INSURANCE

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I. AUTOMOBILE ACCIDENT INSURANCE

In the brief time since the last annual survey of insurance law was written there have been still more legislative attacks on the traditional haphazard tort-liability insurance means of compensating highway traffic victims. Once again, this time in British Columbia,[1] the legislature has refused to go as far as their own Royal Commission recommendations.[2] While academic discussion has moved on to the need for a universal all risks compensation scheme[3] and investigating committees as a routine matter recommend the abolition of tort liability and its replacement with first party accident insurance for automobile accidents,[4] legislatures, rather reluctantly, only keep pace with the suggestions of such arch-conservatives as the All Canada Insurance Federation. This reluctance to act after almost two decades of debate[5] can no longer be explained in terms of economic *argumentum in terrorem* nor more cynically in terms of a lego-insurance conspiracy and control over the legislatures. Nor can it be explained in terms of lack of parliamentary time or inertia in view of the many hours spent on the subject by various legislatures in the past few years. Perhaps the tenacity with which irrational beliefs and fears are held can only be explained in terms of some deep-seated psychological need to punish—if only symbolically—which the charade of motor vehicle negligence litigation satisfies. This obstacle to reform is one which so far has remained unexplored by the literature. Discussion has centred on whether the tortfeasor is really punished or deterred (*i.e.*, the psychological factors which influence his actions) and not the psychological need felt by those opposed to change.

However, whatever the obstacles, be they rational or irrational, econo-

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[1] An Act to amend The Insurance Act, B.C. Stat. 1969 c. 11. At the time this survey was written the Manitoba Legislative Assembly had passed Bill 56 of the Second Session, Twenty-Ninth Legislature. The Manitoba Automobile Insurance Act is enabling legislation which allows the Lieutenant-Governor in Council to establish a government-operated compulsory no-fault automobile insurance scheme. This scheme will be described in the next annual survey, once the necessary regulations have been passed.

[2] BRITISH COLUMBIA ROYAL COMM'N. ON AUTOMOBILE INSURANCE (1968).

[3] *See, e.g.*, Ison, *Tort Liability and Social Insurance*, 19 U. TORONTO L.J. 614 (1969).

[4] A recent example from the United States is the REPORT OF THE N.Y. SUPERINTENDENT OF INSURANCE ON AUTOMOBILES (1970).

[5] See A. EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM (1954).

mic or psychological, public spirited or self-interest motivated, the social and economic costs of the old system and the inadequacies of compensation continue to force change.

The legislation passed in British Columbia is almost identical to that suggested by the All Canada Insurance Federation which was specifically rejected by the Royal Commission. [6] This legislation is almost identical to the legislation which has been adopted in recent years by eight other common-law provinces and which was briefly described in the last annual survey. [7] The only difference in the legislation in British Columbia is that it specifically provides that this limited accident insurance will be a mandatory part of every automobile insurance contract in British Columbia. As in the eight other common-law provinces, this limited accident insurance is supplementary to liability insurance and not designed to replace it. Unlike the other provinces where the terms of this kind of insurance are not provided by legislation, in British Columbia they are set out as a schedule to the Insurance Act.

This accident insurance, set out in the second schedule to the Insurance Act, contains some significant differences from the protection offered in the other provinces. First of all it only covers death and total disability and not dismemberment or loss of sight. As in the other provinces there is no compensation for partial disability. The amount which can be received is slightly higher and the definition of insured persons is slightly different. In the British Columbia standard contract there is nothing which says that if the insured is the occupant of another automobile, it must be of a private passenger or station wagon type in order for him to be covered. However, perhaps the most significant difference is in the exclusions. Unlike the position in the other provinces, in British Columbia the occupants of a car whose driver is convicted of driving while under the influence of intoxicating liquor are not excluded from coverage.

II. LEGISLATION

Insurance legislation was passed in six provinces and the Yukon Territories during the provincial legislative sessions held in 1969. The most significant legislation was passed in Ontario [8] and British Columbia. [9] The Ontario Legislative Assembly passed the new uniform part on accident and sickness insurance that was passed in Manitoba in 1968 [10] and the British Columbia legislature passed both the new uniform part on accident and sickness insurance and a new part on automobile insurance similar to, but with significant differences from, the uniform act that was passed in the eight other

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[6] *Supra* note 2, at ch. 17.

[7] Baer, *Annual Survey of Canadian Law: Insurance*, 3 OTTAWA L. REV. 553 (1969).

[8] An Act to amend The Insurance Act, Ont. Stat. 1968-69 c. 53.

[9] An Act to amend The Insurance Act, B.C. Stat. 1969 c. 11.

[10] An Act to amend The Insurance Act (1), Man. Stat. 1968 c. 34.

common law provinces. In Alberta and Prince Edward Island, [11] the legislatures passed legislation relating to crop insurance, and in Saskatchewan, [12] Manitoba, [13] and the Yukon Territories [14] minor amendments were made to their respective insurance acts. Only the British Columbia and Ontario amendments will be examined in any detail, although reference will be made to similar amendments in other provinces.

1. *British Columbia*

The new compulsory automobile accident insurance has been described above. Aside from making this new accident insurance a mandatory part of every motor vehicle liability policy, [15] the British Columbia part on automobile insurance contains a few significant differences from the uniform act passed in eight other provinces. For example, the "assigned risk plan" is given statutory recognition and every insurer licensed to issue motor vehicle liability policies is required to subscribe to the assigned risk plan. [16] The "assigned risk plan" is defined "as presently constituted and operated by insurers licensed to issue motor vehicle policies," [17] so it could be argued that insurers are not bound to subscribe to any modifications and alterations in the plan. However since the act elsewhere [18] refers to the filing with the superintendent of amendments to the constitution, by-laws, rules and regulations of the assigned risk plan, this may just be an example of poor drafting rather than any intention to bind the insurers to the existing scheme. In providing the minimum liability insurance, the British Columbia statute distinguishes between residents and non-residents in respect to damage to property. Section 235(2) prescribes a minimum limit of 50,000 dollars per accident "against liability resulting from loss or damage to property of non-residents . . . ." There is no minimum limit for damage to property of residents. There is also an elaborate transition section [19] to determine what is excess insurance with respect to third-party direct claims since the minimum limits have been changed periodically over the past two decades. In view of the common practice of issuing insurance contracts of one year's duration such a provision will not often be referred to. There is also a provision designed for the protection of insurance agents in respect of their commissions. [20]

However, potentially the most significant difference is the establishment of a "British Columbia Insurance Board" with powers to investigate all

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[11] The Hail and Crop Insurance Act, Alta. Stat. 1969 c. 42; An Act to amend an Act to Provide for Crop Insurance, P.E.I. Stat. 1969 c. 16.

[12] An Act to amend The Automobile Accident Insurance Act, Sask. Stat. 1969 c. 5.

[13] An Act to amend The Insurance Act. Man. Stat. 1969 (2d Sess.) c. 15.

[14] An Ordinance to amend the Insurance Ordinance, Y.T. Ord. 1969 (3d Sess.) c. 2.

[15] An Act to amend The Insurance Act, B.C. Stat. 1969 c. 11, § 36 adding new § 235A.

[16] *Id.* adding new § 218(5).

[17] *Id.* adding new § 217(1)(*a*).

[18] *Id.* adding new § 218(6).

[19] *Id.* adding new § 241(17).

[20] *Id.* adding new § 250Q.

matters respecting automobile insurance in British Columbia.[21] The board, along with the superintendent, is given powers to prohibit rates which are excessive, inadequate, unfairly discriminatory or otherwise unreasonable. This stems from the Royal Commission's findings that not all insurance rates in British Columbia were justified. In the Commission's words: "Faulty judgment and inadequacies in rate-making techniques, to a considerable degree avoidable, resulted in some erratic pricing of automobile insurance."[22] As well, the statute provides that the Lieutenant-Governor in Council may establish a fund to be named the British Columbia Automobile Insurance Fund to provide government automobile insurance in the event that insurance is not otherwise obtainable at a cost that is, in the opinion of the Lieutenant-Governor in Council, commensurate with the risk.[23]

The new uniform part on accident and sickness insurance passed in British Columbia in 1969 is identical to that passed in Ontario, and it is discussed below in relation to the Ontario statute.

In addition to these two new parts, the 1969 act to amend the Insurance Act also contains amendments similar to the amendments made in Ontario in 1966. There have been similar amendments in seven other provinces and they were described in the last annual survey.[24] That is, the sections now found in various parts of the act relating to the contents of the policy, appraisals, relief from forfeiture, and waiver have been transferred to part II which contains the general provisions respecting insurance.[25]

2. *Ontario*

Although no empirical study has been undertaken, it is this reviewer's impression that over half the amendments made each year to various provincial Insurance Acts are not substantive, but are designed to correct misprints, drafting errors or oversights. Certainly this has been true in Ontario in recent years. The new part on automobile insurance was twice amended before it was proclaimed and in 1969 the legislature had to correct misprints, oversights or poor drafting in sections 62(4)(*c*), 204, statutory condition 4(8), 226*b*(2), 226*c*(2), 226*e*.[26] In spite of this effort, it is safe to say that sections 226*b*(2) and 226*c*(2) will remain incomprehensible to most readers.

Aside from these corrections, the 1969 statute also raises the minimum motor vehicle liability insurance to 50,000 dollars[27] and amends sections

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[21] *Id.* adding new § 250M.

[22] 2 BRITISH COLUMBIA ROYAL COMM'N ON AUTOMOBILE INSURANCE at 491.

[23] An Act to amend The Insurance Act, B.C. Stat. 1969 c. 11, adding new § 250P.

[24] Baer, *supra* note 7, at 557.

[25] The above description is only intended to touch some of the main features of the 1969 amendments. Space does not permit an exhaustive description of all the amendments.

[26] An Act to amend The Insurance Act, Ont. Stat. 1968-69 c. 53, §§ 2, 10, 12, 13, 14.

[27] *Id.* § 11. *See also* An Ordinance to amend the Insurance Ordinance, Y.T. Ord. 1969 (3d Sess.) c. 2, § 2 for a similar amendment in the Yukon legislation.

119(2), 131 and 132 relating to insurance on the premium note plan.[28] The new section 119(2) now refers to section 115(73) of the Corporations Act which in turn refers to section 27 of the Insurance Act. The effect of this legislative ping-pong game is to allow insurance covering the risks specified in section 27 of the Insurance Act on the premium note plan. A definition of "rateable proportion" has been added to section 226*j*.[29] The effect of this would seem to make the method of calculation for the contribution of automobile insurers different from that for fire insurers under section 114.

Perhaps the most significant thing about the new uniform part on accident and sickness insurance which has now been passed in Manitoba, British Columbia and Ontario is the attempt to bring various provisions in line with the uniform life insurance part. For example, the new definition sections found in section 227 of the Ontario act[30] are now almost identical to the definitions in section 137 for life insurance. There seems to be no good reason why in Ontario this duplication should not be eliminated and more defiitions put in section 1. They are repeated in the various uniform acts because some provinces have enacted separate acts for each kind of insurance. Also, section 242 relating to the capacity of minors, sections 240 and 241 relating to insurable interest, section 243 relating to the effect of misrepresentation and non-disclosure, section 248(2)—(5) relating to declarations in invalid wills, section 249 relating to the designation of heirs, next of kin and estate as beneficiaries, section 251 relating to assignments and documents affecting title, section 251*a* which makes insurance money free from creditors, section 251*b* relating to the right of a group person insured to enforce the contract in his own name, section 251*c* relating to simultaneous deaths, section 251*d* allowing the insurer to make payment into court in certain doubtful cases, sections 251*e* and 251*f* relating to situations where a beneficiary is a minor or disabled, section 251*i* allowing action in Ontario by an Ontario resident regardless of the place where the contract was made, section 251*j* relieving the insurer from liability for any default, error or omission in giving or withholding information, and section 251*l* the relief from forfeiture provisions are all equivalent to sections in the life insurance part. Some of these sections are entirely new while others are changes from the old act.

As well as these changes which adopt the life insurance provisions, there are some minor amendments to statutory conditions 1, 2, 9 and 13 of section 235 and section 236(3) which are not substantive but are primarily designed for clarification. Section 235 now provides that the statutory conditions apply to "other than a contract of group insurance" and section 237 now includes, in the circumstances when the statutory conditions do not have to be included,

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[28] *Id.* §§ 7, 8, 9.

[29] *Id.* § 15. A similar amendment has been made in Manitoba; An Act to amend The Insurance Act, Man. Stat. 1969 (2d Sess.) c. 15, § 10.

[30] An Act to amend The Insurance Act, Ont. Stat. 1968-69 c. 53, § 16.

a policy of accident insurance of a non-renewable type issued for a term of six months or less. Section 238 now provides that the insurer may terminate for non-payment of premium upon giving ten days notice and section 239(2) now provides that the effect of the nonpayment of a negotiable instrument or other written promise to pay is that "the premium shall be deemed never to have been paid" rather than "voidable at the option of the insurer" as under the old act. This means presumably that the insurer must give the ten day notice required by section 238 to terminate.

In the case where the insured misstates his age, section 247 now gives the insurer the option of either adjusting the premium or the benefits. Under the old section 245 (as in the life insurance part) there was no option, the benefits were just adjusted. Now, apparently, if the insured cannot afford to pay the additional premium, the insurer could terminate.

III. Case Law

1. *Defining the Risk: Proximate Cause*

In determining the obligations of an insurance company, it is still an accepted starting point to say that the relationship between the insured and the insurer is one of contract. Whether a particular loss is covered by insurance is decided by looking at the contract and construing it, using the standard techniques of contract construction. Of course, it has long been recognized that an insurance contract is somewhat special in that the parties are in an unequal bargaining position. At one time the emphasis was on the uninformed and therefore weak position of the insurer (hence the doctrine of *uberrima fides*), although in modern times the emphasis has shifted to the unfortunate and helpless position of the insured (hence the invocation of the *contra proferentem* rule). Coupled with this has been a fairly active interference by the legislature to impose certain mandatory conditions on the parties and provide the public with a minimum of protection. However the basic thrust of our thinking continues to be of contract and its construction. That this in practice means deciding what reasonable insurance counsel and insurance company executives would understand by a policy, rather than what the average man in the street has assumed, does not seem to trouble the courts at all. Perhaps the time has come to recognize that this conceptual framework is misleading, leads to the wrong emphasis, and occasionally bad results. Perhaps what is needed as a starting point is some positive obligation on the insurance industry and individual insurers to effectively inform the public of what they are buying. This would be something more than just the *contra proferentem* rule which only comes into play when the judge sees an ambiguity—something which presumably depends on his experience and knowledge of insurance matters. Insurers should not be allowed to hide behind obscure, archaic, highly technical language, albeit perfectly unambiguous to those steeped in the history of insurance litigation. The em-

phasis should not be on what the contract says, but rather on what the insured has been effectively told.

That the *contra proferentem* rule may not be enough is illustrated by such a case as *Lahey v. Hartford Fire Insurance Co.* [31] where, as we noted in the last annual survey, [32] Mr. Justice Haines invoked "the cardinal rule of construction that plain words shall be given their plain meaning" [33] in order to find that damage to a retaining wall was not covered by "building fixtures and fittings, frescoes, plate glass, fences, walks, flag poles, pergolas, garden improvements and decorations . . . ." This judgment has now been affirmed on appeal.

Although the problem was correctly identified by Mr. Justice Haines, neither he nor the Court of Appeal seems willing to do much about it. As Mr. Justice Haines noted:

> The difficulty arises because in the vast majority of cases, the underwriter uses words of description of the risk and coverage designed to apply generally to what he contemplates the usual risk to be, and the average purchaser would want to cover. He never sees the particular property. The insurer accepts the policy without really examining the description and coverage and more important, without carefully examining the likely sources of loss. As a result, there arise, frequently, losses an underwriter did not intend to insure and a purchaser never really considered whether they were within the coverage. These unexpected eventualities provide a no man's land where disputes arise. The solution lies in the intelligent insurance agent who inspects the risks when he insures them, knows what his insurer is providing, discovers the areas that may give rise to dispute and either arranges for their coverage or makes certain the purchaser is aware of the exclusion. [34]

However, the solution suggested by Mr. Justice Haines is not one which either he or the Court of Appeal is prepared to impose on the insurer and its agents.

While the *contra proferentem* rule continues to benefit the insured on occasion, [35] other recent cases illustrate how our method of construing insurance contracts fails to force the insurance industry to accurately or even adequately inform the public of what insurers are selling.

In *Husak v. Imperial Life Assurance Co. of Canada*, [36] an interim assurance certificate was issued without the standard suicide clause. The person whose life was insured committed suicide and the court had to decide whether this death was covered by the contract. The trial judge [37] noted

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[31] [1969] 2 Ont. 883, 7 D.L.R.3d 315.

[32] Baer, *supra* note 7, at 562.

[33] [1968] 1 Ont. 727, at 728, 67 D.L.R.2d 506, at 507.

[34] *Id.* at 729, 67 D.L.R.2d at 508.

[35] *See, e.g.*, Hildon Hotel (1963) Ltd. v. Dominion Ins. Corp., 66 W.W.R. (n.s.) 289, [1969] Ins. L.R. 627, 1 D.L.R.3d 214 (B.C. Sup. Ct.); Daoust v. La Compagnie d'Assurances Elite Inc., [1970] Ins. L.R. 901 (Que. C.S. 1969).

[36] 72 W.W.R. (n.s.) 257, [1970] Ins. L.R. 858, 9 D.L.R.3d 602 (Sask. 1969).

[37] 67 W.W.R. (n.s.) 181, [1969] Ins. L.R. 694, 2 D.L.R.3d 228 (Sask. Q.B. 1968).

the statutory provision which allows life insurance contracts to cover the risk of suicide and held that in the absence of a suicide exclusion clause in the interim assurance certificate, that the contract "not only impliedly but expressly insures where the insured commits suicide."

The trial judgment was corrected in a didactic editorial note in the Dominion Law Reports [38] which pointed out that several leading academic text books outline two reasons for not allowing recovery on a life insurance contract in the event of suicide: 1) it would be contrary to public policy and 2) as a matter of construction an insurance contract does not cover the case where the loss results from the intentional act of the insured. The editorial note points out that the Saskatchewan statute only removes the first hurdle—only provides that such a contract will not be contrary to public policy, and has nothing to do with the second hurdle. While this argument makes the word "implied" in section 154 of the Insurance Act vacuous, it was accepted by the Court of Appeal which reversed the trial judgment. The argument that there are two distinct reasons why suicide is not generally part of life insurance coverage probably stems from Lord Atkins' judgment in *Beresford v. Royal Insurance Co.* [39] where the learned judge gives no authority for the proposition. If one looks at the authorities referred to in the standard texts [40] it is difficult to find a single case where as a matter of construction—apart from the question of public policy—a claim on an insurance contract was denied because the loss was occasioned by the insured's intentional act. All are cases where the insured's act was a crime, suicide, arson etc. and hence involved the public policy argument or were specifically covered by some statutory provision such as the Marine Insurance Act 1906, section 55 (2)(*a*). In fact, the idea that insane suicide is covered or that in Marine Insurance, jettisons are covered, can only be explained with some circumlocution if you assume such a rule of construction. In truth, if there was such a rule of construction, it must have been because of some public policy argument, and the two ideas have always been intertwined. Rule of construction is probably just another way of talking about public policy. While at one time Lord Atkin had the support of the United States Supreme Court, [41] the modern American rule is the reverse—that suicide is impliedly included unless expressly excluded. [42]

However, Lord Atkin's dicta has oft been repeated in dicta by other judges and treated by text writers as a fundamental rule of all insurance contracts. Inasmuch as life insurance companies will be allowed to do what they want, it may not seem of much significance whether suicide is impliedly included or excluded since they will expressly provide for it. Only in an occasional unusual case such as *Husak* will the question be significant. But

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[38] 2 D.L.R.3d at 229.

[39] [1938] A.C. 586, at 595.

[40] *E.g.*, E. MACGILLIVRAY, INSURANCE LAW ¶¶ 533, 534 (5th ed. D. Browne 1961).

[41] Ritter v. Mutual Life Ins. Co., 169 U.S. 139, 18 S. Ct. 300 (1898).

[42] W. VANCE, INSURANCE 560 (3d ed. B. Anderson 1951).

where it is significant perhaps the emphasis should have been on whether the company had done all that was reasonable to inform the insured that the contract did not cover suicide. If it did not bother saying that plainly in the documents, there is no reason why it should be protected. Is there any reason for allowing the insurer to rely on a rule of construction whose rationale has disappeared, and which, if anything, is likely unknown to the public and hence calculated to mislead?

The kind of approach advocated here is illustrated by the recent Ontario case of *Stevens v. Howitt.* [43] In defence to an action for damages arising out of a motor vehicle accident the defendant pleaded that the parents of the infant plaintiff signed a document under seal releasing the defendant from all manner of actions and undertaking to indemnify the defendant for any claims brought by the infant plaintiff. The agreement was delivered to the parents by the insurance adjuster. At the time neither the parents nor the adjuster thought the injuries were serious and the insurer paid fifty dollars for medical expenses in consideration for the waiver and indemnity agreement. The court pointed out that the parents had ample time to read and study the document and seek whatever advice necessary before applying their signature. However, the court did not think this was determinative and added:

> Notwithstanding that there was no misrepresentation or fraud on the part of the adjuster, in my opinion his experience and knowledge makes it incumbent upon him to take care to explain the nature and contents of the document which he is requesting persons who are inexperienced and ignorant in the area of insurance and indemnity law to sign. In my opinion, there is a very heavy responsibility in these circumstances upon the representative of the insurance company when dealing with unknowledgeable parties to see to it that the terms of the agreement itself and their ramifications are clearly understood. [44]

It may be that the case is only a manifestation of the concern that courts have traditionally shown for the protection of infants. In fact, the court went on to rule that a release given by a parent as next friend of an infant child was unenforceable because it was "so contrary to the procedures set up in our Courts for the protection of infants. . . ." [45] However the language used by the trial judge is broad enough to indicate a tendency to protect all of the public and to put a special onus on the representatives of insurance companies to carefully explain the meaning and ramifications of documents they request persons to sign.

Of course, even within the present framework, the courts can go some way in protecting the public if they are so inclined. It is after all the rare case where the contract has words so plain that the court has no choice. To what advantage the courts have used their discretion is illustrated by some recent cases involving the frequently litigated question of what is the proper meaning to be attributed to the word "accident" as it appears in various kinds

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[43] [1969] 1 Ont. 761, 4 D.L.R.3d 50 (High Ct.).
[44] 4 D.L.R.3d at 52.
[45] *Id.*

of insurance contracts. In particular, the question is whether loss which results from negligent or careless conduct of the insured or even deliberate conduct with unforeseen results can be an accident. In several cases during the past year, courts in several provinces have continued to include such negligent or careless conduct within the meaning of "accident." For examples, see *Straits Towing Ltd. v. Washington Iron Works* [46] where the British Columbia Supreme Court held the collapse of a crane following negligent repairs by the defendant insured was an accident entitling it to claim indemnity from the third party insurer, and *Trynor Construction Co. v. Canadian Surety Co.* [47] where damage to a trailer resulting from a bridge collapse was held by the Nova Scotia Supreme Court to be accidental, even though the plaintiff's employees knowingly drove over the bridge when the weight of the trailer and load was far in excess of that permitted by highway regulations. This decision was affirmed on appeal [48] and the appeal division's discussion of *Crisp v. Delta Tile & Terrazzo Co.* [49] illustrates that it is sometimes a fine line between negligence or carelessness and "a deliberate courting of the risk with the knowledge of the risk and with an element of reckless conduct. . . ." On the other hand, in *Erie Concrete Products Ltd. v. Canadian General Insurance Co.* [50] the Ontario High Court held that a vendor's liability for defective pipes was not within a "property damage endorsement" to a liability insurance contract which read "for damages because of damage to or destruction of property caused by accident." However, the judgment is based not only on the finding that the defect in manufacturing was not an accident, but also on the finding that the damage claimed was not damage to property, but the cost of equipment, material and labour required to rectify the situation which arose when the pipes proved unsatisfactory. [51]

Often the question of defining the proper scope of the risk covered under the insurance contract is discussed in terms of causation. The question is traditionally phrased, was the loss proximately caused by a risk insured against? In the last annual survey [52] the case of *Milashinko v. Co-operative Fire & Casualty Co.* [53] was noted as an example of how in life insurance it is often difficult to determine whether the deceased died as a result of accidental bodily injuries. That was the case where the deceased died of a heart attack following the accidental inhalation of poisonous insecticide fumes. The majority in the Saskatchewan Court of Appeal held there was no "bodily injury" and furthermore, even if the inhalation of fumes was an "accident," the plaintiff had failed to establish that death had been caused by it. The

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[46] [1970] Ins. L.R. 982 (B.C. Sup. Ct.).
[47] [1969] Ins. L.R. 787 (N.S. Sup. Ct.).
[48] 10 D.L.R.3d 482 (N.S. 1970).
[49] [1961] Ont. W.N. 278, [1961-65] Ins. L.R. 228.
[50] [1969] 2 Ont. 372, Ins. L.R. 692, 5 D.L.R.3d 397 (High Ct.).
[51] *See also* Poole-Pritchard Canadian Ltd. v. Underwriting Members of Lloyds, 71 W.W.R. (n.s.) 684, [1970] Ins. L.R. 915 (Alta. Sup. Ct. 1969).
[52] Baer, *supra* note 7, at 561.
[53] 1 D.L.R.3d 89 (Sask. 1968).

Supreme Court of Canada has now allowed the appeal [54] and restored the trial judgment, adopting the reasoning of Chief Justice Culliton, the dissenting judge in the Court of Appeal. [55]

Of course, no matter what kinds of rules of construction or what kind of conceptual framework the courts use, there will continue to be difficult cases whose decision will not be easy, no matter how far the courts would want to go in protecting the unsophisticated and unsuspecting public. Such a case is *Johnson-Hutchinson Ltd. v. Wawanesa Mutual Insurance Co.* [56] where the plaintiff jewelery store owner claimed indemnity under a composite mercantile insurance contract issued by the defendant insurer. The contract covered burglary which was defined in the policy to mean: "Theft by a person making forcible entry." The words "forcible entry" were defined to mean: "Entry made by actual force and violence as evidenced by visible marks . . . upon . . . the exterior of the premises. . . ." A theft occurred at the store. Entrance to the store was probably gained through the front door by picking the lock. There was no visible evidence that the lock had been picked although there was hearsay evidence by the police to that effect (statements made by one of two men who had lock picks in their possession and from whom police received the stolen merchandise).

One can sympathize with the insurer's desire to be protected from unwarranted or uninsured claims. Perhaps it is not unreasonable for them to demand proof that there has been a "burglary" in the form of "visible marks" —otherwise it is perhaps too easy for insureds who suffer theft from unsecured or unlocked premises to bring claims. All this is assuming of course that the true extent of the insurance has been made clear to the insured. At the same time, when there is other evidence of forcible entry it seems unfair that the insured should not collect because of a technical matter of proof. Perhaps what is needed here is a power in the court to relieve against an unreasonable definition of the risk similar to their power to relieve against unreasonable conditions.

Another case which was close to the line was *Western Pile & Foundation (Ontario) Ltd. v. Canadian General Insurance Co.* [57] The plaintiff was a sub-contractor who was successfully sued by the main contractor when a cofferdam built by the plaintiff gave way. The plaintiff claims indemnity under a general public liability contract of insurance. The defendant insurer relied on an exclusion clause which excluded from coverage: "Construction, installation or repair operations of the Insured for another after such operations have been completed or abandoned." The defect in the cofferdam was discovered after the plaintiff had completed the driving of

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[54] [1970] Ins. L.R. 925 (Sup. Ct.).

[55] For another case involving a difficult question of causation *see* Crocock v. Orion Ins. Co., 68 W.W.R. (n.s.) 149, [1969] Ins. L.R. 688, 4 D.L.R.3d 295 (B.C. Sup. Ct.) where an airline pilot's failure to meet Department of Transport tests was held to be a disability resulting from "natural deterioration."

[56] [1970] Ins. L.R. 970 (Man. Q.B.).

[57] [1970] 3 Ont. 172, [1970] Ins. L.R. 962.

interlocking sheet metal piles for the cofferdam and the main contractor was proceeding with excavating. The Ontario Court of Appeal held that the exclusion clause did not apply because the plaintiff had not completed the job, since under its contract with the main contractor, the plaintiff had agreed to remedy any deficiencies in its work. The one troubling aspect of the court's reasoning is that any liability of the insured was likely to be in contract—that is, situations in which it was responsible for defective work. How can it make any difference whether this liability is express or implied? If a job is never complete whenever the plaintiff still has contractual liability, what meaning can the exclusion clause have? But perhaps the court is distinguishing this case where there is not only contractual liability for the deficient work but also an express contractual understanding to try to remedy the deficiencies. [58]

2. *Conditions: Warranties*

Since Lord Mansfield's judgment in the classic case of *De Hahn v. Hartley* [59] it has been accepted law that a condition or warranty in an insurance contract is a stipulation with which there must be strict compliance. Once a term has been made a condition of the contract, questions of materiality and causation disappear. If the condition has not been met, the insurer can repudiate the contract regardless of whether the breach materially affected the risk—or indeed whether it had anything at all to do with it. In the past year there has been another modern illustration of this rather pernicious doctrine. The case will be of widespread significance to dealers in automobile, machinery and durable consumer goods. In *Automotive Products Co. v. Insurance Co. of North America* [60] there was a reporting insurance policy covering all sales of heavy construction and road equipment which automatically attached at the time of sale and lasted during the period of financing. The contract was "subject to" a stipulation that "full details of all such sales be reported." There were three blanket policies with the respondent insurance company which were similar in substance, one relating to each of the three finance companies with which the appellant company did business. The appellant company sold a tractor to the appellant Gagnon. A few days later, before the respondent or the appellant company's broker had been appraised of the sale, the tractor was irreparably damaged in an accident. The respondent resisted a subsequent claim on the ground that the appellant had not reported and included in the cover all its financed sales.

The majority of the Supreme Court of Canada agreed with the Court of Appeal: "The Court concluded that the stipulations in the contract were

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[58] Two other important cases which are close to the line have been reported in the past year. Space does not permit discussion of them at length. *See* Cedar Grove Mobile Home Sales Ltd. v. Home Ins. Co., [1970] Ins. L.R. 854, 10 D.L.R.3d 142 (Ont.) and British American Assurance Co. v. Raizen, [1970] Ins. L.R. 905 (Man.).

[59] I Term. R. 343, 1 Rev. R. 221 (Q.B. 1876).

[60] [1969] Ins. L.R. 719, 6 D.L.R.3d 210 (Sup. Ct.).

onerous, synallagmatic, clear, precise, and expressing without ambiguity the mutual intent of the parties in that they oblige respondent to ensure and appellant company to report and submit for insurance with respondent all its financed sales." [61] This the majority found was a condition, the breach of which allowed the respondent to avoid the contract and refuse to pay the appellants' claim. As the dissent correctly pointed out, a stipulation is not to be construed as a resolutive condition unless the intention to do so is expressed—and expressed clearly. Here there is nothing in the wording to indicate a condition—such as the word "warranted" which is commonly used in insurance contracts to indicate that a resolutive condition is being stipulated.

The dissenting judgment also points out that since there were three separate blanket policies, only one of which was in dispute, it was impossible to conclude that this particular contract was intended to cover all financed sales. It must mean, as the appellants argued, all financed sales not otherwise insured.

The dissent further argued that if the clause was to be interpreted in the manner urged by the respondents and considered a condition allowing the respondents to repudiate the contract, then the respondents would not be entitled to have it declared null without any refund of premiums. This would involve the refund of substantial premiums relating to a number of purchases under the blanket policy. Although perhaps the distinction has nothing to commend it, the dissent's argument does ignore the theoretical distinction between avoiding a policy for misrepresentation in which the party aggrieved denies the existence of any binding contract at all, and a case where the aggrieved party, by relying on a condition of the contract, accepts its existence as a binding contract.

The majority judgment illustrates that the drastic effect of a breach of condition may still continue in some cases. The harshness of this common-law doctrine has been ameliorated in relation to fire and automobile insurance by the imposition of statutory conditions, giving the court power to hold a condition unjust or unreasonable and hence not binding upon the insured in the case of fire insurance, and giving the superintendent power to control the contents of automobile policies. However, in other areas where the legislature has not interfered, apparently the doctrine continues with all its rigour. So far the courts seem unwilling to put similar restrictions on insurers in relation to other kinds of insurance by analogy.

While the imposition of unjust and unreasonable conditions is controlled to some extent, it has always been accepted that, but for the statutory definition of fire and the rather elaborate control over standard automobile insurance contracts, the insurer is free to define the risk as it sees fit. What has not been sufficiently recognized and appreciated is the fact that the same object can be accomplished either by the imposition of a condition or by re-

[61] *Id.* at 721, 6 D.L.R.3d at 215.

defining the risk. Sometimes it is not so easy to tell just what is involved. It may be argued that there is in fact no difference. Yet different results may occur depending on the court's classification. If the problem is thought to be a question involving a condition, the court checks its consistency with the statutory conditions and perhaps has the ability to strike it down as unjust or unreasonable. However if the problem is thought to be one of defining the risk, the court is limited in its arsenal to the *contra proferentem* rule.

The artificiality of the distinction between the definition of the risk and a condition is illustrated by the recent case of *Lepp v. Canada General Insurance Co.* [62] This was a claim by injured victims under the old section 223 (now section 222) of the Ontario Insurance Act. The owner's insurance policy in question covered a named insured who had died intestate before the accident. The accident occurred while the intestate's son was driving the car with his mother's permission. The policy stipulated that in consideration of a reduced premium that the insured automobile would be driven only by the intestate or by another person if accompanied by the intestate or by a person engaged in the business of repairing, servicing, storing or parking automobiles while so engaged with respect to the automobiles described in the policy. The defendant insurance company argued, *inter alia* that the plaintiffs could not bring an action under section 223(1) because their claim was not one "for which indemnity is provided by a motor vehicle policy" and the company relied on *Nadeau v. Insurance Corp. of Ireland.* [63]

In the *Nadeau* case the third-party victims, who were gratuitous passengers were unsuccessful in a direct action against the insurer under the New Brunswick equivalent to Ontario section 222 because the court found the contract did not provide coverage for gratuitous passengers (which at the time under the uniform act was extended coverage). That is, while the insurer could not set up a breach of condition against a third-party victims claim under section 222, it could argue that the risk was not insured against. In the *Lepp* case Mr. Justice Laskin, for the court, accepts this distinction. "There is, of course, a difference between acts or defaults in breach of the insurance contract and the scope of the risks or of the indemnity provided by the contract." [64] Laskin went on, however, to point out that here, unlike in the *Nadeau* case, the extent of coverage was prescribed by the statute in section 213. The court held that the insurer could not contract out of the provisions of the Insurance Act, "save as authority for so doing is found in the Act itself."

The court makes no mention of the fact that the definition of the risk here was a standard one approved by the provincial superintendent of insurance [65] for use with the standard owner's policy. Nor does the court refer

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[62] [1969] Ins. L.R. 714, 6 D.L.R.3d 365 (Ont.).
[63] 67 D.L.R.2d 592 (N.B. 1968).
[64] [1969] Ins. L.R. at 716-17, 6 D.L.R.3d at 369.
[65] Standard Endorsement Form No. R-20, Uniform Provinces 1961, More Automobiles Than Operators Endorsement.

to the old section 222 which appears to give the superintendent the ability to vary any of the provisions in Part VI of the act.

However, aside from the fact that this was a standard endorsement approved by the superintendent, it is difficult to see why there should be such a difference between "conditions" and "coverage." Why in relation to victims' claims should the insurer not be allowed to set up the defence that the driver was under the influence of alcohol contrary to the provisions of the contract and yet be allowed to set up the defence that the driver was not accompanied by the named insured contrary to the provisions of the contract? That this should result from the grammatical distinction between "condition" and "coverage" seems highly artificial.

3. *Agents—Misrepresentation*

In the last annual survey [66] it was suggested that perhaps the Supreme Court of Canada's decision in *Compagnie Equitable d'Assurance Contre Le Feu v. Gagné* [67] represented a trend towards a more acute awareness by the courts of the need to protect the public from the misleading conduct of insurance agents. However, this year there has been a case reported which will make all those interested in consumer protection despair.

In *Boutilier v. Traders General Insurance Co.* [68] the plaintiffs, Mr. and Mrs. Boutilier, bought a car from Mahone Auto Service (1958) Limited, financed by means of a standard conditional sales contract with Traders Finance Company. The car was bought for the use of the plaintiffs' son, but since he was under eighteen years of age and his father's licence had been revoked, the car was to be in his mother's name. At the time of purchasing the automobile the plaintiff, Mrs. Lilla Boutilier, signed an application for insurance with Traders General Insurance Company along with other documents, including the conditional sales contract. While there was some conflict in the evidence, the appellate division accepted the view that the application was probably not filled in at the time it was signed except to indicate the premium. It was later filled in by someone in the office at Mahone Auto Service (1958) Limited incorrectly. It did not indicate that the father who was shown on the application as one of the applicants had had his licence suspended within the preceding three years. This fact had been disclosed to the Mahone salesman who arranged the purchase.

Traders General Insurance Company issued a standard automobile policy in the names of Mr. Hazen Boutilier and Mrs. Lilla Boutilier as the insured. In the policy the agent was shown as "Cox Insurance Agencies Limited." At the trial the jury found that there was a "false representation knowingly made" not by the plaintiffs but by Mahone Auto Service who was acting on behalf of itself, Traders Finance Corporation and Traders General Insurance Company. The learned trial judge [69] dismissed the action on the

[66] Baer, *supra* note 7, at 565.
[67] 58 D.L.R.2d 56 (Que. 1966), *aff'd*, 67 D.L.R.2d 761 (Sup. Ct. 1968).
[68] [1969] Ins. L.R. 815, 7 D.L.R.3d 220 (N.S.).
[69] 1 D.L.R.3d 379 (N.S. Sup. Ct. 1968).

ground that the jury's finding that Mahone Auto Service was acting for the Traders General Insurance Company was perverse and that a finding to the effect that Mahone Auto Service made the false representation amounted in the circumstances to a finding that the applicants for insurance, Hazen Boutilier and Lilla Boutilier, made the false representations. The learned trial judge was upheld on appeal. To quote from the trial judge:[66] "The evidence clearly showed that Fred Collicutt [the salesman employed by Mahone Auto Service] was not acting as agent for Traders Finance Corp. Ltd. or for Traders General Insurance Co. He said that he was not an insurance agent, he was not certified to sell insurance and not licensed to sell insurance and had no authority from Traders General Insurance Co. to sell insurance on behalf of that company."[70] In confirming the trial judgment the appeal division referred to such cases as *Reid v. Traders General Insurance Co.*,[71] and *Bonneville v. Progressive Insurance Co. of Canada*[72] in support of the finding that the Mahone Auto Service salesman was only acting as the amanuensis of the applicants.

With all possible respect to their lordships, it is not the jury's finding which is perverse. Whether Mahone Auto's salesman was in fact acting as agent for the insurance company does not depend on whether he was certified or licensed to sell insurance nor on whether he thought of himself as an insurance agent. Not much attention can be placed on the company's claim that he was not their agent if in fact they were permitting and encouraging him to do all the things an insurance agent usually does. Surely it is well accepted law that what the parties call their relationship is in no way determinative. The court's finding is particularly perverse in view of the fact that this was not some isolated incident, but part of the standard practice acquiesced in, if not actually dictated by the finance and insurance companies. These two companies were closely related and supplied all the sales and insurance forms. While it is not clear from the evidence, Mahone had probably agreed to arrange all financing and insurance through the Trader companies—certainly they directed much of their business to these companies. This particular employee alone had "dealt with" between 100 and 150 insurance application forms in the summer of 1964. It is clear from the evidence that the standard practice was for the salesman to help arrange insurance at the time of the sale, for him to telephone someone (exactly who, apparently, was not clear—which probably indicates that the insurance and finance companies were treated as the same people), and for the girls in Mahone's office to type in the answers on the insurance application forms. Probably purchasers were never sent to some other office to arrange insurance—it certainly was not the usual practice. In face of this evidence, the obvious question is what else do insurance agents do in arranging insurance? It is not even a case of holding out or apparent authority—the evidence clearly

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[70] *Id.* at 386.
[71] 41 D.L.R.2d 148 (N.S. Sup. Ct. 1963).
[72] [1955] Ont. 103, [1951-55] Ins. L.R. 711, 2 D.L.R.2d 779.

indicates that the insurance company authorized Mahone's employees to do the things insurance agents do.

While the judgment at first blush seems consistent with the *Reid* and *Bonneville* cases, in neither of those cases was the evidence so clear that the filling of the application by the salesman was part of the standard practice encouraged by the insurance company. It is interesting to note, and not surprising, that the same defendants are involved in the *Reid* case as in *Boutilier*. The court's judgment in the earlier case did nothing to encourage the Trader companies to correct their sloppy business practices. In fact it encouraged them to continue in them so that clerical and other mistakes made by the salesman and other middlemen could be attributed to the insured.

It is difficult to see what the court hopes to accomplish by such a judgment. It certainly will not encourage any insured to refuse to sign an application before it is completed. In the face of the standard practice adopted by these companies and now sanctioned by the courts, few individuals will make more than token objections. On the other hand, it is difficult to see why the insurance company should be protected when the mistake occurs through the use of procedures which they are party to and can no doubt control.

Not only does the judgment fly in the face of the facts, but in order to reach it the court had to ignore the spirit, if not the letter of section 76(2) of the Nova Scotia Insurance Act. The court held that: "it is limited in its scope to the provisions of s. 76(1), that is, that the agent must have authority to sign to come within the prohibition and in the second place, that it is a prohibition only and is covered by the penalties in the subsequent section s. 272 and does not constitute an answer to the position taken by the trial Judge." [73]

The business procedure followed in the *Boutilier* case also illustrates how an important and fundamental doctrine of insurance law has probably survived too long—at least in relation to automobile insurance. In *Boutilier* it was the practice of the salesman to get the pertinent information from the applicant (some of which was part of the approved application form, some not) and then telephone someone at the Traders companies to find the premium. He would fill in the premium and apparently the girls in the office would type in answers on the application using the premium charged and a schedule of premiums of the company to figure out what the answers must have been. All concerned quite sensibly recognized that the information was only used to set the premium and had no intrinsic or permanent importance. As long as the right premium was charged, it probably did not matter to any of the companies involved what was typed on the application.

However, it is accepted doctrine in insurance law that a material misrepresentation by the insured allows the insurer to avoid the contract. This is based on the idea that if the insured had made full and accurate disclosure,

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[73] 7 D.L.R.3d at 239.

the insurer might not have agreed to insure, or at least would have stipulated for a higher premium.

The fact that the insurer might not have insured at all if it had known all the facts is perhaps a convincing reason for allowing it to avoid the contract because of material misrepresentation. However, if it would have insured anyway, albeit stipulating for a higher premium, it is harder to see why *ex post facto* it should be allowed not just to collect the extra premium, but to avoid the contract. That a fairly minor and innocent misrepresentation might have disastrous results out of all proportion to the misconduct of the insured has been partially recognized by the legislatures which have modified the common law standard and have at least allowed third party victims to collect. However, the time may have come when we should recognize that voiding a policy is too drastic a device to discourage misrepresentation.

With the present political climate and the possibility of compulsory government insurance around the corner—no individual is left uninsured by having his application for insurance declined (at least for third party liability insurance). In fact, since the "facility" replaced the assigned risk plan, even drivers with poor records who are high risks are accepted at no more than three times the normal premium. The information disclosed in the application is now only used to set the premium and to decide whether the insurer is entitled to make use of the "facility"—a reinsurance scheme established by the industry to spread high risks. The only way the company is prejudiced by inaccurate information is through not collecting all the premium they would normally charge. They no longer would decline the risk. They can always collect this additional premium in a case like *Boutilier*. The only evil is that some insureds might get away with deliberately lying in order to get a lower premium. Surely stiff monetary fines for intentional or even perhaps negligently made misrepresentation should be enough to discourage this. Why completely innocent misrepresentation (if you insist on calling it that) in a case such as *Boutilier* should avoid the contract and deny all recovery is hard to see. This is especially so when the evidence at least indicates that perhaps the correct premium was charged and that it was just the written application (which is of no further use to anyone once the premium is set) which was inaccurate. [74]

4. *Materiality*

Of course in order for the insurer to avoid the contract for misrepresentation, the misrepresentation must be material. However in view of the way courts determine materiality, this is no great obstacle to the insurer. The

[74] In another recent maritime province case, the harshness of this doctrine of the insurance agent acting as the insured's amanuensis was blunted by the fact that the company had previous dealings with the insured through which it acquired the correct information. *See* Paget v. Belyea, [1970] Ins. L.R. 897 (N.B. Sup. Ct.). Other cases involving questions of misrepresentation which have been reported during the past year which because of space limitations cannot be examined in detail include, Desser v. Occidental Life Ins. Co., [1969] Ins. L.R. 783 (Man. Q.B.) and Lacroix v. L'Industrielle Compagnie d'Assurance sur la Vie, [1970] Ins. L.R. 875 (Que. C.S.).

manner in which materiality is proved is illustrated by *McArthur v. Prudential Insurance Co. of America* [75] where a claim on a life insurance contract was dismissed because the deceased life insured had failed to disclose that he had diabetes and had previously complained of chest pains. The court followed *Henwood v. Prudential Insurance Co. of America* [76] in finding that this non-disclosure was material on the evidence of the defendant's own underwriter who testified that the defendant would have thought this information material. It is difficult to imagine an employee of the insurer saying anything else and difficult to see how this goes very far in showing whether the information would be considered material by the reasonable insurer which still seems to be the lopsided test used.

One of the strangest cases concerning the question of materiality is the Manitoba case of *St. Onge v. Union Insurance Society of Canton Ltd.* [77] The only dispute was in respect of the responsibility for payment for the loss of personal property which the plaintiff claimed was covered by two fire insurance policies. The action against one of the insurers was dismissed on the ground that a change in the location of the personal property was a material change in the risk not communicated to the insurer. The court held that the fact that the risk of loss was less at the new location did not assist the plaintiff. One cannot imagine a more blatant example of mechanical jurisprudence in the court's application of previous authorities which have held that locality is always material. If the test of materiality is whether the fact would affect the insurer's decision to insure or stipulate for a higher premium, how is the change in locality material here? If the insurer was prepared to insure at the old location, there can be no doubt they would insure at the new one where the risk was lower. Similarly, the reasonable insurer would hardly stipulate for a higher premium where there is a lower risk. [78]

5. *Estoppel and Waiver*

Nothing is more confusing in the law of insurance than the use of the terms estoppel, waiver and election. It remains as true now as in 1928 [79] that waiver in insurance law is a good illustration of the aphorism that bad law is the product of bad language. The difficulty, confusion and bad law comes from the tendency to confuse the equitable doctrine of estoppel which

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[75] [1969] Ins. L.R. 730, 6 D.L.R.3d 477 (Ont. High Ct.).

[76] [1967] Sup. Ct. 720, 64 D.L.R.2d 715.

[77] [1970] Ins. L.R. 905 (Man. Q.B.).

[78] The court also refused to invoke the provisions of § 136 (relief against unjust and unreasonable conditions) without any reason. It merely referred to Bobrowski v. Canadian Fire Ins. Co., 39 W.W.R. (n.s.) 351, [1962] Ins. L.R. 331, where the Manitoba Court of Appeal held a value reporting clause was not unjust or unreasonable.

In contrast to this case, in Prince Edward Island, the Supreme Court held that the movement of a mobile home to a new location was not a change material to the risk. *See* Traders Group Ltd. v. North British & Mercantile Ins. Co., [1969] Ins. L.R. 735, 6 D.L.R.3d 604 (P.E.I. Sup. Ct.).

[79] See Ewart, *Waiver in Insurance Law*, 6 CAN. B. REV. 257 (1928).

prevents a party from alleging certain facts when he has led the other party into believing that he would not do so and the other party has relied on this to his prejudice, and the contractual doctrine of election which in insurance law means that when the insured has misrepresented some material fact or breached a condition, the insurer must elect either to repudiate the contract or "waive" the insured's breach and treat the contract as still subsisting. That these are two distinct concepts is not always recognized by the courts or by the standard insurance text books. For example in MacGillivray [80] and Ivamy [81] the concepts seem to be treated as synonymous, while in Preston and Colinvaux [82] they are treated as intertwined and complementary. However, in Vance [83] they are carefully distinguished. In the courts, the concepts were carefully distinguished by at least some judges in the Supreme Court of Canada in *Caldwell v. Stadacona Fire & Life Insurance Co.* [84] However, most lower courts continue to treat the concepts as being the same.

The history of the contractual doctrine of waiver or election is one of continual battle between the insurance industry and the courts. The courts have continually seized upon the doctrine of waiver to relieve insureds from harsh or unreasonable conditions or from the harsh effect of minor and innocent omissions or misrepresentations. They have extended the doctrine to say that an election to waive the insured's breach can be found in any act by the insurer which recognizes the contract as existing. The industry has in the past countered with contractual stipulations that agents had no authority to "waive" or that waivers had to be in writing. The courts in turn blocked this move by insurers by saying that this stipulation, like others in the contract, could be waived. Finally, at least in relation to automobile insurance, the industry managed to get a legislative amendment in the early thirties which specifically provided that waivers had to be in writing. The courts seem to have responded to this by simply ignoring the statutory provisions.

An example of the confusion is the recent Alberta Supreme Court decision of *Abbi v. Klippert & State Farm Fire & Casualty Co.* [85] The plaintiff was involved in a serious automobile accident and claimed indemnity from his insurers. The insurer, learning after the accident for the first time of two earlier accidents which the plaintiff had failed to disclose in his application for insurance, cancelled the insurance contract and returned to the insured a *pro rata* portion of the premium. It argued that it was not bound to indemnify the plaintiff because of his misrepresentation. The court held that the company, by retaining part of the premium, elected to recognize the contract as binding until the day it had cancelled and that the plaintiff was entitled to recover.

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[80] E. MacGillivray, Insurance Law ¶ 960.

[81] E. Ivamy, General Principles of Insurance Law 234 (1966).

[82] S. Preston & R. Colinvaux, The Law of Insurance 99 (2d ed. 1961).

[83] W. Vance, Insurance 470.

[84] 11 Sup. Ct. 212 (1883). *See* particularly the judgments of Mr. Justice Strong at 241, Mr. Justice Henry at 248 and Mr. Justice Gwynne at 254.

[85] 68 W.W.R. (n.s.) 426, [1969] Ins. L.R. 755 (Alta. Sup. Ct.).

Since in the case of automobile insurance, the answers to questions in the application only go to determine the premium and not whether the insurer will insure, the result reached by the court seems eminently sensible. There is no justification for visiting a misrepresentation with such a harsh consequence as no insurance—let the insurer be content with collecting the proper premium. Therefore it may seem somewhat pedantic to quibble with the way the judge picked his way through the conceptual labyrinth. What does it matter if the theory is not pure and the language ineloquent? Unfortunately, the judge came to a sensible conclusion by using some questionable and confusing arguments which are apt to be read and acted upon by other judges.

In the first place, it is not clear that the judge recognizes the distinction between estoppel and waiver. Here the plaintiff cannot argue that he relied on the defendant's conduct to his prejudice. Once the plaintiff made his misrepresentation and it was discovered, there was nothing he could do that would affect his position. This is not a case of estoppel. Therefore cases considering whether the insurer by its conduct was estopped from alleging some breach are not pertinent.

The only hope the plaintiff had was with the contractual doctrine of waiver. In applying this doctrine the trial judge failed to distinguish between the effect of a misrepresentation at common law and its effect now under the Alberta Insurance Act. At common law a misrepresentation avoided the contract. This meant that any act by the insurer which recognized the existence of a contract was an election to "waive" the misrepresentation. Hence, keeping part of the premium is an act which recognizes there was a contract at one time and hence is an election to "waive" the misrepresentation. Otherwise if the insurer wants to take advantage of the misrepresentation, it must treat the contract as *ipso facto* void and return all of the premium. However, section 286(1) of the Alberta Insurance Act does not say that the contract is void—only a claim is invalid "and the right of the insured to recover indemnity shall be forfeited." The insurer does not have to avoid the policy nor return any premium. The statement made by the Alberta Supreme Court that Mr. Justice Duff said in *Canadian Railway Accident Insurance Co. v. Haines* [86] that the result of such a clause was to make the policy, as opposed to a claim under the policy, void at the election of the company, is simply not so. The only way the company can waive its rights under section 286(1) is by offering or paying indemnity. It is not a waiver to keep any or all of the premium, since the insurer is perfectly entitled to do so.

However, even if the court wanted to interpret section 286(1) as simply a statutory enactment of the common law and hold that its effect was to avoid the contract and give the insured the right to a return of the premiums, the insured should still have lost because of section 187*d*. [87] While in proper circumstances the court might rule that the insurer was estopped from setting

[86] 44 Sup. Ct. 386 (1911).
[87] Alta. Stat. 1967 c. 39, § 6 adding new § 187d.

up this section, as we have seen this is not a case for estoppel. The insured here could not affect his position by any act he could or could not do, so he hardly relied on the insurer's holding out to his prejudice. The Alberta court completely ignored this section. It is interesting to note that all cases the court relies on as authority for what it is doing pre-date 1933, the year this section was introduced in Alberta. [88]

If the courts are really convinced that an insured such as the plaintiff here should not be deprived of insurance although his action is reprehensible, they should say so. Whether they have insurance or not should not turn on the whim of the company. But beyond that it certainly should not depend on some accidental slip by the company which in no way has prejudiced the insured. If the matter turns on what the insurer has in reality elected to do, did they not make it plain that they thought they were not bound to pay? If they failed to return the full premium when they should have, which is questionable in view of section 286(1), their mistake hardly confused anyone about their intention not to indemnify the insured. [89]

6. *Rectification*

Two recent cases illustrate how an old contract doctrine not often employed in insurance law can be used as a device for consumer protection. Both are Ontario cases and both invoke the concept of rectification, although in one, *Trans-Continental Bolt Co. v. Canadian Sprinklered Risk Pool*, [90] the court does not seem to recognize the problem as such. The insured was operating in several buildings all of which were intended to be insured. The insurance contract, however, only referred to 1700 Langlois Avenue, the office of the insured. After a fire occurred, the insurer argued that only the office was covered. The court held there was a latent ambiguity in the contract description and looking at all the evidence it was clear that all parties intended all buildings to be insured. Rather than viewing this as a problem of contract construction, it perhaps would have been more accurate to allow rectification of the contract. In the second case [91] involving a fire insurance contract with an inventory value reporting clause, inventory was reported at 40,000 dollars instead of 140,000 dollars as a result of a clerical error. The court held that since this was a bona fide error and there was no intention to defraud or mislead, there should be rectification of the report filed. The court pointed out that although there has been rectification in marine insurance value reports, this appears to be the first time it has been done in non-

[88] Alta. Stat. 1933 c. 57, § 4 adding new § 256.

[89] In contrast to the sympathetic treatment given the insured in Alberta *see* the British Columbia case of Silcock v. Co-operative Fire & Casualty Co., 67 W.W.R. (n.s.) 469, [1969] Ins. L.R. 744, where the Supreme Court indicates there is no room for the operation of the doctrine of estoppel in view of the emphatic wording of the B.C. Statute (the relevant section of which, § 225, is the same as the statutory provisions in the other common law provinces).

[90] [1970] 2 Ont. 502, [1970] Ins. L.R. 926 (High Ct.).

[91] Leepo Machine Prods. Ltd. v. Western Assurance Co., [1970] Ins. L.R. 868, 9 D.L.R.3d 649 (Ont. High Ct. 1969).

marine insurance. If other courts follow this Ontario court's lead, rectification may be an effective alternative to the courts' refusal to allow relief from forfeiture in these cases. [92]

7. *Valuation*

One of the most vexing problems in insurance law is the problem of valuing the loss. This problem is not often litigated because of the widespread use of replacement cost endorsements and statutory condition 11 in fire insurance which establishes a method of appraisal. As well, the uncertainty of litigation perhaps encourages parties to settle. However, the past year has been an exception to the usual paucity of cases. In *Kinnaird v. C. L. Martin & Co.* [93] a fire destroyed an insured's barn which was replaced. In assessing the damage, the trial judge took as his starting point the replacement cost and then deducted an allowance for depreciation. The plaintiff insured had obtained a better and more efficient building than the destroyed barn, although evidence disclosed that the undepreciated life of the old barn was 30 years and this was the life span of the new building. In allowing the plaintiff's appeal in part, the Ontario Court of Appeal held *inter alia* that it was not depreciation which ought to have been applied, but rather the premium which the plaintiffs obtained by reason of having a new and more efficient building. This premium was set at forty per cent by the court although there is nothing in the reasons for judgment to indicate how that figure was arrived at. You would think that since the new barn was not going to last any longer than the old, that the forty per cent figure would only be justified if the barn had that much increased capacity or that its increased efficiency resulted in that much reduction in running costs. Whether the court had such evidence before it is not apparent.

In *P.M. Scientific Fur Cleaners Ltd. v. Home Insurance Co.*, [94] a fire occurred in the insured's fur storing premises. There was extensive smoke damage to the stored furs. The furs were cleaned by the insured pursuant to an arrangement worked out with the adjuster. The plaintiff insured then claimed it was entitled to the usual amount it would receive from customers for such cleaning. Under an endorsement in the policy the insurer agreed to indemnify the insured for "the cost of repair. . . ." The insurer, however, took the position that the insured was only entitled to collect for the cost of the cleaning but not for any profit which the insured ordinarily would make on cleaning. The court agreed with the insurer and calculated the cost of repairs on a basis which excluded profit but yet included "the expense of so much overhead, administration, and maintenance expense as, upon a proper basis of accounting, should be charged against the work in dispute." The

[92] The court held that if there had to be strict compliance with the value reporting clause, failure to do so would not constitute a forfeiture and § 115 of the Ontario Insurance Act would have no application. *See also* Bobrowski v. Canadian Fire Ins. Co., 39 W.W.R. (n.s.) 235, [1962] Ins. L.R. 331 (Man.).

[93] [1970] Ins. L.R. 849 (Ont.).

[94] [1970] Ins. L.R. 945 (Man. Q.B.).

decision could have been reached perhaps on the basis that this was the agreement between the adjuster and the insured. Certainly there was some evidence to show that the adjuster tried to make this point at the time the parties worked out the arrangement. However, the court does not base its decision on this ground. In fact, the court waffles about just what was the understanding between the parties. After much discussion over who stood to gain from this arrangement (the insured by avoiding publicity and the insurer by getting the services of one of the best cleaners in the business) and who first suggested the arrangement (all of which seems to be irrelevant), the court says: "I find that while the adjuster Scott certainly acquiesced, and thereby assented, or agreed, to performance of the necessary work by plaintiff itself, the relationship between them did not go beyond that. Certainly, he did not instruct, or engage plaintiff, to clean the furs." [95] Where all this leads to is not clear but perhaps it is the germ of a thesis that in construing a contract, something turns on which party makes the offer, and which accepts.

However, the reasoning of the judge seems to be that the cost of repair cannot include profit because that would allow the insured to recoup a profit out of the fire disaster. Such reasoning confuses the fact that there are two separate contracts and two separate claims involved. A contract of service between the insurer and the plaintiff and a contract of insurance under which the plaintiff and the fur owners appear to be insured. In the absence of evidence of negligence by the plaintiff, the insureds with the claim against the insurer would appear to be the owners of the furs. In any case, even if you assume the plaintiff insured is liable to its customers and this liability is insured, that is quite a different thing from the plaintiff's claim for work done under an arrangement with the insurer.

Even if you lump all the transactions together as the court does, it seems a somewhat medieval ecclesiastical view of profit to say that the loss of profit is not a loss or cost to the insured. Surely return on capital investment is as legitimate an overhead cost as for example, rent.

The fact that the trial judge must of necessity sometimes make suppositions and estimates based on evidence open to various interpretations is illustrated by *Morris Rubenstein Ltd. v. Bay City General Assurance Co.* [96] There the Ontario High Court had to fix a value for a number of intangibles including a large inventory of samples used for food and soap packages and for promotions, plus a large collection of valuable papers containing information as to sources of supply, names of manufacturers, distributors, costs and selling prices, net margin, etc. Mr. Justice Lieff performed the creative task of valuing these intangibles in terms of their future profit-making potential, in spite of the fact that the insured had been losing money in its business for the past few years. [97]

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[95] *Id.* at 949.

[96] [1970] Ins. L.R. 934 (Ont. High Ct.), *appeal dismissed*, [1970] Ins. L.R. 1122 (Ont.).

[97] *See also* Irving Refining Ltd. v. Travelers Indemnity Co., [1969] Ins. L.R. 790 (N.B.); Sheer Mist Hosiery Ltd. v. Canadian Gen. Ins. Co., [1969] Ins. L.R. 704 (Man.).

8. *Subrogation*

The recent Manitoba Queen's Bench decision of *Drache v. City of Winnipeg* [98] is a modern illustration of the leading cases of *Rayner v. Preston* [99] and *Castellain v. Preston.* [100] The case reaffirms the proposition that a fire insurance contract is a personal contract which does not run with the land. What is insured is not property, but a particular insured's interest in property. In the *Drache* case, a fire occurred after expropriation proceedings by the city had been commenced. The city was not allowed to deduct from the arbitration award the amount the plaintiff received from her insurance. The trial court [101] pointed out that the insurance company could probably be subrogated to the plaintiff's claim against the city. However, the judgment of the court of appeal is somewhat surprising in that it makes no reference to this right of subrogation and in fact by its reference to *Jakimowich v. Halifax Insurance Co.*, [102] seems to indicate that the insured is entitled to keep both the insurance and expropriation proceeds. What is also surprising, in view of the fact that Mr. Justice Freedman wrote the judgment in both cases, is the failure of the court in the *Drache* case to recognize the important fact in the *Jakimowich* case that the settlement with the city expressly reserved to the insured the proceeds of the insurance contract. That is, in the *Jakimowich* case the insurer was unsuccessful because they could not show that the insured was more than indemnified. To allow Mrs. Drache to keep both the insurance and expropriation proceeds in this case would certainly be contrary to authority.

While there may be some practical conveyancing problems associated with the Anglo-Canadian approach (as opposed to the American, where the new owner in these situations could take advantage of the insurance), the idea that the new owner should not be insured is basically fair. The new owner can after all arrange his own insurance. However, in a situation such as this where the city has not yet paid, why should the insurance company take advantage of this through the concept of subrogation? If the prime aim is to make sure Mrs. Drache does not collect twice and profit from the fire, why not do this by invoking a concept of frustration in the expropriation proceedings? Why should the city pay for something that no longer exists and why should the insurer be allowed to take advantage of the windfall (*i.e.*, a contract or expropriation proceeding between the insured and a third party)?

A regulation made pursuant to the Ontario Hospital Services Commission Act, [103] which subrogates the commission to the right to recover for the

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[98] [1970] Ins. L.R. 1024 (Man.).

[99] Rayner v. Preston, 18 Ch. D. 1 (C.A. 1879).

[100] Castellain v. Preston, 11 Q.B.D. 380 (C.A. 1883).

[101] [1970] Ins. L.R. 967, 9 D.L.R.3d 532 (Man. Q.B.).

[102] 57 W.W.R. (n.s.) 767, [1966] Ins. L.R. 158 (Man.).

[103] Reg. 52(2) made pursuant to ONT. REV. STAT. c. 176 (1960). This right to subrogation for future hospital costs is now found in the act itself, Ont. Stat. 1968 c. 53, §§ 1, 3.

cost of future insured services has been held *intra vires* by the Ontario High Court in *Dias v. Ontario Hospital Services Commission.*[104] The court's struggle to assess what these future services might be worth shows how foolish the system established by the legislature is. Of course it would not be appropriate to allow the victim to collect from a tortfeasor (or more likely the tortfeasor's insurer) for hospital expenses which are covered by the government hospital insurance. But it would be so much simpler just to deny recovery for this in the tort action. Inasmuch as the injuries occur as a result of an automobile accident where the tortfeasor is insured, it is simply a waste of time and money to allow this kind of subrogated action. It cannot be justified on the grounds that otherwise the "wrong-doer" would go unpunished since it is not he, but his insurer who pays. What besides improving the appearance of the commission's accounts is accomplished by transferring in this costly and haphazard way, sums of money from car owners and to some extent drivers as a class (who pay for automobile insurance) to the general employed population (who pay for hospital insurance), especially when to a large extent these two groups are the same people?

9. *Third Party Claims*

For some time now there has been confusion in the case law as to the exact effect of a mortgage clause in a fire insurance contract. Some courts have held that such a clause is a mere assignment of the benefit of the insurance contract to the mortgagee, while others have stated that such a clause amounts to a separate contract between the mortgagee and the insurer—in other words, the mortgagee himself is insured. Since the practice in Ontario is to have the mortgagor carry the obligation to insure in the mortgage, which view is adopted does not affect the amount the mortgagee can recover. However, it has been easier for the courts to say that the mortgagor's conduct does not affect the mortgagee's interest on the separate contract theory. Although, once again, the fact that the mortgagee should be affected by the mortgagor's conduct is not inconsistent with either the assignment or separate contract theory. There is no reason why in their separate contract with the mortgagee, the insurer cannot stipulate that the insurance is dependent on the absence of misrepresentations or breaches of conditions by the mortgagor in his contract. On the other hand, if the assignment theory is accepted, the familiar cut-off clause in the assignment of conditional sales contracts would seem to indicate that the mortgagee may still insulate himself from the mortgagor's conduct. In other words, there is no reason why either theory should be determinative, although the courts seem to feel that it is easier to give the mortgagee immunity from his mortgagor's acts under the separate contract theory.

In *Bonser v. London & Midland General Insurance Co.*,[105] Mr. Justice Donohue was prepared, if it were necessary, to hold that a mortgage clause

[104] [1969] Ins. L.R. 827, 5 D.L.R.3d 594 (Ont. High Ct.).
[105] [1969] Ins. L.R. 777, 7 D.L.R.3d 561 (Ont. High Ct.).

amounted to a separate contract with the mortgagee. The case involved a suit brought by the mortgagee against the insurer for damages caused by its failure to notify the plaintiff that the mortgagor had cancelled the insurance. The court held that the insurer was under the same duty to notify the mortgagee as it would be under section 110 of the Ontario Insurance Act, that is, where it itself had cancelled the insurance.

The recent Ontario case of *Whitelaw v. Wilson*,[106] gives some comfort and assistance to automobile accident victims having difficulty collecting from tortfeasor's insurers. There it was held not to be necessary to sue the insurer before bringing a claim against the minister of transport pursuant to section 6 of the Motor Vehicle Accident Claims Act. The court held that the minister of transport could settle the dispute as to whether there is a policy of insurance in a separate action against the insurer.

In *Fischer v. Canadian Provincial Insurance Co.*,[107] the plaintiff brought an action on behalf of himself and all others having judgments against Williston, an insured, pursuant to section 211 of the Insurance Act.[108] The judgments against Williston were originally obtained in Ontario and then registered in New Brunswick under the Reciprocal Enforcement of Judgments Act.[109] Williston bought his car under a conditional sales contract when he was twenty years old. In order to get collision insurance the car was registered in his brother's name (Robert). Insurance was then obtained from the Canadian Provincial Insurance Co. When Williston became twenty-one he had the car transferred to his own name and insured with the defendant, Economical Mutual. The defendant, Canadian Provincial, alleged misrepresentation in that the brother (Robert) was never the owner of the car. The court dismissed the action against Canadian Provincial but allowed the action against Economical Mutual. The court relied on section 209 of the Insurance Act to hold that the owner's policy was first loss insurance and that even if Robert's policy was valid it would be excess insurance only, and with respect to excess or extended insurance over 35,000 dollars the insurer may avail itself of any defence it could set up against the insured. The court went on to say that Canadian Provincial had set up the necessary defences and dismissed the plaintiff's action against it. With respect, this reasoning seems somewhat obtruse. In relation to a claimant under section 211 neither insurer can set up a misrepresentation to avoid a contract of insurance. If both contracts are valid they are both owner's policies. Since they are made out to two different people as "owner" this seems somewhat unusual, but not impossible. Section 209 really has no application here. However, it is true that in excess of 35,000 dollars the insurer can set up defences. That is, the insurer Canadian Provincial can allege misrepresentation as to ownership.

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[106] [1969] Ins. L.R. 813 (Ont. High Ct.).
[107] [1970] Ins. L.R. 893 (N.B. Sup. Ct.).
[108] N.B. REV. STAT. c. 113 (1952).
[109] N.B. REV. STAT. c. 192 (1952).

For the first 35,000 dollars there should have been contribution between the two companies. Then for the excess above that, since Canadian Provincial had a good defence and Economical Mutual did not, Economical Mutual should have been liable to the limits of their policy.

10. *Meaning of Insured*

As we noted in the last annual survey, in spite of the attempt made by the various statutes to give "insured" an extended meaning in motor vehicle liability policies, the courts are not always willing to extend insurance coverage. For example, in *Minister of Transport for Ontario v. Canadian General Insurance*,[110] the contract insured "the Lessee and any every other person who with the Lessee's consent personally drives the automobile." A father who was the "Lessee" gave permission for his son to drive the automobile. The son in turn allowed a friend of his to drive. There was an accident while this friend was driving. The Ontario Court of Appeal set aside a judgment obtained against the insurer by the minister of transport as assignee of a tort judgment obtained by the accident victims. The court held that the driver was not driving with the consent of the "Lessee." There was no express consent and the evidence did not convince the court that there was any implied consent. Once again, it is difficult to understand what the court is trying to do. The whole thrust of the statute is to extend insurance coverage to as many drivers as possible. Certainly this does not mean that the insurer should pay if for example the car is stolen and the thief has an accident (although there may be good arguments for saying that it should). However, in doubtful cases, the courts should err on the side of inclusion. The case only means that in giving permission for someone else to drive, an owner will have to go through the ritualistic motion of saying that the driver may also give permission to others, if the owner wants to be sure that there will be insurance coverage. If he wants to avoid problems he will do this, since a determination that the insurer is not liable under section 222 of the Insurance Act because the driver was driving without permission, will not necessarily be conclusive as between the owner and victims in a tort action under section 105 of the Highway Traffic Act. In fact, the tort action will occur first and it may not be until after it is concluded that the insurer will argue lack of permission, although in some circumstances it may be estopped from doing this. The result may be to leave the owner stuck with a tort action not covered by insurance.[111]

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[110] [1970] 2 Ont. 569, [1970] Ins. L.R. 938.

[111] *See also* Stolberg v. Pearl Assurance Co., [1970] Ins. L.R. 975, 9 D.L.R.3d 195 (B.C. Sup. Ct. 1969).