INSURANCE LAW

*Marvin G. Baer**

I. INTRODUCTION

Since the last insurance survey was written for this review, [1] more than two hundred Canadian insurance cases have been reported. In addition, every common law province has amended its insurance statute at least once. In some provinces amendments are an annual event. Meanwhile the Association of Superintendents of Insurance of the Provinces of Canada meet annually with the industry. [2] The meetings result in recommendations for uniform amendments to the various provincial insurance statutes. In addition these meetings result in the adoption of industry-wide rules.

On top of this normal pace of judicial, legislative and administrative activity has been added a Working Paper on Some Suggestions For the Reform of Fire Insurance Legislation in Manitoba by the Manitoba Law Reform Commission, [3] and a report by the Ontario Law Reform Commission on Motor Vehicle Accident Compensation. [4] With so much material available, any survey of insurance law must be highly selective. I have tried to concentrate on material concerned with fundamental insurance concepts, reoccurring and seemingly intractable problems, and those things which illustrate weaknesses in the legislative and regulatory process. In addition, I have arbitrarily left out the latest steps in the movement towards a new motor vehicle accident compensation system. [5]

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* B.A., 1966, University of British Columbia; LL.B., 1965, Queen's University; LL.M., 1966, University of California. Professor, Faculty of Law, Queen's University.

[1] Baer, *Annual Survey of Canadian Law: Insurance*, 6 OTTAWA L. REV. 193 (1973).

[2] A record of these proceedings is published as the MINUTES OF PROCEEDINGS OF THE ASSOCIATION OF SUPERINTENDENTS OF INSURANCE [hereinafter cited as PROCEEDINGS].

[3] MANITOBA LAW REFORM COMMISSION, WORKING PAPER ON SOME SUGGESTIONS FOR THE REFORM OF FIRE INSURANCE LEGISLATION IN MANITOBA (December 1974). See a forthcoming comment on this working paper by Professor R. A. Hasson in the second issue of 1 CAN. BUS. L.J.

[4] ONTARIO LAW REFORM COMMISSION, REPORT ON MOTOR VEHICLE ACCIDENT COMPENSATION (1973). *See also* the proposal of the Insurance Bureau of Canada, *Vari-Plan*, reproduced as an appendix to Berg & Kilby, *Motor Vehicle Accident Compensation In Ontario: Proposed Changes—are they Necessary?*, 13 WESTERN ONT. L. REV. 125, at 147 (1974). The I.B.C. plan is also discussed in *A Symposium of No-Fault Automobile Insurance*, 8 L.S.U.C. GAZETTE 17 (1974).

[5] The latest plan is that in British Columbia: Automobile Insurance Act, B.C. Stat. 1973 c. 6; Insurance Corporation of British Columbia Act, B.C. Stat. 1973 c. 44; Statute Law Amendment Act, 1973, B.C. Stat. 1973 (2d Sess.) c. 152, § 2; Statute Law Amendment Act, 1974, B.C. Stat. 1974 c. 87, §§ 4 & 21; Statute Law Amendment Act, 1974 (No. 2), B.C. Stat. 1974 c. 114, § 1; Insurance Corporation of British

II. CASE LAW

A. *Secret Law and Litigation Caused by Inadequate Legislation*

Previous surveys [6] have been critical of the drafting quality of much recent insurance legislation. Typographical errors, complex and obscure provisions and ambiguity abound. In addition, the public has to cope with several levels of delegated legislation whose duration in some cases is almost fleeting and whose existence is not often widely-known. The deleterious effect of this poor legislative effort is aggravated by the attitude of some courts and superintendents.

The courts are reluctant to compensate for inadequate legislation. This attitude reached a new nadir in the trial judgment in the *Minister of Transport for Ontario v. Phoenix Assurance Co.*, [7] where the court refused to "usurp legislative functions" by interpreting a statutory provision according to "logic and good sense". [8] The attitude of the superintendents on the other hand is one shared by the insurance industry. Like the industry they find the legislative process cumbersome and too formal. Instead they prefer the informality of indusy-wide rules which can be quickly changed to meet unforseen difficulties. [9] In part, this attitude stems from frustration caused by what they consider to be incorrect interpretation by the courts. However, this attitude does not give sufficient recognition to the interest of the public. The superintendents rely too heavily on the industry itself to inform the public of its rights. The conflict of interest that this creates when an insurer is denying liability should be obvious.

An example of this growing body of secret law came to light in the recent judgment of the Ontario High Court in *Allstate Insurance Co. v. Minister of Consumer & Commercial Relations for Ontario.* [10] The judgment reveals that the Ontario Superintendent has required undertakings from non-licensed insurers to abide by conditions similar to those provided by section 25 of the Insurance Act. [11] These undertakings seem to be for the

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Columbia Amendment Act, 1975, B.C. Stat. 1974 c. 30; Automobile Insurance Amendment Act, 1975, B.C. Stat. 1975 c. 5. In New Brunswick, Bill 33, An Act to amend the Insurance Act, was given second reading and referred to Committee on April 25, 1975. For Quebec, *see* Foster, *A Comment on the Memoire du Barreau du Québec au Comité d'Etude sur l'Assurance Automobile*, 9 R.J.T. 47 (1974), *and* Tunc, *Le Rapport du Comité d'étude sur l'assurance automobile*, 16 C. DE D. 9 (1975). In Manitoba, the legislation was extensively amended in 1974: An Act to Amend the Automobile Insurance Act, Man. Stat. 1974 c. 58.

[6] Baer, *Annual Survey of Canadian Law: Insurance*, 3 OTTAWA L. REV. 553 (1969), 4 OTTAWA L. REV. 497 (1971), 6 OTTAWA L. REV. 193 (1973).

[7] [1972] 3 Ont. 777, [1972] Ins. L.R. 1538, 29 D.L.R.3d 513 (High Ct.).

[8] The decision was reversed on appeal: 1 Ont.2d 113, [1973] Ins. L.R. 1854, 39 D.L.R.3d 481 (1973).

[9] For a typical discussion by the industry and superintendents on the advantage of industry-wide rules over legislation, *see* PROCEEDINGS 119 & 122 (1973).

[10] [1973] 2 Ont. 5, [1973] Ins. L.R. 1665, 32 D.L.R.3d 655 (High Ct.).

[11] ONT. REV. STAT. c. 224 (1970).

benefit of the public, but who outside of the industry knew of their existence? Nor is it necessarily easy to get a copy of these undertakings from the Superintendent. [12]

Shortcomings in drafting have been particularly numerous in the new limited automobile accident insurance provisions. Much of the recent litigation which resulted from ambiguity in the statutes, regulations and standard contracts was predictable. One of the more important examples involves the definition of dependent in Part B of the Standard Automobile Policy. [13] The references to "household" and "head of the household" have led several courts to deny death benefits to wives and children living apart from the husband and father, [14] even when he is paying support voluntarily, [15] or under a court order. [16]

More careful drafting might also have prevented the more than a dozen cases involving the effect of the payment or availability of accident benefits on the insured's tort claim. [17] Although here some responsibility for the continuous litigation must be placed on some courts which have continued to interpret rather broadly drawn release provisions very restrictively. While the initial reaction of the courts was to allow full recovery of the tort claim coupled with some subrogation by the accident insurer (depending upon which part of the Part B benefits were involved), the more recent cases seem

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[12] A letter to the Superintendent from the author requesting a copy of these undertakings has not been answered.

[13] In addition to the cases listed in the following notes, *see* Revega v. Western Union Ins. Co., [1965] Ins. L.R. 2280 (Alta. Sup. Ct. 1974), where parents who received 65 to 80 dollars a month from the deceased were held not entitled to the death benefit because they were principally dependent on the Old Age Security, *and Re* Public Trustee & Man. Public Ins. Corp., [1975] Ins. L.R. 2163, 46 D.L.R.3d 762 (Man. Q.B. 1974), where children received death benefits for both parents who were killed in a single accident.

[14] Linsley v. Co-operators Ins. Ass'n of Guelph, [1975] Ins. L.R. 2344 (Ont. High Ct.).

[15] Sullivan v. Saskatchewan Mut. Ins. Co., [1975] Ins. L.R. 2229 (B.C. Sup. Ct. 1974).

[16] McNeilly v. Allstate Ins. Co., [1972] 5 W.W.R. 764, [1973] Ins. L.R. 1609, 29 D.L.R.3d 384 (B.C. Sup. Ct. 1972).

[17] Leggate v. Curts, [1972] 3 Ont. 78, [1972] Ins. L.R. 1497, 27 D.L.R.3d 402 (High Ct.); Canwest Geophysical Ltd. v. Brown, [1972] 3 W.W.R. 23, [1972] Ins. L.R. 1504 (Alta. Sup. Ct.); Tucker v. Lindstrom, [1972] 6 W.W.R. 757, [1972] Ins. L.R. 1584 (B.C. Sup. Ct.); Mero v. Coleman, [1973] 2 Ont. 858, [1973] Ins. L.R. 1656, 35 D.L.R.2d 518 (High Ct.); Orion Ins. Co. v. Hicks, [1973] 2 W.W.R. 209, [1973] Ins. L.R. 1686, 32 D.L.R.3d 256 (Man. Q.B. 1972); Skrypnyk v. Wilson, [1973] 4 W.W.R. 764, [1973] Ins. L.R. 1846, 36 D.L.R.3d 766 (B.C. Sup. Ct.); Young v. Forster, [1973] 3 Ont. 536, [1973] Ins. L.R. 1883, 37 D.L.R.3d 364 (High Ct.); Northwestern Mut. Ins. Co. v. Bachalo, [1974] 1 W.W.R. 9, [1974] Ins. L.R. 1949 (Man. Q.B. 1972); Gorrie v. Gill, [1975] Ins. L.R. 2327 (Ont.); Whitten v. Poltronetti, [1974] 3 W.W.R. 676, [1974] Ins. L.R. 2090, 44 D.L.R.3d 120 (Man. Q.B.); Sabiston v. Ollenberger, [1973] Ins. L.R. 1809 (B.C. Sup. Ct), *rev'd*, [1975] 3 W.W.R. 261, 52 D.L.R.3d 455 (B.C. 1974); Milone v. Harty, 7 Ont.2d 241 (High Ct. 1975); Brusic v. Silva, [1974] Ins. L.R. 2128, 44 D.L.R.3d 318 (B.C. Sup. Ct. 1973); Remeika v. Administrator of Motor Vehicle Accident Claims Act, [1975] 4 W.W.R. 337, [1974] Ins. L.R. 2153 (Alta. Dist. Ct.); Plachta v. Richardson, 4 Ont.2d 654 (High Ct. 1974); Zemans v. Hannah, [1975] Ins. L.R. 2337 (B.C. Sup. Ct.).

to hold consistently that the insurer is not entitled to any subrogation and the amount of the tort claim should be reduced by the amount of the accident benefits received. In Ontario, the situation was made more complex by the seemingly inconsistent provisions of the Fatal Accidents Act.[18] However, the Ontario Court of Appeal has now applied the release provision found in the Insurance Act to a claim under the Fatal Accidents Act.[19]

That such a fundamental issue has been the subject of so much litigation suggests serious inadequacy in both legislative and judicial effort.[20] The savings to be realized by substituting accident benefits for tort litigation were, after all, at the centre of the decades of debate about no-fault insurance. The issue is not some unexpected technical problem.

Another less fundamental problem in the interpretation of the limited automobile accident insurance provisions which might have been avoided if the language had been more widely vetted before implementation, is the meaning of the phrase "entitled to workmen's compensation". Recent Ontario cases[21] have held that the accident victim is not entitled to workmen's compensation until he makes a claim and the Workmen's Compensation Board rules on it. If he elects not to claim compensation, he is not deprived of his limited accident benefits. Any reflection at all leads to the conclusion that if this is what the legislature meant, they have created an unnecessarily complex scheme for reconciling workmen's compensation and limited automobile accidents benefits. Not only is it complex, but it either allows the victim to decide which is first loss coverage, or perhaps gives him both if he claims his accident benefits first.[22]

B. *Defining the Risk: Proximate Cause*

As in the past, the most frequently litigated issues relate to the construction of insurance contracts. What do the words used in policies mean, especially exclusions to the risk, and was the loss proximately caused by a risk insured against? More than 25 per cent of the reported cases in the last three years are of this kind. Unlike the cases reported in previous years surveyed by the author, the cases reported in the last three years do not involve a large variety of different terms or clauses. Instead most of the

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[18] ONT. REV. STAT. c. 164 (1970).

[19] Gorrie v. Gill, *supra* note 17.

[20] In spite of the confusion in the case law the superintendents have decided to wait until the next revision of the Uniform Automobile Part to redraft the pertinent statutory provisions: *see* PROCEEDINGS 61 (1974).

[21] Benlezrah v. Federal Fire Ins. Co. of Canada, [1974] Ins. L.R. 1945 (Ont. Cty. Ct. 1972); Chu v. Madill, 5 Ont.2d 729, [1974] Ins. L.R. 2134, 51 D.L.R.3d 481 (1974).

[22] While most of the litigation involving limited automobile accident insurance should not have been necessary, there has been the odd case reported which could not reasonably be anticipated. The case of *Re* Strum, 2 Ont.2d 70, [1973] Ins. L.R. 1885, 42 D.L.R.3d 52 (High Ct. 1973) is an example of this. There the insured car hit a street sign which struck the deceased. The issue raised was whether the deceased was covered under Part B of the Standard Automobile Policy.

cases involve a short list of old familiar phrases such as "accident", "liability imposed by law", "carrying passengers for compensation or hire", "automobile of a private passenger type", and "collision".

The reason for this significant return to litigation over well-litigated phrases is not obvious. In some cases litigation is bound to continue given the nature of the distinction drawn by the insurance industry. For example, as long as automobile physical damage cover is divided between collision and comprehensive, litigation will continue as insureds find new ways to damage their cars. In other cases, litigation continues because of a certain "school-marmish" perversity of the courts. The interpretation of the phrase "carrying passengers for compensation or hire" is an example of this. In spite of repeated efforts by the industry and legislature to exempt informal or neighbourly arrangements from the operation of this exclusion, the courts continue to adopt the attitude that while they may understand what is being attempted, the industry and the legislature have not quite got it right yet. In these cases one wonders about the motive of the insurer in raising the defence. Short of changing the attitude of the judiciary, the solution seems to be to start over from scratch and rewrite the exclusion in a way which more precisely excludes that which is intended to be excluded.

Before discussing the recent interpretation of each phrase in turn, it is worth noting certain general issues which have been raised by recent cases. Since the time of *De Hahn v. Hartley*,[23] it has been the law that any breach of condition by the insured allows the insurer to treat the contract as void. There is no need for the insurer to show any casual link between the breach of condition and the occurrence of the risk insured against. The same general notion has usually been applied to exclusion clauses. That is, if the exclusion clause is applicable there is no need for the insurer to show some casual link between the conduct excluded and the occurrence of the risk.

Two recent British Columbia cases illustrate the harshness of this doctrine. In *Wilson v. Insurance Co. of North America*,[24] the policy excluded coverage when the insured pilot was not properly licensed. The pilot was qualified, and the court found that "no additional risk was occasioned by the non-compliance".[25] However, in denying the insured's claim they held that there was no need for the insurer to show any casual relationship between the exclusion and the accident. In *Squires v. B.C. Motorist Insurance Co.*,[26] the plaintiff claimed under an accident insurance policy issued by the defendant to the plaintiff's husband. The husband was killed when he was struck down by a motor vehicle while crossing a street. The policy excluded coverage while the insured was under the influence of any intoxicant. Once again the plaintiff's claim was dismissed even though there was no

[23] 2 T.R. 186n, 100 E.R. 101n (Ex. Chambers 1787), *aff'g* 1 T.R. 343, 99 E.R. 1130 (K.B. 1786).

[24] [1974] 5 W.W.R. 444, [1974] Ins. L.R. 2139 (B.C. Sup. Ct.).

[25] *Id.* at 449, [1974] Ins. L.R. at 2142.

[26] [1974] 6 W.W.R. 673, [1975] Ins. L.R. 2236, 48 D.L.R.3d 478 (B.C. Sup. Ct. 1974).

causal relationship between the accident and the excluded conduct. These cases suggest that there may be a need for a provision similar to section 98(5) of the Ontario Insurance Act requiring all exclusions to be material in operation. Even without such a provision, some courts use the test of materiality as an aid in construing ambiguous exclusions.[27] However, this is not an universal, or even widespread, practice.[28]

Sometimes a causal link may be required by the terms of the exclusionary clause. But courts do not always interpret such clauses very strictly. For example, in *Whiting v. Co-Operative Life Insurance Co.*,[29] a policy providing double indemnity for accidental death contained an exclusion for death resulting "directly or indirectly from or was in any manner or degree associated with or occasioned by: . . . committing . . . [a] criminal offence". The British Columbia Court of Appeal held that the words of the exclusion meant that if there was "the slightest *possibility* of a causal connection between the death and the commission of the offence it is sufficient to bring the exception into play".[30]

Another general issue raised by the recent construction cases is whether there is some special rule in interpreting exclusion clauses. That there is some special rule seems to be the attitude of Chief Justice Laskin in *Sirois v. Saindon*.[31] In fact, the Chief Justice implies that it is only exempting provisions which are construed *contra proferentem*.[32] It is true that there is special judicial hostility to exclusions since they involve what is thought to be an unfair practice of giving with one hand while taking away with the other. However, the leading texts contain numerous citations of cases where *contra proferentem* has been invoked more generally in interpreting insurance contracts. It is not limited to the interpretation of exclusionary provisions.

In the courts application of *contra proferentem* there is little recognition of the role of the Superintendent in drafting insurance policies. No form of automobile insurance policy can be used without the approval of the Superintendent. In fact, in some provinces part of the policy has been drafted, in theory at least, by the legislature or the Lieutenant Governor in Council. In this situation is it appropriate to invoke *contra proferentem* against the insurer? In *Twa v. Co-Operative Fire & Casualty Co.*,[33] the majority of the Supreme Court of Canada did apply *contra proferentem* in interpreting an exclusion approved by the Superintendent.[34] In *Chu v.*

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[27] *See, e.g.*, Royal Ins. Co. v. Rourke, [1974] Ins. L.R. 2118 (Que. 1973).

[28] The technique might lead to a more sensible interpretation of the phrase "carrying passengers for compensation or hire".

[29] [1975] Ins. L.R. 2353 (B.C.).

[30] *Id.* at 2354, although the court did go on to say that on the evidence it "offends common sense to suggest that this death was not associated with [the criminal act]": *id.*

[31] [1975] Ins. L.R. 2290 (Sup. Ct.).

[32] *Id.* at 2294.

[33] [1974] 1 W.W.R. 467, [1973] Ins. L.R. 1859, 39 D.L.R.3d 723 (1973).

[34] *Cf.* Linsley v. Co-operators Ins. Ass'n of Guelph, *supra* note 14.

Madill, [35] Mr. Justice Arnup for the Ontario Court of Appeal applied *contra proferentem* in interpreting the Schedule E benefits provided by the Ontario Insurance Act.

While at first this may seem a strange use of the *contra proferentem* doctrine, it is not inappropriate. In fact, most automobile insurance policies continue to be drafted if not by the individual insurer, at least by the insurance industry. This is true not only of those parts which are approved by the superintendents, but also of those which take the form of legislation or regulations. Simply because any ambiguity has not been caught by the Superintendent, Cabinet or Legislature is no reason to deprive the insured of the normal protection provided by *contra proferentem*. After all, these bodies quite often rely upon the industry, especially in matters of technical detail. Moreover, it would not be unjust for the courts to go further and to invoke *contra proferentem* against the insurer even where legislation or regulations have been drafted by the government. The insurance industry is in the best position to initiate corrective or clarifying changes.

1. *Accident*

Of the recent cases interpreting old familiar phrases, the most surprising are those concerned with the meaning of "accident". As I indicated in previous surveys, the meaning of this word had become fairly settled in the case law. [36] The general weight of authority was to the effect that the occurrence of the risk was still accidental even if caused by the insured's negligent conduct. Moreover, it was still an accident if it was the unforeseen result of deliberate conduct. This attitude of the courts emerged more clearly in liability insurance than in other types, but it was an interpretation which was widely accepted as being applicable to all insurance policies. There have been several recent cases, [37] including one in the Supreme Court of Canada, [38] which have adopted this general approach to interpreting the word "accident". However, new uncertainty has been introduced by the recent Supreme Court of Canada case of *Sirois v. Saindon*. [39]

The incident which gave rise to this litigation started with a dispute over the cutting of branches on the defendant's cherry tree. Angered by the removal of his cherry tree branches, the defendant threatened the plaintiff by raising a rotary lawn mower shoulder-high and directing it towards the

[35] *Supra* note 21.

[36] Baer, *Annual Survey of Canadian Law: Insurance*, 4 OTTAWA L. REV. 497, at 506 (1971), 6 OTTAWA L. REV. 193, at 220 (1973).

[37] Avalon Consol. School Bd. v. McNamara Indus. Ltd., 6 Nfld. & P.E.I.R. 375, [1975] Ins. L.R. 2202 (Nfld. Sup. Ct. 1974); Prince George White Truck Sales Ltd. v. Canadian Indem. Co., [1973] 6 W.W.R. 365, [1974] Ins. L.R. 1923, 40 D.L.R.3d 616 (B.C. Sup. Ct.); Tiko Elec. Co. v. Canadian Sur. Co., [1973] Ins. L.R. 1888 (Ont. Cty. Ct.); Stevenson v. Continental Ins. Co., [1973] 6 W.W.R. 316, [1973] Ins. L.R. 1818 (B.C. Sup. Ct.).

[38] Canadian Indem. Co. v. Walkem Mach. & Equip. Ltd., [1975] Ins. L.R. 2238, 53 D.L.R.3d 1 (Sup. Ct.).

[39] [1975] Ins. L.R. 2290, 56 D.L.R.3d 556 (Sup. Ct.).

plaintiff's face. The plaintiff tried to protect himself and in doing so the blades of the lawn mower struck both of the plaintiff's hands severing the fingers from his left hand and injuring his right wrist.

The trial judge allowed the plaintiff's tort claim against the defendant but dismissed the third party claim against the liability insurer.[40] In so doing the trial judge found that the defendant intentionally and deliberately raised the lawn mower in order to scare the plaintiff, but that he did not intend to injure him. In dismissing the claim against the insurer the trial judge found that:

> The proper interpretation of this section of our *Insurance Act* has always been to the effect that where injuries are caused to a Third Party by a deliberate calculated act, the assured cannot recover indemnity from his Insurer. On this ground of its defence, the Third Party is, in my opinion entitled to succeed.[41]

The provisions of the Insurance Act to which the trial judge referred are those contained in section 2 of the Insurance Act of New Brunswick which provides:

> PUBLIC POLICY RULE
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> 2. Unless the contract otherwise provides, a violation of any criminal or other law in force in the Province or elsewhere does not, *ipso facto*, render unenforceable a claim for indemnity under a contract of insurance except where the violation is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage . . . .[42]

The trial judge also based his decision on the terms of the insurance policy which provided that the coverage did not apply to "bodily injury or personal damage caused intentionally by or at the direction of an insured". The trial judge said: "There can be no doubt in my mind that the defendant deliberately raised the lawn mower in the face of the defendant [*sic*]. On this third ground the Third Party, is in my opinion, also entitled to succeed."[43]

In reversing the trial judgment, Mr. Justice Limerick speaking on behalf of the Court of Appeal said:

> As the injury to the plaintiff was not intentionally inflicted, but was the unforeseen result of a criminal act, the effect of section 2 above is to negate the "Public Policy Rule" and as the insurer in the contract exclude only personal injuries intentionally inflicted and does not exclude injuries otherwise arising out of the commission of a criminal act, the insurer is not relieved of its liability on the ground of public policy.[44]

There were then two distinct but complementary lines of argument accepted by the trial judge and rejected by the Court of Appeal. One involved the application of the common law rule that an insured could not recover for a criminal act, and its modification by section 2 of the New

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[40] Sirois v. Saindon, 7 N.B.2d 285 (Q.B. 1973).

[41] *Id.* at 288.

[42] N.B. REV. STAT. c. I-12 (1973).

[43] *Supra* note 40, at 289.

[44] Sirois v. Saindon, 7 N.B.2d 280, at 285, [1974] Ins. L.R. 2000, at 2002, 44 D.L.R.3d 469, at 472 (1973).

Brunswick Act. The second involved the application of the exclusion in the policy for damage caused intentionally by or at the direction of the insured. Both lower courts interpreted section 2 in such a way that its application depended upon the same criteria as the exclusion in the policy. That is, if the damage was intentionally caused, the insurer was relieved from liability both by the application of section 2 of the Insurance Act and the policy itself.

The Supreme Court of Canada allowed the appeal and restored the trial judgment denying the insured's claim. The judgments of both the majority and dissent are curiously lacking in citations to the Canadian case law. Instead the majority relied on a recent English Court of Appeal decision, [45] and the dissent of Chief Justice Laskin has several references to American cases. Perhaps the most noteworthy omission in the majority decision is any discussion of the court's judgment in the *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.*, [46] although the case was cited and relied upon by Chief Justice Laskin in his dissenting judgment.

As in the courts below, the majority judgment appears to find that the interpretation of the public policy rule found in section 2 of the Act is the same as the interpretation of the policy itself. Both turn on whether the insured's conduct was intentional. The majority found that the insured's conduct was intentional in language which shows they viewed the problem as one of causation. The court concluded:

> The fact that the lawnmower tipped when put to such an unnatural use was an eminently foreseeable development and one which the respondent ought to have known to be a part of the danger to which he was exposing his neighbour. The immediate cause of Sirois' injury was a combination of his gesture of self-protection and the tipping of the lawn mower but, in my opinion, these two circumstances flowed directly from the respondent's deliberate act in raising the lawn mower as he did, which was the dominant cause of the occurrence. [47]

This passage does not very carefully distinguish between intentional conduct with intended results, intentional conduct with unintended but reasonably foreseeable results, and intentional conduct with unintended results but done in wanton and reckless disregard of likely results. It is only the first and third of these possibilities which are held to be intentionally caused and not accidents by the predominant weight of authority. This prevailing weight of authority seemed to have been accepted by the court in the *Walkem Machinery & Equipment* case. If anything, the quoted passage suggests that the majority of the Supreme Court of Canada would treat even intentionally caused conduct with reasonably foreseeable consequences as being intentional. One cannot be certain in this conclusion since the Court does refer to "eminently foreseeable development". It may be the Court

[45] Gray v. Barr, [1971] 2 Q.B. 554, [1971] 2 All E.R. 949, [1971] 2 W.L.R. 1334 (C.A.).

[46] *Supra* note 38.

[47] *Supra* note 39, at 2292, 56 D.L.R.3d at 564.

has in mind not the normal standard of negligence but rather that the insured's conduct showed a wanton and reckless disregard for the consequence.

Perhaps Mr. Justice Ritchie's majority decision ought to be read more restrictively. This would make it more compatible with the weight of authority. It may be that it is confined to *criminal* conduct with reasonably foreseeable consequences. This would demonstrate a lingering reluctance to provide insurance coverage for criminal conduct. Such an attitude is also illustrated by the recent Ontario case of *Stats v. Mutual of Omaha Insurance Co.*,[48] discussed below. Such a restricted interpretation is supported by the fact that Mr. Justice Ritchie adopted as being particularly pertinent to the circumstances of the case the following language employed by Lord Phillimore in the English case of *Gray v. Barr*: [49]

> No doubt the word "accident" involves something fortuitous or unexpected, but the mere fact that a willful and culpable act—which is both reckless and unlawful—has a result which the actor did not intend surely does not, if that result was one which he ought reasonably to have anticipated, entitle him to say that it was an accident.[50]

The terms of the exclusion in *Sirois v. Saindon* are not identical to those found in others. The word "accident" is not used. Instead what is excluded is damage caused "intentionally" by the insured. Normally you would expect that whether coverage is provided for damage "caused by accident", or for damage except that caused "intentionally" by the insured, would not be important in deciding whether deliberate conduct with unforeseen consequences is covered by the insurance policy. So unless there is to be some extreme hair-splitting, the case is authority for the interpretation of all similar kinds of clauses. Such a view is supported by the fact that the majority in the Supreme Court of Canada found support for their decision in the recent English Court of Appeal decision of *Gray v. Barr* interpreting the phrase "caused by accident". While Chief Justice Laskin in dissent would distinguish between phrases which provide coverage and those which exclude it, he does not suggest that any distinction should be drawn between synonymous phrases.

Many accident insurance policies now contain exclusion for death or accident resulting from the commission of a criminal offence. There has been some consideration in recent cases as to whether the term criminal offence should be given a broad interpretation or whether it should be restricted to crimes which require a specific wicked intent. These cases do not really discuss the outer limits to the meaning of criminal offence since they are concerned with automobile accidents resulting from drunk driving. In view of the seriousness with which the law treats driving while intoxicated, it would seem to be covered under the most restrictive definition of criminal offence. This has been the conclusion of the two recent British Columbia

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[48] 6 Ont.2d 734, [1975] Ins. L.R. 2242, 54 D.L.R.3d 29 (High Ct.).
[49] *Supra* note 45.
[50] *Id.* at 586, [1971] 2 All E.R. at 969, [1971] 2 W.L.R. at 1358.

cases of *Whiting v. Co-operative Life Insurance Co.*,[51] and *Elsaesser v. Mutual Life Assurance Co. of Canada.*[52] In fact, the Ontario High Court has gone even further in *Stats v. Mutual of Omaha Insurance Co.*[53] There, even in the absence of an exclusion for accidents caused by the commission of a criminal offence, the court held that the deceased's death was not an accident when it was caused by an automobile collision when the deceased was driving while grossly intoxicated. The decision is not based on any public policy reservation that the insured cannot collect for the consequence of a criminal act nor on any policy provision in terms of criminal conduct. Instead the decision is based on the court's view of the meaning of accident and its view of the proximate cause of the insured's death. The court concluded:

> Her death was a direct consequence of deliberately driving her motor-car in the circumstances described, *supra*, directly into the store building without slackening speed. It was not because of the intervention of any fortuitous circumstance. Put another way, the proximate cause of the collision was her self-induced impairment, her actions and manner of driving.[54]

The court described the meaning of accident in the following way:

> Respectfully, it does not require that the conduct of the deceased be "almost deliberately suicidal and pointless" to take the injuries or death out of the area of "accident" as delineated in the policy and as contemplated by the authorities I referred to above, but rather on the basis of the foreseeable consequences of intentional action on the part of the deceased.[55]

As I have mentioned above and in previous surveys, this is contrary to a long line of case law. It can only be explained as a manifestation of lingering but unexpressed public policy reservation against criminal conduct. The case is of doubtful authority for the meaning of "accident" when there is intentional conduct resulting in unforeseen consequences, especially consequences which reasonably ought to have been foreseen.

2. *Carrying Passengers For Compensation or Hire*

With one exception, the recent cases interpreting the phrase "carrying passengers for compensation or hire" which appears in the standard automobile insurance policy must be both depressing and frustrating for those legislative draftsmen who have attempted to remove informal arrangements from the ambit of this phrase. The one exception is *Labadie v. Co-operators Insurance Association (Guelph)*[56] where the Ontario High Court found that the taking of a modest sum in exchange for driving co-workers to work was a sharing of expenses and an informal arrangement not of a commercial nature. As a result it was not covered by the phrase "carrying passengers

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[51] [1975] Ins. L.R. 2253 (B.C. 1974).
[52] [1975] Ins. L.R. 2233 (B.C. Sup. Ct. 1974).
[53] *Supra* note 48.
[54] *Id.* at 741, [1975] Ins. L.R. at 2245, 54 D.L.R.3d at 36.
[55] *Id.* at 741, [1975] Ins. L.R. at 2246, 54 D.L.R.3d at 36.
[56] 4 Ont.2d 325, [1974] Ins. L.R. 2073, 48 D.L.R.3d 16 (High Ct.).

for compensation or hire". By distinguishing between informal arrangements and those of a commercial nature the court fairly accurately captured the essence of the recent statutory attempts to clarify the meaning of this phrase. However, it might have done better by inquiring what facts are really material in making the distinction. Whether materiality is defined as material to the risk or material to the premium, it could easily be found that whether the insured charged his co-worker a modest sum or not did not affect the risk, provided a similar interpretation was used to identify gratuitous passengers under provincial highway traffic legislation. It is only the possibility of being liable for ordinary negligence rather than gross negligence which prompts this provision in the Insurance Act in the first place. While the distinction may still be difficult at times, it would be easier to make if the courts expressly referred to the purpose of the exclusion. What is attempted is to exclude certain situations that have a higher risk. What should be in the forefront of the courts' consideration is whether the conduct of the insured would be considered by most reasonable insurance companies to increase the risk and whether the phrase chosen by the insurer is sufficiently clear to bring this home to the insured. Moreover, this suggests that doubtful cases should be resolved in favour of the insured. However, this is one area where *contra proferentem* seems to have been forgotten.

We should keep in mind that the industry will, for an additional premium, provide coverage for liability caused by ordinary negligence to paying passengers. This suggests that if the distinction between gratuitous and paying passengers is preserved, carrying for hire should not be a defence against the victim's direct recourse action and perhaps should not even be a defence against the insured. Instead, the insurer should have a claim against the insured for an additional premium. At the very least a paying passenger and his host should be covered if in fact there was gross negligence. [57]

The sensible result reached by the Ontario High Court in *Labadie* should be contrasted with the two recent appellate decisions of *Compagnie d'Assurance Provinces Unies v. Verret*, [58] and *Kosic v. Bono*. [59] The facts of the latter case are particularly striking. An insured who charged five dollars every two weeks to take someone to work was held to be in the business of carrying passengers for compensation. If it were not for the legislative and judicial history surrounding this phrase, the somewhat mechanical and strict interpretation made by the court might be justifiable. However, given this history and given also the fact that the legislature has many competing claims for its time, it is respectfully submitted that the attitude of the court seems irresponsible. It is this attitude which has led the industry and superintendents to prefer law making by regulation or informal industry-

[57] For the attitude of the insurance industry, *see* PROCEEDINGS 49 (1974).
[58] [1974] Ins. L.R. 2112 (Que. 1973).
[59] 6 Ont.2d 1, [1975] Ins. L.R. 2186, 51 D.L.R.3d 645 (1974).

wide rules. It is the kind of attitude which in other areas has led to the formation of specialized administrative tribunals.

3. *Liability Imposed By Law*

The meaning of the phrase "liability imposed by law" when coupled with an exclusion for liability assumed under the terms of any contract was considered by the Supreme Court of Canada in two cases a decade apart. [60] Both cases involved the use of these phrases in what the industry calls a "comprehensive business liability policy". These cases had two significant results. In the first place the coverage provided under these comprehensive business liability policies was severely restricted. In fact, coverage was not provided for the kind of liability which the insured would most likely incur in its normal activity. In the second place, the cases resulted in some confusion as to whether the phrase "liability imposed by law" itself included contractual liability.

In the past few years five cases [61] have been reported which once again raise the issue of the meaning of "liability imposed by law". Two of these cases [62] involve the same insurer which has unsuccessfully raised the same defence in litigation in Alberta and British Columbia. Once again the extent of coverage turns on the meaning of the phrase "liability imposed by law" when coupled with an exclusion of liability assumed by contract. The difference in these two cases is the addition of the following phrase to the exclusion for liability assumed by contract: "This exclusion shall not apply to liability for a breach of a warranty of condition implied under the Sale of Goods Act." The gist of the insurer's defence was that liability imposed by law and contractual liability were mutually exclusive categories. That is, any liability based on contract was not covered in the phrase "liability imposed by law". Hence, the insured's liability for breach of the Sale of Goods Act's implied condition as to quality was not covered by the policy. On the other hand, in a Manitoba case [63] the same insurer's defence was based upon the argument that liability imposed by law and contractual liability were not mutually exclusive, that liability imposed by law was a general concept covering both tortious and contractual liability. From this general

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[60] Canadian Indem. Co. v. Andrews & George Co., [1953] 1 Sup. Ct. 19, [1952] Ins. L.R. 369 (1952); Dominion Bridge Co. v. Toronto Gen. Ins. Co., [1963] Sup. Ct. 362, [1963] Ins. L.R. 535.

[61] Northwood Mills Ltd. v. Continental Ins. Co., [1973] 5 W.W.R. 144, [1973] Ins. L.R. 1784, 38 D.L.R.3d 566 (B.C. Sup. Ct.); Moffat Tank Co. v. Canadian Indem. Co., [1974] 1 W.W.R. 688, [1974] Ins. L.R. 2008, 42 D.L.R.3d 260 (Alta.); Foundation of Canada Eng'r. Corp. v. Canadian Indem. Co., [1974] 3 W.W.R. 23, [1974] Ins. L.R. 2041, 44 D.L.R.3d 298 (Man.); Shore Boat Builders Ltd. v. Canadian Indem. Co., [1975] 2 W.W.R. 91, [1975] Ins. L.R. 2307, 51 D.L.R.3d 628 (B.C. Sup. Ct. 1974); T. W. Thompson Ltd. v. Simcoe & Erie Gen. Ins. Co., [1975] Ins. L.R. 2325 (Ont. High Ct.).

[62] Shore Boat Builders Ltd. v. Canadian Indem. Co., *supra* note 61 and Moffat Tank Co. v. Canadian Indem. Co., *supra* note 61.

[63] Foundation of Canada Eng'r. Corp. v. Canadian Indem. Co., *supra* note 61.

coverage was excluded contractual liability. Furthermore, the insurer relied upon the 1963 Supreme Court of Canada decision of *Dominion Bridge Co. v. Toronto General Insurance Co.* [64] to argue that the exclusion for contractual liability covered all liability which could have been brought by an action on the contract. That is, the exclusion was not avoided simply by having the action framed in tort rather than contract.

The conclusion of these recent cases that "liability imposed by law" does include contractual liability is consistent with the earlier Supreme Court of Canada judgments. While the 1953 Supreme Court decision [65] interpreted liability imposed by law and contractual liability as mutually exclusive, the Court did this because of the particular wording of the policy under consideration. The policy in defining the risk had used both phrases as if they were mutually exclusive. Where the phrase "liability imposed by law" is used alone to describe the risk, subject to an exclusion in terms of contractual liability, the courts have given "liability imposed by law" a broader meaning.

As Mr. Justice Johnson noted in *Moffat Tank Co. v. Canadian Indemnity Co.*, [66] one can only speculate as to why changes were made in these comprehensive business liability policies. As the Judge suggests, one reason may be that the restrictive interpretation of the Supreme Court meant that the coverage was so limited it was difficult to sell and changes were made in an attempt to broaden the coverage provided. I suspect that this is an area where the Supreme Court of Canada has just taken a wrong turn and misconstrued the intention of the industry as to the scope of coverage provided by these policies. The response of the industry has been to make the policies more complex in order to broaden coverage. I suspect that the original intention was to provide coverage for the normal kinds of liability associated with the insured's business. What the industry tried to do was protect itself from extraordinary liability created by contract. What they had in mind was contractual liability which was not also tortious, nor the kind of contractual liability which was normally associated with the insured's business. This view is supported by the nature of the industry's reaction to the earlier Supreme Court decision. They have removed from the operation of the exclusion the normal implied conditions as to quality. [67]

In two of these recent cases the defendant insurer has once again raised the issue of whether "liability imposed by law" requires that there be a judgment against the insured. In both the British Columbia case of *Shore Boat Builders Ltd. v. Canadian Indemnity Co.*, [68] and the Manitoba case of *Foundation of Canada Engineering Corp. v. Canadian Indemnity Co.*, [69] the court

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[64] *Supra* note 60.

[65] Canadian Indem. Co. v. Andrews & George Co., *supra* note 60.

[66] *Supra* note 61, at 693, [1974] Ins. L.R. at 2113, 42 D.L.R.3d at 265.

[67] Readers should note the variation in policy wording in the case of Thompson Ltd. v. Simcoe & Erie Gen. Ins. Co., *supra* note 61.

[68] *Supra* note 61.

[69] *Id.*

held that such a judgment was not necessary where the settlement was reasonable. Both were cases in which the insurer refused to act on behalf of its insured. In fact, in the British Columbia case, the court refers to *Reliance Petroleum Ltd. v. Stevenson,* [70] in holding that it is the repudiation by the insurer of its obligations which relieves the insured from the requirement of a judgment. It is not as clear in the Manitoba case whether repudiation by the insurer is necessary in order to provide coverage when there is no judgment, although the court does refer to the fact that the insurer had denied liability, that the insured had kept them fully informed of the proceedings including the settlement proposed and that the settlement had been confirmed by a consent judgment of the court.

In any event, it is only where the insurer has denied liability that the insured will escape his normal obligation in these policies to co-operate with the insurer in defending any action brought against him. Even where it is not clearly spelled out in the policy, this will normally imply that the insured cannot reach a settlement without the consent of the insurer. Of course, even where the insurer repudiates and the insured can reach an independent settlement, the court will still require the settlement to be reasonable. However, if the subrogation cases are any guide, there will be little attempt to second-guess the conduct of the insured and little attempt to determine whether the settlement was reasonable from the bargaining position of the insurer as opposed to the insured. Rather, it will be up to the insurer to almost show some element of bad faith.

4. *Disabled*

Not all of the cases concerned with the interpretation of the policy involved phrases with a long history of litigation. There were a number of cases involving the interpretation of phrases which have not come before the courts in the past. Most of these cases involve phrases which are not common in standard types of insurance. Few general principles can be extracted from these cases. They are most noteworthy perhaps in their selective use of the doctrine of *contra proferentem.* The meaning of a more widely-used phrase has however been raised by two cases involving the extent of coverage provided by disability insurance.

In *McGrath v. Exelsior Life Insurance Co.,* [71] the insured refused to undergo a back operation when he could be given no guarantee that the operation would correct his disability. The defendant insurer argued that the insured's disability was caused not by accident but by his refusal to have the operation. In finding for the insured, the court held that his refusal to undergo the operation was reasonable in the circumstances. The issue was treated by the court as a question of causation. In deciding whether the disability was caused by the accident or by the refusal to have the operation, the test adopted by the court seems to be whether the refusal was reasonable.

[70] [1956] Sup. Ct. 936, [1956] Ins. L.R. 127.
[71] 6 Nfld. & P.E.I.R. 203 (Nfld. Sup. Ct. 1973).

The court's approach seems like an oblique way to discuss the issue of whether the insurer can insist upon medical treatment by the insured as a precondition to making disability payments. Without such a condition in the policy, is there any reason why the insured's refusal to undergo an operation should deprive the insured from disability benefits, whether such refusal is considered reasonable or not by any objective standard? Does the doctrine of *contra proferentem* have any application to force the insurer to clearly spell out such an important limitation on an insured's freedom to seek whatever medical treatment he thinks appropriate?

In the second case of *Fraser v. Maritime Life Assurance Co.*,[72] the Supreme Court of Nova Scotia held that an insured could be totally disabled even though he was enrolled in a theology college.

C. *Agency*

There has been a tendency in the past for Canadian courts to modify the general principles of agency law in applying them to insurance agents. In deciding whether the insurer is bound by the knowledge or action of its agents, they have tended to be more concerned with actual authority and have given less scope to the doctrine of apparent or ostensible authority than in other agency situations. In their concern for actual authority the courts have often distinguished between "soliciting" agents and agents with more general authority. This of course is not a distinction drawn by the Insurance Act nor is it a distinction that is known or discoverable by the insuring public. One of the more important examples of this approach by the courts is in their determination of whether the insured or the insurer should bear the consequences of any misrepresentation by the agent.

In recent years, several cases[73] have been reported which seem to reverse this trend and give proper scope to the doctrine of apparent and ostensible authority. In all three cases the insurer was bound by conduct of its agent acting within his ostensible or apparent authority. One case[74] involved the application of Article 1730 of the Quebec Civil Code by the Supreme Court of Canada, but there does not appear to be any fundamental difference between the Quebec Civil Code and the common law. One can only hope that this trend will continue and that the courts will give sufficient weight to the expectation of the insuring public who view insurance agents as employees of the insurer with authority to bind their employers. At the very least the public expects that the employee will disclose any limit on his authority. If the industry is not to be held to the public's general expectation, it should at least be held to what is usual practice. That is, if agents have more limited authority than is general practice, there should be

[72] 52 D.L.R.3d 204 (N.S. Sup. Ct. 1974).

[73] Code v. British Am. Assurance Co., [1972] 3 Ont. 673, [1972] Ins. L.R. 1532, 29 D.L.R.3d 264 (High Ct.); Fallas v. Continental Ins. Co., [1973] 6 W.W.R. 379, [1973] Ins. L.R. 1848 (B.C. Sup. Ct.); Ledley Corp. v. New York Underwriters Ins. Co., [1973] Sup. Ct. 751, [1972] Ins. L.R. 1570, 30 D.L.R.3d 129 (1972).

[74] Ledley Corp. v. New York Underwriters Ins. Co., *supra* note 73.

the usual emphasis on whether the insurer has done all possible to disclose this limitation to the public.

One particular situation where these agency principles come into play is in cases where the insurance agent fills in the application form to be signed by the applicant for insurance. Difficulties arise because the insured having made a full disclosure, expects the agent will have filled the application in properly. Typically the applicant will not read the application form, but even if he does he will assume that the agent knows what he is doing. If the application form contains some misrepresentation, courts have, following the leading English case of *Newsholme Brothers v. Road Transport & General Insurance Co.*, [75] held the applicant responsible for this. In doing so, they have been faced with the choice of applying normal agency principles and the inconsistent basic notion that someone should be responsible for what he signs.

In previous surveys, [76] I have commented on how unrealistic and unfair it is to place responsibility on the public for the inaccurate completion of documentation, especially where it is the industry's practice to have this documentation completed by the insurance agent. The results, in some recent cases have been particularly unjust because of the informality surrounding the completion of the application form, a procedure which makes no attempt to bring home to the insured that he should be checking the application form for accuracy. Instead the practice implies that the insured's signature is just a formality. Moreover, the insured's difficulty in knowing what is material adds to the injustice of this result.

In these particular kinds of situations, the recent Supreme Court of Canada case of *Blanchette v. C.I.S. Ltd.*, [77] may be the beginning of a reassertion by the courts of the normal agency rules and a more realistic and fair assessment of what responsibility the applicant should have for the misrepresentation of the agent. The majority judgment of Mr. Justice Pigeon is very restrictively qualified. Whether the case really represents the first step in a new direction or only introduces further complexity to the area remains to be determined.

The facts of the *Blanchette* case were somewhat different from those in *Newsholme* but they were by no means unusual. The plaintiff first applied for fire coverage on his granary and for public liability insurance. An application was filled out by the agent and signed by the plaintiff. Subsequently, the plaintiff telephoned the agent and asked him to include fire coverage on two tractors. The plaintiff's claim was based on fire damage to one of these tractors. It is important to note that the agent told the plaintiff that it was not necessary for him to visit the plaintiff's farm and that the additional coverage could be arranged over the telephone. The

[75] [1929] 2 K.B. 356, [1929] All E.R. Rep. 442 (C.A.).

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

[77] [1973] Sup. Ct. 833, [1973] Ins. L.R. 1728.

agent said that all he needed was the serial numbers which he could include in the portion of the application relating to farm equipment which had been left blank when the form was signed. The form relating to the tractors also contained two questions to which the answer "no" was filled in by the agent after the telephone conversation. One of these questions was: "Will any farm equipment be used for logging, forestry, brush cutting or saw-mill operations?" The plaintiff freely admitted at trial that the tractor in question was used for brush-cutting. From the reasons for judgment of both the majority and dissent it is unclear whether these questions were asked over the telephone. It appears that they were not. Moreover, it is not clear that the plaintiff even knew there were additional questions to be answered on the application form.

In relation to the coverage at issue, the case is very similar to the recent Nova Scotia case of *Boutilier v. Traders General Insurance Co.*,[78] in that the application was first signed by the applicant and later incorrectly filled in by the agent.

The judgments in the Supreme Court deal with two distinct issues which are not always carefully separated. First, the insurer argued that the agent did not have authority to accept the application for insurance and it had not been accepted by the company at the time of loss. Secondly, the insurer argued that even if the agent had authority to accept the risk, the misrepresentation in the application form was a material misrepresentation to the risk within the meaning of Statutory Condition 1.

In relation to the first issue there was disagreement in the Supreme Court both on the facts and the proper conclusions to be drawn from them. In addition there was disagreement as to the agent's actual authority and his apparent authority. Both judgments do, however, emphasize the agent's actual authority. For example, Mr. Justice Pigeon in writing for the majority noted that the agent was not a mere "soliciting" agent, that is a man having no authority to make a contract binding on the company. In this regard the view of the majority seems more consistent with the expectations of the insuring public and more consistent with the fundamental contract notions of offer and acceptance. As Mr. Justice Pigeon pointed out, if the agent had no authority to accept, one would have to say that the application was an offer open to acceptance for an indefinite length of time. This would mean that if a loss occurred in the meantime, this company could simply refuse the offer, but otherwise it could issue a policy dated from the date specified in the application thus taking the benefit of the premium for the elapsed time without having been at risk. In Mr. Justice Pigeon's view this cannot be so: "If the company is to earn the premium from the date of the application by issuing a policy bearing that date, this means that a contract has been made when the premium was received by the agent."[79]

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[78] [1969] Ins. L.R. 815, 7 D.L.R.3d 220. See discussion in Baer, *Annual Survey of Canadian Law: Insurance*, 4 OTTAWA L. REV. 497, at 511 (1971).

[79] *Supra* note 77, at 838, [1973] Ins. L.R. at 1730.

This seems a much more satisfactory explanation of the parties' intention than the suggestion of Mr. Justice Ritchie that the company is not bound until it accepts, even when this is coupled with the wishful thought that there is no "reason to think that the officials at the company's head office would be in any way biased or influenced in determining the validity of the application by the fact that fire had in fact occurred while the application was in the course of transit." [80] This views the company's acceptance as having retroactive effect and relies heavily on the company's good faith to accept the contract when a fire has already occurred. Such an unenforceable expectation that the company will accept is hardly what the public expects to get when it is told by an agent that it is insured from the time of signing the application.

In relation to the second issue of whether the insured is responsible for the misrepresentation in the application form, the majority decision does modify the rigorous application of the principle found in *Newsholme*. However, Mr. Justice Pigeon restricted his judgment in two ways. In the first place, he found significance in the fact that the application was signed before it was completed. In these circumstances, he could not see how the insured could be held responsible for what was in the application. Since the insured had no means of verifying the correctness of the form as completed, it would be unfair to hold that he should suffer the consequences of the agent's failure to complete the form properly. This may be so and the limited holding is enough to overrule the conclusion in *Boutilier*. One can only hope that the court will not stop at such hair-splitting and will move in the direction of relieving the insured from any responsibilities for the record keeping of the insurance agent. While in the abstract it may seem desirable that the law encourage people to be careful in what they sign, we must keep in mind the Draconian result of any mistakes in an insurance application. Such an extreme result of avoiding the insurance contract should only be reached if there is no other reasonable way of protecting the insurer. Do insurers have no other reasonable way of insuring that they have honest and careful agents and employees?

The second qualification found in Mr. Justice Pigeon's judgment is the suggestion that the insured may not be responsible for misinformation in the application form if it is part of the agent's duty to fill the application form. This qualification was borrowed from the judgment of Lord Denning in *Stone v. Reliance Mutual Insurance Society Ltd.* [81] Lord Denning used the fact that it was the agent's duty to fill the application form in the *Stone* case to distinguish *Newsholme Brothers*. This is an artificial way of distinguishing *Newsholme* and once again gives undue emphasis to the question of actual authority. How is the insured to know when the agent takes charge

[80] *Id.* at 851, [1973] Ins. L.R. at 1735.
[81] [1972] 1 Lloyd's Rep. 469.

and asks the questions orally, writing down the answers himself, whether he is following company policy or not? [82]

D. *Materiality*

In a number of recent cases, [83] courts have continued to judge materiality with little, if any, evidence of industry practice. Not only is there no attempt made to discover whether the defendant insurance company's practice is that of a reasonable insurer, but perhaps more fundamentally, there is no attempt made to decide whether the change in fact affects the risk. The test continues to be whether it affects the premium, which is a totally different issue. No attempt is made to discover whether the premium structure is based on any valid or scientific actuarial studies or whether it is based largely on competitive pricing policy. For example, are motorcycle clubs charged a higher premium because of greater risk or because limited competition allows the company to charge what the market will bear? [84]

The recent Ontario case of *Poapst v. Madill* [85] illustrates the anomalous effect of Statutory Condition 1 in the standard automobile insurance policy. Those initial misrepresentations which will avoid the policy have been carefully prescribed to misrepresentations in the answers to the questions in the standard application form approved by the superintendent. There is no such limit to the effect of Statutory Condition 1. In effect, the insured could misrepresent or fail to disclose in his application for automobile insurance the present uses of his truck. This misrepresentation or failure to disclose would not deprive him of coverage unless it was in answer to an approved question. However, if the change in use occurs after the inception of the insurance coverage, any failure to disclose something material to the premium will allow the insurer to avoid the policy. So far, there are fortunately no reported cases where insurers have invoked Statutory Condition 1 against individuals for failing to disclose changes material to the risk such as a new male driver under twenty-five, driving the car to work, or driving over a certain mileage per year. These are still items which the industry uses to set premiums but which are not contained in the approved application form. This misrepresentation or failure to disclose by the insured when he applies for insurance, would not allow the insurer to deny a claim. It is certainly anomalous if insurers are allowed to use the same

[82] For those who collect such judicial sexist gossip, we should note the way Mr. Justice Ritchie distinguished the English case of *Stone*, in his minority judgment in the *Blanchette* case. He referred to the English plaintiff, a married woman living with her husband, as a "lone [?] woman of little education": *supra* note 77, at 849, [1973] Ins. L.R. at 1734 (punctuation added).

[83] *See, e.g.*, Poapst v. Madill, [1973] 2 Ont. 80, [1973] Ins. L.R. 1669, 33 D.L.R.3d 36 (High Ct.); Iacobelli v. Federation Ins. Co. of Canada, 7 Ont.2d 657, [1975] Ins. L.R. 2265 (High Ct.), and the Nova Scotia Court of Appeal decision in Truro v. Toronto Gen. Ins. Co., 4 N.S.2d 459, [1973] Ins. L.R. 1673, 30 D.L.R.3d 242 (1972), *rev'd*, [1973] Ins. L.R. 1841, 38 D.L.R.3d 1 (Sup. Ct.).

[84] Iacobelli v. Federation Ins. Co. of Canada, *supra* note 83.

[85] *Supra* note 83.

kinds of facts as a failure to disclose a material fact under Statutory Condition 1 if they occur after the contract is in force.

E. *Waiver and Estoppel*

In the 1971 survey, [86] I noted that the authorities are not in agreement as to whether estoppel and waiver are distinct, identical or complementary notions. At that time, I unfortunately suggested that there would be less confusion if the courts followed the example of Vance and carefully distinguished between them. This was unfortunate because while such fragmentation of similar concepts is useful in some contexts, its mechanical use only creates unnecessary complexity. One example of the usefulness of carefully distinguishing between estoppel and waiver was discussed in the 1971 survey where I described how the Canadian courts had used the distinction to overcome the statutorily enshrined attempt by insurers to insulate themselves from their employees' and agents' conduct. The courts have found that while waiver must be in writing there is no such requirement for the distinct concept of estoppel.

The recent Alberta case of *Mitchell & Jewell Ltd. v. Canadian Pacific Express Co.* [87] relied upon the distinction drawn in several Supreme Court of Canada cases [88] in holding that estoppel and waiver were distinct concepts. The defendant had relied upon a thirty-day notice of loss clause in the contract in denying the plaintiff's claim. The claim was sent after the thirty days had expired but the carrier replied and sought particulars of the claim. There was no estoppel because there was no evidence that the plaintiff had acted to its detriment. However, the court found that the defendant had waived the thirty-day notice requirement by responding to the claim and seeking further particulars. The decision is disappointing not only because it fails to particularize the distinction between waiver and estoppel but also because it fails to give any convincing reasons why a waiver should be irrevocably binding upon the defendant even though there has been no detrimental reliance by the plaintiff.

The court's discussion of the doctrine of waiver suggests that they view it as a rather simple doctrine of general contract law. This is a gross simplification of extremely diverse contract situations. The election to waive an anticipatory repudiation or breach in relation to a single instalment (where such waiver is probably revocable with reasonable notice when there has been no detrimental reliance) cannot easily be summarized with cases of forbearance and variation following breach (where the courts have been preoccupied with the absence of consideration). In fact, the

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[86] Baer, *supra* note 78, at 515.

[87] [1974] 3 W.W.R. 259, 44 D.L.R.3d 603 (Alta.).

[88] Caldwell v. Stadacona Fire & Life Ins. Co., 11 Sup. Ct. 212 (1883); Logan v. Commercial Union Ins. Co., 13 Sup. Ct. 270 (1886); Canadian Ry. Accident Ins. Co. v. Haines, 44 Sup. Ct. 386 (1911); Continental Cas. Co. v. Casey, [1934] Sup. Ct. 54, [1934] 1 D.L.R. 577.

Appellate Division relies on authority only to establish that waiver is a distinct concept from estoppel, but does not go on to discuss any of the leading cases concerned with the doctrine of waiver. If they had looked at such leading cases as *Hughes v. Metropolitan Railway*, [89] or such leading texts as Treitel's, [90] they might have discovered that the doctrine is subject to two requirements. As Treitel has summed up the law:

> First, there must be representation by one party that he will not (at least for a time) force his strict legal rights. And secondly, it must be "inequitable" for him to go back on that representation. It will be "inequitable" if the other party in some way relies on the representation. He may do this by (1) forbearing to take steps which he would otherwise have taken to safeguard his position; or by (2) continuing to make efforts to perform, or by performing the varied obligation: for example, if a seller in reliance on a promise to give extra time for delivery, continues to make efforts to perform after the delivery date fixed by the contract has gone by. [91]

In fact, many of the waiver cases in the context of compromise after breach have involved the issue of whether detrimental reliance is a sufficient substitute for lack of consideration. It is this requirement which has led Cheshire and Fifoot in an unusually pungent comment on the leading case of *High Trees*, [92] to suggest: "There is little doubt that at bottom it (that is waiver or as it has come to be known in this context "promissory estoppel") is estoppel or first cousin to it, though they cannot or dare not say so in unambiguous language." [93]

If the court had looked more closely at the use of the doctrine of waiver in insurance law, they might have found examples where parties had been bound irrevocably to their waiver even though there had been no detrimental reliance on the other side. While this case is not strictly speaking a case involving an insurance contract, the court might have found it close enough to warrant the application of any unique insurance rule. If there is such a unique insurance rule it would be helpful to have some explanation of why this is so. Vance has offered one in his discussion of the Amercian case law. [94] He suggests that while in other contexts, the law requires some ceremonial or consideration to identify transactions which are to have legal effect, this is not required where the insurer is giving up some right to forfeiture. This can be explained by the harsh nature of the forfeiture and the court's general willingness to relieve against it. [95]

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[89] 2 App. Cas. 439, [1874-80] All E.R. Rep. 187 (1877).

[90] G. TREITEL, THE LAW OF CONTRACT 95 (3d ed. 1970).

[91] *Id.* at 97.

[92] Central London Property Trust Ltd. v. High Trees House Ltd., [1947] K.B. 130.

[93] Cheshire & Fifoot, *Central London Property Trust v. High Trees*, 63 L.Q.R. 283, at 299 (1947).

[94] W. R. VANCE, HANDBOOK ON THE LAW OF INSURANCE 504 (3d ed. B. Anderson 1951).

[95] For a further discussion of waiver and estoppel in insurance law, *see* MANITOBA LAW REFORM COMMISSION, *supra* note 3, at 53.

Besides giving no explanation of why the defendants should be irrevocably bound even without detrimental reliance by the plaintiff, there is little discussion of whether the defendant really consciously waived the thirty-day notice of loss clause. One suspects that the defendant's reply was sent inadvertently with no appreciation of its legal consequence.

A much more realistic approach and one which gets the true issue out in the open would be to view this as a problem of whether or not there should be relief against forfeiture. This would involve a determination of whether or not the defendants were unduly prejudiced by the late delivery of the notice of loss. If they have been unduly prejudiced, they should be allowed to rely upon the clause unless they have agreed to pay in spite of this breach, with full knowledge of its prejudicial effect. And even in this case it is difficult to see why they should be irrevocably bound in the absence of consideration or detrimental reliance. [96]

Another series of recent cases [97] illustrates a related doctrine which the courts have used to prevent insurers from setting up the insured's breach of contract. This doctrine is similar to one the courts have suggested in sales law in relation to disclaimer clauses and fundamental breaches, [98] and the English courts have used in relation to hire-purchase agreements and liquidated damage clauses. [99] As this notion is applied in the context of insurance, it takes the form of holding that an insurer which repudiates an insurance contract cannot rely upon the breach of any of its terms in defending an action brought by the insured. For example, in *Hydro Electric Power Commission of Ontario v. Varcoe*, [100] the Ontario High Court held that the insurer, having repudiated the contract (by arguing that the automobile policy insured the named individual rather than the company which actually owned the truck), could not then rely upon a breach of the statutory conditions. As in other branches of the law, some courts have added subtle refinements to this notion, such as distinguishing between repudiating and denying liability, [101] or between repudiation and construction. [102]

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[96] Recent cases dealing with relief against forfeiture include: Currado v. Continental Ins. Co., [1974] Ins. L.R. 2111 (Ont. High Ct.); Canadian Equip. Sales & Serv. Co. v. Continental Ins. Co., 5 Ont.2d 220, [1975] Ins. L.R. 2331, 50 D.L.R.3d 30 (High Ct. 1974).

[97] Hydro Elec. Power Comm'n. of Ont. v. Varcoe, [1973] 1 Ont. 383, [1973] Ins. L.R. 1611 (High Ct. 1972); Northwest Territorial Airways Ltd. v. Hein, [1972] 6 W.W.R. 178, [1973] Ins. L.R. 1613, 30 D.L.R.3d 372 (N.W.T. Terr. Ct. 1972); McCrea v. White Rock, [1973] Ins. L.R. 1864 (B.C. Sup. Ct.). In particular, see Bogusinski v. Rashidagich, [1974] 5 W.W.R. 53 (B.C. Sup. Ct.), where the insurer's election to repudiate and waiver were seen as the same issue.

[98] Suisse Atlantique Société d'Armement Maritime N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361, [1966] 2 All E.R. 61, [1966] 2 W.L.R. 944 (1966).

[99] Financings Ltd. v. Baldock, [1963] 2 Q.B. 104, [1963] 1 All E.R. 443, [1963] 2 W.L.R. 359 (C.A. 1962); United Dominions Trust (Commercial) Ltd. v. Ennis, [1968] 1 Q.B. 54, [1967] 2 All E.R. 345, [1967] 3 W.L.R. 1 (C.A. 1967). *See* Ziegel, *The Minimum Payment Clause Muddle*, [1964] CAMB. L.J. 108.

[100] *Supra* note 97.

[101] Northwest Territorial Airways Ltd. v. Hein, *supra* note 97.

[102] McCrea v. White Rock, *supra* note 97.

It is a pity that Canadian courts resort to such abstract and unsound notions as a substitute for the exercise of their power to relieve against forfeitures. Even an improperly repudiating party does not become an outlaw, unable to rely on a contract to define the scope of his liability and as the foundation for any counterclaim. Perhaps an insurer who denies a liability for one reason should not be allowed to later set up another reason, especially if there has been some detrimental reliance by the insured. However, this notion that the insurer should make full disclosure of the defences upon which it intends to rely is quite different from the concern of the courts in these recent cases. [103]

F. *Valuation*

Since the leading case of *Canadian National Fire Insurance Co. v. Colonsay Hotel Co.*, [104] Canadian courts have been reluctant to be tied down to any particular test for determining actual cash value in property insurance. In spite of this reluctance an observer can accurately say that the courts usually use some combination of replacement value less depreciation or market value. In fact, replacement value less depreciation is the normal starting point for most courts. The courts reluctance to adopt this as a general test however, comes from two factors which have been discussed in recent cases. First, as the leading case of *Colonsay Hotel* illustrates, many courts view depreciation as confined to physical deterioration and not adequate to include obsolescence caused by external factors. Yet most courts feel that some types of obsolescence should be included in the assessment of actual cash value. A large hotel in a small town following local prohibition is an obvious example of the kind of obsolescence which should be considered. A less obvious example was raised in the recent case of *Joe Zimmerman Ltd. v. Phoenix Assurance Co.* [105] There the issue was whether improvements made by the owner, such as unique design and furnishings in a commercial building which did not affect its economic value since they did not affect its earnings, should be considered obsolescence and taken into account in determining value. While the British Columbia court noted that sentimental or special emotional value to the owner must not be taken into account, nor must the unique quality of construction or furnishings be valued too highly, they refused to accept the appraisers' evidence of obsolescence. The court found "the unique style and fittings were means of attracting customers. There is no evidence that the novelty or originality had gone by the time of the fire. Only if these designs and trappings were useless appendages could the doctrine of economic obsolescence be invoked". [106]

The second major reason why the courts are reluctant to accept re-

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[103] See also the discussion of when there must be a judgment in order to qualify for liability insurance in the text accompanying note 70 *supra*.

[104] [1923] Sup. Ct. 688, [1923] 2 W.W.R. 1170, [1923] 3 D.L.R. 1001.

[105] [1972] Ins. L.R. 1593 (B.C. Sup. Ct.).

[106] *Id.* at 1595.

placement value less depreciation as the applicable test is the fact that quite often replacement does not result in a building of greater economic value. This matter is discussed in the recent case of *Chenier v. Madill.* [107]

G. *Subrogation*

In the last survey, [108] comment was made on the growing confusion in the Ontario courts as to the nature of fire insurance and the resulting misapplication of the doctrine of subrogation. This confusion has developed in the context of leases where the Ontario courts have been reluctant to give the tenant the benefit of the landlord's insurance policy. This reluctance has not been a result of the interpretation of the lease so much as a misunderstanding of the nature of fire insurance. The courts have created an artificial division between property and liability insurance and have assumed that a standard fire insurance contract does not cover someone's interest which is in the form of liability for fire damage.

The same kind of misunderstanding seems to have influenced the Alberta Appellate Division in the recent case of *Imperial Oil Ltd. v. Commonwealth Construction Co.* [109] In the Alberta case, the defendant insurance company issued a multi-peril insurance policy covering the named insured Imperial Oil Limited, its subsidiary companies, and any contractors or subcontractors against all physcial loss or damage from any cause. A worker employed by a subcontractor caused extensive fire loss to property owned by Imperial Oil Limited, the named insured. In the Alberta Supreme Court, Appellate Division, the insurer was allowed to bring a subrogated action against the subcontractor. In deciding that the subcontractor's liability was not covered by the policy, the court makes the same kind of distinction between property insurance and liability insurance as made by the Ontario Court of Appeal.

These cases must now be read in light of the judgment by Chief Justice Laskin in *Cummer-Yonge Investments Ltd. v. Agnew Surpass Shoe Stores Ltd.* [110] In that case, a subrogated action was brought by the landlord's insurer against the tenant for loss and damage from a fire originating in the tenant's premises and caused by its negligence. The lessor had covenanted to insure against all risk of loss or damage caused by or resulting from fire. In allowing the subrogated action, the Ontario Court of Appeal [111] was of the opinion that the exculpatory clause in the lease did not exonerate the tenant from liability for negligence. In addition, they were of the opinion that "the ordinary concept" of fire insurance did not embrace insurance

[107] 2 Ont.2d 361, at 382, [1974] Ins. L.R. 1931, at 1943, 43 D.L.R.3d 28, at 49 (High Ct. 1973).

[108] Baer, *Annual Survey of Canadian Law: Insurance*, 6 OTTAWA L. REV. 193, at 229 (1973).

[109] [1975] 2 W.W.R. 72, [1975] Ins. L.R. 2165, 46 D.L.R.3d 399 (Alta. 1974).

[110] [1975] Ins. L.R. 2309, 55 D.L.R.3d 676 (Sup. Ct.).

[111] Cummer-Yonge Inv. Ltd. v. Agnew Surpass Shoe Stores Ltd., [1972] 2 Ont. 341, [1972] Ins. L.R. 1461.

affected by a lessor to protect against its lessee's negligence. This basic misunderstanding was rejected by Chief Justice Laskin in the following terms:

> The "ordinary concept" of fire insurance does embrace fires caused by negligence and the fact is that the policy taken out by the lessor did insure against negligence, whether that of the lessee or others. Even so, the question of the scope of the indemnity as it arises in this case is not dependent on the policy but, rather, so far as the lessor and lessee are concerned, on the terms of the lease. [112]

Mr. Justice Pigeon said: "Nothing could be better settled than that, unlike an exculpatory clause, a fire insurance policy is to be read as covering negligence whether of the insured himself or of his servants or of third parties." [113] By examining the terms of the lease, the Court found that the landlord was to be responsible for fire loss no matter how it was caused. Hence there was no liability in the tenant to which the insurance company could be subrogated.

This Supreme Court of Canada decision does not automatically overrule such decisions as *Pyrotech Products Ltd. v. Ross Southward Tire Ltd.* [114] and *Green v. T. Eaton Co.* [115] However, in each of these cases the court was influenced by the same misunderstanding as to the usual form of insurance as the Supreme Court of Canada rejected in *Cummer-Yonge.* [116]

H. *Third Party Claims*

1. *Automobile Accident Victims*

Several recent cases have dealt with the scope of the victim's direct recourse against the tortfeasor's liability insurer. Even though the broad wording of the statute gives the victim a right against the insurer which is not to be prejudiced by any act or default of the insured, recent decisions [117] have restricted the victim's right by distinguishing between the definition of the risk and a breach of condition. They have held that the victim is not prejudiced by any breach of condition by the insured but is affected if the insured's conduct is outside the definition of the risk.

This distinction, which is not expressly referred to in the Act, has been ignored in several cases reported in the past few years. For example, in *K.C. Cab Co. v. Alliance Assurance Co.*, [118] the insurer was not allowed to set up the intentional criminal act of the insured, who rammed the plaintiff's

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[112] *Supra* note 110, at 2315, 55 D.L.R.3d at 682-83.

[113] *Id.* at 2311, 55 D.L.R.3d at 690.

[114] [1972] 3 Ont. 418, [1972] Ins. L.R. 1512.

[115] [1972] Ins. L.R. 1519 (Ont.).

[116] *Supra* note 110. For a recent example of double recovery caused by the court's reliance on Jakimowich v. Halifax Ins. Co., 57 W.W.R. (n.s.) 767, [1966] Ins. L.R. 158 (Man.), *see* Willumsen v. Royal Ins. Co., [1975] Ins. L.R. 2197 (Alta. Dist. Ct.).

[117] Discussed in Baer, *supra* note 108, at 223.

[118] [1973] 3 W.W.R. 277, [1973] Ins. L.R. 1753 (Alta. Dist. Ct.).

cab, in an action brought under the direct recourse provision. In *Gorveatt v. Canadian General Insurance Co.*, [119] the victim's direct recourse right was not affected by the fact that the automobile was leased contrary to the terms of the policy. In both cases there is no discussion of the distinction between the definition of the risk and a breach of condition. [120]

On the other hand, in *Sabell v. Liberty Mutual Insurance Co.*, [121] the insurer successfully raised the defence against the victim that the vehicle was driven in connection with the business of selling automobiles contrary to the terms of the policy. The insured was hired to drive the car from Montreal to Vancouver. Once again, there is no mention of the distinction between definition of the risk and breach of condition although the implicit acceptance of such a distinction may be why the court stated: "It is common ground that their [the victims'] claim can be no greater than that of the insured, in that any restrictions or limitations covering the insured's right to recover extend also to control the plaintiffs' claim." [122]

In addition to these cases, a Nova Scotia case has been reported which involves the question as to when there is a valid policy in force. In this case, the issuing of the pink slip was held to be sufficient to establish a contract at least for the purpose of the victim's recourse rights. [123]

A distinct kind of issue was raised in *McKinnon v. Canadian General Insurance Co.*, [124] where the owner and the driver were each insured for the statutory minimum. The victim's claim was for more than the statutory minimum and the insurers argued that there was just one fund for the purpose of deciding when the insurers could set up defences against the victim. The Nova Scotia Appellate Division held that neither insurer could set up any defences until they had paid the statutory minimum. Thus the victim obtained more than the statutory minimum from the two insurers without being prejudiced by the conduct of the insured.

Why the victim should have greater claims against two insurers who have each insured for 50,000 dollars than he would have against one insurer insuring for 100,000 dollars is unclear. One can just as easily assume that the intention of the direct recourse provisions is to provide a statutory minimum protection for victims as it is to imagine that the provisions provide a statutory maximum liability without defence for any one insurer. While

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[119] [1975] Ins. L.R. 2296, 49 D.L.R.3d 701 (P.E.I. Sup. Ct.).

[120] Although such a distinction might have been in the mind of judge and counsel in K.C. Cab Co. v. Alliance Assurance Co., *supra* note 118, the court's conclusion was that the public policy which prevents an insured from collecting for his own intentional criminal acts is not an exclusion to the risk. The court seems to have in mind some kind of right-remedy distinction.

[121] [1973] 5 W.W.R. 248, [1973] Ins. L.R. 1772, 38 D.L.R.3d 113 (B.C. Sup. Ct.). *See* Rendall, Comment, 2 DALHOUSIE L.J. 158 (1975).

[122] Sabell v. Liberty Mut. Ins. Co., [1973] 5 W.W.R. 248, at 254, [1973] Ins. L.R. 1772, at 1775, 38 D.L.R.3d 113, at 119.

[123] *Re* Dominion of Canada Gen. Ins. Co., 9 N.S.2d 168, [1974] Ins. L.R. 2085, 43 D.L.R.3d 19 (N.S. Sup. Ct. 1973), *aff'd*, 9 N.S.2d 166 (1974).

[124] 8 N.S.2d 534, [1974] Ins. L.R. 2103, 46 D.L.R.3d 427.

the existence of two applicable insurance policies seems like a happy happenstance for this victim, it is difficult to begrudge him his windfall. Viewed in the broader context, his situation is not unique since compensation for automobile accidents remains very much a lottery.

The victim's fortunate position in *McKinnon* should be compared with the treatment of the victim in *Wolfe v. Oliver.*[125] In the latter case, the named insured was the registered owner but not the beneficial owner. A son had registered his car in his mother's name. This is not an unusual occurrence and is not always done in a deliberate attempt to deceive an insurance company. The court allowed the insurer to set this up against the victim's direct recourse action. In doing so, the court referred to the recent Supreme Court of Canada case of *Hayduk v. Pidoborozny*,[126] which was concerned with the meaning of owner within the vicarious liability provision of the Alberta Vehicles and Highway Traffic Act.[127] In the Supreme Court of Canada case, Chief Justice Laskin described the long judicial history of interpreting owner in both insurance and highway traffic legislation to mean beneficial rather than registered owner. Chief Justice Laskin notes that the qualification to owner started in 1913 in a case involving a conditional seller. The courts were reluctant to find a secured party vicariously liable under the highway traffic legislation. Once the courts started to go behind registration to find out who was the actual owner, it is not surprising that they did this in other circumstances besides those involving secured parties. For the purpose of both vicarious liability in the highway traffic legislation and insurance coverage, the important fact is who is exercising the control of owner rather than who is registered. The importance attached to the disclosure of both the actual owner and the registered owner is brought home to the insured in the standard application form. It may be no more unfair to deny coverage to someone who mistakes the actual ownership than it is to any applicant who misrepresents or breaches the insurance contract. What is irrational and arbitrary is to deny the victim's recourse action. The Nova Scotia Appellate Division has unfortunately followed the lead of the Ontario Court of Appeal in arbitrarily limiting the protection given by the statute which states that the victim is not to be prejudiced by *any act or default* of the insured.

2. *The Rights of Unnamed Insureds*

For some time, the Supreme Court of Canada case of *Keefer v. The Phoenix Insurance Co.*,[128] has been cited by insurance counsel and commentators for the proposition that someone with a limited interest in property can insure on behalf of himself and other interested people. To do this, the named insured must intend to insure the interest of others and the policy

[125] 8 N.S.2d 313, [1975] Ins. L.R. 2176, 46 D.L.R.3d 380 (1974).
[126] [1972] Sup. Ct. 879, [1972] 4 W.W.R. 522, 29 D.L.R.3d 8.
[127] ALTA. REV. STAT. c. 356, § 130 (1955).
[128] 31 Sup. Ct. 144 (1901).

must be aptly worded. The latter qualification has been taken to mean that the policy must not expressly exclude the interest of others. The case has always been difficult to explain on two grounds. First, the case is difficult to reconcile with general theory.[129] If insurance is personal in nature and the identity of the insured is a material element to the insurer, it is difficult to understand how an undisclosed intention to insure others can be enough. In the second place, it is difficult to reconcile the holding in the *Keefer* case with Statutory Condition 2 which provides: "Unless otherwise specifically stated in the contract, the insurer is not liable for loss or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the contract." This statutory condition has been in the Act since 1876 when the statutory conditions were first enacted. What was contemplated by the Royal Commission which recommended this statutory condition is now lost to us. The commission's entire report consisted of the original statutory conditions and a short covering letter. There is no recorded discussion or explanation of what the commissioners had in mind. While the condition existed at the time of the *Keefer* case, the Court made no reference to it.

Two recent cases illustrate the uncertainty of the application of the *Keefer* case because of its inconsistency with fundamental theory and its apparent inconsistency with Statutory Condition 2. In the first case, *Industrial Development Bank v. Atlantic Chinchilla Ltd.*,[130] land was mortgaged to the plaintiff and the mortgagor covenanted to insure. There was no mortgage clause in the policy and no express assignment of the insurance policy or proceeds to the plaintiff. The New Brunswick Queen's Bench disallowed the plaintiff's suit against the insurance company holding there was no privity of contract between them. There is no reference to the *Keefer* case.

The second case was the Ontario case of *Marks v. Commonwealth Insurance Co.*[131] There the named insured was a trustee for undisclosed beneficial owners. The reasons for judgment of both the High Court and the Court of Appeal are not very clear. At times the courts seemed to be saying that a trustee does not have an insurable interest in trust property. This is clearly wrong and unsupported by authority.[132] However, it may be that the judges were not deciding whether the plaintiff had an insurable interest at all, but were only deciding that she did not have an interest insured by the contract. The Court of Appeal made this ruling apart from

[129] Doubts have been expressed by various courts. For the latest instance, *see* Imperial Oil Ltd. v. Commonwealth Constr. Co., *supra* note 109.

[130] 9 N.B.2d 72, [1975] Ins. L.R. 2279, (Q.B. 1973).

[131] 2 Ont.2d 237, at 243, 42 D.L.R.3d 481, at 487 (1973), *aff'g* 2 Ont.2d 237, [1972] Ins. L.R. 1515, 42 D.L.R.3d 481 (High Ct. 1972). *See* Kirsh, Comment, 52 CAN. B. REV. 305 (1974) and Brent, Comment, 52 CAN. B. REV. 604 (1974).

[132] The whole notion of discussing a "bare" trustee as acting in a representative capacity in the same way as an agent is alien to the common law. At law the trustee was the owner and one had to go to chancery to get him to exercise his legal rights on behalf of the cestui que trust.

Statutory Condition 2, although they found that the application of the statutory condition would lead to the same result.

It is impossible to reconcile this decision with the Supreme Court of Canada decision in the *Keefer* case. However, if the identity of the insured is still of fundamental importance to property insurers, the decision in the *Marks* case may be correct. It is the identity of the person with beneficial ownership and control rather than the trustee which is important to the insurer. One can only wish that the courts had been more sensitive to the public's reliance on the rule in the *Keefer* case.

Given the length of time that the *Keefer* case has been accepted as good law, there should have been some requirement that the insurer make clear in the application and policy that it needed more specific information as to everyone's interest in the property.

The Ontario Court of Appeal also interprets Statutory Condition 2 in a way that must have been rejected by the Supreme Court of Canada in *Keefer*. As suggested by Professor Brent, [133] the statutory condition applies when the insured does not own the insured property but has an insurable interest in it, arising as a result of a contract such as a bailee might have, or when the insured is covering personal property owned by other members of his household. It has no application in a case of several owners in the same property.

The meaning given to Statutory Condition 2 by Professor Brent is supported by the nature of the qualification found in the last clause, that is "unless the interest of the insured therein is stated in the contract". This clause requires the named insured to disclose the nature of his interest. The clause does not require someone with a limited interest to disclose the nature of the interest of others.

The Court of Appeal was probably influenced in their interpretation of Statutory Condition 2 by recent cases which in other contexts have tended to define ownership in terms of beneficial ownership. For example, one could look at the discussion of ownership in relation to automobile insurance application forms and the vicarious liability provisions of the provincial highway traffic acts. [134]

The result in *Marks v. Commonwealth Insurance Co.* should be compared to the holding in *Decelle v. Lloyds of London*, [135] where the Saskatchewan Queen's Bench allowed a claim for the total value of the property

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[133] *Supra* note 131.

[134] See notes 125 & 126 and the accompanying text *supra*. *See also* Westland Transp. Serv. Ltd. v. Phoenix Assurance Co., [1972] 6 W.W.R. 491, [1973] Ins. L.R. 1638, 32 D.L.R.3d 357 (Alta. Sup. Ct. 1972), *aff'd*, [1973] 5 W.W.R. 480 (Alta.), where a company was allowed to claim under an insurance contract as "equitable owner" even though the insured property was registered in the shareholder's name, *and* Sellers v. Continental Ins. Co., [1975] Ins. L.R. 2248, 48 D.L.R.3d 369 (N.S. Sup. Ct. 1974), where the insured built a house on land owned by a company controlled by him. He had a right to acquire the land. The court found he had an insurable interest since he was more owner than tenant.

[135] [1973] 3 W.W.R. 134, [1973] Ins. L.R. 1740, 33 D.L.R.3d 743 (Sask. Q.B.).

destroyed. The property was owned by a husband and wife and no mention was made in the insurance contract of the wife's interest. In allowing the husband to collect for both himself and his wife, the court made no mention of Statutory Condition 2.

3. *Beneficiaries of Life Insurance Policies*

There have been several cases [136] reported in the past few years dealing with the rights of beneficiaries under life insurance policies, including two cases [137] which involved the application of the old uniform life insurance provisions. The case which created the greatest surprise in the industry was that of *Scott v. Manufacturers Life Insurance Co.* [138] In this case, the Manitoba Queen's Bench held that an annuity was not a life insurance contract and hence, the deceased was free to change her designations of the beneficiary, even one designated irrevocably. The industry and the superintendent apparently thought that the definition of life insurance in the Act was broad enough to include an annuity sold by an insurer. [139] This impression comes from that part of the definition which states that "life insurance means insurance whereby an insurer undertakes to pay insurance money . . . (c) at a fixed or a determinable future time". [140] Insurance money in turn is defined as the amount payable by an insurer under a contract. The difficulty is however, that the definition says that "life insurance means insurance . . . ." The previous case law has held that an annuity is simply not insurance. The Act makes clear that life insurance companies are licensed to sell annuities, but it is not clear that all of the detailed regulations of life insurance were intended to apply to these annuities. Once again, the industry and superintendents will just have to do better than relying upon the understanding of leading insurance counsel. Insurance is not and should not be an occult business where only "involved and informed counsel" know what is right. [141]

I. *The Insurance Company as Third Party*

Under the direct recourse provisions found in the automobile insurance part, the insurer is liable up to the satutory minimum to the accident victim

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[136] Besides those cases mentioned in the following notes, *see* Canada Life Assurance Co. v. Couture Estate, [1975] 1 W.W.R. 191, [1975] Ins. L.R. 2257 (Man. Q.B. 1974), *and* Montreal Trust Co. v. Public Trustee, [1975] 1 W.W.R. 280, [1975] Ins. L.R. 2261 (Alta. Sup. Ct. 1974).

[137] *Re* Vance, 2 Ont.2d 117, [1974] Ins. L.R. 1921, 42 D.L.R.3d 161 (1973); Boutillier v. Boutillier, [1974] Ins. L.R. 2108, 44 D.L.R.3d 154 (B.C. Sup. Ct.).

[138] [1974] 1 W.W.R. 112, [1974] Ins. L.R. 1963, 41 D.L.R.3d 296 (Man. Q.B. 1973).

[139] *See* PROCEEDINGS 125-27 (1974).

[140] In Ontario, ONT. REV. STAT. c. 224, § 1, ¶ 35 (1970).

[141] See the report of the subcommittee studying the revision of the life insurance part, note 150 and accompanying text, *infra*, where they commented "no doubts were prevalent among involved and informed counsel and other insurance people" that life insurance included annuities.

regardless of any defence the insurer may have against its insured. Hence, it is in the insurer's interest to take part in the tort litigation in an attempt to minimize the victim's recovery. In fact, there is a contractual obligation on the insurer to conduct the litigation on the insured's behalf. However, where the insurer intends to recover any amount paid to the victim from its insured, it would not be appropriate for it to have full control over the defence of the victim's tort claim. The Act recognizes these competing interests and allows the insurer to be added as a third party. Several recent cases have been concerned with the right that this gives the insurer.

The Act ends its enumeration of the insurer's third party rights with the phrase "to the same extent as if it were a defendant in the action".[142] This suggests that the insurer's position is entirely vicarious and parallels its right in an action brought by way of subrogation. However, the recent Ontario High Court case of *Goldman v. Romano*[143] indicates that the insurer has independent rights. The plaintiff appealed an order allowing the insurer to be added as the third party. The insurer had been acting on behalf of the insured. The defendant's statement of defence had been struck out when he failed to appear for discovery. In dismissing the appeal, the court observed that the pleadings had not yet been closed and that the insurer's right to a defence was independent of the insured's.

Goldman v. Romano should be read in connection with *Bogusinski v. Rashidagich*,[144] which illustrates that the insurer cannot wait too long before disassociating itself from the defendant. In *Bogusinski*, the insurer conducted the defence down to the time of the examination for discovery. When the defendant failed to appear at trial the insurer unsuccessfully moved to have itself joined as a third party. The court took the view that the insurer should have moved to be added as third party at the beginning of the trial. By waiting until it did to be added as third party, it was held to have waived its right to do so. The case is consistent with a long line of cases which find detrimental reliance sufficient to support estoppel or waiver in the possibility that the defendant might have acted differently or could have done better. In fact, the detriment to the defendant is more imaginary than real.

That the insurer's right as third party is largely derivative in spite of *Goldman v. Romano* is illustrated by the recent Prince Edward Island case of *Hood v. McKarney*,[145] where the insurer after adding itself as third party tried to have a jury notice struck out. This was just the converse of the Ontario case of *Spence v. Butler*,[146] where the insurer after having itself added as a third party served a jury notice. In both cases the courts held that the third party could not impose on the other parties a mode of trial

[142] In Ontario, ONT. REV. STAT. c. 224, § 225(15) (1970).

[143] 5 Ont.2d 300, [1974] Ins. L.R. 2126, 50 D.L.R.3d 188 (High Ct.).

[144] *Supra* note 97.

[145] 4 Nfld. & P.E.I.R. 175, [1974] Ins. L.R. 1914, 37 D.L.R.3d 295 (P.E.I. Sup. Ct. 1973).

[146] [1964] 2 Ont. 233 (High Ct.).

to which they objected. The Prince Edward Island court also noted in a bit of refreshing worldliness that now that everyone knows that automobiles are insured there was no reason why juries could not hear the case.

As a result of what appears to be yet another legislative drafting error, the question of whether the insured as well as the insurer can move to have the insurer added as a third party has been reopened in Ontario. In 1965, the Ontario Court of Appeal [147] had decided under the old wording of Statutory Condition 6(2) that the insured could not have the insurer added as a third party. However, with the replacement of "nor" with "or" in the Statutory Conditions, the Ontario High Court [148] has decided that the insured can join the insurer as third party after complying with the requirements of Statutory Condition 3. Strangely enough, the question has also arisen in British Columbia even though the Statutory Condition found in the British Columbia Act contains the word "nor". The Supreme Court of British Columbia [149] has given inconsistent answers within the same week to whether the insured can add the insurer as third party before the insured's liability has been determined.

III. The Work of the Association of Superintendents of Insurance

Most changes to various provincial insurance legislation are the result of the work of the Association of Superintendents of Insurance. The Association performs the functions of uniformity commissioners in the area of insurance law. However, the Association's efforts are not confined to drafting legislation. It also encourages uniform practices in the industy through such things as industry wide rules and common teaching and testing materials for the licensing of insurance agents. Of late it has also been using the spectre of more government regulation to spook the industry into adopting measures which the Association feels are in the consumers' interest.

The published proceedings of the annual meeting between the Association and the industry are the best source of information concerning the mischief which amendments to the uniform acts are designed to correct. In the past, the reader of these minutes was bound to feel like an eavesdropper at a private gentlemen's club and could have wondered whether the regulators were not captives of the industry they were supposed to regulate. However, in recent years the changed political climate in some provinces has introduced a little tension to the proceedings.

The following discussion will centre on the recent concerns of some of

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[147] International Formed Tubes Ltd. v. Ohio Crankshaft Co., [1965] 2 Ont. 240, 50 D.L.R.2d 214.

[148] Hydro Elec. Power Comm'n. of Ont. v. Varcoe, *supra* note 97.

[149] McCrea v. White Rock, *supra* note 97; Warenchuk v. Elkey, [1973] Ins. L.R. 1863 (B.C. Sup. Ct.).

the Association's standing committees. Any legislative action in the various provinces which has resulted will be noted.

A. *Standing Committee on Life Insurance Legislation*

Potentially the most important action of this standing committee in the last few years has been the creation of a subcommittee to consider a revision of the uniform life insurance part of the Acts of the several common law provinces. This subcommittee made a preliminary report in 1974. [150]

In its introductory comments, the subcommittee noted with concern the growing tendency by many insurers to ignore the Act. Not surprisingly, the Canadian Life Insurance Association simply did not believe member companies disregard the Insurance Act. [151] Since the operations of the superintendents' offices are largely closed to public scrutiny, it is difficult to assess the scope of this problem and where responsibility lies. In any event the tone of the subcommittee's warning has a peculiarly insurance industry overtone. The subcommittee warns that if the industry does not observe the Act, it will invite regulation. An observer might think that if the superintendents are aware of significant practices contrary to the Act, they should augment enforcement. However, the superintendents may be right in recognizing that the threat of additional regulation is the ultimate terror for the industry.

After this introductory warning the sub-committee makes nearly fifty recommendations. Most of their recommendations are designed to correct departures from uniformity by various provinces, infelicitous or ambiguous expression in the uniform act (not all of which has created any litigation) and changes designed to bring the act in line with the wording of the uniform accident and sickness insurance act.

Besides these changes designed to create more uniformity, there are numerous other changes of substance. Space does not permit a detailed enumeration of all these changes but the more significant include changes in the act to provide specific rules for variable life insurance contracts, proposed restrictions on the right of an individual insured to name beneficiaries in some kinds of group contracts, and a recommendation that the application of the uniform part be restricted.

A second concern of the standing committee on life insurance legislation which potentially is of great significance to consumers is its concern for the public's understanding of life insurance. In response to the committee's concern, the Canadian Life Insurance Association has suggested several changes in marketing procedures. First, they have recommended that all life insurance contracts include a ten day right of rescission. This would provide a cooling-off period for sober second thoughts similar to that provided in itinerant sales legislation. The need for such a cooling-off period

[150] PROCEEDINGS 123 (1974).
[151] *Id.* at 170.

is illustrated by the large average lapse or surrender rate in Canada of seven per cent. This means that well over half a million policy holders each year abandon their life insurance programmes. [152]

Second, the Association recommended some kind of cost index which would allow the public to more readily compare the cost of different insurance contracts. Such an index is designed to facilitate comparative shopping just like the interest rate disclosure legislation in credit sales. However, unlike credit interest rate disclosures, a simple index for life insurance may be misleading given the variety of options available to the insured. What may be needed is some reduction of the profusion of unique features and options. The industry has probably long passed the point where the disadvantage to the consumer in terms of confusion and difficulty of comparing outweighs the personalized service these options are designed to serve.

Third, the Association has recommended that its member companies provide their clients with explanatory material which describes in layman's language the main features of their contracts. In addition, the Association has established a life insurance information centre in its offices in Toronto and Montreal with direct and free telephone access to everyone in Canada. These are all things which have already gained widespread approval in the industry.

The Association also reported in 1974 that several additional moves were underway. First, the Association recommended to its member companies that interest be paid from the date of death until the date of claim payment. Second, it was recommended that the member companies examine their practices concerning promptness in paying cash surrender values to policy holders who wish to discontinue their coverage. As the Association's report notes, the common cause of delay in such cases is the "conservation" effort made by a company or its sales representative when a request is received for surrender payment. "Conservation" is the industry's polite phrase for an all-out high pressure sales tactic. Naturally the industry sees its product as one which it is in the public interest for policyholders to keep. Hence, in the Association's words, "this conservation effort is not a self-seeking process". Finally, the Association is promoting improvement in advertising and information disclosure associated with registered retirement savings plans.

A third major concern of the standing committee in recent years has been variable contracts of life insurance. Rules adopted by the superintendents in the past were adopted in Ontario by Regulation. [153] These rules were amended in 1974 to provide new valuation guidelines for real estate and mortgages in a segregated fund. [154] Meanwhile, the superintendents have

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[152] Cameron, *Permanent Life Insurance and the Public Interest*, CANADIAN FORUM at 14 (July, 1975).

[153] Ont. Reg. 526/71.

[154] PROCEEDINGS 175 (1974).

agreed that these rules should continue to be the rules applicable to such contracts in the common law provinces. [155]

The fourth major concern of the standing committee has been the rules governing group life insurance. These were also amended in 1974. [156] Both sets of rules seem to be gentlemen's agreements between the industry and the superintendents. At least there is no indication that the superintendents are acting pursuant to any particular statutory authority. In some provinces such as Ontario, the Act gives the Superintendent authority to "determine the class or classes of insurance into which the circumstances or conditions in any case may bring any insurance granted or that may be granted in respect thereto, and the policy form for the class of insurance to be used thereunder". [157] However, since the Ontario Act specifically authorizes the Lieutenant Governor in Council to make regulations with respect to variable contracts of life insurance and group life insurance, it is difficult to see how the Superintendent has the authority to amend the regulations. Moreover, some rules, such as Rule 8 of the rules governing group life insurance, go beyond just regulating the policy form for any class of insurance.

The amendments to the rules governing group life insurance include a new provision to clarify the position of franchise insurance, a new rule providing some continuity of group benefits in the event of a change of carrier, and a more flexible rule defining the factors which may be used to determine the benefits available to the members of the group. [158] However, the changes which have created the most discussion in the proceedings are the result of the committee's study of creditors group insurance from the standpoint of consumers. The committee has been concerned about hidden and excessive charges in the form of expenses, dividends and experience rating refunds paid by the insurer to the creditor. It has also been concerned about the conflict of interest inherent in the creditor's handling of any claims. Apparently the superintendents have felt that the existing rule, which is now Rule 10, was not sufficient to control experience refunds or dividends paid to the policyholder. This rule states:

> No insurer shall directly or indirectly pay or allow to the policy holder or to any agent or employee thereof under group contract; (a) compensation for the solicitation or negotiation of insurance on the life of any person insured under the contract; or (b) reimbursement of expenses for the collection of premiums in excess of five percent of the premiums collected from the lives insured. [159]

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[155] *Id.* at 174. In Alberta amendments to the Insurance Act have given the Lieutenant Governor in Council power to make regulations providing for the form and content of variable life insurance contracts: Alta. Stat. 1973 c. 93, § 10, adding §§ 216.1, 216.2 & 216.3.

[156] PROCEEDINGS 179 (1974).

[157] ONT. REV. STAT. c. 224, § 24(3) (1970).

[158] PROCEEDINGS 179 (1974), adding or amending Rule 1(3), Rule 11 & Rule 4(2) respectively.

[159] PROCEEDINGS 183 (1974).

In any event a new Rule 8 has been introduced to control the payment of such experience refunds or dividends. They are only allowed if they are paid to the debtor or applied to stabilize premiums under the contract or retained by the insurer to stabilize future premiums for similar types of contracts. In addition, Rule 8(*b*), (*c*), (*d*) and (*e*) deals specifically with the reimbursement of the policyholder for expenses incurred in connection with the contract. This must be intended as a qualification to the more general provisions found in Rule 10(*b*) quoted above. Finally, Rule 8(*f*) provides that the insurer shall have the responsibility for the settlement, adjustment and payment of claims.

B. *Standing Committee on Accident and Sickness Insurance*

The most significant concern of this committee has been the loss ratios for various classes of accident and sickness insurance. At one time it recommended the establishment by statute of minimum loss ratios. [160] This has been abandoned and instead the committee is studying guidelines relating to disclosure of anticipated loss ratios on individual policies of accident and sickness insurance. [161] The superintendents are now concerned with supplying the consuming public with information about the cost and anticipated benefits from such contracts. Such information would seem to be useful to the purchaser of any kind of insurance and it is not clear why accident and sickness insurance has been singled out for this kind of disclosure. Discussion in the proceedings has been confined to the question of whether the ratio should include lapsed contracts and what corrective action will be available if the disclosure turns out to be inaccurate. The industry has been concerned because if lapsed contracts are included in the loss ratio, the percentage of premiums paid out in benefits will be significantly smaller. They argue that the more accurate ratio for anyone intending to maintain his policy is that given by excluding all lapsed policies. The solution that the committee would like to recommend is the disclosure of both ratios.

The committee is also studying the advisability of adopting rules governing group accident and group sickness insurance. The 1974 proceedings contained such draft rules modelled on the rules for group life insurance. [162] Discussion of the draft rules has centered on two main items. First, the industry does not want the definition of the group insurance to be too restrictive. They point to the example of group insurance offered by credit card companies as a desirable marketing practice which would not be permitted by a restrictive definition. The indutsry sees no reason why this type of marketing or any similar kind of marketing that might develop in the future should be disallowed.

The second matter discussed was the industry's view that benefits under such group policies should not be related to some fixed criteria as they are

[160] PROCEEDINGS 172 (1973).
[161] PROCEEDINGS 194 (1974).
[162] *Id.* at 189.

in group life insurance. They argue that this is undesirable for group policies sold to the self-employed, such as doctors, lawyers and business owners. The committee was instructed to continue to study the advisability of adopting rules governing group policies.[163] In the meantime the Association has recommended that Rule 8 of the Rules governing group life insurance (the rule covering the payment of experience refunds, dividends and expenses to the policyholder) be made applicable to accident insurance policies and sickness insurance policies which provide creditors group insurance.[164]

The committee has been instructed[165] to review section 246*a* of the Ontario Act[166] concerning the continuation of accident insurance upon the termination of a group contract or its replacement. This section was recommended by the Association in 1973.[167]

Finally, the committee continues to recommend that the provinces adopt the provision covering confinement clauses found in section 245*a* of the Ontario Act,[168] as recommended in 1972.[169] This provision has been adopted by Manitoba,[170] New Brunswick,[171] and Alberta.[172]

C. *Standing Committee on Automobile Insurance Legislation and Forms*

Perhaps the most significant decision of this standing committee has been its decision in 1972 to drop the study of no-fault automobile insurance.[173] The committee was instructed to study the proposals submitted to it for no-fault automobile insurance, with a view to facilitating such measures as may appear to be acceptable and desirable in the interest of the public, and with a view to the attainment of a greater degree of uniformity in such matters. There is no area of automobile insurance in more need of such consideration. The explanation given at the 1972 meeting for dropping this matter gives a revealing insight into the workings of the Association of Superintendents. The matter was dropped because no proposals were submitted to the committee by the industry. The reader may wonder whether such a passive role by the Association is in the public interest.

Of those things that remain of concern to the Association many are matters left over from earlier meetings. The Association continues to urge several provinces to adopt those changes which were discussed in the last survey. These include the amendment to the definition of insured,[174] the

[163] *Id.* at 216, resolution (6).
[164] *Id.*, resolution (7).
[165] *Id.*, resolution (5).
[166] Ont. Stat. 1973 c. 124, § 16.
[167] Adopted by Manitoba: Man. Stat. 1974 c. 11, § 4.
[168] Ont. Stat. 1973 c. 124, § 15.
[169] PROCEEDINGS 215 (1974), resolution (2).
[170] Man. Stat. 1974 c. 11, § 5.
[171] N.B. Stat. 1973 c. 52, § 2.
[172] Alta. Stat. 1973 c. 93, § 15.
[173] PROCEEDINGS 156 & 160 (1972).
[174] Not yet enacted in British Columbia, Nova Scotia and Saskatchewan.

two amendments to Statutory Condition 2 relating to driving while under suspension [175] and impaired driving, [176] and the amendment to Statutory Condition 6 to extend the prescription period to two years. [177]

In addition the committee continues to urge other provinces to amend the equivalent of Ontario's section 225(9). [178] This is a classic example of the sloppy drafting that typifies the Association's work. From the discussion in the proceedings of 1972, 1973 and 1974, it is clear that the Association intended to allow gratuitous passengers the same right of direct recourse free of defences as all other victims are entitled to. Unfortunately, for the past four or five years they have consistently referred to the wrong subsection of section 225. This has resulted in a confusing amendment to several provincial statutes. [179] Fortunately, what was originally intended will be accomplished when the repeal of section 216(*a*) of the Ontario Act is proclaimed. [180] This will have the effect of providing insurance for gratuitous passengers and by removing clause (*a*) of section 216 from the reference in section 225(10) will allow gratuitous passengers to bring a direct recourse action in the same way as other accident victims.

In addition to these matters left over from older meetings, the superintendents have been concerned with several new matters since 1972. Perhaps their most disappointing actions have been in relation to the problem of integrating limited automobile accident insurance benefits with other compensation available to the victim. While the superintendents initially proposed amendments to the equivalent of Ontario section 237(2), [181] they have now decided to study proposed revisions to the equivalent of Ontario sections 234(*a*) and 237(2) with a view to making changes at the time of the next revision of the automobile insurance part of the act. [182]

Since 1972, the committee has also been studying the direct recourse provisions (Ontario section 225). They have been concerned that an innocent third party claimant should not be prejudiced or be put to great delay and unnecessary expense in the payment of his claim by reason of the equities and disputes that may exist between the insurer and its insured. [183] The committee saw as a prime cause of delay the need to obtain a judgment against an insured before bringing a direct recourse action. In 1973, the committee reformulated the problem in the following way:

> The Committee feels that the problem today is twofold:
> (a) the apparent need for a third party claimant to obtain a judgment

[175] Not yet enacted in Saskatchewan and British Columbia.

[176] Ont. Stat. 1972 c. 66, § 8; Man. Stat. 1972 c. 20, § 4; N.B. Stat. 1973 Supp. c. 22, § 4; Nfld. Stat. 1974 No. 111, § 2; P.E.I. Stat. 1975 c. 49, § 2(1).

[177] Man. Stat. 1972 c. 20, § 5; P.E.I. Stat. 1975 c. 49, § 2(2).

[178] PROCEEDINGS 61 (1974), resolution (5).

[179] Ont. Stat. 1972 c. 66, § 9; Man. Stat. 1972 c. 20, § 10; N.B. Stat. 1973 Supp. c. 22, § 6; P.E.I. Stat. 1975 c. 49, § 4.

[180] Ont. Stat. 1973 c. 124, § 14.

[181] PROCEEDINGS 42 (1973).

[182] PROCEEDINGS 61 (1974), resolution (2). In the meantime they have urged Alberta, Nova Scotia and Saskatchewan to adopt the equivalent of Ontario's § 234(*a*).

[183] PROCEEDINGS 158 (1972).

> against an insured and then sue again upon that judgment to enforce his rights in situations where the insurer refuses to undertake the defence of an action on behalf of its insured, usually because there has been one or more breaches of the contract and
>
> (b) reverse of this situation from an insurer's point of view is the right to move in and settle a third party claim quickly and still be protected as far as rights over against insured for policy breaches, etc. [184]

The superintendents have proposed an amendment to section 225(1) to allow the victim direct recourse "upon being entitled to recover" damages. They have also proposed consequential amendments to other subsections to implement this policy of allowing direct recourse without the need of a tort judgment. It is a bit difficult to understand how a dispute between insurer and insured causes any unusual delay for the victim. In most instances the insurer will obtain a non-waiver agreement from the insured and then deal with the victim in the normal way. Where this does not happen the superintendents must believe there is a greater tendency for the individual insured to resist claims than insurers. One would have thought that with the insurer out of the picture most tort claims would go by default. Perhaps the delay the superintendents have in mind is the need for a formal judgment in circumstances where the insurer is not denying his ultimate duty to pay the victim but has been unable to obtain a non-waiver agreement. In normal circumstances they cannot simply settle with the victim without prejudicing their right to recover from the insured.

In these circumstances some system needs to be established to encourage insurers to settle with the victim without prejudicing their right to recover from the insured. At the same time the insured should be fully protected by preserving all his rights and defences to the victim's tort claim. The amendments proposed in 1973 do not adequately protect the insured. The insurer need only show that his settlement with the victim was reasonable in order to recover from the insured. The insured should be allowed to raise any defence he had against the victim and be free to argue the quantum of damages. This will of course sometimes make insurer's less willing to settle with the victim, but additional protection should not be given to the victim at the expense of the insured.

In any event the standing committee is continuing to study the problem "bearing in mind the comments and objections put forth by spokesmen for the industry".

Finally, the committee has recognized that its recent amendments to Statutory Condition 2 have been somewhat inconsistent. They have restricted its operation by removing the provision concerning driving while intoxicated, while at the same time broadening its operation by including a provision covering driving while under license suspension. In 1974, the Committee was instructed to study the possibility of deleting Statutory Condition 2 entirely while including the prohibited uses as exclusion to Part

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[184] PROCEEDINGS 44 (1973).

C of the Standard Automobile Insurance Policy with respect to physical damage cover. [185] This change is not primarily designed for the benefit of accident victims since they are already protected under the direct recourse provisions. Instead it gives the insured liability insurance protection (but not physical damage cover) in spite of his improper conduct.

As with the earlier removal of the prohibition of driving while intoxicated from Statutory Condition 2 and its inclusion as an exclusion to physical damage cover, no convincing explanation is given for this diverse treatment of different kinds of automobile insurance.

D. *Standing Committee on General Insurance Legislation*

After discussing and studying the problem since 1968, the superintendents have at last recommended insurance provisions for inclusion in the provinces' condominium legislation. [186] These provisions are based on the report of the Commissioners on Uniformity of Legislation made in 1973. They are designed to allow the corporation to insure the units and common elements to the replacement value thereof against fire and other perils. In addition the corporation is allowed to obtain and maintain liability insurance covering both the corporation and the unit owners' liabilities arising out of the common elements. For these purposes the corporation is deemed to have an insurable interest in the units and the common elements. The provisions make it clear that this insurance is first loss insurance while allowing the unit owners to carry additional insurance.

The need for these legislative provisions is created largely by our narrow and artificial concept of insurable interest. These are just specific stopgap measures. What is needed is a basic reform of the concept of insurable interest.

For some years the committee has been studying the mass or group merchandising of general insurance. The move for such study has come largely from the industry which wishes to be given a freer hand in experimenting with mass or group marketing techniques. In 1973, the Insurance Bureau of Canada submitted proposed regulations relating to mass merchandising of general insurance. [187] Some provinces such as Ontario have specific legislative provisions which inhibited the development of such mass merchandising. For example, in Ontario there is section 363 relating to automobile insurance and section 388(*b*)(iii) which defines as an unfair or deceptive act or practise "any unfair discrimination in any rate or schedule of rates between risks in Ontario of essentially the same physical hazards in the same territorial classification". The Ontario Superintendent has stated that the Insurance Act is not intended to prevent an insurer from having a separate schedule of rates at a reduction which is attributable to the savings resulting from a method of marketing insurance such as direct

[185] PROCEEDINGS 61 (1974), resolution (10).
[186] *Id.* at 62.
[187] Referred to but not reproduced in PROCEEDINGS 64 (1974).

billing or payroll deduction plans. Moreover, in 1969, the Ontario Superintendent issued guidelines on Synthetic Fleets and Collective Marketing of Auto Policies. [188]

The Association of Superintendents continues to study the matter. Their discussions in 1973 and 1974 do not identify any serious problems for the consuming public. The superintendents were preoccupied with the question of the insured's knowledge of the terms of the insurance contract and his right to bring action in his own name. Neither are very serious difficulties with mass or group merchandising. That is, they are no more serious than with individual contracts of insurance. There is some concern that the groups be stable, and as expressed by the Canadian Federation of Insurance Agents and Brokers that any advertising by such mass merchandisers should not be detrimental to other forms of merchandising. Of course, any control over advertising would have to be confined to ensuring its truthfulness and not to suppressing legitimate cost comparisons.

The committee continues to review the desirability of restricting the right of cancellation by the insurer and the period of notice of such cancellation. The recent discussions [189] of the Superintendents indicate that their concern is not so much with the notice requirements in the act or with the question of cancellation for non-payment of premiums. Instead they are concerned about mass cancellations or cancellations in a particular area for reasons which have little to do with the position of the insured. An example given was of an insurer who cancelled all contracts placed by a particular agent after a dispute with the agent which resulted in the determination of the agency arrangement. The problem was particularly acute in British Columbia and Manitoba where between the time of the announcement of the government take-over of automobile insurance and the effective date, many companies cancelled their automobile insurance contracts in mass. This of course was done largely for political reasons. [190]

In 1973, the committee was instructed to consider the necessity of requiring insurers to notify insureds of the pending termination of a contract of insurance in cases where the insurer does not intend to renew. This suggestion has been resisted by the industry both on the general grounds of preferring self-regulation to legislation and on the specific grounds that it would undercut the position of independent agents. The committee continues to study the matter. [191]

Finally, the committee has been instructed to consider the different

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[188] *Id.*

[189] *Id.* at 73.

[190] There was an amusing hypocritical comment by the Chairman of the Board of the Insurance Bureau of Canada to the Manitoba Superintendent of Insurance in the 1974 proceedings to the effect that if the Superintendent had come to the I.B.C. at the time, they would have used their good offices to try to persuade the companies to act more responsibly. The I.B.C. must surely be the only body with an interest in insurance which was unaware of what was happening in these provinces.

[191] PROCEEDINGS 77 (1974).

approach of each part of the Insurance Act to the issuance and delivery of insurance contracts to the insured. [192] This is just one example of a more general problem. What needs to be done is a general study of the Insurance Act to remove anomalous differences in the various parts.

E. *Standing Committee on Insurance Agents, Brokers and Adjusters*

This committee has had little success in recent years in promoting uniformity. Several matters raised by the committee in recent years have led to recommendations that the matters be left to individual provincial policy. Matters on which the superintendents have failed to agree include a suggestion that there be a uniform statute and regulation covering insurance brokers, that the restriction known as single company representation found in the various provincial insurance acts be dropped, that there be multiple licensing of insurance agents and brokers, and other matters dealing with marketing practices but not specifically described in the proceedings. [193]

The move for multiple licensing or triple licensing (or "full circle financial services") comes from several large life insurance companies. These companies have a rapid turnover in their sales force and they see multiple licensing, which would allow their agents to sell general insurance and mutual funds, as a means of stabilizing their sales force. These life insurance companies have been joined, at least for a time, by other insurance companies looking for alternative employment for their automobile insurance agents in British Columbia and Manitoba. The move has been resisted by representatives of the agents and brokers who emphasize the difficulty of any one agent being expert in all lines of insurance.

It was unclear from the proceedings who is behind the sugestion to remove the restriction in most provincial insurance acts known as single company representation. Agents acting for more than one company are the rule in the marketing of group insurance. The restriction has been dropped in New Brunswick and Prince Edward Island. Some companies opposed the removal of the restriction because they feel that they can afford to carry out the company sponsored training programs for agents only if the agent writes business exclusively for them. [194]

The committee continues to study trends and practices in the marketing of insurance. As a result of recommendations by the Life Underwriters Association of Canada, the committee is considering the advisability of recommending the incorporation of a Code of Ethics in provincial application forms for life agents' licences and has recommended that individual provinces consider increasing the passing mark on examinations for life insurance agents to 75 per cent. [195] In addition the committee has agreed to recom-

[192] *Id.* at 90, resolution (5).
[193] *Id.* at 91, 92.
[194] *Id.* at 103.
[195] *Id.* at 114.

mend study and examination material for the licensing qualification of all accident and sickness insurance agents. [196]

Finally, in 1974, there was some discussion of the possible adoption of legislation to ensure that insurance agents and insurers make reasonable attempts to sell suitable insurance to prospective purchasers. This is known in the jargon of the trade as the "know thy customer" rule. The committee suggested the following legislative provision:

> No insurer or agent shall recommend the purchase of an insurance contract and no insurer shall issue an insurance contract in the absence of reasonable grounds to believe that the purchase of the contract is not unsuitable for such prospective purchasers on the basis of the information furnished after reasonable inquiry of such prospect concerning his insurance and investment objectives, financial status and needs, and any other information known to the insurer or to the agent making the recommendation. [197]

That there is need for such legislation is illustrated by recent cases where the insured appears to have been sold insurance which was not suitable. The matter has been dropped by the superintendents following strong resistance by the industry. [198]

IV. Other Legislation

Not all legislation is the result of the Association's activities. Putting aside the numerous Statutory Law Amendment acts which deal with typographical errors, consequential amendments resulting from changes of local procedure, and other matters of detail, there have been a few significant pieces of provincial insurance legislation. For example, Manitoba enacted provisions covering unfair and deceptive acts and practices similar to the provisions found in Part XVIII of the Ontario Act; [199] Alberta enacted new provisions to cover the amalgamation of insurers; [200] and Ontario has established a Fire Mutuals Guarantee Fund as an alternative to the present premium note plan of farm mutual insurance companies. [201] Perhaps the most exhaustively discussed and long awaited of these changes has been the abolition of interspousal immunity in Ontario tort law and the consequential changes to automobile liability insurance. [202]

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[196] *Id.* at 91.
[197] *Id.* at 92.
[198] *Id.* at 104.
[199] Man. Stat. 1972 c. 20, § 2.
[200] Alta. Stat. 1973 c. 93, § 17.
[201] Ont. Stat. 1975 c. 88.
[202] The Family Law Reform Act, 1975, Ont. Stat. 1975 c. 41.