INSURANCE LAW

*Marvin G. Baer**

I. AUTOMOBILE ACCIDENT INSURANCE

The last two insurance surveys[1] have briefly described recent halting and limited steps by various provincial legislatures to rationalize our system of compensating automobile accident victims. Since the last survey was written, the pace of movement, if not reform, has increased with several provinces adopting extremely limited and almost haphazard compulsory accident insurance schemes. These schemes are bound to be transitory. In fact in some provinces they may not be the same by the time this survey is published, being replaced by other schemes in what now seems the inexorable shift away from tort litigation and liability insurance.

Since this change has been resisted with passion and perseverance and in each province has generated political debate of varying intensity of obfuscation and rhetoric, it is not surprising that there is little uniformity.[2] Not that all the differences between the various provincial schemes are the result of different political or policy decisions. Often the differences appear to result from different modes of drafting the statutes, regulations and standard contracts, different levels of awareness of possible problems, and perhaps different conscious decisions about what needs to be provided for by legislation and regulation and what can be safely left to the courts.

The three schemes which were introduced in Ontario, Alberta and Manitoba since the last survey was written are difficult to compare because what is done by statute in one province, is done by regulation or the standard contract in another. Even within one province there are these three levels of law-making. It is a pity that the details of these schemes could not be worked out in advance and published all together in one place. However, the public has to contend not only with the confusion of multiple levels of law-making but also with an aspect of the increasing phenomenon of "secret law." For example, in Ontario the automobile accident benefits were introduced as Schedule E to the Insurance Act.[3] This legislation was passed in

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

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

[2] This problem has been recognized by the Association of Superintendents of Insurance of the Provinces of Canada which has instructed its Standing Committee on Automobile Insurance Legislation and Forms to study proposals for no-fault insurance and the wording of Section B, Accident Benefits, of the standard owner's policy with a view to the attainment of a greater degree of uniformity. MINUTES OF PROCEEDINGS OF THE ASSOCIATION OF SUPERINTENDENTS OF INSURANCE at 155 (1971) (hereafter referred to as PROCEEDINGS).

[3] An Act to amend the Insurance Act, Ont. Stat. 1971 c. 84, § 14, 15

July of 1971 on the eve of the last Ontario provincial election. Several significant changes were made to Schedule E by regulation,[4] incorporating several suggestions put forward by the opposition in the legislature, but rejected by the Government at that time.[5] These regulations were published in the Ontario Gazette several days after the government assumed the new scheme was in effect.[6] Finally on February 5, 1972, more than a month after the scheme was supposed to be in effect, the standard automobile insurance policy which has more changes to Schedule E was published in the Ontario Gazette. In fact, it is not until you read the standard contract that the definition sections in Schedule E make any sense. Of course, these practices will bother the legal profession more than the public who can rely on the Superintendent of Insurance who with a humpty-dumpty attitude publishes pamphlets explaining what the new law is.

Moreover, once one gathers together the products of each level of law making authority and discovers the secret law, one is left with the difficulty of deciding whether the coverage and exclusions actually provided are in all detail the result of policy decisions or erratic drafting. Further, if some limits have been knowingly set, it is difficult to know whether they are arbitrarily set in order to reduce losses or whether they are based on furthering some other end.[7]

None of the three schemes goes so far as to eliminate tort liability in automobile accidents altogether. What is done in each case is to provide limited accident insurance which provides for direct payment by insurer to accident victim without the need to establish that the accident was the fault of a tortfeasor. On the other hand, the victim is free to pursue a tort remedy (and thereafter collect from the tortfeasor's liability insurer), but it is intended that the victim will collect his accident benefits first and this amount will diminish the liability of the tortfeasor. However, while it is accident insurance regardless of fault by someone else, it is not necessarily accident insurance regardless of fault by the victim.

The accident insurance scheme in Manitoba[8] is part of a broader government-run compulsory automobile insurance scheme which includes mandatory liability insurance and physical damage cover. The accident benefits provided in Manitoba are similar to those which have been pro-

[4] Ont. Reg. 540/71 (1971). These changes were affirmed by statute in 1972, Ont. Stat. 1972 c. 66, § 18.

[5] 113 ONT. LEG. DEB. 4721 (July 23, 1971).

[6] Although the government intended the new scheme to come into effect on January 1, 1972, the Act as passed introduced the scheme as of July 28, 1971, Ont. Stat. 1971 c. 84, § 27. What was intended as retroactive corrective legislation was passed in 1972, Ont. Stat. 1972 c. 66, § 19, although through yet another mistake, this statute does not do what was intended.

[7] *E.g.*, the definition of "insured person" in Ontario which excludes the situation where an insured is an occupant of another automobile owned by a person residing in the same dwelling premises as the insured.

[8] The Automobile Insurance Act, Man. Stat. 1970 c. 102, and Man. Reg. 48/71, 63/71, 80/71, 105/71, 120/71, 9/72, 13/72.

vided in Saskatchewan for several years and are more extensive than those provided in Alberta and Ontario. The Ontario[9] and Alberta[10] benefits are similar to those found in British Columbia[11] and offered as an optional coverage in several other provinces.[12] Rather than describing each provincial scheme seriatim, the following will describe certain re-occurring features and problems and note how they have been handled or ignored in the three provinces. The table at the end of this heading contains a more detailed summary of each provincial scheme.

1. Who is insured?

The schemes in Ontario and Alberta like those in British Columbia and the provinces where accident insurance is optional, preserve to a large extent the basic contractual framework of automobile insurance. That is, those who are insured and entitled to receive benefits are related in some way to those who arrange and pay for the premiums with the insurer. By statute and regulation the owner of a motor vehicle who insures automatically insures also on behalf of two classes of individuals who are described in relation to the described automobile and the named insured. Since not every owner whose automobile is operating in the province carries this insurance[13], and since not all residents of the province are related to an automobile owner, many victims are still not covered. Perhaps the legislature thought these victims were undeserving or perhaps they thought that to include them would make the cost of this coverage unacceptably high. However, a more likely explanation is an inability to imagine or an unwillingness to undertake a complete separation of those who pay from those who are covered. Perhaps the drafters of the scheme felt that a motorist should not have to pay for benefits given to a victim who is neither related to him nor injured by an automobile owned by him. Or to use more accurate criteria, that Ontario (or Alberta) motor vehicle owners as a class should not have to pay for injuries caused by another group of motorists and received by victims to whom the Ontario motorists are unrelated.

Another possible explanation may be that the limit on the victims covered is only an unavoidable result of allocating the costs of the scheme amongst various insurers. If there is one insurer there is no need to try to define those covered in terms of those who contract and pay. Some simple criteria such as all victims of accidents which occur within the province or all resident victims can be used. Then the total cost of the scheme can be divided amongst the car owners, drivers, employees, taxpayers, or any other class which it is felt should bear the cost with any differentiation in

[9] *Supra* notes 3 and 4.

[10] An Act to amend the Alberta Insurance Act, Alta Stat 1971 c 53, § 7, adding § 300.1 and Alta. Reg. 305 71 (1971).

[11] Baer, *Annual Survey of Canadian Law: Insurance*, 4 Ottawa L Rev 497 (1971)

[12] Baer, *Annual Survey of Canadian Law: Insurance*, 3 Ottawa L Rev 553 (1969)

[13] While this automobile accident insurance is a mandatory part of every motor vehicle liability policy issued in the province, liability insurance is not compulsory in Alberta or Ontario In addition the owners of out of province automobiles do not necessarily have this coverage

premium that is felt appropriate. With such a scheme there is no need for a mechanism to allocate costs amongst the insureds of various insurers. This is what has been done in Manitoba. Coverage is extended to the victims of all accidents which occur in Manitoba (except foreigners riding in a foreign car), and to a limited extent to Manitoba domiciliaries for accidents which occur abroad.[14]

Since under the Ontario and Alberta schemes a victim can be an insured by belonging to one of two classes of people, the victim will often, by belonging to both classes, be covered by two different insurers. Examples include an automobile owner who is insured with one company who is injured while an occupant of another automobile or who is struck by another automobile while a pedestrian. Provision is made as a general matter to make sure that the victim does not collect twice and to decide which is a first loss insurance. As well, this possibility of overlapping coverage might explain some of the limitations on the definition of insured in the Alberta and Ontario schemes. For example, the named insured and any dependent relative is covered while the occupant of any other automobile, provided, *inter alia*, that such other automobile is not owned or regularly or frequently used by the insured or by any person or persons residing in the same dwelling premises as the insured. This does not mean that if the other automobile is owned by some person residing in the same dwelling premises as the named insured, he will normally be without coverage. He will be insured through the policy taken out by the owner of the other automobile. Of course, the limitation goes beyond just eliminating overlapping coverage. To the extent that a victim will go uninsured while the occupant of an uninsured automobile owned by someone in his household (even though he has insured his own car) the limitation seems designed to force individuals to bring pressure to bear to make sure all automobiles owned by anyone in the household are insured.

No attempt is being made here to give all the detailed limitations on who is insured under the Ontario and Alberta schemes. In fact this is not possible yet in Ontario because in some places the language is incomprehensible. What, for example, is one to make of the clause:

> In this section, the words "insured person" mean,
>
> (b) the insured and, if residing in the same dwelling premises as the insured, his or her spouse and any dependent relative of either while an occupant of any other automobile, provided that,
>
> (i) the insured is an individual or are husband and wife;

From the comparable Alberta regulation it might mean, "where an individual is, or a husband and wife are the named insured, then the named insured, his spouse and any dependent relative while an occupant of any automobile other than the insured automobile." In any event, where the named insured is not an individual but rather a corporation, unincorporated association,

[14] In relation to accidents which occur abroad the Manitoba domiciliary must be injured while an occupant of an automobile driven by the holder of a driver's certificate or owned by the holder of an owner's certificate.

partnership or a sole proprietor, employees and partners are given similar coverage anyway by a further clause in both the Alberta and Ontario schemes.

Such an unsatisfactory state surely will not last. Artificial limitations on the definition of insured which do not relate to the merits of the victim or a justifiable desire to keep down costs but instead are the seemingly unintentional product of circumlocutory drafting, allocation of costs amongst insurers, and an attempt to prevent overlapping coverage, will eventually be replaced by a more comprehensive definition of insured such as that found in Manitoba.

2. Who pays for this insurance?

In Ontario and Alberta, as in British Columbia and the provinces which have optional accident insurance, the coverage is taken out and paid for by those who purchase motor vehicle liability insurance. Normally this is the owner of a motor vehicle, although it could be a driver under a non-owner's policy. However, it should be noted that while the Ontario and Alberta acts make these benefits mandatory in all motor vehicle liability policies, Schedule E of the Ontario Act and the Alberta regulations are drafted with an owner's policy in mind.

In Manitoba[15] every applicant for a driver's licence and every owner seeking to register a vehicle must apply for a driver's certificate or an owner's certificate. For the driver's certificate a basic premium is set by regulation[16] according to the applicant's sex and age. Additional premiums are assessed according to a table of demerit points based on an applicant's record of convictions for offences and violations listed in a schedule to the regulation. For an owner's certificate a premium is paid which varies according to the type (private passenger, ambulance, hearse, *etc.*) make and model, of the vehicle and the territory within which the applicant resides. As explained above, the issuing of an owner's or driver's certificate to anyone is not a pre-condition to a victim collecting benefits for an accident which has occurred in Manitoba.[17] All victims are insured independently from the payment of premiums and issuing of certificates. In relation to the accident benefits there is no need to see under which particular insurance contract represented by an owner's or driver's certificate, the victim should collect. However, the issuing of a certificate is necessary to provide the other two parts of the universal compulsory automobile insurance, liability insurance and physical damage cover.

---

[15] The Automobile Insurance Act, Man. Stat. 1970 c. 102, § 43.

[16] Man. Reg. 48 71 (1971).

[17] Although such a certificate is necessary in order to collect for an accident which occurs abroad.

In Alberta, as in British Columbia, an Alberta Automobile Insurance Board is established[18] with broad powers to investigate any matter it thinks fit respecting automobile insurance in Alberta, including rate, benefits and availability of automobile insurance. The Board is also empowered to approve the rates for the minimum automobile insurance in the province. The usefulness of such a board is demonstrated by the action of the British Columbia Board on January 17, 1972, in ordering a reduction of the annual premiums for accident benefits to a maximum of fifteen dollars. This action followed an invitation by the Superintendent to reduce the rates which were in excess of twenty dollars or to face a public hearing on the matter. There are no similar provisions in Ontario, where neither the Superintendent nor any board has any authority to control the rates charged by the industry.[19]

In Alberta it is also provided by Statute[20] that the rates for the accident insurance benefits shall be shown separately on the policy[21] and shall be the same for every policy issued by an insurer in Alberta unless an increase of rates for any person or class of insured persons has been approved by the Board.

3. Risk covered

Before the introduction of mandatory accident insurance, Manitoba, Alberta and Ontario had three kinds of optional "Limited Accident Insurance": uninsured motorist, medical expenses and accident insurance benefits. In spite of its placement in the Act and its misleading description as "accident insurance," the uninsured motorist coverage still depended on legal liability of an unidentified or uninsured motorist. Since it only applied where a person had no right of recovery against any provincial or state unsatisfied judgment fund, the coverage was of limited application and in fact was provided without additional premium by many insurers.[22] In Alberta[23] this coverage remains optional while in Ontario the Superintendent has made it compulsory by including it in the standard form contract. It remains included in Section B under accident insurance. In fact it is only by doing so that the definition of "insured" in Section B of the Standard Owner's Policy makes sense. As these definitions appear in Schedule E of the Insurance Act itself, they are worded in a puzzling way, since they are drafted as if this coverage were included in Schedule E when it is not. The end result in Ontario is to have a narrower definition of insured for the

---

[18] An Act to amend the Automobile Insurance Act, Alta. Stat. 1971 c. 53 § 8, adding new § 321.1.

[19] Although the Superintendent has power to control deceptive practices.

[20] Alta. Stat. 1971 c. 53, § 7, adding new § 300.1 (8), (9).

[21] The British Columbia order of January 17, 1972 refused the industry's request to have an all inclusive premium covering liability insurance and accident benefits.

[22] The coverage benefits those motorists who travel to the Yukon or Northwest Territories or the United States of America. According to the Insurance Bureau of Canada there are only five American States which have Unsatisfied Judgment Funds: Maryland, Michigan, New Jersey, New York and North Dakota.

[23] ALTA. REV. STAT. c. 187, § 311 (1970).

purpose of this coverage than for the accident insurance providing death and disability benefits.

Similar coverage is not provided by the Manitoba regulations, although there is coverage for accidents occurring within Manitoba caused by an uninsured or unidentified motorist.[24] This corresponds to the Motor Vehicle Accident Claims Funds in other provinces.[25] As in Alberta [25a] (but not Ontario), the Manitoba regulations provide accident benefits in addition to liability coverage for victims injured by an uninsured or unidentified motorist.

Medical Expenses

Manitoba[26] and Ontario[27] now have mandatory medical and rehabilitation benefits while in Alberta[28] this remains optional. In Ontario this insurance is expressed to be excess to all other medical insurances. In view of section 25(1) of the Health Services Insurance Act[29] this coverage probably does not extend to medical insurance available under O.H.I.P. (whether or not the victim is actually covered by O.H.I.P., provided he could have been). Strangely enough by virtue of the regulations[30] made pursuant to the Hospital Services Commission Act[31] it is not illegal to have this kind of duplicate hospital insurance, and a victim who for some reason failed to enrol with O.H.I.P. would be able to collect for hospital expenses from his automobile insurer even though these expenses would normally be covered under the government hospital insurance scheme.

In Manitoba this medical coverage is provided where these expenses "are not otherwise payable through or on behalf of an insured under any compulsory health insurance scheme."[32]

Funeral Expenses

At first blush the compulsory 500 dollars funeral expense coverage provided in all three provinces seems adequate, until it is noted that in some counties in Ontario the rates paid by municipalities for indigents' funerals are 500 dollars plus cemetery charges.

Accident Benefits

There is no uniformity in the accident benefits provided in the three provinces. In Alberta and Ontario the benefits are extremely limited and in

[24] Man. Reg. 120/71, § 73, 74 (1971).

[25] Formerly the Unsatisfied Judgment Fund. Called the Traffic Victims Indemnity Fund in British Columbia. *See* Motor Vehicle (Amendment) Act, B.C. STAT. 1965 c. 27, § 21.

[25a] An Act to Amend the Motor Vehicle Accident Claims Act, ALTA. STAT. c. 72, § 20 adding § 22(m).

[26] Man. Reg. 120/71 § 40 (1971).

[27] Ont. Stat. 1971 c. 84, § 14.

[28] ALTA REV. STAT. c. 187, § 312 (1970).

[29] ONT. REV. STAT. c. 200 (1970).

[30] Ont. Reg. 443 (1970), § 57(11).

[31] ONT REV. STAT. c. 209, § 20(2)(e) (1970)

[32] Man. Reg. 120/71, § 40 (1971)

all three provinces there are sexist provisions. While all three provide death benefits, the need for a timely death following the accident, the definition of insureds and beneficiaries entitled to the benefits, and the method of calculating the benefits vary. Some of these differences seemed based on differing policies such as the fact that the Ontario and probably the Alberta schemes give nothing for the death of a single person without dependents while the Manitoba scheme gives 500 dollars. However, others seem to be the result of drafting difficulties. For example in Ontario when the opposition raised objections to the definition of "dependent child" in Schedule E this resulted in an amendment by regulation.[33] No longer is the test whether the head of the household is legally liable to support the child but whether the child is in fact wholly dependent on the head of the household. As well they introduced the qualification that the child must reside with the head of the household. The Regulation has the effect of extending the definition of dependent child to include some 18-21 year olds but results in the exclusion of any under 18 who are away at school or college or are children of separated parents.

The Alberta and Manitoba definitions are better drafted, the Manitoba definition coming closest to including every child at least who is in fact dependent on the head of the household.

All three provincial schemes contain gaps, ambiguities and anomalies. Some of these no doubt will be clarified and removed by later amendments. To use the Ontario scheme as an example, is it not anomalous that no single person's estate gets anything yet the death of a spouse when both are working results in payment of 2500 dollars to the surviving spouse or that parents receive 500 to 1000 dollars for the death of a dependent child but nothing for the death of a dependent parent? Why must children be wholly dependent while parents need only be principally dependent? In fact, in the definition of dependent child, why is not the relevant age that found in the provincial Age of Accountability and Majority Act?

Some examples of ambiguities in the Ontario Death Benefit provisions might include the fact that nowhere is it stated clearly that a woman with children but no husband is the head of the household. Nor is it stated clearly whether the provision that no amount shall be paid to a person who is not alive thirty days after the death of the insured person is meant to affect the amount of recovery or just who can receive. If the former it seems out of keeping with the common disaster provision. In the Manitoba and Alberta provisions many of the issues covered in the Ontario provisions are just not mentioned.

Alberta and Ontario give benefits only for total disability, while Manitoba provides coverage for both total and partial disability. Some of the differences concerning waiting periods, duration and maximum benefits are set out in the table on page. All three provinces treat housewives

[33] Ont. Reg. 540/71 (1971).

separately, providing extremely limited coverage for them (although Manitoba provides considerably more coverage than Alberta and Ontario). The requirement found in all three schemes that the insured be employed (although in Manitoba this only applies to partial disability benefits) seems hard to justify. The unemployed who are often the temporary victims of economic planning are now to have their unfortunate situation perpetuated and aggrevated by being denied any of these benefits.

As well as coverage for both partial and total disability, Manitoba pays a percentage of a principal sum of 6,000 dollars (but never more than 6,000 dollars) for impairments according to an elaborate schedule set out in the Regulation.[34] Reading the schedule conjures up the rather macabre imagery of a room full of actuaries, doctors, and politicians deciding that the loss of a permanent molar is worth $6 and a totally disabled brain is worth 6,000 dollars.

The Effect of the Victim's Wrongdoing: Herein of Exclusions, Conditions and Misrepresentations

Under the existing tort and liability insurance scheme for compensating automobile accident victims, whether the victim's conduct will deprive him of insurance proceeds depends on principles of tort law (*i.e.*, whether his conduct amounts to contributory negligence). Whether the tortfeasor's conduct affects the victim's right to recover insurance proceeds depends on principles of insurance law (*i.e.*, whether the tortfeasor, insured's conduct goes to the definition of the risk, is a breach of condition or is a misrepresentation or failure to disclose a material fact during the process of negotiating the insurance contract). If there is a misrepresentation or failure to disclose a material fact which is *not* included in the standard application form, this affects neither the victim's nor the insured's insurance coverage. If there is misrepresentation or failure to disclose a material fact which is included in the standard contract or a breach of condition by the insured, under all provincial statutes this does not deprive the victim from collecting the insurance proceeds, but does give the insurer a right to recover over against the insured. If the loss is occassioned by conduct beyond the definition of the risk, there is no coverage for the insured and hence no right of recovery by the victim.[35]

In relation to the rights of victims under these three provincial accident schemes, the legislation and regulations are not always clear whether this same four-fold classification is meant to apply. As well, with the extended definitions of "insured" in the various statutes and regulations there is a certain ambiguity in places as to which "insured's" conduct will affect which "insured's" recovery. For example, under section 204(1) of the Ontario Act it is unclear whether the applicant's conduct will only affect his recovery, or all insureds' recovery.

---

[34] Man. Reg. 120/71 (1971).

[35] *Infra.*

Probably for the purpose of this kind of accident insurance it is not significant whether conduct be classified as going to the definition of the risk or as a condition of the contract. A useful classification might be: conduct by the principal insured (the "named" insured) during the process of negotiation for the contract with the insurer, conduct by the owner or driver at the time of the accident and conduct by the victim at the time of the accident.

Although the statutory provisions are not as clear as they could be, under all three Acts, a mistatement or failure to disclose in the approved application probably does not affect the right of other insured victims to recover. In Manitoba this is particularly so for accidents which occur in Manitoba since insurance benefits in that case do not depend on the existence of a valid owner's or driver's certificate.

On the other hand, certain kinds of conduct by the victim effectively deprives him of accident benefits and this is so whether the conduct is considered an exclusion to the risk or breach of condition. After what we have seen so far it is hardly surprising that there is little uniformity in the three provinces as to the kinds of conduct by the victim which prevents his recovery. What is surprising is that in each province the scope and wording of the exclusions or conditions are not the same as those found in the statutory conditions applicable to liability insurance and physical damage cover. This leads to anomolous results. For example, in Ontario while a conviction for impaired driving will not deprive an insured of liability insurance coverage in the future, it will prevent him from collecting total disability payments.

The prohibited conduct is by and large the kind of things mentioned in the Statutory Conditions: impaired driving, driving while the driver's licence is suspended or when the driver is not authorized to drive, engaging in a race or speed test or a prohibited trade or transportation, etc. In all three provinces the death benefits are payable in spite of most of this type of conduct, presumably on the grounds that it is the dependents rather than the victim who actually receive the benefits. To some extent this refusal to let anyone "benefit from their own wrong" seems inconsistent with the idea of compensation without regard to fault. In fact by excluding suicide, the schemes adopt an exclusion which has been largely dropped in life insurance. Strangely enough Manitoba, which has the widest coverage for victims regardless of anyone else's fault has by far the greatest list of exclusions based on the victim's fault.

While it is fairly clear in the Ontario standard contract that a victim is not prevented from recovering because of some other insured's conduct (such as an owner's or a driver's), section 56 of the Manitoba Regulation 120/71 and section 29(2) of the Act are more ambiguous. In Alberta whether it was intended or not, a victim can sometimes be deprived of benefits through the conduct of the automobile driver by virtue of section 4 of Reg. 305/71.

5. The Effect of these Schemes on other Benefits

There are several possible ways in which these benefits could have been integrated with other benefits available to victims. These benefits could have been simply added to everything else, allowing victims to retain tort claims and all other insurances. This would leave the question of whether these benefits were collateral benefits within the non-principle[36] applied in tort law to determine whether recovery should be reduced by insurance proceeds. It would also leave the question of whether the victim could collect on more than one insurance contract to the other contracts involved and their characterization as indemnity or non-indemnity insurance. As a second alternative these benefits could have been declared a kind of excess insurance, available after first looking to all other tort and contract (including insurance) remedies. Thirdly, these benefits could be in place of other insurance and tort claims. That is other insurance could be excess and these benefits first loss insurance and all tort remedies reduced. Finally, these benefits could be classified as indemnity insurance giving the insurer the right to be subrogated to all other claims.

The provinces have not adopted any of these simple solutions. They have treated the medical payments differently from the other accident benefits. While they have made some attempt to integrate these payments with the victim's tort remedies, they have not given sufficient attention to how these remedies should affect other insurance claims.

In all provinces the medical payments are treated as excess insurance available when no other insurance is available. While it normally would be indemnity insurance, the intention seems to be to reduce the liability of third parties to the extent that the victims receive payment, and hence deny the insurer the right of subrogation. This was done only partially in the uniform provisions covering release. Identical provisions exist to cover death and disability payments. These statutory provisions which are found in section 231(2) and section 232(2) of the Ontario Act are not easy to understand and have been considered by the courts in three recent cases. In *Schiedel v. Risk*[37] the Ontario Court of Appeal considered the effect of section 232(2). A widow, who received payments from an insurer under section 232(1) as a dependent of her deceased husband, successfully brought an action for her own personal injuries and under the Fatal Accidents Act for the death of her husband and children. The defendent tortfeasor argued that the death benefit the widow received under section 231(1) should be deducted from the tort judgment. Counsel for the plaintiff pointed out that section 3(3) of the Fatal Accidents Act[38] provides that in assessing the damages in an action brought under that Act there shall not be taken into account any sum paid or payable on the death of the deceased under a contract of insurance. He also pointed out that the persons who might be

---

[36] See Cooper, *A Collateral Benefits Principle*, 49 CAN. B. REV. 501 (1971).

[37] [1972] 2 Ont. 114, 25 D.L.R.3d 30 (C.A.)

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

termed the "releasors" under section 232(3) are "the insured person" and "his personal representative" and not dependents under the Fatal Accidents Act. The court accepted these arguments pointing out that the widow's claim under the Fatal Accidents Act was in her own right and not as personal representative of the deceased.

The opposite conclusion was reached in *Sale, Franche & Ricard v. Will*[39] by the Alberta Supreme Court where death benefits paid to the children of the insured were deducted from a tort claim brought on their behalf against the tortfeasor (whose liability insurer was the insurer who paid the death benefits). The Alberta Supreme Court's judgment discusses at length authority which allowed them to correct a typographical error in the uniform release section (the equivalent of sections 231(2) and 232(2) of the Ontario Act) which had since the time of the accident been corrected in most provinces. However the arguments accepted by the Ontario Court do not seem to have been raised by counsel in the Alberta case.

A similar argument was raised by the defendant in *Lovelace v. Fossum*[40] where the defendant tortfeasor argued that the amount of accident benefit the plaintiff would receive under section 248 of the British Columbia Insurance Act[41] should be deducted from the tort judgment. The court rejected this argument. They held that the sums paid by the insurer to the insured person (victim) entitle the insurer to be released to the extent of the sums so paid. However, they held that there is no provision for deducting from the insured's (tortfeasor's) liability an amount to cover a future liability of the insurer to the insured person (victim) nor any provision which would entitle the insurer to be released from liability to the insured person (victim) to the extent of any payments made by the insured (tortfeasor) to the insured person (victim). The court went on to point out that apart from the fact that there was no authority to permit the court to make such a deduction, such action would be undesirable since the court would be purporting to fix the liability of the insurer to the insured person in an action to which the insurer is not a party.

Since these cases were heard, both Ontario and British Columbia have introduced amendments designed to force a victim to look first to the accident insurance benefits and to prevent him from collecting twice for the same loss. Both statutes are very broadly worded and are not free from ambiguity. The Ontario statute[42] provides that any payment made or available under Schedule E, "constitutes a release by the claimant of any claim against the person liable to the claimant or his insurer." Although the reference to "claimant" rather than "insured" overcomes the argument of counsel for the plaintiff in the *Schiedel* case, there are at least two points of ambiguity. Firstly, while probably intending only to release tort liability,

[39] [1972] Ins. L.R. 1388, [1972] 1 W.W.R. 138, 22 D.L.R.3d 566 (1971).

[40] [1972] Ins. L.R. 1384, (B.C. Sup. Ct. 1971).

[41] B.C. Stat. 1969 c. 11.

[42] Ont. Stat. 1971 c. 84, § 17, amending § 237.

the section could apply to any liability, including that of another insurer. If so, the section contradicts the provisions which make the medical payments excess insurance and seems inconsistent with the co-insurance provisions relating to the disability insurance. As well, if the section was to be so broadly interpreted it would have the effect of reducing the amount payable under any life insurance policy by the amount of the automobile accident death benefits. Secondly, it is somewhat ambiguous as to whose insurer, the claimant's or the person liable, the section refers. Does payment under Schedule E release the person liable and his insurer or only the person liable to the claimant or the claimant's insurer? Since most of the accident insurances are non-indemnity insurances under which there will be no right to subrogation by the claimant's insurer, the section probably refers to the insurer of the person liable. If that is so, the new section makes section 231(2) and section 232(2) redundant. The British Columbia statute[43] is even more broadly worded. It states "(3) Where a claimant, entitled to the accident insurance benefits set out in the Second Schedule, receives payment from any person, there shall be deducted from the amount of payment receivable by that claimant, other than a payment under the Second Schedule, a sum equal to the amount paid, or made available, to him under the Second Schedule." As worded this provision could apply to completely unrelated payments made even by those under no legal liability to do so. Like section 237(2) in Ontario, the new section 250c(3) of the British Columbia Insurance Act seems to make section 248(2) redundant.[44]

The problem raised by *Lovelace v. Fossum* of determining an insurer's liability when it is not a party to the litigation has been ignored by the legislature of both Ontario and British Columbia. Sometimes the insurer liable to pay accident benefits to the victim will also be the liability insurer of the tortfeasor and therefore before the court in the sense that they are defending the tort action on behalf of their insured or have been added as third parties. However, there is no statutory authority to add the accident insurer to the tort litigation (and there is nothing for them to be subrogated to). Since a judgment between the victim and tortfeasor would not be binding on the accident insurer, it is possible that an amount may be deducted from the tort judgment which it later appears cannot be recovered from the accident insurer.

Aside from these statutory provisions, the benefits actually received by the victim where the victim has not himself paid the insurance premiums would be deducted from the tort claim by some courts under their application of a collateral benefits principle. See for example the recent case of *Rados v. Neumann*[45] where an employer paid the whole premiums on a sickness and accident insurance policy pursuant to a collective agreement.

---

[43] B.C. Stat. 1972 c. 29, § 4, adding new § 250C

[44] The Association of Superintendents of Insurance of the Provinces of Canada are now studying this problem. See the MINUTES OF PROCEEDINGS OF THE 54TH ANNUAL CONFERENCE at 154.

[45] [1971] 2 Ont. 269, 17 D.L.R.3d 521 (Ont. High Ct. 1970).

The employee collected benefits under this policy for the time he was unable to work as a result of injuries received in an automobile accident. The court deducted the benefits received from his tort claim against the negligent motorist.

The death and disability benefits are not indemnity insurance and there is hence no right (even without the various release provisions) of subrogation by the insurer. Assuming the release provisions do apply only to tort liability, there exists the possibility that the victim will receive compensation from more than one insurance contract. All three provinces have a similar provision[46] which reduces the benefits in the event that the victim receives benefits from several insurers which are greater than his gross earnings. This co-insurance clause does not however, prevent victims from receiving more than their gross earnings. That will depend on the other insurance contracts. Typically these contracts are non-indemnity contracts and hence will not be affected by the amount collected under the automobile insurance policy. Since many of these other accident insurances will be provided by collective agreements or in connection with pension funds and cannot be readily changed, there will be much undesirable overlapping coverage with the related double premiums.

AUTOMOBILE ACCIDENT INSURANCE

	Alberta	*Ontario*	*Manitoba*
Legislative Source	Alta. Stat. 1971, c. 53, § 7 adding §§ 300.1 and 300.2 Alta. Reg. 305/71	Ont. Stat. 1971, c. 84, §§ 13-19, 27 Ont. Reg. 540/71 Standard Automobile Policy (Owners' Form) published in the Ontario Gazette Feb. 5, 1972	Man. Stat. 1970, c. 1 40 Man. Reg. 48/71, 63/71, 80/71, 105/71, 120/71.
Insured (given protection)	Varies according to coverage but for most truly "accident" insurance includes two classes of people 1. those related to named insured 2. those who are occupants or are struck by described automobile		Generally 1. Everyone injured as a result of accident in Manitoba. 2. Every Manitoba domicilary injured outside Manitoba while riding in a car whose owner has an owner's certificate or whose driver has a driver's certificate.

[46] Ontario: § (3) of Part II of Subsection 3 of Schedule E; Manitoba: § 56(6) of Man. Reg. 120/71; Alberta: § 10 of Alta. Reg. 305/71.

	Alberta	*Ontario*	*Manitoba*
Insured (pay premiums)	While the Acts say it's mandatory in every motor vehicle liability policy the regulations and standard contracts in both provinces are worded with an owners policy in mind.		Every licensed driver and registered owner must pay the prescribed premium in order to obtain a drivers certificate or owners certificate as the case may be
Coverage: Unidentified & Uninsured Motorist	optional	mandatory	
	Based on fault and tort liability of an unidentified or uninsured motorist. Not applicable to accidents in Canada or in a state that has an unsatified judgment or similar fund		
Medical Benefits	optional $2000 maximum	mandatory* $5000 maximum	compulsory* $2000 maximum
Funeral Expense	mandatory $500 maximum	mandatory $500 maximum	compulsory $500 maximum
Death Benefits	mandatory	mandatory	compulsory
	Amount varies depending on age and status of deceased insured.		
Death Benefits	Maximum of $5000 plus 20% (*i.e.*, $1000) for each survivor other than the first, plus 1% per week for 104 weeks of the $5000 + 20%.	Maximum $5000 plus $1000 for each survivor other than the first.	Maximum $10,000
	While the Act requires a surviving spouse or dependent relative of the deceased to survive, this would mean for example that nothing was ever paid for the death of a 4 year old, even though the table provides for a $500 payment. Likely it was intended to have the same rule as Ontario (See Alta. Reg. 305/71, s. 8)	Payments made for a head of household or spouses death only if spouse, dependent child or parent survive or in the event of a child's death only if a parent survives. Death within 180 days of accident or within 2 years if totally disabled within that period.	

	Alberta	*Ontario*	*Manitoba*
Disability	mandatory total	mandatory total	compulsory total and partial
	104 weeks	104 weeks for disability which prevents him from performing any and every duty pertaining to his occupation or trade. lifetime if disability prevents him from engaging in any occupation or trade for which he is reasonably suited ...	lifetime for total 104 weeks for partial disability
	maximum $50 a week	maximum $70 a week	maximum $50 a week for total disability $25 a week for partial.
Disability	7 day waiting period	no waiting period	7 day waiting period
		Disability must occur within 20 days of accident.	
		Must be employed	No requirement of employment for total disability, but required for partial disability.
	Unemployed Housewife $50 per week for 26 weeks	*Unpaid Housekeeper* $35 per week for 12 weeks	*Unemployed Housewife* $50 a week for lifetime for total disability $25 a week for 12 weeks for partial disability
Impairments	not included	not included	compulsory according to schedule, maximum $6000 but subtracted from death benefits — must occur within 90 days or in some circumstances 1 year of accident

*The term mandatory is used to indicate that while automobile insurance is not required in the province, every automobile insurance contract issued must contain this coverage. The term compulsory on the other hand means that all automobile owners must have this insurance.

II. LEGISLATION

1. Uniform Legislation

The automobile accident insurance legislation described above is atypical in several respects. Not only is there lack of uniformity but it was preceded by special Royal Commissions, parliamentary committees and sometimes election promises. Its introduction was heralded with much emotional public debate. Most provincial insurance legislation in Canada is remarkably uniform and is introduced without much public discussion or even warning, after extensive consultation between the provincial superintendents of insurance and the insurance industry. The superintendents have their own Association which usually meets twice a year, once with the insurance industry.[47] By reading the annual published Minutes of Proceedings of these Conferences one can get a preview of amendments which will soon be introduced into the provincial legislative assemblies. Often it is the only place to turn to get an idea of the purpose of the amendments. Certainly it is more reliable than the official records of debate in the various legislatures.

Given the source of most legislative changes, it will be useful to examine the concerns of the Superintendents in recent years and point out where that has resulted in legislative action in the various provinces. The following headings are those used by the Association of Superintendents to identify their various standing committees.

Life Insurance Legislation

The primary concern of the Superintendents in this field at their meetings in 1970 and 1971 has been with Variable Life Insurance Contracts and Group Life Insurance Contracts.

Variable Life Insurance contracts are a relatively recent development. They were discussed at the 1967 Conference and Interim Rules applicable to them were approved at the 1968 Conference. To use the definition adopted by the Superintendents a "variable contract means a contract of life insurance under which the reserve, or part thereof, varies in amount depending upon the market value of a specified group of assets, and includes a provision in a contract of life insurance under which policy dividends are deposited in a fund."[48] The concern of the Superintendents has been largely to ensure that applicants for this type of insurance have adequate information. That is, that applicants have warning that some benefits are not guaranteed, information as to the method of determining the benefits related to the market value of the fund, the times at which the fund will be valued, and the charges or methods of determining the charges against the fund for taxes, management, or other expenses.

---

[47] As far as one can tell from the list of registrations at these conferences published in the PROCEEDINGS, no one attends representing the insuring public.

[48] PROCEEDINGS 85 (1971). In Ontario the statutory definition includes "an annuity" as well as a life insurance contract. Ont. Rev. Stat c. 224, § 85 (1970).

Ontario passed legislation in 1970[49] authorizing these variable contracts, requiring separate funds for them to be maintained, requiring information folders providing "brief and plain" disclosure of all material facts to be given to all applicants, authorizing the Lieutenant Governor in Council to make regulations prescribing *inter alia* the form and content of variable insurance contracts and information folders, and giving the Superintendent power to prohibit misleading or deceptive practices. Since then, the Superintendents have approved revised rules in 1971[50] and these have now been adopted by regulation in Ontario.[51]

Group Life Insurance Contracts have also been under study by the Superintendents since 1967. At the 1967 Conference the Standing Committee on Life Insurance Legislation was instructed "to consider and discuss with representatives of the industry the underwriting practices in the case of group life contracts issued to banks, credit unions and similar institutions in conjunction with savings deposits and loans."[52] In 1968 this instruction was expanded and the committee was asked to "consider and discuss with representatives of the industry the practices relating to group insurance with particular reference to (a) the nature of groups being insured; (b) post coverage underwriting practices; (c) compensation directly or indirectly to the group policyholders; and (d) insuring completion of savings or similar plans."[53] Proposed Interim Rules were introduced at the 1969 Conference, and several changes were made at the 1970 and 1971 Conferences which adopted Rules governing Group Life Insurance.[54] The rules do not apply to contracts which were in existence at the end of 1970, but for contracts made after that date they provide special rules for creditors group insurance or savings group insurance, special rules for other kinds of group insurance, and rules applicable to all group insurance. For other than creditors group insurance or savings group insurance the rules provide for the kind of group that can be covered. Like the rules governing charter airline flights the rules specify that the group must be formed for a specific purpose other than the purchase of life insurance. They also prescribe requirements which are intended to ensure that the group is relatively stable and adequately administered. As well for group contracts other than creditors group insurance and savings group insurance the benefits must be non-discriminatory and the contract convertible without evidence of insurability into an individual contract of insurance.

For creditors group insurance and savings group insurance the rules prohibit insurance for more than the amount owing or the amount intended to be saved. Where eligibility is to be conditioned on health, the application shall contain specific questions concerning health.

---

[49] Ont. Stat. c. 134. § 9 adding what is now ONT. REV. STAT. c. 224, § 84 and 85 (1970).

[50] PROCEEDINGS 85 (1971).

[51] Ont. Reg. 526/71 (1971).

[52] PROCEEDINGS 35 (1967).

[53] PROCEEDINGS 52 (1968).

[54] See PROCEEDINGS at 101 (1971) for the latest version of the rules.

For all kinds of group insurance, the insurer is not to pay to the policyholder or to any agent or employee thereof compensation for the solicitation or negotiation of insurance or reimbursement of expenses for the collection of premiums in excess of five per cent of the premiums collected. These finders' fees, which are usually ways of disguising part of the cost of borrowing, have been dealt with by provincial consumer protection legislation, but now they should disappear.

Although the Ontario Insurance Act was amended in 1970[55] to allow the Lieutenant Governor in Council to make regulations governing group insurance contracts, these rules have not yet been adopted by regulation in Ontario. Presumably, however, the rules are being followed by the industry.

The Superintendents have raised the question of whether it is in the public interest to have a health requirement for group life insurance, but after discussion with the industry seem to have concluded that the industry should be allowed to impose such a requirement if it wishes to do so.

The Standing Committee on Group Life Insurance is continuing to consult with the industry on ways of improving the nature and quality of Group Life Insurance and of requiring more complete disclosure to members of the group of any limitations in the protection afforded under the plan.[56]

The Committee is also continuing to study the question of commutations of instalment payments of insurance monies. This matter was first raised by the Ontario Law Reform Commission in 1968. In 1971 a draft amendment to what is now section 191 of the Ontario Insurance Act was presented which would have allowed commutation by the court without the consent of the insurer. In spite of the desire of the Ontario Law Reform Commission not to let the matter drift for another year, no amendments have been approved by the Superintendents or introduced in Ontario almost a year later.

Accident and Sickness Insurance

At the 1967 Conference the Superintendents adopted a new Uniform Accident and Sickness Part. This was revised at the 1968 Conference and was briefly described in the last survey at the time it was introduced in several provinces.[57] All of the common law provinces[58] have now enacted

---

[55] Ont. Stat. 1970 c. 134, § 11, adding what is now § 95(3)(*c*).

[56] *Supra* note 50.

[57] Baer, *Annual Survey of Canadian Law: Insurance*, 4 OTTAWA L. REV. 497, at 501 (1971) commenting on its introduction in New Brunswick, Manitoba, British Columbia and Ontario.

[58] An Act to amend the Alberta Insurance Act, Alta. Stat. 1970 c. 59, § 15, adding a new Part 8; an Act to amend the Insurance Act, N.S. Stat 1970 c. 46, adding new Part V; an Act to amend the Insurance Act, P.E.I. Stat. 1970 c. 29, § 7, adding new Part VI; an Act to amend the Saskatchewan Insurance Act, Sask. Stat. 1970 c. 59, § 12 adding new Part VII; The Accident and Sickness Insurance Act, 1971 Nfld. Stat. 1971 c. 6.

this legislation and October 1, 1970 was fixed as the effective date for it by the Superintendents.[59]

This Standing Committee has also been concerned with confinement clauses and at the 1970 Conference adopted an additional working rule concerning them to be added to the Revised Principles applicable to Accident and Sickness Insurance Policies in Canada.[60] This working rule provides that confinement (other than hospital confinement) is a separate risk and shall be so underwritten and that confinement shall not be a measure of "disability" for the purposes of determining the entitlement of the insured to benefit under a contract.

Agents, Brokers and Adjusters

The Association recommended at the 1971 Conference that provinces adopt the minimum educational standards, study material and examinations for the licensing of general insurance agents that were submitted to the 1970 Conference. This material is not set out in the Proceedings of the Conference nor in any provincial statutes or regulations but is no doubt available from the provincial Superintendents.

The Standing Committee on Insurance Agents, Brokers and Adjusters is currently studying the minimum educational requirements for licensing accident and sickness insurance agents and preparing appropriate study and examination material, studying the statutes and regulations relating to the licensing and regulation of adjusters, and studying generally trends and practices in the marketing and soliciting of insurance.[61]

General Insurance Legislation

There are several legislative changes recommended by Conferences in 1966, 1968 and 1969 which have now been enacted by all provinces except New Brunswick and Saskatchewan.[62] These changes include amendments to the equivalent of sections 108(3) of the Ontario Insurance Act concerning N.S.F. cheques,[63] 109 concerning the furnishing of proof of loss forms[64]

[59] PROCEEDINGS 103 (1970).

[60] *Id.* at 100.

[61] PROCEEDINGS 120 (1971).

[62] New Brunswick and Saskatchewan have enacted some but not all of these changes. Saskatchewan has not amended the Fire Statutory Condition 5 and 11 or the equivalent of Ontario's § 109(2) and New Brunswick has not amended any of the Fire Statutory Conditions. Manitoba, Ontario and British Columbia adopted these amendments prior to 1970.

[63] An Act to amend the Alberta Insurance Act, Alta. Stat. 1970 c. 59, § 5, amending § 188(3); an Act to amend the Insurance Act, N.S. Stat. 1970 c. 47, § 1, amending § 161; an Act to amend the Insurance Act, P.E.I. Stat. 1970 c. 29, § 1, amending § 92; an Act to amend the Saskatchewan Insurance Act, Sask. Stat. c. 59, § 4, amending § 108(3); the Insurance Contracts (Amendment) Act 1971, Nfld. Stat. 1971 c. 3, § 2.

[64] An Act to amend the Alberta Insurance Act, Alta. Stat. 1970 c. 59, § 6; an Act to amend the Insurance Act, N.B. Stat. 1971 c. 41, § 1, amending § 103; an Act to amend the Insurance Act, N.S. Stat. 1970 c. 47, § 2, amending § 18; an Act to amend the Insurance Act P.E.I. Stat. 1970 c. 29, §§ 2 and 3, amending § 93; an Act to amend the Saskatchewan Insurance Act, Sask. Stat. 1970 c. 59, § 5, amending § 109(3); the Insurance Contracts (Amendment) Act 1971, Nfld. Stat. 1971 c. 3, § 3.

and the Fire Statutory Conditions 5 (Termination), 11 (appraisal) and 15 (notice).[65]

No new legislative changes have been approved by the Association in the last two years although the Standing Committee is studying legislation with respect to condominiums, the question of whether group property and liability insurances should be written on a group basis, and the desirability of restricting the right of cancellation by the insurer and of lengthening the prescription periods and the period of notice of such cancellation required to be given.[66]

Automobile Insurance Legislation and Forms

Since the last survey was written several provinces have passed legislation recommended by the Association at the 1969 Conference. This included enabling legislation to allow insurers to issue a certificate of insurance rather than the standard policy itself.[67] This change is designed to reduce the printing cost of unread (and for most customers unreadable) documents. The standard contracts are to be published in the various provincial gazettes and are to be made available to those insureds who request them.[68] The industry recommended this change with some trepidation because it recognized that these certificates might be carried by motorists and produced at the scene of an accident (much like the pink cards are now) thus disclosing the amount of insurance coverage available to the motorist.

The 1969 Conference also recommended an amendment to Statutory Condition 2 to prohibit the insured from driving while his driver's licence is suspended.[69] This amendment is necessary because of the courts interpretation of "authorized by law or qualified to drive" found in Statutory Condition 2 of most provincial statutes.[70]

In 1969, the Association also recommended the addition of statutory provisions to clarify that liability for contamination of cargo was not covered under automobile liability insurance.[71]

---

[65] An Act to amend the Alberta Insurance Act, Alta. Stat. 1970 c. 59, § 7; an Act to amend the Insurance Act, N.S. Stat. 1970 c. 47, § 9; an Act to amend the Insurance Act, P.E.I. Stat. 1970 c. 29, §§ 4, 5 and 6; an Act to amend the Saskatchewan Insurance Act, Sask. Stat. 1970 c. 59, § 6, amending Statutory Condition 15; the Fire Insurance (amendment) Act, 1971, Nfld. Stat. 1971 c. 4.

[66] PROCEEDINGS 127 (1971).

[67] Ont. Stat. 1971 c. 84, §§ 11 & 12; Man. Stat. 1971 c. 88, §§ 10, 11, & 12; N.B. Stat. 1971 c. 41, §§ 4 & 5; P.E.I. Stat. 1971 c. 19, §§ 4, 5 & 6.

[68] In British Columbia where a certificate was introduced at the beginning of 1970, five major companies reported that they had issued 109,000 certificates and had received less than thirty-three requests for a policy. PROCEEDINGS 147 (1970).

[69] Alta. Stat. 1970 c. 59, § 8; N.B. Stat. 1971 c. 41, § 6; N.S. Stat. 1970 c. 47, § 7; Nfld. Stat. 1971 c. 74, § 2; Ont. Stat. 1970 c. 134, § 13.

[70] See *e.g.*, Schauerte v. Wawanesa Mut. Ins. Co., 27 W.W.R. 618 (Alta. Trial Div. 1959), affirmed without written reasons, 29 W.W.R. 560 (Alta. 1959). In some provinces Statutory Condition 2 reads "authorized by law and qualified to drive."

[71] Alta. Stat. 1970 c. 59, § 9; N.B. Stat. 1971 c. 41, § 7; N.S. Stat. 1970 c. 47, § 3, Nfld. Stat. 1971 c. 74, § 3; Ont. Stat. 1970 c. 134, § 14.

Finally the Association recommended statutory provisions which would allow insurers to make advance payments without admitting liability but getting an automatic release in favour of the insurer and insured from the person receiving the payment.[72] This is an attempt to cope with public criticism that insurance payments are delayed for unreasonable lengths of times. Now the insurers can pay some expenses incurred by the victim immediately without necessarily admitting liability for further claims.

At the 1970 Conference the Association approved amendments to the definition of "insured" to include recipients of the new accident benefits[73] and a new section which is designed to clarify the order of payments of these accident benefits where benefits are payable under more than one contract.[74] As well an addition was recommended to the exclusions listed in the statutes to the meaning of carrying passengers for compensation or hire.[75] The exclusion covers the occasional and infrequent use by the insured of his automobile for the transportation of children to or from school or school activities.

In 1970 the Association also recommended an amendment which would have had the effect of forfeiting any of the medical expense and accident insurance benefits by anyone who brought a claim against anyone for these expenses and benefits in lieu of claiming them.[76] This recommendation was dropped at the 1971 meeting and instead the Standing Committee was instructed to give the matter further study.[77] Meanwhile Ontario[78] and British Columbia [79] have introduced legislation to the opposite effect designed to force a victim to look first to the accident insurance benefits.

Two matters which have been under discussion for a couple of years and which resulted in recommendations for legislative change at the 1971 Conference have been enacted in some provinces. The first was a small step in correcting the unfortunate position of gratuitous passengers.[80] For the purpose of direct action under section 225(1) of the Ontario Insurance Act by a victim against the insurer, the contract is deemed to provide all

---

[72] Alta. Stat. 1970 c. 59, § 10; B.C. Stat. 1972 c. 29, § 1; N.B. Stat. 1971 c. 41, § 9; N.S. Stat. 1970 c. 47, § 4; Nfld. Stat. 1971 c. 74, § 5; Ont. Stat. 1970 c. 134, § 14.

[73] Ont. Stat. 1971 c. 84, § 10, amending § 199(b); N.B. Stat. 1971 c. 41, amending § 224; P.E.I. Stat. 1971 c. 19, § 3(2), amending § 180(*b*).

[74] Ont. Stat. 1971 c. 84, § 16, adding § 234 a; B.C. Stat. 1972 c. 29, § 3, adding § 248A; Man. Stat. 1971 c. 88, § 22, adding new § 267.1; N.B. Stat. 1971 c. 41, § 13, adding § 257A; P.E.I. Stat. 1971 c. 19, § 10, adding § 203Q; Nfld. Stat. c. 74, § 7, adding § 33A.

[75] Ont. Stat. 1971 c. 84, § 13, adding § 217(4)(*e*); Man. Stat. 1971 c. 88, § 13, adding § 248(4)(*e*); N.B. Stat. 1971 c. 41, § 8, adding § 241(4)(*e*); P.E.I. Stat. 1971 c. 19, § 7, amending § 197; Nfld. Stat. 1971 c. 74, § 4, amending § 19.

[76] PROCEEDINGS 159 (1970).

[77] Meanwhile Newfoundland has enacted the amendment, Nfld. Stat. 1971 c. 74, § 7, adding new § 35B.

[78] Ont. Stat. 1971 c. 84, § 17, adding § 237.

[79] B.C. Stat. 1972 c. 29, § 4, amending § 250c.

[80] Ont. Stat. 1972 c. 66, § 2, amending § 225(9). The B.C. amendment as introduced and given first reading contains some confusing misprints.

the types of coverage mentioned in section 217. The exception to this where the victim was a gratuitous passenger has been dropped. From reading the discussion in the 1970 and 1971 Proceedings it seems the Superintendents (at least at one time) had in mind giving gratuitous passengers the same right of recovery free of defences as other victims. For some reason they either changed their minds[81] or perhaps the recommended statutory change does not do what they intended. In any event, as against a gratuitous passenger, the insurer can still avail itself of any defence that it has against the insured. And, of course, the gratuitous passenger is still subject to the tort rule found in the various provincial Highway Traffic Acts that he must prove gross negligence or wanton and reckless conduct in an action against his host.

The second matter which was recommended at the 1971 Conference was the removal of impaired driving from Statutory Condition 2 and its inclusion as an exclusion under Section C (Physical Damage Cover) of the Standard Policy.[82] While this change was approved by the industry, they did urge that consideration be given to situations where the driver and passenger were engaged in a joint venture. The effect of this change will be to allow victims to collect under the equivalent of section 225 of the Ontario Act up to the actual limits of the policy (not just the Statutory limits set out in section 218) and will deny to the insurer the right to recover against the impaired insured. While the concern seems to have been primarily with giving the victim additional coverage, this does extend the coverage of the insured. At the same time in Sections B and C of the policy most provinces adhere to the view that the insured should not himself receive compensation from his own wrongful acts. Perhaps it is strange that at the time this fault is being removed as a pre-condition of liability insurance it is introduced as a pre-condition to what is billed as "no-fault" accident insurance.

The Association also recommended in 1971 that Statutory Condition 6 be amended to extend the prescription period for bringing action against an insurer to two years. So far this has not been done by any province.

The Superintendents have been concerned about the inconsistency in the practices of companies who apply mid-term surcharges. These often result from a traffic conviction or accident during the term of the policy. The Superintendents seem to feel that a large part of the problem is due to the public's misunderstanding or confusion about them. One doubts whether the public's attitude that automobile insurers are fair weather friends would change if they knew in advance exactly when they would face an additional premium or cancellation of their insurance. The Standing Committee has been instructed "to study both the underwriting practices of companies applying such surcharges and the question of whether or not the right of cancellation should be available to companies in connection herewith."[83]

[81] Perhaps they accepted in part the industries argument that there was a danger of collusion or that gratuitous passengers were undeserving, being engaged in a joint "quasi-criminal frolic" with the driver.

[82] This has been adopted in Ontario. Ont. Stat. 1972 c. 66, § 9.

[83] PROCEEDINGS 155 (1971).

Finally with the explosion in the population of such recreational vehicles as snowmobiles and mini-bikes, the Association has requested the Insurance Bureau of Canada to submit a draft of a policy form appropriate for insuring recreational and miscellaneous type vehicles.

2. Unique Legislation

Besides the statutory changes which have resulted from the work of the Association of Superintendents of Insurance, several provinces have amended their acts unilaterally. Some of the provinces which did so would have profited from a more careful discussion with the other provinces. Most of the provinces have in recent years passed legislation to change the age of majority and this usually affects age provisions in the provincial Insurance Acts. However other changes are more idiosyncratic. Only some of the major changes are mentioned below.

Ontario

In 1970 those provisions in the Corporations Act which prescribed the kind of investments an Insurer could make were transferred, with some minor changes, to a new Part XVII, entitled "Investments," of the Insurance Act.[84] In the same year a new Part XVIII was passed[85] to regulate unfair and deceptive acts and practices in the business of insurance. The new Part describes what "unfair and deceptive acts and practices" are, gives the Superintendent power to investigate to determine whether such practices are being engaged in, and, gives the Superintendent power to order anyone to cease engaging in such practices.

In 1971 a new twisting provision was introduced.[86] The explanation given by the Minister in the legislature as to why the old section was inadequate is not very helpful.[87] He suggested that there is now a much broader field for misleading statements because life insurance agents now also sell "investments, securities, mutual funds and that type of thing." There is a new temptation for them to encourage people to drop their life insurance in favour of some other investment scheme. If this is what the government had in mind, the new section 357 does not accomplish the purpose. The offence of twisting is still defined in terms of surrendering one life insurance contract for another. What has been broadened in the new section is the persons who can be charged with an offence. Under the old section only "a person licensed as an agent for life insurance under the act" was prohibited from twisting. Under the new section "any person" is prohibited from twisting. The Superintendent's office has assured the public that the section does not mean what it says and that professional advisors such as accountants, bank managers and lawyers can still advise their clients to change life insurance. Nor would friendly advice from relatives and neighbours be

---

[84] Ont. Stat. 1970 c. 134, § 17.

[85] *Id.*

[86] Ont. Stat. 1971 c. 84, § 20.

[87] 113 ONT. LEG. DEB. 4717 (The Honorable Mr. Wishart, July 23, 1972).

an offence.[88] What was intended was anyone selling life insurance. Why anyone selling, who was not a licensed agent and hence not caught by the old section, could not have been dealt with under the sections prohibiting anyone from acting as an agent without a licence is not clear. Since any prosecutions under the section are likely to be instigated by the Superintendent, the sloppy drafting is probably harmless. However, at best the difference between what the section says and what the Superintendent says it means is another example of secret law.

If the Minister's explanation is to be taken seriously and the government does intend to prohibit anyone from inducing people from switching from life insurance to some type of investment scheme, perhaps the whole argument in favour of a complete prohibition against twisting should be re-examined. Such a complete prohibition can only be justified if such change in life insurance contracts never benefits the insured or if whatever benefits there are, are more than outweighed by the dangers of hard to detect or prove coercion and false and misleading representations. Given the nature of competition in the life insurance industry, perhaps it was true in the past than an insured seldom if ever benefited from a change of life insurance from one insurer to another. However, given the wide variation of investment schemes now available to the public there may be many situations where an insured would be better off to surrender his existing life insurance contract. The real evil is coercion and false and misleading representations, not change per se. A much more subtle weapon is needed than a blunt prohibition of all "inducing," beneficial and detrimental alike.

In addition new section 357(3) authorizes the Lieutenant Governor in Council to make regulations "regulating the replacement of an existing life insurance contract by another contract of life insurance." Perhaps these words are broad enough for the Lieutenant Governor in Council to limit the blanket prohibition against twisting found in section 357(1).

In 1972 a new section 32a was added to the Insurance Act[89] requiring insurers which have their head office outside Ontario to execute a power of attorney to a chief agent resident in Ontario. This power of attorney is to authorize the chief agent to receive service of process in all actions in Ontario and to receive all notices given by the Superintendent. At the same time the Ontario High Court[90] has allowed substituted service on the defendant's insurer in a tort action resulting from an automobile accident. However, not all judicial decisions have made insurers more amenable to local courts. In a precedent setting case the Ontario High Court[91] has modified the transient rule of jurisdiction and applied the doctrine of *forum non conveniens* even though the writ was served on the insurer within

[88] The Superintendent's office explains their interpretation with the argument that only someone who stands to gain from the switch can "induce" it.

[89] Ont. Stat. 1972 c. 66, § 4.

[90] Saraceni v. Rechenberg, [1971] Ins. L.R. 1313 (Ont. High Ct.)

[91] Moreno v. Norwich Union Fire Ins. Society, [1971] Ins. L.R. 1156 (Ont. High Ct. 1970).

Ontario. The court refused to hear an action by the accident victim (as assignee of the insured) against the insurer following an automobile accident in England and a tort judgment in Illinois.

The 1972 amendments[92] also include a new section 353(2a) and (2b) which prohibit the licensing of non-residents to carry on the business of insurance agent, broker or adjuster. This action reflects the growing public concern over foreign influence and control of Canadian businesses.

Manitoba

In 1971 Manitoba passed several amendments to the Insurance Act designed to prevent the practice of forcing borrowers to insure with a specific insurer as a condition precedent to financing.[93] These kinds of tied house arrangements allow institutional lenders to disguise part of the cost of borrowing as insurance premiums. The amendments do however allow the vendor or mortgagee to require a standard mortgage clause in the insurance contract taken out by the purchaser or mortgagor.[94] The legislation specifically provides that if the insurer pays to the mortgagee or vendor any sum under the mortgage clause where there was no liability to the insured, the insurer becomes subrogated to the mortgagee's security or by paying off the full amount of the mortgage, the insurer shall receive a full assignment of the mortgage.[95] The legislation also allows the vendor or mortgagee to insure when the mortgagor or purchaser fails to do so according to the contract of sale or mortgage.[96] Since a mortgagee or vendor could do this in any event it is not obvious what additional rights or powers the statute was intended to infer. Although the statute does not specifically say so, perhaps it is intended to allow the mortgagee or vendor to place the insurance at the expense of the mortgagor or purchaser.

III. Case Law

1. The Definition of Insurance

For those teachers who like to begin each subject with problems of classification, to distinguish insurance from other similar transactions, there has been a rare case reported in the past year which attempted to define insurance.[97] The case involved the interpretation of a collective agreement, the meaning of section 25(1) of the Ontario Health Services Act, and in particular the meaning of "insurance" within section 25 (1). The collective agreement provided that after the introduction of government health insurance that "the employees would receive no less benefits

[92] Ont. Stat. 1972 c. 66, § 14.

[93] An Act to amend the Insurance Act, Man. Stat. 1971 c. 88, § 2, amending § 133.

[94] *Id.* new § 133(5)(*a*).

[95] *Id.* new § 133(5)(*b*).

[96] *Id.* new § 133(6).

[97] *Re* Bendix Automotive of Canada Ltd. & United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.) Local 195, [1971] 3 Ont. 263, 20 D.L.R.3d 151 (High Ct.).

than currently provided" in the collective agreement. This agreement by the employer to provide coverage not provided by O.H.S.I.P., including the 10 per cent of the Ontario Medical Association scale of fees, was held to be a contract of insurance within the meaning of section 25(1) of the Health Services Insurance Act and hence void. The court referred to many sources in an attempt to define insurance without much appreciation that the term might have different meanings in different contexts. For example, could an employer who agrees to sick leave benefits under a collective agreement be charged under Provincial Insurance Acts for selling insurance without the appropriate licence or for failing to perform all the duties prescribed in the acts to guarantee the solvency of insurance companies?

The court's judgment is also interesting because of the purpose it subscribes to section 25(1). The court says the purpose and object of the provision "is to encourage a sense of responsibility in the use of the medical plan by the members of the public." This purpose is manufactured by the court out of whole cloth. The court refers to no evidence which indicates that the government was trying to establish a deterent fee. For all the evidence that was before the court the purpose might just as easily have been to prevent competing insurance to the government scheme or to reduce costs through the knowledge that most doctors would probably accept 90% of their fees directly from the government and never bother to claim the extra 10 per cent from their patients.

2. Defining the Risk: Proximate Cause

Not much by way of general rules can be extracted from the most frequently litigated insurance problems, those involving the interpretation of insurance policies. The cases are extremely disparate since once a phrase has been given judicial interpretation it joins the large, occasionally venerable, frequently obtuse jargon known to insurers and insurance counsel. However, sometimes similar problems of interpretation keep re-appearing in the cases. This occurs where the courts have made a distinction which is difficult or impossible to apply, where the industry uses a device to limit the risk which is inherently arbitrary, or sometimes where there are conflicting lines of authority which have not been resolved by the Supreme Court of Canada.

In the past two years several courts have had to decide whether death or injury which results from an intentional act is an accident within the meaning of life and accident insurance policies. This kind of problem has been before the courts in the past. The difficulty is created by the fact that while the loss results from the insured's deliberate act, the insured does not intend the consequences, and usually through ignorance or carelessness is not aware that his deliberate acts will result in the loss.

This problem of construction was raised in two recent cases with remarkably similar facts. In both cases an unemployed husband was found

dead in a hotel room, in a large city away from home. In one case[98] the man died from an overdose of barbiturates while in the other[99] the man was asphyxiated while sniffing glue. In neither case did the insured tend to take his own life but in both cases he intentionally did the act which resulted in his death. The courts deciding the two cases came to opposite conclusions, the British Columbia Supreme Court held that the deceased although consuming at least twelve tuinal tablets did not intend to cause himself injury, while the Ontario County Court judge found that the deceased in placing a plastic bag filled with cutex over his head was foolhardy, that he ought to have known that death might well ensue, and hence that his death was not the result of an accident. While the Ontario court lists a number of cases[100] referred to by counsel, the list does not include a number of recent cases mentioned in the last survey[101] where courts have tended to include negligent or careless conduct within the meaning of accident and to exclude "a deliberate courting of the risk with the knowledge of the risk and with an element of reckless conduct." Perhaps even applying this somewhat higher standard of recklessness the Ontario court would have found that the deceased's death was not an accident. However, the court relied on the decisions of several courts in applying the lower standard and excluding the results of careless or negligent conduct from the definition of accident. This line of cases which apply the lower standard define accident in a way which seems inconsistent with the use of the term in other areas of insurance law. For example the Automobile Accident Insurance described in Part 1 of this survey are intended to provide benefits regardless of the carelessness or negligence of the insured victim. Since these two conflicting lines of cases include decisions of provincial appellate courts, the matter will have to be decided by the Supreme Court of Canada if there is to be national uniformity.

An example of a recurring fact pattern which probably results from an arbitrary risk limiting devise used by the industry is *British Motorcyles Ltd. v. Great American Ins. Co.*[102] This case involved an action under a burglary policy which had the standard clause requiring visible markings of forcible entry. Courts could perhaps come to more just decisions in these cases if the argument were not so narrow. Why should recovery depend on whether the theft was committed by a slovenly thief? Of course, such a question must be directed to the industry rather than the courts.

This limitation on the risk in burglary insurance is not as unreasonable, however, as that found in *Opyr. v. Pitts Ins. Co.*[103] In this case, a life

---

[98] Legallee v. Travelers Ins. Co., [1972] Ins. L.R. 1380 (B.C. Sup. Ct. 1971).

[99] Jones v. Prudential Ins. Co. of America, [1972] 2 Ont. 101, [1972] Ins. L.R. 1374, 24 D.L.R.3d 683 (Ont. County Ct. 1971).

[100] [1972] Ins. L.R. 1374, at 1375 and 1376.

[101] Baer, *Annual Survey of Canadian Law: Insurance*, 4 OTTAWA L. REV. 497, at 506 (1971).

[102] [1971] Ins. L.R. 1153, 75 W.W.R. 372 (B.C. County Ct. 1970).

[103] [1971] Ins. L.R. 1173, [1971] 2 W.W.R. 284 (Man. Q.B. 1970).

insurance policy provided that "this Insurance does not cover: any loss while the member is under the influence of alcohol... or if the consumption of alcohol affects the member to the extent as to be considered a factor in the accident." The insured was killed while a passenger in an automobile. He was intoxicated at the time although this did not contribute to his death. The court read the "or" in the exclusion disjunctively rather than conjunctively, and denied recovery under the policy. In doing so, the court must assume the parties to the contract intended it to be affected by an obviously immaterial circumstance. In view of this perhaps even if the court had a general discretion such as that found in fire insurance to render not binding an unfair or unreasonable exclusion, the decision might have been the same. The court would have come to a more reasonable decision if the emphasis had not been on what the contract said, but rather on what the insured had been effectively told. As suggested in the last survey the courts should go beyond the *contra proferentum* rule in construing insurance contracts. In disputed cases they should enquire as to whether the insurer has done all that it reasonably could to explain its product accurately. Such a rule would avoid the harsh results of cases like *Ramey v. Maritime Life Ass. Co.*[104] where a claim on a life insurance contract was denied because of an exclusion in the policy which was not mentioned in the application or the information folder which was distributed with the application. The exclusion related to the commencement of the contract in circumstances where the insured was confined to hospital. The insured was confined to hospital when he applied for the insurance. Since he probably would not have applied for insurance and paid premiums as long as he was in hospital if he knew he would not be covered, should there not be some onus on the insurer to bring this to his attention? Should they be allowed without investigation to sell what is, as long as the insured remains in hospital, a worthless product?

The approach advocated here might also have avoided the results of *Hill v. Lumbermen's Mut. Casualty Co.*,[105] a case which received much publicity in the popular press and which caused some confusion and extra paper work for the industry.[106] The plaintiffs, husband and wife, were the owners of five houses which were rented as income properties. The plaintiff husband was also an employee of the Halton County Board of Education. A fire which resulted from the negligence of the plaintiff husband destroyed a tenant's property. The tenant successfully sued the plaintiff husband and recovered 5,000 dollars in damages and 500 dollars in costs. Mr. Hill in turn claimed against his insurer under the comprehensive personal liability coverage of his insurance policy. This coverage was limited by an exclusion which read "This Policy does not apply: [in respect to this coverage] to any business use of the premises unless stated in the Declarations, or to any business pursuits of an Insured." Mr. Justice Haines in denying the plaintiffs' claim held that the plaintiff, Mr. Hill, was in the

[104][1972] Ins. L.R. 1447, [1972] 2 Ont. 169 (Ont. High Ct.)

[105][1972] Ins. L.R. 1387 (Ont. High Ct.)

[106]See The Globe and Mail (Toronto), January 19, 1972

business of operating these income producing properties. The comments which followed the case by a "spokesman" for the Ontario Department of Insurance and by various insurance company executives indicates the industry thought that a personal liability clause was appropriate to cover such part time landlords provided they got their principal income from other jobs. Mr. Hill had carried this insurance for fifteen years and he would have recovered if he had the right policy, a commercial property (called a premises, property and operations) liability policy. There is nothing to indicate that Mr. Hill made any misrepresentations to his insurers or that he failed to disclose any material fact. Unknown to him (and apparently even to most of the industry) the policy was not apt to provide him with liability coverage. The insurer mistakenly issued an inappropriate policy. The theories and concepts used in insurance law have lost all touch with reality if the courts deny recovery in such a case.[107]

3. Agency

The judgments given in recent Quebec decisions[108] are in stark contrast to that given in *Boutilier v. Traders Gen. Ins. Co.*[109] and other decisions from common law provinces reported in the past two years. The Quebec courts have no difficulty in finding insurers bound by the actions of insurance agents. Meanwhile in the common law provinces courts persist in the fanciful but unfair notion of the bicephalous agent, part of whom acts as agent for the insured while the other part acts for the insurer; one head with the knowledge of the insured misrepresenting to the other head acting for the insurer. Where insureds sign applications filled in by agents they are at least responsible for the agents' carelessness if not their intentional ambidexterity. In *Blanchette v. C.L.S. Limited*[110] the trial judge found that the insured had given correct information to an insurance agent who improperly filled in the answers in an application for insurance which was signed by the insured. In allowing the insurer's appeal and denying the insured recovery under the policy, the Saskatchewan Court of Appeal held that the agent was acting as agent for the insured when he filled in the answers. No finding was made as to whether the mistake resulted from the agent's carelessness or intentional act. Presumably in either case the agent would be acting as agent for the insured even though the insured had not authorized his "agent" to act deceptively. While in this case the insured probably would have realized there was a mistake if he had read the application over carefully, why should the insuring public be asked to supervise the accuracy of the industry's paperwork?

---

[107]Since the last survey was written the Supreme Court of Canada has reversed the Ontario Court of Appeal and restored the trial judgment in Canadian Gen. Ins. Co. v. Western Pile & Foundation (Ontario) Ltd., [1971] Ins. L.R. 1308, 20 D.L.R.3d 325.

[108]Levinson v. Canada Life Ass. Co., [1972] Ins. L.R. 1399, at 1405 (Que. Sup. Ct. 1970); Patrick v. Maryland Casualty Co., [1971] Ins. L.R. 1193 (Que. C.A. 1970).

[109][1969] Ins. L.R. 815, 7 D.L.R.3d 220 (N.S.), see discussion Baer, *Annual Survey of Canadian Law: Insurance*, 4 OTTAWA L. REV. 497, at 511 (1971).

[110][1971] Ins. L.R. 1248 (Sask. C.A.).

In *Hoey v. Merit Ins. Co.*[111] the Manitoba Queen's Bench faced a situation reminiscent of *Boutilier* commented upon in the last survey. As in *Boutilier* a "finance man" acting for an automobile vendor filled in all conditional sales and insurance forms. The insured claimed to have given the finance man the correct information although the application did not disclose the particulars of the applicant's driving record. However unlike the jury's finding in *Boutilier*, the court in this case simply did not believe the insured.

4. Valuation

The last survey[112] reviewed the trial judgment in *P.M. Scientific Fur Cleaners Ltd. v. Home Ins. Co.*[113] and noted the confusion between an action on the insurance contract and an action on the subsequent contract to repair the loss. The Manitoba Court of Appeal[114] recognized this distinction in allowing the appeal and awarding the plaintiff damages including profit for cleaning the smoke damaged furs. The dissent of Mr. Justice Guy would have dismissed the appeal and refused to allow the plaintiff's claim for profit through a novel application of the doctrine that an insured has a duty to mitigate his loss. The judge stated that this duty required the plaintiff to clean the furs at cost. While there may be a duty to minimize loss which can be extended by a sue and labour clause such as found in Statutory Condition 9, this does not include repairing the damaged property after the loss has occurred. Of course, even if such cleaning came within the requirements of a sue and labour clause, such clauses have long been recognized as being independent collateral contracts, not part of the contract of insurance.[115] However Mr. Justice Guy's decision seems based not so much on the application of some notion of indemnity to this obligation to mitigate as the general notion that the insured could mitigate his loss by not claiming profit. The implications for insureds if this view gains judicial acceptance are obvious since any insured could mitigate his loss by abandoning part of his claim.[116]

5. Third Party Claims

i) Automobile Accident Victims

Under all provincial insurance acts, automobile accident victims, once they have obtained judgment against an insured tortfeasor, are given a statutory right of action against the insurer. Up to the statutory limits,

---

[111][1971] Ins. L.R. 1274 (Man. Q.B.).

[112]Baer, *Annual Survey of Canadian Law - Insurance*, 4 Ottawa L. Rev. 497, at 519 (1971).

[113][1970] Ins. L.R. 945 (Man. Q.B.).

[114][1971] 2 W.W.R. 15 (1970), 17 D.L.R.3d 144, [1971] Ins. L.R. 1161 (Man. C.A.) an appeal to the Supreme Court has been quashed, [1972] 2 W.W.R. 203, [1972] Ins. L.R. 1437.

[115]Aitchison v. Lohre, 4 App. Cas. 755 (1879).

[116]Two other cases involving problems of valuation have been reported in the past two years: Becker Milk Co. v. Consumers' Gas Co., [1971] Ins. L.R. 1339 (Ont. High Ct.), and Coast Ferries Ltd. v. Coast Underwriters Ltd., [1971] Ins. L.R. 1341, 23 D.L.R.3d 226 (B.C. Sup. Ct.).

victims can recover in spite of misrepresentations or breaches of conditions by the insured. In fact insurers are not even allowed to argue that the insured's misrepresentations avoided the contract or that there never was a contract with the insured at all. This insulated position of victims is in danger of being whittled away by the courts which with increasing frequency are invoking the distinction between the definition of the risk and conditions to uphold limitations on the victim's right of recovery. This distinction was developed in another context and was used to limit variations of the Statutory Conditions in Fire Insurance.[117] The artificiality of this distinction was noted in the last survey[118] in commenting on Mr. Justice Laskin's acceptance of it in *Lepp v. Canadian Gen. Ins. Co.*[119]

Most readers will be familiar with the rather widespread family practise of having automobiles registered and insured in the name of someone other than the true owner. Typically, automobiles owned by minors are registered in the name of one of the parents. Often the parties think that this is a legitimate way to avoid legal impediments. Sometimes it is done with deliberate intent to deceive insurance companies but more often it is done at the request of the secured party financing the purchase of the automobile. In a dispute between insured and insurer not many readers would be surprised if the courts did not allow an insured, even in the absence of fraud, who was not the true owner to recover under the contract. Similar decisions have been made in relation to Statutory Condition 2 of the Fire Insurance Part.[120] However, the courts go further than this. Two recent cases[121] have come to the same result as *Comer v. Bussell*[122] and have denied recovery to accident victims suing under the equivalent of section 225 of the Ontario Insurance Act in such situations. In both recent cases the plaintiff was injured in an accident which occurred at a time when the true owner was driving with the consent of the registered owner. In *Siegeroma v. Canadian Gen. Ins. Co.*[123] there is no discussion of the difference between a breach of condition and the definition of the risk. After obtaining a judgment against the driver, the

---

[117]While quotations from Lord Dunedin giving the judgment of the Privy Council in Curtis's & Harvey (Canada) Limited v. North British & Mercantile Ins. Co., [1921] 1 A.C. 303, are often cited in support of this distinction, the distinction is more the product of the attempt in the Supreme Court of Canada in W. Malcolm MacKay Co. v. British America Ass. Co., [1923] Sup. Ct. 335, to distinguish the *Curtis's & Harvey* case. See the judgments of Mr. Justice Duff, at 345, and Mr. Justice Anglin, at 349. The distinction was re-affirmed by Mr. Justice Anglin in Fidelity—Phoenix Fire Ins. Co. of New York v. D. McPherson, [1924] Sup. Ct. 666, and seems to have been accepted by the Privy Council in Palatine Ins. Co. v. Gregory, [1926] A.C. 90.

[118]Baer, *supra* note 112, at 510.

[119][1969] Ins. L.R. 714, 6 D.L.R.3d 365 (Ont. C.A.). The judgment of Mr. Justice Anglin in the leading case of W. Malcolm Mackay Co. v. British America Ass. Co., [1923] Sup. Ct. 335 demonstrates that the distinction may be just a grammatical one

[120]See *e.g.*, Drumbolus v. Home Ins. Co., 37 Ont. 465 (1916).

[121]Minister of Transport v. London & Midland Gen. Ins. Co., [1971] Ins. L.R. 1272, [1971] 3 Ont. 147, 19 D.L.R.3d 643; Siegersma v. Canadian Gen. Ins., [1970] Ins. L.R. 1123, 12 D.L.R.3d 306 (Alta. Sup. C.).

[122][1940] Sup. Ct. 506, 7 Ins. L.R. 247, [1940] 3 D.L.R. 417.

[123]*Supra* note 121.

victim sued the insurer. The Alberta Supreme Court held that it was necessary to establish that the driver was an insured under the policy. The court held he was not since he was not driving with the owner's consent. "In my view the consent of another party cannot be implied to the use of a motor vehicle by its owners." The court's reasoning is difficult to understand since there is no doubt that the driver was driving with the permission of both the registered owner, the named insured and the real owner, the driver himself.

In the Ontario Court of Appeal case of *Minister of Transport v. London & Midland Gen. Ins. Co.*,[124] the court did distinguish between a misrepresentation and the definition of the risk. The court recognized that since *Comer v. Bussell* the statute has been amended so that a misrepresentation will not provide the insurer with a defence against third parties. However, they held that this policy did not cover this risk because it was not an owner's policy[125] and because the alleged owner was not in a position to give consent to operate the car.[126] The result of allowing the insurer to deny recovery because of mistatements concerning the ownership of the car when the insurer cannot deny recovery because of mistatements such as those concerning the driving record or place of resident of the insured is irrational. There is absolutely no evidence to indicate that one is considered by the legislature as more serious wrongdoing by the insured than the other or that the nature of one kind of wrongdoing is such as to bring it home to the accident victim. The provincial legislation which gives victims this direct recourse states that they are not prejudiced by "any act or default of the insured." The statute does not refer to "misrepresentations" or "breach of condition."

The same criticisms apply to the way the distinction was used in *Co-operative Fire & Casualty Co. v. London & Edinburgh Ins. Co.*[127] The applicant insured a fleet of trucks individually described in a schedule to the policy owned by a Manitoba Dairy & Poultry Co-Operative. While one of these vehicles was disabled it was replaced by a unit loaned by Penner's Transfer Ltd. insured by the respondent. No agreement was made between lender and borrower with respect to responsibility for damages in the event of an accident. An accident occurred, claims were brought against both the Co-operative and Penner's Transfer, each of which looked to its insurer for indemnity. Motion was brought for directions as to which insurer was ultimately liable.

The respondent's policy insured Penner's Transfer in respect of "All Commercial Vehicles Operated By or On Behalf of the Named Insured."

---

[124]*Supra* note 121.

[125]This was the finding of the Supreme Court of Canada in *Comer v. Bussell*.

[126]The court relied on Pascoe v. Provincial Treasurer of Manitoba, [1958] Ins. L.R. 552, 17 D.L.R.2d 234 and Peters v. General Accident & Life Ass. Corp., [1937] 4 All E R. 628 in support of this latter proposition Pascoe was a case in which the insured had purchased a new automobile while Peters was a case where an automobile had been sold and the new owner claimed to be covered by the policy taken out by the former owner. In both cases the courts held the contract of insurance lapsed when the car insured was sold.

[127][1971] 3 W.W.R. 266, 19 D.L.R.3d 406, [1971] Ins. L.R. 1240 (Man.).

The policy contained no other description or identification of the vehicles insured. The policy also contained an endorsement which restricted coverage to "all equipment owned, and/or operated, by the Named Insured only when such equipment is being operated exclusively in the interests of the Named Insured." This endorsement was not approved by the Superintendent. After an exhaustive review of the fire insurance cases in which the distinction was developed in the 1920's, the court held that the respondent had not attempted to vary a Statutory Condition but had just defined the risk. The court went on to conclude that there was nothing in the Insurance Act to prevent the insurer and insured from limiting the risk in the way they did. Fortunately the case involved two insurance companies rather than a claim by an accident victim, but the courts reasoning would deny recovery by a victim from the respondent as well.

With due respect to their lordships, even accepting the court's artificial distinction, the decision is wrong. The policy contradicts the definition of the risk in an owners' policy prescribed by the Insurance Act.[128] No authority is given to any insurer to limit the scope of sections 219(1) and 207 (1)(d) of the Manitoba Insurance Act. As well the court ignores section 209(1) of the Manitoba Insurance Act (formerly section 214(1)) which, along with the equivalent sections in the other provinces, prevents an insurer from using a "form of application, policy or endorsement other than a form approved by the Superintendent."

Not all courts recognize such a neat distinction between the definition of the risk and conditions. For example in *McDonald v. Prudential Ass. Co.*[129] the insured deliberately ran his car over the plaintiff. The court held that while the insured could not recover for his intentional act, section 211(3) and (4) of the New Brunswick Insurance Act[130] (the equivalent of Ontario section 225(3) and (4)) was intended to deprive insurers of the benefit of this public policy defence. No mention is made of the distinction between a condition and the definition of the risk.[131]

Not only have the courts whittled away at the effect of section 225(3) but a recent judgment of the High Court of Ontario[132] has limited the effect of section 225(4). This subsection was passed following the case of *Borgeois v. Prudential Ass. Co.*[133] to prevent insurer's from arguing that there was no insurance contract because of the misrepresentation of the insured. In *Leslie v. Pitts Ins. Co.* a policy was issued by the insurer but the court found that by reason of the papers attached to it, it was only an offer to insure which had never been accepted. The court held that the instrument was not a policy

[128]MAN REV. STAT. c. 140 (1970).

[129][1972] Ins. L.R. 1394, 24 D.L.R.3d 185 (N.B. 1971).

[130]N.B. Stat. 1968 c. 6.

[131]Another case in which the distinction was properly ignored and which demonstrates the difficulty of making it if you try is Davis v. Hugh McKinnon Ltd., [1971] Ins. L.R. 1367, [1972] 1 W.W.R.669. (B.C. Sup. Ct.).

[132]Leslie v. Pitts Ins. Co., [1970] Ins. L.R. 1032 (Ont. High Ct.).

[133]18 Mar. Prov. 334, 13 Ins. L.R. 1, [1946] 1 D.L.R. 139 (N.B.).

within the meaning of section 225(4). By definition in the Insurance Act a policy evidences a contract. The court held that since there was no contract there could be no policy and that for section 225(4) to apply there must be a policy evidencing a valid contract. In the words of the court, "If there be no contract, there can be no policy no matter what the form of the instrument may be." Such reasoning deprives section 225(4) of all effect, making it a meaningless statement that an insurer cannot say a valid policy is not a valid policy. The court's reasoning is the very reasoning of *Borgeois* that the section was designed to reverse. The court would have been on more acceptable grounds if they had held that section 225(4) required an instrument to be issued *with the intention* that it was a policy.

ii) Mortgagees

The trial judgment in *Bonser v. London & Midland Gen. Ins. Co.*[134] which was noted in the last survey[135] has been appealed to the Ontario Court of Appeal[136] and the Supreme Court of Canada.[137] The case involved the termination of fire insurance by a mortgagor with no notice of such termination to the mortgagee. As we noted in the last survey the trial judgment was prepared, if necessary, to hold that a mortgage clause was a separate contract between the mortgagee and insurer, rather than a mere assignment of the loss payable as some courts have held. The Supreme Court of Canada, relying on both the mortgage clause found in the insurance contract and section 110 of the Ontario Insurance Act, allowed the mortgagees claim against the insurer following a fire. There is discussion at length of the independent contract theory but it is not expressly adopted by the court. In the Court of Appeal, Mr. Justice Schroeder for the court found for the mortgagee on the basis of section 110 of the Insurance Act and stated, "Basing our judgment on this ground as we do, we refrain from offering any comment upon the view expressed by the learned trial judge that there was a separate and distinct contract between the mortgagee and the insurers."[138]

iii) Beneficiaries

Once again a provincial court has been faced with trying to integrate or reconcile the seemingly contradictory common disaster provisions of provincial Insurance and Survivorship Acts. In *Re Fair*[139] the Appellate

---

[134][1969] Ins. L.R. 777, 7 D.L.R.3d 561 (Ont. High Ct.).

[135]Baer, *Annual Survey of Canadian Law: Insurance*, 4 OTTAWA L. REV. 497, at 522 (1971).

[136][1970] 3 Ont. 324, 13 D.L.R.3d 60 (C.A.).

[137]The judgment was delivered on May 1, 1972 and has not yet been reported.

[138][1970] 3 Ont. 324, at 327. *See also* Huntley v. Drazdoff, [1972] Ins. L.R. 1453 (B.C.) which reaffirms that a loss payable clause to a mortgagee is only effective as long as the mortgage debt is outstanding and In the Matter of Guardian Ins. Co., [1972] 1 W.W.R. 319, [1972] Ins. L.R. 1350 (B.C. Sup. Ct. 1971), in which insurance proceeds were payable to a vendor where a purchaser (who was the insured with loss payable to the vendor) was relieved by his obligation to pay the vendor by a quit claim deed following the fire.

[139][1971] Ins. L.R. 1316, 17 D.L.R.3d 751. (N.S.).

Division of the Nova Scotia Supreme Court has followed the Ontario Court of Appeal decision in *Re Topliss*[140] in applying the provisions of the Insurance Act and the Survivorship Act seriatim.

The case of *Re Fell*[141] illustrates the dangers inherent in the informality which sometimes accompanies group life or accident and sickness insurances. The case involved a dispute between the mother and wife of the life insured as to who was entitled to the insurance proceeds. After his marriage the life insured had requested his employer to change the name of his beneficiary from his mother to his wife. The employer not having a change of beneficiary form, used a new application form and sent it to the insurer with a letter explaining that the insured wished to change his beneficiary. The correct form was sent to the employer which was signed by the insured. This form was subsequently lost. The court found the wife entitled to the proceeds holding that the new application and letter were sufficient under the terms of the Insurance Act and the insurance contract to constitute a valid change of beneficiary. Few would quarrel with the result, although some might with the court's conclusion that the terms of the insurance contract govern this question where the act is silent. The relevant contractual provision, requiring notice of the trustee to effect a change of beneficiary should perhaps be treated in the same way as a Receipt Clause or Facility of Payment Provision in a life insurance contract. Such clauses are considered to be designed only to protect the insurer, to allow it to know who it can pay and get a good discharge from. An agreement in the contract of insurance should not bind the various assignees (beneficiaires) in a dispute inter se.[142] Their rights including who is ultimately entitled to the insurance proceeds, depends on the law of assignment as amended by the Insurance Act.[143]

6. The Insurance Company as Third Party

Several recent cases have re-affirmed the choices open to an insurer under a motor vehicle liability policy when its insured is sued in a tort action. The insurer cannot have itself added as a third party where it does not deny liability to its insured.[144] On the other hand the insurer is probably not required to make out a prima facie case on the merits of any defence to its liability.[145] If, however, the insurer does not deny liability to its insured

[140] 10 D.L.R.2d 654 (19t. 1957).

[141] [1971] 4 W.W.R. 1, 20 D.L.R.3d 480, [1972] Ins. L.R. 1329 (B.C. Sup. Ct.).

[142] While the effect of a Receipt Clause in a dispute between beneficiaries was expressly left open in O'Reilly v. Prudential Ins. Co., [1934] 1 Ch. 519 (C.A.), the American rule that such a clause does not effect the rights of rival claimants between themselves, 4 COUCH ON INSURANCE § 27:87, at 613 (2d ed.); 2A APPLEMAN, INSURANCE LAW PRACTICE § 1170, at 335 has been approved in dicta in several cases before the English Industrial Assurance Commissioner noted in 2 MACGILLIVRAY, ON INSURANCE LAW 542 (5th ed.).

[143] For another recent case involving the rights of beneficiaries *see Re* Geraci, [1970] 3 Ont. 49, 12 D.L.R.3d 314.

[144] Giese v. Hunking, [1971] 4 W.W.R. 8, [1971] Ins. L.R. 1325, 21 D.L.R.3d 12 (Alta.). Mahar's Transfer Express Ltd. v. Ferretti, 11 D.L.R.3d 381 (N.S. Sup. Ct.) (1971).

[145] British Columbia Hydro & Power Authroity v. Fox [1971] W.W.R. 494, [1971] Ins. L.R. 1214, at 1217 (B.C. County Ct. 1970).

and have itself added as a third party, but instead defends in the name of the insured, it will be estopped from later alleging a breach of the insurance contract by the insured (at least in the absence of a nonwaiver agreement).[146] Since insurers will not always know at an early stage whether there has been a breach of the insurance contract and they will want to take part in the tort action to minimize the victim's recovery, defending in the name of the insured after obtaining non-waiver agreement seems the best choice open to them. This has the added advantage of allowing them to settle with the victim out of court, since the courts have held that the insurer has no right to recover from his insured under the equivalent of section 225(15) of the Ontario Insurance Act unless there has been a tort judgment.[147] However, the recent case of *Allstate Ins. Co. v. Foster*[148] should warn insurers that they need a genuine non-waiver agreement to preserve their right of action against their insured. A unilateral arrangement in the form of a reservations of rights letter will not be enough.

7. Subrogation

Two recent Ontario cases[149] illustrate the importance of drafting leases and insurance contracts with some care to make sure that both lessor and lessee are protected against loss and that an insurer will not be subrogated to a lessor's statutory right to claim from the lessee for fire damage caused by the lessee's negligence. There are two ways in which this could be done without duplicating insurance coverage. The lessor and lessee could specifically provide in the lease that either the lessor or the lessee is liable for all loss by fire (no matter whose negligence causes the fire). Then the party liable could insure against fire. Alternatively one of the two parties could specifically insure on behalf of both.

If the parties adopt the first alternative they (or their legal advisors) should be aware of what seems to be an extreme reluctance by the courts to find an agreement in a lease to shift the responsibility for fire loss from the lessee when the loss is caused by the lessee's negligence. There has been several instances of this reluctance in the past where the exclusion of damage by fire from the lessee's convenant to repair[150] or a lessor's convenant "to pay all premiums of insurance upon the buildings erected on the demised premises"[151] have not been enough to displace the lessor's right to recover for the lessee's negligence. However, with *Cumber-Young Inv.*

---

[146]London & Midland Gen. Ins. Co. v. Beliveau, [1970] Ins. L.R. 1102 (Que. C.S.).

[147]Northwest Casualty Co. v. Fritz [1941] Ont. 287. *See also* London Ass. v Jonassen, [1968] Ins. L.R. 348, [1968] 1 Ont. 487.

[148][1972] 1 Ont. 653, 24 D.L.R.3d 9, [1972] Ins. L.R. 1459 (Ont. County Ct. 1971).

[149]Pyrotech Prod. Ltd. v. Ross Southward Tire Ltd., [1971] Ins. L.R. 1296, 21 D.L.R.3d 168 (Ont. High Ct.), and Cummer-Yonge Inv. Ltd. v Agnew-Surpass Shoe Stores Ltd., [1972] Ins. L.R. 1461 (Ont.).

[150]United Motors Service Inc. v. Hutson, 4 Ins. L.R. 91, Sup. Ct. 294, [1937] 1 D.L.R. 737, Norman v. J.L. Edwards Motor Sales Ltd., 15 D.L.R.2d 211 (Ont. High Ct. 1958)

[151]Shell Oil Co. of Canada Ltd. v. White Motor Co. Ltd., 8 D.L.R.2d 753, [1957] Ont. W.N. 229 (High Ct.).

Ltd. v. Agnew-Surpass Shoe Stores Ltd. this reluctance has probably defeated the parties' intentions and has introduced another unnecessary unique rule to landlord and tenant law. The Ontario Court of Appeal has ruled that even a covenant by the lessor to insure against fire loss coupled with an exclusion of damage by fire from the lessee's covenant to repair does not relieve the lessee from liability for a negligently caused fire. This ruling creates a unique rule since in other areas of the law (such as mortgages, bailment of personal property, sale of goods *etc.*,) an agreement to insure is usually held to indicate who has the risk. The decision probably defeats the parties' intentions since it implies that the lessor and lessee wanted to split the risk of a fire loss and each carry his own fire insurance. Given the standard fire insurance contracts available in Ontario this would mean an expensive and unnecessary duplication of insurance. The standard fire insurance contracts provide the coverage stipulated in section 118 of the Insurance Act. They do not cover only the risk of fire caused by specific individuals or groups of individuals. With due respect to their lordships, a failure to understand the basic nature of fire insurance coverage, in fact, seems to be at the root of the courts' decision. The court states that the lessee's contention, if correct, would require the lessor to effect insurance to protect itself against its lessee's negligence and that would not be fire insurance "in the ordinary concept of the term." The court adds that there is nothing in the policy of insurance to indicate any intention "to insure against the peril of Lessee's negligence" and concludes that the policy has the "usual effect only, namely, entitlement in the Lessor to indemnity (in addition to indemnity against any loss suffered by accidental fire) against fire loss arising from Lessee's negligence to the extent to which the Lessor may be unable to recover that loss from the Lessee, and to a similar extent against fire loss occasioned by the negligence of third parties."[152] No authority is given for this extraordinary notion that a fire caused by a third party's negligence is not covered in contract of fire insurance, or to put it the way the court does, that insurance covering such a fire is not fire insurance. Further the passage seems to stand the concepts of indemnity and subrogation on their heads. Rather than the insurer being entitled to subrogation (once it has made full or partial indemnity) to all claims the insured has against third parties as a result of the fire loss, the court says the insurer is only liable to make good such loss by fire which cannot be made good from other sources.

The court has gone at the matter backwards. Whether the insurer is entitled to subrogation cannot be determined by examining what coverage is provided in the fire insurance contract. All losses caused by fire as defined in s.118 of the Insurance Act are covered. The insurer must indemnify the insured for these losses and then claim to be subrogated to all rights the insured has against the lessee. What these rights are is determined by the lease, not the insurance contract. As between lessor and lessee the matter is simply who did they intend to bear the risk of fire. While it is not impossible to imagine that they intended the risk of some fires to be on the lessor

[152][1972] Ins. L.R. at 1464.

and some on the lessee depending on how the fires were caused, a much more natural inference is that they intended the lessor, who agreed to carry the fire insurance, to bear all of the risk of fire.

If the lessor and lessee follow the second alternative and one of them insures on behalf of both, they should be sure this is made clear in the insurance contract.[153] In *Pyrotech Prods. Ltd. v. Ross Southward Tire Ltd.* the Ontario High Court[154] held that a covenant in the lease which required the lessee to pay insurance premiums did not make the lessee an insured under the landlords' fire insurance policy.[155]

8. Meaning of Insured

In the last survey[156] we noted the limitation put on the meaning of "insured" in an automobile insurance policy by the Ontario Court of Appeal in *Minister of Transport v. Canadian Gen. Ins. Co.*[157] The judgment of the Ontario court has now been affirmed by a bare majority decision of the Supreme Court of Canada.[158] The majority seem to be persuaded by the fact that the president and majority shareholder of the company which was the named insured had not directed his mind to the possibility of his son allowing others to drive the automobile. As Mr. Justice Laskin pointed out in dissent, the evidence indicated that the father had fully entrusted his son with the car. "In the circumstances, proof of negative consideration of driving by strangers would be required to erase the effect of the father's evidence rather than demanding that it be supplemented by further evidence that the father had considered the matter and had not expressed any objection."

Although the majority pointed out that "the issue falls to be determined according to the facts of each particular case and that precedents are accordingly of little value," the case does establish the principle that when the named insured permits someone else to use the automobile that permission does not include the authority for the user to permit others to drive unless the named insured has consciously directed his mind to this issue. The fact that he would not have refused if he had thought of it is not good enough. Such a pointless limitation on the definition of insured seems inconsistent

---

[153]Even though in Keefer v. Phoenix Ins. Co. of Hartford (1900), 31, Sup Ct. 144, the Court said all that was necessary is that the named insured intend to insure on behalf of all interested parties and that the policy was apt.

[154]*Supra* note 149. The Ontario Court of Appeal, in a judgment which has not yet been reported, has dismissed an appeal from the judgment relying on the argument of the court in Cummer-Yonge Inv. Ltd. v. Agnew-Surpass Stores Ltd.

[155]Two recent cases also indicate the courts' reluctance to allow subrogation by an insurer where the insured has not been fully indemnified. See Sheridan v. Tynes, 19 D.L.R.3d 277, [1971] Ins. L.R. 1351 (N.S. Sup. Ct.) and *Re* Ledingham v. Di Natale, [1972] 1 Ont. 785, 24 D.L.R.3d 257, (High Ct.).

[156]Baer, *Annual Survey of Canadian Law: Insurance*, 4 OTTAWA L. REV. 497, at 524 (1971).

[157][1970] 2 Ont. 569, [1970] Ins. L.R. 938.

[158][1971] Ins. L.R. 1278, 18 D.L.R.3d 617.

with the legislative history of broadening the meaning of insured in order to provide protection to as many victims as possible. No-one should be surprised if the rule found in this decision is amended by legislation.[159]

[159]*See also* Stolberg v. Pearl Ass. Co., [1971] Ins. L.R. 1269, [1971] 3 W.W.R. 764, 19 D.L.R.3d 343 (Sup. Ct.) and Western Indus. Laboratories Ltd. v. Switzerland Gen. Ins. Co., [1971] Ins. L.R. 1207, [1971] 1 W.W.R. 384 (Alta. Dist. Ct.) (1970).