

RECENT DEVELOPMENTS IN CANADIAN LAW: INSURANCE LAW

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I. INTRODUCTION

In the first half of the 1980's, Canadian insurance law has continued to be dominated by traditional concerns. These concerns focus on the solvency of insurers, marketing integrity, the legal rights of insureds and the honesty and competence of insurance intermediaries. There have been significant recent developments in each of these areas. Some developments continue trends which were described in previous surveys,¹ while others represent a marked break with the past.

Among the continuing trends is the movement towards the autonomous self-regulation of insurance intermediaries by organizations that are not directly controlled by the Superintendents.² This category also includes the shift of reform initiative from the legislatures to the courts with respect to marketing integrity and the legal rights of insureds. The innovations in insurance law have involved the elaborate legislative and administrative controls designed to guarantee the solvency of insurers. The present system has been in place since the 1930's and depends largely on federal licensing, reporting, investment and inspection rules and on federal enforcement efforts. This system was successful for many years. However, the recent insolvencies of several property and casualty insurers have led to suggestions for change. The suggestions have included more sophisticated actuarial information and sounder underwriting decisions,³ an industry-wide guarantee fund⁴ and stricter control over dealings with off-shore, unregulated re-insurers.⁵ Some commentators, usually within the insurance industry, have also referred to the dire financial straits of insurers as evidence of the need to restrict the recovery of accident victims and their dependents.⁶ At the same

¹ Baer, *Annual Survey of Canadian Law: Insurance Law*, 3 OTTAWA L. REV. 553 (1969), 4 OTTAWA L. REV. 497 (1970), 6 OTTAWA L. REV. 193 (1973), 8 OTTAWA L. REV. 218 (1976), 12 OTTAWA L. REV. 610 (1980) [hereafter cited as Baer, *1969 Survey*, *1970 Survey*, *1973 Survey*, *1976 Survey* and *1980 Survey* respectively].

² Agents are regulated by their own organizations in Ontario and Quebec. In addition, at the 1984 Annual Meeting, the Canadian Council of Superintendents of Insurance (formerly the Association of Superintendents of Insurance) adopted a resolution put forward by its Standing Committee on Insurance Agents, Brokers and Adjusters which authorizes the Committee to receive and to study submissions regarding the "self-regulation" of all insurance agents and brokers, except those selling life insurance.

³ Humphrys, *Canadian Insurance and some of its Current Developments and Problems*, 51 ASSURANCES 1 (1983).

⁴ The provincial ministers responsible for insurance regulation met in Sep. 1985 and agreed to study the feasibility of such a fund.

⁵ The regulation of off-shore re-insurers has been a recent concern of the federal Superintendent of Insurance.

⁶ See, e.g., Harding, *Etudes Techniques: L'Assurance automobile illimitée*, 52 ASSURANCES 500, at 503 (1985). See also Robey, *The State of Canadian General Insurance in 1984*, 52 ASSURANCES 344, at 354 (1984). Robey reports the recommendations of the Insurance Bureau of Canada in this area.

time, various segments of the financial industry have advocated the desegregation of banks, trust companies, stock brokerages and insurance businesses.⁷ As one might expect in a post-Orwellian age, this proposed change in the manner of government regulation has been labelled "deregulation".⁸

While the initiative for reform in some areas has continued to shift from the legislature to the courts, this has not meant that there has been a lot of judicial activism or a pronounced shift in the courts' ideology. While there have been isolated instances of bold innovation and a growing disquiet with the use of technical defences, there have been as many, if not more, countervailing examples. Many courts have been unable or unwilling to extricate themselves from what they recognize to be harsh or unjust judicial doctrines.⁹ In some instances, the changes in insurance doctrine that have occurred have been the result of the large number of reported superior court cases and the way in which the common law reaches consensus by repetition. As in the child's game where a whispered message is passed from child to child, mutations are inevitable if the number of players is large. These trends in the caselaw have not been marked departures from past practice. The courts have become the centre of reform only in relative terms. It is not that they are doing so much as it is that, compared to the past, the legislatures are doing so little. Illustrations of this inactivity are easier to provide than explanations. The Ontario Select Committee on Company Law, for example, studied the industry over several years and issued five reports.¹⁰

⁷ The Life and Health Insurance Association advocates this position in its SUBMISSION ON THE REVISION AND CONSOLIDATION OF THE CANADIAN AND BRITISH INSURANCE COMPANIES ACT AND THE FOREIGN INSURANCE COMPANIES ACT: FINANCIAL SERVICES FOR THE FUTURE (Sep. 1983). Also, the federal Ministry of State for Finance tabled a discussion paper (GREEN PAPER) on Apr. 15, 1985 entitled THE REGULATION OF CANADIAN FINANCIAL INSTITUTIONS: PROPOSALS FOR DISCUSSION. The paper recommends "a greater degree of flexibility in institutional arrangements" and "greater flexibility in developing and packaging financial services". See TECHNICAL SUPPLEMENT TO THE REGULATION OF CANADIAN FINANCIAL INSTITUTIONS: PROPOSALS FOR DISCUSSION, MINISTRY OF STATE FOR FINANCE, GREEN PAPER, (Jun. 1985), at 1, 2.

⁸ But see TECHNICAL SUPPLEMENT, *id.*, which warns that "[t]hese proposals should not be interpreted as the 'deregulation' of financial institutions." *Id.* at 2. In spite of this warning, commentaries and news accounts of the GREEN PAPER proposals continue to refer to "deregulation". See, e.g., the numerous reports in the Financial Post and the Globe and Mail in the latter half of 1985.

⁹ See, e.g., *Perry v. General Security Ins. Co.*, 7 C.C.L.I. 231, at 255, 47 O.R. (2d) 472, at 492 (C.A. 1984).

¹⁰ THE SELECT COMMITTEE ON COMPANY LAW, THE INSURANCE INDUSTRY — FIRST REPORT ON AUTOMOBILE INSURANCE (1977); THE INSURANCE INDUSTRY — SECOND REPORT ON AUTOMOBILE INSURANCE (1978); THE INSURANCE INDUSTRY — THIRD REPORT ON GENERAL INSURANCE (1979); THE INSURANCE INDUSTRY — FOURTH REPORT ON LIFE INSURANCE (1980); THE INSURANCE INDUSTRY — FIFTH REPORT ON ACCIDENT AND SICKNESS INSURANCE (1981).

Yet, so far, very few of its recommendations have led to specific legislative changes.¹¹

Part of the explanation for this inaction may be that both regulators and governments have been preoccupied with the question of how to ensure the solvency of insurers and other financial institutions. In addition, the Association of Superintendents of Insurance (now the Canadian Council of Superintendents of Insurance) seems to be going through a mid-life crisis in which minor bureaucratic attacks and introspective self-doubts have deprived the Association of much of its former vitality.¹² Yet its continued presence has deterred other law reform bodies from initiating action. Whether this trend will continue remains to be seen. Recently, at least one provincial branch of the Canadian Bar Association has expressed interest in studying reforms to the uniform parts of the provincial insurance acts.¹³

Since there have been more than 600 superior court cases reported in the period under review,¹⁴ identifying significant developments is a difficult task. Focussing on the issues that have been considered by appellate courts is not helpful as few appellate courts can set their own agendas, and there is no apparent industry practice of appealing only leading cases. Although the phenomenon is not new, the large number of cases may in itself be the most significant aspect of insurance law. No other industry, financial or manufacturing, produces such a large quantity of litigation.¹⁵ Only in bankruptcy law, where the economic incentive for disputation is significant, is there more civil litigation.

I do not believe that this frequent resort to the courts can be explained on the basis that the service provided by insurers is that much more complex or subject to misunderstanding than other financial services. One possible explanation reflects a cynical and pessimistic view of human nature: the temptation for gain is so great that insureds engage in deliberate acts of destruction or practice fraud in the presentation of their claims. However, these issues are overtly raised in only a relatively small number of reported cases. Nevertheless, suspicion of this kind of wrongdoing may explain the insurer's attitude in many other cases.

¹¹ The only significant recommendation that has been acted on was the recommendation in the THIRD REPORT to establish self-regulation of insurance agents and brokers in the property and casualty field.

¹² The Canadian Council of Superintendents of Insurance performs the function of the Uniform Law Conference in the area of insurance law. In the past, a record of their annual meetings was published as the MINUTES OF THE PROCEEDINGS OF THE ASSOCIATION OF SUPERINTENDENTS OF INSURANCE. A partial record of its recent self-appraisal is contained in the 1983 MINUTES OF PROCEEDINGS.

¹³ The Insurance Law Subsection of the British Columbia branch of the Canadian Bar Association organized a "Committee to Review the Insurance Act" in 1985.

¹⁴ The period under review extends from Jan. 1981 to Jun. 1985.

¹⁵ For example, there have been less than 140 Superior Court cases involving the sale of goods reported between Jan. 1981 and Jun. 1985. The statement in the text ignores debt collection by the credit industry with the aid of small claims courts.

The numerous technical defences raised by insurers may be proxies for such real concerns.

While insurers may be justified in their suspicions, the legal doctrines employed by the courts ought to bear some relationship to the *real* issues in dispute between the parties. Otherwise, court battles resemble trial by ordeal or combat. The courts may be applying an objective standard that appears to be based on rational principles, but the decisions rendered will have no obvious correlation with the actual fears or suspicions of the insurer. Such stylized disputes require lawyers to determine what is technically relevant rather than to address the true concerns of the parties. This approach also allows insurers to circumvent the procedural and evidentiary safeguards usually associated with allegations of misconduct.

One further aspect about the number of reported insurance cases is worth noting. Property and casualty insurers are more often involved in litigation than are life and health insurers.¹⁶ I do not think that this can be explained by the fact that life and health insurers employ more in-house counsel than property and casualty insurers (if in fact this is still true) or by the fact that the life and health insurance industry is predominantly Canadian-owned while the property and casualty insurance industry is not. The explanation may be that life and health underwriting is less selective and the coverage broader than in property and casualty insurance. Alternatively, the explanation may be that fewer technical defences are available in the life and health insurance fields: life and health insurance policies are often characterized by incontestability clauses, the absence of warranties and the substitution of the life insured's consent for the requirement of an insurable interest.

While a large number of cases have been reported in the period under review, the number of Supreme Court of Canada cases has declined sharply.¹⁷ This trend will likely continue. So far, this decline has had little impact on the development of the law of insurance. However, this trend may lead to divergent interpretations of both uniform legislation and the common law. It is too early to tell whether, in the absence of intervention by the Supreme Court, provincial courts will make greater efforts to resolve these differences.

In the following sections, the areas in which there have been significant developments will be discussed in detail. There are, however, several common themes or features of the caselaw that can be mentioned by way of introduction. First, there has been little attempt in recent years to assimilate insurance law with general contract doctrines. The

¹⁶ For example, in the first ten volumes of the C.C.L.I. only 34 cases involved life and health insurance while 327 cases involved property and casualty insurance.

¹⁷ No insurance judgments have been handed down since the fall of 1983, prior to the retirement of Ritchie J. In 1982-83 and 1983-84 terms, the number of cases heard each term was half of the number heard each term in the 1970's.

classification of contract terms, the consequences of breach, the obligation to mitigate in the face of breach and the court's power to relieve against forfeitures and penalties are some of the areas in which insurance law continues to be developed in isolation. Second, despite favourable comment by some judges,¹⁸ there has been no general acceptance of the American doctrine that insurance policies should be interpreted so as to give effect to the reasonable expectations of the insured. Third, while there has been some recognition of technical defences,¹⁹ there has been no serious challenge to their use as a method of bypassing the procedural or evidentiary protections provided to insureds accused of serious wrongdoing. Fourth, there has been no serious attempt to use underwriting practice as an aid to interpreting insurance policies. Fifth, there has been some indication that the courts are now prepared to take a more practical attitude when determining which social institution should attempt to devise principled, consistent and workable solutions to insurance issues and where the initiative for change should lie.²⁰

II. CASELAW

A. Classification

Some forty years after the problem was first considered and left unresolved by the Association of Superintendents, the issue of whether the fire part of the provincial *Insurance Act*²¹ applies to a composite policy covering several perils continues to engage the courts' attention.²² This is surprising as the fire part could easily be amended to make it applicable to all perils. Moreover, in most multi-peril policies the

¹⁸ See, e.g., *White v. Dominion of Canada Gen. Ins. Co.*, 11 C.C.L.I. 121 (Ont. H.C. 1985).

¹⁹ A technical defence is a legal defence without merit of its own, but grudgingly tolerated by the courts who either think their hands are tied or accept it as a proxy for a more meritorious defence. See, e.g., the reference by Carruthers J. in *Genser v. Waterloo Mutual Ins. Co.*, 6 C.C.L.I. 157, at 158 (Ont. H.C. 1983).

²⁰ I have in mind, in particular, the caselaw that gives a broad interpretation to the Underinsured Motorist Endorsement (S.E.F. 42): this caselaw acknowledged that insurers were in the best position to initiate corrective changes if they found the courts' decisions unsatisfactory. The accuracy of this assessment has been demonstrated by the speed with which S.E.F. 42 was replaced by the Family Protection Endorsement (S.E.F. 44), which provides more limited coverage.

²¹ R.S.O. 1980, c. 218, Part IV.

²² The problem was first brought to the attention of the Association of Superintendents in 1939. See M. BAER & J. RENDALL, *CASES ON THE CANADIAN LAW OF INSURANCE* 45 (2d ed. 1983).

statutory conditions are adopted as a matter of contract.²³ Insurers are free to do this, provided the insured is not caught by surprise or is not in any way misled by the description of the conditions as "Statutory Conditions".²⁴ There is some incentive for insurers to adopt the statutory conditions as insurers often benefit from their provisions. In fact, in all the recently reported cases, it has been to the insured's advantage to argue that the fire part did not apply.²⁵

In determining whether the fire part applies, few courts have noticed that two distinct questions can be asked: first, what fire losses, if any, are not governed by the fire part of the *Insurance Act*²⁶ and second, does the fire part ever apply to losses from other perils? Only the first question is directly addressed in the Act. The Act excludes the application of the fire part where the peril of fire is incidental to either the insurance provided or to some other peril defined under the Act.²⁷ The Act does not define what incidental means in this context. The courts that have considered the matter have rarely indicated the reasons for their conclusions, providing little guidance for subsequent cases.²⁸

The second question, which is not directly covered by the Act, could be answered by applying the maxim *expressio unius est exclusio alterius* to the opening words of section 120.²⁹ If the fire part expressly applies to the peril of fire then, by implication, it does not apply to a peril other than fire. Few courts have expressly adopted this explanation although some have held that composite policies are divisible for other

²³ In *Knight Ventures Ltd. v. Cumis Ins. Soc'y*, [1983-84] I.L.R. 6159 (B.C.S.C. 1982), the Court found that, in any event, a common law duty existed to notify the insurer of material changes.

²⁴ This is one instance where the courts may not automatically assume that the insured has agreed to the conditions simply because they are in the policy. In any event, the insured may not be bound where the policy has not been delivered before the loss. See *Sayers and Assoc. v. Insurance Corp. of Ireland Ltd.* (unreported, Ont. H.C., 10 Mar. 1980), *aff'd on other grounds* [1981-82] I.L.R. 500, 126 D.L.R. (3d) 681 (Ont. C.A. 1981). The lower court judgment is cited in *George A. Demeyere Tobacco Farms Ltd. v. Continental Ins. Co.*, 7 C.C.L.I. 38, at 52, 9 D.L.R. (4th) 734, at 744-45 (Ont. H.C. 1984).

²⁵ See, e.g., *Sayers and Assoc.*, *supra* note 24; *George A. Demeyere Tobacco Farms Ltd.*, *supra* note 24; *McLelland v. Wawanesa Mut. Ins. Co.*, 58 B.C.L.R. 293, [1983-84] I.L.R. 7093 (S.C. 1984); *Hirschler v. Dominion of Can. Gen. Ins. Co.*, 56 B.C.L.R. 1, 6 C.C.L.I. 115 (S.C. 1984); *supra* note 23; *Disher v. Gore Mut. Ins. Co.*, [1983-84] I.L.R. 6310 (B.C. Cty. Ct. 1983).

²⁶ R.S.O. 1980, c. 218, Part IV.

²⁷ The general definition of fire insurance in para. 1.22 of the Act refers to insurance that is not "incidental to some other class of insurance defined by or under this act". This definition is not necessarily compatible with the definition in the fire part, para. 120(1)(c), which exempts "an incidental peril to the coverage provided" from the definition.

The general definition in para. 1.22 preserves the wording originally used in the fire part. The difference between the two sections is probably the result of oversight.

²⁸ See the cases discussed in Baer, *1980 Survey*, *supra* note 1, at 613-16.

²⁹ Equivalent sections are included in most provincial insurance acts.

reasons.³⁰ Most courts, however, have held that composite policies are indivisible and have applied the statute to determine whether fire is a primary or incidental risk.³¹ This seems to have been an application of the statute through confusion rather than by acknowledged analogy.

Recent caselaw has done little to clarify what guidance can properly be found in the Act, whether composite policies should be treated as divisible or not, and what primary and incidental might mean. For example, in the recent case of *George A. Demeyere Tobacco Farms Ltd. v. Continental Insurance Co.*³² the insured claimed indemnity for the loss of a crop through disease. The issue was whether the statutory limitation period from the fire part applied to the insurance policy.³³ Under the Ontario Act the statutory limitation applies to both fire and weather insurance.³⁴ In deciding that this was neither fire nor weather insurance, Griffiths J. used a divisible approach to identify weather insurance and an indivisible approach to identify fire insurance.³⁵

The British Columbia statute seems to provide that, at least in some contexts, a multi-peril policy is indivisible.³⁶ The structure of section 213 also suggests that the characterization of the insurance should be based on whether fire is an incidental peril to the coverage provided.³⁷ The application of these provisions to a tenant's residence multi-risk policy led one judge to observe:

On examining this policy, I am not able to discern any particular insurable peril taking primacy over the others in the policy. After fire, they appear to be enumerated on a random basis; in a tenant's policy, loss from theft or fire would likely be of equal importance.³⁸

Being unable to construe the policy as either primary fire or theft

³⁰ In *Canadian Imperial Bank of Commerce v. Nickolievich*, [1976-78] I.L.R. 882, 77 D.L.R. (3d) 637 (Man. C.A. 1977), the Court reached this result by misapplying the equivalent of sub. 138(4) of the Ontario Act (*Insurance Act*, R.S.M. 1970, c. 140, sub. 138(4)). See Baer, 1980 *Survey*, *supra* note 1, at 614. In *Knight Ventures Ltd.*, *supra* note 23, the Court recognized the more limited application of the equivalent subsection of the British Columbia *Insurance Act* (R.S.B.C. 1979, c. 200, sub. 216(4)). However, the Court did not otherwise explain why the fire part applied to damage caused by vandalism or malicious acts.

³¹ *Supra* note 28.

³² *George A. Demeyere Tobacco Farms Ltd.*, *supra* note 24.

³³ The policy covered "hail, fire, lightning, wind, frost, spring blow out, drought, excess rain, insect ravage, disease, explosion, smoke damage (kilns only), riot, vandalism or malicious acts, transportation, burglary, impact by aircraft or vehicles". *Id.* at 424, 7 C.C.L.I. at 42.

³⁴ R.S.O. 1980, c. 218, sub. 289(1).

³⁵ *George A. Demeyere Tobacco Farms Ltd.*, *supra* note 24, at 50-51, 9 D.L.R. (4th) at 743.

³⁶ R.S.B.C. 1979, c. 200, s. 213.

³⁷ This difference in the British Columbia statute was noted in *Disher*, *supra* note 25. Cowan J. considered the contract as a whole and found that the primary insurance afforded was fire insurance. *Id.* at 6311-12.

³⁸ *McLelland*, *supra* note 25, at 297, [1983-84] I.L.R. at 7095.

insurance, the Court resolved the doubt in favour of the insured by not applying Statutory Condition 5.³⁹ This condition allows the contract to be terminated by registered mail, whether or not the insured actually receives delivery of the notice. The Court did not explain why the Statutory Condition was ineffective as a matter of contract. In any event, the Court was prepared to relieve against the termination of the contract under a unique British Columbia statutory provision.⁴⁰ In contrast, Callaghan J.⁴¹ has found that a multi-risk policy was primarily fire insurance because "fire or lightening" was enumerated first, followed by an alphabetical list of ten other perils.

B. Agency

1. *The Agent's Authority*

In previous surveys⁴² I have described how Canadian courts have qualified the "amanuenses" doctrine established in the leading English case of *Newsholme Brothers v. Road Transport and General Insurance Co.*⁴³ The leading Canadian case is now the Supreme Court of Canada's judgment in *Blanchette v. C.I.S. Ltd.*⁴⁴ This decision restricted the application of the doctrine but stopped short of abolishing it altogether. The vestigial doctrine seems to apply only when the agent has no underwriting authority and when the insured is educated, not suffering from any emotional or intellectual handicap, has had an opportunity to verify the accuracy of the application form and (possibly) when the insured has asked the agent to complete the form on his or her behalf.⁴⁵ Aside from Mr. Justice Pigeon's tendency to decide cases on the narrowest possible grounds, there seems to be no reason why *Newsholme Brothers* should not have been clearly rejected and insurers made responsible for the failure of their agents to pass on material information. In fact, subsequent decisions of lower courts have tended to give the *Blanchette* decision the widest possible application.⁴⁶ In *Stromme v. Occidental Life Insurance Co.*⁴⁷ Mr. Justice Berger stated without qualification that the Supreme Court of Canada had chosen not to follow

³⁹ R.S.B.C. 1979, c. 200, s. 220.

⁴⁰ S. 12.

⁴¹ *Hirschler*, *supra* note 25, at 10, 6 C.C.L.I. at 126.

⁴² *Supra* note 1.

⁴³ [1929] 2 K.B. 356 (C.A.). The English Court of Appeal held that an agent who filled in an application form that was later signed by the insured was acting as the amanuensis of the insured.

⁴⁴ [1971-75] I.L.R. 590, 36 D.L.R. (3d) 561 (S.C.C. 1973). *See* analysis in Baer, 1976 *Survey*, *supra* note 1, at 234.

⁴⁵ *Id.*

⁴⁶ *See* the cases discussed in Baer, 1980 *Survey*, *supra* note 1, at 629.

⁴⁷ [1981-82] I.L.R. 387 (B.C.S.C. 1981).

Newsholme Brothers. Referring to the older cases based on *Newsholme Brothers*, Mr. Justice Berger stated that: "These cases do not appear to be founded on any clear idea of how life insurance contracts are usually obtained."⁴⁸ He also quoted a 1913 decision in which Hunter C.J. stated: "I think an applicant for insurance is entitled to consider an agent is not a rogue" and that when an agent does not pass on information "that is a matter to be fought out between the agent and the company, and not between the company and the assured".⁴⁹

Chief Justice Hunter's sentiments, however, are not always shared by modern courts or, if they are, courts find it impossible to come to the aid of the insured given existing agency doctrine. For example, the New Brunswick Court of Appeal has recently reaffirmed that the holding out of authority by an agent is not enough to bind the principal unless the principal permitted the agent to do so.⁵⁰ In this case the plaintiff applied for fire insurance to cover its barn and dairy equipment. After obtaining the plaintiff's approval of the rate, an independent agent informed the plaintiff that it was insured. The agent had express authority to bind coverage for normal commercial risks but not for specialty market risks. The trial judge found that the plaintiff's barn was a normal commercial risk.⁵¹ However, the Court of Appeal concluded that the barn was a specialty market risk and that the agent had no actual or ostensible authority to bind coverage for such risks. The Court did not consider how an insured would normally know of such a limit to the agent's authority or, in Chief Hunter's words, know that the agent was a "rogue".⁵²

2. *The Agent's Liability*

Canadian courts have not adopted the American doctrine that insurance contracts should be interpreted so as to give effect to the reasonable expectation of the insured. However, insureds are no longer without a remedy when their expectations are defeated. Insureds are

⁴⁸ *Id.* at 390. Compare *Kruska v. Manufacturers Life Ins. Co.*, 54 B.C.L.R. 343, 6 C.C.L.I. 299 (S.C. 1984), where the Court stated that a medical doctor was to be treated as an agent of the insured for the purpose of completing an application for life insurance. However, these comments are *obiter dicta* as the Court found that it would have been quite unrealistic to expect the doctor to remember the applicant's medical history. Furthermore, the insured was saved from the consequences of her material misrepresentation by an incontestability clause.

⁴⁹ *Carlin v. Railway Passengers' Assurance Co.*, 5 W.W.R. 387, at 388, 14 D.L.R. 315, at 318 (B.C.S.C. 1913).

⁵⁰ *Ferme de la Vallée St. Jean Ltée. v. Fairweathers Ins. Ltd.*, 42 N.B.R. (2d) 553, [1981-82] I.L.R. 1101 (N.B.C.A. 1982).

⁵¹ *Id.* at 561, [1981-82] I.L.R. at 1104.

⁵² In this case the insured and the agent had the same principal shareholder. Given this fact, it is not clear why the insured was pursuing this claim against the insurer who would have recourse against the agent for breach of authority.

frequently compensated for their defeated expectations by the imposition of liability on agents and brokers. To the extent that these intermediaries have errors and omissions insurance or are otherwise capable of meeting the judgments, Canadian insureds are often in much the same position as their American counterparts. The number of cases involving an agent's or broker's liability to an insured continues to be very large.⁵³

In the period under review, Canadian courts have continued to find agents liable fairly readily for failing to perform their central duty: that duty is to obtain adequate coverage to meet the insured's needs or to warn the insured of gaps in coverage.⁵⁴ In defining the scope of this duty, the courts have placed a significant onus on agents to inform themselves about the business of their clients. However, the courts have continued to be reluctant to impose other duties on agents.⁵⁵

Most courts have referred to the leading case of *Fine's Flowers Ltd. v. Central Accident Assurance Co.*⁵⁶ when noting that the agent's liability may be based either in contract or tort. The third alternative, a breach of equitable duty, has seldom been mentioned. In most cases, nothing has turned on which theory of liability was adopted. The only difference that has been identified is the possibility that the apportionment principle might not apply to an action in contract. This issue was considered at some length in *Cosyns v. Smith*.⁵⁷ However, the Ontario Court of Appeal found it unnecessary to resolve the apportionment issue

⁵³ More than 20 cases dealing with agents' and brokers' liability were reported in the period under review. See, e.g., notes 54, 55 *infra*.

⁵⁴ See, e.g., *Gilmore Farm Supply Inc. v. Waterloo Mut. Ins. Co.*, 3 C.C.L.I. 221 (Ont. H.C. 1984); *Bar-Don Holdings Ltd. v. Reed Stenhouse Ltd.*, 44 A.R. 246, [1983-84] I.L.R. 6282 (Q.B. 1983); *Norlympia Seafoods Ltd. v. Dale & Co.*, [1983-84] I.L.R. 6475 (B.C.S.C. 1983); *Elliot v. Ron Dawson & Assoc. (1972) Ltd.*, [1981-82] I.L.R. 1017, 139 D.L.R. (3d) 323 (B.C.S.C. 1982); *Fraser Valley Mushroom Growers' Coop. Ass'n v. MacNaughton & Ward Ltd.*, 37 B.C.L.R. 20, [1981-82] I.L.R. 931 (S.C. 1982); *Gerber v. Eagle Star Ins. Co.*, [1981-82] I.L.R. 514 (B.C.S.C. 1981); *Jessett v. Conacher*, 30 A.R. 489, [1981-82] I.L.R. 472 (Q.B. 1980); *Hornburg v. Toole, Peet & Co.*, 28 A.R. 546, [1981-82] I.L.R. 21 (Q.B. 1980); *Luft v. M.G. Zorkin & Co.*, [1982] 4 W.W.R. 548, [1981-82] I.L.R. 1020 (B.C. Cty. Ct.). *But see Hoffman v. State Farm Fire & Cas. Co.*, [1981-82] I.L.R. 914 (Ont. H.C. 1982); *Pond v. Dovell*, [1981-82] I.L.R. 133 (B.C. Cty. Ct. 1980).

⁵⁵ See, e.g., *Green v. Donald T. Ritchie Ins. Agencies Ltd.*, 2 C.C.L.I. 182 (Ont. H.C. 1983); *Machat Jewellery Ltd. v. Jenkins*, [1981-82] I.L.R. 61 (Ont. H.C. 1980), *aff'd* [1983-84] I.L.R. 6196 (Ont. C.A. 1982); *Wallace v. Co-operative Fire & Cas. Co.*, 9 Sask. R. 28, [1981-82] I.L.R. 2 (Q.B. 1980).

⁵⁶ [1976] I.L.R. 1894, 81 D.L.R. (3d) 139 (Ont. C.A. 1977).

⁵⁷ [1983-84] I.L.R. 6335, 146 D.L.R. (3d) 622 (Ont. C.A. 1983).

as the insured's failure to verify his coverage did not constitute contributory negligence. Similar results have been reached by courts in Alberta⁵⁸ and British Columbia.⁵⁹

Several other courts have applied the apportionment principle without considering whether it could have been avoided had the insured claimed for breach of contract.⁶⁰ Courts in Saskatchewan,⁶¹ New Brunswick⁶² and Nova Scotia⁶³ have attributed various degrees of fault to insureds who fail to check their policies or otherwise make enquiries to see that they have adequate coverage. While it is too early to identify any pattern in apportionment, the percentage appears to vary by province,⁶⁴ no doubt based on the varying sophistication that insureds acquire from particular provincial education systems.

Where agents have been found in breach of their duty to arrange adequate coverage, they have usually been held liable for the insured's total loss.⁶⁵ However, in *Gibbs v. Claridge*⁶⁶ the Court limited the insured's damages to what he would have obtained from such limited insurance coverage as was available. The reasoning adopted in this case may not apply if the insured can show that he might have taken other steps to avoid risks had he known of the gaps in his coverage.

Holding the agent liable for gaps in the insured's coverage is often an adequate alternative to giving effect to the insured's reasonable expectations. However, this approach allows the insurer to escape liability even though the failure to provide adequate coverage may also be the fault of the insurer. In *G.K.N. Keller Canada Ltd. v. Hartford Fire Insurance Co.*⁶⁷ Mr. Justice Rutherford found this to be the case. He allowed the insured to recover in negligence against both the agent and the insurer. Rutherford J.'s approach to the insurer's liability was novel as it overcame the traditional contract doctrine which gives controlling effect to the

⁵⁸ See, e.g., *New Forty Four Mines Ltd. v. St. Paul Fire & Marine Ins. Co.*, 34 Alta. L.R. (2d) 28, [1985 Transfer Binder] I.L.R. 7189 (Q.B. 1984); *Jessett*, *supra* note 55. In *New Forty Mines* the insured was a lawyer who was not found contributorily negligent despite his failure to read the two-page binder containing the policy on a large commercial risk.

⁵⁹ *Luft*, *supra* note 54. The Court quoted judicial opinion going back to 1914 in support of its conclusion.

⁶⁰ *Lewis v. C.M. & M. Ins. Serv. Ltd.*, 51 N.B.R. (2d) 433, [1983-84] I.L.R. 6666 (Q.B. 1983); *Helpard v. Atkinson Marine & Gen. Ins. Ltd.*, [1981-82] I.L.R. 121, 118 D.L.R. (3d) 330 (N.S.S.C. 1980); *Wallace*, *supra* note 55.

⁶¹ *Wallace*, *supra* note 55, at 37, [1981-82] I.L.R. at 7. The Court attributed 40 percent of the fault to the insured.

⁶² *Lewis*, *supra* note 59, at 435, [1983-84] I.L.R. at 6668. The Court attributed 75 percent of the fault to the insured.

⁶³ *Helpard*, *supra* note 59, at 123, 118 D.L.R. (3d) at 334. The Court attributed 50 percent of the fault to the insured.

⁶⁴ See notes 61 to 63.

⁶⁵ *Supra* note 54.

⁶⁶ [1985 Transfer Binder] I.L.R. 7185 (B.C.S.C. 1984).

⁶⁷ 1 C.C.L.I. 34, [1983-84] I.L.R. 6357 (Ont. H.C. 1983).

precise words of the policy rather than to the oral understanding between the parties. The decision was overturned in part, however, by the Ontario Court of Appeal.⁶⁸ The Court of Appeal endorsed on the record: "In our view, there was no duty of care owed to the plaintiff by the defendant insurer and none was asserted by the plaintiff in its action against the insurer."⁶⁹ This endorsement suggests that even though the insurer may have been at fault, it owed no duty of care to the insured and could not be sued for negligence. As the insurer had a contract with the insured, the decision suggests that there could not be concurrent liability in tort. Given the agent's concurrent liability in contract and tort, some explanation for this different treatment of the insurer would have been welcome.

One explanation might be that the relationship between the insurer and insured should be governed by the policy. Since the parties have carefully spelled out their relative obligations, their agreement should govern and should not be replaced with a different allocation of obligations that might result from a tort action. This is a sensible approach so long as the policy reflects the parties' understanding and there is no technical contract rule that prevents the courts from giving effect to this understanding. The difficulty in *G.K.N. Keller Canada Ltd.* was that the policy did not meet the insured's needs. The trial judge found that this mistake was the fault of the insurer.⁷⁰ In other words, in this instance the policy did not reflect the true understanding of the parties. The inaptly worded policy should not in itself prevent the rights of the parties from being governed by the true agreement between them. Contractual remedies are only inadequate where the courts use the parole evidence rule in an artificial way to ignore the true intention of the parties. If there is an artificial rule that provides that the contract is limited to the terms of the policy, then it may be perfectly legitimate to resort to tort law to give effect to the parties' real understanding.

C. Rights of Joint Insureds

The Ontario Court of Appeal's decision in *Rankin v. North Waterloo Farmers Mutual Insurance Co.*⁷¹ was discussed in the last survey.⁷² The Court held in that case that the parents' right to recover under a homeowners' policy was not affected by the wrongful act of their son.

⁶⁸ 4 C.C.L.I. xxxvii (Ont. C.A. 1984).

⁶⁹ *Id.* But see *Wallace*, *supra* note 55, at 36, [1981-82] I.L.R. at 7. The Saskatchewan Queen's Bench held that an insurer owed a duty to warn the insured that its policy was about to expire. Liability was based on negligence and the insured was found to be contributorily negligent.

⁷⁰ *Supra* note 67.

⁷¹ 25 O.R. (2d) 102, [1979-80] I.L.R. 337 (C.A. 1979).

⁷² Baer, 1980 Survey, *supra* note 1.

The case involved the interpretation of a standard exclusion clause which stated:

This Policy does not insure:

- (d) loss or damage caused by a criminal or wilful act or omission of the Insured or of any person whose property is insured hereunder. . . .⁷³

The exclusion incorporates what would otherwise be two implied terms: first, that an insured cannot benefit from his own criminal act; and second, that an insured cannot recover for a loss which he has deliberately caused. Both implied terms are based on independent rules of public policy. However, as Professor Rendall has noted,⁷⁴ the standard exclusion appears to be deliberately designed to extend significantly beyond what would otherwise be implied or mandated by public policy. Professor Rendall has identified the most significant reason for the use of this somewhat oppressive clause as a desire to avoid the difficulties involved in proving knowledge or complicity by the claimant in the wrongdoing of other insureds.⁷⁵ Despite the insurer's desire to create another technical defence, the Ontario Court of Appeal allowed the parents' claim. The Court concluded that the word "Insured" in the exclusion clause referred to the person claiming under the policy. In making this finding, the Court simply ignored the last clause of the exclusion. While the decision in *Rankin* was based on an interpretation of the standard exclusion, the Court was undoubtedly also aware of the similar but narrower terms either implied by the courts or mandated by public policy.

The standard exclusion clause and the related rules of public policy have been considered by several courts in the period under review.⁷⁶ In most of the cases no clear distinction appears to have been drawn between the rules of public policy and the wording of the policy, as the matter is not discussed as two separate issues.⁷⁷ Several courts have purported to be interpreting the policy, but they have paid little attention to the precise words used.⁷⁸ Many subsequent trial decisions have either refused to follow *Rankin* or have interpreted the decision narrowly.⁷⁹ However, the Ontario Court of Appeal has suggested that the case has

⁷³ *Supra* note 71.

⁷⁴ Rendall, Annot., 8 C.C.L.I. 216, at 217 (1985).

⁷⁵ *Id.*

⁷⁶ See, e.g., *Genser v. Waterloo Mut. Ins. Co.*, 6 C.C.L.I. 157 (Ont. H.C. 1984); *Siountres v. United States Fire Ins. & Reliance Ins. Co.*, [1981-82] I.L.R. 689 (Ont. H.C. 1981); *Weins v. Fireman's Fund Ins. Co.*, [1981-82] I.L.R. 443 (B.C.S.C. 1981).

⁷⁷ *But see* *Kolta v. State Farm Fire and Cas. Co.* (1981), 32 O.R. (2d) 515, [1981-82] I.L.R. 206 (H.C.).

⁷⁸ See, e.g., *Rankin v. North Waterloo Farmers Mutual Ins. Co.*, *supra* note 71; *Scott v. Wawanesa Mutual Ins. Co.*, 8 C.C.L.I. 216 (B.C.S.C. 1984).

⁷⁹ See the cases cited in notes 76 and 77 *supra*, and note 101 *infra*.

wider application.⁸⁰ In particular, Mr. Justice Lacourcière has given a further reason to support the decision in *Rankin*:

The general principle which I accept is that the purpose of enlarging the group of persons who are named as insured under the policy is to broaden the coverage by extending it to the additional persons named so that the company undertakes separate and distinct obligations to each assured. The company cannot turn to its advantage a provision of the policy which is intended not to prejudice but rather to benefit the named insured.⁸¹

In contrast, several trial judges have restricted the *Rankin* approach to cases in which the claimant's interest is separate and distinct from that of the wrongdoer.⁸² Where the various insureds' interests are inseparable, the wrongdoing of one insured affects the rights of all. The courts have usually relied on Viscount Cave's tentative dictum:

It may well be that, when two persons are jointly insured and their interests are inseparably connected so that a loss or gain necessarily affects them both, the misconduct of one is sufficient to contaminate the whole insurance.⁸³

Some judges have adopted the distinction without much enthusiasm. For example, the trial judge in *Higgins v. Orion Insurance Co.*⁸⁴ stated: "This conclusion may appear to some to be unjust, but if any change in the law is to be made in this area, it must come from the Legislature or from a Court higher in the judicial hierarchy than this one."⁸⁵ Mr. Justice Linden also considered at some length the nature of the distinction and its foundation. Referring to joint ownership as an example of inseparable interests, he explained that because of the fiction of unity of ownership "there seems to be no way of paying an innocent joint owner without benefiting the guilty joint owner at the same time".⁸⁶ Hence, denying the innocent insureds their reimbursement was "an unavoidable by-product of denying wrongdoers compensation".⁸⁷ He concluded that the interests of the partners in a partnership were akin to joint interests in property and subject to the same concept of unity. Yet Mr. Justice Linden also recognized that the action was really being brought by three creditors who would have had the benefit of any judgment.

The Ontario Court of Appeal,⁸⁸ in allowing the appeal in part,

⁸⁰ See, e.g., *Oshawa Group Ltd. v. Great American Ins. Co.*, [1981-82] I.L.R. 712 (Ont. C.A. 1982); *Kloppenborg v. Pitts Ins. Co.*, [1981-82] I.L.R. 202 (Ont. C.A. 1981); *Higgins v. Orion Ins. Co.*, 10 C.C.L.I. 139 (Ont. C.A. 1985).

⁸¹ *Oshawa Group Ltd.*, *supra* note 80, at 719.

⁸² See, e.g., *Kolta*, *supra* note 77 and *Weins*, *supra* note 76.

⁸³ *P. Samuel & Co. v. Dumas*, [1924] A.C. 431, at 445 (H.L.).

⁸⁴ 36 O.R. (2d) 79, [1981-82] I.L.R. 774 (H.C. 1981).

⁸⁵ *Id.* at 96, [1981-82] I.L.R. at 785.

⁸⁶ *Id.* at 90, [1981-82] I.L.R. at 781.

⁸⁷ *Id.*

⁸⁸ *Higgins*, *supra* note 80.

distinguished between coverage on the stock and equipment and coverage on the building. The stock and equipment were covered by a policy that contained an express exclusion against damage caused by dishonest acts. The building was covered by a policy that had no express exclusion: the insurer was relying on implied terms supported by compelling public policy. The express exclusion provided:

This policy does not insure . . . against . . . (i) loss or damage resulting from any dishonest act on the part of the insured or other party of interest, his or their employees or agents or any person to whom the property may be entrusted (Bailees for hire excepted).⁸⁹

The appellant accepted the trial judge's conclusion that the wrongdoing partner was a party of interest and that the loss or damage was caused by that partner and the employee with whom he conspired. The argument on appeal focussed on the meaning to be given the words "dishonest acts". The Court of Appeal found that the partner's conduct amounted to a dishonest act by a party of interest and thus the appellant, the innocent partner, was precluded from recovery by the express wording of the policy. Given the appellant's concessions, the Court was not required⁹⁰ to consider what differences, if any, existed between the wording of this clause and the clause in *Rankin*.⁹¹ The clause in *Rankin* seems broader than the *Higgins* clause; yet, in *Rankin* it was ignored or treated as otiose. Furthermore, it is not easy to understand why one clause is more ambiguous than the other. In any event, the interpretation given in *Higgins* indicates that the courts are willing to enforce a clause that extends beyond what would otherwise be implied from either the parties' assumed intention or compelling public policy.

In its discussion of the policy covering the building, the Ontario Court of Appeal considered the appropriate scope for any implied exclusion or rule of public policy. The Court considered American authority and identified two rules. The first is the "old" or "traditional" rule that has often been quoted with approval by Canadian courts⁹² and served as the basis of Linden J.'s dismissal of the action. The second is the "new" or "modern" rule which has become dominant in the past decade. The Court in *Higgins* preferred the modern rule because it "plainly seeks to reach a more equitable result than that achieved by the old rule".⁹³ The Court's view of an equitable result is expressed in several places in the judgment. For example, the Court held:

⁸⁹ *Id.* at 144.

⁹⁰ *Id.* at 145. The Court stated: "More specifically, it is not necessary to determine whether arson by one of two named insured or by a person included within an extended definition of 'insured' is by virtue of this clause chargeable to an innocent named insured so as to deny him recovery on any amount under the policy."

⁹¹ *Supra* note 71.

⁹² *See, e.g., Siountres, supra* note 76; *Weins, supra* note 76; *supra* note 77.

⁹³ *Higgins, supra* note 80, at 154.

To deny recovery to an innocent partner because of the guilt of a co-partner is in reality to impute that guilt to the innocent party and to punish him vicariously for the crime of the co-partner. Such a result is repugnant to a sense of fair play and our fundamental notions of justice. Our law is premised on individual responsibility for wrongdoing.⁹⁴

However, in adopting the modern rule the Court stopped short of giving full effect to these sentiments. Instead, following American precedents, the Court concluded that the rights of the innocent insured depended primarily upon the construction to be given the insurance contract and not upon the form of ownership of the insured building. This approach required the Court to characterize the policy as either joint or several or, as it was alternatively put, as either joint or several interests. This characterization, in turn, depended on whether the expression "and/or" in the description of the insureds had been used conjunctively or disjunctively.⁹⁵

In effect, the judgment replaced one artificial distinction with another. In so doing the Court may have made matters worse. A distinction based on joint ownership may have been arbitrary or based on a fiction but it was based on legal categories that have been developed for other purposes, are widely used and are at least partially understood by the public. However, the distinction between joint and several insurance has no meaning in any other context. At best, the distinction becomes a circular inquiry in which insurance is deemed to be joint insurance only if there is an express clause precluding recovery for damage caused by the wrongdoing of other insureds. At worst, the distinction allows the insurer to preclude recovery by the use of apparently innocent conjunctives or obscure references to joint insurance. The close examination given to the expression "and/or" unfortunately suggests the worst. While the Court held that in the event of any ambiguity the insurance should be considered separate, the creation of such unnecessary categories facilitates the insurer's use of obscure terminology that insureds are unlikely to understand. Given the Court's attitude toward the patent unfairness of denying insurance protection to an innocent insured, it is surprising that it found any scope for such an implied term. It is also surprising that the Court stopped short of stating clearly that any limitation on an innocent insured's right to recovery would have to be provided by express exclusion.

The Court considered the requirements of public policy as a separate matter. In determining whether a wrongdoer would benefit from his own wrongdoing, the Court was prepared to go beyond legal fictions and to ignore remote hypotheticals.⁹⁶ The Court held that it was necessary to "ascertain in each case whether the arsonist will benefit by the recovery

⁹⁴ *Id.* at 162.

⁹⁵ *Id.* at 159.

⁹⁶ *Id.* at 163.

and fashion its judgment to guard against such a result".⁹⁷ The Court concluded that in this case there was no realistic possibility that the guilty party would derive a benefit if the appellant was awarded his *pro rata* share of the insurance proceeds.

The discussion of this distinction by other courts indicates that the determination of what interests are inseparable is as much a matter of legal fiction as social inevitability.⁹⁸ The courts make no attempt to look beyond the form of ownership to see whether it is possible to prevent the wrongdoer from benefitting from any recovery. The distinction is artificial and does not respond to the concerns of either the public or insurers. From the insurer's viewpoint, the determining factor must be membership in a particular social group. The extent to which members of a household will enjoy each other's property and the insurance proceeds therefrom does not depend on whether or not they hold title as joint tenants.

I am not suggesting that an innocent insured should be disqualified from recovery whenever there is economic unity between the wrongdoer and an insured. I agree with Professor Rendall⁹⁹ that there is no demonstrable need to apply rules of public policy absolutely, at the expense of innocent persons. Whether or not the insureds' interests are separable, there is no need for "a legal doctrine which fixes one insured, who is entirely innocent of any misconduct, with the consequence of the wrongdoing of another".¹⁰⁰

A similar kind of artificial legal fiction is involved where a corporation is denied recovery because of the wrongdoing of one of its officers,¹⁰¹ even when recovery would not benefit the wrongdoer personally. In these cases the courts have been more ambivalent towards the fiction of a separate corporate identity and have been willing to pierce the corporate veil if necessary. There has also been a tendency to deny that third parties such as creditors and shareholders have any direct entitlement to recovery. Their rights are viewed as being derived entirely from the corporation.

D. *Rights of Mortgagees and Other Loss Payees*

The cases involving mortgagees and other loss payees are in marked

⁹⁷ *Id.*

⁹⁸ See, e.g., Linden J.'s discussion at trial, *supra* note 84.

⁹⁹ *Supra* note 74.

¹⁰⁰ *Id.* at 218.

¹⁰¹ See, e.g., Canadian Yugoslavian Culture Sports Centre "Balkan" v. Waterloo Ins. Co., 6 C.C.L.I. 152 (Ont. H.C. 1984); Zouzouras v. Royal Ins. Co., 5 C.C.L.I. 207 (B.C.S.C. 1984).

contrast to the cases involving partners and joint owners.¹⁰² In these cases, the courts do not initially assume that the mortgagee is an insured. Instead, the courts assume that a mortgagee who is a mere loss payee is not independently insured but is merely an assignee of the benefit of the mortgagor's insurance. Since assignees normally take their interest subject to equities, the mortgagee's rights are no better than the mortgagor's. This treatment of mortgagees does not always prevent them from being insulated from the mortgagor's wrongdoing. Such protection can be obtained by an appropriately worded mortgage clause. However, in the absence of such a mortgage clause, the courts have treated mortgagees quite differently from joint insureds. In fact, the situations are treated in a manner contrary to that which intuition suggests. One would expect that the mortgagee in an arms length relationship with the mortgagor would be more readily regarded as having independent rights than the members of a family unit who tend to pool their resources and enjoy their property in common. Nevertheless, the traditional analysis has been adopted in recent Nova Scotia appellate decisions. In *Amherst Credit Union Ltd. v. Quebec & Casualty Co.*,¹⁰³ in the absence of a mortgage clause, a mortgagee was unable to recover because of a misrepresentation by the mortgagor. The mortgagee's action in negligence against the insurance agent also failed because it was customary in Nova Scotia not to insert the mortgage clause in a commercial subscription fire insurance policy unless requested to do so. The Court also found that the mortgagee had the policy in its possession for six months and, therefore, the mortgagee had had ample opportunity to determine whether the coverage was adequate.

This description of Nova Scotia insurance practice should have led the Court to consider some obvious questions. Were mortgage clauses readily inserted in commercial policies if requested? Was more than a nominal premium charged for such clauses? Under what circumstances would a mortgagee not want the protection of a mortgage clause? In other words, was the practice part of a genuine attempt to respond to the differing needs of informed customers or a misleading attempt to take advantage of some customers' ignorance or carelessness? In any event, unless commercial customers are familiar with this practice, it should be an important part of an insurance agent's duty in that province to inform mortgagees that they must specifically request a mortgage clause.

In contrast, where a mortgage clause has been included in the policy, the mortgagee is not subject to the defences that could be raised against the mortgagor. In fact, the mortgagee may acquire further remedies

¹⁰² See, e.g., *Bank of Montreal v. Lumbermens Mut. Cas. Co.*, [1981-82] I.L.R. 1068 (Ont. C.A. 1982); *Traders Group Ltd. v. Stanley Mut. Fire Ins. Co.*, [1983-84] I.L.R. 6513 (N.B.Q.B. 1983).

¹⁰³ 51 N.S.R. (2d) 431, [1981-82] I.L.R. 1027 (C.A. 1982).

not available to the mortgagor. In *Gordon v. Royal Insurance Co.*¹⁰⁴ the Nova Scotia Court of Appeal held that the mortgage clause held its own remedy, and that the failure of the mortgagee to notify the insurer that the insured building was vacant did not lead to a forfeiture of the mortgagee's rights. The Court followed an earlier decision of the Ontario Court of Appeal¹⁰⁵ and rejected American authority which has held that mortgagees are not protected by a mortgage clause if they have actual knowledge of any act or neglect by the mortgagor.¹⁰⁶

The distinction between a mere loss payee and the independently insured has been applied in order to determine how the requirements after loss can be properly satisfied. In *Ford Credit Canada Ltd. v. Canada West Insurance Co.*¹⁰⁷ the Court suggested that only "the insured" could satisfy the notice requirement of Statutory Condition 4(1)(a) of the automobile part¹⁰⁸ even though the loss payee, a conditional vendor, would actually suffer the loss. There may be circumstances in which an insurer cannot be expected to act on the gossip of an officious intermeddler. However, when the insurer knows that the insured would not suffer a direct pecuniary loss by abandoning the vehicle, notice by the loss payee should be sufficient to protect the interests of the insurer. Similarly, it should be possible for the loss payee to take any other steps necessary to protect the insurer's interest.

Not all courts have held that a mortgage clause is necessary. In *Trans Canada Credit Corp. v. Royal Insurance Co.*¹⁰⁹ the Court stated: "In my opinion there appears to be little, if any, difference in principle between a mortgage clause and a loss payable clause and any third party rights that may be created by them."¹¹⁰ The Court relied on authority which held that the mortgagee was not subject to the privity doctrine, even in the absence of an independent contract with the insurer, because the loss payable clause created an equitable assignment.

¹⁰⁴ 45 N.S.R. (2d) 513, [1981-82] I.L.R. 484 (C.A. 1981).

¹⁰⁵ *London Loan and Sav. Co. v. Union Ins. Co.*, 57 O.L.R. 651, [1925] 4 D.L.R. 676 (C.A.).

¹⁰⁶ *But see* *New Brunswick Hous. Corp. v. State Farm Fire and Gas Co.*, 43 N.B.R. (2d) 10, [1981-82] I.L.R. 1069 (C.A. 1982). The New Brunswick Court of Appeal, without reference to the earlier Ontario or Nova Scotia decisions, followed American authority in holding that the protection of a mortgage clause did not extend to a mortgagee who breached a term of the policy.

¹⁰⁷ 56 A.R. 174, 8 C.C.L.I. 275 (Q.B. 1984).

¹⁰⁸ *Insurance Act*, R.S.A. 1980, c. I-5, s. 299.

¹⁰⁹ [1983-84] I.L.R. 6252 (N.S.S.C. 1982).

¹¹⁰ *Id.* at 6255. The Court noted that in any event it would not have allowed the privity doctrine to defeat the parties' intention.

E. Subrogation

Modern Canadian courts continue to recognize that an insurer's right to subrogation may be limited in three ways:

1. The insurer can renounce or waive its right to subrogation;
2. The insured can arrange its affairs so that it has no rights against third parties; and
3. The policy may insure the interests of potential defendants in a subrogated claim.

These limitations have been considered in recent litigation.

The first method, express renunciation, gives rise to two issues: first, whether the renunciation benefits the third party or leaves the insured free to pursue the claim; and second, whether the privity doctrine prevents the third party from relying on the insurer's renunciation.

In *Canbra Foods Ltd. v. C & L Transport Ltd.*¹¹¹ the Alberta Queen's Bench assumed that the insurer's renunciation relieved the third party from liability. The Court avoided the privity doctrine by holding that "the defendant is not claiming a benefit under a contract to which it is not a party but rather, the insurer is seeking to enforce a right which it no longer has by virtue of its renunciation of that right".¹¹² This may not be a convincing way to avoid the social mischief created by *Greenwood Shopping Plaza v. Beattie*.¹¹³ However, the Court also noted that the Standard Automobile Policy was in a form approved by the Superintendent and was, in essence, a statutory form of contract. The Court, therefore, held that: "Permitting an insurer to renege on its waiver would be tantamount to allowing it to alter the policy approved by the Superintendent (and thereby sanctioned by the statute) without the consent of the Superintendent."¹¹⁴

With respect to the second method of avoiding subrogation, recent cases¹¹⁵ have followed the Supreme Court of Canada's lead¹¹⁶ and have interpreted leases so as to avoid the need for duplicate insurance coverage. However, in other contexts courts have continued to apply the doctrine of fundamental breach, thereby frustrating the contracting parties' allocation of risk and preventing both parties from obtaining the benefit of insurance.¹¹⁷

¹¹¹ 36 A.R. 477, [1981-82] I.L.R. 185 (Q.B. 1981).

¹¹² *Id.* at 480, [1981-82] I.L.R. at 186.

¹¹³ [1980] 2 S.C.R. 228, 32 N.R. 163.

¹¹⁴ *Supra* note 111, at 481, [1981-82] I.L.R. at 187.

¹¹⁵ *Bow Helicopters Ltd. v. Bell Helicopter Textron*, [1981-82] I.L.R. 411 (C.A. 1981); *D'Amours v. Manitoba Forestry Resources Ltd.*, 9 Man. R. (2d) 90, [1981-82] I.L.R. 366 (Q.B. 1981).

¹¹⁶ The recent Supreme Court of Canada cases were discussed in the last survey. See Baer, 1980 Survey, *supra* note 1, at 657.

¹¹⁷ See, e.g., *Rose v. Borisko Bros.*, 33 O.R. (2d) 685, [1981-82] I.L.R. 567 (H.C. 1981).

In relation to the third way of avoiding subrogation, the courts have had to consider the impact of the Supreme Court of Canada's judgment in *Commonwealth Construction Co. v. Imperial Oil Ltd.*¹¹⁸ In that case the Court disallowed a subrogated claim brought in the name of one insured against a defendant that was also a named insured in the same policy. As I have noted elsewhere,¹¹⁹ the case could have been decided on the basis that the defendant's liability was covered by the terms of the policy. This was the issue discussed in the lower courts. However, in disallowing the subrogated claim, the Supreme Court of Canada went beyond interpreting the policy and stated that the defendant "was an insured whose insurable interest extended to the entire works prior to the loss so that in accordance with the basic principles, the insurers had no right of subrogation".¹²⁰ This statement suggests that an insured is automatically covered to the full extent of his insurable interest without regard to the terms of the policy. The novelty of this proposition is illustrated by those decisions which have recognized the numerous exclusions found in any standard liability insurance policy.

The decision has now been taken one step further: the approach has been used to exclude subrogation against a member of a household under a comprehensive homeowner's insurance policy.¹²¹ In *Morawetz v. Morawetz*¹²² an insurer indemnified the named insureds, who were husband and wife, for fire damage to the family home and its contents. The insurer then sought to bring a subrogated action against the couple's son, alleging that his negligent welding had started the fire. The son brought third party proceedings against the insurer, claiming indemnity as an unnamed insured under the comprehensive liability rider. He also brought separate third party proceedings against his father based on the father's negligence.

In disallowing the insurer's claim the Court stated that "[t]he starting point is the basic principle that subrogation rights could not be asserted against the insured himself."¹²³ The Court then found that the "next step" was to determine whether the son was an insured. The Court recognized that the liability rider excluded coverage and that the son was not named as an insured or included in any extended definition in the fire coverage rider. However, the Court went on to inquire whether the son had "an insurable interest in the policy" (or simply, "an insurable interest" or "such an overall interest in a household policy as to be immune to an action by an insurer under its subrogated rights"). This inquiry was suggested by Mr. Justice de Grandpré's statements in

¹¹⁸ [1976-78] I.L.R. 331, 69 D.L.R. (3d) 558 (1976).

¹¹⁹ Baer, 1980 *Survey*, *supra* note 1, at 657.

¹²⁰ *Supra* note 118, at 334, 69 D.L.R. (3d) at 565.

¹²¹ *Prudential Assurance Co. v. Royal Trust Co.*, 21 Alta. L.R. (2d) 273 (Q.B. 1982); *Morawetz v. Morawetz*, 5 C.C.L.I. 11 (Ont. H.C. 1984).

¹²² *Id.*

¹²³ *Id.* at 16.

*Commonwealth Construction Co.*¹²⁴ An insurable interest was found because the son had “a vital interest in the policy” and “his right to recover benefits in a great variety of situations [was] clearly theoretically present”.¹²⁵ The Court concluded that “[t]he fact that certain exclusions may apply on the facts of this case or in other given circumstances from time to time, it seems to me ought not to be a factor in determining the right to be subrogated.”¹²⁶

The insurer’s action in *Morawetz* was not as pointless or offensive as might first appear. The insurer was attempting to recover from another insurer that had issued a policy to the son. In effect, the dispute was between two insurers and focussed on the appropriate principle to apply where there is overlapping coverage.¹²⁷ Both policies appeared to provide that the parents’ policy was excess insurance. Counsel for the parents’ insurer gave an undertaking that the defendant son would not be required to pay any judgment personally. Not allowing the facts to get in the way of moral indignation, the learned judge found the undertaking irrelevant and the subrogated claim “offensive and objectionable”.¹²⁸

Given the issue before the Court, it would have been reasonable to ignore a unilateral provision in the parents’ policy, if it did not represent industry practice, and to require contribution from both insurers. However, there seems to have been no good reason for reversing the order of payment by the insurers, thereby making the son’s insurance excess.

In determining whether the insurer should be able to claim subrogation against the son personally, different considerations apply. The basic reason an insurer should be prevented from claiming subrogation in such circumstances is that family members would be caught by surprise. There is no good reason to use the *Morawetz* family as an example to teach other families to carry adequate liability insurance.¹²⁹ There is little social utility in fostering a system that encourages duplicate insurance coverage and the transfer of liability from one insurer to another on a case by case basis.¹³⁰ However, in disallowing subrogated claims against family members, the courts should be forthright in their explanations and not rely on numerous legal fictions. It is fictitious to pretend that parent and son are one in order to make subrogation impossible or to pretend that the insurer intended to insure the son to the full extent of his insurable interest, regardless of the wording

¹²⁴ *Supra* note 118.

¹²⁵ *Morawetz*, *supra* note 121, at 18.

¹²⁶ *Id.*

¹²⁷ It is perhaps worth speculating whether a defence to this claim would have been raised at all if the son’s liability insurer had not been in receivership.

¹²⁸ *Morawetz*, *supra* note 121, at 19.

¹²⁹ This statement is based on the assumption that liability insurance that does not exclude inter-familial liability is available.

¹³⁰ Hasson, *Blindfolding the Courts: A Further Comment on Photo Production v. Securicor*, 5 CAN. BUS. L.J. 498 (1980-81).

used in the policy. A more realistic explanation of the result obtained would be based on the following arguments. First, the courts should not take very seriously the assumption that a homeowner's policy is meant to be a mere personal contract. The presence of an omnibus clause suggests that the personal attributes or moral hazard associated with the named insured plays only a minor part in the underwriting process. Second, the insurer should not be allowed to mislead the public about the effect of an omnibus clause. No matter how clearly the clause is worded, the policy should not be used to defeat the insured's reasonable expectations. This result could be achieved either by finding an implied term that subrogation has been waived (at least against the son personally) or by applying an overriding rule of equity that subrogation cannot be used when it would produce inequitable results. Mr. Justice Smith does not refer to Lord Denning's notion that subrogation is a principle of equity and that, therefore, its use is subject to judicial discretion.¹³¹ If he had, he might have realized that there was a straightforward way to give effect to his belief that: "Subrogation against a member of the household is on its face offensive and objectionable when dealing with a comprehensive household package."¹³² This is the heart of the matter. Thus, courts should attempt to identify more precisely when subrogation is offensive and objectionable. Little insight into the matter is gained by questioning whether the son had an insurable interest in the policy.

F. *Insurable Interest*

The requirement that all insureds must have an insurable interest in order to support an insurance contract has been an accepted part of the Canadian common law for so long that few modern courts discuss the requirement's purpose or speculate as to its origin. Instead, the courts often refer to the definitions of insurable interest provided in the old English case of *Lucina v. Craufurd*.¹³³ In that case two distinct views emerged and these have become identified with two of the judges who gave reasons. The minority view, associated with the judgment of Lawrence J., has been identified as the test of factual expectancy: "To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction."¹³⁴ The test to be applied is whether there is some demonstrable causal link between the insured event and the harm suffered by the insured. The majority view is usually associated with the judgment of Lord Eldon who gave a much narrower definition: "[N]or am I able

¹³¹ See Denning M.R.'s judgment in *Morris v. Ford Motor Co.*, [1973] 1 Q.B. 792 (C.A.).

¹³² *Morawetz*, *supra* note 121, at 19.

¹³³ 127 E.R. 630 (H.L. 1806).

¹³⁴ *Id.* at 643.

to point out what is an interest unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party".¹³⁵

The factual expectancy test has been generally accepted in American courts. In the nature of things, the test has been used in Canada to define insurable interest in the life and health insurance fields. However, in the property and casualty fields, Canadian courts have usually adopted Lord Eldon's restrictive test. In so doing the courts have seldom distinguished between the need of the insurer to know the nature of the insured's interest and the need of the public to be protected from certain kinds of public mischief. For example, in the Supreme Court of Canada's leading decision, *Guarantee Co. of North America v. Aqua-Land Explorations, Ltd.*,¹³⁶ few of the judges indicated whether they were concerned with protecting the insurer or the public and why protection was necessary in either case. Similarly, in the leading English case of *Macaura v. Northern Assurance Co.*¹³⁷ the discussion of insurable interest was so devoid of particular purpose that the case has become a universal authority for the notion of a separate corporate personality. The case has universal application because it is neither tied nor even closely related to particular concerns about public mischief such as gaming and deliberate acts of destruction.

The formalism of the *Aqua-Land* decision has led to two related problems in the insurance industry. First, and most obviously, insureds who have made full disclosure are prevented from recovering for real losses because of a requirement which in their case serves no purpose. Second, in some contexts this formalism frustrates the purpose of the requirement by disguising the real party in interest. In the past, Canadian courts have been more willing to look beyond form in the latter situation. The courts have recognized shams, pierced corporate veils and looked behind title registrations to identify the real party in interest where its identity was significant to the insurer. At the same time the courts have used the remedial device of a constructive trust to ensure that a nominal insured does not personally profit from the loss.

The Supreme Court of Canada will soon have an opportunity to re-examine the requirement of an insurable interest in the context of property and casualty insurance as an appeal has been taken from the Ontario Court of Appeal decision in *Kosmopoulos v. Constitution Insurance Co.*¹³⁸ The Court of Appeal decided that a sole shareholder has an insurable interest in the assets of a corporation. The Court adopted

¹³⁵ *Id.* at 650.

¹³⁶ *Guarantee Co. of North America v. Aqua-Land Exploration Ltd.*, [1966] S.C.R. 133, 54 D.L.R. (2d) 229 (1965).

¹³⁷ [1925] A.C. 619 (H.L.).

¹³⁸ 42 O.R. (2d) 428, 1 C.C.L.I. 83 (C.A. 1983).

the factual expectancy test and distinguished *Aqua-Land* on the basis that it dealt only with the question of whether one of three shareholders had an insurable interest in the assets of the company. In so doing, the Court made no attempt to return to first principles in order to explain why the factual expectancy test fully meets the legitimate needs of both insurers and the public. The Court did, however, refer to American authority including a judgment of the Supreme Court of Tennessee.¹³⁹ The judgment of the Court of Appeal has placed the entire burden of explaining why the Supreme Court of Canada should depart from previous authority on counsel for the respondents. It has provided no convincing reason itself why *Aqua-Land* should not be followed and its distinction of the case is too artificial to survive the appeal. In particular, the Court of Appeal has not explained how the sole shareholder could be prevented from defeating the creditors of the corporation if he were allowed to recover the insurance. If the sole shareholder kept the proceeds, free from the claims of the corporation's creditors, this would create a temptation for the public mischief that the requirement of an insurable interest is designed to prevent. The solution would seem to be to require the sole shareholder to hold the proceeds in trust for the corporation. In other words, the Court should treat the situation in much the same way as it would if the shareholder intended to insure the interest of the corporation as an unnamed insured. In any event, the distinction between these two situations seems largely a matter of pleading.

In practice, a businessman such as Kosmopoulos naturally assumes that he and his company are one; so, of course, he intends to insure the company's interest. However, having seldom put his mind to the concept of the corporate veil, he may not "intend" in the way that the law requires. The imposition of a constructive trust would be a more satisfactory protection for the corporation's creditors than the denial of recovery. To find the insurance contract invalid because a shareholder lacked an insurable interest would seem to be a perverse way of expressing concern for the interests of the corporation's creditors.

G. *Controlling Insurers' Defence*

1. *Materiality*

During the period under review, the courts in a few cases¹⁴⁰ have examined more skeptically the insurer's evidence of materiality than

¹³⁹ *American Indem. Co. v. Southern Missionary College*, 260 S.W. 2d 269 (S.C. Tenn. 1953).

¹⁴⁰ *Double Bar L Ranching Ltd. v. Madill*, [1981-82] I.L.R. 331 (Sask. Q.B. 1981); *Long v. Commercial Union Assurance Co.*, [1981-82] I.L.R. 611, 121 D.L.R. (3d) 623 (H.C. 1981).

courts usually have in the past. Following the leading case of *Henwood v. Prudential Insurance Co.*,¹⁴¹ Canadian courts have often relied on the self-serving evidence of the insurer to determine reasonable underwriting practice.¹⁴² Moreover, the employees of the insurer have been allowed to predict future events in fields in which they have no particular expertise. When courts have looked beyond the evidence of the individual insured's underwriting practice, it has been to refer to the decisions of other courts. This approach has distorted the definition of materiality in two ways. First, it has downplayed the question of whether the individual insurer's underwriting practice was "reasonable" or "prudent". Second, it has tended to change what is primarily a question of fact, based on current actuarial information, into a rule of law based on possibly stale information.¹⁴³

Until now, Canadian courts have not closely examined what is meant by "reasonable" or "prudent" underwriting. The issue involves at least two different inquiries. First, courts should question the scientific basis for the categories and predictions made by the insurer. Is there any causal link between the factors upon which the insurer has based its predictions and the risk of loss? Has the relationship been demonstrated by experience and, if so, has that experience been quantified? Apart from automobile insurance, there is surprisingly little shared actuarial information in the areas of property and casualty insurance and much underwriting is based on subjective judgment. Yet this fact has seldom been noted by Canadian courts and, apart from the context of human rights legislation,¹⁴⁴ has rarely been used to characterize unsubstantiated judgments as "unreasonable".

Once a scientific basis for the insurer's categories and predictions is demonstrated, the second inquiry should be whether the use of such categories and predictions is unreasonable. For example, are they based on attributes such as race, religion, sex or age? Such attributes may be impermissible distinctions because they are beyond an insured's control and otherwise have led to disadvantage in our society or because they are not the most accurate predictors. In ascertaining what are accurate predictors, the desire to avoid stereotyping and to make more particular judgments based on individual assessments runs counter to the need for objective judgment. As a result, what is reasonable may be a matter of much controversy.¹⁴⁵

¹⁴¹ [1967] S.C.R. 720, 64 D.L.R. (2d) 715.

¹⁴² For a recent example, see *Melvin v. Pilot Ins. Co.*, [1981-82] I.L.R. 287 (Ont. H.C. 1980).

¹⁴³ For a recent example of this tendency, see *Wharton v. Citadel Gen. Assurance Co.*, 5 C.C.L.I. 297, at 303, [1983-84] I.L.R. 6829 (Ont. Cty. Ct. 1984).

¹⁴⁴ See, e.g., Baer, *A Famous Victory: Insurance Corporation of British Columbia v. Robert C. Heerspink and Director, Human Rights Code*, 17 U.B.C.L. REV. 229, at 310 (1983).

¹⁴⁵ See Underwood, *Law and the Crystal Ball: Predicting Behaviour with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408 (1979).

To date, when the courts have considered whether an insurer's underwriting practice is reasonable, the analysis has been limited to a consideration of the relevance of the factors upon which insureds make their predictions. However, some Boards of Inquiry¹⁴⁶ established under human rights legislation and some Superintendents¹⁴⁷ have considered the second issue, the reasonableness of the criteria applied. In some cases, evidence other than the insurer's assertion of materiality has been required. In *Long v. Commercial Union Assurance Co.*¹⁴⁸ Mr. Justice Linden refused to accept the insurer's assertion that the fact that the insured drove his truck in the United States was material:

The Courts are not forced to accept the views of individual insurers as to what *they* think is important without evidence of independent experts to that effect. This is obviously an area where opinions may differ and where there is much unsubstantiated opinion. Thus Courts should not deny coverage to insured persons on the basis of such unfounded allegations as to risk and as to the materiality of this risk.¹⁴⁹

Other courts have relied on the absence of express exclusions to find a change in risk immaterial.¹⁵⁰ In contrast, some courts continue to accept the evidence of individual corporate practice as sufficient to establish materiality¹⁵¹ while others appear to act on their own experience or intuition.¹⁵²

2. Warranties

There are a number of ways in which insurance warranties can be uniquely oppressive:

1. A warranty must be strictly complied with.
2. A warranty does not have to be material to the risk.
3. The insurer is discharged from liability from the date of any breach of warranty, regardless of whether the loss is related to the breach.
4. The courts have no general power to relieve against forfeiture caused by a breach of warranty.

Few Canadian courts, if any, have explained why insurers should enjoy such significant immunity from general contract law doctrine. However, in the past, these unique elements of insurance law were treated

¹⁴⁶ See, e.g., *Vitcoe and Director, Human Rights Branch v. Dominion Life Assurance Co.*, a decision of a B.C. Human Rights Code Board of Inquiry, noted in 4 C.L.H.I.A. Decisions 3 (1984); *Bates v. Zurich Ins. Co.* (1985), a decision of a Board of Inquiry appointed under the *Ontario Human Rights Code, 1981*.

¹⁴⁷ For several years the Superintendents have been urging automobile insurers to adopt a rating system which is not based on age, sex and marital status.

¹⁴⁸ *Supra* note 140.

¹⁴⁹ *Id.* at 617, 121 D.L.R. (3d) at 634.

¹⁵⁰ *Supra* note 143.

¹⁵¹ *Supra* note 142.

¹⁵² *Watkins v. Portage La Prairie Mut. Ins. Co.*, 5 C.C.L.I. 108 (B.C.S.C. 1984).

as settled. There are, of course, countervailing doctrines that exist at common law or are created by statute. However, legislative provisions have not been treated analogically so as to affect general insurance principles.

There are indications that modern courts are increasingly unwilling to give full scope to traditional insurance warranty doctrine. In several cases¹⁵³ courts have avoided forfeiture of the insured's claims by characterizing policy terms not as promissory warranties but as suspensive conditions, that is, part of the definition of the risk. In some instances, the courts have done so even when the word warranty is expressly used in the policy. The result of this characterization has been that the insured has not forfeited his claim because of conduct that was no longer operative at the time of loss. In some of the cases, it is not clear that the courts were aware of the distinction between suspensive and promissory conditions.¹⁵⁴ In other instances, the courts have expressly arrived at their decision because of the oppressive results that would arise if the term was considered to be a promissory warranty.

In *Case Existological Laboratories Ltd. v. Century Insurance Co.*¹⁵⁵ a marine insurance policy contained a term under the heading "Special Conditions" which read:

WARRANTED that a watchman is stationed on board the [insured vessel] each night from 2200 hours to 0600 hours with instructions for shutting down all equipment in an emergency.¹⁵⁶

The British Columbia Court of Appeal concluded that this term was a suspensive condition and, therefore, did not affect the insured's right to recover for a loss that occurred in the early afternoon. The Court referred to the judgment of Estey J. in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*¹⁵⁷ Mr. Justice Estey had held that insurance policies should not be construed so as to substantially deprive the insured of the protection for which he had contracted. Applying this principle, the Special Condition in *Case Existological* should not be interpreted as a promissory condition. Such a promissory could be so easily broken that coverage would be an illusion.

¹⁵³ *Case Existological Laboratories Ltd. v. Century Ins. Co.*, [1981-82] I.L.R. 1031, 133 D.L.R. (3d) 727 (C.A. 1982), *aff'd* [1983] 2 S.C.R. 47, 150 D.L.R. (3d) 9; *Insurance Corp. of B.C. v. Turner*, 43 B.C.L.R. 59, [1983-84] I.L.R. 5761 (C.A. 1983); *McKay v. Insurance Corp. of B.C.*, 56 B.C.L.R. 391, 8 C.C.L.I. 90 (S.C. 1984); *Riverside Landmark Corp. v. Northumberland Gen. Insurance*, 8 C.C.L.I. 118 (Ont. H.C. 1984); *Heon v. Insurance Corp. of B.C.*, 8 C.C.L.I. 189 (B.C.S.C. 1984); *Britsky Bldg. Movers Ltd. v. Dominion Ins. Corp.*, 7 Man. R. (2d) 402, [1981-82] I.L.R. 433 (Man. Cty. Ct. 1981); *Bourgoin v. Guardian Ins. Co. of Can.*, [1981-82] I.L.R. 521 (Ont. Dist. C. 1981).

¹⁵⁴ *See* Rendall, Annot., 8 C.C.L.I. 189 (1985).

¹⁵⁵ *Supra* note 153.

¹⁵⁶ *Id.* at 6013, 133 D.L.R. (3d) at 740.

¹⁵⁷ [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49.

In at least one case a Court has gone so far as to assimilate insurance warranty law with general contract law doctrine. In *Long v. Commercial Assurance Co.*¹⁵⁸ an automobile insurance policy was issued for a truck which was being used exclusively in the Niagara region of Canada. Without informing the insurer, the insured began to use the truck to haul silica sand to Ohio. The truck was demolished in a collision with a train in Niagara, Ontario and the insurer denied liability. The insurer claimed that there had been a material change in the risk, contrary to Statutory Condition 4. In an oral judgment Linden J. found that no independent expert evidence had established that the change was material to the risk. In addition, he rejected the insurer's defence on the grounds that "there is no causal link at all between the information not given, that is the trips to the United States, and the loss which occurred".¹⁵⁹ The judge did not attempt to distinguish or overrule prior authority, nor did he expressly state that he was attempting to assimilate insurance doctrine. Instead, he relied on what he assumed must have been the legislative intention: "To ignore this causal requirement would lead to some horrendous results which the Legislature could never have intended to follow."¹⁶⁰

3. *Unjust or Unreasonable*

For some time, the fire part of the Insurance Acts has contained a provision allowing courts to hold that an exclusion, stipulation, condition or warranty is not binding upon the insured if it is unjust or unreasonable.¹⁶¹ Most of the caselaw interpreting this provision dates from the time when variations from the statutory conditions were permitted, subject to judicial scrutiny.¹⁶² Variations from the statutory conditions were found unjust or unreasonable to the extent that they were more onerous for insureds than the statutory conditions.¹⁶³

¹⁵⁸ *Supra* note 140.

¹⁵⁹ *Id.* at 616, 121 D.L.R. (3d) at 632.

¹⁶⁰ *Id.* at 616, 121 D.L.R. (3d) at 631.

¹⁶¹ In Ontario, see *Insurance Act*, R.S.O. 1980, c. 218, s. 128. There are equivalent sections in most other provinces.

¹⁶² Variations from the Statutory Conditions were permitted in Ontario prior to 1924. The history of s. 128 of the Ontario *Insurance Act* is explained by Hogg J.A. in *Tarr v. Westchester Fire Ins. Co.*, [1953] O.R. 378, at 387 (C.A.).

¹⁶³ This was the approach in most of the early cases. See the judgment of Osler J.A. in *Smith v. City of London Ins. Co.*, 14 O.A.R. 328 (C.A. 1887). However, on appeal, Gwynne J. doubted that Statutory Conditions were "intended to express the utmost limit of exaction that was just and reasonable", 15 S.C.R. 69, at 78 (1888). In spite of this doubt, which was later repeated by Gwynne J. in *H.P. Eckardt & Co. v. Lancashire Co.*, 31 S.C.R. 72 (1900), most courts continued to regard any terms that were more onerous than the Statutory Conditions as *prima facie* unjust or unreasonable. See *Tarr*, *supra* note 162.

Variations of the statutory conditions are no longer permitted.¹⁶⁴ Hence, the court's supervision of policy terms now operates in a different sphere. The court's control now extends to stipulations that cover matters that are completely unrelated to the statutory conditions. Without the bench mark of the statutory conditions, it is not clear what standard the courts should use to determine what is unjust or unreasonable.¹⁶⁵

The provision in the fire section has seldom been invoked in recent years and rarely with success.¹⁶⁶ The reluctance of insureds to invoke the provision is not easy to explain. Uncertainty about the appropriate standard cannot be the only reason. While some of the most arbitrary exclusions included in insurance policies apply to risks other than fire, insureds could still attempt to invoke the provision with respect to composite policies.

In those rare cases where this section has been raised, the courts have tended to equate "just and reasonable" with "material". In *Kekarainen v. Oreland Movers Ltd.*¹⁶⁷ the Manitoba Queen's Bench not only equated just or reasonable with material but also took judicial notice of what was material.¹⁶⁸ The Court held that the location of goods was material to the risk and that an exclusion of "property in a storage warehouse" was a just and reasonable variation of the statutory conditions.¹⁶⁹ This approach tends to limit the scope of the section even if the courts adopt a skeptical attitude towards the insurer's evidence of materiality. Furthermore, the approach ignores any consideration of how onerous the stipulation may be and makes no attempt to balance this burden against the advantage, in terms of decreased risk, that the stipulation gives the insurer.

4. Relief against Forfeiture

In most provinces, legislation confirms the court's general equitable power to relieve against forfeiture.¹⁷⁰ Yet, for some time Canadian courts have refused to apply this legislation to the breach of a condition of an insurance policy.¹⁷¹ Instead, the courts have insisted that any power

¹⁶⁴ See *Insurance Act*, R.S.O. 1980, c. 218, sub. 125(1) and the equivalent sections in other provinces.

¹⁶⁵ *Supra* note 161.

¹⁶⁶ I have found only one case in the period under review where the provision was invoked, though unsuccessfully. See *Kekarainen v. Oreland Movers Ltd.*, [1981-82] I.L.R. 271, 121 D.L.R. (3d) 561 (Q.B. 1981). The case dealt with a similar section in a Manitoba statute (*The Insurance Act*, C.C.S.M., c. 140, s. 145).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 273, 121 D.L.R.(3d) at 564-65.

¹⁶⁹ *Id.* at 274-75, 121 D.L.R. (3d) at 567-69.

¹⁷⁰ In Ontario, see *The Judicature Act*, R.S.O. 1980, c. 223, s. 22. Equivalent legislation exists in other provinces.

¹⁷¹ See, e.g., *Johnston v. Dominion of Canada Guaranty & Accident Ins. Co.*, 17 O.L.R. 462 (C.A. 1908).

to grant relief must be *specifically* provided by the provincial insurance legislation. Provincial insurance legislation only authorizes the granting of relief where there has been imperfect compliance with requirements after loss.¹⁷² There is no power to grant relief from forfeiture for a breach of a condition that occurs before loss, even when the breach is completely unrelated to the loss. Moreover, the doctrine is not considered applicable in cases involving an unexpected or arbitrary exclusion — the most common reason that an insured is denied recovery.

In the leading case of *Johnston v. Dominion of Canada Guaranty & Accident Insurance Co.*¹⁷³ Meredith J.A. gave the following reason for refusing to invoke the Court's general equitable power to relieve against penalties and forfeitures:

To treat the condition as a forfeiture, which any Court can in its discretion ignore, would be to create a revolution in the law of contracts, especially contracts of insurance; and it would be an extraordinary thing that it should be left until this late day to discover that the Courts had such power.¹⁷⁴

Meredith J.A. would likely have found it an even more “extraordinary” thing that it has been left another seventy-five years to discover that some courts have such power. In *Bonne v. Irvine*¹⁷⁵ the Manitoba Court of Appeal considered an automobile owner's claim against the negligent driver of another car. The plaintiff had been driving when he was not authorized to do so. The collision coverage in his policy prevented him from recovering in such circumstances. Furthermore, subsection 33(5) of *The Manitoba Public Insurance Corporation Act*¹⁷⁶ provides that the liability of the negligent driver is reduced by the total amount of benefits and insurance money that would have been payable in respect of the loss but for the plaintiff's breach. The Court found that it could not grant the plaintiff relief under section 17 of the Manitoba Act because the breach took place before any loss occurred. However, the Court invoked the more general statutory authority found in *The Queen's Bench Act*¹⁷⁷ which empowers a court to relieve against penalties or forfeitures. In granting the plaintiff relief, the Court stated that there was no question that section 33 of *The Manitoba Public Insurance Corporation Act* constituted a penalty and worked a forfeiture; thus, this was precisely the kind of situation in which relief should be granted. No reference was made to the *Johnston* decision or to Meredith J.A.'s fear that such relief would create a revolution in the law of contracts. There are no convincing reasons why insurers should enjoy the unique

¹⁷² *Insurance Act*, R.S.O. 1980, c. 218, s. 106. There are equivalent sections in other provinces.

¹⁷³ *Supra* note 171.

¹⁷⁴ *Id.* at 482.

¹⁷⁵ 31 Man. R. (2d) 81, [1985 Transfer Binder] I.L.R. 7237 (C.A. 1984).

¹⁷⁶ C.C.S.M., c. A180.

¹⁷⁷ R.S.M. 1970, c. C280, s. 63, rule 7.

freedom to impose penalties or forfeitures. The Manitoba decision is a welcome assimilation of insurance law with general contract doctrine.

Other courts have been less sympathetic towards insureds. In *Braun v. Co-operative Fire & Casualty Co.*¹⁷⁸ the plaintiff was a passenger in a van that overturned. She obtained judgment against both the owner and the driver of the van. The owner's insurer paid the policy limits and the passenger brought an action against the driver's insurer for the balance. The claim was dismissed on the grounds that the driver had failed to report the accident to his insurer. The Alberta Court of Appeal refused to grant relief from the forfeiture even though the owner's insurer had made a complete investigation at the time of the accident. This is an extreme example of the manner in which the courts will sometimes assume that an insurer has been prejudiced despite the lack of specific evidence of actual prejudice. In this case, there was no evidence that the position of the driver's insurer would have been different had it conducted its own investigation. Moreover, the Court's solicitude towards the insurer occurred at the expense of a completely innocent third party.

H. *Defining the Risk: Proximate Cause*

In recent years the courts have often returned to the task of identifying rules for the interpretation of insurance contracts. Occasionally, the courts have attempted to discover the purpose of policy terms or have interpreted such terms in view of industry underwriting practice. However, all too often the courts establish the meaning of policy terms without regard to their purpose. This practice has led to some bizarre results, reducing the insured's right to recover to a form of gaming.¹⁷⁹

One of the most common rules or assumptions applied by the courts is that the words of an insurance policy are to be given their plain meaning; that is, they are to be interpreted in their ordinary and natural sense. Only rarely does the invocation of this rule provide any convincing explanation for the result: what is unintelligible and ambiguous to one court may be plain to another.¹⁸⁰ However, the rule is more than just a harmless makeweight. Often its application is a variation on Gresham's Law that more valuable coinage is hoarded while less valuable coinage remains in circulation.

References to plain meaning are matched in frequency by references

¹⁷⁸ 40 A.R. 358, [1983-84] I.L.R. 6142 (C.A. 1982).

¹⁷⁹ For an extreme example, see *Charnia v. Travelers Indem. Co.*, 47 O.R. (2d) 705, 12 D.L.R. (4th) 478 (C.A. 1984). See also Hasson, *The Rape of the Lock: A Comment on Charnia v. Travelers Indemnity Co. of Canada*, 10 CAN. BUS. L.J. 373 (1985).

¹⁸⁰ E.g., compare the decision in *Anderson v. Co-operators Group Ltd.*, 5 C.C.L.I. 154 (Alta. Q.B. 1984) with *MacLaughlin v. Commercial Union Assurance Co.*, [1983-84] I.L.R. 6182 (N.B.Q.B. 1982).

to *contra proferentem*. The proper scope of the doctrine has been considered in several recent decisions. Different views have been expressed when considering whether the doctrine should be applied either to statutorily mandated terms or to terms approved by the Superintendents. In Manitoba, the doctrine has been applied to regulations made by the Lieutenant Governor in Council which the government insurer had helped to draft.¹⁸¹ In Ontario, several courts¹⁸² have applied the doctrine to an optional endorsement in a standard automobile insurance policy. The courts have held that as the insurer chose to offer the optional coverage, it thereby adopted the wording of the endorsement. Having had ample access to legal advice and ample opportunity to consider the form before selling the coverage, the insurer could not then assert the interpretation most favourable to its interests. In *Borland v. Muttersbach*¹⁸³ Mr. Justice Barr explained that the wording of the endorsement had not been forced upon the insurer. After referring to the work of the Superintendent's Advisory Committee on Forms,¹⁸⁴ he concluded that "the evidence discloses that the form was drafted and redrafted by representatives of the insurance industry. The role of the three public servants on the advisory committee was a passive one. There is no evidence of anything done by them other than to discuss and approve the form."¹⁸⁵ These statements are equally applicable to the compulsory parts of automobile insurance. Even if public servants played a more active role in drafting the forms, it would still be appropriate for courts to interpret them in favour of insureds as insurers are in a far better position to initiate corrective or clarifying changes.

Other Ontario courts¹⁸⁶ have reached similar results by noting that the legislation creating accident benefits was designed for the protection of insureds and should therefore be construed in a manner that is favourable to them. This approach has been applied even when the issue was whether the claimant was, in fact, an insured.¹⁸⁷

In addition to such long standing "canons" as plain meaning and *contra proferentem*, the courts have recently made frequent references to the statements of Estey J. in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machine Insurance Co.*¹⁸⁸ when interpreting policy terms.

¹⁸¹ DePape v. Manitoba Pub. Ins. Corp., 7 Man. R. (2d) 119, [1981-82] I.L.R. 168 (Q.B. 1980).

¹⁸² *Borland v. Muttersbach*, 49 O.R. (2d) 165, 8 C.C.L.I. 232 (H.C. 1985); *Wigle v. Allstate Ins. Co.*, 44 O.R. (2d) 677, 10 C.C.L.I. 1 (C.A. 1984), *leave to appeal to S.C.C. denied* Mar. 1985.

¹⁸³ *Borland*, *supra* note 182..

¹⁸⁴ *Id.* at 170, 8 C.C.L.I. at 237.

¹⁸⁵ *Id.* at 181, 8 C.C.L.I. at 250.

¹⁸⁶ *Morgan v. Dominion Ins. Corp.*, 31 O.R. (2d) 285, 118 D.L.R. (3d) 675 (H.C. 1980); *Muir v. Royal Ins. Co.*, 33 O.R. (2d) 562, [1981-82] I.L.R. 502 (Cty. Ct. 1981); *Belland v. Pitts Ins. Cos.*, [1981-82] I.L.R. 457, 126 D.L.R. (3d) 487 (Ont. H.C. 1981).

¹⁸⁷ *Muir*, *supra* note 186.

¹⁸⁸ [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49 (1979).

The references support two related ideas. First, exclusions should not be interpreted in a manner that is inconsistent with the main purpose of the policy. Second, exclusions should not be interpreted so as to result in a substantial nullification of coverage under the contract. The first idea is much broader than the second and could aid the insured more often.

Mr. Justice Estey's decision in *Consolidated-Bathurst Export Ltd.* has had a much greater impact than might have originally been predicted. Mr. Justice Estey himself described this principle of construction as "trite".¹⁸⁹ However, the principle has not become threadbare, Mr. Justice Estey's restatement of what he considered to be a long standing principle has evoked new interest, largely because of its similarity to the American doctrine of giving effect to the insured's reasonable expectations. Both doctrines are based on the recognition that the insured's expectations are not based entirely on the strict wording of the policy. Neither doctrine indicates clearly how the insured's expectations are created nor what makes these expectations reasonable. The principle underlying both doctrines is the need to inform the insured of the true nature of the coverage provided. However, the Canadian doctrine at least nominally requires the existence of an ambiguity in the policy which appears to both give and take away protection. The American doctrine is more frank in its recognition that the insured's reasonable expectations may arise apart from the policy and that even the clearest most unambiguous policy term should not always defeat such expectations.

1. Accident

In the last survey¹⁹⁰ I indicated that the interpretation of what is an "accident" continued to be a fertile source of litigation despite the frequent consideration of this issue by the Supreme Court of Canada. Three different views for determining if a loss was the result of an accident or intentional conduct have vied for acceptance. The first view, as expressed by Welford, is that "[a]n injury which is the natural and direct consequence of an act deliberately done by the assured is not caused by an accident."¹⁹¹ Despite its apparent resurrection by the Supreme Court of Canada in *Sirois v. Saindon*,¹⁹² this view has not subsequently been accepted by any Canadian court.

The second view, as expressed by Couch, is that "[w]here the harm which befalls the insured is a reasonable and probable consequence

¹⁸⁹ *Id.* at 899, 112 D.L.R. (3d) at 57.

¹⁹⁰ Baer, 1980 Survey, *supra* note 1, at 637.

¹⁹¹ A. WELFORD, THE LAW RELATING TO ACCIDENT INSURANCE INCLUDING INSURANCE AGAINST PERSONAL ACCIDENT, ACCIDENT TO PROPERTY AND LIABILITY FOR ACCIDENT (2d ed. 1932).

¹⁹² [1976] 1 S.C.R. 735, 56 D.L.R. (2d) 556 (1975).

of his volitional act, the harm, by definition, cannot be deemed accidental.”¹⁹³ This test of reasonable foresight has usually been rejected by Canadian courts, especially in the context of liability insurance, on the grounds that it would deprive insurance of much of its efficacy.¹⁹⁴ Nevertheless, Canadian courts have occasionally adopted this test. For example, in *Dukoff v. London Life Insurance Co.*¹⁹⁵ a man fell to his death when he tried to descend from the balcony of his sixth floor apartment using belts tied to the balcony railing. The Court dismissed the widow’s claim for a double indemnity accidental death benefit, stating that the husband’s “actions must be judged on the basis of what a reasonable person might foresee as the result naturally following from those actions”.¹⁹⁶ It seems likely that in these circumstances the Court would also have found the husband’s actions reckless or a deliberate courting of the risk. Nevertheless, the judgment illustrates the tenacity of this theory despite the frequent disapproval expressed by appellate courts.

The third view is that a loss is not caused by an accident if there has been a deliberate or reckless courting of the risk. This test has been adopted by most of the recently reported cases.¹⁹⁷ However, the Alberta Court of Appeal¹⁹⁸ has added a new subtlety to the issue. The Court examined some of the reported cases and found that a distinction had been drawn between policies that refer to “accidental injury” and those that refer to “injury caused by accident”. According to the Court, the first type of policy concentrates on the nature of the result, while the second focusses on the nature of the cause. The Court acknowledged that: “The distinction is not always recognized but it is recognized in two decisions of the Supreme Court of Canada.”¹⁹⁹ The two Supreme Court of Canada cases involved death from circulatory or heart disease following deliberate acts of exertion.²⁰⁰ In the first of these cases, the British Columbia Court of Appeal commented that the cause of death might have been disease. Assuming, however, that the cause of death was the exertion, Mr. Justice Sheppard stated:

On the literal meaning of the policy the accident must be the cause of the injury: it is not sufficient that the injury, that is the consequence, be

¹⁹³ *G. Couch*, 10 *Cyclopedia of Insurance Law* 35 (2d ed. R. Anderson 1982).

¹⁹⁴ See *Mutual of Omaha Ins. Co. v. Stats*, [1976-78] I.L.R. 1188, at 1192, 87 D.L.R. (3d) 169, at 182, *per* Spence J.: “to exclude from the word ‘accident’ any act which involved negligence would be to exclude the very largest proportions of the risks insured against”.

¹⁹⁵ [1981-82] I.L.R. 259 (Ont. H.C. 1981).

¹⁹⁶ *Id.* at 262.

¹⁹⁷ *Infra* note 207.

¹⁹⁸ *Leontowicz v. Seaboard Life Ins. Co.*, 58 A.R. 66, 8 C.C.L.I. 290 (C.A. 1984).

¹⁹⁹ *Id.* at 67, 8 C.C.L.I. at 293.

²⁰⁰ *Columbia Cellulose Co. v. Continental Gas Co.*, [1961-65] I.L.R. 581, 42 D.L.R. (2d) 40 (S.C.C. 1964), *aff’g* [1963] I.L.R. 489, 40 D.L.R. (2d) 297 (B.C.C.A.); *Smith v. British Pac. Life Ins. Co.*, [1965] S.C.R. 434, 51 D.L.R. (2d) 1.

an accident. . . . The exertion would be deliberate and not an accident; only injury, that is the consequence, at the most would be an accident. Hence the plaintiff's case is that the wilful act of exertion, which was no accident, has caused an unexpected consequence which is said to be an accident, but that is the reverse of what the policy requires.²⁰¹

The Alberta Court of Appeal adopted this distinction and disallowed a husband's claim under an accidental death policy insuring his wife's life. The policy insured against "loss resultng from injury" and defined injury to mean "bodily injury caused by an accident". The wife had rapidly consumed a quantity of liquor sufficient to depress her respiratory centre and cause death. The wife was not an experienced drinker and her death was totally unexpected. Mr. Justice Stevenson referred to American authority, including Cardozo J.'s observation (in dissent) that adopting the distinction between accidental results and accidental means "will plunge this branch of the law into a Serbonian Bog".²⁰² The learned judge stated that he shared Carodzo J.'s anxiety, "that we may, having regard to the situs of this case, enter into muskeg in trying to identify and distinguish accidental causes".²⁰³ However, in spite of these misgivings, he concluded that "we are bound by the decisions of the Supreme Court of Canada to respect the distinction between cause and result and on those authorities, the beneficiary must be able to point to an accident".²⁰⁴

With due respect, I wonder if this judgment is not irresponsible pedantry masquerading as reluctant but loyal acceptance of higher authority. No doubt a provincial appellate court should be reluctant to ignore decisions of the Supreme Court of Canada when that Court has not itself acknowledged that its decision is no longer persuasive or authoritative. However, more recent decisions of the Supreme Court of Canada have recognized that accidents can result from deliberate causes or means.²⁰⁵ I do not mean to suggest that the two earlier decisions of the Supreme Court of Canada ought to have been decided differently. In both cases, the Court was prepared to find that death resulted from disease rather than from exertion. In essence, the Supreme Court of Canada has recognized the futility of trying to isolate accidental causes, such as, trying to distinguish between the voluntary consumption of alcohol and the voluntary driving of an automobile.²⁰⁶ Both acts can produce an unanticipated mishap or untoward event that is not expected or designed. Later cases that give accident its ordinary and popular meaning do not suggest that "accidental injuries" should be interpreted

²⁰¹ *Columbia Cellulose Co.*, *supra* note 200, at 491, 40 D.L.R. (2d) at 301.

²⁰² *Landress v. Phoenix Mut. Life Ins. Co.*, 54 S. Ct. 461 (1934).

²⁰³ *Id.* at 463.

²⁰⁴ *Supra* note 198, at 71, 8 C.C.L.I. at 299.

²⁰⁵ *See, e.g., Mutual of Omaha Ins. Co.*, *supra* note 194.

²⁰⁶ *Compare Leontowicz*, *supra* note 198, with *Mutual of Omaha Ins. Co.*, *supra* note 194.

differently from "injuries caused by accident". Given the difficulty of applying the accidental means definition, it should be preserved only if insurers have clearly specified the nature of the coverage. Moreover, it should not be assumed that the Supreme Court of Canada intended to allow insurers to use "accidental" in other than its ordinary and popular meaning by invoking a particular pattern of words whose significance would be unknown to the insuring public. Fortunately, most recent cases have not adopted this distinction. The courts have usually followed the more recent Supreme Court of Canada cases, even when the policy has referred to "caused by accident".²⁰⁷

I. Valuation

Indemnity insurance contracts have traditionally provided that the insurer will pay the "actual cash value" of lost or destroyed property. The meaning of these words has never been precisely defined by the courts. Instead, Canadian courts usually accept the broad evidence rule which provides that "the trier of fact may, and should, call to its aid, in order to effectuate complete indemnity, every fact and circumstance, which would logically tend to the formation of a correct estimate of the loss".²⁰⁸ This approach occasionally leads courts to assume that questions of value are simply matters of fact, best left to the judgment of experts. In at least one recent case this approach led the Court simply to average the figures suggested by three experts, despite the fact that one expert adopted a procedure that the Court described as "obviously unsatisfactory" and "completely arbitrary".²⁰⁹ In contrast, the British Columbia Supreme Court has used the broad evidence rule in a less arbitrary way. In *Royal Bank of Canada v. Non-marine Underwriter's at Lloyd's*²¹⁰ the Court suggested appropriate criteria for choosing a method of determining actual cash value. In this case, a hotel had been totally destroyed by fire. Expert evidence of the hotel's value was provided, based on three different valuation methods: market value, replacement cost less depreciation and comparative and prior sales. The

²⁰⁷ See, e.g., *Johnson v. Mutual of Omaha Ins. Co.*, 39 O.R. (2d) 559, [1981-82] I.L.R. 1122 (H.C. 1982); *Sumitoma Canada Ltd. v. Canadian Indem. Co.*, [1981] 5 W.W.R. 508, [1981-82] I.L.R. 576 (B.C.S.C.); *Koch v. Empire Life Ins. Co.*, 29 A.R. 49, [1981-82] I.L.R. 405 (Q.B. 1981). The same distinction could be made between "intentional bodily injury" and "injury caused intentionally". However, no such distinction was made in *Long Lake School Div. No. 30 Sask. Bd. of Educ. v. Schatz*, 6 C.C.L.I. 1, [1983-84] I.L.R. 7010 (Sask. Q.B. 1984) nor in *Taylor v. Cooperatives Fire & Cas. Co.*, [1985 Transfer Binder] I.L.R. 7335 (Alta. Q.B. 1984).

²⁰⁸ The rule comes from *McAnarney v. Newark Fire Ins. Co.*, 247 N.Y. 176 (C.A. 1928).

²⁰⁹ *Pulla v. Simcoe & Erie Gen. Ins. Co.*, [1981-82] 5 C.C.L.I. 65 (Ont. H.C. 1984).

²¹⁰ [1981-82] I.L.R. 754 (B.C.S.C. 1981).

Court held that the actual cash value could not be determined conclusively by any one analytical approach. Instead, the value was to be determined “from a consideration of a variety of analysis to each of which appropriate weight in the circumstances must be given”.²¹¹ The Court’s intention is indicated by its treatment of the expert opinions. The Court rejected the opinion based on the market value determined by capitalization of assumed income because of “[t]he uncertain basis upon which all of [the] assumptions were made — bordering at times on pure speculation.”²¹² Instead the Court adopted the opinion based on comparative and prior sales, stating: “the approach [the expert] adopted and the assumptions on which he based his conclusions [are] less speculative than that of the other witnesses”.²¹³ In other words, the Court adopted the approach based on the factors which could most readily be proved. This is a sensible result. In theory, the different analytical approaches identified by the Court ought to produce identical values, at least where the insured premises are used for commercial purposes. In practice, the approaches lead to different values because assumptions have to be made. As the Court indicated, the most reliable approach will depend on what factors can most readily be established. The insured should be allowed to prove his claim with whatever evidence is available, and the Court should adopt an analytical approach to valuation that reflects the available evidence. The alternative, averaging values based on both reliable and speculative evidence, is highly arbitrary.

The adoption of the broad evidence rule has not prevented courts from attempting to decide more specific valuation issues. For example, the courts have considered whether possible future events are relevant to determining value. In the past, Canadian courts have given inconsistent answers to this question, although recent appellate decisions have discounted future events. In reaching this result, some courts have adopted a unique rule, specifically for insurance purposes,²¹⁴ that is inconsistent with the general approach in tort cases. This issue was recently considered by the Manitoba Court of Appeal²¹⁵ where the insured was on the eve of bankruptcy at the time of loss. The Court held that the lost property should not be valued on the basis of what would have been realized at a distress sale: the value of the insured stock-in-trade should not be discounted by such “incidental and collateral” circumstances.

²¹¹ *Id.* at 756.

²¹² *Id.* at 757.

²¹³ *Id.*

²¹⁴ In Ontario, compare the insurance “rule” in *Cyrand Inv. Ltd. v. Aetna Ins. Co.*, 8 R.P.R. 107 (Ont. C.A. 1979), *leave to appeal to S.C.C. denied* Oct. 3, 1979, with the tort rule in *Montreal Trust Co. v. Hercules Sales Ltd.*, [1969] O.R. 661, 3 D.L.R. (3d) 504 (C.A.).

²¹⁵ *Westwood Elec. & Appliance Ltd. v. Manitoba Pub. Ins. Corp.*, 20 Man. R. (2d) 188, [1983-84] I.L.R. 6299 (C.A. 1983).

