To so describe him would be to prejudge the merits of the grounds on which the insurer had rejected his claim."[311]

Not only would the liability insurer's submission require the court to judge the claim of a party not before the court, but it would delay the victim's recovery and force him to become involved in a dispute which is not his concern. However, in view of the Supreme Court of Canada decision in *Chu v. Madill*, *Brown v. Bouwkamp* may now be overruled.[312]

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[310] 12 O.R. (2d) 33, [1976-78] INSUR. L. REP. (CCH) 339, 67 D.L.R. 620 (C.A. 1976).

[311] *Id.* at 36, [1976-78] INSUR. L. REP. (CCH) at 341, 67 D.L.R. (3d) at 623.

[312] This was the view of Henry J. in Liscombe v. Sawyer, 15 O.R. (2d) 198, 75 D.L.R. (3d) 214 (H.C. 1977). However, note the way that the Ontario Court of Appeal

The interpretation of the statutory release provisions when there is a shortfall in the available insurance coverage has been considered by the Ontario High Court in *Baldelli v. Wellington Fire Insurance Co.*[313] In this case, damages to the victims had been assessed at $135,576, although the tortfeasor was insured only for the statutory minimum of $50,000. The court refused to deduct the $9,230 which had been paid in no-fault benefits from the liability insurer's liability under its policy, stating:

> In my opinion the words "or his insurer" at the end of section 237(2) mean only that the insurer is released to the same extent as "the person liable". Having interpreted section 237(2) in this way the insurer, in my view, is not entitled to first deduct these sums from the amount of the judgment and then, where the coverage is not sufficient to provide full indemnity, deduct the sums again from the available public liability coverage.[314]

In contrast, in *Brown v. Kalef*,[315] where the shortfall in insurance coverage was caused by the victim's contributory negligence, the full amount of the no-fault benefits received was deducted from the victim's net tort recovery (after taking into account her contributory negligence). The court held that the deduction was in no way affected by the apportionment of fault. If the deduction had been applied to the total of the victim's claim before taking into account her contributory negligence, the victim would have received more.[316]

A more complex integration issue was raised by *Scott v. Walker*.[317] The injured victim survived the automobile accident for nine months and then died from his injuries. The question was then raised whether the total disability payments made to the victim during his lifetime should be deducted from the widow's claim under the British Columbia Families' Compensation Act.[318] The court, relying on the release provisions in the

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limited the impact of Chu v. Madill, *supra* note 308, in Stante v. Boudreau, 29 O.R. (2d) 1, 112 D.L.R. (3d) 172 (C.A. 1980).

[313] 11 O.R. (2d) 513, [1976-78] INSUR. L. REP. (CCH) 85, 66 D.L.R. (3d) 577 (H.C. 1976). This issue faced the parties in Tozzo v. Boulieris, 16 O.R. (2d) 4, [1976-78] INSUR. L. REP. (CCH) 685, 77 D.L.R. (3d) 35 (H.C. 1977), but it was not discussed in the court's judgment.

[314] *Supra* note 313, at 519, [1976-78] INSUR. L. REP. (CCH) at 89, 66 D.L.R. (3d) at 583.

[315] 5 Alta. L.R. (2d) 92, [1976-78] INSUR. L. REP. (CCH) 957 (S.C. 1977). *See also* Schofield v. Minister of Consumer & Commercial Relations, 25 O.R. (2d) 255, [1979] INSUR. L. REP. (CCH) 4150 (para. 1-1128) (H.C.).

[316] Since the victim received $3,900 in no-fault benefits and was contributorily negligent to the extent of one-third, her recovery based on 2/3 (x-3900) would have been $1,300 greater than the amount granted by the court based on 2/3x-3900 (where x is the total amount of her injury).

[317] [1976-78] INSUR. L. REP. (CCH) 226, 63 D.L.R. (3d) 574 (B.C.S.C. 1975). *See also* the curious and complex solution adopted by the court in Cattapan v. Mitchell, 27 O.R. (2d) 87 (H.C. 1978), where the victim had released his "no fault" insurer without the agreement of the tortfeasor.

[318] R.S.B.C. 1960, c. 138 (now Family Compensation Act, R.S.B.C. 1979, c. 120).

Insurance Act,[319] ruled that they should be. Of course this is necessary to prevent double recovery only to the extent that the wrongful death claim of the widow includes a claim for compensation for the deceased's lost wages before death.

Since the courts and legislators have not been able to fashion a general policy and mechanism for the integration of benefits in domestic situations, it is not surprising that they have been unable to address the problem in the conflict of laws in consistent general terms. In *MacDonald v. Proctor*,[320] a Manitoba resident was injured in an automobile accident which occurred in Ontario while she was driving her car which was registered and insured in Manitoba. She collected $18,211.09 in accident benefits from the Manitoba Public Insurance Corporation. The question before the Ontario court was whether this amount should be deducted from her tort judgment against an Ontario resident, insured in Ontario. The trial judge relied upon the power of attorney and undertaking[321] filed by the Manitoba Public Insurance Corporation with the British Columbia Superintendent of Insurance[322] to find that the payments made by the Manitoba Corporation were the equivalent of Schedule E payments and were to be deducted from the tort judgment under section 237(2) of the Ontario Insurance Act. This decision was reversed on appeal. The Court of Appeal commenced its inquiry by stating the general rule that a wrongdoer cannot claim the advantage of collateral benefits which are paid to an injured person. The exception to this general rule found in the Ontario Insurance Act only applied to Schedule E payments. The court concluded that the payments made by the Manitoba Corporation were not Schedule E payments

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[319] R.S.B.C. 1960, c. 197, s. 248(2) and s. 250C(2) *as amended by* S.B.C. 1969, c. 11, s. 36, S.B.C. 1972, c. 29, s. 4C (now R.S.B.C. 1979, c. 200, ss. 262(2), 268(2)).

[320] 19 O.R. (2d) 745, [1979] INSUR. L. REP. (CCH) 4169 (para. 1-1135), 86 D.L.R. (3d) 455 (C.A. 1977).

[321] The revelant sections of the power of attorney and undertaking are as follows:

> THE MANITOBA PUBLIC INSURANCE CORPORATION aforesaid hereby undertakes: . . .
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> C. Not to set up any defence to any claim, action, or proceeding, under a motor-vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with the law relating to motor-vehicle liability insurance contracts of the Province or Territory of Canada in which such action or proceeding may be instituted, and to satisfy any final judgment rendered against it or its insured by a Court in such Province or Territory, in the claim, action, or proceeding, up to
>
> (1) the limit or limits of liability provided in the contract; but
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> (2) in any event an amount not less than the limits fixed as the minimum for which a contract of motor-vehicle liability insurance may be entered into in such Province or Territory of Canada, exclusive of interest and costs and subject to any priorities as to bodily injury or property damage with respect to such minimum limit or limits as may be fixed by the Province or Territory.

Id. at 747, [1979] INSUR. L. REP. (CCH) at 4170, 86 D.L.R. (3d) at 457.

[322] The British Columbia Superintendent acts as a central filing officer for all of the provinces.

because the undertaking only precluded an insurer from setting up defences; it was not an agreement to incorporate into the Manitoba policy all of the obligations required by the Ontario Insurance Act.

What is not clear from the judgment is that the dispute is between the Manitoba Corporation claiming by way of subrogation and the private Ontario insurer. These subrogated actions for the amount paid in no-fault benefits have clearly been abolished in the case of intraprovincial accidents in both Manitoba and Ontario. This should have been the commencement of the court's inquiry. If it had been, the court might have recognized that its decision creates a "false" conflict. It implements a policy for interprovincial accidents which has been rejected for intraprovincial accidents.[323] Moreover it is a one-sided policy since in most circumstances a private Ontario insurer, having paid Schedule E benefits, could not be subrogated to a claim against the Manitoba Corporation.[324] Anyone familiar with the insurance industry's reaction to the nationalization of automobile insurance in Manitoba will anticipate the special sense of outrage this decision has likely caused in the industry.[325]

The Alberta Supreme Court[326] has reached a similar result in a case involving benefits paid under a British Columbia policy. Surprisingly, the court was unaware of the undertakings filed by the insurers, and based its decision on a narrow interpretation of the release provision in the Alberta Insurance Act.[327] The release provisions of the British Columbia statute were not considered, nor did the court advert to the British Columbia insurer's possible subrogation rights under British Columbia law. Instead, the judge assumed that his decision would allow the plaintiff to be paid twice. The irresponsible nature of the decision is emphasized by the judge's statement:

> I realize that the result in this case is directly against the intentions of both insurers and the legislature in setting up provisions whereby monies could be paid quickly to injured or deceased persons with the expectation that such monies would be credited against any judgment ultimately given.[328]

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[323] Perhaps this fact was not recognized because the defendants neither pleaded nor argued that the Manitoba Public Insurance Corporation Act assisted them.

[324] Subrogation may be possible where there has been an accident in Manitoba and litigation occurs there. If the accident occurs in Ontario or if, in any case, the suit is brought in Ontario, subrogation would not be possible. *See, e.g.*, Jasmins v. Evans, 14 O.R. (2d) 340, [1976-78] INSUR. L. REP. (CCH) 1 (H.C. 1975), where the Ontario court did not allow an Ontario insurer, having paid Schedule E benefits, to be subrogated to the victims claim against a foreign tortfeasor and his foreign insurer.

[325] It should be a simple matter for the superintendents to change the wording of the undertakings to cover this situation.

[326] Gervais Estate v. Ash, [1976-78] INSUR. L. REP. (CCH) 1066, 85 D.L.R. (3d) 439 (Alta. S.C. 1978).

[327] R.S.A. 1970, c. 187, s. 313(2).

[328] *Supra* note 326, at 1067, 85 D.L.R. (3d) at 441. For an interprovincial case where no fault benefits were integrated, *see* Gillis v. Bates, [1979] 5 W.W.R. 164, [1979] INSUR. L. REP. (CCH) 4332 (para. 1-1161) (B.C.S.C.).

Aside from the cases involving the integration of no-fault benefits with other sources of compensation, there have been numerous cases dealing with the various limits on coverage. The most frequently litigated issue has been the meaning of total disability.[329] The courts have used various qualifying phrases to temper the restrictive nature of the word used in the contract. Insureds do not have to be completely immobilized and unable to perform any economic function before they are totally disabled. The phrase is expansively interpreted to mean "unable to perform a substantial portion of his work, or an essential or material aspect of it, or, in general, be able to perform his task to the standard of a reasonable employer"[330] or, more often, unable to perform "in any occupation for wages or profit for which he was suited having regard to his skill and ability".[331] Perhaps the simplest way of expressing the idea has been to say that the individual must be "disabled from regular work".

There have been other cases interpreting the provisions concerned with what expenses and medical services are covered,[332] what it means to be struck by an automobile,[333] who are dependants[334] or members of the household,[335] and whether the victim was employed[336] for the period necessary to qualify for benefits. Some of these cases do not involve the question of whether the victim will collect, but rather from whom. A further example of this is the recent Ontario case[337] in which a passenger

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[329] Ross v. Insurance Corp. of B.C., 3 B.C.L.R. 48, [1976-78] INSUR. L. REP. (CCH) 905 (Cty. Ct. 1977); Campanella v. Great American Ins. Co., [1976-78] INSUR. L. REP. (CCH) 618 (Ont. Cty. Ct. 1977); McMartin v. Liberty Mut. Ins. Co., [1976-78] INSUR. L. REP. (CCH) 492, 70 D.L.R. (3d) 66 (Ont. Cty. Ct. 1976); Foden v. Co-operators Ins. Assoc. (Guelph), 20 O.R. (2d) 728, [1976-78] INSUR. L. REP. (CCH) 1336 (H.C. 1978); Coombe v. Constitution Ins. Co., *supra* note 306; Fast v. Insurance Corp. of B.C., [1976-78] INSUR. L. REP. (CCH) 126 (B.C.S.C. 1976).

[330] *See, e.g., Foden, supra* note 329, at 731, [1976-78] INSUR. L. REP. (CCH) at 1340.

[331] *See, e.g., Ross, supra* note 329, at 733, [1976-78] INSUR. L. REP. (CCH) at 908.

[332] McCuaig v. Unigard Mut. Ins. Co., [1976-78] INSUR. L. REP. (CCH) 1014, 84 D.L.R. (3d) 607 (B.C.S.C. 1978); Hasson v. Hamel, 16 O.R. (2d) 517, 78 D.L.R. (3d) 573 (Cty. Ct. 1977); Loranger v. Unigard Mut. Ins. Co., 6 Alta. L.R. (2d) 387, [1976-78] INSUR. L. REP. (CCH) 1273 (Dist. C. 1978); Morin v. Zurich Ins. Co., 6 B.C.L.R. 235, [1976-78] INSUR. L. REP. (CCH) 1186 (S.C.).

[333] Punja v. Toronto Transit Comm'n, [1979] INSUR. L. REP. (CCH) 4020 (para. 1-1103) (Ont. C.A.); Ezard v. Warwick, [1979] INSUR. L. REP. (CCH) 4196 (para. 1-1141) (Ont. C.A.).

[334] Scrimshaw v. Constitution Ins. Co. of Canada, [1979] INSUR. L. REP. (CCH) 4328 (para. 1-1160) (Ont. Cty. Ct.).

[335] Goodland v. Gore Mut. Ins. Co., 19 O.R. (2d) 521, [1976-78] INSUR. L. REP. (CCH) 1048, 85 D.L.R. (3d) 594 (C.A. 1978); Boasley v. British Am. Ins. Co., 15 O.R. (2d) 120, [1976-78] INSUR. L. REP. (CCH) 512 (Cty. Ct. 1976); Bannerman v. Insurance Corp. of B.C., [1976-78] INSUR. L. REP. (CCH) 396, 71 D.L.R. (3d) 749 (B.C.S.C. 1976).

[336] Proctor v. Guaranty Co. of N. Am., 13 O.R. (2d) 1, [1976-78] INSUR. L. REP. (CCH) 238 (C.A. 1976); Sansone v. State Farm Mut. Auto. Ins., 25 O.R. (2d) 108, [1979] INSUR. L. REP. (CCH) 4139 (para. 1-1125) (C.A.).

[337] Brown v. Zurich Ins. Co., 21 O.R. (2d) 606 (H.C. 1978).

in a car driven without the owner's consent was held not to be entitled to Schedule E benefits from the owner's insurer. If the driver was also uninsured, the passenger would have a claim against the uninsured motorists fund.