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# Topic 1 – The Nature of Insurance Law Date: January 28, 2019

Andrew Spurgeon - Ross and McBride, SCC case *Whiten and Pilot*

**Evaluation:** 10-12 page paper. (Use only nouns and verbs, no adjectives or adverbs).

Overview:

## Sources of Insurance Law

* Lloyds is an insurance exchange. It was a coffee house in 1500-1600 hundreds. Shippers tended to meet here and exchange information about losses they suffered. They began to think about spreading the risk among themselves so no one would go under for losing 1 ship. People would subscribe to cover about 20% of the loss of the ship in the event it sinks, and as a reward for subscribing those subscribers would get paid a premium. They were gambling, because if the ship never goes down then they’ve gained the premiums.
	+ In Llyods, intermediaries are used only to coordinate and spread risk. With most insurance contracts the intermediary is the other party to the contract and the risk shifts to them directly.

### Case Law

The roots of case law in Canada come from common law, courts of equity, and the law merchant. The law merchant arose when merchants had little confidence in the courts. This changed when Lord Mansfield reformed the common law to permit the rules developed in the merchant’s tribunals.

* Case law must be viewed with caution since legislation often displaces it.
* English cases are of little use in Ontario with respect to fire and auto insurance.
* Jurisprudence concerning interpretation of policies, especially liability policies, is based on American law.

### Policies

There is room for contracting parties to make their own rules within the confines of the law. E.g. the statutory rule that a claimants criminal conduct does not automatically invalidate the claim may be reversed by the terms of the contract.

### Industry agreements

Two important examples;

* Agreement respecting standardization of claim forms and practices and guidelines for the settlement of claims
* Agreement of the guiding principles with respect to overlapping coverages relating to property insurance.

### Legislation

Legislation (created by legislature)

Regulations (created by cabinet, easily changed)

* Federal and provincial schemes cover corporate structure, financing and investment, licensing, auditing, and deposit requirements.

Statutory Conditions (Will be added to any policy relevant)

* Some types of insurance policy do not have any statutory conditions, but they may still be very similar across the board because of industry agreements on standards.

Auto Insurance contracts are entirely prescribed in legislation. Currently in Ontario the structure provides you with:

* collision protection (consumer can reduce this to 0),
* statutory accident benefits (first party benefits that protect you if you are hurt regardless of who causes accident),
* Liability protection (if someone else sues you e.g. for their economic losses). You can be sued for an amount in excess of this and end up on the hook personally for the remainder.
* OPCF endorsement 🡪 Can sue your own auto insurance company if the person who hurt you is uninsured or not adequately insured (up to the maximum of your coverage). Then your own auto insurance can go after the guy who hit you for the amount they had to pay you as a result of his inadequate insurance (subrogation).
* But you also allocate some risk to yourself (via the deductible)

#### Provincial Insurance Acts

* Legislation is similar across provinces, except with auto insurance which varies widely.
* Some classes of insurance have their own sections within the act, for Ontario these are: Fire, life, automobile, accident and sickness, weather, and marine.
	+ The other provisions are general.
	+ Statutory defintions and application sections resolve most issues with classification.
	+ A single contract may, in limited circumstances, be governed by more than 1 part of the legislation. E.g. a contract which is primarily fire insurance may provide “extended” cover against fire caused by factors that would otherwise be excluded in a fire insurance contract. However loss resulting from those excluded causes do not trigger the Fire section of the act but falls under the section dealing with general contracts.

*KP Pacific Holdings v Guardian Insurance* 2003 SCC

**Facts**: There is a fire. The policy is a multi-risk policy. The statute on fire policy in insurance act of BC says the limitation period runs out 1 year from the time of the loss. Other parts of the act say the limitation period starts 1 year from filing the proof of loss.

**Held**: No strict interpretation of the policy. The man is allowed to sue.

* The general rule is two years from when the event occurs (especially when a person dies).
* In this case, the courts found that determining what was “incidental” was an elusive task, and that to arbitrarily classifying under Fire was an outdated practise.

## Current Division of Powers:

The provinces have the power to monopolise insurance regulation (except for: marine insurance as it falls under federal jurisdiction over navigation and shipping; and the federal Winding-up Act which prevails in the event of insolvency although does not prevail with respect to regulations aimed at preventing insolvency). This has not occurred. The federal government operates a system of supervision of insurance companies which the provinces utilize or accommodate. Additionally provinces have their own requirements but exempt, in part, companies authorised to do business by other provinces or the federal government.

*Parsons v Queen Insurance Co* 1881 PC

Ratio: Insurance is not within the federal powers of trade and commerce, it is under the provincial powers of “civil rights”

*Alberta (AG) v Canada (AG)* 1916 PC

Ratio: Provinces can regulate insurance companies operating in more than one provinces (i.e. a company does not have to incorporate federally to operate in more than 1 province).

## Conflict of Law

Two common categories:

1. Determine if a particular court has jurisdiction to hear an action.
	* Sometimes a contractual clause resolves this issue
	* If not, jurisdiction depends on compliance with regular rules of procedure and whether there is a more convenient forum. The court must find it has natural or real and substantial connection with the case. Factors considered include:
		+ Juridical advantages to either party
		+ Location of the witnesses
		+ Residence of the parties
		+ Location of the evidence
		+ Where the relevant facts occurred
		+ Respective limitation periods
2. Determine which state’s laws apply if there is jurisdiction.
	* Subject to statute the basic rule for determining what law applies to any contract with multijurisdictional connections is what is intended by the parties.
		+ Can be express, inferred from circumstances
			- Express intentions may not apply if contrary to the public interest.
		+ If intention cannot be discerned the “proper law” applies 🡪 which system of law has the most real and closest connection to the transaction.
	* Common law provinces excluding BC, NS, and AL have legislation providing that if the policy is held by a citizen of a province, then the law of that province applies regardless of where the property is located or if the insurance provider is foreign.

Issues with conflicting laws include:

1. Accidents happen outside home jurisdiction
2. An accident may occur in a jurisdiction that requires the insurer to pay the insured greater benefits than prescribed in the policy because of the scheme of that jurisdiction
3. Where a person is entitled to benefits under more than one scheme (which scheme must pay first?)
4. No fault schemes can restrict tort rights for the injured individual (e.g. in Quebec). In some provinces, like Ontario, are less restrictive of tort rights (where the tort meets a certain threshold). The general rule for this conflict set by the SCC is that the law of the place where the tort occurred is the law that applies.

## Distinguishing Features of Insurance Law

### Purpose of insurance: Shifting risk.

* Insurance helps enable people to do things and also provides relief. Most insurance contracts cover indemnity for negligence liability. General rules of contract law apply (offer, acceptance, measure of damages).
* It is indemnity for loss (1st party) or liability for loss (3rd party)

### Defining insurance

* Defintion: “insurance” means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance; (“assurance”) *Insurance Act*
	+ In auto insurance the peril is in relation to the use and operation of motor vehicle.
* Courts read the definition narrowly
* Insurance does not include:
	+ annuities (no fortuity) *Gray v Kerslake* SCC 1958; or
	+ extended warranties (these are merely expressions of warranty) *Brick Protection Corp v Alberta (Prov. Tresurer)* 2011 ABCA; or
	+ A guarantor, performance, bond, or security (they a actually result in a third party <i.e. the would-be “insurer”> directly assuming the obligation to the other party involved.
* Does include car clubs like CAA that protect subjects dealt with in the insurance act and that involve uncertain misfortunes *R v Anderson* 1940 ABCA
	+ If premium paid is merely an advance for service that can be accessed at any time then its not insurance. *Hampton v Toxteth Co-Op Provident Society* 1915 UK CA

## Underlying Principles

### Consumer Protection:

* Coverage is interpreted widely, exclusions are interpreted narrowly.
* Can’t trick people into not calling in relief.
* Most consumer targeted policies (home owners/renters insurance, car insurance, life insurance, professional liability insurance) are straight forward and regulated by statute because they exist to protect the consumer.
	+ Focus is on consumer protection. Relatively few insurers are pooling risk (insurers have insurers themselves, and so on and so on).
	+ When you buy coverage you are buying peace of mind that you are not bearing all the risks and burden of life.
* The rules of fortuity and indemnity, although restricting claims, offer consumer protection by ensuring the financial viability of the insurer. There are a large number of rules devoted to financial viability.
* An insurer cannot refuse to pay out on a loss on the grounds of immaterial misrepresentation, even if a clause in the insurance contract appears to give it that right.
* Some classes of insurance have certain clauses that cannot be modified to the detriment of the insured. (e.g. fire insurance; accident and sickness insurance)

### Fortuity (not willful)

* Insurance protects against random events, chance, and unintended consequences. Not intentional things.
	+ Negligence is covered, intentional wrongs are not.
	+ Drunk driver didn’t intend to hurt someone. Unless the drunk driver was aiming to hit Y, then Y’s injuries are merely a result of fortune. Liability insurance is meant to protect against people doing dumb things. The drunk driver has not been reasonable (has not taken reasonable steps to avoid foreseeable consequences).
	+ Can’t collect life insurance for someone who has killed themselves for 2 years. Although it is now recognized that any 1 individual can suffer the misfortune of developing mental health, there is still an intentional act required. That intentional act is being viewed as an act of misfortune.
		- What about alcoholics? Aren’t they just misfortunate to have suffer from alcoholism?
* Causation/remoteness is also relevant to determining whether a specific loss is caused by a fortuitous event
	+ *Financial Service Commission* is a recent case that said a person suffering a head injury from a misfortunate car accident can be covered for drug dependant tendencies which arise from the head injury.
	+ But-for test, and novus actus (substantial intervening act) may both come into play.
* Does not cover for normal wear and tear
* Does not cover for loss deliberately caused by a person who stands to benefit from the insurance.

### Compensation

* Must be measurable
* The claimant must hold an insurable interest
* Legislation provides an injured person in a car accident a direct claim against the insurer of the person who caused the accident.
	+ It also provides for compensation for an injured person in the even the driver at fault is uninsured/unidentified.

### Principle of Indemnity:

* can’t get more than the measurable loss,
* only get paid once (no double dipping),
	+ if you sue the person at fault for an accident for you long term losses and this includes your loss of income, you can’t then claim long term disability from your own insurance company.
* In negligence you get to be put in the position had the event not occurred.
* The main objective of the indemnity principle is to avoid moral hazard where people may attempt to gain from insurance by being less careful or even engineering loss.
* Duties to indemnify apply across all police and relates to actual loss, except:
	+ life insurance b/c the issue isn’t the loss it is about ***when*** the loss arises – the time of death is the fortuitous part. You are not indemnified for a measurable loss, you are indemnified for a contractually agreed amount (a claimant can even collect fully under multiple policies). AND
	+ Accident and Sickness Benefit (long-term disability insurance). These losses are not measurable losses because injury or illness can wax or wane, so there is not definite measure of what the loss will be.
* Duty to defend only applies for liability insurance

### Utmost Good Faith

* Unlike where Trustees have a duty to put another person’s interest before their own.
* In insurance contracts the interests of both the insurer and the insured must be put on equal footing.
	+ The insured must be upfront about the risk (e.g. do they have a history of disease?)
		- Modified by regulations for some classes of insurance
	+ The insurer must treat the insured fairly and honestly (not to try to game the insured) and to adjudicate the claim fairly and reasonably. The insured is paying for peace of mind (you are in their hands in the most vulnerable time of your life).
		- Must pay reasonable expenses.
		- Cannot take advantage of innocent non-disclosure
		- Must deal with costumer openly, honestly, and without unreasonable delay in processing claims.

## History of Insurance

Concept of having private insurance contracts came about after the fire in London of 1666 (a lot of people lost their homes, built of wood and heated by fire; 1/3 of city destroyed by fire). One way or another people insured their homes. There were 3 leading companies (which now exist as 1 company) that created the basic concept of fire insurance contracts.

* It became the habit of insurance companies to manage risk by becoming nosey (e.g. what kind of stoves people should use). This also lead to things like building codes and construction methodologies.
* The institute for highway safety is run by insurance companies in the US that use test dummies. These things led to improvement in safety features in cars (such as collapsible steering wheels, and soft dashboard).
* Insurance companies look at the risks and try to address them. They are also dealing with the backlash of climate change (e.g. flooding).

## Form of Insurance Agencies/Companies

Can be public insurance business in the sense that they are publicly traded, or public in the sense that they are owned by the government (e.g. BC’s auto insurer)

### Joint Stock Companies

**Capital:** private or public shares

**Use**: Most non-life insurance business is written by stock companies, and just over half of life insurance business is written by stock companies.

**Incorporation:**

* Incorporated federally or provincially 🡪 In both cases there are requirements for capital. Pg 2-5
* Can be a foreign co. if the company can prove to the government it can meet its obligations.

### Mutual Insurance Corporations

**Capital**: Pooing arrangements whereby members contribute to a fund to cover future claims of other members.

* If pool funds are insufficient members may be liable to provide additional funds (assessments)
* Excess funds are returned as dividends *Ontario Legislature,* Select Committee on Company Law, *The Insurance Industry: Third Report on General Insurance* (Queens Printer, Toronto, 1979).

**Cash mutual:** when these corporations have sufficient reserves 🡪 sufficient reserves are a net surplus of assets over liabilities of at least 500,000

* Must write a minimum amount of $50,000 insurance Ontario Corporations Act s150-151

**Use**: Can write the coverages as joint stock companies (Ontario Insurance Act ss42-43) but are commonly limited in terms of scope and geographical area.

#### Reciprocal Exchanges (rare)

* Similar to Mutual Ins. Corps. except usually with fewer participants. Those participants assume liability personally and not through a corporation.

### Fraternal Societies

**Use**: Licensed to enter into not-for profit contracts of life, accident and sickness, disability or funeral insurance for members or member’s family.

**Structure**: At least 75 members Ontario Insurance Act part 10

### Mutual Benefit Societies

Non-profit organizations such as trade unions licensed to provide limited sickness and funeral benefits for members only. In Ontario there must be 75 members.

### Lloyds (Mostly for Marine)

An insurance market in London Eng. made up of many syndicates(firm/company) of individuals willing to underwrite risk.

* It is common for brokers to spread risk among several underwrites.
* Contracts are with underwriters directly, and not with Lloyds.

## Access to Business

Authorization by one provincial government is usually accepted by others through a system of reciprocity. Authorization by one is evidence of financial viability (Ont Ins Act s 48(1)) and an insurer may not need to duplicate the deposit (Ont Ins Act s66). Cancellation or suspension in one usually results in the same in others (Ont Ins Act s58(5)).

A business with authorization under the federal statute must obtain separate authorisation from each province to do business there (but this is little more than a formality)

### Federal System

A two-step process for business access:

1. Incorporation by minister of finance issuing letters patent (*Ins Companies Act* part 3).
	* Issuing letters patent involves considering (s27):
		+ Applicant’s financial resources
		+ Soundness of feasibility of current business conduct and future plans
		+ Business record
		+ Character and competence of those responsible for the oprtations of the business.
		+ \*If the applicant is foreign the minister must be satisfied the corporation is capable of making a contribution to the financial system of Canada, and that similar access to a Canadian company is available in the foreign jurisdiction. S24(1)
	* Applications must provide the following info (s28):
		+ Company/society name
		+ Location of head office in Canada
		+ In the case of a fraternal society 🡪 the criteria for membership
		+ The manner in which capital is to be acquired
		+ Terms for disposition of property on dissolution/liquidation
		+ In the case of a company 🡪 date of incorporation, and indication of any intention to be a mutual company.
2. Superintendent of financial institutions providing approval to “commence and carry on business.” This must be done within 1 year of coming into existence and before starting operations (Ins Companies Act s52). The superintendent must be satisfied of the following (s57):
	* + There has been a meeting of shareholders and a meeting of incorporators or supreme governing body.
		+ There is a paid up capital of at least $5M (of for a mutual company, the amount prescribed by the minister of finance)
		+ The expenses of the corporation/organisation/society are reasonable
		+ All other relevant requirements of the act have been met.
		+ \*Societies must also file an actuary report stating the assets of the society are sufficient to provide for the payment at maturity of all its obligations (s57(1)(b)).
	* An insurer is restricted to the classes set out in the superintendents order (s443) A life insurer cannot insure other classes of risk (except accident and sickness) (s445).
	* Insurers authorized through the federal government are precluded from certain activities (e.g. acting as an administrator or trustee) (s 466-478)

### Provincial System

* Access to business in provinces involves incorporating (under general corporate law – *Corporations Act* Ont Part 5 is dedicated to insurance) and obtaining a licence (Ontario *Ins Act* s42). Only BC has a two-step process specific to insurers that is similar to the federal process.
* The business must conform to an approved class of organization 🡪 All provinces allow insurers to be joint stock companies, mutual companies, fraternal societies, or Llyod’s Syndicates (Ont Ins Act s 42(1)).
* In some provinces a deposit is required (especially for joint-stock companys) s66.
* Capital: It is usually a requirement for licening that insurers have a certain amount of paid up capital:
	+ Life insurance: $2M (consisting of at least $1M Paid up and $500,000 unimpaired surplus)
	+ Classes other than life insurance, insured by joint stock companies 🡪 $3M (s48)
	+ Mutual Insurance Corporations and Llyod’s underwriters must have a net surplus of assets over liabilities of $2M for life, and $1M for others.
* A license application must be accompanied by documents of incorporations such as bylaws, the charter, the instrument of incorporation, etc..; and details regarding the chief provincial agent; and a current statement of condition of affairs. (s50)
* Licenses specify which classes the insurer is authorized to provide coverage for(s43)

## Cases

### Boyce v The Cooperators General Insurance Company 2013 ONCA – Insurance K can override statutory limitations if it is a business agreement

**Facts**: a boutique had damage and suffered loss because of an odour to their store. They filed a notice of loss within 1 month of the incident, but did not file a statement of claim until after 1 and a half years of the incident.

**PP**: TJ held that the language in the policy was not explicit enough to overrule the 2 year limitation period set out in the Limitations Act. Further, although the limitation act allows a contract to opt out of the 2 year period only business agreements can do so, and the insurance policy at issue is not a business agreement.

**Issues on Appeal:**

1. Is the there a term in the contact providing for a 1 year limitation period
* Yes
1. If there is a term, is it capable of overriding the limitation act?
* Yes, the language must “in clear language describe a limitation period, identify the scope of the application of that limitation period, and exclude the operation of other limitation periods.
	+ It DOES NOT need to reference the statutory limitation period, nor contain a provision alerting the insured that they were foregoing a statutory right to a longer period, nor would any such provision need its own signature/initial.
1. Whether the insurance contract is a business agreement?
* A business agreement defined in s22 of the Limitation Act excludes any agreement involving a consumer. The Consumer protection Act is then referenced ONLY for the definition of a consumer which is “a individual acting for personal, family, or household purposes and does not include a person who is acting for business.” Clearly the insured in this case is not a consumer and therefore the insurance contract IS A BUSINESS AGREEMENT.
	+ It is irrelevant that the insurance contract is also a peace of mind contract.

**Held**: Appeal Allowed – insurance policy’s 1 year limitation period is valid and there is no claim for relief under the insurance policy.

### Marche v Halifax Ins 2005 SCC – S 171 of OIA can void a statutory condition’s unjust result

**Facts**: The insured’s unit was vacant 🡪 they did not inform the insurance company 🡪 Insured got a tenant 🡪 tenant moved out 🡪 fire.

**Overarching Issue**: Does the insured’s failure to inform the insurer of the first vacancy avoid their coverage under the contract?

**TJ**: No

**NS CA**: Yes

**SCC**: NO.

**Held**:

Issue 1: Section 171 of the Insurance act provides that a provision contained in a contract that is unjust or unreasonable can be void. Does this apply to statutory provisions? **Yes** because:

* The term condition is not qualified to exclude statutory provisions
* Statutory conditions are referred to through the Insurance as “conditions”
* The purpose of s171 is to provide relief
* The previous version of the section referred expressly to statutory conditions, while this version does not 🡪 it is now more expansive, not more restrictive.

Issue 2: Can the court use s171 to void statutory conditions, or merely for contractual provision? Issue arises since legislation would not make a condition that is “unreasonable or unjust”? **Yes** because:

* Legislation would not make a condition that is unreasonable or unjust on its face. Therefore, s171 must apply to the application of conditions to allow for equitable relief where application would otherwise be inescapable.

Issue 3: Did the insured breach s4 of the Insurance Act by not informing the insurer of a material risk? NO need to decide because above 2 issues are decided. Section 4 is unclear on whether it would apply on these facts, and that clarity is left for legislature to resolve.

### KP Pacific Holdings v Guardian Insurance SCC 2003 – If Ins. Policy does not fit within a specific class (i.e. fire) then it is general

**Facts**: Unclear whether the insurer’s coverage under the multi -risk policy falls under Part 5 of the insurance act (fire – 1 year limitation period) or Part 2 (general – 2 year limit, cannot be contracted out of <unless the contract actually fits into a different Part of the Act with a shorter limitation period)

**Held**: If a policy does not clearly fit within one of the classes, then it fits within the general class. The insured is guaranteed a minimum 2 year limitation period unless the policy falls within an enumerated class that provides otherwise.

## Framework for Analyzing Insurance Problems

The framework generally follows four (4) steps which are as follows:

1. Identify issues in play given the available facts and evidence.

2. Assemble the relevant sources of law (policy terms – regulations – statutes – reinsurance agreements – priority agreements – undertakings – case law).

3. Classify the type of insurance in question – the purposes of the statute and/or case law.

4. Apply law to issues.

# Topic 2 – Disclosure and Misrepresentation Date: February 4, 2019

## Basic Concepts

(Review of last week)

### What are insurance contracts actually contracting for?

* The information itself that is offered between parties is the subject matter (the RISK) of the K.
	+ This is what defines the risk for which premiums are paid.
	+ In insurance, coverage relates to a contingent event: if X happens, you will be reimbursed.
* Other ways of pooling risk: submitting to governance, provincial health care (we don’t even need to pay an OHIP premium anymore), unemployment insurance, CPP (includes both pension and disability coverage).

### Indemnification of Loss

* We are contracting for compensation of actual loss. This protects consumer by ensuring insurers are able to pay all legitimate claims. Automobile claims indemnify for 4 certain types of loss including:
	+ Statutory accident benefits: This includes income replacement for 70% of your gross income for the time you can’t work - which must be proved by tax forms (difficult for waitresses)
		- This particularly is mandated by the regulation in automobile insurance
	+ Liability insurance: If you are at fault and you’ve been sued, your loss is the possibility of, or a judgement against you. You are insured against having to pay the judgement personally.

### Consumer Protection

* Most contracts for insurance have an inherent power imbalance (insured has less power).
	+ Even in litigation, the insured will only have 1 or 2 insurance disputes in their life. Not only that but they come to those disputes with huge loss (their insurance has very high stakes for them).
	+ For the insurer, paying a claim is just business.

### Good faith and entering into contracts.

* Some questions may be relevant depending on the type of insurance.
* Risk can change in ways non-obvious to the customer. A man and woman at 65 are almost equally likely to both reach 80. Whereas 1-day old boy and girl are far less ***equally*** likely to reach 80. Men are more likely to do stupid things (or also work in dangerous occupations). By the time they reach 65 they do less dangerous things.

### Fortuity (See page 101)

Insurance protects against random and not intended consequences.

* Specifically, act not intended by the policy holder. E.g. It is chance that the robber chooses the ***policy holder’s house***. The selection of that house was fortuitous.

### Good Faith

Obligation for each party to put on the table the risk.

## Checklist

Strategy to approach a set of facts. Internalize.

Identity: Issues 🡪sources of law and types of problems

### Issues:

* Precontractual
	+ Disclosure, etc…
* Contract application
	+ What does it say/provide for
	+ Was it in force at the time?
	+ Who has the ONUS to prove WHAT
* Settlement/Claims process
	+ How is loss valued?
	+ What type of policy is this? First party or third party?
	+ Can a settled case be re-opened?
	+ Rights of insurer? Subrogation or salvage?

## Contracts

Issues of disclosure and misrepresentation in insurance contracts as opposed to contract generally. In insurance at common law there is a duty on both parties (but more importantly on the part of the insured) to disclose: Facts that are material within personal knowledge fully and accurately if not done, the entire contract is void. statutory and regulatory modifications of these elements and how they play out in various classes of insurance.

### Duty of Utmost Good Faith

Historically the duty is heavier on the insured because there was (and to some extent still *is*) an imbalance of information.

**Fire**

The duty to disclose is set out in a statutory condition (a condition that must be replicated in all contracts). Ontario Insurance Act s148.

*Carter v. Bohem (1776) 3 Burr 1905 – Good faith by insured includes duty to disclose, principle of asymmetry of info*

\*First case about good faith.

**Facts/Background**: 7 years was first true world war – engaged on every continent. British, Prussians, and Portuguese on one side. French… on the other side. The 7 year war is what ended French Colonial Rule in Canada. Carter had a fort where he would trade off the islands of Sumatra. He insured the fort against invasion. He did not disclose a war was going on tot the insurer. His fort was invaded by the French. He made a claim (to the syndicate of an individual underwriter).

C took insurance out against his fort to be resistant against natives but not from Europeans. Courts found he knew there was likely an attack coming from the Europeans

**Issue**: Insurer said Carter didn’t tell him the French are around. This is clearly material risk, but does it need to be disclosed?

**Held**: It was known the French wanted to steal this island. Claim succeeds.

**Ratio/key concepts identified**: asymmetry of info, duty to disclose info, limits of duty to disclose (materiality, notoriety)

*Coronation Insurance v. Taku Air [1991] 3 SCR 622 - Principle of asymmetry*

A more recent case that quotes Carter’s principle of asymmetry.

**Facts**: Passengers on small plane died when plane went down. Taku (the airline) lost their first insurance policy. They then sought British insurance, but lost that too. They finally returned to their initial insurer. They lied when fo9rming the new contract with the initial insurer about how many seats were on the plane and did not disclose previous accidents). That insurer said the name Taku rang a bell and could have easily accessed information about their previous accident.

**Held**: If you are in the business, then you should now about safety records and can look it up. There is no imbalance of information with respect to the safety records. But…claim still fails because Taku also lied about the number of seats (which was material and *did* involve an imbalance of information).

***Note***: the style of cause includes the name of not just Taku, but the passengers too. The names of the passenger are there even though they have no privity to the insurance contract. They get standing (the right to be in court and request a remedy) from the provision (s132) in Insurance Act that says if X gets a judgement against an insured (Y), but Y’s insurance company refuses to indemnify them (and the Y has insufficient assets to satisfy the judgement), then X can sue the insurer DIRECTLY.

* When a person/corp. is bankrupt a stay would normally be entered on a judgement because of lack of assets. S132 provides a way to avoid a stay in the event that there is an insurance policy for the bankrupt person that would answer the judgement.
* Taku is indemnified against liability.

### Must disclose:

* Some of these developed from courts and were codefied, while others overwrite what courts developed.
* Provincial statutes treat non-disclosure differently depending on the class of insurance. The rules will fall under: fire, automobile, life, accident/sickness, weather, livestock, marine, or catch all.
	+ For the most part, rules developed by courts apply to the catch all category. The most significant change is that insurer’s cannot ask for warranties of all facts, but only of material facts.

#### Facts

Illusory in the age of TRUMP.

What is a *fact*?

* Eventualities/speculations are not facts. Only a duty to exist a fact that EXISTS.
* Issue frequently arising in fire case. E.g.: if thinking about setting up a basement apartment🡪 not a fact because it hasn’t happened. If you decide to set up a basement apartment, **then** it is a fact.
* How often you DO get your fireplace cleaned (I think this is an ongoing fact…)

#### That are material

What is material?

* Something that would influence a reasonable insurer.
* This is an objective test (with a subjective element per *Pine Top Insurance Co* 1994 UKHL). Would a reasonable insurer have cared, and would this particular insurer have changed their decision to insure had they known that fact.
	+ How do you know what a reasonable insurer would do (Objective)?
		- Expert opinion evidence of long-term underwriter (of whether that factor impact risk)
		- Past practice of other insurers/industry standards (they will give opinion evidence, or possibly documentary evidence)

Warranties can be made that material facts are true: it is an assignment of risk. If I warrant a fact to be true, as a premise upon which a contract exists, I am allocating to myself the risk that it is not true.

* Insurance companies make consumers warrant what they are saying, and if they are wrong they might be stopped from making a claim.
	+ S124 is an example of a provision that prevents insurance companies from abusing warranties.
	+ You can’t just make anything a warranty, it must be material to the contract.
	+ These provisions

##### Discrimination and Materiality

* HRC says you can discriminate (choose) *but not premised on prohibited grounds* in different types of circumstances.
	+ In ON it is illegal to discriminate in contracting (not just in employment contracts as in BC).
	+ Automobile insurance rates changes with postal codes. Insurance in Mississauga and Brampton is more expensive. Two factors:

1. These are diverse communities (discrimination?) ***but***

2. Must drive everywhere and roads are all like highways (bona fide basis?)

- Selling insurance of the person (i.e. not of property) is not a service customarily provided to the public. *Nova Scotia (HRC) v Canada Life Assurance* 1992 NSCA – Leave to appeal denied by SCC. One *must qualify* based on age and medical history.

Human Rights Code Ontario:

S1

S3 – Every person having legal capacity has a right to contract on equal terms without discrimination on protected grounds

S22 – Equal treatment with respect to services and to contract on equal terms etc… but this is not infringed with respect to contracts of automobile, life, A/S, or disability insurance, between an insurer and a person/association other than an employer, that differentiates on REASONABLE and BONA FIDE grounds because of age, sex, marital status, family status, or disability.

* To be Bona Fide it must be used honestly for sound business purposes and not to defeat rights protected by the HRC. *Zurich Insurance Co v Ontario (HRC)* 1992 SCC
	+ The insurance industry must strive to avoid setting premiums based on enumerated grounds, it has obligations to find alternative means of rating that avoid discrimination on the grounds of age, sex, or marital status.
* Section 25(3) deals specifically with discrimination in employment related insurance contracts.

Insurance Act s140:

Any licensed insurer that discriminates unfairly because of race or religion is guilty of an offence.

Insurance Act S124:

Excludes certain things and doesn’t apply to auto or sickness/accident. For auto, there is a form with prescribed questions set by the Superintendent and only those questions can be asked.

* With auto insurance, the insurance follows the car not the person. This is why details of the car are relevant. With respect to the individual who is driving, the insurer has access to records about your convictions or tickets, they also know your age and gender.
	+ If there is a misrepresentation with respect to details of the car, that only impacts liability coverage (when you’re being sued). It has no impact on accident benefits, they cannot take an off-coverage position.

Insurance Act s439 O reg 7/00 s1:

* Bans *unfair* or deceptive practices in respect to discrimination resulting in amount of payment or return of premiums, or rates charged, or other benefits payable, or terms and conditions. Further protecting from *unfair* discrimination in any rate or schedule of rates in Ontario of essentially the same physical hazards in the same territorial classification.

##### Onus to Prove Materiality

The insurer is the party seeking to affirm/advance the proposition and therefore they have the onus: the onus here is on the insurer saying that the contract is void.

* The plaintiff is trying to prove the contract, and that the insurer is breaching it by not paying the claim.
* The defendant is then making a positive assertion that in fact, YOU breached the contract with your omission/misrepresentation. The onus has shifted to them to prove this.
	+ They must prove: it is a fact, it is material, and that you led it.

**Fire**:

Applies 2 part common law test for materiality applies. The common law restriction that it only includes information that is within personal knowledge also applies.

**Auto**

Applies 2-part common law test for materiality

**Life Insurance and Accident/Sickness Insurance**

Reasonable insurer test is used *MacQuarrie v National Bank Life* 2014 ONSC -ONCA Appeal denied (includes medical history, age, and occupation). Some insurers also regard additional things as relevant 🡪 it will be considered relevant according to the objective reasonable insurer test UNLESS the insured can prove it is not relevant. *Henwood v prudential 1967 SCC*

#### Within personal knowledge

* Carter and Taku cases: information asymmetry.
	+ One case involves a “world” war while the other involves a few professionals who are expected to be competent.
		- When does a court take judicial notice of a fact and what is it? This is a fact so notorious it doesn’t need proof. Until a judge confirms a fact it is just evidence. But a judge can take judicial notice without putting you through the hoops of proving it.
		- Mr. Carter didn’t need to prove that there was a 7-year war.
		- When you have sophisticated parties with access to records, the expectation on the individual to disclose information decreases. **The real exceptions are health records** (which are protected as private information without court orders)
* John Mansville
	+ Court can take judicial notice that asbestos takes asbestosis and kills people.

**Fire**

Two types of information must be supplied:

* Info relating to the property being insured (e.g. construction type) *Fulton v Wawanesa* 1932 Alta Ca
* Facts about the consumer that go to “moral hazard’ (e.g. previous insurance, loss and claims, financial status) *Canadian Home Assurance Co v Gauthier* 1966 SCC
* Other matters (e.g. if there is a blacksmiths shop across the street *Benson v Ottawa Agricultural Industry 1877 ONCA*) are outside of personal knowledge.

**Auto**

Two types of information must be supplied:

* Particulars about the automobile
* Information requested on the application form:
	+ Only the questions mandated by the Superintendent or Commissioner of Insurance may be asked (Ont Ins Act s227) – this prevents inappropriate/irrelevant inquiries and also prevents abuses associated with insurers asking for representational warranties

**Life and A/S**

Purchaser of insurance must disclose information about the life they are insuring as well as their own.

**Marine**

This is the only remaining type of insurance where the costumer may be bound to warranty the accuracy of facts not relevant to the risk.

#### Fully and accurately

Misrepresentation or fraudulent omission of material facts can result in voiding a contract.

A policy can be vitiated without fraud (it can be intended or unintended) but this depends on the circumstances (e.g. with marine insurance it does not matter whether it is intentional).

In most cases, innocent misrepresentation of material facts does not result in denying a claim.

**Fire:**

*Periera v Hamilton* 2005 ONCA:

* Omission only voids contract if it is fraudulent. (to pass over *Taylor v London)*
	+ This means doctrine of utmost good faith is abolished here. Must have acted with a wicked mind.
	+ Fraud is proven here when the insured knew the facts ought to have been disclosed, and knew subjectively that those facts were relevant to the insurance. *Taylor v London Insurance Corp* 1935 SCC
* Misrepresentation = voids regardless of intent. (to represent imperfectly *Taylor v London*)

**Auto**

Both misrepresentation and omission must be knowingly done, aka “deliberate” *Wilson v Allstate* ONSCJ2000

* An insurer may reject a claim on the basis of a statement attributed to the insured on if it is:
	+ Signed on the application form
		- An agent can sign for the customer Ont In Act s232(1) (although agents must not be automobiles dealers, financiers of automobiles, or insurance agents Ont In Act s231). If one of these professionals acts as an agent, that has no bearing on the fact that the insurer may deny the claim it is still “legally” signed for insurance purposes. (*Boutilier v Traders General Insurance Co* 1969 NSCA)–
			* However, technically that professional has committed a quasi-criminal act against the customer.
	+ Otherwise proven by the insurer to have been made by the insured.

**Life and Sickness/Accident**

Misstatement of age doesn’t not nullify the contract.

* For life: the benefits payable will be adjusted (in keeping with premiums paid also) Ont Ins. Act s186
* For S/A: Either the benefits can be adjusted or the premiums can be adjusted. Ont Ins Act 312
	+ In group insurance contracts then the misstatement of age is governed by the contract s312(2)

A customer’s failure to comply with the duty to disclose does not excuse the insurer of all obligations. An insured claiming under Direct Compensation provisions is essentially the same as a third party and not subject to the rules relating to disclosure. *Siena-Foods Ltd. V Old Republic Ins Co* 2012

Proving Fraud: Higher than balance of probabilities (pretty sure of intent). But still not beyond a reasonable doubt. There are consequences for alleging fraud and not proving it.

If Fraud 🡪 contract is void (not just voidable).

* This is because other things may go wrong in the future as well. Protects the insurer from other potential claims for losses that have already arisen but are ***unknown***.
* If it was just voidable then the insured could just argue that the particular fact was not relevant to the claim at hand.

### If not done, the entire contract is void

Consequences of information that is not

Void vs voidable. What is the difference and why there is a difference?

Void = never existed and cannot be enforced at any time (at least with respect to claims which the non-disclosure/misrepresentation relates)

Voidable = remains effective until the contract or obligation is revoked.

**Fire:** Contract becomes void (in so far as it covers the property to which the non-disclosure or misrepresentation relates. *Gore District Mutual Fire Insurance Co v Samo*  1878 SCC

**Auto**: A claim is invalid.

**Life and S/A**

Nullification can occur within 2 years from when the contract came into effect - for misrepresentation or omission. If there was fraud then there is no time limit. Ont In Act Ss184(2)

* Fraud is when the customer knows that the info is false or incomplete and that the insurer will act on it as presented, or *is reckless* in that regard.
* For group insurance, coverage can only be terminated for the person guilty of misstatement or omission Ont Ins Act s184(3); 308(3)
* If insurer knows about non-disclosure and does nothing about it, it cannot raise the issue later to its advantage. (principles of waiver and estoppel, chapter 12)

Contract is void regardless of intentions of the insured, but the insured has satisfied their obligation if they provide enough facts to alert the insurer to a situation in general terms. *Central Native Fisherman’s Cooperative v Commonwealth Insurance* Co 1979 BCSC

* There is no obligation to disclose facts the insurer ought to know (Marine Insurance Act <federal> s 21(5) or Ont Marine Ins Act 19(3)(b)) including local customs and usages *Spooner v Western Assurance Co* 1876 Ont HC

Contract is void if a misrepresentation relating to expectations or belief (not fact) can give the insurer the right to repudiate the contract if it is made in bad faith.

## Material Changes

Contracts often require customers to inform the insurer about material changes to risk as they arise. *Pagliaroli v Industrial Alliance Insurance* 2014 ONCA These are mandatory statutory conditions for life, fire, and auto insurance (statutory provision 3)

### Auto

* Material changes specifically include: changes in insurable interest by sale reassignment (but not through succession, death or bankruptcy proceedings). *Hood v Home Insurance* 1964 BCSC
	+ For insurance against loss or damage to the vehicale, a new moertgage, lien or other encumbrance affecting the auto, AND any other insurance policy on the auto, after the application is also deemed material, even if that information is not requested in the application itself.
* Other material changes: physical modifications putting the vehicle into a higher premium, significant change in use. However, mere temporary use by another driver or change of address is not a material change.
* Any change that a reasonable insured (*Algravio v Allstate Insurance Co* 2010 ONCA) things would influence a prudent insurer in accepting risk or setting the premium is a material change.
* When an automobile contract is renewed and premiums are changed, the insurer can get updated information by having a new application completed. Failure to seek fresh information amounts to a waiver of the right to the information. *Pengelly v British Epire Assurance Co* 1973 Sask. QB
* Terms of a policy may impact the obligation to disclose: e.g. if it says “within 14 days” of the change, then not disclosing within 14 days does not prejudice the insured and loss occurring within that period is covered. *Hunter Estate v Thompson* 2002 ONCA

### Fire

See statutory provision 4: where a material change is not made known then the insurer may cancel the contract of change the premium.

* Physical changes must result in an increase in the net risk to be material *Date v Gore* 1864 UCCP CA
* The change must be within knowledge and control of the insured *Scott v Canadian Mercantile Insurance Co 1965 ONHC* : in this case a chicken coop leaning in on itself before blowing over in a windstorm was not within the control of the insured.
* Even if the change is rectified and original conditions restored, the statutory condition applies.
* Changes to moral hazard is not material, moral hazard can only be inquired about at the time the contract is formed. (Moral hazard are concerned with likelihood that the costumer will fabricate a claim or otherwise act dishonestly while dealing with the insurer).
	+ In fact, only physical risk matters – changes like title to the property do not matter *Downing v Home Insurance Co* NBCA 1934
* The exception to applying condition 4: *Unless the outcome is unjust or unreasonable. Marche v Halifax Insurance Co* 2005 SCC

### Mutual Life Ins. v. Ontario Metal Products [1925] SCC 344 – test for materiality

**Facts**: Man forgot to include receiveing injections from a doctor which were aimed to increase his mood because he worked long days and was tired. He later died of cancer which was a superviening illness.

**Issue**: Was this material and sufficient to avoid a life insurance policy? If something merely causes a delay (for investigation purposes) in the insurer’s decision to enter into an insurance contract, is that information material?

**Held**: The injections were treatment for a trivial illness and not material to the contract.

**Ratio**: The test for materiality is that: if the matter concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influence a *reasonable insurer* to decline the risk or to have stipulated for a higher premium. Merely causing a reasonable insurer to delay in entering a contract is insufficient.

### Cases:

Carter v. Bohem (1776) 3 Burr 1905 🡪 See above re Utmost Good Faith

Coronation Insurance v. Taku Air [1991] 3 SCR 622 🡪 See above re Utmost Good Faith

Mutual Life Ins. v. Ontario Metal Products [1925] AC 344 🡪 See above re Material Changes

### Statutes

#### Insurance Act ss.

#### Insurance Contract Legislation

#####  124 - Requirement for all terms to be set out in policy; relevance of proposal, etc.

Terms, etc., of contracts invalid unless set out in full

**124** (1)  All the terms and conditions of the contract of insurance shall be set out in full in the policy or by writing securely attached to it when issued, and, unless so set out, no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect is valid or admissible in evidence to the prejudice of the insured or beneficiary. R.S.O. 1990, c. I.8, s. 124 (1).

Exception

(2)  Subsection (1) does not apply to an alteration or modification of the contract agreed upon in writing by the insurer and the insured after the issue of the policy. R.S.O. 1990, c. I.8, s. 124 (2).

Contents of renewal receipt

(3)  Whether the contract does or does not provide for its renewal, but it is renewed by a renewal receipt, it is a sufficient compliance with subsection (1) if the terms and conditions of the contract are set out as provided by that subsection and the renewal receipt refers to the contract by its number or date. R.S.O. 1990, c. I.8, s. 124 (3).

What regard to be given to proposal

(4)  The proposal or application of the insured shall not as against the insured be deemed a part of or be considered with the contract of insurance except in so far as the court determines that it contains a material misrepresentation by which the insurer was induced to enter into the contract. R.S.O. 1990, c. I.8, s. 124 (4).

Contract not to be invalidated by erroneous statement in application unless material

(5)  No contract of insurance shall contain or have endorsed upon it, or be made subject to, any term, condition, stipulation, warranty or proviso providing that such contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into of the contract by the insurer, unless such term, condition, stipulation, warranty or proviso is and is expressed to be limited to cases in which such statement is material to the contract, and no contract shall be avoided by reason of the inaccuracy of any such statement unless it is material to the contract. R.S.O. 1990, c. I.8, s. 124 (5).

Materiality, how decided

(6)  The question of materiality in a contract of insurance is a question of fact for the jury, or for the court if there is no jury, and no admission, term, condition, stipulation, warranty or proviso to the contrary contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto, has any force or validity. R.S.O. 1990, c. I.8, s. 124 (6).

Application

(7)  This section does not apply to,

 (a) contracts of automobile insurance; or

 (b) contracts of insurance to which Part IV applies. 2002, c. 18, Sched. H, s. 4 (17).

**Section Amendments with date in force (d/m/y)**

[2002, c. 18, Sched. H, s. 4 (17)](http://www.ontario.ca/laws/statute/S02018#schedhs4s17) - 30/04/2007

#### Discrimination Legislation

##### 140, - No racial or religious discrimination permissible

**140** Any licensed insurer that discriminates unfairly between risks in Ontario because of the race or religion of the insured is guilty of an offence. R.S.O. 1990, c. I.8, s. 140.

#### Fire Insurance Legislation

##### 148 - Statutory conditions (they follow this section)

**148** (1)  The conditions set forth in this section shall be deemed to be part of every contract in force in Ontario and shall be printed in English or French in every policy with the heading “Statutory Conditions” or “Conditions légales”, as may be appropriate, and no variation or omission of or addition to any statutory condition is binding on the insured.

Definition

(2)  In this section,

“policy” does not include interim receipts or binders.

#### Auto Insurance Legislation

##### 227 - Approval of forms (for auto insurance)

**227** (1)  An insurer shall not use a form of any of the following documents in respect of automobile insurance unless the form has been approved by the Superintendent:

 1. An application for insurance.

 2. A policy, endorsement or renewal.

 3. A claims form.

 4. A continuation certificate. 1996, c. 21, s. 17; 1997, c. 28, s. 111.

Application for insurance

(1.1)  Paragraph 1 of subsection (1) does not apply if, in accordance with the regulations, the insurer uses a form of application for insurance that is prescribed by the regulations. 1996, c. 21, s. 17.

Approval of policies in special cases

(2)  Where, in the opinion of the Superintendent, any provision of this Part, including any statutory condition, is wholly or partly inappropriate to the requirements of a contract or is inapplicable by reason of the requirements of any Act, he or she may approve a form of policy, or part thereof, or endorsement evidencing a contract sufficient or appropriate to insure the risks required or proposed to be insured, and the contract evidenced by the policy or endorsement in the form so approved is effective and binding according to its terms even if those terms are inconsistent with, vary, omit or add to any provision or condition of this Part. R.S.O. 1990, c. I.8, s. 227 (2); 1997, c. 28, s. 111.

Approval of extensions

(3)  The Superintendent may, if he or she considers it to be in the public interest, approve a form of motor vehicle liability policy or endorsement thereto that extends the insurance beyond that prescribed in this Part. R.S.O. 1990, c. I.8, s. 227 (3); 1997, c. 28, s. 111.

Conditions of approval of extension

(4)  The Superintendent, in granting an approval under subsection (3), may require the insurer to charge an additional premium for the extension and to state that fact in the policy or in any endorsement. R.S.O. 1990, c. I.8, s. 227 (4); 1997, c. 28, s. 111.

Standard policies

(5)  The Superintendent may approve the form of standard policies containing insuring agreements and provisions in conformity with this Part for use by insurers in general. 1993, c. 10, s. 14; 1997, c. 28, s. 111.

Publication

(6)  If the Superintendent approves a form of standard policy, the Superintendent shall cause a copy of the form to be published in The Ontario Gazette, but it is not necessary to publish endorsement forms approved for use with the standard policy. 1993, c. 10, s. 14; 1997, c. 28, s. 111.

Revocation of approval

(7)  The Superintendent may revoke an approval given under this section, and, upon notification of the revocation in writing, no insurer shall thereafter use or deliver a form that contravenes the notification. R.S.O. 1990, c. I.8, s. 227 (7); 1997, c. 28, s. 111.

Reason for decision

(8)  The Superintendent shall, on request of any interested insurer, specify in writing his or her reasons for granting, refusing or revoking an approval of a form. R.S.O. 1990, c. I.8, s. 227 (8); 1997, c. 28, s. 111.

**Section Amendments with date in force (d/m/y)**

1993, c. 10, s. 14 - 01/01/1994; 1996, c. 21, s. 17 - 01/11/1996; 1997, c. 28, s. 111 - 01/07/1998

[2018, c. 8, Sched. 13, s. 22](http://www.ontario.ca/laws/statute/S18008#sched13s22) - not in force

##### 228 – Prescribed Application Forms

Application form

**228** Where so required by the regulations, no insurer shall use a form of application other than a prescribed form. R.S.O. 1990, c. I.8, s. 228.

##### 229 Information for applicants, etc. (supplying prescribed information is mandatory and becomes part of the application)

**229** (1)  An insurer or broker shall supply at such times as may be prescribed such information as may be prescribed to applicants for automobile insurance and to named insureds under contracts. R.S.O. 1990, c. I.8, s. 229 (1); 1993, c. 10, s. 15 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 229 (1) of the Act is amended by striking out “prescribed” wherever it appears and substituting in each case “prescribed by the Authority rules”. (See: 2017, c. 34, Sched. 21, s. 17)

Information deemed to be part of application

(2)  Information supplied under subsection (1) by an insurer or by a broker on behalf of an insurer to an applicant for automobile insurance shall be deemed to be a part of the application. R.S.O. 1990, c. I.8, s. 229 (2); 1993, c. 10, s. 15 (2).

**Section Amendments with date in force (d/m/y)**

1993, c. 10, s. 15 (1, 2) - 01/01/1994

[2017, c. 34, Sched. 21, s. 17](http://www.ontario.ca/laws/statute/S17034#sched21s17) - not in force

[CTS 04 SE 18 - 1](https://www.ontario.ca/laws/consolidated-statutes-change-notices)

##### 230 (Brokers must supply applicants with name of all insurers they do business with)

Information from brokers

**230** (1)  A broker shall provide to an applicant for insurance the names of all the insurers with whom the broker has an agency contract relating to automobile insurance and all information obtained by the broker relating to quotations on automobile insurance for the applicant. 1996, c. 21, s. 18.

Information from agents

(2)  An agent shall inform an applicant for automobile insurance of the insurer or the insurers within an affiliated group of insurers that the agent represents. 2002, c. 22, s. 116.

Request for written information

(3)  The broker or agent shall provide the information referred to in subsection (1) or (2) in writing if the applicant so requests. 2002, c. 22, s. 116.

**Section Amendments with date in force (d/m/y)**

1996, c. 21, s. 18 - 01/11/1996

[2002, c. 22, s. 116](http://www.ontario.ca/laws/statute/S02022#s116) - 01/10/2003

#####  232 Copy of signed application in policy

Copy of application in policy

**232** (1)  A copy of the written application, signed by the insured or the insured’s agent, or, if no signed application is made, a copy of the purported application, or a copy of such part of the application or purported application as is material to the contract, shall be embodied in, endorsed upon or attached to the policy when issued by the insurer. R.S.O. 1990, c. I.8, s. 232 (1).

Policy issued where no signed application

(2)  If no signed written application is received by the insurer prior to the issue of the policy, the insurer shall deliver or mail to the insured named in the policy, or to the agent for delivery or mailing to the insured, a form of application to be completed and signed by the insured and returned to the insurer. R.S.O. 1990, c. I.8, s. 232 (2).

Insured entitled to copy

(3)  Subject to subsection (5), the insurer shall deliver or mail to the insured named in the policy, or to the agent for delivery or mailing to the insured, the policy or a true copy thereof and every endorsement or other amendment to the contract. R.S.O. 1990, c. I.8, s. 232 (3).

Form of policy

(4)  Where a written application signed by the insured or the insured’s agent is made for a contract, the policy evidencing the contract shall be deemed to be in accordance with the application unless the insurer points out in writing to the insured named in the policy in what respect the policy differs from the application, and, in that event, the insured shall be deemed to have accepted the policy unless within one week from the receipt of the notification the insured informs the insurer in writing that the insured rejects the policy. R.S.O. 1990, c. I.8, s. 232 (4).

Certificate of policy

(5)  If an insurer adopts a standard policy approved under subsection 227 (5), it may, instead of issuing the policy, issue a certificate in a form approved by the Superintendent. 1993, c. 10, s. 16 (1); 1997, c. 28, s. 111.

Effect of certificate

(5.1)  A certificate issued under subsection (5) is of the same force and effect as if it were the standard policy, subject to the limits and coverages shown by the insurer on the certificate and any endorsements issued with or subsequent to the certificate. 1993, c. 10, s. 16 (1).

Copy of policy

(5.2)  At the request of an insured to whom a certificate has been issued under subsection (5), the insurer shall provide a copy of the standard policy approved by the Superintendent. 1993, c. 10, s. 16 (1); 1997, c. 28, s. 111.

Application

(6)  Where a certificate is issued under subsection (5), subsection (8) of this section and subsections 261 (2) and 263 (5.3) apply with necessary modifications. R.S.O. 1990, c. I.8, s. 232 (6); 1993, c. 10, s. 16 (2).

Proof of terms of policy

(7)  Where an insurer issues a certificate under subsection (5), proof of the terms of the policy may be given by production of a copy of The Ontario Gazette containing the form of standard policy approved by the Superintendent. R.S.O. 1990, c. I.8, s. 232 (7); 1993, c. 10, s. 16 (3); 1997, c. 28, s. 111.

Endorsement on forms

(8)  Upon every application form and policy, there shall be printed or stamped in conspicuous type a copy of subsection 233 (1). R.S.O. 1990, c. I.8, s. 232 (8).

**Section Amendments with date in force (d/m/y)**

1993, c. 10, s. 16 (1-3) - 01/01/1994; 1997, c. 28, s. 111 - 01/07/1998

[2018, c. 8, Sched. 13, s. 22](http://www.ontario.ca/laws/statute/S18008#sched13s22) - not in force

Inspection requirements

**232.1**  Before issuing a policy in respect of an automobile, an insurer shall comply with the inspection requirements prescribed by the regulations. 1996, c. 21, s. 19.

**Section Amendments with date in force (d/m/y)**

1996, c. 21, s. 19 - 01/11/1996

##### 233 - Misrepresentation or violation of conditions renders claim invalid (but statutory accident benefits still available)

**233** (1)  Where,

 (a) an applicant for a contract,

 (i) gives false particulars of the described automobile to be insured to the prejudice of the insurer, or

 (ii) knowingly misrepresents or fails to disclose in the application any fact required to be stated therein;

 (b) the insured contravenes a term of the contract or commits a fraud; or

 (c) the insured wilfully makes a false statement in respect of a claim under the contract,

a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited. R.S.O. 1990, c. I.8, s. 233 (1).

Statutory accident benefits protected

(2)  Subsection (1) does not invalidate such statutory accident benefits as are set out in the Statutory Accident Benefits Schedule. R.S.O. 1990, c. I.8, s. 233 (2); 1993, c. 10, s. 1.

Use of application as defence

(3)  No statement of the applicant shall be used in defence of a claim under the contract unless it is contained in the signed written application therefor or, where no signed written application is made, in the purported application, or part thereof, that is embodied in, endorsed upon or attached to the policy.

Idem

(4)  No statement contained in a purported copy of the application, or part thereof, other than a statement describing the risk and the extent of the insurance, shall be used in defence of a claim under the contract unless the insurer proves that the applicant made the statement attributed to the applicant in the purported application, or part thereof. R.S.O. 1990, c. I.8, s. 233 (3, 4).

**Section Amendments with date in force (d/m/y)**

1993, c. 10, s. 1 - 01/01/1994

##### 234 - Statutory conditions (included in every applicable policy without variation)

**234** (1)  The conditions prescribed by the regulations made under paragraph 15.1 of subsection 121 (1) are statutory conditions and shall be deemed to be part of every contract to which they apply and shall be printed in English or French in every policy to which they apply with the heading “Statutory Conditions” or “Conditions légales”, as may be appropriate.

Variation

(2)  No variation or omission of or addition to a statutory condition is binding on the insured.

Exceptions

(3)  Except as otherwise provided in the contract, the statutory conditions referred to in subsection (1) do not apply to the insurance required by section 265 or 268.

Definition

(4)  In subsection (1),

“policy” does not include an interim receipt or binder. 1993, c. 10, s. 17.

**Section Amendments with date in force (d/m/y)**

1993, c. 10, s. 17 - 01/01/1994

#### O. Reg. 777/93 – Statutory Conditions for Automobile Insurance

**1. Material change in risk**

(1) The insured named in this contract shall promptly notify the insurer or its local agent in writing of any change in the risk material to the contract and within the insured’s knowledge.

(2) Without restricting the generality of the foregoing, the words,

“change in the risk material to the contract” include:

(a) any change in the insurable interest of the insured named in this contract in the automobile by sale, assignment or otherwise, except through change of title by succession, death or proceedings under the *Bankruptcy and Insolvency Act* (Canada);

and, in respect of insurance against loss of or damage to the automobile,

(b) any mortgage, lien or encumbrance affecting the automobile after the application for this contract;

(c) any other insurance of the same interest, whether valid or not, covering loss or damage insured by this contract or any portion thereof.

**2. Incorrect classification**

(1) Where the insured has been incorrectly classified under the risk classification system used by the insurer or under the risk classification system that the insurer is required by law to use, the insurer shall make the necessary correction.

**Refund of premium overpayment**

(2) Where a correction is made under subcondition (1) of this condition, the insurer shall refund to the insured the amount of any premium overpayment together with interest thereon for the period that the incorrect classification was in effect at the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the incorrect classification was first made, rounded to the next highest whole number if the bank rate includes a fraction.

**Definition**

(3) In subcondition (2) of this condition,

“bank rate” means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short term advances to the banks listed in Schedule I to the *Bank Act* (Canada).

**Additional premium**

(4) Where a correction is made under subcondition (1) of this condition within sixty days after this contract takes effect, the insurer may require the insured to pay any additional premium resulting from the correction, without interest.

**3. Monthly payments**

Unless otherwise provided by the regulations under the *Insurance Act*, the insured may pay the premium, without penalty, in equal monthly payments totalling the amount of the premium. The insurer may charge interest not exceeding the rate set out in the regulations.

**4. Authority to drive**

(1) The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it.

**Prohibited use**

(2) The insured shall not use or permit the use of the automobile in a race or speed test or for any illicit or prohibited trade or transportation.

**5. Requirements where loss or damage to persons or property**

(1) The insured shall,

(a) give to the insurer written notice, with all available particulars, of any accident involving loss or damage to persons or property and of any claim made on account of the incident;

(b) verify by statutory declaration, if required by the insurer, that the claim arose out of the use or operation of the automobile and that the person operating or responsible for the operation of the automobile at the time of the accident is a person insured under this contract; and

(c) forward immediately to the insurer every letter, document, advice or statement of claim received by the insured from or on behalf of the claimant.

(2) The insured shall not,

(a) voluntarily assume any liability or settle any claim except at the insured’s own cost; or

(b) interfere in any negotiations for settlement or in any legal proceeding.

(3) The insured shall, whenever requested by the insurer, aid in securing information and evidence and the attendance of any witness and shall co-operate with the insurer, except in a pecuniary way, in the defence of any action or proceeding or in the prosecution of any appeal.

**6. Requirements where loss or damage to automobile**

(1) Where loss of or damage to the automobile occurs, the insured shall, if the loss or damage is covered by this contract,

(a) give notice thereof in writing to the insurer with the fullest information obtainable at the time;

(b) at the expense of the insurer, and as far as reasonably possible, protect the automobile from further loss or damage; and

(c) deliver to the insurer within ninety days after the date of the loss or damage a statutory declaration stating, to the best of the insured’s knowledge and belief, the place, time, cause and amount of the loss or damage, the interest of the insured and of all others therein, the encumbrances thereon, all other insurance, whether valid or not, covering the automobile and that the loss or damage did not occur directly or indirectly through any wilful act or neglect of the insured.

(2) Any further loss or damage accruing to the automobile directly or indirectly from a failure to protect it as required under subcondition (1) of this condition is not recoverable under this contract.

(3) No repairs, other than those that are immediately necessary for the protection of the automobile from further loss or damage, shall be undertaken and no physical evidence of the loss or damage shall be removed,

(a) without the written consent of the insurer; or

(b) until the insurer has had a reasonable time to make the examination for which provision is made in statutory condition 8.

**Examination of insured**

(4) The insured shall submit to examination under oath, and shall produce for examination at such reasonable place and time as is designated by the insurer or its representative all documents in the insured’s possession or control that relate to the matters in question, and the insured shall permit extracts and copies thereof to be made.

**Insurer liable for cash value of automobile**

(5) The insurer shall not be liable for more than the actual cash value of the automobile at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to that actual cash value with proper deduction for depreciation, however caused, and shall not exceed the amount that it would cost to repair or replace the automobile, or any part thereof, with material of like kind and quality, but, if any part of the automobile is obsolete and out of stock, the liability of the insurer in respect thereof shall be limited to the value of that part at the time of loss or damage, not exceeding the maker’s latest list price.

**Repairing, rebuilding or replacing property damaged or lost**

(6) The insurer may repair, rebuild or replace the property that is damaged or lost, instead of making the payment referred to in statutory condition 9, if the insurer gives written notice of its intention to do so within seven days after receipt of the proof of loss.

**Time for repairs**

(6.1) The insurer shall carry out the repair, rebuilding or replacement referred to in subcondition (6),

(a) within a reasonable period of time after giving the notice required under subcondition (6), if an appraisal referred to in subcondition (2.1) of statutory condition 9 is not carried out in respect of the claim; or

(b) within a reasonable period of time after the insurer receives the appraisers’ determination of the matters in disagreement, if an appraisal referred to in subcondition (2.1) of statutory condition 9 is carried out in respect of the claim.

**New or aftermarket parts**

(6.2) For the purposes of subcondition (6), the insurer may repair, rebuild or replace the property with new parts provided by the original equipment manufacturer or with non-original or rebuilt parts of like kind and quality to the property that was damaged or lost.

**No abandonment; salvage**

(7) There shall be no abandonment of the automobile to the insurer without the insurer’s consent. If the insurer exercises the option to replace the automobile or pays the actual cash value of the automobile, the salvage, if any, shall vest in the insurer.

**7. Time limit**

The notice required by subcondition (1) of statutory condition 5 and subcondition (1) of statutory condition 6 shall be given to the insurer within seven days of the incident but if the insured is unable because of incapacity to give the notice within seven days of the incident, the insured shall comply as soon as possible thereafter.

**8. Inspection of automobile**

The insured shall permit the insurer at all reasonable times to inspect the automobile and its equipment.

**9. Time and manner of payment of insurance money**

(1) If the insurer has not chosen to repair, rebuild or replace the property that is damaged or lost, the insurer shall pay the insurance money for which it is liable under the contract,

(a) within 60 days after the insurer receives the proof of loss, if no appraisal referred to in subcondition (2.1) is carried out in respect of the claim; or

(b) within 15 days after the insurer receives the appraisers’ determination of the matters in disagreement, if an appraisal referred to in subcondition (2.1) is carried out in respect of the claim.

**Reasons for refusal**

(2) If the insurer refuses to pay a claim, it shall promptly inform the insured in writing of the reasons the insurer claims it is not liable to pay.

**Resolution of disagreement by appraisal under s. 128 of the Act**

(2.1) Section 128 of the Act applies to this contract if,

(a) the insurer has received a proof of loss from the insured in respect of property that is lost or damaged;

(b) the insured and the insurer disagree on,

(i) the nature and extent of repairs, rebuilding and replacements required or their adequacy, or

(ii) the amount payable in respect of the loss or damage; and

(c) a request in writing that an appraisal be carried out in accordance with section 128 of the Act,

(i) is made by the insured, or

(ii) is made by the insurer and the insured agrees.

**When action may be brought**

(3) The insured shall not bring an action to recover the amount of a claim under this contract unless the requirements of statutory conditions 5 and 6 are complied with.

**Limitations corporations of actions**

(4) Every action or proceeding against the insurer under this contract in respect of loss or damage to the automobile or its contents shall be commenced within one year next after the happening of the loss and not afterwards, and in respect of loss or damage to persons or other property shall be commenced within two years next after the cause of action arose and not afterwards.

**10. Who may give notice and proofs of claim**

Notice of claim may be given and proofs of claim may be made by the agent of the insured in case of absence or inability of the insured to give the notice or make the proof, such absence or inability being satisfactorily accounted for or, in the like case or if the insured refuses to do so, by a person to whom any part of the insurance money is payable.

**Deductible amounts**

10.1(1) Despite anything in this contract,

(a) the insurer shall be liable only for amounts in excess of the applicable deductible amount, if any, mentioned in this contract; and

(b) any provision in this contract relating to an obligation of the insurer to pay an amount or to repair, rebuild or replace property that is damaged or lost shall be satisfied by paying the amount determined by deducting any applicable deductible amount from,

(i) the amount the insured would otherwise be entitled to recover, or

(ii) the cost of repairing, rebuilding or replacing the property.

**Deemed deductible amount**

(2) For the purposes of subcondition (1), an amount that an insurer is not liable to pay by reason of subsection 261 (1) or (1.1) or 263 (5.1) or (5.2.1) of the *Insurance Act*shall be deemed to be a deductible amount under this contract.

**11. Termination**

(1) Subject to section 12 of the *Compulsory Automobile Insurance Act* and sections 237 and 238 of the*Insurance Act*, the insurer may, by registered mail or personal delivery, give to the insured a notice of termination of the contract.

(1.1) If the insurer gives a notice of termination under subcondition (1) for a reason other than non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract or if the insurer gives a notice of termination in accordance with subcondition (1.7), the notice of termination shall terminate the contract no earlier than,

(a) the 15th day after the insurer gives the notice, if the insurer gives the notice by registered mail; or

(b) the fifth day after the insurer gives the notice, if the insurer gives the notice by personal delivery.

(1.2) Subject to subcondition (1.7), if the insurer gives a notice of termination under subcondition (1) for the reason of non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract, the notice of termination shall comply with subcondition (1.3) and shall specify a day for the termination of the contract that is no earlier than,

(a) the 30th day after the insurer gives the notice, if the insurer gives the notice by registered mail; or

(b) the 10th day after the insurer gives the notice, if the insurer gives the notice by personal delivery.

(1.3) A notice of termination mentioned in subcondition (1.2) shall,

(a) state the amount due under the contract as at the date of the notice; and

(b) state that the contract will terminate at 12:01 a.m. of the day specified for termination unless the full amount mentioned in clause (a), together with an administration fee not exceeding the amount approved under Part XV of the Act, payable in cash or by money order or certified cheque payable to the order of the insurer or as the notice otherwise directs, is delivered to the address in Ontario that the notice specifies, not later than 12:00 noon on the business day before the day specified for termination.

(1.4) For the purposes of clause (a) of subcondition (1.3), if the insured and the insurer have previously agreed, in accordance with the regulations, that the insured is permitted to pay the premium under the contract in instalments, the amount due under the contract as at the date of the notice shall not exceed the amount of the instalments due but unpaid as at the date of the notice.

(1.5) If the full amount payable under clause (b) of subcondition (1.3) is not paid by the time and in the manner that the notice specifies, the contract shall be deemed to be terminated, without any further action being required on the part of the insurer, as of 12:01 a.m. of the day specified for termination.

(1.6) If the full amount payable under clause (b) of subcondition (1.3) is paid by the time and in the manner that the notice specifies, the contract shall not terminate on the day specified for termination and the notice shall have no further force or effect.

(1.7) If, on two previous occasions in respect of the contract, the insurer has given a notice of termination mentioned in subcondition (1.2) and the full amount payable under clause (b) of subcondition (1.3) has been paid by the time and in the manner that the notice specifies and if a non-payment again occurs of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract, the insurer may, by registered mail or personal delivery, give to the insured a notice of termination of the contract and subcondition (1.1) applies to the notice, instead of subcondition (1.2).

(2) This contract may be terminated by the insured at any time on request.

(3) Where this contract is terminated by the insurer,

(a) the insurer shall refund the excess of premium actually paid by the insured over the proportionate premium for the expired time, but in no event shall the proportionate premium for the expired time be deemed to be less than any minimum retained premium specified;

(b) if the termination is for a reason other than non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract or if the insurer gives a notice of termination in accordance with subcondition (1.7), the refund shall accompany the notice, unless the premium is subject to adjustment or determination as to the amount, in which case, the refund shall be made as soon as practicable; and

(c) if the termination is for the reason of non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract and if subcondition (1.7) does not apply to the termination, the refund shall be made as soon as practicable after the effective date of the termination.

(4) Where this contract is terminated by the insured, the insurer shall refund as soon as practicable the excess of premium actually paid by the insured over the short rate premium for the expired time, but in no event shall the short rate premium for the expired time be deemed to be less than any minimum retained premium specified.

(5) For the purpose of clause (a) of subconditions (1.1) and (1.2), the day on which the insurer gives the notice by registered mail shall be deemed to be the day after the day of mailing.

(6) All references in this condition to times of day shall be interpreted to mean the time of day in the local time of the place of residence of the insured.

**12. Notice**

Any written notice to the insurer may be delivered at, or sent by registered mail to, the chief agency or head office of the insurer in the Province.  Written notice may be given to the insured named in this contract by letter personally delivered to the insured or by registered mail addressed to the insured at the insured’s latest post office address as notified to the insurer. In this condition, the expression,

“registered” means registered in or outside Canada.

**13. Statutory accident benefits protected**

Despite a failure to comply with these statutory conditions, a person is entitled to such benefits as are set out in the *Statutory Accident Benefits Schedule*.

#### Accident and Sickness Insurance Legislation

##### 300 – Statutory Conditions Applicable to All contracts (Except group or creditor’s insurance)

Statutory conditions

**300** Subject to section 301, the conditions set out in this section shall be deemed to be part of every contract other than a contract of group insurance or of creditor’s group insurance, and shall be printed in English or French in or attached to the policy forming part of such contract with the heading “Statutory Conditions” or “Conditions légales”, as may be appropriate, and no variation or omission of or addition to any statutory condition not authorized by section 301is binding on the insured.

STATUTORY CONDITIONS

The Contract

 **1.**  (1)  The application, this policy, any document attached to this policy when issued, and any amendment to the contract agreed upon in writing after the policy is issued, constitute the entire contract, and no agent has authority to change the contract or waive any of its provisions.

 (2)  Repealed: 2012, c. 8, Sched. 23, s. 42 (2).

Copy of Application

 (3)  The insurer shall, upon request, furnish to the insured or to a claimant under the contract a copy of the application.

Material Facts

 **2.**  No statement made by the insured or person insured at the time of application for this contract shall be used in defence of a claim under or to avoid this contract unless it is contained in the application or any other written statements or answers furnished as evidence of insurability.

Changes in Occupation

 **3.**  (1)  If after the contract is issued the person insured engages for compensation in an occupation that is classified by the insurer as more hazardous than that stated in this contract, the liability under this contract is limited to the amount that the premium paid would have purchased for the more hazardous occupation according to the limits, classification of risks and premium rates in use by the insurer at the time the person insured engaged in the more hazardous occupation.

 (2)  If the person insured changes his or her occupation from that stated in this contract to an occupation classified by the insurer as less hazardous and the insurer is so advised in writing, the insurer shall either,

 (a) reduce the premium rate; or

 (b) issue a policy for the unexpired term of this contract at the lower rate of premium applicable to the less hazardous occupation,

according to the limits, classification of risks, and premium rates used by the insurer at the date of receipt of advice of the change in occupation, and shall refund to the insured the amount by which the unearned premium on this contract exceeds the premium at the lower rate for the unexpired term.

Relation of Earnings to Insurance

 **4.**(1)  Where the benefits for loss of time payable hereunder, either alone or together with benefits for loss of time under another contract, exceed the money value of the time of the person insured, the insurer is liable only for that proportion of the benefits for loss of time stated in this policy that the money value of the time of the person insured bears to the aggregate of the benefits for loss of time payable under all such contracts and the excess premium, if any, paid by the insured shall be returned to the insured by the insurer.

 (2)  The other contract referred to in subcondition (1) may include,

 (a) a contract of group accident and sickness insurance; or

 (b) a life insurance contract whereby the insurer undertakes to pay insurance money or to provide other benefits in the event that the person whose life is insured becomes disabled as a result of bodily injury or disease.

Termination by Insured

 **5.**The insured may at any time request that this contract be terminated and the insurer shall, as soon as practicable after the insured makes the request, refund the amount of premium actually paid by the insured that is in excess of the short rate premium calculated to the date of the request according to the table in use by the insurer at the time of the termination.

Termination by Insurer

 **6.**  (1)  The insurer may terminate this contract at any time by giving written notice of termination to the insured and by refunding concurrently with the giving of notice the amount of premium paid in excess of the proportional premium for the expired time.

 (2)  The notice of termination may be delivered to the insured, or it may be sent by registered mail to the latest address of the insured on the records of the insurer.

 (3)  Where the notice of termination is delivered to the insured, five days notice of termination shall be given. Where it is mailed to the insured, 15 days notice of termination shall be given, and the 15-day period begins on the day the registered letter or notification of it is delivered to the insured’s address.

Notice and Proof of Claim

 **7.**  (1)  The insured or a person insured, or a beneficiary entitled to make a claim, or the agent of any of them, shall,

 (a) give written notice of claim to the insurer,

 (i) by delivery thereof, or by sending it by registered mail to the head office or chief agency of the insurer in the Province, or

 (ii) by delivery thereof to an authorized agent of the insurer in the Province,

not later than thirty days from the date a claim arises under the contract on account of an accident, sickness or disability;

 (b) within ninety days from the date a claim arises under the contract on account of an accident, sickness or disability, furnish to the insurer such proof as is reasonably possible in the circumstances of the happening of the accident or the commencement of the sickness or disability, and the loss occasioned thereby, the right of the claimant to receive payment, his or her age, and the age of the beneficiary if relevant; and

 (c) if so required by the insurer, furnish a satisfactory certificate as to the cause or nature of the accident, sickness or disability for which claim may be made under the contract and as to the duration of such sickness or disability.

Failure to Give Notice or Proof

 (2)  Failure to give notice of claim or furnish proof of claim within the time prescribed by this statutory condition does not invalidate the claim if,

 (a) the notice or proof is given or furnished as soon as reasonably possible, and in no event later than one year from the date of the accident or the date a claim arises under the contract on account of sickness or disability if it is shown that it was not reasonably possible to give notice or furnish proof within the time so prescribed; or

 (b) in the case of the death of the person insured, if a declaration of presumption of death is necessary, the notice or proof is given or furnished no later than one year after the date a court makes the declaration.

Insurer to Furnish Forms for Proof of Claim

 **8.**The insurer shall furnish forms for proof of claim within fifteen days after receiving notice of claim, but where the claimant has not received the forms within that time the claimant may submit his or her proof of claim in the form of a written statement of the cause or nature of the accident, sickness or disability giving rise to the claim and of the extent of the loss.

Rights of Examination

 **9.**  As a condition precedent to recovery of insurance money under this contract,

 (a) the claimant shall afford to the insurer an opportunity to examine the person of the person insured when and so often as it reasonably requires while the claim hereunder is pending; and

 (b) in the case of death of the person insured, the insurer may require an autopsy subject to any law of the applicable jurisdiction relating to autopsies.

When Money Payable Other Than for Loss of Time

 **10.**  All money payable under this contract, other than benefits for loss of time, shall be paid by the insurer within sixty days after it has received proof of claim.

When Loss of Time Benefits Payable

 **11.**  The initial benefits for loss of time shall be paid by the insurer within thirty days after it has received proof of claim, and payment shall be made thereafter in accordance with the terms of the contract but not less frequently than once in each succeeding sixty days while the insurer remains liable for the payments if the person insured when required to do so furnishes before payment proof of continuing disability.

 **12.**  Repealed: 2002, c. 24, Sched. B, s. 39 (7).

R.S.O. 1990, c. I.8, s. 300; 2002, c. 18, Sched. H, s. 4 (29); 2002, c. 24, Sched. B, s. 39 (7); 2012, c. 8, Sched. 23, s. 42 (1, 2, 4, 5); 2013, c. 2, Sched. 8, s. 23.

**Section Amendments with date in force (d/m/y)**

[2002, c. 18, Sched. H, s. 4 (29)](http://www.ontario.ca/laws/statute/S02018#schedhs4s29) - 30/04/2007; [2002, c. 24, Sched. B, s. 39 (7)](http://www.ontario.ca/laws/statute/S02024#schedbs39s7) - 01/01/2004

[2012, c. 8, Sched. 23, s. 42 (1, 2, 4, 5)](http://www.ontario.ca/laws/statute/S12008#sched23s42s1) - 01/07/2016

[2012, c. 8, Sched. 23, s. 42 (3)](http://www.ontario.ca/laws/statute/S12008#sched23s42s3) - no effect - see [2013, c. 2, Sched. 8, s. 23 (3)](http://www.ontario.ca/laws/statute/S13002#sched8s23s3) - 01/07/2016

[2013, c. 2, Sched. 8, s. 23 (1-3)](http://www.ontario.ca/laws/statute/S13002#sched8s23s1) - 01/07/2016

##### 308 to 312 - Misrepresentation and Non-Disclosure Legislation

Duty to disclose

**308** (1)  An applicant for insurance on the person’s own behalf and on behalf of each person to be insured, and each person to be insured, shall disclose to the insurer in any application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact within the person’s knowledge that is material to the insurance and is not so disclosed by the other. R.S.O. 1990, c. I.8, s. 308 (1).

Failure to disclose, general

(2)  Subject to sections 309 and 312 and subsection (3), a failure to disclose, or a misrepresentation of, such a fact renders a contract voidable by the insurer. 2013, c. 2, Sched. 8, s. 24 (1).

Failure to disclose, application for change, etc., in contract

(3)  A failure to disclose, or a misrepresentation of, a fact referred to in subsection (1) relating to evidence of insurability with respect to the following kinds of applications renders the contract voidable by the insurer, but only in relation to the addition, increase or change applied for:

 1. For additional coverage under a contract.

 2. For an increase in insurance under a contract.

 3. For any other change to insurance after the policy is issued. 2013, c. 2, Sched. 8, s. 24 (1).

**Section Amendments with date in force (d/m/y)**

[2012, c. 8, Sched. 23, s. 49](http://www.ontario.ca/laws/statute/S12008#sched23s49) - no effect - see [2013, c. 2, Sched. 8, s. 24 (2)](http://www.ontario.ca/laws/statute/S13002#sched8s24s2) - 01/07/2016

[2013, c. 2, Sched. 8, s. 24 (1, 2)](http://www.ontario.ca/laws/statute/S13002#sched8s24s1) - 01/07/2016

Failure to disclose

**309** (1)  Subject to section 312 and subsections (2) to (4), when a contract, including renewals of the contract, or an addition, increase or change referred to in subsection 308 (3) has been **in effect for two years** with respect to a person whose life or well-being, or whose life and well-being, are insured under the contract, a failure to disclose, or a misrepresentation of, a fact required by section 308 to be disclosed in respect of that person does not, in the absence of fraud, render the contract voidable. 2012, c. 8, Sched. 23, s. 50; 2013, c. 2, Sched. 8, s. 25.

Same — group insurance or creditor’s group insurance (actually is the same!!)

(2)  In the case of a contract of group insurance or of creditor’s group insurance, a failure to disclose, or a misrepresentation of, a fact required by section 308 to be disclosed in respect of a group person insured, a person insured or a debtor insured under the contract does not render the contract voidable, but,

 (a) if the failure to disclose or misrepresentation relates to evidence of insurability specifically requested by the insurer at the time of application for the insurance in respect of the person, the insurance in respect of that person is voidable by the insurer; and

 (b) if the failure to disclose or misrepresentation relates to evidence of insurability specifically requested by the insurer at the time of application for an addition, increase or change referred to in subsection 308 (2) in respect of the person, the addition, increase or change in respect of that person is voidable by the insurer,

unless the insurance, addition, increase or change has been in effect for two years during the lifetime of that person, in which case the insurance, addition, increase or change is not, in the absence of fraud, voidable. 2012, c. 8, Sched. 23, s. 50.

Exception

(3)  Where a claim arises from a loss incurred or a disability beginning ***before*** a contract (including renewals) has been in effect for two years with respect to the person in respect of whom the claim is made, subsection (1) does not apply to that claim. 2012, c. 8, Sched. 23, s. 50.

Same!!

(4)  Where a claim arises from a loss incurred or a disability beginning before the addition, increase or change has been in effect for two years with respect to the person in respect of whom the claim is made, subsection (1) does not apply to that claim. 2012, c. 8, Sched. 23, s. 50.

**Section Amendments with date in force (d/m/y)**

[2012, c. 8, Sched. 23, s. 50](http://www.ontario.ca/laws/statute/S12008#sched23s50) - 01/07/2016

[2013, c. 2, Sched. 8, s. 25 (1, 2)](http://www.ontario.ca/laws/statute/S13002#sched8s25s1) - 01/07/2016

Application of incontestability to reinstatement (i.e. if K is reinstated, two years starts at that time)

**310** Sections 308 and 309 apply with necessary modifications to a failure at the time of reinstatement of a contract to disclose or a misrepresentation at that time, and the period of two years to which reference is made in section 309 commences to run in respect of a reinstatement from the date of reinstatement. R.S.O. 1990, c. I.8, s. 310.

Pre-existing conditions

**311** Where a contract contains a general exception or reduction with respect to pre-existing disease or physical conditions and the person insured, group person insured or debtor insured suffers or has suffered from a disease or physical condition that existed before the date the contract came into force with respect to that person ***and*** the disease or physical condition is not by name or specific description excluded from the insurance respecting that person,

 (a) the prior existence of the disease or physical condition is not, except in the case of fraud, available as a defence against liability in whole or in part for a loss incurred or a disability beginning after the contract, including renewals thereof, has been in force continuously for two years immediately prior to the date of loss incurred or commencement of disability with respect to that person; and

 (b) the existence of the disease or physical condition is not, except in the case of fraud, available as a defence against liability in whole or in part if the disease or physical condition was disclosed in the application for the contract. R.S.O. 1990, c. I.8, s. 311; 2012, c. 8, Sched. 23, s. 51. **(i.e. two-year bench mark is irrelevant for disclosed condition)**

**Section Amendments with date in force (d/m/y)**

[2012, c. 8, Sched. 23, s. 51](http://www.ontario.ca/laws/statute/S12008#sched23s51) - 01/07/2016

Misstatement of age

**312** (1)  Subject to subsections (2) and (3), if the age of the person insured has been misstated to the insurer then, at the option of the insurer, either,

 (a) the benefits payable under the contract shall be increased or decreased to the amount that would have been provided for the same premium at the correct age; or

 (b) the premium may be adjusted in accordance with the correct age as of the date the person insured became insured. R.S.O. 1990, c. I.8, s. 312 (1).

Misstatement of age in group insurance or creditor’s group insurance

(2)  In the case of a contract of group insurance or creditor’s group insurance, if there is a misstatement to the insurer of the age of a group person insured, person insured or debtor insured, the provisions, if any, of the contract with respect to age or misstatement of age shall apply. 2012, c. 8, Sched. 23, s. 52.

True age governs

(3)  Where the age of a person affects the commencement or termination of the insurance, the true age governs. R.S.O. 1990, c. I.8, s. 312 (3). (**i.e. age last birthday**)

**Section Amendments with date in force (d/m/y)**

[2012, c. 8, Sched. 23, s. 52](http://www.ontario.ca/laws/statute/S12008#sched23s52) - 01/07/2016

#### Ontario Human Rights Code, ss.

##### 1 - Services

**1**Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.  R.S.O. 1990, c. H.19, s. 1; 1999, c. 6, s. 28 (1); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (1); 2012, c. 7, s. 1.

##### 3 - Contracts

**3**Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.  R.S.O. 1990, c. H.19, s. 3; 1999, c. 6, s. 28 (4); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (4); 2012, c. 7, s. 3.

##### 22 - Restrictions for insurance contracts, etc.

**22**The right under sections 1 and 3 to equal treatment with respect to services and to contract on equal terms, without discrimination because of age, sex, marital status, family status or disability, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and *bona fide* grounds because of age, sex, marital status, family status or disability.  R.S.O. 1990, c. H.19, s. 22; 1999, c. 6, s. 28 (10); 2001, c. 32, s. 27 (5); 2005, c. 5, s. 32 (13).

# Topic 3 – Agency and Brokers Date: February 11, 2019

A lot of insurance is purchased through a broker – if they failed to collect info accurately then everybody gets sued! But more often than not insurance arises through an intermediary.

Some companies have captive broker structures.

When is the agent the agent of the insured, when are they the agent of the insurer?

## Off Syllabus Background Info

Rant about Spurgeon being older than email

Each insurance contract reflects the context in which it exists. Walk through each type of contract and context. For example:

* Insurance has a role in mortgage transactions, the applicant’s income stream can be supplemented with accident and sickness benefits, and life insurance.
* In businesses such as partnerships, life insurance can be taken out on partners to insure one person’s death doesn’t bankrupt the business.

Accident and Sickness

A policy that protects you and gives you money in the event you have an accident and become injured or sick.

* Some policies include non-indemnity entitlements to a set amount of money for certain illnesses (e.g. 50k if you get cancer, or 100k if you have a stroke).
	+ But sometimes these policies have fine print that qualify what it means to get a condition (e.g. is it transient or lasting)?
	+ Understand how policy defines sickness or accident.
		- E.g. does an accident have to be entirely fortuitous. A person goes out, has unprotected sex, and gets a particular strain of Herpes causing paralysis. Was it an accident that they got that particular strain of herpes, which was unforeseeable and fortuitous?
			* Should he have worn a condom? This would arise if he sues her, and she counters with **contributory negligence**. This is within the tort analysis, **not necessarily within the *insurance* realm**.
				+ Intentional acts are the kinds of things that exclude coverage.
			* Insurance is about consumer protection premised on bad fortune.
			* People are stupid (he’s talking about things that could amount contributory negligence e.g. not wearing a seat belt) 🡪 insurance is meant to protect humanity against human foils.

Long Term Disability (LTD)

* Being injured and unable to engage in your job, or any job, and earn a living.
* Often group benefit contracts, those with individual contracts are very wealthy.
* Group contracts:
	+ Vast majority of policy holders are employees in businesses. Employer finds large insurer to find blanket coverage for all employees. Usually no difficulty to get covered under these policies.
	+ Large expenditures
	+ Large area of practice.
* No causational requirements (no need to prove accident or sickness). Just need to prove the 2 tests: Unable to engage in their job, Unable to engage in any job.
	+ Get what’s provided in the contract, usually 50-75% of your gross income. Typically 65%.
* Taxation: As a benefit of employment, the benefit may be taxable in the employees hand if the employer paid the premium. However if the employee paid the premiums, then it is a private relationship between you and insurer. If the employer paid the premium then the benefit is a form a wages.
* Definition of disability: if you have an arguable case that you fall within the definition then there is a form of agreement reached.
* Time value of money: the greater benefit of receiving money now rather than an identical sum later (also considers that the beneficiary might even die within that 13 years). E.g. $100k over 13 years may only be worth $950k, and not $1.3M.
* *Manulife and Teaser Palace* SCC. If you earn $90k a year, then $0.53 of ever $1 goes to tax.
	+ <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2208/index.do>
	+ After arguing for an LTD claim, the beneficiary wants to be paid in large lump sum. Both parties want the tense relationship to end and agree to pay out a capital value. The insurer wants to pay less than they would if going to court, and the beneficiary wants money without risk they will lose at court.

Marine

* Not examinable. Perils at sea, incidental value adventure, Incidental to build and repair.

Auto

* Liability
* First party (no fault relationship)
* First party damage rights (get this from our own insurance company, can’t sue the other driver for damaging our car because we have our own insurance)
* Uninsured coverage

General Liability

* Personal
	+ E.g. when owning property or renting a place to live.
	+ Your insurance company will not only indemnify you in case you are at fault, but they will also pay the cost of defending you.
		- The duty to defend, arises from contract and the duty of good faith on the part of the insurance company. There are reasons an insurance company won’t defend you (e.g. you did an intentional wrong, or the accidental thing you did is outside the scope of coverage).
* Business/Commercial
	+ Impact people in all kinds of ways:
		- defective products on the market place (e.g. that cause injuries)
		- Slip and falls in grocery stores (people slip on grapes a lot)
		- Cases where court pierces the veil
		- Errors and omissions: common forms are basically professional liability coverage 🡪 anyone designing, building, making representations about quality
			* S50 of medicine act: Doctors must carry $10M of insurance, but doctors don’t actually carry insurance provincially. They are part of mutual group that is funded by the federal government.

Property

* Identify peril/risk the property is subject to and loss that might be incurred, determine if you will pay deductibles.
* Property component to a car.

Life Insurance

* It is not an indemnification policy: An individual’s economic value to a family unit is not all of the money they make. Their cross-dependency value is what their contribution to the family unit might be (usually ~60%). This does not come up in insurance because life insurance is a non-indemnity contract. This would come up if you sued someone for causing your spouses’ death.
	+ The insurer says what they will pay at the outset of forming a contract. This prevents litigation of economic value and allows the insurer to control their risk.

Other types of insurance: insurance against legal “costs” 🡪 in UK it is advisable to tell client’s ; insurance against hacking…

## Types of Intermediaries

### Agents

* Employees of insurance company.
	+ Except for certain life insurance agents, can only represent one insurer (ON INS Act s 393(12)
* Not intermediary.
* Can rely on them if they tell you “you have insurance”. Talking to them is talking directly to company.
* Must be licensed:
	+ There are diff. licences for diff. classes of insurance. (Ont Reg 374/04)
	+ Getting a licence: pass exam, good character, pay a fee
		- Good character at issue: *British Columbia (Superintendent of Insurance) v Fleming* (1990) BCCA
		- Failure to renew: *Bothwell v superintendent of Financial Services* 2015 CarswellOnt 1748 (FS Tribunal)
	+ Keeping a licence: standards of honest and competence. (Ont Ins Act s 393(8) and regulation 663 s13).

### Brokers

* In Ont, different from agents. Do not need licenses, they are self-regulated.
* Can sell policies with different companies. They are selling a professional service to find you the best protection.
* Legislation in each province establishes a professional incorporated association. In Ontario, the affairs of the association are governed by a board of directors (elected by the broker membership)
	+ The association determines criteria for membership, but must comply with basic regulations (*Registered Insurance Brokers Act* SS 11, 13). The association, not the government, decides who is a member.
	+ Ontario’s code of conduct is prescribed by regulation (reg. 991 s14). This is enforced by a discipline committee. Brokers guilty of an offence may be disallowed to practice (*Registered Insurance Brokers Act* s18(5)

### Adjusters

* These are the people who assess claims (e.g. investigate loss/damages and negotiate settlements)
* Adjusters can be employees of insurance company or can be independent of insurance companies. Examples of when independent adjusters are used:
	+ Small mutual insurance companies may hire external adjusters who are independent of the insurer.
		- In these cases, the question arises in settlements: do the adjusters have authority to resolve the matter.
		- Often, they can’t offer, they can only negotiate and make recommendations to their client.
	+ Often find independent adjusters with complicated cases (e.g., municipalities – get sued e.g., did not plow roads properly. One of the things that happens with their insurance, they tend to self-insure for large amounts of money.
		- They may have enormous deductibles.
		- They will appoint an independent adjuster to deal with it all.
* Must be licensed:
	+ Make an application, pay a fee, satisfy statutory and regulatory requirements.
	+ License can be revoked by superintended where their investigation reveals the adjuster contravened the Insurance Act, was guilty of fraud, the adjuster is untrustworthy, or is incompetent.
* Lawyers who act in these roles are usually excluded from most provinces’ provisions regarding adjusters (Ont Ins Act s 1 “adjusters”).

## Authority to Bind

Agents and brokers can solicit principal applicants, but can they bind the insurance company to provide a policy?

* Often there is an ambiguous conversation with the person in the middle. Anytime there is a **3-way relationship there is a conflict of interest**.
	+ Customer thinks they disclose information 🡪 interest in being insured, the agent may or may not communicate it accurately 🡪 they have an interest in selling the policy, and the insurer has an interest in not paying the policy.

This is a factual determination for the trial judge.

Intermediaries are recognized as being able to bind (acting as an agent) either or both the customer and/or the insurer. *Guardian Insurance Co of Canada v Victoria Tire Sales ltd* 1979 SCC

Insurer bound to provide coverage under K solicited by agent if:

1. Agent has express/actual or implied authority to bind:
	1. Express: broker/agent has right to bind if they have obtained certain information.
	2. Implied: Authority to carry out unstated functions necessary to carryout expressly authorized functions. It can also arise from a pattern of conduct by the intermediary that has been acquiesced to by the insurer.
	3. Although no formality is required to create an agency relationship, most brokers have an underlying brokerage sales agreement that sets out what the express authority is, which may reasonably infer that additional authority is implied.
	* Can be authorized for different things: e.g. an agent just to solicit business or an adjuster just to negotiate (but neither to bind the insurer).
	* 3 different types of agency relationships are usually created:
		+ General Agent: very broad power, essentially the alter ego of the insurer.
		+ Recording Agents: authorized to conclude binding insurance contracts and issue policies.
		+ Non-recording Agents: Must forward proposals to the insurer for approval; some may be able to bind the insurer for interim coverage pending the insurer’s decision for long term coverage.
		+ \* The authority created by an agreement, and not the label, is what matters.
2. Ostensible/Apparent authority:
	1. This is where the **insurer** *acts* in such a way to cause customers to reasonable believe it delegated power.
	2. This source of authority is likely based on theory of objective consent. If the insurer creates, by its actions, the objective impression that it has given the authority claimed, then it is held to suffer those consequences.
		1. This both protects customers from surprise restrictions on the insurer’s liability, and also protects insurers who retain control of the process because it is they who furnish the agents with the means to demonstrate authority.
		2. The other theory, that is less correct, is that this authority arises on the principle of estoppel. This is weak because estoppel is a shield, and not a sword, so it shouldn’t give rise to a claim.

The test for ostensible or apparent authority: *Pudsey v Manufacturers Accident Insurance Co* (1987) SCC:

1. What would the prudent and ordinarily sagacious and experienced person (with no reason to suspect otherwise) think?
2. Why would they think that? (i.e. indica/evidence 🡪 the broader the scope of the agent’s ACTUAL authority = more of the following items/indica = greater basis for creating apparent authority)
	* 1. broker says so,
		2. past dealings,
		3. letterhead,
		4. capacity to issue pink slips,
		5. company manuals in their possession,
		6. if the customer can reasonably believe the insurer’s acquiescence creates authority in the current matter. *Potvin v Glen Falls Insurance Co* 1931 Alta SC
		7. if premium is paid (*although*, this is not always the case since some billing comes at the end of the month, and this is often where these cases come up).
			1. Ontario Legislaion: if paid premium then insured. \*\*But not all insurance involves a premium being paid. That is where a lot of fights coming out. Once premium paid we know the person is bound. Contract has been set properly.
	1. Did the insurer negate the impression of such authority with sufficient notice to the customer?

###### Berryere v Firemen’s Fund Insurance Co 🡪 Limits of Apparent Authority must be Noted to the Customer

**Facts**: The plaintiff was advised that his application have to be approved by the defendant insurer. The agent told him the insurer approved the application and issued a binder.

**Issue**: The insurer maintained that because they have to approve the application only they could issue acceptance.

**Held**: There was reason to believe the agent had the authority he claimed to have including the indica of authority he was furnished with by the insurer.

**Ratio**: Trappings of actual authority issued, absences of notice to customer that there are limits on the authority those trappings suggest = apparent authority. Does not matter whether agent is exceeding actual authority.

1. Ratification: if an agent or broker acts to bind but does not have authority to bind, but the insurer agrees (by acquiescence or positive act) after the fact to be bound, then they are bound. If there is evidence of ratification it will be very difficult to get out of this.
	1. The insurer must have full knowledge of the transaction and sufficient information to know what it is ratifying. *Scott v Co-operative Hail insurance Vo (1957)* Sask CA.
	2. An insurer has been held by SCC to be unable to ratify a contract after the loss has occurred, including where the occurrence of loss is unknown. The reason being that there is no longer subject matter left to insure at the time of ratification. *Kline Bros. & Co. v Dominion Fire insurance* Co (1912) SCC
		1. This is problematic because ratification is in it’s nature retroactive, so the relevant time is not the moment of ratification but ought to be the moment the contract was initially entered.

Some cases have held in favor of ratifying contracts even after loss occurs that the *customers* didn’t initially accept. The justification for distinguishing is to protect insurers from scams about loss which has already occurred.

This attempt to protect insurers is redundant in light of the rules about fraud and non-disclosure. There is no good reason for preventing an insurer from ratifying any arrangement so long as it has full information about everything relevant to the deal.

#### Statutory authority:

In some circumstances intermediaries are decreed by statute to act on behalf of an insurer whether or not authority has been expressly or apparently granted.

* 1. When a customer pays a premium to an agent or broker that is as good as paying the insurer directly. Ont Ins Act s394 (doesn’t apply to life insurance, but see s122 🡪 i.e. they are the agent of the insurer unless they are the agent of the insured)
	2. Some circumstances require a policy be delivered to a customer for the K to be in force. Delivery can be effect even by an agent of the insurer who lack authority to do so. Ont Ins Act s134.

## Transfer of Information

When a misrepresentation occurs it is important to consider who bears the burden of that issue.

* For life and accident and sickness insurance statute states that no person shall, to the prejudice of the insured, be deemed to be the agent of the insured. *Ont Ins Act* s222, 329.
* Otherwise the determination involves the authority given to the agent by the insurer.
	+ If a broker has authority to receive information on the insurer’s behalf then the insurer is considered to have received the information when the broker got it and to have received it in the form it was in when conveyed by the customer to the broker. *Blanchette v CIS Ltd* (1973) SCC
		- The same result ensues when the broker has been given authority to finalize contracts (receiving information is a necessary part of the decision making process involved in accepting or rejecting K’s). *Blanchette*
		- Same^ where an adjuster can settle a claim because there is implied authority to collect information relevant to the claim. *Gilvesy v Steve Mayorsack Ins. Agency Ltd* (1978) On. Co. Crt.
	+ Where an intermediary has NO source of authority to bind or receive information in the insurer’s behalf then they are acting on the customer’s behalf *Sleigh v Stevenson*  (1943) Ont Ca.
	+ Similarly when a customer signs a for containing erroneous information after the form has been completed then they are responsible for the misrepresentation. *Lyons v gore Mutual Insurance Co* (2001) Ont SCJ
		- However, if the customer has a disability or is illiterate, or doesn’t speak English, making it impossible for them to check the accuracy then the intermediary/insurer is responsible. *Stone b Reliance Mutual Insurance Society* (1972) ONT CA
		- Similarly if the form is signed blank then it is unfair to hold the customer liable for the consequences of the intermediary’s failure to complete the form properly. *Blanchette*
* For auto insurance statute sets out that an insurer can only invoke the defence of misrepresentation in respect of a statement KNOWINGLY contained either in a signed written application or a purported application.
	+ Supposedly, a purported app is an unsigned one. In these cases the insurer must prove that the applicant made the statement attributed to him.
	+ Signed written application: signature is sufficient proof that info was supplied by applicant (Sleigh v Stevenson 1943 ONCA)
		- This is true even where the application is signed first and written later. However; a possible argument is that an application signed blank is at that point a “written application”. Either way the statement must have been made **knowingly** (Ont Ins Act s233(1))by the applicant.
		- In *Blanchette v CIS Ltd* (1973) the SCC held that incorrect information inserted into an application after it was signed could result in treating the application as unsigned.

## Personal Liability of Intermediary

This can arise in 4 ways:

### Warranty of Authority

General agency law: If A tells B they have authority, A will have to pay to B for loss suffered in *reliance* on B’s warranty. It is no answer for A to say they were mistaken about their authority even if the mistake was reasonable. *Yonge v Tonybee* (1910) Eng CA

* There must be a causal connection between erroneous assertion and the loss. *Wandlyn Motels Ltd v Commerce General Insurance Co* (1969) NBCA 🡪 Found that even if there had been authority the Plaintiff could not have collect on the insurance policy supposedly placed because the plaintiff had no insurable interest.

### Contract

Contract obligates the broker to provide certain services for the customer (finding appropriate insurance coverage).

* There must be consideration: Clear that insurer and intermediary exchange consideration (insurer pays commission and intermediary acquires business or negotiates on their behalf).
	+ Most clear argument that customers give brokers consideration is that they provide them with the opportunity to earn their commission. *Cosyns v Smith* (1983) Ont CA
* The nature of the obligation undertaken: when an agent or broker agrees to procure insurance they are held to have agreed to exercise reasonable care to ensure that it is appropriate cover, *especially* so where the instructions given are general. *Fine Flowers* Ont CA.
	+ Where instructions are specific the intermediary has an obligation to ensure the coverage obtained to not include inappropriate exclusion clauses (*GKN Keller Canada ltd v Hartford Fires insurance Co* (1984) Ont CA); warranties (*Kezier v Portage LaPairie Mutual Insurance Co* (2013) NSSC); or clerical errors (*Jesset v Conacher* (1983) Alta CA) which undermine the value of the insurance to the insured.

### Tort

Tort law is only an modified/excluded avenue where the contract expressly excludes or modifies any tort claim. *Centre & Eastern Trust Co v Rafuse* (Varied 1988) SCC.

* Usually, unless fraud, the claim is brought in negligence. In Ont it has been held that an adjuster owes a duty of good faith in handling a claim *Spiers v Zurich Insurance Co* (1999) Ont SCJ.
* Most often the duty is based on an undertaking-reliance relationship reminiscent of the approach in *Hedley Byrne & Co. v Heller & Partners Ltd* (1964) HL.
* The emphasis is almost entirely on the responsibility the agent can be said to have reasonably assumed given the nature of the transaction. Liability attaches to loss directly related to that transaction.
* A broker may also be sued by a 3rd party who suffers loss because of the brokers negligence in dealing with the customer.
	+ It is fair to say that the 3rd party’s loss is directly related to the transaction entered into by the broker, even if it can’t be said they “relied” on the broker.

### Equity

When customer places reliance on expertise of intermediary a fiduciary relationship may arise. *Fine Flowers*.

The following are aspects of a fiduciary relationship: *Frame v Smith,* (1987) SCC

1. The fid. has scope for exercise of some discretion or power
2. The fid. can unilaterally exercise that power/discretion to affect the beneficiary’s legal or practical interests
3. The beneficiary is peculiarly vulnerable or at the mercy of the fiduciary holding the discretion or power.

A fiduciary relationship arises in the context of the intermediary b/c:

* The intermediary is placed in a position to make choices on the customers behalf.
* The customer may be vulnerable as they could be left unprotected or inadequately protect if the intermediary fails to act in a trustworthy manner.

Equitable remedies are available to a customer if an intermediary has allowed self-interest to prevail.

* These remedies may be available regardless of whether there is a conflict of interest.
* \*\*The availability of these more severe remedies is what distinguishes equitable remedies from a remedy under a pure tortious cause of action.
	+ Unlike tort, equitable remedies are not limited by remoteness of damages rules. Baer “Insurance Law” (1980) 610 at 628.
	+ A more generous limitation period applies for equitable remedies *Seibold Holdings ltd v Wilson & Kofoed* (1990) BCSC

## The Intermediary’s Duty

### Nature of the Duty

Intermediaries are professionals and have a correspondingly high duty of care. *Fine’s Flowers*

* Unlike doctors and lawyers which collectively fix their own standards, it is the courts that assess the standards for insurance agents. *Fine’s Flowers.*
* The question of what the intermediary agreed to do in the contract has no *necessary* impact on the issue of how the requisite standard of care should be determined.

In general terms: the duty is to do what should reasonably be done given the particular request and undertaking in the circumstances. *Whitevalley Log Homes Ltd. v Valley First Insurance Services Ltd* (1999) BCSC.

### Specific Obligations to Customer

#### Duty to Procure Appropriate Insurance or Advise that it is Unavailable

Where a client seeks particular coverage, whether or not that agreement technically amounts to a contract, there is a duty to either:

* obtain such coverage *Fine’s Flowers*
* advise that they are unable to obtain it *Fine’s Flowers*
* explain the options available *Fairbairn v Rowlands Insurance* (2003) Ont SCJ

 If the customer is not provided with one of the above, then this is a classic example of reliance because the customer forgoes the chance to seek cover elsewhere.

**General instructions:** Where the intermediary gets vague or general instructions, they must sometimes go beyond those instructions to determine appropriate coverage. If the intermediary agrees to do business on such terms, then they cannot shrug off the responsibility when an uninsured loss arises. *Fine’s Flowers*

* What the above really amounts to is an assessment of whether the customer relied on the intermediary’s expertise. The agent may not be in breach of any duty if the customer has a special knowledge that placed him in the best position to determine the adequacy of the coverage. *Green v Donald* (1983) Ont HC
* Conversely, where the agent has special knowledge and it is reasonable for the customer to rely on their expertise, then there may be a breach of duty. *Fine’s Flowers*

**Specific Examples of non-liability *on general instructions* for Intermediary**

In Ontario a common example of allegation that cover is inadequate has to do with optional income replacement benefits in auto insurance.

* A broker bears no liability to a customer for failure to procure a higher amount provided standard procedure in explaining coverage is used (and there is not continuing obligation to explain options every time coverage is renewed). *Godina v Tripernco* 2013 Ont SCJ

Even if there is negligence, the customer must show a causal link between that negligence and the inadequacy of coverage.  *Sagl v Cosburn, Griffiths, & Brandham Insurance Brokers* 2009 ONCA

Even if there is negligence, there is no liability unless the customer can show that the policy requested would have covered the loss that occurred. *Monk v Farmers’* (2014) Ont SCJ

Even if there is negligence, there is no liability unless the customer can show that they would have reacted differently (e.g. take diff. policy or minimise risk) had the broker acted with competence. *Zefferino v Meloche Monnex* (2013) ONCA

Some American cases have place liability on intermediaries for not taking reasonable precautions to avoid placing cover with financially weak companies. However, this is a self-fulfilling prophecy because without business the company will surely fail.

#### Renewal

In Ontario, it is still the client who has the obligation to be aware of the expiry date, although this is changing slightly in other provinces. Other provinces hold the intermediary liable (where there has been a history of the agent or broker arranging renewals. In *Wallace v Co-operative Fire* (1981) Sask QB 2 years of doing so was a sufficient “history”

* Often the insured is found contributorily negligent. *Wallace*

#### Cancellation

An agent who advised a client to cancel an auto policy for two months was held liable when the customer was injured by an uninsured motorist *Engel v Jansen* (1990) BCSC

A broker who failed to communicate the effective date of a temporary change in an auto policy was held liable: *Economical Mutual Insurance Co v State farm* (2015) ONCA

#### Updating

This is an emerging duty.

An intermediary is under a duty to monitor the coverage of clients to ensure adequacy given changing circumstances (Ohm, “Insurance Agents’ and Brokers’ liabilities...” in *Liability of Insurance* *Agents and Brokers* 1986) . especially if there has been an undertaking by the agent to provide the service.

* However, if there is no reliance by the insured on such assistance then there is no duty.

#### Duty to Convey Information

An agent or broker ***with no*** ***authority*** to bind has a ***duty to the customer*** take reasonable care to ensure that material info is forwarded properly. *Bell v Timouth* (1988) BCCA

* Failure to do so could result in no coverage for customer.

An agent or broker ***with*** ***authority*** to bind has a *duty to the insurer* take reasonable care to ensure that material info is forwarded properly. *Allstate Insurance Co of Canada v Wong’s Insurance Services Ltd* (1993) affmd (1994) BCCA.

* Failure to do so means the insurer cannot deny coverage.

### Duty to Third Parties

In the US injured plaintiffs are deemed to have been intended as beneficiaries of the policy only if there is a law making liability insurance compulsory. They have been able to sue the intermediary in negligence if the negligence left that third party unprotected for the loss that occurred. A recent case held that is was not clear whether such a claim would be denied in Ontario. *Diggs v Royal Insurance Co* affmd 1987 Ont HC

 Duties to 3rd parties have been held in the following situations, which both involve ***reliance***:

1. X attempts to get coverage for a restaurant he partly finances. Broker tells him there is coverage for restaurant. Loss occurs. X is not covered because he has **no insurable interest**. Neither is the restaurant insured.
	1. X was able to recover by suing the broker. *Knowles v General Accident* 1984 Ont HC
2. Lessor told lessee to obtain coverage. Lessee thought she obtained coverage through broker based on his reliance. Loss occurs to leased property. Lessor sues broker for failing to obtain coverage.
	1. ***Lessor is able to recover because lessee relied*** on broker’s expertise.

### Duty to Insurers

When intermediary has authority to bind the insurer, then the insurer will be unable to deny coverage on the grounds of misrepresentation where the intermediary transmits info incorrectly. The intermediary is liable to the insurer. *Venner Woodworking Ltd v Wawenesa Mutual* (1996) Ont Gen Div.

There may also be liability to the insurance company if the intermediary fails to discover readily availability facts that detract from the customer’s insurability. *Fleet v Federated Life insurance* 2009 NSCA

Intermediary liable to the insurer for failing to follow instructions to transmit info to the customer (e.g. that a policy has been cancelled). *Northwestern Mutual Insurance Co v JT O’Bryan* affmd 1974 BCCA

Intermediary (adjuster) may be liable if they negligently cause loss to an insurer (e.g. by overlooking the defence that the limitation period for the customer to bring a claim has passed). *Kansa Gen Ins v Morden &Helwig* (2001) Ont SCJ

## Defences Against Liability

### Showing adequacy of coverage

This defence supported by: *Machat Jewellery Ltd v Jenkins* (1981) Ont HC

* Can also argue that the insurer is **bound by the terms of the oral agreement** between the intermediary and the customer, notwithstanding conflicting terms in the policy 🡪 this **deflects the liability to the insurer**. *Piggot Construction (1969) v Saskatchewan Govt.*  (1986) Sask CA.
	+ Use caution because the intermediary may have breached duty of care in concluding such an oral contract.

### Contributory Negligence

* Failing to check expiry date *Wallace Sask* QB 1981
* Failing to read the policy to detect inadequacy of coverage *firestone Canada Inc v American Home Assurance*  (1989) Ont HC.
	+ This may actually negate the intermediary’s liability entirely, esp if the policy terms were clear. *Munro v Shackleton* (1993) Sask QB
* Giving vague instructions *Crown West Steel v Capri Insurance* 2001 BCSC

It is currently not clear whether apportionment is possible in contract cases. See discussion in *Cosyns v Smith* (1983) ONCA

## Liability and Professional Discipline

The process for discipline of Brokers is inadequate in 2 ways:

* The standard required by the regulation is arguably lower than that being imposed by courts in negligence cases – **society expects more** of Brokers than they demand of themselves. *Fine’s Flowers* (what brokers had usually done in the circumstances was held to be insufficient)
* Discipline imposed on a broker does nothing for the customer who suffered loss because of the Broker’s negligence. A client’s entitlement to **compensation** need not be determined on the same grounds as the determination of the Broker’s punishment.

## Lawyer’s Duty

Insurance involves a lot of relations: The lawyer’s job is to understand social context relationships exist. Nature of relationships being formed. And with intermediaries, problem of ambiguity in communication between people.

* Especially in relationships with incentives of taking people in directions and is not alignment of interest (e.g. 3way relationship conflicts)
* That is why we get into *who is the agent of who* and how we prove the individual is an agent.
* Issues of ratification – can use as a tool
* Another problem is limitation periods. Where issues come up, e.g., did not sue in time. Which turns on statutory issues and notice of timing. Most of the time the limitation period to sue an insurer is date of denial. Issue of limitation periods is when do they start.
* Note: previous exam of his, was it a fire loss or mold loss, baring of relationship where limitation period becomes.

## Case Law

When assessing these cases, weigh evidence

### Blanchette v. CIS [1973] SCR 833 – Insured not responsible for mistake on form made by agent ***after*** insured has sign.

**Facts**: The applicant signed an application form for X and Y coverage and then gave to agent. Applicant later realized they also wanted Z coverage. The provided information to agent over the phone to fill in additional part of application. Agent made an error, but applicant did not review the updated form. The loss that arose was not related to the misrepresentation.

**Held**: The claimant was entitled to claim for their coverage and the agent bore the responsibility of the misrepresentation.

### Vrbanic v. London Life (1995) 25 OR (3d) 710 (CA) – Insured’s duty to provide disclosure goes beyond answering Insurer’s questions.

**Facts**:

* The deceased applied for life insurance but excluded the fact that he had been treated for alcoholism. He later died from liver issues.
* The insurer defended the action on the basis of misrepresentation and non-disclosure of material fact.
* The beneficiary of the life insurance policy testified that the deceased signed a blank application and that the information was subsequently filled in by the agent.
* The agent testified that he asked the deceased the questions in the application and wrote down the answers as they were given.
* The application signed by the deceased stated that the applicant had read the application and declared that the answers given were “full, complete and true”.

**Prior Proceedings:**

* The trial judge found that it was part of the agent’s duty to fill the application form in, and that neither the deceased nor the beneficiary gave erroneous answers to the questions which the agent asked them. Therefore, the insurer was precluded from relying upon any erroneous answers contained in the application, since those answers did not emanate from the deceased or the beneficiary.
* However, the trial judge refrained from making a finding as to whether or not the deceased signed a blank form.

**Held**:

* Appeal allowed, and new trial ordered.
* Trial judge failed to make an essential finding of fact which should have been made to decide the case properly [i.e., whether the application form was signed blank, partly blank or completed

**Ratio**:

* The fact that particular questions relating to risk are put to an applicant does not necessarily relieve the applicant of his independent obligation to disclose all material facts.
* Therefore, giving full answers to the questions of the insurer’s agent does not necessarily amount to full disclosure.
* What is material, is not for the applicant to determine.

**Reasoning**:

* It is not dispositive of the case to find simply that it was the agent’s duty to fill in the application form and that the erroneous answers did not originate with the applicant for the insurance.
* It is necessary to determine whether the insurer can rely upon the misrepresentations in the form signed by the applicant.
* In this case, a finding on the question whether the application form signed by the deceased was blank, partly blank or completed would be relevant to whether the signed form could be relied on by the insurer in its defence of material misrepresentation.
	+ **Blank or partly blank → insured would not have a chance to verify the application’s accuracy.**
	+ **Fully completed → regardless of whether the incorrect information emanated from the customer, if the customer had the chance to verify the form’s accuracy then the insurer could rely on the misrepresentation.**

**Significance**:

* Both the customer and the agent had an economic incentive to lie
	+ Insurer does not want to pay claim because *someone* is lying to them.

### Fine’s Flowers v. General Accident (1977) 17 OR (2d) 529 (CA) – When is broker liable for failing to obtain correct policy.

**Facts**: Insured used a broker to obtain “full coverage.” He wanted to be covered for loss resulting from a water boiler breaking down, but not just for the replacement of the water boiler, for the damage that arose when the plants in his greenhouse froze.

**Issue**: Did the broker breach a contractual duty, or cause a tort, or neither, when he failed to inform the plaintiff that other damage stemming from the heaters stopping would not be covered?

Also:

* If the broker acted on a reasonable interpretation of the principal’s instructions they are not liable.

**Held**: The loss which happened was a foreseeable loss and by failing to insure the plaintiff’s against it, the defendant broker was in breach of contract.

**Ratio**: The broker breached a contractual duty because the broker’s responsibility was not just to “exercise a reasonable degree of skill and care to obtain **policies in the term bargained for** and to service those policies as circumstances might require” but also to: “advise his principal (aka the insured) if he is unable to obtain the policies bargained for so that the principal can take further steps to protect himself as he deems desirable”

* If a broker agrees to a contract with vague terms as to coverage, he must have the requisite skills to understand the nature of his client’s business and assess the risks that should be insured against or should not be offering this kind of service.

Also:

* If the broker acted on a reasonable interpretation of the principal’s instructions they are not liable.

**Concurring**: Liable in tort for breach of duty (and also under equity for breach of fiduciary duty) because of a professional undertaking.

## Statute

### Insurance Act

### 148 (Fire Insurance Statutory Condition) 🡪 See Topic 2

### 229-30 (Auto Insurance information between applicants and brokers) 🡪 See Topic 2

### Legislation relating to Intermediaries (Agents, Adjusters, Brokers)

#### 394 - Agent or broker deemed to be insurer’s agent

**394** (1)  An agent or broker shall, for the purpose of receiving any premium for a contract of insurance, be deemed to be the agent of the insurer despite any conditions or stipulations to the contrary.

Exception

(2)  This section does not apply to life insurance. R.S.O. 1990, c. I.8, s. 394.

* Power of $ creates stat agency; regardless of contract. However, this does not apply to life insurance.

#### 395 - Fraudulent representations

An agent or broker who knowingly procures, by fraudulent representations, payment or the obligation for payment of any premium on an insurance policy is guilty of an offence. R.S.O. 1990, c. I.8, s. 395.

* Legislation exists because recognition of. Conflict of interest that can arise.

#### 396 - Personal liability of agent for unlawful contracts

**396** An agent or broker is personally liable to the insured on all contracts of insurance unlawfully made by or through the agent or broker directly or indirectly with any insurer not licensed to undertake insurance in Ontario in the same manner as if the agent or broker were the insurer. R.S.O. 1990, c. I.8, s. 396.

#### 397 - Licences of insurance adjusters

**397** (1)  The Superintendent may, upon the payment of the fee established by the Minister and of any outstanding administrative penalty imposed under Part XVIII.1, issue to any suitable person a licence to act as an adjuster, but a person licensed as an insurance agent or broker under this Part shall not receive a licence to act as an insurance adjuster. R.S.O. 1990, c. I.8, s. 397 (1); 2004, c. 31, Sched. 20, s. 9; 2012, c. 8, Sched. 23, s. 71 (1).

Application to be filed with Superintendent

(2)  The applicant for the licence shall file with the Superintendent an application on a form approved by the Superintendent and shall provide any other information, material and evidence that the Superintendent may require. 2011, c. 9, Sched. 21, s. 5; 2014, c. 9, Sched. 3, s. 17 (1).

Licence to be in force one year

(3)  If the Superintendent is satisfied with the statements and information required, the Superintendent shall issue the licence, which expires on the 30th day of June in each year unless sooner revoked or suspended. R.S.O. 1990, c. I.8, s. 397 (3).

Withdrawal of application

(3.1)  Subsections 392.3 (5) and (6) apply, with necessary modifications, with respect to the withdrawal of an application for a licence. 2014, c. 9, Sched. 3, s. 17 (2).

Refusal to issue licence, etc.

(3.2)  Subsections 392.4 (3) and (4) apply, with necessary modifications, if the Superintendent proposes to refuse to issue a licence or proposes to impose conditions on the licence without the applicant’s consent. 2014, c. 9, Sched. 3, s. 17 (2).

Amendment of licence

(3.3)  Subsections 392.4 (5) and (6) apply, with necessary modifications, with respect to the amendment of an adjuster’s licence. 2014, c. 9, Sched. 3, s. 17 (2).

Renewal of licence

(4)  An adjuster who wishes to apply for renewal of his, her or its licence shall submit an application to the Superintendent in the manner required by the Superintendent and shall give the Superintendent such information, evidence and material as he or she may require and pay the applicable fee. 2014, c. 9, Sched. 3, s. 17 (3).

Same

(5)  Subsections 392.3 (2) and (4) to (6) and 392.4 (1), (3) and (4) apply, with necessary modifications, with respect to the application for renewal of an adjuster’s licence. 2014, c. 9, Sched. 3, s. 17 (3).

Revocation or suspension of licence

(6)  Section 392.5 (revocation or suspension of agent’s licence) applies, with necessary modifications, with respect to the revocation or suspension of an adjuster’s licence. 2014, c. 9, Sched. 3, s. 17 (3).

Surrender of licence

(6.1)  Section 392.7 (surrender of agent’s licence) applies, with necessary modifications, with respect to the surrender of an adjuster’s licence. 2014, c. 9, Sched. 3, s. 17 (3).

Offence

(7)  A person who acts as an adjuster without such a licence or during a suspension of the person’s licence is guilty of an offence. R.S.O. 1990, c. I.8, s. 397 (7).

**Section Amendments with date in force (d/m/y)**

1997, c. 28, s. 124 - 01/07/1998

[2004, c. 31, Sched. 20, s. 9](http://www.ontario.ca/laws/statute/S04031#sched20s9) - 16/12/2004

[2011, c. 9, Sched. 21, s. 5](http://www.ontario.ca/laws/statute/S11009#sched21s5) - 12/05/2011

[2012, c. 8, Sched. 23, s. 71 (1, 2)](http://www.ontario.ca/laws/statute/S12008#sched23s71s1) - 01/01/2013

[2014, c. 9, Sched. 3, s. 17 (1-3)](http://www.ontario.ca/laws/statute/S14009#sched3s17s1) - 01/01/2015

[2018, c. 8, Sched. 13, s. 22](http://www.ontario.ca/laws/statute/S18008#sched13s22) - not in force

#### 398 - Prohibition against public adjusters of motor accident claims

**398** (1)  Subject to subsections (2) and (3), no person shall, on the person’s own behalf or on behalf of another person, directly or indirectly,

 (a) solicit the right to negotiate, or negotiate or attempt to negotiate, for compensation, the settlement of a claim for loss or damage arising out of a motor vehicle accident resulting from bodily injury to or death of any person or damage to property on behalf of a claimant; or

 (b) hold himself, herself or itself out as an adjuster, investigator, consultant or otherwise as an adviser, on behalf of any person having a claim against an insured or an insurer for which indemnity is provided by a motor vehicle liability policy, including a claim for Statutory Accident Benefits. R.S.O. 1990, c. I.8, s. 398 (1); 2002, c. 22, s. 130 (1, 2).

Exception

(2)  This section does not apply to a barrister or solicitor acting in the usual course of the practice of law. R.S.O. 1990, c. I.8, s. 398 (2).

Non-application to prescribed persons

(3)  Subsection (1) does not apply to a prescribed person or class of persons who comply with prescribed terms and conditions. 2002, c. 22, s. 130 (3).

**Section Amendments with date in force (d/m/y)**

[2002, c. 22, s. 130 (1-3)](http://www.ontario.ca/laws/statute/S02022#s130s1) - 01/11/2003

####

#### 399 - Licences to partnerships

**399** (1)  A licence to act as an agent or an adjuster may be issued under section 392.4 or 397 to a partnership, except as otherwise provided in this section or in the regulations. 2014, c. 9, Sched. 3, s. 18 (1).

Statement to be filed by each partner

(2)  The application for a licence shall include the name of each member of the partnership and shall include a request that the licence be issued in the name of the partnership, and the licence may be revoked or suspended as to one or more members of the partnership. 2012, c. 8, Sched. 23, s. 72; 2014, c. 9, Sched. 3, s. 18 (2).

(2.1)  Repealed: 2014, c. 9, Sched. 3, s. 18 (3).

Termination of partnership

(3)  If the partnership is terminated before the expiration of the licence, the partners shall forthwith give notice to the Superintendent or the organization recognized under subsection 393 (14), as the case may be. 1994, c. 11, s. 340.

Revocation

(3.1)  If notice is given under subsection (3), the partnership’s licence shall be revoked. 1994, c. 11, s. 340.

Offence

(4)  A member of a partnership licensed under this section who contravenes any of its provisions is guilty of an offence. R.S.O. 1990, c. I.8, s. 399 (4).

**Section Amendments with date in force (d/m/y)**

1994, c. 11, s. 340 - 01/02/1995

[2004, c. 31, Sched. 20, s. 10](http://www.ontario.ca/laws/statute/S04031#sched20s10) - 16/12/2004

[2012, c. 8, Sched. 23, s. 72](http://www.ontario.ca/laws/statute/S12008#sched23s72) - 01/01/2013

[2014, c. 9, Sched. 3, s. 18](http://www.ontario.ca/laws/statute/S14009#sched3s18) - 01/01/2015

[2018, c. 8, Sched. 13, s. 22](http://www.ontario.ca/laws/statute/S18008#sched13s22) - not in force

####

#### 400 - Licences to corporations

**400** (1)  A licence to act as an agent or an adjuster may be issued under section 392.4 or 397 to a corporation, except as otherwise provided in this section or in the regulations. 2014, c. 9, Sched. 3, s. 19 (1).

When licences not to be issued

(2)  Licences as agents shall not be issued to a corporation if it appears to the Superintendent or the organization recognized under subsection 393 (14), as the case may be, that the application is made for the purpose of acting as agent wholly or chiefly in the insurance of property owned by the corporation or by its shareholders or members, or in the placing of insurance for one person, firm, corporation, estate or family. 2001, c. 8, s. 43 (1).

(3)-(5)  Repealed: 2001, c. 8, s. 43 (2).

Authority of corporation, etc.

(6)  A corporation that holds a licence to act as an agent or adjuster, and every individual who is appointed to act as an agent or adjuster on behalf of and in the name of the corporation, is subject to the provisions of this Act that apply with respect to agents and adjusters. 2014, c. 9, Sched. 3, s. 19 (2).

Exception for certain employees

(7)  Despite subsection (6), an employee of the corporation who does not receive commissions and who performs only office duties on behalf of the corporation in connection with the activities of an agent or adjuster may perform those duties under the authority of the corporation’s licence. 2014, c. 9, Sched. 3, s. 19 (2).

(8)  Repealed: 2014, c. 9, Sched. 3, s. 19 (2).

Superintendent or organization may require information

(9)  If the principal business of a corporation licensed under this section is not the business of an insurance agent or adjuster, the Superintendent or the organization recognized under subsection 393 (14), as the case may be, may require from such a corporation such information as he or she considers necessary in respect to the corporation, its officers and affairs and may make such examination of its books and affairs as he or she considers necessary for the purposes of this Act. R.S.O. 1990, c. I.8, s. 400 (9); 1994, c. 11, s. 341 (3).

Dissolution of corporation

(10)  If a corporation licensed under this section is dissolved or its instrument of incorporation is revoked, the corporation shall forthwith give notice to the Superintendent or the organization recognized under subsection 393 (14), as the case may be. 1994, c. 11, s. 341 (4).

Revocation

(10.1)  If notice is given under subsection (10), the corporation’s licence shall be revoked. 1994, c. 11, s. 341 (4).

Personal liability of officers

(11)  An officer of the corporation who contravenes any of the provisions of this section is guilty of an offence and is personally liable therefor, although such contravention is committed in the name and on behalf of the corporation, and the corporation is liable for any such contravention the responsibility for which cannot be placed upon any such officer. R.S.O. 1990, c. I.8, s. 400 (11); 2014, c. 9, Sched. 3, s. 19 (3).

**Section Amendments with date in force (d/m/y)**

1994, c. 11, s. 341 - 01/02/1995

[2001, c. 8, s. 43](http://www.ontario.ca/laws/statute/S01008#s43s1) - 29/06/2001

[2004, c. 31, Sched. 20, s. 11](http://www.ontario.ca/laws/statute/S04031#sched20s11) - 16/12/2004

[2012, c. 8, Sched. 23, s. 73](http://www.ontario.ca/laws/statute/S12008#sched23s73) - 01/01/2013

[2014, c. 9, Sched. 3, s. 19](http://www.ontario.ca/laws/statute/S14009#sched3s19s1) - 01/01/2015

[2018, c. 8, Sched. 13, s. 22](http://www.ontario.ca/laws/statute/S18008#sched13s22) - not in force

#### 401 - Acting as agent or adjuster without authority

**401** A person who, not being duly licensed as an agent or adjuster, represents or holds himself, herself or itself out to the public as being such an agent or adjuster, or as being engaged in the insurance business by means of advertisements, cards, circulars, letterheads, signs, or other methods, or, being duly licensed as such agent or adjuster, advertises as aforesaid or carries on such business in any other name than that stated in the licence, is guilty of an offence. R.S.O. 1990, c. I.8, s. 401.

#### 402 - Money held in trust by agent

Agent to be deemed to hold premium in trust for insurer

**402** (1)  An agent or broker who acts in negotiating, or renewing or continuing a contract of insurance, other than life insurance, with a licensed insurer, and who receives any money or substitute for money as a premium for such a contract from the insured, shall be deemed to hold such premium in trust for the insurer, and, if the agent or broker fails to pay the premium over to the insurer within fifteen days after written demand made upon the agent or broker therefor, less the commission of the agent or broker and any deductions to which, by the written consent of the company, the agent or broker is entitled, such failure is proof, in the absence of evidence to the contrary, that the agent or broker has used or applied the premium for a purpose other than paying it over to the insurer.

Agent to be deemed to hold money in trust for payee under policy

(2)  An agent or broker who acts in negotiating or renewing or continuing a contract of insurance with a licensed insurer, and who receives any money or substitute for money for payment to a person in respect of the contract of insurance shall be deemed to hold such money in trust for the person entitled thereto, and, if the agent or broker fails to pay the money over to such person within fifteen days after written demand made upon the agent or broker therefor, less the commission of the agent or broker and any deductions to which the agent or broker is entitled, such failure is proof, in the absence of evidence to the contrary, that the agent or broker has used or applied the money for a purpose other than paying it over to the person entitled. R.S.O. 1990, c. I.8, s. 402.

#### 403 - No compensation to be paid by insurer not licensed

**403** (1)  No insurer, and no officer, employee or agent thereof, and no broker, shall directly or indirectly pay or allow, or agree to pay or allow, compensation or anything of value to any person for placing or negotiating insurance on lives, property or interests in Ontario, or negotiating the continuance or renewal thereof, or for attempting so to do, who, at the date thereof, is not an agent or broker and whoever contravenes this subsection is guilty of an offence. R.S.O. 1990, c. I.8, s. 403 (1); 1994, c. 11, s. 342.

(2)  Repealed: 1999, c. 12, Sched. I, s. 4 (58).

Exceptions

(3)  Nothing in this section affects any payment by way of dividend, bonus, profit or savings that is provided for by the policy, or shall be construed so as to prevent an insurer compensating a salaried employee of its head office or a branch office in respect of insurance issued by the employing insurer upon the life of such employee or upon the employee’s property or interests in Ontario or so as to require that such employee shall be licensed as an agent under this Act to affect such insurance. R.S.O. 1990, c. I.8, s. 403 (3).

**Section Amendments with date in force (d/m/y)**

1994, c. 11, s. 342 - 01/02/1995; 1999, c. 12, Sched. I, s. 4 (58) - 22/12/1999

404-406 repealed

#### 407 - Limited or conditional licence

**407** A licence may be issued to an agent or adjuster subject to such limitations and conditions as the Superintendent or the organization recognized under subsection 393 (14), as the case may be, may prescribe. R.S.O. 1990, c. I.8, s. 407; 1994, c. 11, s. 344.

**Section Amendments with date in force (d/m/y)**

1994, c. 11, s. 344 - 01/02/1995

[2018, c. 8, Sched. 13, s. 22](http://www.ontario.ca/laws/statute/S18008#sched13s22) - not in force

####

#### 407.1 Superintendent’s proposal to refuse application (for licence), etc.

**407.1**(1)  This section applies if the Superintendent proposes to do any of the following things:

 1. Refuse to issue a licence under this Part.

 2. Issue a licence and, without the applicant’s consent, impose conditions.

 3. Amend a licence without the licensee’s consent.

 4. Refuse to renew a licence.

 5. Renew a licence and, without the applicant’s consent, amend the conditions to which the licence is subject.

 6. Revoke a licence without the licensee’s consent.

 7. Suspend a licence without the licensee’s consent, except by an interim order authorized under this Part.

 8. Refuse to allow the surrender of a licence.

 9. Allow the surrender of a licence and, without the licensee’s consent, impose conditions relating to the surrender. 2014, c. 9, Sched. 3, s. 20.

Notice of proposal

(2)  The Superintendent shall give written notice of the proposal to the applicant or licensee, including the reasons for the proposal; the Superintendent shall also inform the applicant or licensee that he, she or it can request a hearing by the Tribunal about the proposal and shall advise the applicant or licensee about the process for requesting a hearing. 2014, c. 9, Sched. 3, s. 20.

Hearing requested

(3)  If the applicant or licensee requests a hearing in writing within 15 days after the notice under subsection (2) is given, the Tribunal shall hold a hearing. 2014, c. 9, Sched. 3, s. 20.

Order

(4)  The Tribunal may, by order, direct the Superintendent to carry out the proposal, with or without changes, or substitute its opinion for that of the Superintendent, and the Tribunal may impose such conditions as it considers appropriate in the circumstances. 2014, c. 9, Sched. 3, s. 20.

Appeal

(5)  A party to a hearing held by the Tribunal may appeal the order of the Tribunal to the Divisional Court. 2014, c. 9, Sched. 3, s. 20.

Effect of appeal

(6)  An order of the Tribunal takes effect immediately, but if the order is appealed, the Tribunal may grant a stay of the order until the appeal is finally determined. 2014, c. 9, Sched. 3, s. 20.

Hearing not requested

(7)  If the applicant or licensee does not request a hearing, or does not make the request in accordance with subsection (3), the Superintendent may carry out the proposal. 2014, c. 9, Sched. 3, s. 20.

Continued jurisdiction of Superintendent, Tribunal

(8)  If, after the Superintendent gives notice under subsection (2),

 (a) an applicant withdraws the application to which the proposal relates; or

 (b) the licence to which the proposal relates is suspended or expires,

the Superintendent and the Tribunal retain continuing jurisdiction with respect to the proposal and may take any step and make any order that they could have made relating to the proposal, as if the application had not been withdrawn or as if the licence had not been suspended or had not expired, and the parties may appeal any order of the Tribunal. 2014, c. 9, Sched. 3, s. 20.

Same

(9)  The continuing jurisdiction of the Superintendent and the Tribunal under subsection (8) is terminated when the rights of the parties have been exhausted or have expired and when all proceedings relating to the proposal have concluded. 2014, c. 9, Sched. 3, s. 20.

**Section Amendments with date in force (d/m/y)**

[2012, c. 8, Sched. 23, art. 74](http://www.ontario.ca/laws/statute/S12008#sched23sartp74) - 01/01/2013

[2014, c. 9, Sched. 3, s. 20](http://www.ontario.ca/laws/statute/S14009#sched3s20) - 01/01/2015

[2018, c. 8, Sched. 13, s. 22](http://www.ontario.ca/laws/statute/S18008#sched13s22) - not in force

Transition

**407.2**(1)  In this section,

“transition date” means the day section 407.1 (as re-enacted by section 20 of Schedule 3 to the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014) comes into force. 2014, c. 9, Sched. 3, s. 20.

Same

(2)  If, before the transition date, the Superintendent has given written notice to the applicant or licensee that he, she or it may request a hearing by an advisory board with respect to a matter, and if the matter has not been finally determined before the transition date, this Part as it reads immediately before the transition date continues to apply with respect to the matter. 2014, c. 9, Sched. 3, s. 20.

Same

(3)  If, before the transition date, the Superintendent has appointed an advisory board under subsection 393 (9) with respect to a matter and if the matter has not been finally determined before the transition date, this Part as it reads immediately before the transition date continues to apply with respect to the matter. 2014, c. 9, Sched. 3, s. 20.

**Section Amendments with date in force (d/m/y)**

[2014, c. 9, Sched. 3, s. 20](http://www.ontario.ca/laws/statute/S14009#sched3s20) - 01/01/2015

[2018, c. 8, Sched. 13, s. 22](http://www.ontario.ca/laws/statute/S18008#sched13s22) - not in force

Stat condition in sickness policy:

* Deeming the person to be the agent of the insurer where there is an ambiguity.

## Main Issues:

1. When do actions / statements of the intermediary bind the insurer / insured?
2. What is the role of the intermediary – information flow (ie disclosure and notice issues)?
3. Liability of the intermediary to the insurer / insured.

## Hypotheticals

1. A broker accepts an application for insurance and issues a binder, but no premium is paid, a loss occurs immediately. What happens when communication and information is not clear?
2. Insured gives full and accurate information to an agent, but the agent omits material information to the insurer – what happens if the insurer subsequently discovers the misrepresentation?
3. The agent receives a premium but does not pass on to the insurer, a loss occurs, is the loss covered?
4. In a claim, an adjuster, without specific authority of the insurer waives performance of a condition in the policy relating to proof of loss – what if the insurer subsequently insists upon performance of the condition, but performance is now impossible given reliance on the previous waiver?

# Topic 4 – Insurable Interest (chapter 4)

Next class: insurable interest: who has a right to insure something and who has an interest in something. Who can insure on peoples lives.

The difference between betting and insurance. Betting does not involve a loss. Two civilians can place a bet on whether a hockey player gets injured 🡪 gambling. They don’t have any loss. But the Hockey association has insurance in case that player gets injured, their ability to claim a loss is because the contract creates an relationship between the subject matter/object of insurance and the customer.

Broad Test: Does the customer/insured have a legitimate relationship to the subject matter of the claim.

An insurance claim fails is the person who bought the insurance lacked the appropriate connection with the subject matter of the insurance.

* Subject matter in property insurance is the thing that if lost or damaged triggers entitlement to money.
* Subject matter in life or accident and sickness is the person whose illness, injury, or death gives rise to the claim.

This connection is required to ensure gaming was not disguised as insurance.

### Non-indemnity (life insurance and accident/sickness)

No need to prove financial loss because:

* there is an assumption that when a close relative or a person on whom you are dependent dies you suffer a loss even if it cannot be measured precisely; and

In non-indemnity it is all defined by statute but the nexus behind the statute is the same thing that arises in indemnity contracts of insurance: **A relationship that involves pecuniary interest.**

Whether a person has interest in another person’s life is decided by statute *On Ins Act* s 178, 179, 305 and 306.

*These statutes are the result of policy decisions to protect people from having insurance make them worth more dead or alive. There is sufficient familial affection to offset any incentive to aid in the person’s demise for financial gain*.

* S178, 179:
	+ Where the primary person is **a natural person** they can insure the life of a **child**, **grandchild**, **spouse**, the **person upon whom you are dependant (even partially for for support or education)**.
		- In the family law context, if you have **divorced** someone who must pay you spousal support/child support, then you can insure their life. Normally when they die support would stop, even though you could go after the validity of the will or the estate, having insurance might be easier.
			* This is very common in family law: support obligations are accompanied by life insurance.
		- A natural person can insure the life of those who’s life-duration they have a pecuniary interest in, e.g. a partner, an employee. Lots of small businesses rely on key employees who may not be owners. Without those employees business would be very disrupted.
	+ A **corporation** can take out insurance on any person in whom they have a pecuniary interest. E.g. directors, officers, and employees; and those who’s life-duration they have a pecuniary interest in.
		- There is interest in controlling minds, leadership of a corporation. There are costs involved with replacing the leadership of a corporation.
* The same sections are mirrored in 308-309 for accident/sickness.

### Indemnity

Must prove the occurrence of an insured event and that financial loss was a result. Proof of loss includes proof of value.

General test (factual expectation): Whether the person who bought the insurance would, with reasonably measurable certainty, benefit from the continued existence of that subject matter, or be prejudiced by its loss or destruction.

* This has been adopted over the strict “direct legal right” test. See page 4-11. But also, see page 4-6. I think: All direct legal rights meet the factual expectation test, but direct legal right is not required to meet the factual expectation test.
* The direct legal test was rejected in *Kosmopoulus* by the majority of the SCC because it is harsh. The factual expectation approach is more just and nor more likely to promote wagering or moral hazard.

Look at types of legal relationships: There is a series of relationships that create, by default, financial interest in an object that justify having an insurable interest. Those with a direct legal right can have insurance.

* A ***title holder*** (including: owner, trustee, executor and administrators) will have an insurable interest in that property. *Dominion of Canada General Ins. v Lavers* 1997 Nfld CA.
	+ However, it is possible for someone to be the registered owner but have no insurable interest (he/she does benefit from the continued existence of that subject matter, and is not prejudiced by its loss or destruction) *Rider v North Waterloo* 1991 Ont Gen Div.
* ***Goods***: An unpaid vender of goods can take out insurance on goods for which a contract has been made to sell those goods but before delivery. *Trotter v Calgary Fire Ins.* 1910 Alta CA.
	+ A purchaser can take out insurance on goods after they have signed a contract and before they’ve received the goods (they put in a lot of work to find and negotiate a deal and have an interest that the goods be delivered to them in a certain condition). The purchaser has a smaller bundle of rights then the seller, but still has an interest.
* ***Land***: Vendors and purchasers of land both have insurable interests in that land after a contract has been made but before the closing. *Keefer v Pheonix* (1901) SCC
* ***Tenants***: Have an insurable interest in leased property *Caldwel v Stadacona* (1882) SCC
* ***Trustee in bankruptcy*** (and liquidators) have insurable interests in the property of bankrupts. After declaring bankruptcy assets are vested into the assignee who has a duty to distribute those assets to creditors and then otherwise. The assignee/trustee has an obligation to protect the assets that are confiscated from you to pay your creditors, and they protect them by insuring those assets.
	+ *Gill v Canada Fire* (1882) Ont CH D (trustees)
	+ *Montreal Trust co v Caledonian* (1932) SCC (Liquidators)
* ***Mortgagees (bank)***: They have a When a mortgagor borrows money on a piece of property you pledge a security to the bank and the property is valuable to the bank (in the event you lose your job).
	+ *Staddon v Liverpool-Manitoba Public Insurance Co* (1918) Ont CA
* ***Lienholders***: A charge on title, not a mortgage.
	+ *Staddon v Liverpool-Manitoba Public Insurance Co* (1918) Ont CA
* ***Licensees***: They can have insurable interest on land they occupy. They have a permission to use land.
	+ *Westland transport Service Ltd. v Pheonix* (1973) Alta CA
* ***Possessory*** ***title***: Can get insurance.
* ***Holders of options to purchase***: have an insurable interest n the subject of the option. *Caruso v Manitoba Public Insurance Corp.* (1990) Man QB
* ***Bailees:*** have an insurable interest in the property in their possession. *Cole v Merchants Fire Insurance Co* (1921) Ont CA.

#### If the insured stands to lose the property anyway (i.e. they are stolen goods)

If the insured stands to lose the property anyways they may be tempted to take insurance on the property and then cause an insured occurrence to happen. In doing so they convert the subject of the insurance into cash. For this reason the court may decline to recognize insurable interests. Ex.

* Foreclosure has been finalized on a house or the insured was evicted from the property prior to the loss *Sherbourne v Beaver Mutual Fire Ins Ass.* (1873) On HC
	+ If foreclosure has not been finalized at the time of loss they would still be able to recover. *Walton v General Accident Assurance Co of Canada* (2000) Sask CA.
* Goods are knowingly stolen (or possessor is willfully blind to fact they are stolen)
	+ Where property is acquired innocently there is an insurable interest unless and until the rightful owner comes forward. *Assad v Economical Ins*. *Gp* 2000 Ont Gen Div.

#### Property Imported

Property imported into Canada but **not declared** under the *Customs Act* is automatically forfeited to the Crown at the time the offence is committed. The importer or person in possession has no insurable interest. *Zampiero v Safeco* (1983) Ont Co Ct.

* However, importation without STRICT compliance does not preclude an insurable interest. This would allow insurers to avoid paying out by relying on the letter of the law without regard to the spirit of the contract. *Ardekany v Dominion of Canada Gen Ins.* (1986) BCCA.

#### Marine Insurance

See page 4-8, 9

#### Liability Insurance

The risk insured in a liability insurance contract, liability to third parties, is itself an interest.

Liability insurance for other drivers:

When the named insured on a vehicle insurance contract consents to another driver operating the car 🡪 the operator of the car becomes a party to the contract. *Ont Insurance Act* s244

* It was previously held that the named insured had no insurable interest in the liability of the other driver.

There are two situations where a car is registered on one person’s name, and the same person takes out the insurance police, but is not the true owner.

* It is a **scam** to get lower premiums OR
* The registered owner provides the car as **a form of loan** to the true owner, and the true owner is paying it back. In this case the registered owner does have an insurable interest. *Hayduck v Pidoborozny* (1972) SCC
	+ The *Highway Traffic Act, s92*, imposes liability on registered owners for negligence of persons driving with their consent.
		- It is arguable that this should apply to sham arrangements as well which could then be dealt with as cases of misrepresentation or non-disclosure (where it would depend instead on what the *INSURER* knew).

#### Shareholders and Creditors

Prior to *Kosmopoulos* even a sole shareholder had no insurable interest in assets of a corporation.

### Timing of Interest

Indemnity: At the time of loss the interest must exist. *Daishowa-Murubeni Int’l Ltd v Toshiba* (2003) Alta CA leave to appeal refused SCC

* A K for indemnity insurance is not void from the beginning (the claim merely fails) if there is no insurable interest. In order to claim under indemnity, I have to prove a loss so there is no risk of gaming.
	+ Premiums refundable only if the K was entered into on basis of mistaken belief (e.g. of ownership)

Non-indemnity insurance requires the existence of an insurable interest at the time which the K was made.

* If there is no insurable interest at the time of K formation it is illegal and void from the start. *Cooperators Gen Insurance Co v Carter* (2008) Alta QB
* If there is no fraud the contract is still void from the start but premiums are refundable.
* This ensures it is not a wager in disguise i.e. I insure my boyfriend’s life before we are married and then by the time he dies we are married, then when I took out the policy I was gambling on his life and because I wasn’t actually dependant.

### Insuring Other’s Interest Along with Your Own

It is permissible to insure and collect on another’s interest if: *Keefer v Pheonix* (1991) SCC

* The person taking out the insurance **intended to insure interests of other’s along with** their own
* The terms of the **contract** permit it
	+ Existence of other’s interests relevant to the insurance must be disclosed.
* The person taking the insurance **has** **some interest** in the insured property personally (they must be an “owner” of the subject matter)

Process:

The insured person must then **hold the proceeds** of insurance that exceed their personal loss in **trust for the others** who suffered loss *Maldover v Norwich* (1917) Ont HC

Examples of the exception:

This is an exception to the rule that you can only insure your own interests. It arises in **partnerships** (where one partner ensures all of their interests) or in one **households** where one family member insures property belonging to all members.

## Statute

Insurance Act, s. 148 (SC 2, 3),

* 178-9 (Life – who is insurable),
* 305-6 (Accident and sickness – who is insurable)

## Cases

The direct legal right test, and the factual expectation doctrine allows for a lot of rooms for arguments.

* Where there is ambiguity in whether an insurable interest (direct legal right) exists, the broader more general factual expectation test applies.
* Read subtext/context.

### Guarantee Co. v. Aqua-Land [1966] SCR 133 – One insurance policy already paid out + no insurable interest

**Facts**: 2 engineers work for company Aqualand that designed drilling rigs for drilling into Lake Erie. Accurate makes the rigs. Marine Drilling is a new company that gets created with Aqualand and Accurate. Aqualand gets preferred shares (get paid out first).

* Equipment gets built by Accurate, then transferred to Marine Drilling.
* As equipment is shipped out into the lake it gets destroyed. Aqualand insured the equipment. Aqualand had insurance on the equipment.
* Accurate had a separate insurance policy and got paid out in full.

**Issue**: Did Aqualand have an insurable interest in the equipment even though they didn’t own it?

**Held**: The equipment was owned by Marine Drilling.

**Reason**: The veil shouldn’t be pierced when it is convenient. There was some suggestion that court was frustrated there was some double dipping since Accurate got full payment. One of the parties (which are both somewhat sophisticated) had insurance so this was a good reason not to adopt the factual expectation approach.

* Spurgeon thinks that if there was no other insurance, the court woujld have bent itself into a pretzel to apply the factual expectation approach and give an insurance payment to Aqualand. One insurance payment s enough to satisfy the goals of insurance which is to protect loss, not to provide profit.

### Kosmopolous v. Constitution Ins. [1987] 1 SCR 2 – Unsophisticated party who is the alter ego of the corporation.

Talks about doctrine of factual expectation. “Where premiums are paid, you should lean heavily towards finding an insurable interest”

How is this different from *Aqualand*? How does it work where there is no direct connection to the insurable asset.

* The shareholders both have policies but no direct legal right in the insured goods.
* The difference is that Mr. K was the alter ego of his corporation. They didn’t want to make him go through the hoops of suing his broker. An argument to go back to the Lacuna test from 1806 was adopted: the factual expectation approach. This approach resolves the problem of the shareholder.

**Facts**: Kos was selling leather jackets, his lawyer suggested incorporating. He did and carried on as a he had before, as a sole proprietor. He is a tenant and has insurance personally. His personal name is on the tenancy agreement. But he does not own the goods in the store, his corporation owns them.

A fire next door damages his goods in three ways:

* Fixtures in the store (he was covered for this)
* Leather goods (stock and trade NOT covered b/c owned by company).

**Issue**: Does he have an insurable interest in his stock since they are owned by his company, and the insurance is on him personally.

**SSC**: On a factual basis the expectations of the parties is that Mr. K is insured. The insurer is working on a technicality and didn’t seem fair so the court decides to pierce the veil because the business is owned by one person.

**Obiter**: He sued his insurance broker who has supposed to insure these fabric patterns. He could’ve sued the broker for not advising him about this issue (if the court had ruled against him).

### Marks v. Commonwealth Ins. (1974) 2 OR (2d) 237 (CA) – Scam even though a direct legal right applied the factual expectation test was used.

**Facts**: Ms. Marks has the title of the land and also had a tenant, Mr. Ross. Ms. Marks husband was the beneficial owner and had a weird transaction with Mr. Ross to sell the land. The husband never had the right to sell the land. Ms. Marks was deemed by the judge to be extremely untruthful. Ms. Marks was a bare trustee for her husband. She owed him a fiduciary duty to put his interests ahead of her own.

**Held**: The factual expectation is used again here: The judge found that this was a total scam, and there was no legitimate interest even though there was a direct legal interest. The court flips the tests upside down.

Macurra v Northern assurance Co ltd 1925 UK HL AC 🡪 Case that provides us with the direct legal right test for insurable interest + Distinct from Kosmopolous because he is sophisticated.

**Facts**: Owns a sawmill, insured logs personally. Logs owned by sawmill company. Logs were lost.

**Issue:** Why would you want the insurance payment to go to the individual and not the company? One reason is to get the insurance cheque personally which prevents creditors from coming after that money.

**Held**: No direct legal right, no insurable interest. He would be profiting on the loss and the insurance won’t be there to protect the company.

**Reasons**: He is trying to scam the system, he is a sophisticated guy.

* Mr. K was not sophisticated and was misled by his lawyer, his broker, and now the insurance company.

# Topic 5 – Formation, Renewal & Termination (chapter 6)

Covering topics 5 and 6 today. Next week we will talk about topic 7 and start 8. He says 8 is the most important part of insurance.

Formation, renewal and termination is important because there is gaps in contracts. Issues arise about whether there is a contract and this gives rise to arguing over ambiguity. This is where the lawyer comes in.

## Formation

The **insured is making the offer** and the insurer is making the acceptance. This is true even where the insurer solicits the business and provides the form with the particulars.

* Acceptance that varies the terms is not acceptance but **counter offer**. Consumer can then accept.
* **Amendments** must be agreed to by both parties and burden of proof is on party seeking to invoke amendment. *Gore Mutual Insurance Co* (2005) Affd ONCA

### Acceptance Occurs When:

It is put in the mails or otherwise communicated (accepting premiums, issuing a policy, or verbal communication) *Queens Insurance Co v British Tarders Insurance Co (1928) SCC*

### Withdrawal of offer:

Offer can be withdrawn (and deposits returned) until offer is accepted. *Johnson v G & G* (1904) NBSC

### Difference from Normal Contract Law:

* Policies are always lengthy containing many terms. Terms not requested or contemplated by the consumer are still just as much part of the contract.
* When interim insurance is issued by a broker, while awaiting approval for permanent insurance, that interim insurance can be subject to additional terms not discussed at the time the temporary contract was arranged.

### Factors of Policy that Must be Agreed upon:

An insurance contract requires offer and acceptance of the policy including 5 big factors *Zurich v Davies (*1981) SCC:

1. What subject matter is insured,
2. What events/perils are insured against,
3. Duration of risk/coverage:
	1. Does it include tail coverage for previous undiscovered events or is it strictly for claims reported within duration period; AND
	2. Is it a claims made or a claims current policy (does the policy at the time of the claim or the time of the event apply?
4. What is the premium
	1. Premiums include the deductible because the deductible is part of what you pay out (Deductibles are a form of spreading risk).
	2. It is possible to have temporary auto insurance without a settled premium.
5. What is the amount of insurance:
	1. In indemnity it is usually actual cash value or the “cost of replacement” up to a limit. Non-indemnity is insured for a set amount.
	2. The Negligence Act gets rid of the idea contributory negligence is bar to a cause of action. The Negligence Act cures the issue by making liability proportional.
		1. Liability is split according to a *moral fault attribution and not causation*. Failure to wear a seatbelt rarely results in more than 25% liability.
	3. Joint and several liability: If there are two tort feasors and only one of them has resources to settle the claim then the injured can go after one with resources.
		1. The one with resources is severally only liable for 1%, but they are jointly liable for the other 99% as well.
		2. The tort-feasor who pays up must then go after the other one.
		3. The policy purpose is to protect the innocent and injured plaintiff.
		4. This is relevant to subrogation because if one plaintiff has insurance then that insurance company pays the injured party and then has a subrogated interest to go after the non-insured party. The insurance company can bankrupt the non-insured party if their portion of the liability is greater than their estate.

#### Brief discuss of joint and several liability above.

### Consideration - the Exchange of Promises: (Gallant)

An Insurance Contract is binding because there is an Exchange of Promises(except for life insurance).

* + You promise to pay premiums, so the K can exist before premiums are paid (and accident and sickness insurance).
	+ The insurer promises to pay your liability.
* **The moment the promises are exchanged is when the contract exists**.
	+ The policy itself is only evidence of the promises *Gallant*. In life insurance the policy must be issued and the premium must be paid.
	+ Unless otherwise agreed, one party’s **obligation is not deferred** until the other party’s obligation is carried out. The insurer may have to pay a claim before you pay premium.
	+ Ex. You can get a pink slip in January that doesn’t expire until Dec 31 and then stop paying the policy but retain the certificate.

### Formalities of acceptance

* Once a policy is delivered then the contract is binding as if the premium had been paid (does not apply to life insurance). *Ont Ins Act* s134, 303.
	+ If the premium is unpaid at the time of loss then the insurer may deduct it from the claim payment (or sue for it). However, they cannot deduct from money payable to a 3rd party i.e. under liability insurance.
* A contract can be verbal and be enforceable (except for life insurance which must be evidenced by a policy).
	+ E.g. Oral contracts are often concluded by brokers for interim arrangements. It is formed entirely orally. *Ont Ins Act* s146 (fire) and 232(4) (auto)
	+ **Title insurance** is the only other exception: can’t bind someone verbally for title insurance (because of the *Ont. Statute of Frauds* – this statute aims to maintain the integrity of certain contracts. It sets out for instance that every transaction of land *must* be in writing and recorded in the land registry). A policy of insurance tagging relating to title of land, then the policy must be written. But the 3 different insurance providers of land title insurance each have different policies. Must review policies carefully if you are a lawyer of real estate. *First Chicago*  is an important case dealing with the issue of title insurance writing.
* The policy reason indemnity contracts can be enforceable before policies are issued or premiums are paid is to **facilitates efficient transactions**.
	+ There is a period of uncertainty in these transactions before the policy is issued where the insured can read about things like exclusions.
	+ Section 1 of the insurance act defines insurance as a policy that can be verbal.
	+ For Auto insurance the basic policies are the same for everybody.

### Davidson v Global - An insurance contract requires offer and acceptance – acceptance cannot be imposed unilaterally

**Facts**: In jan. 1963 Mr. D opens a store in Chatham selling mens clothing. He owns the store and needs insurance. He communicates to Ocean Insurance through a broker. On Feb. 2nd or 3rd there is a letter produced by the broker saying that Mr. D has insurance but it is not clear what terms are or what the premium is. On Feb. 5th the broker informs Mr. D of a price but there is no proof acceptance. Mr. D was apparently unhappy with the price and went to Global to get insurance. There is a fire on March 1st.

Mr. D gets settlement money from Global. Global seeks to make Ocean contribute to the settlement.

**Issue**:

1. Why does global have any right to go after Ocean? Is it subrogation? Subrogation is where the insurer can go after the wrong doer to recover what it paid to the insured. Section 31 of the Ontario Hospital Insurance Plan Act gives a right of subrogation to the ministry of health. This doesn’t apply in auto collision cases because the cost of all OHIP coverage for auto claims is totaled and then divided among all the auto insurance carriers in Ontario.
* Global will say that Ocean should pay a pro-rata settlement because there are multiple policies.
1. Did Mr. D have an insurance contract with Ocean?

**Held**: No because Mr. D didn’t accept the contract and Ocean could not compel him to accept the contract. An insurance contract requires offer and acceptance the policy (see above: factors of a policy which must be accepted).

## Renewal

 Most of the time you are creating a new contract (home/property insurance, auto insurance, and liability insurance) *Continental Casualty Co v Casey (1934) SCC*.

* The insurer is now the one making the offer. *Manitoba Public Insurance Corp v Fischer* 2007 Man QB
	+ They have you on file and you’ve been a good risk so far so they want to insure you again. They say they will insure you again on the same terms if you pay them.
* **Silence** on part of customer after insurer sends renewal documents is not acceptance.
	+ The **insurer may bind itself** to continue coverage in cases where they issue a policy (or document that can be construed as a policy under the *Insurance Act*). *Patterson*
		- A document is construed as a policy where it signifies the insurer’s intent to assume obligations *Grenville Mutual Ins.* 2001 On SCJ
			* An insurance contract can be renewed by delivery of a renewal receipt identifying the original policy or a new “premium note.” Ont Ins Act s 124(3)
			* A document *not couched in the terms of an* ***offer*** *to renew* may be construed as a policy giving rise to the insurer being bound. *Patterson*
	+ **Once an insurer binds themselves**: must follow statutory procedure for unilateral termination. *Ont Ins Act* s 148, statutory condition 5(fire); s 300 statutory condition 6(accident/sickness); Ont. Reg. 777/93 statutory condition 11(auto)
	+ **A pink card is not proof of renewal** *Patterson*: But where the insurer issues a pink card and a third party reasonably relies on the pink card to their detriment then the insurer is estopped from denying the existence of a contract, even when the insured did not accept renewal. *Patterson*

#### Intention for Non-renewal on Expiry

* Auto Ins: The insurer must give 30 days notice of intention not to renew and reasons. A contract remains in force until there is compliance with notice/reasons, even beyond the date of expiry. *Ont Ins Act s236*
* Offer to renew indemnity insurance may be accompanied by a grace period (a period where insurance is covered before new premiums are paid or acceptance is signed) *Bordeniuk v Co-operative Fire (1979) Alta CA*

#### Policies must have specific terms:

* Satisfied by receipts that reference original policy *Ont Ins Act* s 124(3)

#### New Contract = Distinct Terms (important for liability ins)

* Some coverage for liability insurance is for occurrences only during the life of the contract.
	+ Insurers are trying to prevent claims whose relevant facts do not fall within the contract term. Only possible where periods are distinct.
	+ However, it is common that coverage is triggered by claims made during the life of the K.

### “Application” Used for Renewed Policies

* For auto and fire new applications are not usually completed. The new K can be viewed as entered into on the strength of the original negotiations or on whatever transpired at the renewal stage.
* However, it is common for policies to contain a provision requiring insured to inform insurer about material risks as they occur anyways.

### Life insurance

Life insurance renewal is dictated by the policy (e.g. is there an obligation for re-assessment of risk)

#### Patterson v. Gallant - A document not couched in the terms of an “offer to renew” may be construed as a policy; pink slip is evidence of a contract but not determinative and not a contract in itself.

**Facts**: Accident 15 days after Mr. Gallant’s auto insurance expired on March 5th. Before the expiry, the insurer company sent him a pink card and document saying if he paid them the premium on or before the 5th then they would insure him. He forgot to pay or contact his insurer before March 5th and had no insurance at the time.

* The parties made an application to proceed with a stated case. (An application is a form of proceeding that isn’t an action, and doesn’t require a trial for the judge to give an answer). The stated case is an agreed statement of facts. They agreed his previous policy had expired and he thought he had insurance.

**Argument**: Mr. Gallant had insurance because you can have an insurance contract before premiums or policy’s are exchanged.

**PIE CA:** Premiums need not be paid to have coverage.

**Held SCC**: A pink slip is evidence of a contract but *not determinative and not a contract in itself*. The contract set out clearly that there was no intention to create a new contract until premiums were paid or acceptance was communicated, the document sent with the pink card was called “offer to renew”. A document not couched in the terms of an offer to renew may be construed as a policy.

* Coop insurance was off the hook but Mr. Gallant is still liable. Mr. Gallant has insufficient funds to pay the Patterson’s claims. The Patterson’s must sue their own insurance company up to the limits of their policy. The Patterson’s insurance company will then sue Mr. Gallant and likely bankrupt him.

## Termination

#### Process:

Parties enter into a new contract to cancel the policy. The consideration is that the insurer is excused from carrying risk and the consumer gets their money back.

* There are opportunities to paying back up and getting insurance back.
* The insurer is still on the hook for insurance until the notice period expires despite a lack of consideration (due to statute)

If terms allow, then the statutory conditions for unilateral withdrawal may be followed for termination. *Ont Ins Act* s 148, statutory condition 5(fire); s 300 statutory condition 6(accident/sickness); Ont. Reg. 777/93 statutory condition 11(auto)

* Insurance companies must give notice in specific ways (registered mail or personal service) within set time limits. These formalities are very strict for the insurer. *City Mutual Insurance Co* (1893) On Ch Div.

#### Timing:

Typical there is an expiry date or a specific event that triggers cancellation.

* Interim K’s often do not have these. Pending a decision from the insurer about final coverage they will last for a reasonable time unless an expiry date was set. *Wilcox v Norberg*  aff’d BCCA 1981.
* Homeowners and auto = set periods
* Life insurance:
	+ Set period (called “term insurance”); or
	+ Whole-of-life (assuming premiums are kept)
* Crop Insurance = expires after harvest
* Construction ins = expires on completion of project

Insured can cancel their policy at any time.

Insurer cannot cancel if they know a **loss has occurred** and if the insured does not know about the loss. *Brown v British American Assurance Co* (1875) ON CA

Where the **insured has breached a condition** in the contract the insurer may cancel on that ground provided that the requirements for doing so, as contained in the policy, are met. *Singh v Sangha* 2014 ONSC

Reinstatement

An insurer may agree to reinstate a K that has been terminated or lapsed for non-payment of premiums, usually on condition of payment.

* Cannot do this with life insurance policy after death if the policy terminated before the death. *Paul v Cumis Life Is Co* 2012 BCCA
	+ Can you do this a vehicle or home after a loss though? Presumably yes

### Auto – Unilateral Termination

Auto insurance is mandatory so it may not be cancelled arbitrarily once it has been in effect for more than 60 days.

It may be cancelled if:

* Premiums unpaid
* False information given on application
* Material change in risk (e.g. racing modifications to car)

*(Compulsory Auto Insurance Act RSO s12)*

## Replacement of the Insurer

May arise when there is corporate amalgamation, or an insurer is getting out of the business.

Transfer to another insurer must get approval from the superintendent of insurance. *Ont Ins Act* - Part 16 XVI (referred to “reinsuring” although that is not the common use of the word “reinsure”)

## Statute

Insurance Act, ss. 124, 126, 127, 128, 134, 139, 145, 146, 148, 227, 232, 234, 235-9, 298, 300, 303

O. Reg. 664, s. 5

## Case Law

### Davidson v. Global [1965] 1 OR 505 (HC)

See on page 75

### Patterson v. Gallant [1994] 3 SCR 1080

See on page 77

# Topic 6 – Coverage – Anatomy of a Policy (chapter 7)

Lecture Notes

When the agreement is sent in the mail they ae very confusing. The Ontario Auto Policy is government mandated and they took a stab at writing it in plain language (a good one to read).

The insurance contract is not just the policy, it also includes a declaration page (identifies parties, insured subject matter); policy and endorsements; conditions and warranties; definitions section (**crucial**). In auto cases they never send you the policy, the send you a link to see the policy online.

* There are so many rules and regulations you don’t realize what you get in your policy, some of the regulations are merely referenced in the policy and you’d have to go to the regulation to read them.
* There is no requirement that the language policy in any two policies are the same. Sometimes the language varies, sometimes it varies but has statutory requirements.
* An agreement must include the 5 factors discussed in topic 5.

##### Policies and Endorsements

Onus for Proving Coverage

General proposition of onus for proving coverage:

* + - Coverage must be proven by the insured; exclusions of coverage must be proven by the insurer. There can be exceptions to the exclusions 🡪 the burden here lies with the insured.
		- Whoever is advancing the proposition has the burden of proving the proposition.

Actual cash value is usually the depreciated cash value of a used item. This is different from the replacement costs (car insurers often sell you coverage for a brand new if your car is destroyed and is less the 3 years old).

#### Conditions (substantial compliance)

Some agreements can include conditions. Jeweler stores have conditions that insured items cannot be taken off the premise (because they are most secure on premises e.g. where they are under video camera). If stolen off premises then not covered, but if stolen after it has returned to the store then it is covered.

Conditions can be very specific.

They operate more so in commercial liability contexts where there is significant amounts of insurance and the insured are frequent targets of claims. Operate less so for consumers.

When employers have protocols which they fail to enforce adequately then they are still covered. When they fail to enforce the policies at all then they are not covered.

#### Warranty (strict compliance)

A warranty however means that once it has been breached it cannot be rectified. In the jewelry example above even if the jewelry was stolen after returning it to the store it would ont be covered because it had left the store.

* Insurance policies used to so full of warranties that they negated the total value of the insurance.

Strict vicariously liability 🡪 You ensure your car and are strictly liable for anyone who drives your car.

Do the intentional acts of one insured impact the entitlement of another innocent insured party?

* I.e. a divorced couple where one insured spouse burns the insured house down to spite the other insured ex-spouse who was going to get the house under the separation agreement.
* Recall joint and several. If you conceive each individual as a several then they remain untainted one can claim. But if they are joint and several then the one insured taints the other and neither can claim. What should the law be: several or joint and several.
	+ Should the wife get paid for her interest in half of the house? What about the residual value in the land where the husband still owns half of that value? (see note on residual value below). Since they are separated, given that there is an undivided half-interest in the whole, should she get half?
		- Most likely this issue will be resolved by statute.
		- The implication of joint and several is that you can be part of something and not part of something at the same time.
	+ A tenant in common owns an undivided half interest in the whole and upon death the interest goes to the estate. If it is a joint tenancy then upon death the interest goes to the other tenant.
	+ Residual value: If your car is “totaled” then the insurance company will pay you for the value of the car. The insurance company then gets ownership rights in your car. The insurance company has rights to the residual value and can sell it or do what they want with it.
	+ A Peringer agreement is an agreement where you agree to severe joint liability.

## Requirements of form:

### Evidence of K

* Policy is not the K 🡪 merely evidence of the K (*Ont Ins Act* s1).
	+ Other evidence includes: receipts, oral testimony, application forms, memos.
* Property and Auto K’s usually exist on interim basis before any policy is issued.
* Title Insurance Ks **must** be in writing setting out and limits on liability *an unwritten K is void*. *Ont Ins Act* s139(1).
* An issued policy does not always override conflicting agreements captured in earlier agreements (e.g. oral agreements, interim receipts, or applications). *Inn. Cor International Ltd v American Home Assurance Co* (1973) ONCA

#### Life Insurance

* The entire contract is *OIA S174(2)*:
	+ policy, (there **must be a policy issued**) *s174 (OIA)*
		- K may be effective before it is in writing, esp. if an interim receipt is issued *s174(2) OIA*
	+ the application,
	+ attachments to the policy when issues,
	+ amendments agreed on in writing.
* **A policy overrides the application**, esp. where customer accepts delivery of the policy without protest and pays premiums . *Provident Savings life assurance v Mowat* (1902) SCC
* Policy must include: (OIA s175(2))
	+ The name or a sufficient description of the insured and of the person whose life is insured.
	+ The amount, or the method of determining the amount, of the insurance money payable, and the conditions under which it becomes payable.
	+ The amount, or the method of determining the amount, of the premium and the period of grace, if any, within which it may be paid.
	+ Whether the contract provides for participation in a distribution of surplus or profits that may be declared by the insurer.
	+ The conditions upon which the contract may be reinstated if it lapses.
	+ The options, if any,
		- of surrendering the contract for cash;
		- of obtaining a loan or an advance payment of the insurance money; and
		- of obtaining paid-up or extended insurance.
	+ The following statement: Action barred unless commenced w/in Limitations Act time frame.
* For group insurance: policy must be issued to group institution and certificates issued to each member *OIA s176-77.*

#### Accident and Sickness Insurance

* K requires issuance of a policy. (*OIA* S293-294)
	+ Obligation to issue a policy is statutorily imposed on the insurer. *If essential elements of a contract (agreement on basic terms and consideration)* are met then the insurer’s failure to issue a policy does not prejudice the consumer.
		- Not usually a practical problem because insurer K’s state they are not in effect until a policy is delivered and premiums are paid.
* For group insurance: policy must be issued to group institution and certificates issued to each member *OIA S298.*
	+ Certificate must include: (*OIA s293<policy>, s296<group>*)
		- name of insured individual;
		- method of determining who is insured;
		- who is to be paid money;
		- amount payable; AND when is becomes payable;
		- conditions for reinstatement;
		- period of grace for premium payments;
		- the duration of insurance.
* There is no specified list of what constitutes the ***entire* K** therefore, 🡪 inconsistent details (e.g. details in an application, or interim agreement) **may override the policy** ***unless*** there is clear agreement that the parties both agreed the policy terms applied). *Inn. Cor International Ltd v American Home Assurance Co* (1973) ONCA

#### Automobile Insurance

* The K may be entirely orally, or a customer may only be issued a certificate (which insurers are statutorily permitted to issue instead of the standard policy). *OIA s232(5)*
* Standard policies and other forms must be approved for use by the Provincial Superintendent of Insurance *OIA s 227*.
	+ Insurer’s failure to oblige does not prejudice the insured. *Royal &Sun alliance Ins. Co.* (2017) ONCA
* Policies must clearly set out:
	+ Insured’s duty to disclose *s232(8)*
	+ Existence of any partial payment clause (deductible) s*263(5.3)*
	+ Statutory conditions (not required in interim agreements) *s234*
* Policy is deemed to accept any differences from the written application, unless differences from the written application have been drawn to the customer’s attention in writing. *S232(4)*
* Errors in policy can be corrected by an endorsement. *Adler v Dominion Gresham* (1927) ON HC

#### Fire Insurance

* No formal obligation to issue policies. It is custom to issue policies.
	+ Where they are issued, they are usually issued some time after K takes effect.
	+ Where they are issued, they must contain statutory conditions. Interim binders/receipts need not state statutory conditions. OIA s 148
	+ Where they are issued, the policy must show, on its face in red ink, the existence of any: (OIA s 149).
		- Deductible
		- Co-insurance
		- Average or similar clause
		- Clause limiting recovery to a % of the value of the property.
* K can be evidenced by:
	+ The written application
	+ The broker’s receipt
	+ Oral testimony

#### Other (i.e.: not life, accident/sickness, marine, auto, or fire)

No formal requirement to issue policy, but severe consequences follow from failure to do so:

* Legislation requires all the terms of the K are to be set out in full in the policy:
	+ the insurer can only use, to its advantage, terms in the ***policy***. *OIA s124*
	+ the customer can enforce for their advantage any term of the ***K*** established by evidence even if that evidence does not derive from the policy. *OIA s126(2).*

### Required Content of Policies

**Auto**: Auto insurance policies are determined by both statutory specification and a process of official approval.

* Most aspects of auto insurance policies are not negotiable.
	+ Statutory conditions include matters dealing with changes to risk; prohibited uses; termination; and parties’ obligations after loss occurs*. Ont Reg 777/93*
* **Some parts, such as collision insurance, are optional**, but are always included using elements dictated by statute and any other specific wording approved by the appropriate official (may be the superintendent) *OIA s 227*.

**Fire:** Policy must cover certain risks including loss of or damage to subject matter by fire, lightning, or explosion.  *OIA s144.*

**General**: Legislation sets out general standards to which **all Ks must conform**. *OIA s 127:*

* 127(1)“Every policy shall contain the name of the insurer, the name of the insured, the name of the person or persons to whom the insurance money is payable, the amount, or the method of determining the amount, of the premium for the insurance, the subject-matter of the insurance, the indemnity for which the insurer may become liable, the event on the happening of which the liability is to accrue, the date upon which the insurance takes effect and the date it terminates or the method by which the latter is fixed or to be fixed”

**Unjust or unreasonable terms:**

Any stipulation, warranty, or condition, held in court to be unjust or unreasonable is not binding on the insured. *OIA s 151*

* Although this clause is found under the part for Fire, case law is not only from fire:
* *Dunningham v St. Paul Fire & Marine Insurance Co:* it was not unjust or unreasonable to ask a jeweler to keep his stock lock in drawers over night because 🡪
	+ The insured suggested this provision
	+ The insured’s premiums were lowered by this condition, and
	+ It could be readily complied with.
* Courts will consider the premium charged when determining unjustness and unreasonableness *Dunningham.*
* Even if a condition is just on its face, the courts may hold it is not binding in the circumstances of a particular case.

### The Structure of Policies

Format may be specified by statute/regulation, may be subject to approval from the Superintendent, or may be in accordance with industry wide standards for the wording of clauses, but otherwise there is no specified format.

Headings in policies have no consistent usage and can include: insuring agreement, exclusions, conditions, warranties, edorsements, declarations, definitions, and coverages.

#### The Insuring Agreement (typical)

* Defines the subject matter;
	+ Specifically or generally
	+ There can be issues relating to insurable interests: It is usual to refer the subject matter of property insurance as the property itself but it is more correct to specifiy the interest in the property which is insured.
		- Consider bailees: Insurance can be taken out by bailees on property in their possession. The bailee has their own interest in the property they possess, but they may also become liable to the bailor if the property should be lost or damaged. They can therefore insure the property on both a first party and third party basis. Often insurance excludes losses to property within an insured’s “care, custody, and control”, which has been held to refer only to property which has passed into the posession of the bailee. *Indemnity Insurance Co v Excel Cleaning Service* [1954] SCC
* Duration of cover;
* Premium and how it is paid;
* Monetary limits of cover;
	+ The amount of coverage often sets out:
		- the upper limit for recovery;
		- defines deductibles (what is subtracted from the value of the loss when the insurer’s contribution is calculated); and
		- any co-insurance clause (if the upper limits of a policy are less than a certain percentage (usually 80%) of the total value of the property then the insurer is only responsible for a portion of the loss since the insured is a “co-insurer”)
			* Any deductibles and co-insurance clauses must be in red ink on the face of a policy for fire insurance. OIA s149
* Perils against which insurance is provided. The events which lead to a loss.
	+ Can include: fire, flood, theft, vandalism, disease, personal injury, or incurring of liability.

#### Exclusions

These specify events or circumstances which, if they happen in a way that relates to the loss, the result is that there is no coverage.

The onus is on the insurer to establish that a claim is excluded. *Progressive Homes ltd v Lombard Gen. Ins. Co* 2010 SCC

Presumed exclusions in all Ks:

* Losses deliberately caused or recklessly or allowed to happen by the customer or someone else covered by the K.
	+ The terms of the K may protect one co-insured from the delinquencies of another. *Scott v Wawanesa Mutual Ins. Co.* (1989) SCC
* Normal wear and tear (due to lack of fortuity)

##### Limits to exclusions:

* An exclusion for loss resulting from an inherent vice of a crane was found not to apply to defects attributable to negligent assembly of the crane. *Brown Fraser & co v Indemnity marine Ins.*  1959 BCCA
* Similarly, “latent” defects do not include structural defects apparent to an experience observer. *Dawson Creek (city) v Zurich Insurance Co* 2000 BCCA

#### Conditions and Warranties

Distinguishing feature: failure to satisfy a condition or warranty results in loss of coverage even if the particular instance of default had nothing to do with the loss. *Elkhorn Developments v Sovereign General Insurance Co* 2001 BCCA

* An exclusion only apply to circumstances giving rise to the actual loss.

Can be positive (insured must do something) or negative (insured must refrain from doing something).

May relate to circumstances before loss happens, or may concern matters after loss (i.e. adequate proof of loss or protecting from further damage)

* A condition may actually be an exclusion if it applies only to the circumstances giving rise to the loss. Doesn’t matter whether the policy calls it a condition, warranty, or exclusions.

The difference between conditions and warranties:

* Conditions require substantial compliance *Golob v Dumfries Mutual Fire Insurance Co* (1979) ONCA
* Warranties require strict compliance *Dunningham v St Paul Fire & Marine Insurance Co* (1964) BCCA.

**Fire Insurance:**

* No condition or warranty is to be given effect if it is unjust or unreasonable. *OIA* s151
	+ This section applies to statutory conditions *Marche*
	+ The comparable section of the BC Insurance was held **not to apply to multi-peril policies** i.e. only applies to fire (presumably this holds in Ontario as well) *KP Pacific holdings v Guardian Insurance* (2003) SCC.
		- Although in BC and ALTA there is no longer a separate piece of legislation dealing with fire insurance 🡪 therefore the section dealing with “unjust/unreasonable” terms in the fire section of the legislation applies to all property insurance *in those provinces*.
* Any clause that amounts to a condition or a warranty is unenforceable against a customer if it amounts to a variation or omission of or addition to any statutory condition. *OIA s 148(1)*
	+ Insurers have tried to get around this by describing the subject matter so specifically that the description essentially amounted to a condition (e.g. “the building *occupied* as a residential store” implies a condition of occupancy via the definition of the subject). When that exact description is not met then the subject matter would cease to exist.
		- The definition of the subject matter was not thought of as a condition, stipulation, or warranty that could be challenged as unjust or unreasonable. *Sun Insurance Office v Roy* 1927 SCC
		- This loophole was rectified with legislation, but amendments have since simplified the legislation and vacancy clauses are once again used by insurers *Cody v Beaver Ins Co* 1964 ALTA CA.
			* Again there is litigation over whether such clauses are exclusions, conditions, or part of the description of the risk *Hirst v Commercial Union assurance Co* 1979 , reversed BCCA 1979

### Multiple Insureds

Other insured’s may be covered if they are named specifically or designated generally (‘employees’)

**Can be insured Joint or Severally**

Joint

Several

* Each insured is entitled to their own notice of termination *Transportation Lease Systems* (2005) ON CA
* No insured is prejudiced by the misconduct of other insured

**Determine whether Joint or Several w/3 steps:**

Procedure from *Scott v Wawanesa Mutual Insurance Co* 1989 SCC

1. Examine policy to determine if the words clearly exclude the insurer’s liability even on an innocent insured’s claim when another insured has been guilty of specified wrong doing.
2. Inquire whether the opposite intention is manifest: that an innocent insured’s claim should survive the wrongdoing of another person insured under the same contract.
3. If not 1 or 2 (the policy is neutral) 🡪 a presumption arises:
	1. the insurance of an innocent insured is contaminated in respect of property in which both insureds have interest that are “inseparably connected.” *Rochon v Rochon* 2015 ONCA
		1. inseparably connected = a loss or gain necessarily affects them both *Scott*
	2. Where the interests are separate and distinct then the claims are to be treated separately and are uncontaminated by actions of others. *Kloppenburg v Pitts Insurance Co* 1981 ONCA

### Temporary Contracts

Do the terms included in the policy apply to interim Ks that take effect before the policy is issued?

* If the interim policy references the full terms then it is clear that those terms apply. *McQueen v Phoenix Mutual Fire Insurance Co* (1879) SCC
* Statutory conditions apply to every K (*OIA* s148), regardless of whether they are written *Citizens Insurance v Parsons* (1881) Canada PC.
	+ Fire and automobile interim binders need not state the applicability of statutory conditions for those conditions to be binding.
	+ For accident and sickness insurance, **even interim binders** must state the applicability of statutory conditions.
		- Statutory conditions not in writing may not be invoked ***against the customer***. This is based on the general principle that a person should not be bound by obligations of which they have no notice *Re Colemans Depositories* 1907 UK CA. They may be invoked against the insurer.
			* In fact, the legislation provides an exception: a policy of accident insurance of a *non-renewable type issued for a terms of six month*s or less *or in relation to a ticket of trave*l only need to state “this contract is subject to the terms of the statutory conditions.” *OIA* s302
				+ Stating this exception implies other types of accident and sickness insurance do need to set out the statutory conditions, even in their interim biding.

## Sample Policies

Ontario Auto Policy (OAP 1)

OPCF 44R Endorsement

Manulife sample LTD policy

RBC sample LIFE Insurance Policy

ISO Sample Commercial General Liability Coverage Policy

Sample Declaration Page

## Statute

Insurance Act, ss. 118, 142-44, 151, 239, 241-51, 256, 260, 265, 268-76

# Topic 7 – Interpretation of Insurance Contracts

A court should give effect to the intention of the parties. If the words used are not clear enough to indicate the parties’ joint intention then the words are given a meaning which, if reasonable, favours the consumers.

* This is fair because the language was chosen by the insurer and/or because the meaning chosen by the court achieves a result which the parties could have reasonably expected.

Problems arise:

* where Ks are ambiguous; or
* where the agreement discussion did not even consider the facts that arise;
* where interim agreements are binding before policy is issued;

Asymmetry of power

* Insurer usually has more power in consumer driven contracts.
	+ Experience of insurer during formation
	+ Consumer is especially vulnerable and powerless when they have experienced loss
* Asymmetry of power is remedied by the following:
1. Coverage is always interpreted broadly:
* The default is to go to the benefit of the insured.
* The person seeking the coverage has the burden to prove on a balance of probabilities that their claim is covered, BUT this claim is heard sympathetically.
	+ Insurer can still prove the claim is excluded.

## Process: Brissette v Westbury Life insurance Co 1992 SCC

Step 1 🡪 the true intent of the parties is to be gleaned from the whole K.

Step 2 🡪 Where two or more meanings are possible, the court is to select that which most reasonably promotes the intention of the parties.

* determine whether it is a K reflecting the parties’ intentions or a K where terms are standard/mandated
* Use the literal approach and the presumed intentions

Step 3 🡪 Resolve ambiguity against the insurer (This only comes when Step 2 is futile *Stevenson v Reliance* 1956 SCC at 953)

Step 4 🡪 Avoid interpretations giving windfall to the insurer or an unanticipated recovery to the insured.

## Parties’ intentions

Primary principal is what the parties’ intentions are with respect to the transaction. If the parties intentions can be found, they will be preferred even over the literal meaning of the words in the policy.

*Consolidated Bathurst* 1980 SCC at 901

But in situations where intention cannot realistically be found lead the court to apply its idea of a “fair and reasonable” result

* Purely consumer contracts (i.e. auto) are mandated by statute and regulation. There is little negotiation and the insured often only sees the full policy after it comes into effect 🡪 therefore little “intention”
	+ Conversely, large and special Ks for construction companies on specific a project may involve more negotiation.
	+ Consumer contracts may sometimes include one or two specially negotiated terms. Only extrinsic evidence about surrounding circumstances known to both parties can be used to argue the meaning of ambiguity in these specially negotiated terms. *Onex Corp (*2015) ONCA

### Evidence of the parties’ Intentions

Where there is evidence of the parties intentions, that diverts from standard policy that will be delivered later, then those intentions will be upheld.

* **Broker’s representation:** This might arise where a broker with authority gives the consumer an idea of intentions that is different from the policy.
* **Interim Contract or Application** prevails over standard form policy where there is conflict *Inn. Cor International Ltd* (1973) ONCA
* **Separate endorsement**, separate from the standard form policy, is very strong evidence of the parties intention to divert from the standard form policy. Because it was negotiated, attention was given to it, and the rest of the policy should be read ad subject to any conditions endorsed upon it. *Consolidated Bathurst*
	+ This can also work against a customer who tries to escape the separate endorsement: because these are specifically negotiated there is evidence the customer has a very good understanding of those terms.
	+ **The more negotiation that takes place the more risk there is for ambiguity.**
* **Terms of art**: Can lead evidence about what the terms of art mean and how those understandings reflect the intentions of the parties.
	+ Use Expert Evidence to prove what terms of art mean: only experts can draw conclusions or give opinions because they have a framework of knowledge based on expertise or training that is outside the scope of the court.
		- Other people can only reflect on what they saw or make inferences.
* **Inoperative terms** of a standard form K do not impact the meaning of words in the operative parts *Home Insurance Co of New York* (1907) Canada PC
* **Handwritten or typed terms**  prevail over those printed.  *Poole & Thomson Ltd London* (1938) SCC
* **Terms that protect the insurer from paying any essentially claim** are likely void because it is hard to imagine a customer intends such insignificant coverage. (unless there is contrary evidence, e.g. low premiums). *Banes* (1992) BCCA

### Limits of the Literal Approach to Intention

Literal approach 🡪 the words are so clear that the parties must have meant to achieve the meaning they convey. *Progressive Homes Ltd* 2010 SCC

However there are some limits:

* Reasonable minds can differ about the meaning of terms (i.e. does construction include repair work, or only building something new)?
* The consumer may not have had the term in mind when the contract was concluded (i.e. words in policies should not be given their literal meaning if to do so would contradict the parties’ intention as gleamed from the K as a whole). *Consolidated Bathurst.*
	+ The literal meaning should not be applied where it would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the K was created *Consolidated Bathurst*
* Words and phrases which can be used as terms of art are generally given their ordinary meaning rather than their technical one. *Guidmond* (1912) SCC This is to protect the intent of the consumer.
	+ Where is it “clear cogent and irresistible” that both parties intended to use a particular technical or trade usage meaning then that meaning will be used. *Provincial Insurance Co v Connolly* (1879) SCC
		- E.g. a third party is given the normal lay meaning of “not a party to the K” *Blackmore v Blackmore*  1994 BCSC
		- See page 8-9 for more examples of ordinary lay meanings.
		- See above for providing evidence on meaning of terms of art.

### Presumed Intention

Courts choose to impose a commercially realistic interpretation on the assumption that this is what the parties would have intended if they had turned their minds to it when entering the K. *Kingsway General Ins.* 2004 BCCA

In order to choose an interpretation that gives effect to a viable commercial agreement over an interpretation that nullifies it, the following guidelines are used:

* Read the policy as a whole *MDS inc v Zurich* 2013 ON SCJ
* No cover for loss which is not fortuitous, even if literal words suggest such coverage
* Courts tend to avoid forfeiture where possible *Soveriegn Fire Insurance Co v Peters* (1885) SCC
	+ Even to the extent of ignoring a clearly worded exclusion if it amounts to a nullification of the coverage purchased. *Zurich Insurance co v 686234* (2002) ONCA
* Coverage provisions are always interpreted broadly. Exclusions are interpreted narrowly. *Canadian National Railway v Royal & SunAlliance Ins. Co. of Canada.* (2008) SCC; *Ledcor* 2016 SCC

### Ambiguities

A term is ambiguous when the meaning cannot be determined using the literal approach or the parties presumed intentions. *Stevenson v Reliance* 1956 SCC at 953

* A term is not ambiguous merely because multiple interpretations are available. There must be at least 2 ***reasonable*** alternatives. *Sabean v Portage* 2017 SCC
* A term is found irreducibly ambiguous when after due inquiry (into literal meanings and presumed intentions) it cannot be pronounced clear.
	+ Finding ambiguity is a question of fact. Courts may consider extrinsic evidence to determine the parties’ true intentions, however it must be objective evidence of joint intent (not just evidence of what one party intended) *JILM Enterprise* (2012) SCC

Two ways ambiguity arises:

* Divergent meanings: (i.e. when some doctors would call a condition chronic, while others wouldn’t 🡪it is unclear to the lay insured person and therefore the term “chronic” ambiguous *Taylor v National Life Assurance* 1990 BCCA)
* Irreconcilable terms in the same (doesn’t only apply to two terms in the same policy 🡪 can even a term in the policy that disagrees with a term in the cover note *Elite insurance Management* 1993 BCSC)
	+ The ambiguity may even arise because of the location of terms in the policy (i.e. if they come out of context, or appear to be a limit but are not placed in the limit heading of the K) *Solway v Lloyd’s Underwriters* (2006) ONCA

Ambiguity is usually resolved in favor of the insured based on contra proferentem or reasonable expectation (or, I think, possibly both):

#### Contra Proferentem

* *The words of a K are to be construed more strongly against the person offering them*.
* Insurance Ks are usually evidenced by policies drafted entirely by the insurer.
	+ Whether the policy is imposed by the insurer, or is a manuscript policy (terms are negotiated) is a question of fact *Dunn v Chubb Insurance* (2009) ONCA
	+ Where the policy is mandated, word by word, by the legislation, contra proferentem does not USUALLY apply. *Insurance Corp of BC v Joseph* 1989 BCCA
		- **Exception**: CP applies to standard form Auto insurance Ks because, although approved by the Superintendent, the Ks were based entirely on submissions from insurers. *Wigle v Allstate insurance Co. of Canada.* (1984) ONCA – refuse to leave SCC.
			* Further, some would argue that **insurers are more involved in drafting the legislation** than consumer advocates are, and therefore insurers are still drafters and CP should still apply. Professor Baer *Cases on the Canadian Law of Insurance* 6th ed. Page 696
* Policy: The approach of contra proferentem also helps remedy the inequality of sophistication and bargaining power, and lack of opportunity to negotiate terms.

#### Reasonable Expectation Doctrine

Use of contra proferentem is restricted if it results in an unreasonable outcome. *Wigle*

* This is consistent with *Consolidated Bathurst* where it is held that a proper interpretation **shouldn’t give either insured or insurer a windfall**.

Where ambiguity exists and the courts favor the insured, they should limit the favorable construction by “reasonableness” and only apply the doctrine (giving reasonable expectations) where it is impossible to give the K a fair interpretation by using other rules. *Wigle v Allstate insurance Co. of Canada.* (1984) ONCA – refuse to leave SCC.

Favor reasonable expectations where ambiguities cannot be reconciled.

* Fear that Canadian courts will follow American use of this doctrine and imply contractual obligations despite clear exclusionary language to the contrary. But it has been held that reasonable expectations cannot create contractual obligations which do not otherwise exist. *Elite Builders ltd. v Maritime Life Assurance* (1985) BCCA, leave to SCC refused.

Evidence: Courts may consider extrinsic evidence as to surrounding circumstance (but not evidence of what one party subjective expected) *Jesuit Fathers of UC v Guardian*  2006 SCC

### Rectification

Where there is evidence of an agreement, between the parties, as to terms which are at odds with the policy then the policy may be rectified.  *Ross v Scottish Union*  1922 ONCA

* There must be a meeting of minds on the term and not just one party claiming the wording of policy should be different. Pilon v Progressive 1958 ONCA
* Legislation requiring all of a policy be in writing does not preclude rectification. *Concord Pacific* 2009 BCSC

#### Evidence of rectification

Mere oral evidence of the agreement to the term may be enough. *Protection Mutual Insurance Co* 1991 BCCA

The premium paid may be sufficient evidence that something different from the written terms was intended where the issue is the agreed amount or type of coverage. *Aetna Life insurance* 1880 SCC

* Where the insurer seeks to reduce the coverage described in the policy based on the premium paid, the insurer will only be successful if the premium paid is so patently inefficient that it must be a mistake*. Kraus v Rocky mountain Life* 1991 Sask QB

The parties’ actual agreement may also be deduced from their habit, on renewal, to simply repeat coverage on the same terms. *Young’s-Graves Inc* aff’d ONCA 1992

## Causation

* If the (or one of the) proximate causes fits the description of an insured peril 🡪 loss is covered. *Wadsworth v Canadian Railway* 1914 SCC

### Proximate cause (dominant or effective cause)

* Not dealing with time and space, dealing with whether the cause is dominant or effective relative to other causes. *Sirois v Saindon* 1976 SCC
	+ It is more than merely common sense
* Can be more than 1 dominant cause (contrary to British law) *Milashenko v Co-operative Fire* 1968 SCC

### Multiple Causation

* What if you can’t tell which cause is the dominant cause? There can be more than 1.

#### Chain of causation

##### Insured Peril is Originating Factor

Insured peril may be originating factor in loss but not the dominant. The test for directness is whether, once the originating cause has operated, there has been a new intervening cause. *Wynward Ins Group v MS* 2016 BCCA

* Firemen dismantled a furnace to control flames 🡪 pipes freeze 🡪 damage to store. Damage was covered *Drumbolus v Homes*  1916 ONSC)
* Store owner moving furniture out of his burning store 🡪 violent mob enters store and breaks items 🡪 items not covered b/c fire was remote cause and mob was proximate cause *Marsden v City & Country Assurance* 1956 NBCA)

Any action taken to control or avoid the consequences of an insured peril are **not intervening**. *Drumbolus.*

Action most likely to be seen as intervening if it is human intervention *R v Kansa General Insurance* 1994 ONCA leave to appeal refused.

* If lightning strikes first it is the proximate cause even if high winds follow. *Roth v South Easthope* 1917 aff’d ONCA 1918
* The peril insured against need not be the “actual instrument of destruction” if the peril insured against brings about the impact of the actual instrument of destruction. *Shea v Halifax Ins.* 1958 ONCA (fire is covered, fire causes propane to heat up 🡪 propane explosion causes destruction. Fire is the proximate cause, propane explosion is proximate cause)

##### Insured Peril is Not Originating Cause

If the first peril to occur is excluded 🡪 no coverage because the first/excluded peril was the proximate cause, not the insured peril. *Wadsworth v Canadian Railway* 1914 SCC

If the first peril to occur is **not** excluded, **and** the subsequent peril was an insured peril 🡪 coverage. *Consumers Glass Co v Allandale Mutual Insurance Co.* 1977 Ont HC.

##### 3rd Party Liability

An action in negligence can be maintained even if there is some human intervention. An insurance policy excluding liability to 3rd parties, where there is an intervening cause, will not always be successful. The courts will give a narrow interpretation to the excluding clause. *Canadian National Railway*

* If there are two proximate causes (this case says there can be), and only one of them is excluded, then the insurer is still liable for its customer’s negligence. *Derksen v 539938* 2001 SCC
* Where an exclusion is clear and unambiguous it should apply. *CUMIS General Insurance* 2008 ONCA

#### Independent Contributing Causes (where loss cannot be apportioned)

An insured peril is the proximate cause, even when other perils are involved, if the other perils would not have result in the insured loss. **An insured peril is the proximate caus**e where the insured loss would not have happened **but-for the insured peril**. *Milashenko v Co-operative Fire* 1968 SCC

* Man had heart attack coincidentally at same time he was exposed to toxic fumes. Neither would have killed him alone, but their combined effect was enough to kill him. *Milashenko*
* If other perils involved are excluded then the exclusion would likely apply. *FordMotor Co* 1959 aff’d SCC

**Sole Causes**

Exclusions clearly stated, such as those stating that coverage only applies where the insured peril is the sole cause of the loss, are valid. *Consolidated Bathurst Experts*

* Whether an accident is a sole cause can be tricky to determine, especially where loss results from both diseases and an external cause:
	+ If disease is *merely a condition* in which an accident operates, then the accident is the sole proximate cause. (e.g. someone has diabetes, and then an injury occurs in an accident but their diabetes makes it worse) *Meyer v Allstate* 1981 Man CA
	+ If disease is a *cooperating cause* that lead to the injury then the accident is not the sole cause (e.g. an accident caused by someone having a seizure)
	+ This is essentially the **thin-skull principl**e being applied to insurers. The insurer is not relieved of any liability because the insured happens to have an unusual **susceptibility to the kind of loss** suffered. *Smith v Christie Brown* 1955 Ont HC, aff’d ONCA.
		- This applies to animal illnesses/conditions as well *Filkow v Gore Mutual Insurance Co* 1965 Man CA

Without specific language to the contrary an accident remains the sole cause of loss (including medical consequences) other than the immediate trauma. *Farmer v Great-West Life* (1984) ONCA

## Fortuity

Basic principle of insurance: you only get coverage for loss that is fortuitous. *Progressive Homes Limited* 2009 SCC

* If something is bound to happen or is deliberately caused by the insured it is not an accident

What is an accident?

* The definition can be set out clearly through exclusions in the policy otherwise there is no set definition of accident. Recklessness is becoming less of a barrier to

Few exceptions for coverage under auto insurance because occurrence was not an “accident”:

* Conviction of drunk driving: you don’t get income replacement but you still get healthcare benefits.

### Randomness vs certainty (occurrence still an accident even it happens over time, but not if it’s just wear and tear)

Even all-risk insurance doesn’t cover inherent vice or normal wear and tear. Insurance covers a risk and not a certainty. *British & Foreign Marine Insurance Co v Gaunt* 1921 UK HL

* As long as these things are not expressly provided for, they are presumed excluded. *Progressive Homes Limited* 2009 BCCA
* But unexpected consequences of normal wear and tear can be covered *Consolidated Bathurst*
	+ An occurrence is no less an accident because it happens over time (e.g. water leaking) as long as it is **unintended and unexpected**. *Progressive Homes Limited* 2009 SCC

Damage that occurs in the natural course of events is not covered (e.g. a fire place becomes covered in soot) however if that fire were to escape the fireplace it would become fortuitous. Young v Waterloo 1955 Ont Co Ct.

### Accident vs Diseases

Death is certain, timing of death isn’t.

When death or disability is due to a condition existing and known at the time the policy was acquired the death or disability may be held to be not-fortuitous. *Nelson v Industrial-Alliance* 2012 Alta CA

* All the circumstances must be taken into consideration.

Accident insurance and accidental death insurance, without more, does not cover death or disability resulting from disease. It is not health insurance. Diseases contracted unexpectedly are no longer considered as resulting from accidents. *Gibbens v Cooperators*  2009 SCC

* We would not say the bubonic plague spread through a series of accidents.

The term accident must be construed according to the parties’ intentions, reasonable expectations of both parties, the premium paid for accident insurance (vs health insurance).

Onus is on the insured to show the injury resulted from an accident and not a disease. *Nelson v Industrial alliance* (2012) Alta CA.

### Accident vs Intention (See also page 146)

Issues arise where insured performs an act deliberately not expecting the consequences that follow:

* if the "injury" is intentional then the injury is obviously not fortuitous and there is no coverage. But if the mere physical act (car surfing, sleeping with patent, etc) is intentional, and the injury is fortuitous (not guaranteed to happen as a result of the physical act) there is coverage.

Liability insurance is to protect against findings of negligence. But, negligence requires foreseeability. Therefore foreseeability cannot be a bar to a liability insurance claim. An accident arises when the result is unintended even if it was foreseeable or the result of a calculated risk. *York Region Condominium Corp No 772*  -2008 ONCA

For the purposes of accident insurance: An accident arises when the result an looked for mishap or an untoward event which is not expected or designed. *Stats v Mutual of Omaha Insurance* 1978 SCC

* A court must determine whether the insured intended to die, and if they can’t determine this then whether a reasonable person in the position of the insured would have expected to die. *Martin v America international* 2003 SCC

## Public Policy

When insured commits a criminal act (e.g. they are assaulting someone and that person accidentally dies) then denying them liability insurance can only have 2 impacts:

1. It attempts to punish the insured, supplementing the role of criminal law
2. It denies the victim compensation.

 Legislation addresses the common law (cl allows insurers to refuse the claim) with respect to auto insurance:

* OIA s258: a person suffering injury or damage in an auto accident…has a direct right against the insurer of the other car

Legislation also includes a more general clause that extends to all insurance:

* *OIA s128* **Unless the K provides otherwise**, a contravention of any law does not ipso facto prevent a claim, except where the contravention is committed by the insured, or with the consent of the insured, **with the intent** **to bring about loss or damage**.
	+ *This section only applies to the disability part of a life insurance K.*
		- Aka: This does not apply to most life insurance. *But* where the deceased killed themselves accidentally the claim by the beneficiary (*not the deceased’s estate)* is not disqualified. *Stats v Mutual of Omaha Insurance* 1978 SCC
			* Legislation resolves concerns that suicide is a deliberate cause of loss. *OIA* S188
	+ This section allows insurer to expressly provide that criminal actions prevent a claim
	+ This section specifies the intent must be the loss, and not the act which brought about unexpected loss
	+ The application of s128 in *Sirois v Saindon* (1976 SCC )was likely wrong since the K did not expressly provide criminal acts prevent a claim, nor did the insured intend to bring about the loss.

## Case Law

### Ledcor v. Northbridge 2016 SCC 37 – Broad Interpretation of Coverage. Court found term ambiguous 🡪 applied contra proferentem to interpret in favour of insured 🡪 limited the result by the parties’ reasonable expectations.

Very important case.

**Facts**: Building being built was insured. Close to building’s completion, the contractor hired sub-contractors to clean windows. Subcontractor scratched windows. To replace all the windows costs 2.5M.

* Insured sought coverage.
* Insurance policy protects “all risks of direct physical loss or damage…”***except***: “The cost of making good faulty workmanship … unless physical damage … results, in which event this policy shall insure such resulting damage.”
* Insurer denied coverage saying the scratches were a result of faulty workmanship.

**Issue**: 1. What is faulty workmanship? 2. What is physical damage not otherwise excluded?

**Wagner J SCC**:

1. The idea of faulty workmanship implies having to fix and **redo** the work you did, faulty workmanship doesn’t apply to consequential damage to other things.
* The windows are damaged property that were damaged by a workman not taking proper care. This is not the same as faulty workmanship.
1. This is ambiguous 🡪contra proferentem subject to parties’ reasonable expectations = a broad interpretation of the all risk policy that provides coverage.
* The COMMERCIAL purpose of builder’s **all-risk** policies are to be broad, a purpose that is advantageous to both insured and insurers.
	1. Insured’s have assurance from all risk policies, and
	2. Insurers have certainty about the broad scope of the all-risk policy and are paid in high premiums for them.

**Held**: The commercially reasonable expectations of the parties here was to have broad interpretation of coverage and narrow interpretation of exclusions.

### MacDonald v. Chicago Title Insurance Company of Canada, 2015 ONCA 842 - Municipal work orders do not need to be registered against title to affect the “marketability” of the property.

**Facts**: The insureds had obtained title insurance in connection with the purchase of their family home. Seven years after aquiring their home, the insureds discovered that the previous owner had removed load bearing walls in construction undertaken without a permit which had rendered the second floor unsafe. The City issued an Order to Remedy an Unsafe Building which required that work be done to temporarily support the floor. The insureds undertook the required temporary work and made a claim under their title insurance policy for the cost of the repairs needed to make the home structurally sound. The insurer denied the claim on the primary basis that the property was still marketable.

**Issue**: Was the house marketable under the terms of the policy which denied coverage if prorety was marketable?

**ONCA**: the Court did not accept the insurer's argument that the insureds might be able to sell the property to someone else at an undetermined lower price. The fact that someone might be willing to purchase a dangerously defective building did not make it marketable under the terms of the policy. The Court granted judgment on the issues of coverage and indemnification.

**Note**: Title insurance is not standard for policy regulated by statute.

### Bains v National Life Assurance (1991) BCSC aff’d 1992 BCCA - Coverage is broadly interpreted, exclusions are interpreted narrowly: avoid interpretations that prevent insurer from paying any claim.

**Facts**: Mr. B took out life insurance on himself, payment plan to pay every month, and within the first year, on August 2nd he stops paying because he finds a better insurance plan. He dies on August 4th. On August 14th the insurance company issues him a letter saying please pay us or we will cancel on September 2nd.

* Policy itself has no terms on termination (no mechanism or date). They have chosen to give him a grace period and to keep his business.
	+ Absent a specific term on mechanism for termination then there is coverage.

**Argument:** Insurer tried to argue that the term “first premium” meant premium for the entire first year. And that since coverage did not begin until the first premium was paid🡪 this customer did not pay his first premium and was not entitled to any insurance.

* Life insurance requires exchange of premium for policy before the K takes effect. Essentially they were saying no premium was paid.

**Reasons**: Coverage is broadly interpreted, exclusions are interpreted narrowly. First of all, it is hard to imagine that the insured intended to agree to terms that prevented the insurer from having to pay any claim. Further, there is evidence available from the insurer that they want to continue coverage until September 2nd 🡪 they gave him a grace period even though he’s already dead.

* + - There is no term that provides an exclusion in this situation.

**Issue**: Does the insurer have to pay?

**Held**: Insurer was liable.

### McLean v. CDN Premier Life Ins. (1991) 3 CCLI (2d) (BCSC) *Contra Proferetem*

**Facts**: Company sent him on a chartered flight, and he died. McLean has life insurance that says there is coverage for accidents on planes only where the insured is a fare paying customer on a “common carrier”.

**Issue:** Broad coverage, narrow exclusions.

**Held**: the TJ said coverage arises if he died in a plane that was available to the public (e.g. air Canada).

**Reasons**: Contra preference. There is no definition for “common carrier” and there is not specific exclusion for charter flights.

### Jesuit Fathers v. Guardian [2006] 1 SCR 744 - What is a “claim”

**Facts**: Residential school in Spanish river was being run by Jesuit fathers until 1958. They were still insured against any potential claims into the 1980s. Mr. Cooper makes a claim, and other people’s potential claims come to light. The other’s identity remained unknown and they did not make a claim.

The insurer refused renewal at the end of the term. All potential new insurers carved out exceptions that would deny coverage for any claims relating to the residential school.

**Issue**: The insurer knew roughly what claims might come forward. Were those 9 potential claims within the scope coverage?

**Held**: SCC 9 potential claims were not covered. The definition of a claim is an actual claim made, not knowledge of a potential claim.

**Note**: illustrates the idea of what a claims made is vs what an occurrence is.

# Topic 8 – Claims Process

Requirements and conditions precedents

* Duty of good faith in both directions. Insurer must adjudicate the claim fairly and honestly. Insured’s duty deal with disclosure at formation of contract.

## Notice and Proof of Loss

Insured must notify insurer of loss. This is usually stated in the policy.

### Time limits and manner of notice

Time limits and manner of notice for loss are **usually set out in policy**. The obligation to provide notice within a reasonable time is also part of the obligation of good faith *Hwang* 2001 BCCA

* **Accident/Sickness**: must be in writing and delivered or sent by registered mail within 30 days from the date the claim arises. *OIA* s 300 (Stat. condition 7(1))
* **Fire Policy**: forthwith and in writing. *OIA* s148 (stat. condition 6(1)(a).
* **Auto liability and property insurance** (i.e. other than accident benefits): must notify promptly and in writing.
	+ **For liability insurance:** notice must include all available info about the accident, damage, and any claims. Ont Reg 777/93 (stat. condition 5(1)(a)
	+ **For coverage for damage to the insured’s vehicle**: notice must include the fullest info available at the time. Ont Reg 777/93 (stat. condition 6(1)(a)
* **No-Fault Auto Insurance Benefits provided by private insurers**: in writing, and sent by registered mail or delivered with 30 days from the accident, or “as soon as practicable thereafter” (Page 9-2)
* Shortest notice period is under the municipal act for slip and fall on a city sidewalk. If you don’ give notice you can’t make a claim. Interpreted very harshly.

**Purpose of time limits is**:

* To allow insurer to investigate:
	+ Shortest notice period is under the municipal act for slip and fall on a city sidewalk. If you don’ give notice you can’t make a claim. Interpreted very harshly. Snow and ice conditions can change quickly.
* To allow insurer to salvage:
	+ - Value can diminish (e.g. due to exposure to elements).

**Interpreting Notice Timeline Terms:**

* Determining whether conditions like “promptly” and “forthwith” are met are questions of fact giving regard to the circumstances. *Duchene v General Accident Assurance* Co. 1926 Ont HC
	+ Immediately = with all due diligence in the circumstances *Shera v Ocean Accident*  1900 ONCA.
	+ **Immediately** and **forthwith** are construed strictly *Merchants & Employers Guarantee & Accident Co* (1918) Que KB.
	+ **Prompt** means almost immediate and calls for ordinary diligence. *Duchene v General Accident Assurance Co.* 1926 Ont HC

**Timeline starts to run:**

Compliance with timeline is a condition precedent to recovery. *Kumsathira v Pembridge* 2007 ONCA

Deferring notice: If the insured is not aware of the loss until sometime after it occurs, or does not believe it is covered, there may be grounds for arguing that notice be deferred. *Stuart Estate v Royal & Sun Alliance* 2005 NSCA

Suspected claims: where there are gronds for suspecting a claim then the customer will not be excused for not providing notice within the time limit. It is for the insurer to investigate and deem whether any measures necessary at that time. *Marcoux v Halifax Fire* (1948) SCC

* Reasonable doubt as to cover may result in relief against forfeiture ordered by the court. See below.

**Manner of Notice**

When written notice is required compliance is a condition precedent to recovery. *Evans v Railway* (1912) ONCA

* When the insurer receives and acts on oral notice then the requirement for written notice may be dispensed with. *Aubertin v North Assurance Co* (1924) BR Que.
	+ The insurer is said to have waived the requirement on one of 2 grounds: *Chapter 12*
		- The insurer is estopped from asserting non-compliance as a defence to paying a claim; **or**
		- The insurer has elected to treat the claim as valid not-withstanding non-compliance.
	+ If oral notice is given to an agent then the agent’s authority to waive written notice requirement must be considered.
* The insurer benefits from oral notice because it commence adjusting immediately. An insurer beginning to adjust a claim on oral notice IS NOT, without more, sufficient evidence to demonstrate an election to treat the claim as valid despite lack of written notice, however, it may give rise to an estoppel. *Chapter 12*

### Proof of Loss:

Condition precedent to recovery: Proving on balance of probability (*Shakur v Pilot)*1990 ONCA that the loss occurred and the value of that loss. *Atlas assurance v Brownell* (1899) SCC.

* Proof may fulfill notice, but notice without more does not fulfill proof. *Johnson v Dominion of Canada* (1908) ONCA
* Time limits, manner of providing proof, and what constitutes proof is set out in stat conditions and in policies.
	+ Insured’s burden of proving continuing disability under accident and sickness policies is discussed in *Barlow v Citadel* (2009) ONCA

**Purpose:** Allows insurers to verify whether the claim is valid in nature and amount. *Ontario Securities Commission v Osler* (1991) Ont Gen Div. If these objects have been met then the proof requirement is generally met.

* Where the insurer demands proof beyond what is reasonably necessary to assess the claim then *reasonable* rather than *strict* compliance on the part of the insured may allow the court to relieve against forfeiture. *Regal Films Corp* (1946) Ont HC aff’d ONCA

**Time limits:** Same rules as those for notice apply.

**A proof of loss includes disclosure of *everything*:**

 - E.g. Statutory condition 6(1) for **fire** that the proof of loss must include:

 (b):

(i) giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed,

(ii) stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes,

(iii) stating that the loss did not occur through any wilful act or neglect or the procurement, means or connivance of the insured,

(iv) showing the amount of other insurances and the names of other insurers,

(v) showing the interest of the insured and of all others in the property with particulars of all liens, encumbrances and other charges upon the property,

(vi) showing any changes in title, use, occupation, location, possession or exposures of the property since the issue of the contract,

(vii) showing the place where the property insured was at the time of loss;

Further:

(c) if required, give a complete inventory of undamaged property and showing in detail quantities, cost, actual cash value;

(d) if required and if practicable, produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers verified by statutory declaration, and furnish a copy of the written portion of any other contract.

- Accident and Sickness 7(1)(b): such proof as is reasonably possible in the circumstance of the loss and the right of the claimant to payment under the policy.

- No-fault auto insurance (both for government and private insurers): requirement is similar as above see: Ont Reg 776/93 s59.

- Auto-property damage: requirement is similar as above but see: auto insurance stat condition 4(1)

**Forfeiture**

* Even where records are destroyed, the customer is still required to meet the general test of the fullest account possible. If not, the insurer may find the claim in forfeited.

Forfeiture Allowed:

* Cinq-Mars v. Equitable Insurance Co. [1857] Eng CA
	+ The customer’s invoices had been destroyed along with other records and the insured property.
	+ The customer refused to procure copies of invoices which were available.
	+ Without them the insurer was unable to properly assess the loss and the claim was forfeited.
* Nixon v. Queen Insurance Co. [1893] SCC
	+ The customer’s invoice book had been destroyed.
	+ However, it was possible for him to have made a more detailed list with the help of his clerk.
	+ Therefore, the customer’s claim failed as he gave only a general account of the property lost.

Forfeiture Not Allowed:

* David’s Apparel Ltd. v. Economical Mutual Insurance Co. [1978] Ont HC
	+ The customer satisfied the test of fullest amount possible where one of his two clothing stores were lost by fire together with most of the business records of that store.
	+ The customer estimated the loss on the basis of the inventory at the remaining store and a comparative analysis of financial statements from previous years.
	+ This was held to have met the obligation of providing the loss on the balance of probabilities.

**Proof of Loss Must be Specific:**

* Value of items lost/damaged must be included along with the basis of valuation. *Anderson v Stevenson* (1943) Ont HC
	+ Where the value recoverable under the policy is clearly much lower than the value of the loss 🡪 less detail is required *Garceau v Niagara* 1877 Quebec.
		- * However, if the value recoverable under the policy is only slightly lower than the actual loss it is beneficial to the insured to provide detailed proof and establish there is no co-insurance.
* The customer must establish facts which bring the loss under the terms of the policy *Griffen v Prudential* Insurance (1934) Ont SC
	+ The customer only need to state the facts fully, and need not use technical language. *Boyle v Yorkshire insurance* (1952) ONCA
* The customer may supply any info mistakenly omitted as long as it is still supplied within the original time limit. *Kent v Ocean* (1909) ONCA
* Once the insured asks if further info is required, then insurer’s silence is enough to estop the insurer from using the defence of insufficient proof. *Adams v Glen Falls* (1916) ONCA.

**Manner of Proof**

Statutory Declaration: A sworn document proving your loss**:**

* Policy may require stat. declaration in all claims (*fire insurance: stat condition 6(1)(b*) or *auto insurance Saskatchewan stat condition 4(1)(c)*)
* or merely at the insurer’s discretion (*auto insurance Saskatchewan stat condition 3(1)(b)*)
	+ - Usually an insurer requires you to sign proof of loss if they **become skeptical**.
* If you lie, then you are at risk of perjury or fraud.
* Stat. declaration not required for auto benefits and accident/sickness.
* In auto insurance:
	+ - insurer can request you to swear on how the accident happened, or
		- they can request you are subject to an examination of discovery (perjury would be possible if you lie in either case)
* Claims involving illness or injury: a doctor’s certificate may be necessary to prove the cause and nature of the loss. *Accident and Sickness Stat Condition* 7(1)(c);
	+ A similar certificate may be required for No-fault benefits: Ont Reg 776/93 s60

**Implications of imperfect compliance with claims formalities**

* Following imperfect compliance:
	+ the insurer may act in such a way that gives rise estoppel or amounts to an election to treat the claim as valid not withstanding the default. *Chapter 12*
	+ The court may find that the lack of strict compliance did not prejudice the insurer and grant relief against forfeiture.
* *Claims practices* in Canada are such that proof of loss requirements are waived for:
	+ First-party automobile claims less than 2k (except where involving subrogation)
	+ Claims in property classes of insurance less than 2k (except where involving theft, mysterious disappearances, and/or subrogation)
	+ *Insurance Bureau of Canada: Agreement Respecting Standardization of Claim forms and Practices and Guidelines for the Settlement of Claims* (1984, revised 1992)
		- The standard practices agreed upon do not relieve customers of obligations imposed by policy or stat. conditions *without more*: some conduct by the insurer known to the insured that excuses compliance is also needed.
			* Failure to send proof of loss forms, when they are requested, likely excuses non-compliance. I think so, because this is evidence in addition to the agreement 🡪 it is actually acting on the agreement.

**Insurer’s Obligation to Provide Proof Forms *OIA* s112**

* When requested these forms must be provided immediately
	+ When insurers otherwise receive notice of a loss these forms must be provided within 60 days of that notice.
	+ In practice, insurers only send out forms where: there is large loss; there is suspicion; the claimant is being unreasonable or uncooperative. See above (*Insurance Bureau of Canada: Agreement*)
* Failure to provide forms is an offence and renders inoperable the insurer’s defence of failure by the insured to provide proof.
	+ Furnishing these forms does not establish the insurer’s liability to provide coverage.
	+ In ONT provision of these forms are not required for: life insurance, marine insurance, and accident and sickness insurance. *OIA* s122
		- For accident and sickness the insurer shall (note: not *must*) provide forms w/in 15 days, but if they don’t then the customer may submit a written statement stating: cause/nature of accident/sickness/disability and the extend of the loss.
			* If the insurer doesn’t provide the form w/in 15 days 🡪 gives rise to estoppel of the insurer’s defence for failure by the insured to provide proof *Chapter 12*
* Where there is no obligation (from statute or policy) to provide forms the failure of the insurer to assist the customer in making proofs may amount to estoppel of the insurer’s defence for failure by the insured to provide proof. *Mechanic v General Accident Assurance Co 1923 Ont HC – reversed on other grounds 1294 ONCA*
* The customer can provide the information requested on the forms by other written statements, unless the insurer’s forms are expressly required. *Marks v Commercial Travelers* 1956 SCC

### Notice **and** Proof Requirements

**Where to send:**

Fire: *May* be delivered at, or sent by registered mail, to the chief agency or insurer’s head office in the province. *Stat Cond 15*

Auto: *May* be delivered at, or sent by registered mail, to the chief agency or insurer’s head office in the province. *Stat Cond 9* - Saskatchewan

* No-fault (aka statutory accident) Benefits See (see 403/96 s 68)

Accident/Sickness: *May* be delivered at, or sent by registered mail, to the chief agency or insurer’s head office in the province. OR may be delivered to an “authorized” agent. *Stat Cond 7(1)(a)(ii)*

Notes:

* Less than personal delivery/reg. mail: Delivery by other means suffices, but the onus is on the insured to prove the notice/proof was forwarded *Home Life Assn v Randall* (1899) SCC (they do not need to prove it was received *Milinkovich v Canadian Mercantile*  1960 SCC).
* Delivery to agents: as a matter of industry practice delivery to local offices of agents, brokers, adjusters or district offices, are regarded as sufficient. *Sumitomo Canada* aff’d 1982 BCCA.

**Who may send:**

Where an agent forwards proof/notice then the obligation is no less fulfilled. *Melnichuk v London Life* 1936 ONCA

Exceptions:

An agent may only forward the proof/notice where the customer is absent or otherwise unable.

* Fire Insurance: the agent can only give notice where the absence/inability is satisfactorily explained *Stat Cond. 8*
	+ If the customer refuses to act, any person to whom part of the insurance money is payable to may do so.
* Property
* Auto liability: the agent can only give notice where the absence/inability is satisfactorily explained *Stat Cond. 7*
	+ If the customer refuses to act, any person to whom part of the insurance money is payable to may do so.

No fault auto-Insurance: proof and notice may be filed by claimants other than the named insured. *OIA s22(1)* and Ont Reg 403/96 s 68

Accident/Sickness: any insured person (named or not), a beneficiary or agent of any of them, may give notice/proof. *Stat Cond 7(1)*

## Misrepresented and Fraudulent Claims

* Non-compliance with the requirements for providing proof of loss results in non-recovery, subject to waiver or relief from forfeiture.
* Like non-compliance, fraud in connection with making a claim will also result in forfeiture.

**Impact of fraud**

Fire: entire claim is vitiated *stat cond 7*

Auto: Entire claim is vitiated *OIA* s223

Other: absent a term in the policy, the insurer is entitled to avoid the contract as a whole and be reimbursed any insurance money already paid. *Trans v Aviva Canada Inc* 2016 Ont Div Ct]

**Elements of fraud:**

1. Willfully made (not mere inadvertence or innocent mistake) – *National Ben Franklin Fire Insurance* 1927 ONCA
2. Act or omission - *Mortgage Corp of Nova Scotia*  1937 SCC
3. Material to proof of fact or extent of loss – *Alavie v Chubb* 2005 ONCA
	* Material: “capable of affecting the mind of the insurer, either in management of the claim or in deciding to pay it” *Gilchuck v Insurance* 1993 BCCA
		+ Fire: In the context of fire only the particulars listed in the stat condition need be accurately stated. False statements relating to other matters do not affect the claim. *Patterson v Oxford Farmers Mutual* (1912) Ont HC
	* Insurer not prejudiced: a false statement that is material but does not result in the prejudice of the insurer does not vitiate the claim. This only applies where the insurer’s conduct can be said to waive it’s reliance on the misstatement, otherwise the insured cannot escape the consequences of their fraud respecting a material matter *Skuratow v Commonwealth*  2005 BCCA
		+ Examples of non-prejudice:
			- Insurer already has notice of fact misrepresented *McCoy v Alliance Insurance* 1951 Ont HC
			- Information is readily available to the adjuster *Royal Insurance Co v Byers* 1885 Ont CA

**Burden of Proof**

* Onus to prove fraud is on the insurer. *Adams v Glen Falls* 1916 Ont CA
* Must prove fraud on balance of probabilities *Hanes v Wawanesa Mutual Ins.* 1963 SCC
	+ BUT: Evidence ought to be at least “clear and satisfactory, and leave no room for any reasonably inference but that of guilty” *Adams v Glen Falls* 1916 Ont CA
		- “The more unlikely or improbable the allegation required to be proved, the more cogent is the evidence required to overcome the unlikelihood or improbability” *Mazurek v Saskatchewan Government Ins* 1984 Sask QB aff’d Sask CA 1986.
		- The court must be satisfied “the facts are such as to make it reasonably probable, having due regard to the gravity of the suggestion, that the act was in fact committed.” *Hanes* 1963 SCC

**Guilty Plea in Related Matters**

Where a customer pleads guilty to fraud (*Wawanesa Mutual Ins.* 1939 Ont SC) or arson (Ottenbrite v Statefarm 2001 On SCJ) in relation to the same fire at question under the insurance policy 🡪 there is a strong but rebuttable presumption of fraud relating to insurance.

* The onus is still on the insurer to prove fraud.

**Common Fraud:**

* Non-existent property
* Loss that did not occur
* False statements about how the loss occurred
* False value placed on loss by the customer
	+ Gross over-valuation creates a rebuttable presumption of fraud. *Lynch v Royal Insurance* 1984 Ont Dist Ct.

**Fraud relating to part of claim**

* The entire claim is vitiated (e.g. if both building and contents are covered but the fraud only relates to the contents 🡪 both claims are vitiated) *Harris v Waterloo mutual Fire insurance*  (1886) Ont CA
* Unless there is more than one person insured and the subject matter of the insurance is divisible (as it would be with buildings and contents) *Truglia v Travelers* 1966 (Ont HC).
	+ Where the subject matter is not divisible 🡪 the result is forfeiture with respect to all insureds. *Siountres v Uunited States Fire ins.* 1982 Ont HC
* The insurer must prove fraud. Evidence of fraud must be clear and satisfactory as to leave no reasonable inference other than guilty on a balance of probability.
* If you allege fraud, and fail to prove fraud, the costs are very high.

Facts: Man on motorcycle is stopped at an intersection when he sees approaching danger he diverts and ends up breaking his leg. He didn’t know he could recover from his insurer. He didn’t notify his insurer or policy.

* He then notifies insurer. He insurer had in the mean-time received his accident benefits claim. The insurer claimed he was in breach of his obligation to notify the insurer within 30 days.
* In response he sought relief from forfeiture

## Relief from Forfeiture

### Courts of Justice Act

Gives courts the authority to grant relief against “penalties and forfeitures” on such terms as they see fit.

* “The Insurance Act does not codify the whole law of insurance; it merely imposes minimum standards on the industry.” [as per the SCC in *Saskatchewan River Bungalows v. Maritime Life Assurance* Co.] 1994

Relief available in respect of life insurance and pre-loss issues, but where that is the equitable result, meaning:

####  It cannot prejudice the insurer in the sense as relating to s129 OIA.

* See below. “Prejudice to insurer”

#### It cannot create contractual rights:

* The courts of justice act does not give courts the authority to grant relief where contractual rights do not exist or where they have expired. *Chamberlain v Saskatchewan Government ins.*  1995 Sask CA
	+ The goal of this limit is to protect the essential sanctity of a contract freely bargained.
	+ Non-payment of premiums ends the K: Courts have denied relief where the breach is non-payment of premiums.
		- The reason is that the effect of a breach of this nature is to bring the contract to an end. *Pluzak v Gerling Global Life ins*. 2001 ONCA
			* There being no contract, there are no rights to be forfeited so there can be no forfeiture and therefore nothing to relieve against. *Pluzak*
		- Mere failure to pay an additional premium, say on the acquisition of a new automobile, has been held not to justify forfeiture. *Sage v Peel Mutual Ins.* 2005 ONSCJ
	+ No Vehicle Registration = Cancels the K: Failure to maintain registration of a vehicle is a breach that does not to qualify for relief because without a registered vehicle there is no basis for the K and the K is validly cancelled. *Chamberlain v Saskatchewan Government ins.*  1995 Sask CA
	+ Non-Renewed Drivers License *does not* end the k: Where the insured had inadvertently failed to renew her driver’s license four months before an accident the ONCA gave relief under the section *Kozel v. Personal Insurance Co*. (2014).
		- Although the insured’s breach occurred prior to the loss, the court did not consider it sufficiently substantial or prejudicial to the insurer to preclude relied and that the consequences of forfeiture for the insured were disproportionate to the breach.
		- Specifically, the Court held that:
			* “This holding does not upset the balance in the existing relief against forfeiture jurisprudence because an insured must still make three showings – (a) that his or her conduct was reasonable, (b) that the breach was not grave, and (c) that there is a disparity between the value of the property forfeited and the damage caused by the breach, in order to prevail.”

Discretion to grant relief turns on three factors the ONCA in *Williams v. Paul Revere Life Insurance Co.* [1997].:

1. Was the conduct of the plaintiff reasonable in the circumstances?
2. Was the object of the right of forfeiture essentially to secure payment of money?
3. Was there a substantial disparity between the value of the entitlement forfeited and damage to the insurer caused by the breach?

### Insurance Act s129

“Where there has been imperfect compliance with **a statutory condition** as to the proof of loss to be given by the insured or other mater or thing required to be done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part **and the Court considers it inequitable that the insurance should be forfeited** or avoided on that ground, the Court **may relieve against the forfeiture** or avoidance on such terms it considers just [s. 129 of the Ontario Insurance Act].

* Types Insurance s129 Covers: In Ontario, this section **does not** apply to life insurance, marine insurance or to accident and sickness insurance.
	+ However, accident and sickness insurance contacts usually contain a clause with a similar effect.
* Relief available for policy not subject to non-stat. conditions: *Minto Construction Ltd. v. Gerling Global General Insurance Co.* [1978], the ONCA held that relief was available in respect of a policy of general liability insurance which is not subject to any statutory condition.
* Only covers matters arising after loss: *Williams v. York Fire & Causality Insurance Co.,* [2005], the ONCA confirms that the section applies only to matters arising after loss.
* Imperfect compliance covered (not non-compliance): The sections all refer to “imperfect compliance” – this means that complete non-compliance disqualifies the customer from obtaining relief.

##### Delay = non-compliance:

* + - Failure by the customer to submit notice during the policy period for insurance providing coverage for “claims made and reported” amounts to non-compliance even if they submit the claim after the expiry of the policy period. *Stuart v Hutchins* (19980) ONCA
		- Mere delay on the other hand is imperfect compliance. *Elance Steel* 1989 SCC
	+ Non-compliance with ONE part = imperfect compliance because the requirements for proof must be read as a whole, (*Schwatrz v Providence* 1963 Man CA*)* however:
		- Proof AND Notice: Unless the wording of the section indicates otherwise, the requirements for notice are considered separately from the requirements for proof.
			* Thus, non-compliance with the entire proof requirement is more than mere imperfect compliance with all the post-loss requirements and relief is not available. *Schwatrz v Providence* 1963 Man CA
	+ Fraud = Non-compliance: Deliberate failure to disclose material facts or a wilful misrepresentation in the claim have also been held to be more than imperfect compliance and to preclude relief. *Fitzgerald v Casualty Co*(1981) NFLD TD
		- It cannot be said to be “inequitable” for the claim to be forfeited where the customer has wilfully failed to comply with post-loss requirements.
		- The benefit of the section is not available to a claimant with unclean hands. *Sultana v Vasconez* (1990) On Dst Ct

#### Prejudice to Insurer:

Principle of equity protects insurers: Because of the concept of equity in the legislation: If the insurer has been prejudiced, relief will usually not be granted. *Cervo v Raimondo* 2006 ONCA

* + - Conversely, where the insurer is not prejudiced, grant of relief is more likely, if not absolutely certain. *McNish & McNish* (1989) Ont HC 1989 aff’d ONCA 1991

Defining prejudice – losing a realistic opportunity: An insurer is prejudiced if the customer’s breach causes the insurer to lose a “realistic opportunity to do anything that it might other have done” in responding to the claim. *Spezzano v Spezzano* 2002 Ont SCJ

Grounds not-related to post-loss requirements = no prejudice: An insurer is not prejudiced where it is denying liability on grounds not related to imperfect compliance with post-loss requirements. *Canadian Equipment Sales* 1975 ONCA

Late notice may result in prejudice (depending on how late): When late notice is involved, the degree of lateness is relevant to the issue of prejudice.

* + - However, in one case, even a delay of 5 years was held not to have prejudiced the insurer *Kelowna v. Royal Insurance Co. of Canada* 1992 BCSC
		- In claims made liability insurance, late notice is automatically prejudicial to the insurer. *Stuart v Hutchinson* 1998 ONCA
			* However, this interpretation contradicts s129 which covers “any matter or thing…omitted with respect to the loss” by limiting the section in the case of claims made liability insurance. A case may arise where forfeiture of a claim because of such lateness leads to inequity. Only the SCC will be able to overrule this interpretation (at least in ON).

\*Onus to prove prejudice on Insurer: Onus is on the insurer to prove that it was prejudiced. *Coombs v Royal Ins.* 1985 Ont. Dst. Ct, aff’d ONCA 1988

### K rights must exist to provide relief against their forfeiture:

* Like waiver and estoppel, the relief power may not be used to create contractual relations where none exist. *Burns v Maritime Life assurance Co* 2003 ONT SCJ
	+ - A person who is not insured because, for example, the policy has been validly cancelled, cannot invoke relief from forfeiture to restore the contract. *Burns v Maritime Life assurance Co* 2003 ONT SCJ

### Cannot relieve against limitation periods:

* The courts have consistently held that there can be no relief against forfeiture arising from non-compliance with the limitation period for bringing an action on the policy against the insurer. *Elance Steel* 1989 SCC
	+ The reason is that the limitation period does not operate as a bar to any substantive right of the customer under the contract but only to his or her access to remedy. This is thought to be something which cannot appropriately be the subject of relief. *Elance Steel* 1989 SCC

# Disposal of Claims

## Negotiation and Settlement

### Negotiation and the duty of good faith

Negotiation and the duty of good faith manifest in the insurer’s obligation to adjust the claim

#### Dispute Resolution in the context of denial of claims

**City**: Some city centres, require mediation.

**Union:** In some situations, you are obliged not to sue: i.e. under group insurance K’s for union members 🡪 a dispute may take the form of a grievance.

**Tribunals**: License and appeal tribunal are the required venue for automobile accident insurance. (insurer’s like this because there are no costs awarded 🡪 they will deny almost every claim because they can afford the costs of litigation, they hoped to paralegalize the process)

### Settlement of Claims (pick up next week along with Duty to Defend)

There are only 2 ways out of a claim: settlement or court order. (A claim continues after you die with your estate).

* Process: When the insurer receives notice of loss the claim is investigated and, if it is accepted as valid, a settlement is negotiated with the customer or, in many cases of liability insurance, with the injured third party.
	+ Role of adjuster: In this process the insurer is commonly represented by an adjuster who may be a salaried employee of the insurance company or an independent person retained by the insurer on contract to deal with specific cases.
		- Although adjusters often seem to act as intermediaries between the claimant and the insurer, assisting in the preparation of proofs, their primary function is to represent the insurer’s interests and, at least in complicated cases, the claimant may be well advised to seek separate advice.
* Settlement is made when 3 conditions are all met: After an investigation of the circumstances surrounding the alleged loss, if the insurer is of the view that:
	+ (a) loss occurred;
	+ (b) it is covered by the policy; and
	+ (c) there is no reason, such as misrepresentation or a breach of a condition, which would cause the claim to be forfeited, a settlement offer will be made.
* Settlement offer is a new K:
	+ The extent of this offer will depend on the limits of cover in the policy [including the existence of a deductible clause] and the actual extent of loss.
	+ In most cases, if the offer is accepted, the agreement reached is reached as binding and the insurer pays out agreed amount and obtains a release against further liability, although a release may apply only to part of the claim.
		- The settlement is a binding contract, the insured’s consideration for which is the giving up of the right to sue the insurer.
		- In some circumstances the terms of the release may incorporate, or be deemed to incorporate, terms of the policy, such as those defining subrogation rights or providing for dispute resolution.

### Amending a Settlement

After a settlement to dispose of a claim has been reached (and is subject only to payment), either the customer or the insurer may wish to have the settlement amended or set aside.

#### Where Loss is Recovered (Settlement must stand)

* + where property insured against theft is stolen and then recovered by the customer after settlement, the insurer might seek to revoke the settlement ***and*** either obtain reimbursement or withhold payment if it has not already been made.
		- But the principle that applies in these circumstances is **that the settlement must stand.**
		- The loss covered by the policy, theft, still occurred.
		- However, provided a full indemnity has been paid, the insurer is entitled to receive the recovered property as salvage.

#### Where Insurer Was Not Obliged to Make Any Payment

A more difficult case is where, after loss and final settlement, the insurer discovers that it was under no obligation to make any payment.

* E.g. customer made a material misrepresentation in applying for the policy or was in breach of one of its conditions.
* Overpayment: In *Garneau v. Industrial Alliance Insurance and Financial Services* [2015] ONCA:
	+ **Facts**: The insured was overpaid long term disability benefits because a permitted deduction was overlooked.
	+ **Held**: The insurer was allowed to deduct the amount paid mistakenly from future payments as allowed by the policy.
* Common/Mutual Mistake:
	+ A settlement can be set aside if it is a K based in common mistake*. Magee v. Pennine Insurance Co.* [1969] Eng CA.
		- The common mistake must be fundamental to the contract to set the K aside. *Bell v. Lever Brothers Ltd.* [1932] HL.
			* A mistake is A mistake is fundamental to the agreement to settle if it relates to the fact of loss or the manner of its occurrence. *Economic Mutual Insurance Co v Kadoche* 1987 Ont Dst Crt
	+ The mistake must be between the insurer and the insured customer (i.e. not the 3rd party plaintiff or beneficiary). *Sands v. Unigard Mutual Insurance Co*. [1975] Alta Dist Ct
	+ If, after a settlement based on an honestly made claim, it turns out that the loss did not occur, any money paid may be recovered by the insurer or *money due to be paid may be withheld*. *Baxter v Constellation Assurance Co* (1997) Ont Gen Div

##### Cases (Common/Mutual Mistake)

* *Magee v. Pennine Insurance Co.* [1969] Eng CA.
	+ **Facts**: There had been a material misrepresentation in the application made, not by the customer himself, but by his agent. Accordingly, at the time the claim was made, both the customer and the insurer considered the policy to be applicable.
	+ **Held**: the settlement is a contract made on the basis of common mistake.
		- **Reason**: Lord Denning stated that this meant that the settlement could be set aside in equity and, given that the customer had no valid claim under the policy, it was inequitable for the insurer to be bound by the settlement.
		- **Issue w/Reason**: However, this analysis might be thought to be problematic because of difficulties in reconciling it with the leading case on common mistake, *Bell v. Lever Brothers Ltd.* [1932] HL.
			* In that case the House of Lords held that only a mistake that is so fundamental that it constitutes the underlying assumption on which the contract is based, that Is a mistake as to the identity of the subject matter justifies setting aside the contract.
				+ Mistakes concerning merely the quality, as opposed to the nature, of the subject matter of the contract do not qualify.
* In *Sands v. Unigard Mutual Insurance Co*. [1975] Alta Dist Ct:
	+ **Facts**: The insured customer, a dry-cleaner, mistakenly believed that the plaintiff’s coat has been stolen while in for cleaning. The insurer was notified and paid an amount directly to the plaintiff.
		- The insured customer(dry cleaner) then found the coat and reported that fact to the insurer who stopped payment on the cheque.
	+ **Issue**: Can the insurer argue mistake of fact as a defence against a 3rd party plaintiff in 3rd party liability insurance?
	+ **Held**: This argument was rejected on the ground that the plaintiff was not party to the mistake.

##### Misrepresentation after loss:

* + An insurer may recover payments made on the basis of misrepresentation by the customer after loss. *Axa Insurance Co v Ahmed Nuur* 2000 Ont SCJ
		- But where the misrepresentation relates to additional loss, and not the loss for which payment was made, the settlement will not be set aside even if the misrepresentation is fraudulent. *Gore Mutual Insurance Co v Bifford* 1988 (BCCA)

#### Customer Wishes to Set Aside

* The customer may also wish to have a settlement amended or set aside.

##### Extent of Loss is Greater than Thought at Time of Settlement = Still Binding

* If after signing a release, the customer discovered that the extent of the loss is greater than initially thought (common mistake argument unlikely to succeed b/c mistake not fundamental) the agreement is usually treated as final and binding on the customer *Kent v Ocean Accident* 1909 ONCA:
	+ ***Unless*** future **adjustment** of the amount payable is **contemplated** by the parties in the K. *Kruger v Mutual Benefit Health* 1944 ONCA

##### Unconscionable Agreement

* In general, the test for determining whether a settlement is unconscionable includes three parts *Nelitz v Dyck* (2001) ONCA:
1. Inequality of bargaining power;
2. The stronger party has unconscionably used a position of power to achieve ad advantage; and
3. The result is substantially unfair according to community standards, and commercial morality.
* If after signing a release, the customer discovered that the extent of the loss is greater than initially thought (common mistake argument unlikely to succeed b/c mistake not fundamental) the agreement is usually treated as final and binding on the customer *Kent v Ocean Accident*  1909 ONCA:
	+ ***Unless*** the customer has been unfairly **induced** to accept the insurer’s offer, the customer may not be bound by the settlement.
		- This will arise where the customer has not obtained any independent legal advice and where there is evidence of confusion in his or her mind perhaps resulting from the loss itself, *particularly where personal injuries* *are involved*. *Doan v insurance Corp of British Columbia* (1987) BCSC
		- Policy rationale: The usual justification for setting aside a settlement in these circumstances is the **inequality** of bargaining power between the customer and the adjuster. *Williams v Condon* 2007 Ont SCJ
			* However, not every case where such inequality is established will result in the settlement being overturned. E.g. if there is inequality, but no evidence of confusion and rather there is **evidence of understanding***. Sloan v. Maude-Roxby* [1940] BCSC
* *Sloan v. Maude-Roxby* [1940] BCSC:
	+ **Facts**: The claimant had been injured in an automobile accident and negotiated in hospital with the adjuster. He signed a release in return for a settlement of $2,000. His claim was in fact worth $3,000.
		- The claimant, who was 35, was found to be of average intelligence. The court agreed that he was not on equal terms with the adjuster and accepted that there had been no independent legal advice.
	+ **Held**: the release was binding.
	+ **Reason**: there was no evidence of confusion.
		- On the contrary, the claimant acknowledged that he had understood the document he signed and consciously chose to act independently.

### Payment

#### Form of Payment

* The insurer must honour a settlement by:
	+ making payment of the agreed sum, or
	+ replacing property directly. Property: *Holmes v Payne* UK KB 1930, Auto: Stat. Condition 6(6); fire: Stat condition 13.

#### Time of Payment

* The policy /statute may contain a clause that payment be made within a stated period.
	+ For fire, automobile, and accident and sickness insurance, statutory conditions provide a limit of 60 days from the completion of proof of loss by which payment must be made.
		- Fire Insurance: statutory condition 12 of s. 148 of the *OIA*
		- Automobile insurance: statutory condition 9(1)(a) O. Reg. 777/93.
			* If, in an automobile insurance case the parties have resorted to the appraisal procedure to establish the amount of loss, payment must be made within 15 days from the date of the appraiser’s award.s9(1)(b)
		- Accident and sickness insurance: statutory conditions 10 and 11 of s. 300 *OIA*.

#### Payment into Court

* In certain circumstances the obligation to pay may be discharged by the insurer’s making payment into court. The deadlines for payment remain in place. Such payment is usual where:
	+ there are adverse claimants,
		- Auto: s271(a) *OIA*
		- Accident/S: s320(a) *OIA*
	+ when the whereabouts of the person entitled to payment is unknown
		- Auto: s271(b) *OIA*
		- Accident/S: s320(b) *OIA*
	+ where there is no one capable and authorized to provide a valid discharge
		- Auto: s258(7) *OIA*
			* A minor is (presumed) not capable s271 (1.1) *OIA*
				+ See 271(1.4) for when they are capable
		- Accident/S: s320(c) *OIA*
	+ Where there are multiple claimants
		- Auto: s258(7) *OIA*
	+ Where there is no person entitled to the money
		- Accident/S: s320(d) *OIA*
	+ Where the person who the money would be payable to becomes disentitled (on public policy or other grounds)
		- Accident/S: s320(e) *OIA*

## Actions Against the Insurer, Appraisal and Arbitration

If settlement has not been reached, or if it has not been honoured by the deadlie, the customer will normally be able to bring an action against the insurer to enforce the claim.

### Premature Actions

* It is premature to commence an action before deadline, even if the insurer has clearly indicated that it does not intended to pay at all. *Melanson v Dominion of* *Canada* (1933) NBCA
* The *policy/statute may contain a provision* stating that a form of arbitration/appraisal is a condition precedent for the action to be maintainable.
	+ Fire Insurance: stat. condition 11- s. 148 *OIA*.
		- “In the event of disagreement as to the value of the property insured, the property saved or the amount of the loss, those questions shall be determined by appraisal as provided under the Insurance Act before there can be any recovery under this contract *whether the right to recover on the contract is disputed or no*t, and independently of all other questions. There shall be no right to an appraisal until a specific demand therefor is made in writing and until after proof of loss has been delivered.”
	+ Automobile insurance: stat. condition 4(8) O. Reg. 777/93 (**is it 9(2.1)?**
* The effect is that the customer cannot succeed against the insurer until the question of valuation of loss is settled.

### Fire Insurance

* **Threshold for bringing action**: both the 60-day period for payment must have passed and the valuation question settled BEFORE the liability question will be entertained by the court.
	+ This is true even if the insurer alleges fraud by the claimant. *Arlington Investments ltd v Common wealth* 1985 BCCA
* **No appraisal**: If it is clear that the insurer will not accept the appraisers’ decision, the court **may** proceed to hear the case as a whole without waiting for an appraisal.
	+ - This is less relevant for modern times in which ADR generally is more common. [Seed v. ING Halifax Ins. [2002] ONSC]
	+ Although, it appears that the insurer may waive the appraisal requirement. (e.g. if the dispute does not centre around value of loss). *Brandiferri v Wawanesa Mutual Insurance Co* 2012 ONSCJ

### Auto Insurance

* An appraisal is required: [stat. condition 9(2.1) of O. Reg. 777/93].
	1. if the insurer has received a proof of loss, and
	2. there is disagreement about the nature and(or) extent of repairs, rebuilding or replacement required or the adequacy of the amount payable, and
	3. either the insured or the insurer requests an appraisal and the other has agreed

### Filing a Notice (Valuation)

* Requirement applies to both insured customer and 3rd party claimant: The need to settle the valuation question as a condition precedent to maintain an action applies not only to the insured customer but also to a party filing a third-party notice. *790180 Ontario Ltd v St Paul* 2004 ON SCJ
* Onus to prove valuation settled on claimant. *Atkinson v Dominion of Canada* 1908 Ont Dv Crt
* If action is commenced before valuation settled: and the insurer objects, the insurer may, after appointing its own appraiser, bring a motion for an order that the customer appoint one. *McCallum Construction Ltd v Zurich* 1994 PEI CA
	+ This does not require an additional motion to stay the proceedings, given that valuation appraisals are different from the actual arbitrations themselves.

### Proceedings

#### Agreement to Arbitrate, but Customer Commences Court Proceedings:

* **Insurer applies for a motion to stay:** Where there is an agreement to submit a dispute to arbitration, as opposed to appraisal, and yet the customer commences court proceedings instead, the insurer must apply for a stay of those proceedings in accordance with s. 7 of the *Ontario Arbitration Act*:
	+ This is after the appearance but before the (defence) pleadings are filed .
	+ If the motion is not made in time it will be refused and the action will proceed notwithstanding that the arbitration has not been held. *Cole v. Canadian Fire Insurance Co*. [1907] ONCA
		- In *Cole*, Riddell J. justified this result in the following terms: “There is no hardship in so holding. No claim can be made against the insurance company until the lapse of 60 days from the delivery of the proofs of loss. This is surely ample time to allow an insuring company to determine whether they desire to contest the amount [of claim]. Then, even after the accruing of the cause of action and the issuing of the writ, they have some 18 days before the state of defence is due. During this time an application may be made for a stay and if the defendants, instead of moving for a stay, choose to put in a pleading, they must be held to have elected that method of having their rights determined, and to have waived the provision for arbitration.”
* **Court considers time line and equity:** If the application for a stay is made in time the court will make the order “if satisfied that there is no sufficient reason why the matter should not be referred” to arbitration. *Altwasser v Home Insurance Co of New York*  1933 Sask CA

#### Appointment of Arbitrators and Appraisers

* **Appraiser**: The court may be called upon to appoint an appraiser if one party fails to appoint one [s. 128 of the *Ontario Insurance Act*
* **Arbitrator**: Arbitrations are governed by the *Ontario Arbitration Act*.
* **Jurisdiction**: Once appointed the appraisers or arbitrators are restricted to matters referred to them. Decisions within the jurisdiction made by at least a majority of the panel are binding. *Glasgow Underwriters v Smith* 1924 SCC
	+ Any determinations by them outside their jurisdiction are not binding on the parties [*Harrison v. Western Assurance Co*. [1903] SCC].
		- Questions not referred to the appraisers, such as liability on the policy where the reference is only for appraisal of the value of the loss, remain for the courts to determine. *Pfeil v. Simcoe & Erie General Insurance Co.* [1984] Sask QB
	+ Where the appraisers’ award is not unanimous, the losing party is not denied recourse to the courts. Only clearer statutory language would deny this recourse. *Pfeil v. Simcoe & Erie General Insurance Co.* [1984] Sask QB
* **Arbitration Cannot be Reopened**: If an arbitration concludes without deciding a matter referred, the arbitration cannot be reopened and the matter must then be settled by the court. *Hakll v Queen Insurance Co* 1906 NSCS
* **Not Generally Reviewable by Court**: Where the questions referred have been settled, the general rule is that the decision is final and not subject to review by the court (*Anchor Marine Insurance Co v Corbett* (1882) SCC) unless:
	+ the terms of the reference provide for review *merchandise Building Inc v Aviva* 2006 Ont SCJ ***or***
	+ there is fraud, negligence or bias *on the part of the members of the pane*l (*Tepei v Insurance Corp of B.C.* 2009 BCCA.
		- It may be open for a court to quash an award for “error of law” related to the method of valuation. *Barrett v. Elite Insurance Co*. [1987] ONCA

#### Payment for Appraisal

* **Appraisal**:
	+ Where the procedure is for an appraisal of the amount of loss under the Insurance Act each party pay its nominated appraiser and half the umpire’s fee s. 128(4) *OIA*.
* **Arbitration**:
	+ The parties may agree to a sharing of certain costs, or, in certain circumstances, costs may be awarded by the arbitrators [s. 54 of the Ontario Arbitration Act].

#### Other arbitration re Auto Insurance

* Arbitrator in auto insurance may also arise in other contexts. E.g.:
	+ When it must be determined whether a customer is legally entitled to recover damages from an uninsured or unidentified third party and the extent of any such entitlement.
	+ If the insurer and the customer cannot agree on these matters, the standard form policies provide for arbitration.
	+ The award of the arbitrator is binding on the parties.
* A form of dispute resolution applicable to no-fault insurance (or Statutory Accident Benefits (SABS) as they are called) Appearance before the License Appeal Tribunal of Ontario is compulsory because access to courts for adjudication of these disputes are precluded (except for judicial review). ss. 279-287 *OIA*

## Limitation of Actions

### Uniform Act

* Actions on certain types of insurance contracts are subject to specific limitations periods provided in the uniform legislation.
	+ Actions against an insurer on a fire insurance contract must be brought within one year after the loss or damage occurs [statutory condition 14 of s. 148 *OIA*].

### Non-government Auto Insurance

* Damage to vehicle: Actions in respect of damage to the insured automobile or its contents must be commenced within 1 year from the date of the loss happening. Stat condition 9(4) - *ON Reg 777/93*
* For “loss or damage to persons or other property” the action must commence “within two years after the cause of action arises”. Stat condition 9(4) - *ON Reg 777/93*
	+ Since the statutory condition limits actions against the insurer, the phrase “cause of action arising” most appropriately refers to the action against the insurer on a liability policy.
	+ With respect to first-party cover for personal injury under the accident benefits sections of automobile policies, the period within which License appeal tribunals must commence is TWO YEARS after the insurer’s refusal to pay the benefit in question [s. 280(2) OIA and s. 56 of O. Reg. 34/10].
	+ For loss transfer actions between insurers, the period runs from the day after the first insurers makes a demand for a transfer and not when the second party insurer refused to make a transfer. *Markel Ins Co v ING Ins Co* 2012 ONCA

### Limitation Period Prescribed by Contract

* If no limitation period expressly provided by statute 🡪 parties may agree to include a period in the contract *Canadian Imperial Bank of Commerce v. Nickolievich* [1977] Man CA
	+ NOTE: s. 22 also provides that a **limitation period under the Act applicable to a “business contract”** and not one involving a “consumer” who is contracting for individual, family or household purposes, made AFTER Oct 19, 2006, **may be lengthened or shortened** by the terms of the contract.
* **Limitations are seen as contractual provisions**: they are statutory conditions imposed in the contract as contractual provisions. *Canadian Imperial Bank of Commerce v. Nickolievich* [1977] Man CA.
	+ In *Canadian Imperial Bank of Commerce v. Nickolievich* [1977] Man CA holds:
		- **Customer must see any limitation periods**: The statutory condition concerning limitation of actions was treated by the court as a contractual provision in so far as the provision aimed to extended the applicability of the fire limitation period to coverage [other than fire loss]: the customer had not seen the policy before the loss occurred, he was held not to be bound by its terms as to limitation.
		- **Statutory Limits must be stated in the contract**: Where a fire policy *omits* the statutory conditions the insurer cannot rely on them at all.

### If No Insurance-Specific Statutory; AND no Contractual Limitation 🡪 limitations Act

* The applicable period is that provided in the *Limitations Act* - that being TWO YEARS s. 4 of the *Ontario Limitations Act*, 2002].

### Determining which Period Applies

* Different limitation periods apply depending upon the type of insurance 🡪 it may be necessary to categorize a particular policy.
* Multi-peril polices are subject to a limitation period applicable to non-fire coverage, even when the damage or loss is caused by fire. *KP Pacific v. Guardian Insurance Co.* [2003] SCC

### When Time Starts to Run

Limitation Periods

* Often run from date of denial.
* Fire policies often run from date of loss
* With multi-peril policies there is conflict about when the limitation may begin to run.
	+ When stat conditions of fire are within an actual policy

#### Date of Loss, not Discoverability

* the actual date of loss applies and not the date on which the insured customer becomes aware of it.
	+ a limitation should not be applied strictly if:
		- the insurer is not prejudiced and
		- the delay was caused by the non-negligent inadvertence of the plaintiff’s solicitor.
* Courts in insurance cases have subsequently rejected the “date of loss” approach in favour of a “discoverability rule” by which time starts to run when the insured knew or ought to have known that loss had occurred.
	+ The discoverability rule does not apply to extend a limitation period prescribed by the legislature where the period was stated to run from a specific event [the death of the defendant]. *Ryan v. Moore* [2005] SCC
		- It was held that the “judge-made” discoverability rule could not displace ***a clear statute t***o the contrary.
		- However, this decision has not prevented frequent application of the discoverability principle in respect of legislated insurance limitation periods. (Presumably ambiguous statutory language that could be interpreted as either from date of loss or date of discoverability).

When the “Cause of Action Arose”:

The phrase “**when the cause of action arose**” is problematic. Its meaning varies according to the type of insurance involved.

* ***Under*insured motorist coverage:** This insurance is not a creature of statute. The approach for determining the date of the cause of action is the approach taken for breach of contracts:
	+ Policies in Ont. now expressly states that actions must be commenced “within 12 months of discoverability (the date that the eligible claimant...knew or ought to have known [about the inadequacy of the other driver’s liability insurance]) but this requirement is not a bar to an action which is commenced within 2 years of the date of the accident.” *Rogue v Pilot Insurance* 2012 ONCA
* ***Un*insured and *unidentified* motorist cover**: This insurance is a creature of statute, the breach of contract rationale has been rejected.
	+ The relevant date is “when the material facts on which the claim is based have been discovered or ought to have been discovered by the… exercise of reasonable diligence.” *Johnson v Wunderlick*  1986 ONCA
	+ These material facts are (*Johnson*):
		- (1) the claimant is a person insured who
		- (2) is legally entitled to recover damages from the owner or driver of
		- (3) an uninsured or unidentified automobile.
	+ *This is usually the date of accident.*
* **Automobile liability (i.e. to cover damage/loss to 3rd parties)**: Cause of action arises when:
	+ - the customer satisfies the conditions precedent to bringing an action as imposed by statutory conditions [these relate mainly to notice and proof of loss]; and
		- the time given the insurer for making payment has elapsed.
	+ Reason: Time should not start to run until the claimant is legally entitled to bring an action.
* **Auto Accident Benefits**:
	+ **limitation period applicable to no-fault benefits in Ontario** is a period of TWO YEARS from the INSURER’S RESUAL TO PAY A CLAIM. *ON Reg 403/96* stat. condition 51.
* **Actions Against Insurer from 3rd Party**: An injured third party must commence the action against the insurer of the person who injured him or her, within 1 year from the final determination of the action by the third party against the insured person, “including appeals if any” s. 258(2) of the *OIA*
	+ If no appeal: If there is no appeal, the time allowed for appeals must have elapsed (presumably this means before the limitation can end, not before it can begin) . *Brissky v Cooperators General Insurance Co* (1986) BCSC
	+ If injured 3rd party doesn’t know insured has insurance: Moreover, the discoverability rule applies in a case where the plaintiff does not know that the person against whom he or she has obtained the judgement is insured. *Grenier v Canadian General Insurance Co* 1999 ONCA
		- i.e. Time runs from the date on which the plaintiff ought reasonably to have discovered the existence of insurance.
* **Ongoing Payments**: the recovery of ongoing payments, such as income replacement benefits (under no-fault or accident/sickness).
	+ Cause of actions continually renew themselves each time an installment becomes payable because the insurer is under a continuing liability for each succeeding(future) benefit.
		- so long as entitlement continues [e.g. by continued disability], the limitation period only bars claims “originating more than [the prescribed period] before the commencement of an action.” *Morgan v Dominion Insurance Corp* (1981) Ont HC
		- Each cause of action “originates with each benefit as it becomes payable **or**, depending on the wording of the policy or regulation, when the application for benefits is denied.
	+ **Business Interruption Insurance** is similar: The intention of the parties is that losses are calculated as they arise on an ongoing basis. *718340 Alberta Ltd v CGU Insurance* 2002 Alta QB
		- Accordingly, time starts to run at the end of the agreed indemnity period and not at the date of the fire. *718340 Alberta*

### Factors reducing Effective Limitation Period

#### Date of Loss (Part of Period Consumed by Conditions Precedent)

* Where the limitation period is measured from the date of loss, the period during which the customer may bring an action against the insurer is effectively considerably less than the period stated.
	+ This is because, as described, the action cannot be brought before the conditions precedent to recovery have been met and the time for payment has expired – necessarily some time after the date of loss.
	+ **For example,** under typical statutory conditions for fire insurance and for automobile insurance [for damage to the uninsured automobile], a customer must bring the action within ONE YEAR from the date the loss or damage occurs.
		- But such an action cannot be brought until the question of valuation of loss has been settled and, if there is disagreement, this may involve an appraisal procedure.
			* Fire Insurance: statutory condition 11 of s. 148 of the Ontario Insurance Act.
			* Automobile insurance: statutory condition 4(8) of Saskatchewan Stat Conditions.
		- The appraisal procedure itself may require considerable time.
			* Each party had to appoint an appraiser or, if the appraisers cannot agree on an umpire, to apply to the court to make an appointment [s. 128 of the Ontario Insurance Act].
			* In complex cases, the gathering of evidence for this purpose can take considerable time.
			* If more than a year is needed the **customer is out of time** for bringing an action to determine liability under the policy.
			* This unfortunate result would **appear to be unavoidable** on the face of the statutory conditions, at least **where the insurer had not been responsible** for unreasonably delaying the process.
* Faced with this dilemma the customer should commence the action before the expiration of the limitation period notwithstanding that the appraisal proceedings have not been completed. *Shepard v. British Dominions General Insurance Co*. [1919] SCC
	+ It is this formal step which avoids the consequences of the limitation section.
	+ The worst that will happen in terms of action will be that it will be stayed on application by the insurer.
	+ This does not nullify the action; it merely postpones it.
	+ Once the valuation question is settled, the customer may reactivate the action by application without having to commence fresh proceedings.
	+ Note: the insured must still be careful to submit proofs more than 60 days before the expiry of the limitation period or it may not be impossible to bring an action.
* In *Shepard v. British Dominions General Insurance Co*. [1919] SCC, a fire insurance case, there was a delay in submitting formal proofs [a condition precedent to recovery] as a result of lengthy investigation by the insurer into the possibility of arson.
	+ Held: If the customer had waited until the expiration of the time for payment [60 days after the filing of proof] his action he would have been statute barred.
		- The SCC granted relief against forfeiture for late filing [of proofs] putting the customer in the same position for all purpose as if proof of loss had been furnished earlier as required.
		- The period for payment was therefore deemed to have elapsed and the action was not premature.
	+ If the action was not brought before the end of the limitation period, it would be absolutely barred. Relief against forfeiture provisions in the Insurance Acts do not enable the court to grant relief against the consequences of failing to comply with a limitation period.
		- However, the court might have treated the conduct of the insurer as amounting to an election not to rely on the limitation period as a defence.
		- Where the delay is the result of *bona-fide* disagreement over the extent of loss, a similar approach may not be available.

### Extending the Limitation Period

* The limitation period may be effectively extended through the application of the discoverability rule.
* It can be the effect of a “waiver” by the insurer. (Chapter 12)
* A limitation period may also be extended when the delay in commencing proceedings is caused by “explainable solicitor inadvertence” so long as the insurer is not prejudiced. *St Dennis v TD Insurance Home and Auto* 2005 Ont SCJ

## Insurer’s Duty of Good Faith

### Requirement of Good Faith

Parties to an insurance contract owe each other a duty of utmost good faith when negotiating the contract.

* **Duration**: This obligation of candor and fair dealings applies throughout the life of the contract and stands in addition to the obligations contained in the terms of the contract itself.
* **Remedy**: breach of duty invites remedies beyond those afforded by ordinary contract law.
	+ **Rationale**: This special treatment is justified by the particular nature of insurance which, in different ways and at different times throughout the life of a contract, places each party in a position of vulnerability to the other.

#### Applicability

##### In Negotiating the K

* In the *vast majority* of cases the duty was applied to customers in the context of negotiating the contract of insurance.
	+ A customer seeking to transfer a risk to an underwriter is obliged, not only to refrain from untrue representations, but also positively to disclose all matters material to the risk even if not asked specifically about them.
	+ **Rationale**: The objective of this duty of utmost good faith is to place the parties on an equal footing by canceling the perceived information advantage held by the customer. *Greenhill v Fed. Insurance* 1927 KB CA
		- Without this rule, it was feared insurers would be forced to accept risks different from those they thought they were accepting, thus undermining their viability as underwriters.
		- In other words, underwriters were thought to be vulnerable given the customer’s monopoly on information material l to the risk being transferred.
	+ But gradually this one-sided view has changed.
		- Legislation has significantly modified the judge-made rules in recognition that the balance of power has shifted.
			* The courts too have taken a somewhat different view.
		- It has long been the rule that a customer’s duty extends *only to the information within his or her personal knowledge* [so the customer is not penalized for failing to mention something, however material to the risk it may be, the insurer knows or ought to know [*Carter v. Boehm*].
		- Now, it is a breach of good faith for the insurer to lure a customer into a contract knowing it, the insurer, would never have to pay out under the contract owing to the defence of non-disclosure. *Coronation Insurance Co. v. Taku Air Transport Ltd.*
			* The underlying principle is that the parties be on an equal footing.
			* Neither party is permitted to hide relevant facts from the other.

##### In Dealing with Claims

* The insurer is seen as having this duty when it comes to dealing with claims. At that stage the customer, having suffered loss or injury, is economically and possibly, psychologically vulnerable.
	+ **Liability**: First applied in Canada in liability insurance cases.
		- The insurer’s contractual right to control the defence of any litigation (or settlement negotiations) within the scope of liability coverage gives rise to a triangular-relationship involving the third party plaintiff as well as the insurer and customer.
			* This creates *special tensions* concerning claims resolution which do not arise in first party insurance.
		- In its dealings with the third-party plaintiff, the insurer may face decisions which place its own interests in conflict with those of its customer.
			* In such a case, the good faith obligation requires that an insurer is bound to afford the customers’ interests priority equal to its own.
	+ But now insurers in all classes, regardless of whether any 3rd party relationship exists, carry a more general burden of good faith. *Kang v Sun life Assurance* 2013 ONCA (plus additional reasons also 2013 ONCA)
* The general duty of good faith (IN CLAIMS) **involves two requirements**:
1. First, the insurer must pay a claim in a timely fashion if there is no reason to contest it. *Amaprop Canada Inc v Guardian Insurance Co* 2000 Ont SCJ
2. Second, the insurer must treat the customer fairly throughout the process of investigation and assessing the claim.*702535 Ontario Inc v Non-Marine Underwriters* 2000 ONCA
* This applies both to the manner of investigation and assessment and the decision whether or not to pay.
* The insurer is required to refrain from using its economic muscle or the customer’s economic weakness to extract a settlement favorable to itself.
* This duty does not extend to a requirement to inform the customer about an applicable limitation period *Usanovic v. Penncorp Life Insurance Co.* [2017] ONCA.
* **Rationale of requirement**: These requirements reflect the concern with redressing an imbalance of bargaining power that might exist because of the customer’s economic disadvantage or emotional vulnerability.
	+ **Examples of not meeting requirement**: Conduct which fails to meet the standard of fairness and timeliness include:
		- persistence in maintaining a defence of arson by ignoring or manipulating evidence;
			* *Whiten v. Pilot Insurance Co.* below
		- denial or termination of disability benefits without the regard to object evidence of disability;
			* *Adams v. Confederation Life Insurance Co.*
		- demanding material, in support of a claim, to which the insurer was not entitled;
			* *Beninger v Kingsway General Insurance Co* 2000 Alta Prov Ct, reversed on other grounds 2001 Alta QB
		- settling the claim without disclosing that terms of coverage had been misrepresented by the insurer when the policy was acquired; and
			* *Kang v. Sun Life Assurance Co of Canada* 2013 ONCA
		- highhanded and contemptuous treatment of a customer.
			* *Dhami v Abengoza* 2001 BC Prov Ct
* The test is one of **reasonableness** so not all refusal to pay a claim amounts to breaches of good faith, even if the insurer ultimately changes its mind or is required to pay by a court.
	+ A denial of coverage must be based on a reasonable interpretation of its rights and obligations under the policy and that there is a “genuine issue” pertaining to coverage. *702535 Ontario Inc v Non-Marine Underwriters* 2000 ONCA
	+ Mounting a defence based on allegations of arson is not bad faith despite the customer’s having been acquitted of arson in a criminal trial if there is a *reasonable* case for a different outcome when the *civil standard of proof* is applied. *Sagl v Chubb Ins Co* 2011 Ont SCJ
	+ A disability insurer’s standard practice of refusing/delaying claims on the basis of the amount claimed or the insured’s employment status regardless of the terms of the policy is bad faith. *Clarfield v. Crown Life Insurance Co*. [2000] ONSC
* **Claims against adjusters personally:** most cases of breaches of good faith are brought against insurance companies, but it is possible that successful claims may also be brought against adjusters personally where it is found that they owe the customers an independent duty of good faith. *Spiers v. Zurich Insurance Co.* [1999] ONSC
	+ However, this may not be consistent with general corporate law principles about employee’s liability.

#### Consequences of Insurer’s Breach When Settling the Claim (I.A.Wrong)

* If an insurer’s conduct falls short of the requirements of good faith, it is guilty of more than a mere breach of contract.
	+ “breach of an insurer’s obligation to act in good faith is a separate or independent wrong from the wrong for which compensation is paid [*Whiten v. Pilot Insurance Co*. 2002 ONCA].
	+ The duty arises even before determination of the insurer’s obligation to pay the loss under the terms of the insurance contact. *Maschke Estate v. Gleeson* Ont Dv Ct. 1986.
		- As the court stated, “the duty to act promptly and in good faith arises the day the insurer receives the claim.”
* This separate wrong is not a tort.
	+ The duty is not a fiduciary duty. *Whiten v. Pilot*
		- An insurer is not required to place the customer’s interest above its own; merely to give it *equal* consideration [*Whiten v. Pilot*]
* The good faith obligation, while founded on the contractual relationship between the insurer and insured, ***it is* distinct from the obligation to honour the contract and this distinction is sufficient to qualify its breach as a separate wrong**. *Whiten v. Pilot*
* Assignments of rights of an insured (e.g. the rights to a settlement go to the trustee in bankruptcy when the insured goes bankrupt) do no automatically include assignment for a cause of action for bad faith against the insurer. *Ernst & Young Inc v Chartis insurance* 2014 ONCA

#### Determining Damage Resulting from Bad Faith

The most important considerations for determining the damages resulting from bad faith are **harm** and **causation**.

* **Denial of coverage**: If there turns to be coverage, establishing a causal link between the insurer’s wrongful conduct and the customer’s loss is straightforward.
	+ Denial of coverage is loss in itself.
		- Denial may be redressed by requiring payment of the insurance money and in appropriate cases aggravated damages.
* **Delay**: Unjustified delay in payment may not cause any loss, aggravated or otherwise. If there is no loss then there are no damages awarded for the delay or bad faith. *702535 Ontario Inc. v. Lloyd’s Underwriters* [2000], the ONCA
	+ But this situation is likely to be rare.
* **No Coverage but bad faith**: Where there is no legitimate basis on which the claim can stand, either as a matter of interpretation of the coverage provisions in the policy or because of a breach of condition by the customer, but where the insurer has been guilty of conduct amount to bad faith. *Kang v. Sun Life Assurance Co of Canada* 2013 ONCA
	+ Examples are an unreasonable refusal to investigate or deny liability promptly or unnecessarily heavy handed tactics in addressing the claim.
	+ This conduct may cause harm, **even if there is no coverage**.
	+ the cause of action is established if the plaintiff can show:
		- (a) conduct amounting to bad faith and,
		- (b) loss or harm resulting from that conduct

### Punitive Damages

Punitive damages have been awarded where the court has determined the insurer’s conduct to be so harsh, reprehensible or malicious as to offend its sense of decency.

#### Examples

* In Whiten v. Pilot Insurance Co. [2002] SCC:
	+ The insurer persisted in maintaining a defence of arson by manipulating the evidence.
	+ The SCC upheld a jury’s award of $1,000,000 in punitive damages
* In Adams v. Confederation Life Insurance Co. [1994] Alta Q.B:
	+ The insurer terminated the customer’s disability benefits on the basis of its unilateral determination of entitlement made in defiance of medical reports contrary to its view and without exercising its rights to an independent medical examination.
	+ The insurer terminated benefits without giving the customer an opportunity to respond.
	+ The court therefore awarded punitive damages in the amount of $7,500.

#### Rationale/Amount

* Punish an insurer for inappropriate conduct and to deter it (and other insurers) from repeating such conduct.
	+ In *Whiten v. Pilot Insurance Co.* [2002], the SCC adopted a theory of “**proportionality”** for determining whether punitive damages should be awarded or, if so, their amount.
	+ There should be proportionality between the amount awarded and: (Whiten?)
1. the **degree of** **blameworthiness** [taking into account intention, motive, duration of the conduct, cover-up attempts, and knowledge of the effect on the plaintiff];
2. the **vulnerability of the plaintiff** and the impact on his or her “peace of mind”;
3. the need for **deterrence**;
4. **criminal or other civil penalties**; and (Does this increase or decrease the damages?)
5. any benefit, including profit, gained by the defendant by its conduct.
* In Clarfield v. Crown Life Insurance Co. [2000] ONSC,
	+ The court set out seven factors to be considered:
1. The reasonableness of the relationship between the quantum of punitive damages and the degree of past, present and future harm;
	1. The plaintiff suffered considerable harm in the form of denial of economic security and peace of mind.
2. The reprehensibility of the conduct [including its duration, the defendant’s awareness of it, any concealment and the existence of a past pattern of similar conduct];
	1. It also found that the insurer’s conduct failed to meet the appropriate standards of timeliness and fairness. : In particular, its tacit of pressuring the customer to accept a small *ex gratia* payment in place of benefits amounted to a “condemnable form of negotiating with a disabled person.”
	2. Moreover, evidence suggested such conduct was a matter of company policy in dealing with large disability claims involving unemployed claimants thus underlying the need for a deterrent award.
3. Any profitability to the insurer of the conduct;
	1. The court also found that the insurer stood to profit from this conduct in that denial of claims represented “exceedingly large” savings.
4. The financial position of the insurer;
	1. The financial position of the insurer [$10 bullion in assets] was such that “an immense amount would be required to make an economic impact on the company”.
5. The costs of litigation;
6. Any criminal penalties imposed for the same conduct; and
7. The existence of other civil awards for that conduct.
	1. While the court realized that other factors mitigated the size of the award, the financial means of the insurer clearly encouraged the court in awarding what, by Canadian standards in these cases, is a substantial amount.
	* On the facts before it, the court awarded $200,000 in punitive damages.
	* Note: this case was decided by the ONSC prior to while the SCC decision in Whiten was pending.
* A claim for punitive damages based on the insurer’s bad faith is denied if there was no coverage in the first place (due to the customer breaching the K). *Barker v Zurich Insurance Co* 2001 ONCA
	+ - This case may have also been influenced by its clear finding that there was no bad faith anyway and by its barely disguised suspicions about the customer’s conduct in his dealings with the insured vehicle.
	+ It is instructive that in the U.S., where these matters have been litigated over a longer period the key factor is the manner of the insurer’s conduct whether there turns out to be coverage or not.

### Aggravated Damages

* In Bullock v. Trafalgar Insurance Co. of Canada [1996] BCCA:
	+ Persistence in alleging arson without benefit of convincing evidence was held by the BCCA not to warrant punitive damages.
	+ However, the court made an award of aggravated damages.
* Similarly, in Warrington v. Great West Life Assurance Co. [2000] ONSC:
	+ The court deemed the insurer’s hard-nosed and burdensome tactics together with its refusal to pay benefits not sufficiently “harsh, vindictive, reprehensible or malicious” to justify punitive damages, yet it awarded aggravated damages to compensate for the distress and humiliation caused by the insurer’s conduct.
* In Clarfield, the court awarded the plaintiff, whose claim had not been dealt with by the insurer with sufficient promptness or fairness, $75,000 in aggravated damages to compensate the plaintiff for “the increased anxiety, stress and financial pressure both from the rejection of his claim and from the delay in dealing with it… at a time when he was particularly vulnerable to stress because of the nature of his illness.”
	+ The financial uncertainty resulting from his treatment by the insurer caused him to sell his house only to buy it back when the insurance money was finally forthcoming.
	+ The humiliation attending this process and the disruption involved were taken into account in the assessment, as was an amount to cover the needless transaction costs involved.
* Aggravated damages are sometimes conflated with damages for mental distress caused by breach of contract.
	+ But the two categories should be distinguished.
	+ First, aggravated damages encompass more than mental distress.
	+ Second, while aggravated damages are usually awarded in response to bad faith by the insurer, damages for mental distress do not require that.
* In Fidler v. Sun Life Assurance Co. of Canada [2006] SCC:
	+ The SCC held that since insurance is a “peace of mind” contract, it should be within the reasonable contemplation of the insurer that an insured might suffer mental distress in the event that a claim is wrongly denied.
	+ Accordingly, damages to compensate that are available in accordance with the well-known principles set out in Hadley v. Baxendale [1954] Eng.
		- While the degree of mental distress must warrant compensation, it is not necessary that there be financial loss associated with it or that the insurer’s conduct amounts to bad faith.
* This raises an interesting dilemma for insurers in cases where there is a genuine issue of fact or policy interpretation in dispute which is ultimately resolved against the insurer.
	+ Mental distress on the part of the insured is no doubt foreseeable even where the insurer acts in good faith.
	+ Yet, because the insured ultimately succeeds, the insurer’s initial denial can be characterized as “wrongful”
	+ The logic from Fidler suggests an insurer can be both in good faith and wrongful at the same time.
	+ However, this may be more of a theoretical problem than a practical one.
	+ Most of the cases in which mental distress damages have been awarded involve conduct by the insurer that amounts to bad faith.

### Bad Faith by Insured

* There can also be consequences if the customer is guilty of bad faith at the claims stage.
* As a practical matter, this is seldom an issue.
* Conduct amounting to bad faith is usually characterized as fraud which entitles the insurer to deny coverage.
	+ For example, in fire insurance: statutory condition 7 of s. 148 of the Ontario Insurance Act provides that “any fraud or wilfully false statement…vitiates the claim”.
* Courts in some provinces, including Ontario, have held that fraud by the customer in making a claim amounts to bad faith and that punitive damages may be awarded against the customer.
	+ The reasoning is that this is a necessary deterrent, mere forfeiture of the claim being insufficient because that consequence attends even innocent mistakes.
	+ Moreover, bad faith by the customer may be seized upon by the court to offset, entirely or in part, any bad faith on the part of the insurer.
	+ This is referred to as “comparative bad faith” and it operates like contributory negligence in the sense that any damages attributable to the insurer’s bad faith are reduced in proportion to the customer’s bad faith.

## Marine Insurance Claims

* Much of the process of settling claims and brining actions under insurance policies generally applies in cases of marine insurance.
	+ The provision of proof of loss is a condition precedent to the maintenance of action.
		- However, there are some aspect of the settlement process in marine insurance that are largely unique to marine insurance.

Marine underwriters, in addition to agreeing to pay the value of the subject matter lost, undertake to cover certain incidental losses that may arise.

* There are two special types of liability that marine insurers fact:
1. Particular charges
* Particular charges are certain expenses that may be incurred by the customer to prevent any or greater loss where the subject matter of the insurance becomes endangered by one of the perils insured against.
* Particular charges are usually recoverable under the policy whether or not greater loss is prevented.
	+ E.G.: tug-boat charges incurred by a ship-owner to have a ship which has run aground refloated in order to prevent sinking.
1. General average contribution
* The other special type of liability that a marine insurer faces is for “general average contribution.”
* These may arise where the insured person’s property suffered no damage at all but where expenses have been incurred or other property has been sacrificed in order to save it.
	+ E.g.: when some cargo is jettisoned to save the ship or other cargo.
* It is a rule of maritime law that persons whose property has been saved by such action are under an obligation: to contribute to the loss sustained by the person incurring the expense or whose property was sacrificed.
	+ Maritime insurance reflects this general principle by providing indemnity against this obligation.
* For the principle to apply, however, certain criteria must be met:
	+ 1. the common adventure [**both** the insured person’s interest and that of the party whose property was sacrificed] must have actually be imperiled;
		2. the sacrifice, or payment, must be **voluntary** and not merely inevitable;
		3. the sacrifice or payment must be reasonably made;
		4. the loss must be “extraordinary” in nature;
		5. the **goal** of the sacrifice/loss must be the preservation of the whole adventure;
		6. the adventure must **in fact be saved**; and
		7. the loss must be a direct consequence of the sacrifice or incurring of expense.

## Liability Insurance Claims

### Insurer’s Rights and Duties

* A liability policy reserves for the insurer the exclusive right to deal with the person brining the lawsuit against its customer (in negotiating a settlement or otherwise managing the litigation).
	+ The insurer chooses the lawyer who will defend the action; and
	+ The insurer is entitled to decide question such as: whether to settle the case, what witnesses to call and whether to appeal.
* The insurer therefore must conduct itself in accordance with a duty of good faith and fair dealing in relation to its customer.
	+ This means that when the person bringing the lawsuit makes a settlement offer within the policy limits, the insurer may not reject it without taking account of its customer’s interest.
		- Recall: if a case is allowed to go to judgement, and the court awards the person bringing the action damages in excess of the policy limits, the insured customer has to pay the extra amount personally.
		- It is therefore in the customer’s interest that a settlement offer, within the policy limits, be accepted.
	+ But the insurer may consider it to be in its own interest to let the matter go to court, calculating that the case is winnable by the defence.
		- An insurer must therefore resolve this dilemma with care.
* The insurer also has the duty to pay the costs of the defense.
	+ An insured is excused from paying defence costs, just as it is excused from its other obligations under the policy, if the customer has breached one of his or her obligations under or in connection with the policy such as material misrepresentation, failure to pay premiums or deliberate causing of loss.
		- However, an insurer is only able to raise an issue like this if it has undisputed evidence.

### Advance Payments

* When the insurer is reasonably satisfied that there is liability on the policy and that its customer has incurred liability to a third party, it may make an advance payment to the third party.
* Such a payment is clearly for the benefit of the third party claimant in that it makes some funds available quickly when financial assistance is often needed without having to wait for the conclusion of protracted negotiations or litigation.
* There are also benefits for the insurer.
	+ Most insurers are concerned with earning a reputation for promptness, honestly and fairness.
	+ The making of advance payments helps to promote good public relations.

## Cases

### Whiten v. Pilot Ins. Co., 2002 SCC 18 (Establishes punitive damages and bad faith on part of insurers)

**Facts**: Fire in country home in January when it was -18 degrees. The couple, along with their daughter and pets were home. Mr. Whiten gave his daughter his slippers so she could run to get help. He got frostbite.

Could Mr. Whiten recover under the fire insurance policy? Initially the adjuster said the loss was legitimate but Pilot didn’t like that so they told the adjuster to investigate further. The adjuster maintained this was a legitimate loss, and so he was fired. Pilot hired a lawyer who orchestrated a series of expert reports to suggest the fire was set deliberately.

The lawyer orchestrated these misleading reports by sending to the experts his theory of the case memos which he wrote for Pilot.

The experts were told to bring all of their documents to trial. When they did, they brought the memo from the lawyer.

Recall the role of the expert is to assist the court, and their primary duty is to the court and not the client. *Icarian reaper UK Case*

**PP**: Punitive damages are awarded on the grounds of a separate actionable wrong. It goes to SCC

**Held**: Can punish wrong doers when they have clearly done wrong acting in bad faith. Para 94 lists 11 points that would give rise to punitive damages. The regulatory framework for punishing insurance companies is a fine that maxes out at 10k.

### Clarfield v. Crown Life, (2000) 50 OR (3d) 696 (SC) (Aggravated damages)

Measure of damages in Ks is to put you in the position you would have been in had the contract been honour (to be paid the amount of the benefit in the policy).

The failure to pay a claim *in bad faith* can cause consequential damages above and beyond your original damages.

The distinction is that people can have honest disagreements about what the evidence discloses. Honest/good faith disagreements can give rise to aggravated damages, but not punitive damages.

### Fidler v. Sun Life, 2006 SCC 30 – Mental distress is expected to flow from breach of disability insurance K; Punitive damages require an independent actionable wrong not merely misjudging a claim.

**Mental distress damages possible:**

Damages for mental distress for breach of contract may be recovered where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made.

* There is no requirement for an independent actionable wrong.
* Test:
	+ The object of the K was to secure a psychological benefit that bring **mental distress upon breach** within the reasonable contemplation of the parties at the time the contract was made; AND
	+ a plaintiff must prove his or her **loss**; AND
	+ the court must be satisfied that the **degree of mental suffering** caused by the breach was of a degree **sufficient** to warrant compensation.
* These questions require sensitivity to the particular facts of each case.  Here, given the nature of a disability insurance contract, it would have been within the reasonable contemplation of the parties at the time the contract was made that mental distress would likely flow from a failure to pay the required benefits.
	+ An unwarranted delay in receiving the bargained for protection can be extremely stressful.

**Held**: The mental distress at issue here was of a degree sufficient to warrant compensation.  The trial judge concluded, based on extensive medical evidence documenting the stress and anxiety that F experienced, that merely paying the arrears and interest did compensate for the years that F was without her benefits.  His award of $20,000 seeks to compensate her for the psychological consequences of the insurer’s breach.

**Punitive Damages possible, but not awarded:**

Punitive damages are not compensatory.  They are designed to address the purposes of retribution, deterrence and denunciation.  An insurer will not necessarily be liable for such damages by incorrectly denying a claim that is eventually conceded, or judicially determined, to be legitimate.

Test:

Whether the denial was the result of the **overwhelmingly inadequate handling of the claim**, or **the introduction of improper considerations into the claims process**

* There must be an independent actionable wrong, and the defendant’s behavior must have been malicious, high-handed, or oppressive, AND offend the court’s sense of deceny.

**Held**: Here, after a thorough review of the relevant evidence,  the trial judge found that the insurer had not acted in bad faith.  Denial was the product of a real, albeit incorrect, doubt.

# Negligent Acts are Covered, intentional acts are not

* Negligence is covered by the duty to defend; intentional actions are not covered.
	+ - Elements of negligence: duty of care, breach of standard for duty of care, causation leading to injury, damages.
			* Can try and spin intentional wrongs in a way that they are covered, and the duty to defend arises.
		- **Hybrid**: A negligent act triggers an intentional wrong. (Get in a car accident and then a fist-fight with the other driver).
			* One allegation is covered and the other is not.

### Non-Marine Underwriters, Lloyd's of London v. Scalera, 2000 SCC 24 – Claim must fall within coverage

* An insurer only has a duty to defend when a lawsuit against the insured raises a claim that could potentially fall within coverage.
* The insurer’s duty to defend is related to its duty to indemnify.
* Therefore, if an insurance policy excludes liability arising from intentionally caused injuries, there will be no duty to defend actions based on such injuries.

The approach is:

1. Are the allegations properly pleaded? What is the cause of action?
2. Are there claims that are derivative in nature?
3. Do the non-derivative claims trigger coverage?

#### Unarnu v KA Northern BCCA is a better approach:

1. If you take the intentional components of the alleged wrong out, will the remaining facts disclose a cause of action (i.e. negligence).
2. If yes, then duty to defend even if the cause of action is bare!

###

### Sansalone v. Wawanesa Mutual Insurance Co., 2000 SCC 25 – Explicit Exclusions in one policy do not equate to automatic inclusions in other polcies

* It is noted in this case that the appellant did not purchase an option endorsement for Day Care Coverage, which expressly excluded claims for sexual molestation.
* It was held that the optional day care endorsement in the appellant’s policy should not be used to interpret the more general coverage provisions.
* An explicit exclusion for sexual torts in one context does not imply that they are to be covered in all other contexts.

### Buchanan v. Gan (2000) 50 OR (3d) 89 (CA) (Intentional wrong v intentional act) – If tort is intended (i.e. cause physical harm) then extent of damage is irrelevet.

* **Facts**:
	+ Two boys, B and W, got into a fight.
	+ W suffered a broken nose, chipped tooth, facial cuts, a closed head injury, post-traumatic stress disorder and reactive depression.
	+ W therefore sued B for the injuries sustained and obtained a judgment in the amount of $246,435.
	+ B’s mother held a policy of homeowner’s insurance.
	+ The policy contained an exclusion clause which provided that the policy did not apply to “bodily injury or property damage caused intentionally by or at the direction of” an insured.
	+ B brought an action against the insurer for indemnification for the amount of the judgement against him.
	+ At trial, it was held that the insurer could rely on the exclusion clause in the policy.
	+ B appealed, *conceding liability to broken nose, chipped tooth and facial cuts*, but that closed head injury, post-traumatic stress disorder and reactive depression were outside the ambit of the exclusion clause because they were not the natural and probable consequences of the assault.
* **Issue**:
	+ Could the insurer rely on the exclusion clause to avoid indemnification?
* **Held**:
	+ Yes, the insurer could rely on the exclusion clause and did not have to indemnify B for ANY of the damages awarded to W.
	+ Appeal dismissed.
* **Ratio**:
	+ If a tort is intended, it does not matter that the result was more harmful than the actor should, or even could have foreseen.
* **Reasoning**:
	+ B intended to make physical contract with W during the fight.
	+ Therefore, it was irrelevant that the magnitude of W’s injuries exceeded B’s expectations, subjective or objective.

### Charbonneau v. Intact Insurance Company 2018 ONSC 5660 – Car Surfing is normal use of vehicle; reckless and foolishness do not equal to **intentional harm.**

“[14] In our opinion, **while reckless and foolish**, Ms. Charbonneau was using the vehicle for its normal purpose of transportation (CAR SURFING) and there was an accident in which the Adjudicator correctly determined there was Statutory Accident Benefits.

* car surfing is a commonplace enough activity that **the legislature has thought fit to criminalize it** as an offence under s. 178 of the *Highway Traffic Act*, which prohibits “attaching oneself to a vehicle”

# The Duty to Defend

The cost of defending liability claims can cost more than the claim itself.

* The duty of the insurer to defend is of independent value to the insured. Where there is a duty to indemnify there should be a duty to defend. But sometimes the duties diverge.

## To Whom is the Duty Owed?

If the defendant owes indemnity to other people, not named on the policy, those other people may have rights under the defendant’s policy to be defended.

* The insurer has no privy with those people but they have a duty to defend under the policy.

#### The insured is the client

* Sometimes the counsel is in house and is employed by the insurance company.
	+ This can bring up confidentiality issues where clients have adverse interests to their insurance companies.
	+ Usually when insurers take off-coverage positions they farm out to other lawyers.

#### Confidentiality

* Must not disclose to the insurer during consultations with Insurer.

## When does it arise?

### May be set out in terms of policy, if not 🡪 implicit from duty to indemnify

* Can be explicitly, if not, then it is implicit.
	+ It is implied if there is a duty to indemnify there is a duty to defend.
* It can be simply the obligation to pay for litigation or it can be the obligation to oversee the case.
	+ In most cases the duty to defend is accompanied with the insurer’s right to control the case.
		- It is not accompanied in cases like officer/director liability.
		- It is accompanied with things like auto insurance.

### When statement of claim discloses a covered cause of action against the insured

* The duty arises based on what’s in the statement of claims against the insured customer. The statement of claim contains:
	+ Material allegations proving a cause of action if true.
		- Must identify the parties, why they’re involved, material facts about the transactions which if true disclose a cause of action (e.g. negligence; but not intentional torts).
* Statement of claim is the way to start at action which ends in a trial. (Applications are started by notice of applications and end with glorified hearings resulting in affidavits 🡪 more of a paper process.

#### Ambiguous pleadings

* Rule 21: motion to strike pleadings for failure to disclose cause of action.
	+ The claim must identify the cause of action clearly.
	+ The standard is to give a generally liberal reading assuming the material facts are true. *Hunt v Carey*
		- *The plaintiff can provide particulars to disclose the cause.*
		- *If they don’t it will be struck*
* Where there is doubt wide … if there is a mere possibility that a claim made fits within the policy then that is enough to trigger the defence.

#### Burden of Proof

The burden of proof for triggering the duty to defend is *POSSIBILITY* (that the claim fits within the policy) not balance of probability.

##### Application to Confirm Course of Action

If the insurer says there is no duty to defend then the insurer can bring an application to confirm that they are not defending.

However, it is more popular in Canada that the insured will bring an application to confirm that there is a duty to defend.

#### Extrinsic Evidence Considered in 2 Circumstances

You may have to rely on extrinsic evidence to determine if there is a duty in 2 circumstances:

1. You need to interpret the K itself.
2. Get underlying facts relating to the statement of claim (statement of claims often contain attachments to support, but they not contain all documents which might be needed to determine whether there is a duty to defend.
	1. E.g. The general rule is that the insurer should only look at the claim itself. However, if the claim against the insured (the defendant) is poorly drafted, then the insured can lead its own evidence to supplement that poorly drafted claim bringing the claim within coverage. The insurer can also rely on its on evidence.

### Exclusion of Duty When Claim Within the Deductible

* Policy can exclude the duty to defend when the claim is within the deductible. Relevant with policies that have large deductibles ($500,000).
* Policies that don’t exclude the duty to defend when the claim is within the deductible implicitly include the duty.

### Duty to Defend Above $ Coverage Limit

Is there a duty to defend you beyond posting their minimum amount?

* Look at the policy.
	+ - It may be strict and specific. “Once the value of the claim is at the limits of the policy, we will take no further steps to defend you”
* If it is silent then there may be continuing duty to defend.
	+ The duty to defend is separate from the duty to indemnify.
		- Otherwise, they may indemnify you only monetarily, but leave you as **liable on the record**.

## Presence of Jury

Civil suits all start off with no jury:

* if one party wants a jury then they will proceed with a jury (unless it is a certain type of case e.g. against the crown or a municipality).
	+ - The jury can be striked out (e.g. for racial prejudice)
* The jury cannot be told about insurance, even though they all already know.

## Scope of duty to defend

### Investigation

* Do a diligent job

### Defend

* Appoint diligent counsel:
	+ - You are being forced to place your well-being in the hands of the lawyer (especially if the claim is **less** than the deductible where you owe the whole amount)
		- The counsel must be knowledgeable and skilled.
* **Or** allow you money to find a lawyer.
	+ - This is not likely because insurance company has less control over risk and costs.

### Raise affirmative defences (e.g. is another at fault?)

* E.g. identify a 3rd party not named in the action, but who might be at fault.
	+ If that 3rd party is also insured by the insurance company: conflict interest for the lawyer representing the insurance company.
		- (i.e. if both insured’s have policies that together offer complete coverage of the claim then the insurer is liable for the excess, where as if there were only 1 insured then that insured would be personally liable for excess).
	+ There is no duty to name the 3rd party.

### Disclose

* The insurer must disclose to the insured all material information relevant to the litigation.
	+ E.g. if the insurance company finds that the exposure is greater than the limits of your coverage. It takes time to assess injuries.
* This duty falls on both the insurer and their lawyer.

## Insurer Right to Select and Instruct Counsel

Insurer generally gets control of the defense of the action.

* If there are multiple insurers there might be a fight about who controls the action (could be the insurer who provides the excess insurance because they have a large stake)
* Control includes things like costs as well.
	+ There are guidelines in how much adjusters can spend on defending different types of actions. Quality of counsel and resources (such as experts) allocated are matched with the complexity of the case.
	+ These have material impacts on effectiveness of a claim.

#### Consultation with Insured

However, there is often still a duty to consult with the insured:

* If money is paid out on your behalf either as a settlement or judgement you are still liable on record (bad for drivers and regulated professionals)

#### Excess Costs

* Some policies say if you have 3 claims under that policy they will only cover you for two. Issues:
	+ - Who pays the excess if you have 3 claims? Or if you have claims worth more than your coverage?
* You can have excess insurance to cover the remainder.
	+ Who is responsible for defending for the excess of the claims:
		- May have two lawyers (courts may decide whether you have 1 or 2 lawyers).
			* There may be some debate about who gets paid for defence, who controls defence.

## Duty to Settle

The language regarding whether the insurer has a duty to settle within limits of policy is permissive and not mandatory.

Under the courts of justice Act there is a provision that says in any litigation limits of the insurance policy must be disclosed.

* The plaintiff will also ask if there is any chance the insurer will take an off-coverage policy.
	+ If the plaintiff lawyer finds the claim is worth 1.5 million, but knows no other money is available from the defendant aside from their 1 million policy: the plaintiff will make a settlement.
* The settlement triggers costs under s49 of the Civil Procedure Act.
* The Defendant’s lawyer will consult with the insurance company. If the insurance company chooses not to settle under the policy then the client may sue for bad faith dealings, unfair dealings, or negligence.
	+ Failure to accept the plaintiff’s offer to settle within limits of the policy does not trigger create strict liability for the defendant’s lawyer or insurer.
		- If the insure and the lawyer acted in good faith there is no liability for taking the claim to trial.
			* BUT if the defendant-insured was not kept in the loop (and was not given the opportunity to consult independent legal counsel) then the there is a suggestion the insurer lawyer did not act in good faith.
			* The insurer meets its duty to keep the client informed even if there is a disagreement on litigation strategy. The insurer does not have to listen to the client’s strategy.
				+ But where the client gets independent legal counsel, *that counsel* will also asses the case and encourage the insurance company to take the settlement (if it is good). If the insurer ignores the other lawyer’s advice as well it is more likely they did not act in good faith.

## Duty of Appeal

Does the insurer have a duty to appeal? If the judgement is in excess of policy limits, then it will be important to the insured customer.

Generally, policies are silent on the duty to appeal.

#### The duty arises in two cases

1. If there are **reasonable grounds** to believe the judgement in **excess** of the policy limits can be **reduced**, presumably there is a duty to appeal.
* Therefore, must look at underlying merits of the appeal.
1. If it is reasonable to believe that a judgement against the insured on an **uncovered** area might be **reversed**.

##### *Hoang v Vincenti* - An insurer w/adverse interests to their client must pay for client’s lawyer and intervene as a 3rd party during the appeal.

**Facts**: Boy was with dad who took him out of their car downtown Toronto. The boy ran out into the street and was hit by car in downtown Toronto. Mom becomes litigation guardian for the boy. (Rule 7 *Civil Procedure* say “infants” (i.e. minors) cannot commence an action). The litigation guardian takes the burden of any adverse cost order following an action commenced on behalf of the infant.

* Mom sues both the driver of the car who hit the child and the husband.
* The husband’s insurer says it is not within the cover of the Husband’s policy. The husband was not driving a motor vehicle, so it is out of scope.
	+ However, the insurer chooses to defend the husband and gives his a reservation of rights later (not likely we will have to indemnify you and defend you).

**Held**: Father was at fault because of his negligence in choosing where to “offload” his son. This was considered negligent use of a motor vehicle.

**Issue**: The insurer wanted to appeal the judgement, but the husband did not (he wanted the money for his son).

**CA:** Finds conflict of interest between insurance company and the husband (and the husband’s lawyer). The CA told the insurance company to get their own lawyer, and continue paying for the husband’s lawyer. An insurer in auto insurance who wants to take an off coverage position can do so as a statutory third party.

* The court of appeal said in this case that since the insurance company had adverse interests to its client they were a stat. 3rd party .

## Consequences of Refusing to Defend

Could be bad faith if the insurer refuses.

* This will arise after you go to trial.

Damages for bad faith would be the amount of the judgement, and possibly punitive or aggravated damages, plus costs.

# Waiver and Estoppel

Waiver:

* Voluntarily giving up a right you would have otherwise had
* Unequivocal decision
* No need for proving prejudice
* Intentional act (you must intend to waive the right)

Estoppel:

* Less intention.
* Can be silence or oral: but must show that the representation was made with the intention that it would be acted on by the person it was made to. Must show detrimental reliance.
* Insured may rely on fact that you have undertaken their defence and then turn against them after lulling them into disclosing confidential information to you and choosing not to defend them.
	+ If insurer thinks there is a chance the claim is not covered, but they want to gain more information, the insurer should issue a P**reservation of rights letter** saying that if there is no coverage for this claim they will not defend the insured.
		- If the insured tells the lawyer telling something then the lawyer has a duty not to share the information with the insurer.

## Introduction

* A claim on an insurance policy is usually not successful if there has been some default on the part of the customer such as misrepresentation of a material fact or a breach of the term of the contract.
	+ If, however, the insurer has in some way excused or authorized the default is cannot later rely on that default as a basis for denying the claim.
* In the terminology normally employed, the insured is said to have “waived” its rights to set up the default as a defence to a claim or to be “estopped” from doing so.
	+ There is little consensus in the courts and among the writers as to whether waiver and estoppel are merely different aspects of a single concept, or whether they relate to complete separate theories.
* A substantive doctrine of waiver in relation to insurance contracts is elusive.
	+ Thus to say “the insurer has waived its rights to terminate the policy” means simply that circumstances have arisen whereby the insurer is prevented from denying a claim by the customer notwithstanding some term in the policy or some other rule appearing to give it that right.
	+ To determine if this is true, it is necessary to discard, at least temporarily, the term “waiver” as referring to some substantive doctrine.
* Several theories, none of them called “waiver”, operate to protect a customer’s claim in the face of default:
1. Estoppel by representation
2. Promissory estoppel
3. Election of remedies [which is the nearest to a discreet concept of waiver]
4. Variation of the contract
5. Repudiation
* Legislation in force in all common-law provinces provides that, for certain types of insurance, an insurer is not bound by a “waiver” unless it is in writing and signed by an authorized officer.
	+ **An** **important question therefore is which of the following five theories were regarded by the legislatures [or contracting parties] as falling within the ambit of the provision**.
	+ A similar problem arises from the widespread practice among insurers of having the customer sign “non-waiver” agreements which are designed to allow steps to be taken after loss has occurred, without prejudicing the insurer’s right ultimately to deny liability.

## 1. Estoppel by Representation: Reliance on representation of ***existing*** fact, not reliance on assurance of future conduct.

### Definition

* The doctrine of estoppel by representation has been defined as follows:
	+ “Where one person [“the respondent”] has made a representation to another person [“the representee”] in words or by acts and conduct, or [being under a duty to the representee to speak or act] by silence or inaction, with the intention [actual or presumptive], and with the result, of inducing the representee on the faith of such representation to alter his position ***to his detriment***, ***the representator***, in any litigation which may afterwards take place between him and the representee, ***is estopped***, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.”

### The Representation

* The first requirement then is that there must have been a representation [for present purpose by the insurer] to the person seeking to rely on it.
	+ By definition, a representation in this context is a representation of an **existing fact.**
		- This distinguishes estoppel by representation from promissory estoppel which is founded on an assurance of future conduct.
	+ E.g. a statement by an insurer that a policy was in full force and effect even though premiums were in arrears.
		- If the other requirements were satisfied, the insurer would be estopped from raising the non-payment of premiums as a ground for refusing a claim.
	+ E.g., a representation to the effect that the policy requirements for notice and proof of loss need not be met and that action already taken by the customer is sufficient would preclude the insurer from denying liability because of non-compliance with those requirements.

#### Evidence may be writing, oral, conduct, or silence

* A representation may be evidenced by written documentation, such as a receipt acknowledging acceptance of a late premium.
* But despite legislation requiring that “waivers” be in writing if they are to bind insurers, it is generally accepted that estoppel may be founded on oral representations, other conduct or indeed silence.
	+ S. 131(1) of the Ontario Insurance Act:
		- The obligation of an insured to comply with a requirement under a contract is excused to the extent that,
1. the insurer has given notice in **writing** that the insured’s compliance with the requirement is excused in whole or in part, subject to the terms specified in the notice, if any; **or**
2. the **insurer’s conduct reasonably** causes the insured to believe that the insured’s compliance with the requirement is excused in whole or in part, and the insured acts on that belief to the insured’s detriment.
* **Conduct:** amounting to a representation is:
	+ an insurer’s acceptance of *full* late premiums.
		- although *acceptance of part payment* of a late premium is not itself sufficient.
	+ a liability insurer providing its customer with a defence
		- but this can be done in a way that preserves the insurer’s rights.
	+ actions taken during the settlement process generally may also amount to representations.
		- an admission of liability by the insurer estops it from later invoking the limitation period as a defence to an action against it by its customer.
		- where negotiations are inconclusive, even if most matters have been settled, the majority of cases have held that no estoppel arises.
			* This is because the representation must amount to an *unambiguous undertaking* that the insurer has changed its position as regards its legal relationship with the customer.
* **Silence or Inaction:** may give rise to a representation if the insurer is under a duty to speak or act.
	+ This could occur where the insurer wrongfully retains the policy or otherwise withholds from the customer details of his/her obligations regarding, for example, notice of loss or owed premium.
		- In such a case, the insurer is estopped from denying a claim where the denial is based on the customer’s failure to meet these obligations.
	+ Silence after filing of notice may also amount to a representation.
		- In one case the insurer’s lengthy delay in responding gave rise to estoppel [Zed v. Barrister’s Society of New Brunswick]
	+ \*\*If, however, there is **no duty to communicate 🡺 silence is not sufficient** to found an estoppel.
	+ \*\*Nor does estoppel arise from the mere fact that a question ***is*** answered if there ***is no duty to answer it i***n the first place.

### Detrimental Reliance

**No detrimental reliance**:

* A clerical error is an insurer’s office resulted in the customer receiving a notice extending his insurance for a period longer than that to which he was entitled, it was held that, while this was a representation that might give rise to an estoppel, it did not in this case because the customer has not acted on the notice to his detriment.
	+ It would have been *different if he had consequently decided not to buy alternative insurance*.
* In cases involving missed limitation dates, estoppel has operated only where the customer has been misled.
* Where a customer is equally able to recover from either of two insurers. He suffered no determine on losing the right to look to one of them because he retained the right to recover from the other.
* Third-part victims raising estoppel against the insurers of persons responsible for their losses often fail because the third party cannot show detrimental reliance on a representation by the insurer.
	+ In one case, where an insured issued a “pink card” to its customer, the insurer was held not estopped from denying that it covered the customer because the third party could claim no detrimental reliance on the fact that the card had been issued.

**Yes, Detrimental Reliance:**

* In Western Canada Accident & Guarantee Insurance Co v. Parsons, the customer was able to show that the insurer, in assuming the defence, prevented him [the customer] from settling the claim at a figure below that at which judgment was finally set. Being thus, “lulled into a sense of security” the customer was prejudiced and the insurer was estopped from denying liability.

### Pleading

* The representee must “at the proper time and in the proper manner” object to the representator’s seeking to establish facts which, it is alleged, s/he is estopped from doing.
	+ In the context of insurance cases this was once thought to mean that estoppel, or indeed waiver, had to be specifically pleaded.
	+ Recently, however, a more flexible approach has been espoused.
* Not ***necessary*** to formally to plead estoppel, or even to mention its name, so long as the presentation of the issues reasonably raises the possibility. Still probably better to do so.

### 2. Promissory Estoppel – Promises that strict K’ual rights will not be insisted on and customer need not comply in the ***future*.**

##### Definition

* The effect of the statement or act of the insurer is to convey to the customer the impression of a *future* default of a certain kind will not prejudice the customer’s rights under the contract.
* The principle of promissory estoppel is well summarized here:
	+ If one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted on, intended that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do.
* Again, for our purposes it is both more accurate and helpful to refer to the doctrine as promissory estoppel and not waiver.

##### Evidence

* As with estoppel by representation, a central issue in the analysis of promissory estoppel is the sufficiency of the statement or conduct of the party against whom estoppel is alleged. *Maracle v Traveller’s* SCC 1991
* **Onus**: Whether based on words or conduct, the onus is on the insured to prove that, by such words or conduct, the insurer indicated it would relinquish the right in question.

#### Conduct

* conduct by the insurer must amount specifically to a promise that it will not enforce a K’ual right:
	+ E.g. a statement by the insurer that “no action can be taken by the customer until after the insurer’s investigation is complete” means the insurer is estopped from using the limitation deadline.
	+ E.g., a clear representation that insurance will be reinstated upon “payment of back-premiums without new evidence of insurability” is conduct stopping the insurer from denying coverage once the premiums are paid.
	+ E.g. If the insurer makes a habit of accepting late payment of all or part of the premium, the insurer may not later declare a forfeiture for non-payment by the due date.
		- It is essential, however, that the customer *reasonably perceive* the practice as customary and is *led to believe* it is always acceptable.
			* One, or even a few, occasions is not sufficient.
		- This is true notwithstanding that such is required by the contract
	+ E.g. Once a customer learns from the insurer that insurer knows of the accident then the customer no longer needs to inform the insurer:
		- In Lickiss v. Milestone Policies at Lloyds, the English Court of Appeal considered a situation where an automobile liability insurer, having heard that its insured customer had been charged with careless driving, wrote to him inquiring why he had not informed them of the proceedings as he was required to under the policy.
			* The letter arrived while the customer still had time to submit this information in accordance with the terms of the policy but he still did not send in formal notice.
		- It was held that “any reasonable person receiving that letter would have concluded that the insurers, having learnt all about the intended prosecution, no longer required him to notify them of it or send them the summons.
		- The insurer was estopped from raising the failure to provide notice.
	+ E.g. If the insurer denies the customer access to any information necessary for the completion of proof, it will be estopped from setting up the unsatisfactory proof as a defence.
		- But where the customer is excused from complying strictly with the time limit in order to complete the necessary information or have amounts properly calculated, the extension is only for the time necessary for that purpose.

##### Reliance

* Reliance by the insured in that the sense that s/he forgoes complying with the strict terms of the policy in circumstances where s/he could comply without penalty. *Motors Insurance Corp v Old Republic 2009 ON SCJ*
* Can be raised where it would be inequitable for the promisor not to be bound by the promise to refrain from enforcing strict rights under the contract.
	+ This may fall short of detriment to the promisee, Professor Waddams has suggested that in Anglo-Canadian law the evolving rule protects the promisee to the extent to which s/he has relied on the promise.
	+ If an insurer has “promised” that its strict rights under the policy will not be enforced, and in reliance on that the customer does not comply [whereas s/he otherwise could and presumably would have], the insurer cannot then go back on the promise and deny liability on the basis of non-compliance.

### 3. Election of Remedies: Excuse Default rather than Avoid K

##### Definition

In the law of contract, one party can effectively excuse a breach by the other party under the election of remedies doctrine.

* the party not in breach may choose to enforce the consequential rights–in insurance cases 🡪 to avoid the contract
	+ ***or*** to treat the contract as continuing in force and call for performance [such as continued payment of premiums] from the party in breach.

Thus, an insurer may choose, in effect, to excuse a default of its customer because it expects to benefit in the future, and continue to assume liability under the contract.

* This is different from estoppel by representation in that the customer need not show detrimental reliance on the conduct of the insurer.

### 2 Key Elements: Conscious Choice and Unequivocal Act

The two key elements are that the insurer makes a **conscious choice** and that it acts unequivocally. *Scarf v Jardine* 1882 HL

* Conscious choice = the insurer must have full knowledge of the right it is forgiving.
* Unequivocal Act = must be communicated to the customer in unambiguous terms.

### Irrevocable

Following the unequivocal Act, the election to excuse the default is usually irrevocable.

* A “wavier” may be retracted if reasonable notice is given to the customer & the customer has not already acted in reliance on the prior communication of the original election. *Saskatchewan River* SCC 1994
* \*Prior to the communication of its election to the customer, the insurer retains the right to make its choice either way.

### Conduct

There are a number of ways in which it may be argued that an insurer makes an election to affirm the contract.

#### Acceptance/Demand of Premiums

* **Acceptance of premiums**
	+ E.g., where the insurer accepts premiums - in full knowledge that the customer is in breach of the policy, where the breach is the lateness of the payment itself.
		- Acceptance of the premium may also amount to an election not to rely on other breaches unrelated to premium payments. *Gill v Zurich* 2002 ONCA
* **Actual acceptance of the premium may be required**.
	+ In *Northern Life Assurance Co. v. Reierson* SCC 1977, a premium cheque had been retuned due to insufficient funds. When a new cheque was eventually forthcoming it was not cashed. For the SCC, Dickson J. held that the test of “express or unequivocal language or conduct” by the insurer had not been satisfied.
		- **Simply Demanding** payment even repeatedly, may be too equivocal to amount to an election.
		- Where a customer submitted a cheque for the premium but after the due date when the insurer presented the cheque for payment there were insufficient funds. Money was placed in the account just prior to the happening of the insured event but the insurer was unable to present the cheque for payment in time. It was held that there **was no “waiver”** in these circumstances and the insurer was able to deny the claim on the basis of non-payment of premiums. *Neill v. Union Mutual Insurance Co*.
	+ Actual acceptance **not required if there is Unequivocal Act**: SCC has recently stated that cases such as these *do not reflect an inflexible nature.*
		- “in some circumstances a demand for payment may constitute waiver. The nature of waiver is such that hard and fast rules for what can and cannot constitute waiver should not be proposed. **The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.”** Saskatchewan River Bungalows v. Maritime Life Assurance Co. [1994] SCC

#### Suing for payment/obtaining a judgement is not always an election

* An insurer’s action in suing for payment, obtaining a judgment, or even executing on it, can be consistent with avoiding the policy 🡪 therefore it is not an election. *Manufacturers Life ins v Gordon* 1893 ONCA
* However, this position is difficult to reconcile with general principles and other cases.
	+ For example, in Dyrkacz v. Monarch Life Insurance Co., [1936] Man K.B
		- The policy contained a provision that, while non-payment of premiums gave the insurer the right to avoid the contract, the insurer could nonetheless sue for premiums unpaid to that date. On its face this clause would have allowed the insurer to sue and it would not amount to an election.
			* But the provision was held to be overridden by legislation dealing with premiums paid by promissory notes.
		- **The court therefore treated the suit as an election to affirm the contract**.

#### Continuing the Defence (for Liability Insurance)

* With respect to liability insurance, if the insurer assumes the defence of its customer and discovers during the course of the proceedings that the customer has been in breach of the policy, but nevertheless continues the defence, it will be held to have elected not to avoid the contract on the grounds of that breach. Parrott v. Western Canada Accident & Guarantee Insurance Co., [1921] SCC,

#### Silence/Delay do not equal election.

* Delay in making an election does not itself constitute an election. *Economical Mutual Ind Co v Fleming* 2008 on scj
* An election cannot be inferred from mere silence. *Accident Ins Co of North America v Young* (1982) SCC
	+ Therefore, a statement by the insurer denying liability on the basis of a particular default on the part of the insured does not, by neglecting to refer to other breaches, waive the insurer’s right to rely on those breaches.
	+ There is no election unless the insurer’s action is unequivocal. Administrative oversights are often *equivocal.*
* If an insurer takes some steps towards negotiating a settlement of the claim, it may be taken to have elected to affirm the contract provided, again, those steps are unequivocal.
	+ Simply appraising or adjusting the loss or even an attempt to arbitrate the **amount** of claim, for example, will not qualify as a waiver of a condition as to notice and proof of loss. *Marcoux v Halifax* 1948 scc

### 4. Variation and Repudiation of the Contract

* An insurer may, in effect, authorize future non-compliance with particular conditions in the policy by a binding variation of the contract or by repudiation of it.

##### a) Variation = NEW K.

* A customer will not have to comply with a term of the contract is he/she can show that the contract has been varied by agreement with the insurer to exclude that term.
* To be binding, such an agreement must be **supported by consideration**.
	+ If **both the insurer and the customer gain a benefit from the variation**, it is said to generate its own consideration.
		- However, if only one party benefits that party has to provide fresh consideration for the variation. Unless there are factors creating an estoppel, the insurer would be entitled to enforce the original K’ual rights.
* In fire insurance, the statutory conditions allow an insurer to opt to repair rather than replace. Where this option is chosen a new K is entered into 🡪 a contract for repair where any limits in the initial insurance contract do not apply. *North West Electric Co v Switzerland* 1977 Sask CA

##### B) Repudiation = Insurer shows intention not to uphold it’s duty

* Where the insurer denies all liability under the policy & *subsequently* the customer fails to comply with a condition in the policy (such as one requiring delivery of a declaration and proofs) the insurer cannot later point to *that* failure as a ground for denying the claim. *Ross v Scottish* 1918 SCC
	+ This is especially relevant in liability insurance.
	+ **Limit**: **While** a liability insurer’s initial refusal to defend its customer against a suit brought by a third party **precludes it raising, as a further defence, its customer’s subsequent failure** to comply with the terms of the policy, that refusal does not strip the insurer of all rights regarding the litigation.
		- An the order to defend does not leave the insurer having to pay the defence costs while its customer calls the shots.

### 5. The Role of Intermediaries

### Weight of Intermediary’s actions depends on nature of their authority

Conduct, or a representation, of an intermediary, or knowledge gained by him/her, is attributed to the insurer depending upon the nature of the authority enjoyed by the agent under the terms of the agreement with the insurer, subject to the doctrine of ostensible authority.

* **Limited authority**: Agents with authority limited to receiving and forwarding applications for insurance have no authority to:
	+ - “waive” a forfeiture arising from a breach of condition, *Torrop* **nor**
		- to bind the insurer by representations that allegedly support, for example, an estoppel concerning warranties in the contract. *Tarr*
	+ where the agent displays the “indicia” of authority his or her actions *may* be taken to bind the insurer even without actual authority. *O’Byrne*
* **Authority to accept premiums**: Where the agent has actual authority to receive premiums on the insurer’s behalf and accepts a premium after learning that the customer is in breach of a condition of the policy, this has been held to amount to an election to affirm the contract and is binding on the insurer. *Campbell*
	+ The implication is that since the agent has is imputed to the insurer.
* **Authority to gain knowledge**: Where an agent has authority to inspect, assess and accept risks, knowledge gained in the course of an inspection will be imputed to the insurer. *Shannon*

#### Inequality present because insurer holds knowledge about agent’s actual authority

In those cases, where the actions or knowledge of the agent are not imputed to the insurer because of limited authority, the customer may suffer a considerable injustice.

* + While the rights of the insurer may certainly not be ignored, the insurer is in a very favorable position to enforce the agency agreement granted thereunder because the terms of the agreement are within its knowledge and greatly within its control.
	+ The customer, in contrast, is a stranger to the limitations on the agent’s authority.
	+ This inequality in position permeates all aspects of agency in insurance law.

### 6. “Wavier” in Legislation and Similar Contractual Provisions

* In considering the common law and equitable doctrines it is helpful to avoid the term “waiver” as referring to a distinct theory.
	+ However, since legislation places restrictions on the use of “waivers” and since commonly used clauses in policies import similar provisions, it is necessary to determine what the term is intended to encompass when it appears in this way.

##### a) Provisions Excluding Waivers in Certain Circumstances

* A provision in the uniform legislation relating to insurance *(other than* ***life****,* ***marine*** *and* ***accident and sickness insurance***), states as follows:
	+ Neither the insurer nor the insured shall be deemed to have waived any term or conditions of a contract by any act relating to the appraisal of the amount of loss or to the delivery and completion of proofs or to the investigation or adjustment of any claim under the contract [s. 131(2) of the Ontario Insurance Act]
		- Note this doesn’t address written waivers, nor variation, estoppel, or repudiation. Those may be relied on.
			* Since the subsection uses the term waiver and that term is capable of meaning something other than estoppel, it is best to give the term waiver a restrictive interpretation.

##### B) Provisions Requiring Waivers to be in Writing

Another subsection in the uniform act requires waivers to be in writing.

* “No term of condition of a contract shall be deemed to be waived by the insurer in whole or in part unless the waiver is stated in writing and signed by a person authorized for that purpose by the insurer.”

#### Applies to terms of contract only

* This provision refers only to terms or conditions of the contract.
	+ If a contract contains no reference to misrepresentation of material facts, a waiver of a default of that nature would not have to be in writing even though such a default would, without the waver, entitle the insurer to avoid the contract.
	+ With respect to fire policies, however, the statutory conditions are included as a term of those contracts a condition that misrepresentation makes them void.
* This provision does not apply to estoppel.
* This provision can also only have application to elections of remedies.

#### Limiting Effect of Provision that Waivers must be in writing:

* One avenue to limit the effect of such a provision:
	+ It is possible for an insurer to “waive” the waiver-restricting provision itself. The waiver of the waiver-restricting provision need not be in writing.
		- E.g. Insurer said to insured “we elect to defend” after knowledge of the breach 🡪 it could not be said that the election should have been expressed in writing because the acts of the insurer were unequivocal.
* Another avenue is to give a liberal construction to the term “in writing”
	+ All that is required is some evidence in writing [although presumably signed by an authorized person] of the insurer’s conduct and need not state expressly that the contract is affirmed, or use the term “waiver”.
		- E.g. A letter from the insurer’s solicitors writing after the expiry of the limitation period asking the customer to delay the action further for the convenience of the insurer has been held to comply.
		- E.g. “special offer” on a printed form bearing the name of the customer typed in and stating that a lapsed policy may be reinstated if certain conditions are met has been construed as the type of waiver contemplated by the legislation.

##### C) Other Relevant Legislation

#### Accident and Sickness Insurance

* The application, this policy, any document attached to this policy when issued, **and any amendment to the contract agreed upon in writing** after the policy is issued, constitute the entire contract, and no agent has authority to change the contract or waive any of its provisions. [s. 3001.(1) of the Ontario Insurance Act]
	+ First, for this type of insurance, variations of contract have to be in writing.
	+ Second, any agent is denied authority to change or waive any term of the contract.
		- It is arguable, as above, that change or waiver do not include estoppel.
		- A wider inquiry about the particular agent’s authority with respect to acquiring information and binding the insurer is needed to see if they can amend in writing. See “Role of Intermediaries”.
* S300 1(2) says: The insurer shall be deemed not to have waived ay condition of this contract…unless the waiver is clearly expressed in **writing and signed** by the **insurer**.”
	+ This again makes it clear that the nature of an agent’s authority is critical.

#### Marine Insurance

In marine insurance legislation there are two provisions dealing specifically with “waiver.”

* One states that a breach of warranty may be waived by the insurer.
	+ With respect to waivers of breach, the term is used in the sense of election of remedies.
		- E.G. where a customer was in breach of a warranty requiring him to serve notice of abandonment, but where the insurer had nevertheless taken possession of the ship and retained it, the insurer was held to have accepted the abandonment and to be liable for the total loss.
		- E.g. where the insurer participated in arrangements for repairs of a vessel, it was held to have waived compliance with a condition providing that the ship be laid up for the winter months.
* The other allows notice of abandonment to be waived.
	+ Waiver of the requirement that notice of abandonment be given may amount either to an election or to estoppel.
* There is no requirement that waivers in either case be in writing and it is clear from the above examples that conduct not evidence in writing will suffice.
	+ However, this may be affected by express provisions in the policy.

### 7. Non-Waiver Agreements

If the insurer denies all liability and does nothing for fear of jeopardizing its position on that point, it loses the opportunity to be involved in the defence and thus protect its own position should it find out ultimately that there is, indeed, liability.

* To address this problem, insurance company practice has produced what is commonly called the **non-waiver agreement**.

A form of such agreement currently used provides that:

1. The Insurer may make such investigations of the occurrence and claims arising therefrom as it deems necessary.
2. The Insurer may appear and defend all actions arising from the occurrence in the name of the undersigned [insured].
3. The Insurer may carry on negotiations toward possible settlement in respect of claims or actions arising from the said occurrence without judgement against the undersigned or without the further consent of the undersigned.
4. Any action taken by the Insurer shall be without prejudice to the respective rights of the Insurer and the undersigned under the designated policy of insurance.
	1. Note: This is strong evidence that there is no estoppel, waiver, and clearly no repudiation of variation. See below “disadvantage to the customer.”
5. In the event of any proceedings between the Insurer and the undersigned the undersigned will not plead nor contend that by investigation of the occurrence or by defending any action or by negotiating any settlement in respect of the said occurrence the Insurer waived any of its rights under the designed policy.

#### Advantage to the customer: He or she is assured of a defence usually at the insurer’s expense.

* Even if the insurer is found not liable on the policy to indemnify the insured, the insurer may still bear the costs of the defence, the duty to do so being sometimes independent of the obligation to indemnify.

#### Disadvantage to the customer: Cannot argue estoppel or election

* **No estoppel**: In most cases, the agreement would prevent a successful plea of either estoppel by representation or promissory estoppel.
	+ When a customer has signed a non-waiver agreement, there is strong evidence that he or she has not relied on the conduct of the insurer in the sense that he or she has assumed that the insurer has definitely accepted liability.
	+ Although, if the insured’s signature to the agreement is obtained through misleading as to the nature of the arrangement, he or she may not be held to be bound by it.
		- For this reason, it has been suggested that a customer be referred to independent legal advice before signing.
* **No Election**: With respect to elections, the very nature of a non-waiver agreement makes it clear that the actions referred to in the agreement are not unequivocal conduct indicating the insurer’s intention to affirm the contract.

#### Limits on Benefit to the **Insurer**

* Additional conduct may bring the effect of the agreement to an end by effectively waiving the rights secured by the non-waiver agreement.
	+ In acting for the customer, if the insurer negotiates with the third party to the point of settlement and actually pay over the amount agreed upon 🡪 the insurer will be taken to have elected not to deny liability with respect to its customer. *Western Canada Accident* 1991 SCC
		- even if a non-waiver agreement states that “settlement” does not constitute a waiver, the insurer cannot obtain reimbursement from the customer once it has paid the settlement. *North-West Casualty*  1941 ONCA
		- The agreement in question, while preserving the insurer’s right to deny liability, did not authorize the insurer to make a payment on the customer’s behalf.
	+ **An appropriately worded agreement may give such authority**, for example, by containing explicit approval to settle for specific amount. *London Assurance* 1968 ONCA

### A Letter of Reservation of Rights: Unilaterally achieves the same effects.

* It is evidence that the insurer is not unequivocally electing to affirm the K, or that it is not varied or repudiated.
* Also likely no estoppel: there is strong evidence that he or she has not relied on the conduct of the insurer in the sense that he or she has assumed that the insurer has definitely accepted liability.

# Subrogation

Subrogation is a concept that operates where the insured customer has a legally enforceable right against a party other than the insurer to recover the amount of loss.

* The insurer is said to be subrogated to such a right so that the customer may not retain both the insurance money and the damages recovered from the third party.

## Principle of Indemnity

* The principle of indemnity in insurance law requires that an insured person who has incurred loss should recover no more than the value of that loss.
	+ **Two Policies**: If there is more than one indemnity insurance policy covering the same subject matter and the same risk, insurance law provides for contribution among the insurers to account I total for only the extent of the loss.
	+ **Additional Source of Compensation**: If there is only one indemnity policy, but still an additional source of compensation for the loss, over-recovery may be prevented by implementation of the doctrine of subrogation.
		- E.g. a court order in law suit for tort damages paid by tort-feasor
		- E.g. the contractual right of a vendor of land to receive the purchase price from the purchaser [regardless of subsequent damage]

### Subrogation holds the wrongdoer liable

* It is sometimes said that the rationale of the doctrine of subrogation is not only to prevent over-recovery but also to ensure that a wrongdoer is not excused of any or all liability merely because the victim of the wrongdoing had insurance.

### Subrogation is achieved in one of three ways:

1. Where the insurer has paid out under the insurance contract, it may bring the action against the third party in the customer’s name. Any amount recovered goes to reimburse the insurer and any recovery in excess of the amount paid out by the insurer is payable to the customer.
2. If the customer has already exercised the right against the third party and recovered the value of the loss; and the insurer has paid out under the contract, the insurer may seek reimbursement from the customer.
3. If the third party has indemnified the customer and the insurer has not yet paid out, the insurer may withhold payments.
* The right of subrogation in insurance is ***independent* of statute** **or the express terms** of the policy.
	+ - for some classes of insurance, the general principles have been modified by statute
		- for other classes, the parties to an insurance contract may modify them for the purpose of that contract.

## First, the Customer Must Have an Enforceable Right Against a Third Party

The insurer’s right of subrogation is derivative: The insurer can be in no better position as against a third party than its customer would be.

* + Therefore, if the customer does not have access to an alternative source of recovery that is in the form of an enforceable right, the insurer has nothing to which to be surrogated.
* **No right of action against oneself**: Simpson v. Thompson [1987] Scot HL.
	+ Two ships owned by the same person were involved in a collision.
	+ The House of Lords held that there was no right of subrogation since such a right was derivative of the insured customer’s right and he, the customer, had no right of action against himself.
* **No right of action after limitation**: an insurer was defeated by the expiration of the limitation period that applied to the customer’s cause of action. *Aguiar* 1984 ONCA

### Sources of Enforceable Rights:

#### Gifts ARE NOT subject to subrogation

* A mere gift to the insured customer from a third party, even if it has the effect of making good the loss, does not give rise to a right of subrogation since the customer could not have recovered that payment by action.
	+ See: Burnard v. Rodocanachi, Sons & Co. [1882] HL, it was held that where a gratuitous payment is made after loss occurs in order to diminish that loss, and it is bestowed in such terms as to demonstrate an intention to benefit the insured customer, then the customer entitled to retain it as against his insurer, even if he or she received additional payment from the insurer.

####  Tort Rights

* Where the insured’s loss has been caused by the negligence or other tort of a third party, the insurer covering that loss is subrogated to the right of action sounding in tort against the third party.
* Negligence is not the only tort to which the right of subrogation may attach of course.
	+ The principle may apply with respect to trespass, an action based on Rylands v. Fletcher, nuisance, or other strict liability theory.
* A common example is an automobile accident that causes loss for which an insured customer is indemnified by his or her own insurer [for property damage to his or her vehicle] but where there is also a claim against a third party based on negligence.
	+ The first party insurer is subrogated to the rights against a third party.
		- In practice, this most often produces the situation where one insurance company is, in reality, proceeding against another since the third party in most cases has liability insurance.
	+ In Ontario, this does not now arise because of s. 263 of the Ontario Insurance Act.
		- An insured motorist whose vehicle is damaged must seek recovery from his or her own insurer regardless of who is to blame for the damage although, unless there is collision coverage, it is still necessary to demonstrate that someone else was at fault.
			* As part of this scheme, the insurer is precluded from seeking reimbursement from the person at fault.
			* In rare circumstances the insurer may claim an “indemnification” from the at-fault driver’s liability insurer.

#### Contract Rights

* Situations where the insured customer may recover the value of the loss by virtue of a contractual right.
* Examples:
	+ bailment contracts, mortgage agreements, agreements for sale and purchase of land, leases of real property, and guarantee agreements.

#### Mortgage Agreements

* A mortgagee (the lender), even if his or her security interest in property is insured, usually has a right of recovery against the mortgagor in the event of loss of or damage to the property.
	+ Whether or not the mortgagee’s insurer has rights of subrogation in these circumstances depends upon the nature of the arrangements entered into by all three parties.
		- contemporary practice is for the mortgagor to insure subject to an assignment of priority to mortgagees.

##### Agreements for Sale and Purchase of Real Property

* under modern conveyancing practice, sale and purchase agreements typically include a clause providing that the risk remains with the vendor until closing and that, should substantial damage occur after the agreement is entered into but before the transaction is completed, either the vendor shall hold the proceeds of insurance in trust for the purchaser or, if the damage is extensive, the purchaser may revoke the agreement.
	+ Where such a clause is included, any insurance proceeds received clearly will not duplicate recovery so there is no basis for subrogation.
		- Previously it was the case that if the property was damaged before the transaction was complete the vendor (seller) could claim insurance for the damage. However, *if the purchaser still bought the property for the full price, the vendor’s insurer could recover since the vendor suffered no loss*.

#### Compensation For Expropriation of Land

* The insurer’s right to subrogation depends on:
	+ What the statute authorizing expropriation says the government must indemnify (i.e. full value, or the value in excess of insurance) *Guardian Assurance Co v Chicoutimi* 1915 SCC
		- If it is value in excess then the municipality essentially has the right of subrigation against the insurer.
	+ **OR** Whether the government is assigned a right to the insurance police: without such assignment the government has no interest in the policy and no right to benefit under it. *Drache v Winnipeg* 1970 Man CA.

#### Leasing Agreements

* An insurer of the landlord may be subrogated to the landlord’s right of recourse (*right of recourse to tenant for damage to property*).
* Where the lease contains terms allocating the obligation to insure the premises, either to the landlord or to the tenant, an agreement to remove any right of action between the parties for damage caused to the property may be inferred.
* In such cases, **there is no enforceable right** to which an insurer may be subrogated.

## 3. General Principles

### A) The Insured Customer Must be Fully Indemnified

The insurer’s right of subrogation arises only when its customer has been fully indemnified for the loss, even if the insurer has paid to the full extent of its liability.

* This broad statement of principle has application to specific contexts in which subrogation may occur as follows:
1. Where the insurer is seeking to enforce its customer’s right against a third party, the insurer must have paid out a full indemnity to the customer before it can (a) recover from the third party and (b) control the litigation or settlement process.
2. Where the insurer has paid out under the insurance contract and its customer has already received an amount towards the loss from the third party, the insurer may seek reimbursement from the customer only if the total amount received from the third party and the insurer exceeds the extent of loss and only for that amount in excess of loss [including expenses incurred by the customer in pursuing the claim against the third party].
3. Where the customer has obtained an amount from the third party and the insurer had not yet paid out, the insurer may withhold only that amount which had been retrieved *less expenses* incurred by the customer in so doing.

### B) The Customer’s Obligation to Pursue the Claim Against the Third Party **in Good Faith**

Where the insurer has not made payment of the full loss (either because the customer’s claim against the insurer has not yet been presented or processed, or because the insurer is only liable for part of the loss) the customer is under a duty to pursue his or her claim against the third party diligently and in good faith.

* Consequently, the customer must include in that claim the insured portion of that loss, and must settle the claim in good faith for the full amount obtainable under the circumstances.
	+ He or she **cannot accept a lesser amount merely because the balance is made up by insurance money**.
	+ If the customer does not meet this standard of diligence and good faith, he or she is liable to the insurer for damages.

#### Test for bad faith:

* “Did the insured take from the third party less than he/she honestly and in good faith though it wise and prudent to accept, considering the possibility of not establishing liability and the chances and expenses involved in litigation,?” Globe & Rutgers Fires Insurance Co. v. Truedell [1927] ONCA

### C) Insurer’s Right to Control Proceedings

* Where the insurer has paid for the full extent of the loss, the insurer gains the right of control over any proceedings against the third party.
	+ Control includes:
		- Decisions pertaining to the litigation, including whom to appoint as solicitor, when to settle and for how much, what tactics to employ and whether to appeal.
* Similar to the customer’s duty to pursue a claim in good faith, where the insurer assumes control of the action, the duty is owed to the customer.

## 4. Statutory Modification of the Common-Law Rules

### A) Automobile Insurance: Uniform Act 🡪 provides right of sub. For property damage when insurer has assumed liability for even partial payment

* **Partial Payment**: All the common-law provinces have provided statute for a right of subrogation in automobile insurance property damage where the insurer has made or assumed liability for *any* payment [s. 278 of the Ontario Insurance Act].

#### Apportionment of loss:

* Where the amount recovered from the third party is not sufficient to meet the loss, the shortfall is apportioned between the insurer and the customer in the proportions in which they have borne the loss.
	+ For example, in a loss totaling $1,000, where the insurer has paid out $900 [being the limit of liability] the customer has had to bear $100 or one-tenth of the loss.
		- If the amount recovered from a third party is $600, the $400 shortfall is apportioned whereby $40 or one-tenth for the customer and $360 or nine-tenths for the insurer to bear.
			* In the result, **the customer is indemnified for all the loss except for one-tenth of the shortfall [therefore, getting a total of $960].**

#### Control over Proceedings

* The statutes deal specifically with the question of control over proceedings [s. 278(3), (5) of the Ontario Insurance Act]. It is also gives insurer right to bring suit in name of customer.
	+ If the customer’s only interest in recovering from the third party after having received payment of insurance money, is to retrieve the amount of a deductible, the **insurer has control of the action**.
		- If there is a dispute between the insurer and the customer as to any matters involved in pursuing a claim it may be resolved by application to court by one or both of the parties.
* Control includes: which solicitors to instruct, the conduct and carriage of the action or any matters pertaining thereto, the offer of settlement or the apportionment, etc.,
* A customer nor an insurer cannot release the 3rd party in a settlement from any liability to the other (customer or insurer) unless both agree to the release.
	+ A customer cannot destroy an insurer’s right of subrogation by a release. *Biafore* 1976 On Div Ct

##### \*Where Insurer has right to control but does not bring action against 3rd party 🡪 Insured can still bring action.

If the insurer clearly has control according to the stated criteria but declines to exercise its right of subrogation, does this mean that the customer is precluded from bringing an action personally, for example to recover the amount of a deductible?

Situations where this might arise:

* Insurer is a party to an agreement with another insurer [the liability insurer of the third party] not to do so.
* the insurer may also happen to be the liability insurer of the third party.

##### 3 Policy reasons why customer can still bring action:

An insurer, by entering into such an agreement (as above), does not bind its customer or restrict is or her rights against the third party. *Morley v Moore* 1936 UK CA

* + This is probably the law in Canada too.

A third party should obtain no benefit from the fact that the customer/victim has been paid by an insurer.

The customer may disagree with the insurer’s valuation: the customer is taming the position that their interest is greater than merely the deductible.

However, it makes more sense for the customer here to go to the court and have them resolve what is essentially a matter pertaining to the “conduct and carriage of the action” under *OIA S 278(4)*

### B) Automobile Insurance: Ontario

* Since 1990 automobile insurance in Ontario has operated on a basis which severely restricts tort liability.
	+ Accordingly, the rights to which insurers may be subrogated have also been curtailed.
		- However, the rules differ depending upon whether property damage or personal injury is involved.

#### Property Damage – Claim against own insurer but rare cases where claimant’s insurer can seek indemnification.

* For property damage, if the affected vehicle is insured in Ontario and at least one other vehicle involved in the accident is too, the claim for compensation lies against the claimant’s own insurer, regardless of who is at fault.
	+ The claimant must show that the driver of another vehicle was at fault, but no action lies against that other driver [s. 263 of the Ontario Insurance Act].
		- Moreover, in most cases, **no** action lies against that other driver’s insurer.
* There are exceptions where the claimant’s insurer can seek indemnification after proving fault of the other parties listed below:
	+ The insurer of a vehicle damaged while “in the care, custody or control of a person who is engaged in the business of selling, repairing, maintaining, servicing, storing or parking automobiles” is entitled to indemnification from the person.
	+ The insurer of a vehicle being towed may seek reimbursement from the owner of the towing vehicle (if owner is in business or the towing vehicle is heavier than 4,500 KG)
	+ The insurer of a vehicle whose contents suffer damage over $20,000 may seek reimbursement from owner of another vehicle involved.

#### Personal Injury – Tort damages in addition to no-fault damage not subject to subrogation. Except in limited circumstances.

* For personal injury and death arising out of automobile accidents, tort rights are severely restricted in favour of no-fault beneficiaries [s. 266-67 of the Ontario Insurance Act].
	+ Compensation in the form of no-fault benefits may not be duplicated by tort damages.
	+ To the extent that tort damages are available, they are for losses not met by the no-fault scheme.
		- \*\*Because tort rights do not relate to losses compensated by the no-fault benefits, there is nothing to which the insurer paying those benefits can be subrogated.
* In limited circumstances, a no-fault insurer is permitted to seek reimbursement from another insurer, if the other driver is at fault.
	+ Where the injury victim was an occupant of a **motorcycle hit by a car or a truck**, or an **occupant of a car hit by a heavy truck**, the victim’s insurer is entitled to indemnification by the insurer of the other vehicle if the driver of that vehicle was at fault in causing the accident [s. 275 of the Ontario Insurance Act].
		- It has been held that the right to indemnification is purely statutory and that equitable doctrines such as *laches* do not apply.

### C) Fire Insurance

* **Partial Payment**: Subrogation arises in fire insurance when the insurer makes *any* payment or assumes liability for such payment [s. 152 of the Ontario Insurance Act].
* the insurer may bring an action in the name of its customer to enforce rights against a third party.
* The fire insurance subrogation section also provides for prorating of an amount recovered which is not sufficient to cover the whole loss.

#### Differences from auto

1. **Settlement**: there is no reference in the fire section to recovery by action or settlement as there is in the automobile insurance section.
* This omission is of no consequence since the wording “net amount recovered” after deducting the costs of recovery probably includes recovery by settlement as well as action.
1. **Apportionment**: The other point, which is also of no practical importance, is that the formula for prorating is set up in reverse to the formula in the automobile.
	* The amount recovered is apportioned rather than the shortfall.
	* This is also of no consequence since result is the same.
2. **Control:** The subrogation section in the fire insurance part of the uniform act, unlike the corresponding section in the automobile insurance part, does not deal with the question of control of the action in specific terms.
* On the basis of the maxim of statutory interpretation *inclusio unis est exclusio alterius* and on the further basis of the principle that a clear statutory expression is required to overturn a rule of common law, it is arguable that for fire insurance the common-law rule requiring full indemnity before control passes to the insurer applies.
	+ On the other hand, the section does refer to the fact that the insurer is subrogated to all rights of recovery of its customer against a third party upon making any payment.
		- Moreover, the insurer upon making any payment is expressly given the right to bring an action in the name of its customer against the third party.
	+ Thus, sensibly viewed, the section provides that insurer with the right to commence proceedings against a third party, but such proceedings are then subject to the overriding control of the customer.
		- This still leaves the section some meaning in that the insurer is in a better position to enforce the rights against a third party than previously when, if the full amount of loss had not been paid, it had to rely upon the customer’s duty of good faith to pursue a claim against the third party.
	+ Once the action is commenced by the insurer, but under the control of the customer, the latter is still under the duty of good faith.
		- Therefore, he or she cannot arbitrarily bring the proceedings to a halt.
	+ It would also appear that an insured customer may commence proceedings personally; at least in the case where the insurer has declined to exercise its rights of subrogation at all.

### D) Marine Insurance

* **Partial Payment**: Marine insurance legislation provide that the insurer is subrogated to all rights and remedies of its customer even in the event of partial payment.
* The right exists only to the extent to which the insurer has indemnified the customer.
	+ **Apportionment**: There is authority in England for the proposition that partial recovery under rights of subrogation is to be apportioned between the insurer and its customer in a manner similar to that provided in the insurance acts for fire and automobile insurance. *The Commonwealth* 1970 P. 216 (CA)
* **Control**: there is no specific provision corresponding to that in automobile insurance dealing with the question of control.
	+ The common-law position of full indemnity before control passes to the insurer would apply, although as in the case of fire insurance, the insurer may launch proceedings itself.

## 5. Contractual Modification of the Common-Law rules

### A) Modification of the Full Indemnity Requirement 🡪 Partial Payment

* A customer may agree in the policy to allow the insurer to assume rights of subrogation including the right of recovery and the right of control of proceedings against the third party before there has been full [or any] indemnity paid.
	+ The wording used in contracts is almost identical to that used in the uniform statutes for fire and automobile insurance.
* **Control**: While the clause gives the insurer the right to bring an action against a third party, in the event of a dispute between the insurer and its customer as to the conduct of those proceedings, the view of the customer would likely prevail to the duty of good faith and subject to his or her holding any excess for the insurer.
* **Insurer does not to pursue subrogation rights**: The insured can still pursue the claim against the 3rd party subject to good faith and holding any amount in excess for the insurer. *Arthur Barnett Ltd v National Insurance Co of New Zealand* 1965 NZLR CA

### B) Limitation of Subrogation Rights by Contract (e.g. extending liability cover to employees)

* **Extension of coverage to a class of people**: It is also possible for the parties to limit the rights of subrogation by agreement.
	+ The insurer may waive the right of subrogation with respect to a particular class of third persons [such as relatives or employees].
		- In this way, a form of liability insurance is effectively extended to those parties.
* **Silence on extension of coverage** 🡪 the insurance contract may have the effect of extending insurance to other parties, and thereby denying the right of subrogation in respect of actions against them. *Finlayson v GMAC* 2007 ONCA.
	+ The same effect is had by OIA s 239 and 244: A driver using a vehicle with consent of insured is covered.
* **A party cannot sue itself**, so if the person the insurer is going after (in the name of their customer) is inseparably connected to the customer then there is no right of subrogation. *Commonwealth Construction Co v Imperial Oil* 1978 SCC
	+ This will turn on the terms of the policy and contract between two parties. *Brookfield Homes* 2010 ONCA

## 6. Subrogation vs. Assignment of Rights to the Insurer (Assignment = insurer uses it’s own name)

* The effect of subrogation sometimes allows the insurer to bring an action against the third party.
	+ The proceedings must, however, be brought in the name of the customer, although the customer may be compelled to allow the use of his or her name for that purpose.
* Any judgment obtained is nominally in favour of the customer but the award is received on behalf of the insurer.
* In the relatively rare cases, **where the customer may and has assigned his or her right of action to the insurer, the insurer may proceed in its own name** and the insurer is not accountable to its customer for any amount in excess of the insurance paid out.

#### Tort Right = Generally Unassignable

* Tort right remain largely unassignable (except to trustees in bankruptcy and personal representatives) *McCormack v Toronto Railway* 1907 ONCA
	+ It would be bad policy to allow someone to sell their rights to sue in tort when that person did not care enough to bring that action personally. *Defries v Milne*  1931 UKCA.
* Tort rights can be assigned in three situations (*Fredrickson v insurance* 1988 SCC):
	+ - 1. the proceeds of the action, not the action itself, may be assigned
			2. An insurer may take an assignment of it’s customer’s right of action in lieu of exercising a right of subrogation
			3. A cause of action may be assigned when coupled with the transfer of some legitimate interest to the assignee.
* “Assignment to the insurer does not encourage speculation in the outcome of lawsuits… may facilitate the implementation of sensible schemes, as for example, compensating accident victims fairly and quickly.” O’Connel and Brown.

## 7. Is Subrogation Necessary?

There is a widely-held view that subrogation in insurance is unnecessary.

* harmful because: imposes additional costs on the process of loss allocation and loss spreading.

#### Justifying Subrogation:

* **No double recovery**: It removes the possibility of an insured person’s profiting from the loss [thereby addressing the problem of moral hazard];
* **Cheaper insurance**: It reduces the cost of insurance because insurers take into account that the will be reimburse when in setting premiums; and
* **Wrongdoer doesn’t benefit** b/c insured has insurance: It ensures that a wrongdoer does not benefit from the fortuitous circumstances that his or her victim has insurance.

##### \*None of these reasons are persuasive.

**Better Ways to Avoid Double Recovery:**

* There are more efficient ways of preventing double recovery than subrogation.
	+ The most sensible method is the reduction of tort damages to account for benefits from collateral sources such as first-party insurance.
* **First-party insurance** = insured is paid by his or her insurer in the event of an accident, injury or loss whether caused by itself or a third party.
	+ This is now the approach taken in Ontario in motor vehicle accidents [as per s. 267 of the Ontario Insurance Act].
* This is cheaper to administer than subrogation and at least as effective in upholding the indemnity principle.

**Cheaper Insurance Unlikely**

Most observers consider the cost-saving rationale of subrogation to be insignificant at best and that, in fact, a successful recovery in a subrogation claim is really a windfall for an insurer.

* Windfall = unearned advantage
* Even if it is not correct that insurers gain windfalls through subrogation and do achieve some savings, those savings effected in first-party insurance premiums would presumably be offset by corresponding increases in liability insurance premiums since most tort-claims worth pursuing involve liability insurance.
	1. Note: many policies [i.e., homeowner’s and motor vehicle policies] contain *both* first-party and third-party sections.

**Subrogation has little direct impact on wrongdoers**

* Because most “wrongdoers” who are pursued under subrogation have liability insurance, the moral imperative [even if accepted] or bringing the loss home to the culprit personally disappears.
	1. It is just a question of which insurer is going to pay.

#### Mechanisms to make Subrogation Effective

As subrogated actions are commonly contests between insurers, mechanisms have evolved to reduce the waste that can result from the addition layer of litigation which subrogation introduces.

* Take, for example, automobile insurance: 2 agreements are made:
	1. Since most automobile insurers insure against both collision and liability, they are often in a position of plaintiff in some subrogated actions and, just as often, in a position of defendant in others.
		+ Accordingly, they find it more convenient and less costly simply to agree among themselves not to press subrogated claims.
	2. In Ontario, most automobile insurers are party to a multilateral agreement whereby the agree, in appropriate cases, to apportion loss according to a simple formula.
		+ Note: the agreement only applies where the vehicles involved carry valid insurance against third-party liability and against collision or upset and where the damage to any vehicle does not exceed $15,000.
		+ If this agreement is inapplicable because of disagreement of facts, there may be recourse to arbitration under the Inter-Company Arbitration Agreement if the insurers involved are party to it.

\*The existence of agreements between insurance companies does not inhibit the right of the insured personally to pursue a tort claim against a third party, even if that third party carries liability insurance.

* In providing for limited no-fault accident benefits in automobile insurance, the various provincial legislatures, have provided a formal alternative to subrogation:
	1. Tortfeasors are expressly released from having to pay any damages which duplicate available no-fault benefits.
	2. This approach recognizes that loss spreading and administrative savings are more important than the symbolic calling to account of a “wrongdoer”.
* It is good public policy to place emphasis for loss spreading on first-party insurance.

# Automobile Insurance in Ontario

* The auto insurance policy is a standard form policy in Ontario
* Insurers only have to show you a certificate of coverage (S 232(5) OIA)
* This is a combination of first party and third party coverage – it is an expression of S 227(5) which provides that the insurance policy is standard/approved by Superintendent.
	+ If you want the policy, you can request it
	+ It is known in the industry as OAP #1

## Four Parts Policy

## Collision damage coverage (Direct compensation property damage)

* + **Collision: First-Party Coverage** (optional, not mandatory)
		- This is for *either* fault
	+ **Direct Compensation Property Damage (mandatory)** (S 263)
		- If the conditions are met, then the insured recovers damages from their **own insurer, but you only recover subject to *the fault determination* rules**
		- If you get in an accident, this covers repairs to your car to the extent that it isn’t your fault from your own insurer
			* **Fault Determination Rules** are under regulation
				+ Where B rear-ends A, B is 100% at fault
				+ Where A and B sideswipe each other and you can’t determine where on the road it was, they are each 50% liable (Reg. 668).
				+ NOTE: If they had purchased collision insurance, they’d get full coverage, no matter who was at fault
		- Insured and insurer have no right to take action against anyone for the property loss, which gets rid of subrogation claims
	+ **Optional Coverage for Property** **(Under S 7 OAP)**
		- If you pay an additional premium:
			* Specified Perils (theft, vandalism)
			* Comprehensive (includes specified perils and collisions)
			* Collision (only collision)
			* All Perils (everything)
	1. Automobile Policy Liability Protection s239 (3rd party liability)
	+ This is what you get if someone sues you.
		- *Amos v ICBC* (SCC): (1) Did the injury result from the ordinary and well known use of a car? If so: (2) Was there some nexus or connection b/w the loss and ownership or operation of the car
			* Where the auto in some manner **contributes to or adds to the loss**, then there is likely coverage
		- SCC said that “use or operation of an automobile” means the ordinary and well known uses to which an automobile is put (first part of the *Amos* test)
	+ **Section 258: Absolute Liability (Application of Insurance Money, 3rd Party Claims)**
		- Insurer’s duty to defend
		- **258(1)** provides that accident victim (the third party) has a right of direct recourse against insurer for their damages (the insurer of the at-fault driver)
			* There is no way that the insurer can avoid coverage. This is in the name of compensation – want them to recover in tort for their injuries.
		- **S. 258(4)** and **(5)** there is absolute liability on the part of the insurer to the third parties – the sections prevent insurer from arguing there is coverage because of misrepresentation or obtained policy fraudulently.
			* In the event that the insured has breached some conditions, the insurer is only liable for the statutory minimum ($200,000)
		- **258(13)** Any damages that the insurer has to pay to the victim, they can sue their insured for recovery based on the breach of the contract
	1. No Fault Statutory Accident Benefits s268 (no fault – your own insurer always pays)
	+ This is what you get from your own insurance company if you are in an accident
	+ **Compensation is based on need and the extent of disability** (Income replacement, rehab, medical benefits, and death benefits)
	+ You get these **regardless of who was at fault**
		- No damages for pain and suffering just indemnification
	+ If you have a tort claim, the insurer for the tortfeasor will look to deduct collateral benefits such as SABS. The point of creating these benefits was to give Ontario Motorists **recovery without waiting**.
		- Loss transfers OREG 276/90.
			* Insurers who pay accident benefits for accidents caused by other driver have system of loss transfer between insurance companies for the accident benefits they’re paying because of the faults of the insured of the other companies.
	+ Government set up its own dispute resolution system, which is run by a Tribunal, so if there is a dispute, then the insured applies to mediate and a mediator is appointed. If this fails, then they can litigate in the usual system, or they arbitrate.
	1. OPCF lets you sue your own insurer (Mandatory uninsured motorist coverage s265)
	+ If you’re hit by someone without coverage, you can recover your bodily injury claim (BI) and your property damage (PD) claim from your own insurer
		- If there is no S 263, or S 7, then go here for property damage *if the other driver is uninsured* and *you’re not at fault*.
	+ Property damage aspect of this is that if you’re hit by an uninsured driver, you can recover your own property loss from your insurer, and so Section 265(6) allows the insurer to pursue a subrogated claim against the uninsured

 (if un-indemnified/under-indemnified driver).

* + - optional auto insurance **coverage** Ontario drivers may purchase. ... The amount of any **OPCF** 44R **coverage** is the same as an insured's third-party liability **coverage**.

## Two Sets of Rights

* **Against other driver:** Ability to sue other guy if they’re at fault for general damages, past lost income above what you can recover from your own insurer, future care costs above and beyond what’s in your policy for statutory accident benefits.
* **Against own insurer**: Ability to sue your own insurer if there isn’t a policy responding on the other side or if it’s not enough

## Auto Insurance is Mandatory

* In Ontario, automobile insurance is the most heavily regulated – and everyone must be protected by insurance to spread the risk and to have a pool of funds to compensate those injured
	+ Under the *Compulsory Auto Insurance Act*, it is a quasi-criminal offence to be caught driving without insurance and this requires every automobile to have insurance

### Creation of the Auto Insurance Contract

* The contract starts with the insured presenting offer with the application to the insurer, which must be approved by the Superintendent of Insurance, and the insurer can only reject on approved grounds (Sections 227, 237 *Compulsory Auto Insurance Act*

### Termination of Contract

* Under *CAIA*, S 12 (1): Where a contract of automobile insurance has been in effect for more than sixty days, the insurer may only terminate the contract for one or more of the following reasons:
	+ Non-payment of, or any part of, the premium due under the contract or of any charge under any agreement ancillary to the contract.
	+ The insured has given false particulars of the described automobile to the prejudice of the insurer.
	+ The insured has knowingly misrepresented or failed to disclose in an application for insurance any fact required to be stated therein.
	+ For a material change of risk within the meaning of the statutory conditions referred to in section 234 of the *Insurance Act.*
* S 12(2): Subsection (1) does not apply to,
	+ (a) An insurer running off its business, where the insurer has specific approval of the Superintendent to cancel a contract; or
	+ (b) A contract in respect of a motor vehicle used in the course of carrying on a business, trade or profession.

### Renewal

* Section 236 *Compulsory Auto Insurance Act*
	+ The insurer is also strictly regulated in how they renew a contract
	+ If an insurer decides not to renew or raise premiums, they must give 30 days’ notice, because this allows the insured time to get other coverage (since mandatory insurance regime), or consider whether you will accept the higher premium.
	+ If the insurer fails to comply with the notice requirement, **coverage continues until complies;** reflects consumer protection and compensation.
	+ We are looking for an insurer in tort to pay the damages. Premiums rise b/c damages go up.

### Consequences of no Insurance:

* + Jail: If you drive without insurance, you could go to jail.
	+ Barred from suing: If you drive and have an accident without insurance, you’re barred from suing.

## Suing a 3rd Party for Tort Damages

* + If someone has hurt you in accident through their own fault, you can sue for general damages for pain and suffering, sue for loss of earning capacity, economic loss for cost of care beyond limits of your accident benefits policy.
		- Caveat 1: If you seek damages for severe permanent impairment of physical/mental function then judge has to agree that’s true upon conclusion of trial.
			* “severe” as subjective – but Gov’t tried to define it last time it made changes saying, “it must be accompanied by opinion from physician qualified to give that opinion”;
				+ Spurgeon says there’s no professional body who certifies a professional to give that opinion, so court has to define it.
			* Proving this severity adds 5-10K to cost of each claim.
		- Caveat 2: If your general damages are <128K, about a 40K deductible built in.
			* Jury can’t be told about it; 40K is just chopped off the top 🡪 your “gift” to Ontario Insurance Industry,
			* meant to keep insurance premiums low
				+ these deductibles make a swath of mid-range cases uneconomical to pursue]
			* If there’s a party involved in the lawsuit who caused/contributed to the damage in the lawsuit but doesn’t have an auto policy, the deductibles don’t apply.
				+ Eg. negligent municipalities

## Income Replacement Benefits

* IRB (income replacement benefits – bought from your own insurer.
	+ If Pedestrian doesn’t have car insurance, can tag on to the insurance of the car that hits them. There will always be insurance available.

**Calculation**

* Premised on calculation of 70% of gross income up to 400/week unless you buy enhanced package or you have another LTD policy (so baseline is <30K a year)
	+ Right to sue for past income losses in a car accident against the other driver likewise limited to 70% of gross income (get back the difference of what you got from your own insurance policy and 70% of your income)
		- 70% recovery means you’re never put back to your original position in our legislative scheme in Ontario
	+ You don’t get any income replacement benefits in the first week.
	+ Have to notify the insurance company as soon as possible, need proof income (issues w/ self-employment and misfiled taxes)
* System of no-fault benefits regardless of fault.
	+ Criminal drunk driving = lose future income, but not care costs.

## Statutory Accident Benefits Schedule (changed in 2016)

* + Under accident benefits schedule, three major bands depending on how badly you’re hurt.
		- MIG: Minor injury: $3.5K for care.
		- REG: Injury between minor and catastrophic: $16K or 5 Years of coverage for any kind of care not in hospital or provided by medical doctor (message, therapy, medication).
			* You get 16K or 5 years, whichever comes first 🡪 If you need more have to sue.
		- CAT: Catastrophic impairment (def’n changed in 2016 to be more rigid and less forgiving than the past)
			* Before 2016 means you would have:
				+ up to 1M of attendant care (6K/month cap 🡪 means will move through the 1M in < 20 years) **and**
				+ 1M for medical relocation care.
			* In 2016 the gov’t cut benefit in half by combining the two together **under one silo capped at 1M**.
				+ Def’n for catastrophic impairment for brain injury and medical professions says it would exclude about 3/4 the people who would’ve gotten it before.

### Disputing Denial of Benefits (Licensing Appeal Tribunal):

* + Previously could have fought the denial of benefits by suing or arbitrating before financial services commission.
		- But in 2016 gov’t took away the right to sue.
		- Removed all disputes to Licensing Appeal Tribunal,
			* catchall admin law tribunal resolves all sorts of disputes under 16 statutes: (eg. disputes re: tarion benefits – new home structural integrity insurance)
		- In policy for Licensing Appeal Tribunal says that they **don’t award costs**, on any level of benefits.
			* One of the implications means insurers are more aggressively denying benefits.
		- Policy made with the intent of reducing costs for the system.
			* Purported to be because gov’t wants to keep auto premiums low. But there’s a formula gov’t prescribes for auto premiums which assumes 12% rate of return for auto insurance, basically guarantees level of profit for a business prescribed by statute w/o any innovation.
			* Make money by hitting costs and reducing benefits.

#### Medical Examinations

* Section 44 of Stat. Accident Benefits Sched – Your insurer can send you out for medical examinations to determine and possibly reduce the amounts they pay in benefits.
	+ However, this will undermine their own insured’s injury to the benefit of the insurance company of the tortfeasor.

#### SABs or Torts – Differences between provinces

* Highly regulatory private tort system in ON, Alberta is also more tort-based, and BC is like this but with only one insurer
	+ QC, Sask., and Man. are almost entirely a no-fault system.
	+ In ON the sense is that gov’t will mess with this. Lawyers think government is going to drastically reduce the amount of A/B available (maybe going back to primarily tort-based fault system, though you won’t get upfront money for expenses before fault is proven, and diminution of rights and benefits over time since only certain people will have claims that would be worth pursuing).

# Insurance Law in Practice

Ted: Agro Zaffiro

* Take the rules of civ pro with you everywhere you go (to court, to see principal)
* Take civ pro and evidence
* Go to Lawyers and ask them if there is anything you can do in preparing for trial that they might not have time to do: i.e. research judge or experts hearing the case?
* Ask lawyer “how does this fit in to the big picture of your case” when they send you to do motions
* Can call lawyers who’ve worked on highly relevant cases to a case you’re assigned 🡪 can ask things like “are you appealing.” They will share lots of relevant details and they’ve already done the work.

Joe Sullivan: Mediator

1. Gather all facts,
2. gather all sources of law: policy, endorsements or writings to the policy, regulations or statutes, provisions of the insurance act, letters between agents and brokers.
* Important because there may be differences (e.g. in non-auto cases, the insurer writes aspects of the policy, and contra preforentem may give preferential interpretation of ambiguous terms to the insured)

# FINAL EXAM

2 hours, arguable case

* 1 fact pattern, 1 general discussion.

Be the judge and not the advocate. Ask:

* What do you want (objective),
* can the judge give it you (jurisdiction), and
* should they give it to you(merits of the case).
* Identify what the other side might say and deal with it (Barriers).

What is the concept of shared risk, how does the law modify shared risks (including statute and case law)

Insurance is a peace of mind contract – in Whiten the client has the insurer from HELL

He wants us to play with the concepts. Demonstrate ability to analyze and make a point. Identify issues.

Don’t worry about getting it just right – this is not a memo it is an exam.

Exams

* Series of facts: you are the lawyer for X – what rights does x, and y? What strategies should you advise. No judgement required. Practically oriented.
* Make chart of deadlines that insurers must meet in cases (i.e. when does statement of coverage and defense go out).
* An insurance defence lawyer may have an obligation to raise the issue of whether the plaintiff is mentally capable, otherwise the agreement they reach on behalf of the insurer may be declared void if mental incapacity is later discovered.
* If you think the other party to a negotiation is operating under a false understanding (i.e. they think your policy limit is $1M but it is $2M, something they should have known from discovery anyways but must’ve forgotten, it is a bad idea to settle without alerting them to the issue. Despite the fact that there is a full and final release they may sue you as the lawyer, they may sue their own lawyer)
* Some insurer’s want non-disclosure agreements in a settlement to prevent similar claims from surfacing, but the insured may not require or even want a non-disclosure (i.e. where the insured is a school and a teacher has been accused of sexually assaulting a student plaintiff). There is a conflict for the insured to work out with the insurer.

**Insurable Interest**

A loss that is worthy of indemnification: do they have a real proprietary interest (always have interest in your own life) and is there a moral hazard in indemnifying the interest?

* Do I benefit from the existence in the insurable item? If so then likely an insurable interest unless:
	+ The existence of the insurance give me an interest in the destruction of the item? If so, there is moral hazard.

**Accidents: Bad fortune includes stupid stuff and circumstance**

When is something an unfortunate event and when is something an intended wrong. *Buchanan*

Guy got beat up in a fight where he was defending himself at school. The homeowners policy of the instigator refused to cover their insured, and so the guy who was beaten up could not recover because the instigator had no other money.

* The insurer for the instigator said the outcome of the fight was foreseeable, but the lawyer of the instigator argued that he was covered because the gravity of the fight was not foreseeable.
* Court held the outcome cannot be accidental, if you engage in an intentional act that might result in negative consequence: the gravity of the damage is not relevant if damage of that kind is intentional.
* E.g. Hitting someone while drunk IS AN ACCIDENT even though it is foolish. Something that is foolish can still be an accident. The insurer must still cover you. It is an unintended event that someone gets hurt.
* Pulling someone behind a car is a common activity considered the use of , car surfing, it is has a name. It is not intended that someone gets hurt, that is an accident even though it is stupid to do and there is a high risk it will happen.
* A specific intended breach (e.g. of a code of conduct) is not an accident. The intention of the action and not the intention of the breach.