INSURANCE LAW

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I. LIMITED AUTOMOBILE ACCIDENT INSURANCE

Nothing in recent years had produced such public discontent, academic criticism, legislative inquiries [1] and models for reform [2] as our present tort-liability insurance system for compensating victims of automobile accidents. The arguments for and against a new no-fault compensation system have been so thoroughly canvassed in recent years that the public discussion has been largely reduced to pamphleteering. Little empirical work has been done, but that which has shows serious failings in the present system. [3] In Canada there is still a need for a systematic empirical study to discover the cost (in lawyers fees, court fees, adjusters, and so on) of operating the present system, especially the process of fault litigation and the savings that could be made by its abandonment.

In this climate it is not surprising that in Ontario a Select Committee on Automobile Insurance of the Legislative Assembly recommended in 1963 [4] that a limited amount of first party accident insurance protection be made an integral and mandatory part of the standard motor vehicle liability policy sold in Ontario. After agreement was reached by the superintendents on a new uniform automobile insurance part, enabling and regulatory legislative amendments were passed by the Ontario Legislative Assembly in 1966. [5] This legislation was proclaimed August 8, 1968, [6] and finally after nearly a six-year gestation period a limited scheme similar (but with some significant differences) to the 1963 recommendations has been made available to the Ontario public as of January 1, 1969. The government apparently delayed proclamation in order to give other provinces a chance to enact similar legislation so that the Ontario legislation could be brought in in conjunction with

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[1] The latest is the REPORT OF THE BRITISH COLUMBIA ROYAL COMM'N ON AUTOMOBILE ACCIDENTS (1968).

[2] The most exhaustive treatment is R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965) which also examines the various other schemes which have been proposed or implemented.

[3] *A Survey of Views on Motor Vehicle Accident Compensation and the Concept of Fault*, 2 OSGOODE HALL L.J. 425 (1963).

[4] FINAL REPORT OF THE SELECT COMM. ON AUTOMOBILE INSURANCE (1963).

[5] An Act to amend The Insurance Act, Ont. Stat. 1966 c. 71, § 11.

[6] 101 THE ONT. GAZETTE 2105.

similar legislation in other provinces. [7] By 1968 all provinces except British Columbia and Quebec had passed similar legislation. [8]

This introduction of a limited amount of automobile accident insurance in eight provinces is the most significant development of the past year. In all of these provinces this insurance is optional and supplemental to the existing motor vehicle liability insurance. The legislation is practically identical in all provinces and in the following discussion reference will be made to the Ontario act.

In Ontario, as in all provinces, the statute does not itself contain detailed provisions describing and regulating this new accident insurance. Section 226*i* [9] allows the insurer to provide the terms of the contract, but this is subject to the superintendent's authority to control the application and policy used by insurers. The statute acknowledges that accident insurance benefits can be provided, and describes who is insured by such a contract. [10] It also prescribes the circumstances when this insurance will be a first loss and when excess insurance, [11] gives injured persons or the personal representatives of persons killed a right to demand from the owner of an automobile or his insurer a statement of whether the owner has this type of insurance, [12] gives unnamed insureds the same rights as named insureds, [13] allows the insurer to apply to pay the money into court in certain doubtful cases, [14] allows a person against whom a claim is brought to demand of the claimant full particulars of all insurance of this type available to the claimant, [15] and provides a limitation period for actions against the insurer under this type of contract. [16]

This limited accident insurance is designed to supplement rather than to replace motor vehicle liability insurance. It makes no attempt to replace the present fault determination litigation process. [17] Rather, it extends insurance coverage to people injured in accidents in which no one is at fault and where there is no opportunity to sue in negligence. It does not exclude injured people who have tort claims or even injured persons who could now

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[7] 89 ONT. LEG. DEB. 3202 (May 22, 1968).

[8] An Act to amend The Alberta Insurance Act, Alta. Stat. 1967 c. 39, § 8; An Act to amend The Saskatchewan Insurance Act, Sask. Stat. 1968 c. 64; An Act to amend The Insurance Act, Man. Stat. 1966-67 c. 26, § 12; An Act to Amend Chapter 9 of the Acts of 1962, the Insurance Act, N.S. Stat. 1966 c. 79, §§ 4-8; Insurance Act, N.B. Stat. 1968 c. 6; The Automobile Insurance Act, Nfld. Stat. 1968 No. 36; An Act to amend The Insurance Act, P.E.I. Stat. 1967 c. 28, § 8.

[9] An Act to amend The Insurance Act, Ont. Stat. 1966 c. 71, § 11.

[10] *Id.* § 226*c*(1).

[11] *Id.* § 226*c*(3).

[12] *Id.* § 226*d*.

[13] *Id.* § 226*e*.

[14] *Id.* § 226*f*.

[15] *Id.* § 226*h*.

[16] *Id.* § 226*g*.

[17] In fact, it may be argued that litigation may be promoted, since the limited accident benefits may provide individuals with the necessary capital to engage counsel and proceed with a tort claim.

collect from an insurance company through third party liability insurance. Although the act provides that an insurer may demand as a condition precedent to payment of this limited accident insurance, a release from tort liability to the extent of the payment in favour of the insured and the insurer. This is provided for in the standard contract. As well, such a release occurs automatically under the statute where the injured victim is claiming to be an insured person by virtue of a limited accident insurance contract taken out by the tortfeasor.[18] However, contrary to the recommendations of the 1963 select committee, the act does not make this limited accident insurance an integral and mandatory part of the standard motor vehicle policy sold in Ontario. The insurance is optional. Since to some extent this insurance just duplicates accident and medical insurance already available and purchased by large elements of the motoring public, this option might seem justified. It might seem unfair to force owners to duplicate insurance. However, this scheme is not just designed with owners in mind. The insurance is also designed to protect drivers, passengers and pedestrians. Few owners will be altruistic enough to be concerned with making compensation available to "strangers" (*i.e.* other than their immediate family) at their expense when there is no possibility that they personally can suffer pecuniary loss. Owners will base their decision to insure or not on the basis of whether they or their family may not otherwise be covered by insurance or can suffer a loss, not on whether all the people who could be injured will be adequately compensated.

To some extent a victim, although not being the owner of the motor vehicle involved in the accident, may be covered because of the broad definition of insured. Insured includes the named insured and his spouse and dependent relatives (if residing in the same dwelling house) whether they are passengers, drivers or pedestrians and no matter what automobile is involved in the accident, as well as passengers of, and pedestrians injured in an accident involving the described automobile (or newly acquired or temporary substituted automobile). Therefore, to some extent victims do not have to rely on the altruism of other owners since, if they own a car, they can take out this accident insurance themselves.

Once it has been decided that there are large numbers of victims who receive no compensation and should receive it even when no one is at fault, and that the present voluntary system of arranging accident insurance doesn't seem to be providing this, and that automobile owners as a group should pay for this compensation, a *compulsory* insurance scheme must be the result. Otherwise you just duplicate something already available on a voluntary basis.

If you look at the standard contract which the companies have decided to offer and which the superintendent has approved, you will notice that it provides a fixed schedule of payments for death, total disability and dismemberment or loss of sight. There is no provision for assessing actual

[18] An Act to amend The Insurance Act, Ont. Stat. 1966 c. 71, § 226c(2).

economic loss and no provision for pain and suffering. The amounts provided seem small (maximum principal sum of 5,000 dollars) but not out of line with what the Osgoode Hall study shows to be the average recovery under tort claims. However, one of the biggest shortcomings of this new insurance is that there are no benefits for partial disability—the victim must be wholly and continuously disabled.

Unlike the case of liability insurance, the insurer can resist paying the victim in certain circumstances on the grounds of the wrongdoing of the driver or owner. No one can collect if the accident occurred while the automobile was being used in any race or speed test. No occupants can recover if the automobile is being used for any illicit or prohibited trade or transportation and, most significant of all, no occupant may claim if (except for death benefits) the driver is convicted of drunken or impaired driving or of driving while under the influence of drugs. As well, a person driving while under age, or while unqualified to drive, cannot collect (except for death benefits).

The schedule of payments is expressed in terms of percentages of a principal sum (which is either 1,000 dollars or 5,000 dollars). Death benefits are payable to spouses, dependent children or, in the case of an unmarried person under eighteen, parents. In the case of a person over eighteen years of age, death benefits may be paid to parents if they *reside* in the same dwelling premises and are principally dependent upon him for financial support. No other dependent is entitled to death benefits. These provisions as to who qualifies for death benefits seem somewhat arbitrary, and it perhaps would have been better to allow any dependent to qualify.

Benefits are also paid for dismemberment (actual severance of hands, legs, feet or arms) or loss of sight (entire and irrecoverable). This will be of no value to the majority of victims who injure their limbs, though there is no severance, or who hurt their eyes, though there is no loss of sight.

The total disability benefits are available to persons who have been working at the time of the accident or have worked for any six of the preceding twelve months. Housewives are specifically covered, and there is a special schedule of weekly benefits for them. If the injury does not prevent the victim from performing *any and every duty* pertaining to his occupation or employment, no benefits are payable. This failure to provide for partial disability is the most serious shortcoming of the scheme.

Any amount paid for dismemberment or loss of sight is reduced from the benefits payable for total disability, and payments for both dismemberment or loss of sight or total disability are reduced from the amount payable as death benefits. As well, the total disability payments are reduced if the benefits either alone or together with benefits for loss of time under another contract, including a contract or group accident insurance and a life insurance contract providing disability insurance, exceed the money value of the time of the insured person.

II. LEGISLATION

The past year, 1968, saw legislative activity in all provinces except British Columbia, Prince Edward Island and Nova Scotia. The most ambitious undertakings were in New Brunswick, [19] which enacted a whole new insurance statute and Manitoba, which enacted a new part on accident and sickness insurance. [20] As well, Saskatchewan [21] and Newfoundland [22] finally enacted the new Uniform Act on Automoblie Insurance. Besides providing for the kind of accident insurance already described, this new act reorganises and attempts to clarify the automobile part of the Insurance Act. This will be discussed below in reference to the Ontario statute.

1. *Ontario*

During the past year, the Ontario legislature has made only minor amendments to the Insurance Act, which, *inter alia*, give the minister the discretion to suspend an insurer's licence for non-payment of an undisputed claim instead of making the licence ipso facto void. [23] The legislature also amended Schedule A which prescribes the fees payable by insurers under section 88, [24] and corrected some legislative oversights and contradictions in the Ontario act. [25]

The more significant occurrence has not been fresh legislative activity, but rather the proclamation, finally, of some important amendments made in 1966. These 1966 amendments have already themselves been twice amended [26] and were finally proclaimed on August 20, 1968 to come into effect on January 1, 1969. They are similar to recent amendments made in seven other provinces. [27]

These 1966 amendments in Ontario contain a new Part VI on automobile insurance. To a large extent the changes in the 1966 act are designed to make the Insurance Act's organization more rational and easy to follow, and do not involve substantive changes. For example, provisions now found in both the automobile and fire insurance parts relating to the contents of the policy, appraisals, relief from forfeiture and waiver [28] have been transferred to Part III which contains the general provisions governing

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[19] Insurance Act, N.B. Stat. 1968 c. 6.

[20] An Act to amend The Insurance Act (2), Man. Stat. 1968 c. 35.

[21] An Act to amend The Saskatchewan Insurance Act, Sask. Stat. 1968 c. 64.

[22] The Automobile Insurance Act, Nfld. Stat. 1968 No. 36.

[23] An Act to Amend The Insurance Act, Ont. Stat. 1968 c. 58, § 2.

[24] *Id.* § 6.

[25] *Id.* §§ 4-5.

[26] An Act to amend The Insurance Act, Ont. Stat. 1967 c. 40, §§ 1-6 and An Act to amend The Insurance Act, Ont. Stat. 1968 c. 58, § 5.

[27] *Supra* note 8.

[28] For automobile insurance these were found in The Insurance Act, ONT. REV. STAT. c. 190, § 202 (1960), statutory conditions 6-9 of §§ 203, 207, 209, respectively and for fire insurance §§ 94(2), 112. 115, 117 respectively.

insurance contracts in Ontario.[29] Other amendments correct the confusion in the act between "contract" and "policy." They correct the misuse of the term policy, attempting to preserve the definition of policy as the instrument evidencing a contract and not as a synonym for the contract itself.[30]

The definitions of "automobile" and "automobile insurance" have been changed; the latter has been extended to include certain types of accident insurance.[31]

The provisions relating to motor vehicle liability policies remain much the same. The standard exceptions of liability imposed by any workman's compensation law, for bodily injury to, or death of, certain near relatives and employees of the insured are identical under the old and new acts. Instead of the confusing array of statutory conditions, extended coverage and expressly excluded provisions of the old act concerned with gratuitous passengers, trailers, explosives, carrying passengers for hire, garage repair shops, property carried in the automobile and so on, the new act provides in all these cases that the insurer may provide that it shall not be liable in these cases.[32] The act attempts to settle or to avoid the confusion of the case law as to what amounts to carrying passengers for compensation or hire by providing that the typical car-pool, occasional shared-cost trip or carrying of a client or domestic servant is not carrying passengers for compensation.[33]

While the act seems to continue to allow the insurer to exclude coverage for gratuitous passengers, the standard owner's policy approved by the superintendent and now in use in Ontario contains no such exclusion. This change from the need to have an optional additional premium paid for passenger hazard, plus the recent amendments to the Ontario Highway Traffic Act, goes some way to correct the unfortunate position of the gratuitous passenger in Ontario.

There is a new provision which provides that where the insurer is subrogated to the rights of an insured and a dispute arises between insured and insurer as to the conduct of the action or appeal, the solicitor to be used, or any offer of settlement, either party may apply to the Supreme Court for determination.[34] No rules are laid down in the act to settle these disputes; the court is authorized to make such order as it considers reasonable.

The new part concerning physical damage cover does not introduce any substantive changes, although, unlike the old act, it specifically provides that the insurer may provide in a contract such exclusions and limitations, in respect of loss or damage to, or the loss of, the automobile as it considers

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[29] An Act to amend The Insurance Act, Ont. Stat. 1966 c. 71 § 8 which adds §§ 94*a*-94*d* and § 7 which amends § 94(2).

[30] *E.g., id.* § 2 amending § 25 and § 1 amending and transferring to § 1 certain definitions found in the old § 198.

[31] *Id.* § 1.

[32] *Id.* § 11 providing for this in §§ 213-15.

[33] *Id.* § 11 adding new § 215(4).

[34] *Id.* § 11 adding new § 226*k*(4).

necessary.[35] This, of course, is subject to the superintendent's approval.

It is the introduction of three types of limited accident insurance which is most significant. These include uninsured motorist cover, medical expense coverage, and accident insurance. The accident insurance has already been described. The medical expense coverage is the same as what was offered in Ontario before, without specific statutory recognition. The uninsured motorist cover allows an insurer on an optional basis to insure certain people against bodily injury or death arising out of an accident in which there is legal liability of another person for the injury or death and that person cannot be identified or has no insurance against his liability. The insurance does not apply if the victim has a claim under the Motor Vehicle Claims Act or similar Canadian or American legislation. The persons covered are: drivers and passengers of the insured automobile, the named insured, his spouse, and any dependent relative residing in the same dwelling premises while they are drivers or passengers of any automobile or while they are pedestrians if struck by any automobile. In view of the definition of uninsured automobile in the standard contract approved by the superintendent in Ontario,[36] it is doubtful whether this type of insurance will often be of much value.

2. *Alberta*

In Alberta, the 1968 amendments[37] to the Insurance Act are all related to the statutory requirements designed to insure the solvency of insurance companies. There is a requirement that life insurance companies deposit 500,000 dollars with the minister and there are new rules for the valuation of securities for the purposes of section 102.

3. *Saskatchewan and Newfoundland*

In 1968, Saskatchewan[38] and Newfoundland[39] enacted the same amendments as Ontario did in 1966. In both provinces, there is a new part on automobile insurance and provisions relating to the contents of the policy, appraisals, relief from forfeiture and waiver have been transferred from the

[35] *Id.* § 11 adding new § 224.

[36] "An 'uninsured automobile' . . . shall not include an automobile owned by or registered in the name of:

(c) any person who is an authorized self-insurer within the meaning of a financial or safety responsibility law; or

(d) any person who had filed a bond or otherwise given proof of financial responsibility with respect to his liability for the ownership, use or operation of automobiles."

[37] An Act to amend The Alberta Insurance Act, Alta. Stat. 1968 c. 48.

[38] An Act to amend The Saskatchewan Insurance Act, Sask. Stat. 1968 c. 64 and An Act to amend The Automobile Accident Insurance Act, Sask. Stat. 1968 c. 7.

[39] An Act Further to amend The Fire Insurance Act, 1957, Nfld. Stat. 1968 No. 31; An Act Further to amend The Insurance Contracts Act, 1961, Nfld. Stat. 1968 No. 32; An Act Further to amend The Insurance Companies Act, 1961, Nfld. Stat. 1968 No. 33.

fire and automobile parts to the general part. Contracts and policies have been more carefully distinguished and there are the same new definitions of "automobile" and "automobile insurance" as in the Ontario Act.

4. *Manitoba*

In Manitoba, the legislature in 1968 amended the Insurance Act [40] to broaden the definition of carrying on business in Manitoba, to effect the superintendents' power and authority to issue licences to adjusters and brokers and to amend the statutory condition concerned with the termination of fire insurance contracts. However, the major undertaking in Manitoba has been the enactment of a new Part VI on accident and sickness insurance. [41]

III. Case Law

1. *Defining the Risk: Proximate Cause*

The most frequently litigated insurance problems continue to involve the interpretation or construction of insurance contracts, especially the definition of the risk, and the related problem of whether the damage was proximately caused by a risk which was insured against.

In automobile insurance cases, the problem most frequently centres around the definition and scope of such terms as "collision," "upset," "use" or "operation of a motor vehicle." For example, in *Woodman v. Yorkshire Insurance Co.* [42] a tractor slid into a frozen slough and sank. It remained slightly tilted, but the treads were never lifted off the ground or ice. The court held there was no "upset." However, in *Ploughman v. Yorkshire Insurance Co.* [43] a tractor slid off a trailer when it was temporarily tilted. The court held there was an "upset" although the trailer did not overturn. The court held that "upset" meant something less than overturning.

In both cases, the courts appear to be unduly concentrating on an imaginary inherent definition of words, and do not articulate any test such as what would reasonable men or reasonable insureds or insurers have in mind.

In *British American Oil Co. v. Royal Exchange Assurance,* [44] the insured claimed under a general liability policy. The plaintiff refines and distributes petroleum products. The plaintiff's driver pumped 2,000 gallons of fuel oil into half of a customer's tank in spite of the fact that he saw it contained a brownish foreign substance. The plaintiff's claim arose from the customer's claim for damage to the fuel oil. The defendant insurer

[40] An Act to Amend the Insurance Act (1), Man. Stat. 1968 c. 34.
[41] An Act to Amend the Insurance Act (2), Man. Stat. 1968 c. 35.
[42] 66 W.W.R. (n.s.) 64 (Alta. 1968).
[43] 61 W.W.R. (n.s.) 569, [1967] Ins. L.R. 196, ¶ 1-188 (B.C.).
[44] [1968] Ins. L.R. 257, ¶ 1-203 (Ont. High Ct.).

alleged that this claim fell within the exclusion clause in the insurance contract which excludes "claims arising out of the ownership, use or operation . . . of any self-propelled land motor vehicle." Evidence showed that the pump and hose used to deliver the fuel oil were attached to the tandem part of the truck. The court held that the exclusion section applied in view of the facts.

In *Walker v. Blakeley*,[45] an automobile was stolen by a member of the owner's household. A collision occurred while the thief was driving. The insurer claims that this falls within the exclusion for theft contained in the policy. The court held that the collision was the *causa causans* and the theft an anterior event, a *causa sine qua non.*

In another recent case, *Wheeler v. B. A. Assurance Co.*,[46] the insurer claimed that driving into a river when the driver was fleeing from the police was not an accident within the meaning of the policy.

Not much by way of general rules can be gleaned from these cases, except to say the courts do not always invoke the *contra proferentem* rule.

In life insurance, disputes frequently involve the definition of "accidental bodily injuries" or "accidental death" or some similar phrase. Usually, the cases involve difficult questions of causation. Typically the deceased also has suffered from some disease, and it is difficult to determine what was the principal cause of death. Such a case was *Milashenko v. Co-operative Fire & Casualty Co.*[47] The insured, a farmer, was covered against "injury or loss of life . . . resulting from accidental bodily injuries due to external force or violence." The policy expressly excluded "injuries fatal or non-fatal, where there is no evidence of injury."

The insured had left a can of poisonous insecticide standing in the sun for several hours. When he went to resume his spraying, he accidently inhaled the fumes which arose from the can of warmed insecticide as he opened it. He immediately experienced pains in his chest, faintness and a choking sensation. He died a few hours later. An autopsy was performed which showed the insured died of coronary artery thrombosis. The insured had no record of heart trouble and was unaware when he died that he had suffered a heart attack. There was conflicting testimony as to the probable time of the heart attack and as to the effect of the insured's anxious state on his heart. He believed that the pain was caused by the inhalation of poisonous fumes. The question was whether severe mental stress seriously aggravated what was otherwise a mild heart attack. The majority held that there was no "bodily injury" and furthermore, even if the inhalation of fumes was an "accident" within the meaning of the policy, the plaintiff had failed to establish that death had been caused by it. Even if the insured could have survived his attack but for the mental stress, the majority held that it was the recurring severe pains which gave rise to the fear, anxiety and re-

[45] 63 W.W.R. (n.s.) 577, 67 D.L.R.2d 613 (Man. 1968).
[46] [1968] CAN. CURRENT L. 551 (N.S.).
[47] 1 D.L.R.3d 89 (Sask. 1968).

sultant stress, although the deceased thought his condition was caused by the inhalation.

The dissenting judge held that the evidence clearly established that the insured believed he was suffering from the effects of poison which caused his anxiety. He thus upheld the finding of the trial judge that death would not have occurred but for the anxiety created by the accident and therefore the accident was the proximate cause of death.

In *Re Pinder*,[48] a healthy man with a good job who was an experienced hunter disappeared on a hunting trip. Both parties admitted the death of this insured. The court held that the claimants had not satisfied the onus on them to show "accidental death."

In a recent fire insurance case, an Ontario Supreme Court judge had to decide whether a dry stone retaining wall came within the extended coverage for "fences . . . garden improvements and decorations." As a result of a fire on the adjacent property, water flowed down the slope and through the retaining wall where it froze and damaged the wall. Mr. Justice Haines in *Lahey v. Hartford Fire Insurance Co.*,[49] applying the cardinal rule of construction that plain words shall be given their plain meaning, held that "a reasonable underwriter and a reasonable insurer" would not consider this retaining wall a fence. "[A] fence as used in this insurance policy refers to a structure which encloses wholly or partially some piece of property so as to impede ingress and egress. It may be composed of anything so long as it creates a line of obstacle serving this purpose."[50] The reader may ask what has become of the *contra proferentem* rule and what about whether the reasonable insured would consider this retaining wall a fence.

In *Young v. Dale & Co.*,[51] the insured claimed under a voyage insurance policy covering the M.V. "Triangle Express." After completion of the voyage, the vessel was tied to a wharf and eventually sank at its moorings. The vessel was raised and sent by truck to Vancouver for repairs. The defendant's agent in a letter agreed to consider that "underwater damage" referred only to damage to those parts of the hull that were normally underwater, and not to damage caused to the vessel by the fact that it was underwater. The court held it must interpret the letter in view of the knowledge of the defendant at the time the letter was written. At that time the vessel had sunk. If the defendant wanted to limit its admission of liability it could have said so. " 'Underwater damage to the hull' is easy to write."[52]

In another recent marine insurance case, *J. L. Fisheries Ltd. v. Boston Insurance Co.*,[53] Mr. Justice Dubinsky examined the history of "Inchmaree

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[48] [1968] Ins. L.R. 257, ¶ 1-204 (Ont. High Ct.).
[49] [1968] 1 Ont. 727, 67 D.L.R.2d 506 (High Ct.).
[50] *Id.* at 728, 67 D.L.R.2d at 507.
[51] [1968] Ins. L.R. 243, ¶ 1-200 (B.C. Sup. Ct.).
[52] *Id.* at 245.
[53] 69 D.L.R.2d 18 (N.S. Sup. Ct. 1968).

clauses." While apparently accepting the distinction made by Justice Kennedy in *Jackson v. Mumford*[54] between latent defects and weakness of design, on the evidence he found that the damage was caused by a "latent defect in the machinery."[55]

Often in these cases, the dispute largely centres around the evidence. Such a case was *Dekeyser's Tobacco Plantation Ltd. v. Simco Insurance Co.*,[56] where a barn roof collapsed. The insurer defended a claim brought by the insured on the grounds that the damage was caused by snow and ice and such loss was excluded by the policy. The plaintiff argued that the damage was caused by high winds. The court, after reviewing the evidence, found that the damage was not caused by accumulated ice and snow.

In the same way in *Paul's Hauling Ltd. v. London & Edinburgh Insurance Co.*,[57] the question of whether there was a renting or leasing, and whether a trailer was being operated "exclusively in the interests of the Named Insured," turned largely on the facts proved and the proper inference to draw from them.

2. *Agents—Misrepresentation*

The problem of who should suffer as between the insured and insurer for what is essentially the mistake or wrongdoing of an insurance agent is one which continues to challenge the courts. The problem is inevitable, given the present commercial practice in Canada where the general public does not "negotiate" a contract of insurance directly with the insurance company. Typically, a person seeking insurance goes to an independent agent who may represent one or several companies.

Even if the potential insured is aware of and is trying to meet the standard of *uberrima fides*, unless he is unusually intelligent and trained in the law, he will not always appreciate what information he is required to disclose. The need to have contracts of fixed and certain meaning has resulted in application forms which are, to laymen, phrased in somewhat difficult and unusual language. The agent anxious to conclude a contract does not always act in the best interest of either the insured or insurer. Deliberately in bad faith, or negligently, he tends to minimize those things which might prevent or delay the granting of insurance to the applicant.

Frequently, to save time, the agent will ask the required questions orally and write in the applicant's responses himself. In rare cases the agent will deliberately write in the wrong answers. He will then have the applicant sign the application form, which the applicant does without reading it. However, more often if asked what a question means, he will "fudge" in order that the applicant can give an answer satisfactory to the insurer.

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[54] 19 T.L.R. 18 (K.B. 1902).
[55] 69 D.L.R.2d at 29.
[56] [1968] Ins. L.R. 277, ¶ 1-211 (Ont. High Ct.).
[57] [1968] Ins. L.R. 280, ¶ 1-212 (Man. 1968).

The ground rules established by the legislature in Ontario (and they are similar in the other provinces) vary depending on the type of insurance involved. In the case of fire insurance, statutory condition 1 provides that the contract is void if the applicant "misrepresents or fraudulently omits to communicate any circumstance that is material . . . ." In automobile insurance, section 203 provides that the insured's right to recover indemnity is forfeited if an applicant "knowingly misrepresents or fails to disclose in the application any fact required to be stated therein." And in life insurance, section 149 requires the insurer to disclose "every fact within his knowledge" that is material.

The mental element seems to vary from one type of insurance to another. Therefore, the cases have to be used as authority with some care, carefully distinguishing with what type of insurance the case deals.

In automobile insurance, the courts have interpreted the phrase "knowingly misrepresents" to mean to have knowledge of the true answer to the question, whether or not the applicants know or realize that there is misrepresentation in the application form that they have signed. That is, in the typical case, they cannot rely upon the fact that they did not read the application form and did not know a misrepresentation had been made.

The typical interpretation of "knowingly misrepresents" is illustrated by the trial judgment in *Blair v. Royal Exchange Assurance*, [58] although there is dicta in the Court of Appeal [59] which may throw this doctrine into doubt. In that case, the father of the owner took out insurance in his own name. The agent knew the automobile was owned by the son and not the father. The father was unaware that the application contained misrepresentations and signed the application form without reading it. The trial judge held on the facts that in the completion of the application for insurance the agent was not the agent of the insurer, but was the agent of the applicant, and the insurer is not charged with the knowledge of misrepresentations to which the agent was party. [60] The court also held that, even though the applicant was unaware of the misrepresentations, they were "knowingly" made, as the true facts were within his knowledge when he signed the application. In any event, even if there were misrepresentations, the insurer could not raise them in a suit brought by an injured third party. In the Court of Appeal, the appeal was dismissed, but in doing so the court said the following salient point should be emphasized: "That there was no conscious misrepresentation" [61] as far as the father and son were concerned. Whether this was meant to suggest that the test used by the trial judge in determining whether there was "knowingly misrepresentation" was wrong, or whether it was just meant

[58] 63 W.W.R. (n.s.) 428, 67 D.L.R.2d 420 (Man. Q.B. 1968).

[59] 65 W.W.R. (n.s.) 511, at 512, 69 D.L.R.2d 340, at 341 (Man. 1968).

[60] Often the courts seem to ignore the provisions in the acts such as §§ 189 and 201 of the Ontario act which seem to say that an agent will not be deemed to be an agent of the insured.

[61] 65 W.W.R. (n.s.) at 512, 69 D.L.R.2d at 341.

to show that the insured were innocent in a non-legal sense and so "justice" was on their side, is not clear. In any event it is dicta, since the court held that under section 227(4) of the Insurance Act [62] the defendant was precluded from denying its liability vis-à-vis third parties.

Recently, the Supreme Court of Canada has upheld a judgment of the Quebec Court of Queen's Bench, Appeal Side, which goes some way to protect the insured when he has relied on the explanation of the agent as to the meaning of questions in the application form. In *Compagnie Equitable d'Assurance Contre Le Feu v. Gagne*, [63] the defendant automobile owner approached Romain Filion, an insurance agent, with a view to obtaining third-party liability insurance. Filion took one of the application forms supplied by the plaintiff and began himself to write down the defendant's answers to the questionnaire contained in the application. One of the questions required the applicant to set out "[d]etails concerning all claims made by the applicant or against him, as well as all damages resulting from accidents or other losses suffered by him, as a result of the possession or use of any automobile during the course of the last three years." [64]

After the question was read to him, the defendant told the agent that he had two accidents in the prior three years. The agent told the defendant that he did not have to reveal these two accidents, since the first had been paid for with his own money, and the second did not result in damage to third parties, such damage comprising the sole purpose for which he was now applying for coverage.

Following a subsequent claim, counsel for the plaintiff informed the defendant that, because of his statements concerning previous accidents, the plaintiff was denying liability and tendering a refund of his premium. The plaintiff then instituted an action seeking to have the contract of insurance annulled.

The Quebec court held that the agent either by express or implied mandate was authorized to cover the applicant and to furnish him with explanations concerning the interpretation to be placed on any question asked by the company. The court rejected the argument that, since the question presented no ambiguity, the defendant ought not to have relied on the agent's interpretation. They said such an argument could apply only against a lawyer or a well-informed person, that is, a person whose good faith could be questioned. It would seem the same result could be reached in the common-law provinces using equivalent concepts of agency.

However, where the insured has not inquired of an agent what something means or whether something should be disclosed, the courts continue to find misrepresentation or concealment. They do this in spite of the fact that the insured has not been in bad faith, but has acted innocently in error (in

[62] MAN. REV. STAT. c. 126 (1954).
[63] 58 D.L.R.2d 56 (Qué. 1965), *aff'd* 67 D.L.R.2d 761n. (Sup. Ct. 1968).
[64] 58 D.L.R.2d at 59.

those areas where the statute does not call for fraud as in Ontario fire insurance provision). *Ménard v. Transportation Insurance Co.*[65] is the most recent example. The standard continues to be, not what a reasonable applicant would think material or needed to be disclosed, but what a typical insured would want to know.

3. *Materiality*

Representations, like breaches of conditions, are only significant if they are material. What is material is a question which also continues to concern the courts. In *Reid v. Prince Edward Island Mutual Fire Insurance Co.*,[66] at least two of the judges in the Prince Edward Island Court of Appeal indicated that vacancy was not a change material to the risk within the meaning of statutory condition 4.[67] However, this was just dicta, since the court held that, in view of the agent's knowledge of the vacancy at the time of the renewal of the fire insurance contract, there was not a change in the building's circumstances, whether it was material or not. The court referred to *Davidson v. Laurentian Insurance Co.*[68] and *Danielson v. Union Marine & General Insurance Co.*[69] They distinguished the latter case on the fact that there was no one to look after the building which, therefore, made the vacancy material.

In an automobile insurance case, the Quebec Queen's Bench, Appeal Side, had to decide whether registration was material to the risk. In *Wawanesa Mutual Insurance Co. v. Goupil*,[70] the plaintiff purchased on January 29, 1964, a new motor vehicle giving his old one in exchange. He informed his insurer, the defendant, who prepared an endorsement to the policy substituting the newly acquired car for the old, effective January 29. On January 30 the vendor sent the necessary transfer documents to the registry, and registration was completed on February 10. On February 9 the plaintiff was involved in an accident. The defendant resisted a resulting claim on the ground that the plaintiff was not the registered owner at the time of the accident. The court dismissed the defendant's appeal, holding that registration did not change the insurable interests of the true owner, nor did it affect the nature and extent of the risk.

4. *Insurable Interest*

The Saskatchewan Court of Appeal, in *Zimmerman v. St. Paul Fire and Marine Insurance Co.*,[71] has, like the Supreme Court of Canada,[72] given

[65] [1967] Qué. R. Prat. 430 (C.S.).
[66] 66 D.L.R.2d 727 (P.E.I. 1968).
[67] *Id.* at 734-35.
[68] [1932] Sup. Ct. 491, [1932] 2 D.L.R. 750.
[69] 17 W.W.R. (n.s.) 655, [1956-60] Ins. L.R. 35, ¶ 1-216 (Alta. Sup. Ct. 1956).
[70] [1968] Qué. B.R. 12.
[71] 1 D.L.R.3d 277 (Sask. 1968).
[72] Guarantee Co. of North America v. Aqua-Land Explorations Ltd., [1966] Sup. Ct. 133, 54 D.L.R.2d 229 (1965).

a narrow and restricted definition to insurable interest. The decision of both courts illustrate that "insurable interest" has become somewhat of a shibboleth which is defined and applied by the courts without too much concern with the function or purpose of this concept. In the *Aqua-Land* case, no indication is given that the Court was concerned with what was fair and reasonable to imply into the insurance contract (what you can assume the parties intended), or that they were concerned with whether the insured had misrepresented his interest. Nor did they attempt to relate the need for insurable interest to any public interest, such as to discourage arson or gaming. Instead, insurable interest was defined in the abstract. Somewhat the same attitude prevailed in the *Zimmerman* case. The plaintiff insured and one Juber owned all the shares equally in a provincial corporation. The company was the registered owner of a parcel of land on which was situated the insured building. The company had been inactive for years, and in 1957 it was struck off the register, apparently for non-payment of fees. The plaintiff wanted to protect his interest or share in the building; accordingly, he took out in 1965 a policy with the defendant insurance company in his own name. The building was totally destroyed by fire on April 15, 1966. The court dismissed the plaintiff's claim because he had no insurable interest. As pointed out by Justice Maguire, the same result might have been arrived at on the grounds of misrepresentation and statutory condition 2. However, the main thrust of the judgment seems to be that shareholders have no insurable interest in property owned by the company, and, independent of any question of misrepresentation, cannot claim under an insurance contract.

5. *Relief from Forfeiture*

Two recent Saskatchewan cases dealt with the relief against forfeiture provision which is section 62 of the Automobile Accident Insurance Act.[73] This section is almost identical with section 94*b* of the Ontario act, and there are similar sections in the other provinces. The cases would be interesting throwbacks to the legal sophism of a by-gone era if they were not a serious abdication of judicial responsibility. In the first case, *Presco Industrial Ltd. v. Saskatchewan Government Insurance Office*,[74] the insured did not commence action to enforce the insurance contract within six months next after the happening of the loss or damage.[75] Mr. Justice Tucker allowed plaintiff insured's application for leave to commence an action.[76] The Saskatchewan Court of Appeal unanimously allowed the appeal ruling that section 62 only gives the court jurisdiction:

> [T]o grant relief on equitable grounds for imperfect or non-compliance by the insured with those statutory conditions which impose upon the insured

[73] SASK. REV. STAT. c. 409, § 62 (1965).
[74] 61 W.W.R. (n.s.) 637, 65 D.L.R.2d 120 (Sask. 1967).
[75] SASK. REV. STAT. c. 409, § 36 (1965) statutory condition 14.
[76] 60 W.W.R. (n.s.) 489, 62 D.L.R.2d 495 (Sask. Q.B. Chambers 1967).

> a requirement with respect to a loss, and when the imperfect or non-compliance with such requirement may result in the forfeiture or avoidance of the insurance or benefits. Statutory condition 14 is not such a condition; it does not work a forfeiture or avoidance; *it does not bar any right—it only bars a remedy.* [77]

In the second case, *Sawyer v. Saskatchewan Government Insurance Office*,[78] Justice Johnson followed the reasoning of the Court of Appeal in the *Presco* case and held section 62 did not give the court jurisdiction to relieve against failure to comply with the written notice requirement of section 48(2) (notice was given verbally within fourteen days). The court held that section 48(2), like statutory condition 14, only bars a remedy—not a right. This decision has now been upheld on appeal. [79]

6. *Third-Party Claims—The Insurance Company as Third Party*

The statutory provisions allowing third parties to sue insurers directly and the practice of insurers of controlling the defence in actions brought against their insureds continue to raise difficult problems for the courts.

In *London Assurance v. Jonassen*,[80] the plaintiff claimed reimbursement from its insured of the amount paid in settlement of a third-party claim. The defendant was insured by the plaintiff under a policy of motor vehicle liability insurance. The plaintiff settled with the third party after entering into a non-waiver agreement with the defendant which provided, *inter alia*, "[t]hat the Insurer may settle and pay any or all claims arising from the said occurrence without the requirement of a judgment against the undersigned." [81] The plaintiff claimed that at the time of the accident the defendant was in breach of a statutory condition, since he was driving while under the influence of intoxicating liquor. The defence, accepted in the court below, was that the liability of an insured to reimburse his insurer arose only where the third party has secured a judgment against the insured.

The court held that the whole basis of the insured's liability was section 223(8), and the securing of a judgment by the third party against the insured was:

> [O]nly evidence by means of which liability under the subsection and its amount are ascertained. They are matters of fact which would not give rise to liability for reimbursement in the absence of subsection (8), the essential purpose of which is to provide indemnity to the insurer against a loss it has been compelled by the statute to assume despite the insured's breach of the insurance contract. . . . [P]roof was waived by the parties and the settlement rather than the judgment evidenced the loss the plaintiff had to assume. [82]

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[77] 65 D.L.R.2d at 122 (emphasis added).

[78] 62 W.W.R. (n.s.) 577 (Sask. Q.B. Chambers 1967).

[79] 66 W.W.R. (n.s.) 127 (Sask. 1968). The reasoning has also been accepted in Nova Scotia. *See* Bacon Co. v. Orion Ins., 67 D.L.R.2d 75 (N.S. Sup. Ct. 1968).

[80] [1968] 1 Ont. 487, 66 D.L.R.2d 692.

[81] *Id.* at 488, 66 D.L.R.2d at 693.

[82] *Id.* at 490-91, 66 D.L.R.2d at 695-96.

In *Lere v. Hartford Accident & Indemnity Co.*,[83] the respondent had recovered judgment from the driver and registered owner of an automobile which was in fact owned by the driver's mother, the named insured. The insurer argued that, judgment having been given against the driver based on pleadings alleging that the driver was the owner, it was not open to the plaintiff in an action against the insurer under section 242(1) of the Insurance Act[84] to challenge that judgment and allege that in fact the mother who was insured by the appellants was the true owner. The British Columbia Court of Appeal dismissed the appeal. They held that the fact of ownership was not admitted or adjudicated upon, and that ownership was an incidental fact which was immaterial and irrelevant to the plaintiff's cause of action. Plaintiff's claim was based solely against the son on his negligent operation of the motor vehicle. No claim was made against the son *qua* owner.

The question concerning the circumstances under which the insurance company can be added as third party, and the effect of so adding it, has also been before the courts. In *Duff v. Perkins*,[85] there was an application to strike out third-party proceedings. The insurer relied on a provision of the insurance contract which said "[n]o action shall lie against the Company unless, as a condition precedent thereto, . . . the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company."[86] The insured argued that the company had repudiated the policy (by denying liability), and therefore could not take advantage of the clause on which it relied. The senior master allowed the order on the ground that denial of liability under the contract "does not amount to a repudiation of the policy itself in the sense that the very existence of any binding contract is being disputed."[87]

In *Mitt v. Hendricksson*,[88] the insurer took advantage of the Ontario Insurance Act and was added as a third party. The insurer applied to vary the judgment obtained by the plaintiff so that it would be relieved of direct liability to pay the plaintiff's claim and costs. The court deleted that part of the judgment which gave judgment against the third party for the amount of plaintiff's claim. The court said that "[u]nder the provisions of section 223 of the Insurance Act it will have to pay them in any event."[89] As to costs, the court held that the third party must take all responsibilities that go with an unsuccessful defence of an action as between it and the plaintiff relating to costs which it caused the plaintiff to incur (that is, where the

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[83] 64 W.W.R. (n.s.) 380, 69 D.L.R.2d 704 (B.C. 1968).
[84] B.C. REV. STAT. c. 197 (1960).
[85] [1968] 2 Ont. 1 (Sup. Ct. Master's Chambers).
[86] *Id.* at 1-2.
[87] *Id.* at 3.
[88] [1968] 1 Ont. 373 (High Ct. 1967).
[89] *Id.* at 374.

defendant insured does not enter a defence or appear at the trial of an action).

In *Winfield v. Walker*, [90] the insurer under a motor vehicle liability insurance contract applied *ex parte* for an order under section 242(9) of the Insurance Act to be added as a third party to contest the liability of the driver to the appellants. The appellants submitted that this order should be set aside, on the ground that the word "insured" in section 242(9) means a named insured or someone driving with the consent of the named insured, and not, as in the case at bar, a person who may eventually be found to be an insured but to whom liability to indemnify is denied by the insurer on the very ground that he is not an "insured" within the meaning of the policy and statute because he is driving without the owner's consent. The court refused to give the term "insured" such a narrow meaning. They held that subsection 9 provides for a right to an insurer, who has denied liability, to protect itself to some extent from the limitation of defences permitted it in proceedings under subsection 1 by allowing it to be brought into the main action to defend on the merits. The purpose is to alleviate the prejudiced position that an insurer finds itself in. In order to give subsection 9 such a full meaning as to be properly concomitant to subsection 1, "insured" must be given the same meaning in both sections. Also, there is no reason to qualify the condition precedent of subsection 9 that the "insurer denies liability under a policy" in this way. The insurer denies liability whether it says "you are not a person we have agreed to cover" or "the claim against you is not one which we have agreed to cover."

The extent of the mortgagee's rights to the proceeds of a fire insurance contract was examined recently in *London & Lancashire Guarantee & Accident Co. of Canada v. M. & P. Enterprises Ltd.* [91] This was a claim by the plaintiff insurance companies for the overpayment of the proceeds of their fire insurance policies to the defendant mortgagee. Under the policies, loss was "in the usual way" payable to the mortgagees as their interests may appear, with mortgage clause attached accordingly. After the fire, with the consent and approval of the plaintiffs and the owners, the adjusters arranged to clean up and restore a portion of the damaged building. This work cost the plaintiffs 2,710.20 dollars. The mortgagees were not parties to these arrangements, and gave no verbal or written approval. The defendant later became sole mortgagee. The plaintiffs paid the defendant an amount of 62,500 dollars fixed by arbitration. They now claim an overpayment of 2,710.20 dollars. The court, in dismissing the claim, held that both under the Mortgage Act [92] and in the insurance policies the insurance proceeds were payable to defendant. The mortgagee had an absolute right to control the destination of the insurance proceeds, untrammelled by any adjustment made directly with the insured owner (mortgagor). If the insurer elects to adjust or in any

[90] 65 W.W.R. (n.s.) 176, 69 D.L.R.2d 167 (B.C. 1968).
[91] 65 W.W.R. (n.s.) 242, 69 D.L.R.2d 461 (Man. Q.B. 1968).
[92] MAN. REV. STAT. c. 171, § 8 (1954).

other way pledge disposition of the proceeds of insurance in the face of an obligation to pay such proceeds to the mortgagee, it does so at its peril.

7. *Subrogation*

The action in *Royal Insurance Co. v. Bischoff*[93] arose out of an accident in which a tank truck loaded with high octane fuel overturned on the street. A fire developed which did extreme damage to buildings and other property of many people including the defendant. The defendant was underinsured, but received the full amount of his insurance coverage from the plaintiffs. The defendant, through his own solicitors, commenced action against the trucking concern and oil company involved in ownership and operation of the truck and fuel. The plaintiffs' solicitor cooperated in the resulting negotiations with the insurers of the alleged wrongdoers, and an ultimate settlement was approved by all. The plaintiffs then claimed under section 217*b* of the Alberta Insurance Act.[94] The dispute involved the division of the funds recovered. The plaintiffs claimed that their costs should be taken off the top, and the remaining amount be divided in the proportions in which the loss or damage was borne as between them and the defendant. They contended that the defendant should not be allowed any costs, since section 217*b* subrogated them to all the rights of the insured, and the insured could not commence an action against the wrongdoer. The court held that no statute should be so construed as to take away or destroy common-law rights, except if it is clearly indicated by its wording. While the section allowed the insurer rights of subrogation, it does not take away any right of the insured to sue the wrongdoer. Hence the "costs of recovery" were the combined proper costs of the plaintiffs and defendants.

In *Sainas v. Sainas*,[95] an application was brought to set aside a writ of summons on the grounds that the plaintiff had not authorized it. The case illustrates the clearly established principle that the insurer being subrogated to the rights of the insured must bring an action in the insured's name. The insured is bound to permit this. The position between the insured and insurer is *res inter alios acto* and of no concern to the tortfeasor. Therefore, the endorsement of the writ and statement of claim in such an action are not bad merely because they do not recite the facts which show the action is brought by the insurer by way of subrogation.

8. *Meaning of Insured*

In spite of the attempt made by the various statutes to give "insured" an extended meaning in motor vehicle liability policies in order to give individuals driving with the owner's consent the same protection as owners, the New Brunswick Court of Appeal has recently given this term a restrictive

[93] 62 W.W.R. (n.s.) 502, 66 D.L.R.2d 263 (Alta. Sup. Ct. 1968).

[94] Alberta Insurance Act, ALTA. REV. STAT. c. 159 (1955) *as amended*, Alta. Stat. 1957 c. 34, § 30 (subrogation).

[95] 66 D.L.R.2d 753 (B.C. Sup. Ct. Chambers 1968).

meaning. In *Nadeau v. Insurance Corp of Ireland Ltd.*,[96] the plaintiffs were successful in obtaining judgment in a personal injury negligence action against the driver of a motor vehicle. The driver was the daughter of the owner who had a motor vehicle liability insurance contract with the defendants. The plaintiffs were injured during a ride which they had paid for and brought action against the insurer under section 211.

There was an endorsement on the policy which included the following wording:

> In consideration of a premium . . . permission is hereby given for the automobile to be used to carry passengers for compensation or hire in the business of or for the use described as follows:—
> To carry passengers for compensation or hire to and from their employment while and only while the insured himself is going to and from his employment.[97]

The court held that "the insured himself" in the endorsement must be interpreted as referring only to the owner, the named insured. Hence, indemnity was not provided under the insurance contract and no action could be brought under section 211 against the insurer.

9. *Burden of Proof*

The recent case of *LeBlanc v. MacDonald*[98] illustrates the proposition that old ideas die hard. The question before the court was whether the driver of a motor vehicle was at the time of the accident in question "under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of the automobile."[99] After an encyclopedic summary of the authorities, including the Supreme Court of Canada decision in *Hanes v. Wawanesa Mutual Insurance Co.*,[100] Mr. Justice Coffin concluded that "where the defence is of a *quasi-criminal* nature, the facts should be such as to be inconsistent with any other rational conclusion than that the evil act was in fact committed."[101] However, the judge also concluded, "[t]he burden on the insurance company is onerous, and the breach of the condition must be proved 'according to the balance of probabilities.' "[102] In two fire insurance cases involving the defence of arson reported in the last year, the trial judges successfully applied the civil burden which the Supreme Court of Canada held applicable in the *Hanes* case without reference to the special circumstances and burdens in a "quasi-criminal offence."[103]

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[96] 67 D.L.R.2d 592, [1968] Ins. L.R. 232, ¶ 1-198 (N.B. 1968).
[97] *Id.* at 595, [1968] Ins. L.R. 235, ¶ 1-198.
[98] I D.L.R.3d 132 (N.S. Sup. Ct. 1968).
[99] *Id.* at 133.
[100] [1963] Sup. Ct. 154, 36 D.L.R.2d 718.
[101] 1 D.L.R.3d at 144 (1968).
[102] *Id.*
[103] Oystryk v. Canadian Indemnity Co., [1968] Ins. L.R. 273, ¶ 1-210 (Sask. Q.B.) and Direct Inv. Ltd. v. Dom. Ins. Corp. [1968] 2 Ont. 117, 68 D.L.R.2d 278 (High Ct.).