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MISREPRESENTATION AND NON DISCLOSURE ON APPLICATIONS FOR INSURANCE

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MISREPRESENTATIONS AND NON DISCLOSURE ON APPLICATIONS FOR INSURANCE

1 INTRODUCTION:

Law is often seen by the public as a set of technical rules applied to determine a result in a dispute. The rules are seen as largely arbitrary, and determined by lawyers and judges as if they were participating in a game more concerned with the technical rules than achieving a result in accordance with a generally accepted sense of justice.

In practice, however, both the law and legal process are the result of a continuing effort by judges to achieve a fair result in each case, tempered by the recognition that this result will be best achieved if there is some consistency of approach and some predictability in results.

Because of this, looking at any area of law can often best be examined and understood by looking at the problem that the law in question has addressed. This includes consideration of the law relating to insurance applications.

People in the insurance industry are familiar with insurance and the various stages in the insuring process. These include marketing, assessment of the risk, negotiation of the terms of the insurance contract, issuance of the policy, renewals, and making and settling the claim.

Yet this very familiarity may blind us to the very real and important underlying issues. Insurance has evolved over thousands of years in response to commercial and personal necessities. While our economies and societies could easily function without some of the insurance commonly available, it is hard to conceive of a productive economy and comfortable existence without insurance. The law

will determine how effective our insurance is. If we are to have insurance which serves us well it is important that insurance law reflect the legitimate concerns of all concerned.

In essence insurance is the transfer of a risk from an insured to an insurer in return for which the insured pays a premium. But if this is to be marketed efficiently and yet still provide worthwhile protection for insureds then the insuring process must achieve the following:

- the insurer must know with sufficient certainty what the extent and probability of the risk are;
- the insured must be able to transfer a sufficient enough risk to make the insurance worthwhile;
- a corollary of this, particularly for the insured, is that there must be sufficient certainty as to what the extent of the transferred risk is.

In this paper one stage of the insuring process will be examined: the application¹. The role of the application will be considered and how legislatures and courts have responded to problems relating to the application will be examined in some detail. Alternative approaches will be discussed to show that some of the assumptions underlying existing law are not as necessary as is often believed. However primary attention will be given to existing law.

We will start by looking at the nature of the problem addressed by applications from the perspective of the insurer and the insured.

¹ While applications are referred to throughout the Insurance Act, the term is not a defined term. It can be seen as the insured's description of the risk which the insured proposes the insurer accept, or the insured's proposal to the insurer. The legislation sometimes takes this approach. However, as in practice the application is determined by the insurer for its own purposes, a more accurate description is that the application is the information submitted to the insurer in response to the insurer's demand so as to obtain the information the insurer needs to assess the risk and prepare the policy.

2 CONCERNS OF INSURERS AND INSUREDS AT THE APPLICATION STAGE:

2.1 What is the Insurer's Concern at the Time of the Application:

In general terms the insurer's concern is obvious. The insurer wants to know whether it wishes to insure the insured, what the terms of the insurance should be and what premium to charge.

More specifically the insurer wishes to assess:

- what are the chances of a loss occurring;
- how large is such a loss likely to be;
- how large can such a loss be;
- independent of these considerations, is the insured the type of person with whom the insurer wishes to do business.

The information needed to do this will vary widely but certain types of information are commonly requested. Examples include the description of the property, its value and its use, the insured's claims history and disclosure of high risk factors such as a history of disease in life insurance or the presence of flammable substances in buildings.

In many ways the most interesting information is that which would shed light on the risk of a fraudulent claim being advanced. Such information may include questions which probe the character and financial circumstances of the insured and include questions which are not traditionally asked on applications.

2.2 What are the Insured's Concerns:

2.2.1 to be assessed fairly:

An honest insured may be concerned that some information may unfairly result in an insurer refusing to insure or stipulating an excessive premium. This may be because some information, particularly out of context, is likely to be misinterpreted. It may also be because of prejudice.

An Ontario decision earlier this century illustrates the point, as well as revealing much about Ontario at the time. In *London Guarantee & Acc. Co. v. Green*² the plaintiff was asked his "racial extraction" on an application. His answer was Canadian. The Court concluded that this was a misrepresentation as the insured was a "Hebrew". Quite aside from the moral repugnancy of such a decision, the reasoning is clearly faulty in several respects. However, the point for the purpose of this discussion is that there may be information which has nothing to do with legitimate concerns of insurers which an insured may wish not to give to the insurer.

Dishonest applicants will simply hope to benefit from insurance obtained as the result of misrepresentation or non disclosure either because they will assume the insurer will not discover the deception or that it will not make any difference once a claim occurs. In some cases, such as the purchase of compulsory automobile or property insurance required by a mortgagee, the insured may not care as much about the ultimate consequences as getting a cheap policy at the time.

London Guarantee & Acc. Co. v. Green (1930), 380 W.N. 398 (H.C.J.).

2.2.2 not to compromise coverage:

An insured will wish not to complete an application in a way that may prejudice its claim after a loss occurs. This desire may well conflict with the honest insured's concern to be assessed fairly, or the dishonest insured's desire **not** to be assessed fairly.

In addition problems may arise for an insured because of honest misunderstanding arising out of the questions put by the insurer, particularly if interpreted by an overly enthusiastic broker or agent. In practice applications are confusing, are misinterpreted by sales people and are honestly misunderstood by applicants. At the same time, applicants are often willing parties to misunderstanding, choosing to interpret the questions in a way that will enable the insured to avoid disclosing prejudicial information.

2.3 Summary of the Problem:

In short, the insurer balances a desire to know as much as possible about the risk and limit it where necessary, and the desire to sell insurance and to do so at as low a cost as possible.

The insured balances a desire to obtain coverage at an attractive premium and on attractive terms, and a desire not to create problems which may arise should it appear later that the insured has caused or permitted the insurer to improperly assess the risk.

The application can be used to assist both the insured and the insurer though there are other means available to achieve the same ends.

3 MEANS TO ENABLE INSURERS TO ASSESS THE RISK:

Underwriters have available information from many different sources which would assist them in assessing the risk. First, they have their general experience of the risk in question. Second they have public general information such as statistics collected by governments and other public organizations and information services such as libraries and news services. Third, they have internal general information such as that kept within the insurer or by industry bodies.

The distinguishing feature of this type of information is that it is general in that it enables the underwriter to assess the risk in an individual case without any specific information on the peculiar circumstances presented by a particular applicant. Such information may well be sufficient for the insurer's purposes at least where a sufficient number of insureds will be covered and there is reason to conclude that the group of insureds has not been artificially selected so as to make the general information invalid. Group life insurance is an example.

However in almost all property insurance the insurer will need information which is specific to the applicant to adequately assess the risk. Again, much of this information can come from sources other than the applicant. The same sources of general information mentioned above may assist. In addition, the insurer can conduct its own investigation of the applicant and the specific risk in question.

But at some point the insurer is likely to prefer information from the insured or the broker. Historically Courts and insurers have been quick to assume that this is a necessary result given the nature of insurance. Brown and Menezes in *Insurance Law in Canada*³ in commenting upon the

nsurance Law in Canada (2nd Ed) (1991, Carswell) p.88.

duty to disclose refer to this:

"In particular, an obligation was traditionally imposed on each party to inform the other of matters that might be detrimental to the self-interest of the disclosure. This profound deviation from the basic common law obligations applying to contracts between strangers arose from the nature of Marine Insurance. The subject matter of the insurance was very likely far removed from the place at which the insurance was being negotiated, and the insurer was therefore unable to assess the risk independently of information provided by the insurer.

If applied to insurance in general this assumption is questionable. In fact, there are many alternative sources of information and in practice insurers often give little attention to applications. Applications may not be obtained, forms are poorly drafted, forms are often patently incomplete or improperly completed and yet the insurer chooses to insure.

Critics may suggest that an insurer which seeks to avoid a claim once a loss occurs on the basis of an alleged vulnerability of the insurer to being misled by the insured, or even in the face of a misrepresentation on the application by the insured, is simply trying to capitalize on an insured's error as opposed to having been exposed to a loss because of an insured's dishonesty.

The problem is highlighted by situations where insureds have failed to disclose a fact which is material to the risk, and a devastating loss then occurs which has nothing to do with the fact not disclosed. Where the failure to disclose is innocent, forfeiture of the claim strikes many as unduly harsh. Even where the failure to disclose is less than innocent, the consequences may seem disproportionate to the failure.

Notwithstanding the reservations noted above, there are good reasons for insurers to rely on information obtained from insureds. The most obvious are that there is some material information which may only be available to the insured and that it may be the most efficient way of collecting relevant information. It may also be seen as the fairest way in that if the insured obtains coverage

on the basis of misinformation, then it is easier to conclude that the insured should suffer the consequences. Viewing this from a strictly pragmatic viewpoint, the insurer may be seen to try and transfer the risk of providing underwriting information to the insured.

The means used by insurers to this end are to request applications from those persons who wish to be insured by the insurer and by requesting in the application the underwriting information which the insurer either wishes to have in assessing the risk. Whether intended or not, it is also potentially a means of setting out the information which the insurer will use once a loss occurs to determine if it is prepared to cover the loss in question. In other words, the insurer is saying if this information is true, we will pay losses which occur in accordance with the terms of the policy. But if they turn out not to be true, then we should not have to pay any claim.

In looking at information disclosed or withheld by insureds at the time of the application Courts have been faced by every situation from a deliberate lie to innocent silence in the absence of any question intended to elicit the missing information. The two terms used most commonly to put some order in this are misrepresentations and non-disclosure.

4 MISREPRESENTATIONS AND NON-DISCLOSURE:

4.1 Possible Definitions:

Consideration of the situations in which an insurer may not assess the risk properly due to inadequate information demonstrates that there is a broad spectrum of possible situations which can give rise to this. To the extent that an insurer knowingly fails to locate and review information from sources other than the insured it is unlikely that anyone would conclude that the insured should be prejudiced.

At the other end of the spectrum, in situations where an insured has knowingly and expressly misrepresented a fact which is both material to the risk and gives rise to the loss, and it is clear that the insurer would not have insured had the insured not lied, then few would conclude that the insured should be entitled to any benefit under the policy.⁴

But it is the many cases in between these extremes which give us difficulty and provide a deeper understanding of what the law is with respect to applications.

Courts could have taken the position that if an insurer wished to rely on information from the insured then it had to clearly ask for the information in writing and unless the insured deliberately lied in a written answer to such questions, coverage would not be affected.

The Courts could have gone further and concluded that even where an insured lied, coverage would not be affected unless the loss was directly related to the lie **and** the insurer could prove it would not have insured had the insured told the truth.

The first approach would have offered the benefits of increased certainty and simplicity. The

Coronation Insurance v. Taku Air Transport, [1991] 3 S.C.R. 622.

second may appear to some to be fair in that it appears to tie the consequence which flows from an insured's lie to its consequences.

However, the Courts did not take such approaches though legislative changes have moved closer to these positions. In order to understand current law it is necessary to follow the historical treatment of misrepresentations on applications and their relationship to "non-disclosure". Such an examination will start with the treatment of applications for insurance by the Courts and then review how legislatures have changed the obligations of the parties.

4.2 Duty of Insured at Common Law:

Discussion of the duty to disclose should start with a consideration of the 1766 English case of *Carter v. Boehm*⁵. This case is often cited as support for a general obligation of utmost good faith owed by an insured to an insurer both not to misrepresent a fact to the underwriter and also not to fail to disclose a fact to the underwriter which is material to the risk.

However, a careful review of the case shows that much of the later commentary is misleading.

The facts of the case were as follows. The plaintiff Carter was the Governor of Fort Marlborough. The policy insured that the Fort on the Island of Sumatra in the East Indies against capture by a European enemy. During the policy period, the Fort was captured by the French and Dutch. The insurer denied the claim on the basis that material facts had not been disclosed. Specifically, the insurer alleged that the insured had not properly disclosed facts regarding the weakness of the Fort and the probability of its attack, including specific knowledge of a past abandoned plan by the

Carter v. Boehm (1776), 3 Burr. 1905, 97 E.R. 1162 (H.L.).

French.

Notwithstanding the impression given of this decision by many, the court held that the insurers were **not** entitled to avoid the policy on the ground of non-disclosure. In doing so the Court set out the basis of the insured's duty, the limitations on such duty and the extent of the insurer's obligations with respect to the insuring process.

In his decision, Lord Mansfield stated:

"Insurance is a contract upon speculation.

The special facts, upon which the contingent chance is to be computed, lie mostly in the knowledge of the insured; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.

The keeping back of such circumstance is a fraud, and therefore, the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement...

The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon...

"The reason of the rule to obliges parties to disclose is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract which one privately knows, and the other is ignorant of and has no reason to suspect. The question therefore must always be "whether there was, under all the circumstances at the time of the policy was underwritten, a fair representation, or a concealment, fraudulent if designed, or, though not designed, varying materially the

object of the policy, and changing the risk understood to be run."⁶

It is important to note the obligations on the insurer and the limits on the insured's obligation to disclose.

The insured may be innocently silent with respect to the following:

- what the underwriter knows;
- what the underwriter ought to know;
- what the underwriter takes upon itself to know;
- what the underwriter waives
- what does not increase the risk;
- general topics of speculation such as the risk of natural or political perils

The insurer is seen to have a substantial obligation to inform itself generally and to ask the insured if it wants to know something from the insured.

The Court really appears to be focusing on an idea of "concealment" which appears to contemplate a number of things which together suggest taking advantage of the other party. The requirements which the insurer must meet are rigorous including unique knowledge of the insured, ignorance of the insurer in circumstances where the insurer has no reason to suspect the fact and such fact materially varying the object of the policy, changing the risk understood to be run⁷.

Notwithstanding what one may gain from a careful reading of this case, later decisions built on this foundation to find insurers and insureds responsible in a wide variety of circumstances on the basis

brod at 1164-1165.

See page 185, especially at G.

of a broad concept of an obligation of utmost good faith.

However some recent decisions make it clear that the Courts have not lost sight of the limits placed on the insured's obligations to disclose information as discussed in *Carter v. Boehm*, particularly in light of the ability of insurers to seek information either from other sources or from the insured by simply asking direct questions in the application.

4.2.1 Information of a public character or notoriety:

At common law, following the principles in *Carter v. Boehm*, there was no obligation on the insured to disclose facts that were of such public character or notoriety that one could presume that the insurer knew about them. However, in the *Carter* case the discussion was limited and focused on circumstances of the day. The Canadian Courts have applied this approach to a variety of circumstances and in doing so have made it clear that insurers are presumed to know a certain amount of information regarding the activity being insured.

In the case of *Canadian Indemnity Company v. Johns-Manville Company Limited*⁸, the insured was in the business of selling asbestos. The insurer cancelled the insured's policy in 1975 and the insurer brought an action to have the policy annulled. The insurer stated that the insured had failed to disclose material facts within its knowledge regarding health risks associated with asbestos fibres. One of the defences put forth by the insured was that the material facts alleged to have been misrepresented were known to the insurer or ought to have been known to the insurer as a result of their public character.

1990] 2 S.C.R. 549

The insured argued that the risks of the asbestos industry were common knowledge and that the insurer ought to have known about the facts. In the alternative if the insurer was not informed of these facts, it had a duty to enquire.

The Supreme Court of Canada stated that the insurer had to keep itself informed of facts which were readily available or well known in the activity that it insures. The Court stated that the relevant standard to be met is that of a reasonably competent underwriter insuring similar risks in the industry covered by the policy. In the case before the Court, it was held that a reasonably competent underwriter would have been aware of the asbestos related health risks. Thus, since the insurer was presumed to know this undisclosed fact, the insured was not under a duty to disclose the fact.

The Supreme Court of Canada again discussed a similar issue in the case of *Coronation Insurance v. Taku Air Transport*⁹. Taku was a small commercial air carrier based in British Columbia. It had obtained liability insurance from Coronation, but due to its three accidents occurring within the first year of coverage, Coronation declined to renew the policy. Taku then obtained coverage through another insurer between the years of 1979 and 1986. Further accidents occurred during that time, and the second insurer declined to renew its coverage.

In 1986 Taku then applied for coverage with Coronation once again. At the time of this application, Taku made a misrepresentation on its application and stated that it had had only had one accident. In fact, Taku had been involved in several accidents. Coronation did not check its own records for any information and Taku was requested to disclose its records. Taku did not report some of its accidents since Coronation had initially refused to renew back in 1979.

Coronation relied upon Taku's representations and did not conduct any investigation into Taku's

accident history. Coronation calculated a premium based upon Taku's representations and issued a policy. One of Taku's planes was subsequently involved in an accident and crashed, killing five passengers.

Coronation denied coverage under Taku's policy and claimed that the misrepresentation of Taku rendered the policy void. Mr. Justice Cory for the majority of the Supreme Court of Canada, stated that the ruling in *Carter v. Boehm* was good law. The insured had a duty of utmost good faith to not make misrepresentations and to disclose facts material to risk insured. However, Cory, J. stated that this doctrine was not to apply in the where the information was readily available to the underwriters. In particular, the Supreme Court of Canada was particularly critical of the insurer's failure to diligently research the risk being insured. The Court noted that Coronation did not consult its own records, did not make inquiries to the Canadian Aviation Safety Board and also failed to contact previous insurers of Taku.

The Coronation case and the *Johns-Manville* decisions may have a significant impact upon insurers. The decision in *Johns-Manville* is consistent with *Carter v. Boehm* and arguably there was no misconduct on the part of the insured. The decision will force insurers to pay more attention to underwriting or suffer the consequences. This may increase the costs of underwriting or of claims.

The Coronation decision is more difficult to accept. It is true that the insurer could have obtained the material information from its own or public records. But insofar as the insured expressly misrepresented the material fact and was aware of the misrepresentation, it is hard to justify allowing the insured's claim on moral or practical grounds. While there is some basis for this decision in *Carter v. Boehm*, it also seems contrary to the general legal approach reflected in both common law and legislation to embody a measure of deterrence in the treatment of misrepresentations, at least where they are material as clearly was the case here. It also fails to follow the decisions which speak of an insured inducing an insurer not to investigate and the

relevance of the insured's fraudulent intent.

4.2.2 wording on the application form

Insurers can obtain material facts from the insured by use of a written application form. While written applications are by no means universal, they could be. Where such forms are used several problems can arise, such as:

- where the insured knowingly expressly misrepresents a fact, material or not;
- where the insured chooses to interpret a question in a way so as to avoid providing prejudicial information;
- where the insured provides an ambiguous answer resulting in the insurer assuming no prejudicial information exists;
- silence, or the failure to answer a question;
- an insured does not disclose a fact where it is not asked on the application form;
- one of the above occurs but due to the involvement, innocent or otherwise of an agent or broker.

Where the insurer does not ask something on the application, it runs a serious risk of not being able to rely on any failure to disclose. There are different ways that this can result. For example, one judge stated:

"The insurance companies also run the risk of the contention that matters they did not ask questions about are not material, for, if they were, they would ask questions about them."¹⁰

Newshome Brothers v. Road Transport & Gen'l Ins. Co., [1929] 2 KB 356 at 363

Alternatively, the absence of a specific question may lead the Court to conclude that there is no fraud in the non-disclosure where this is required¹¹.

In an Ontario case an insured did not disclose the existence of a mortgage on the property in an application for fire insurance. The court considered the fire statutory condition with respect to the duty to disclose and stated the following:

"The object plainly expressed...is to obtain information before accepting the risk to enable the company to judge the risk about to be undertaken. Such information is usually obtained by answers in writing to questions in a written application, although, doubtless, verbal questions and answers would serve the purpose, and if no questions were asked it is to be assumed, in the absence of course of fraud, that the company is willing to accept the risk without such information, or that the company has otherwise satisfied itself".¹²

The use of certain qualifying words in the phrasing of the questions may introduce an element of ambiguity into the answer. If the questions are held to be ambiguous, it may well be that a Court will find that the insurer will not be able to rely upon misrepresentations or non disclosure. For example, there have been several cases where medical experts have debated the meaning of the term "chronic".¹³ For example, one insured was asked whether he had consulted a physician or been treated for any chronic condition in the past five years. The insured answered no notwithstanding that he had been hospitalized on three occasions in the past year for health problems. The Court of Appeal concluded that the insured's condition was not chronic within the

see statutory condition one of the fire conditions for example.

Coulter v. The Equity Fire Ins. Co. (1904), 9 O.L.R. 35 (Court of Appeal)

Katmchak v. National Life Assurance Company of Canada (1992), 7 C.C.L.I. (2d) 195 (B.C.S.C.).

meaning of the questions. Moreover the court held that the use of such a restrictive question in its application form had effectively relieved the insured of any obligation to disclose health problems not covered by the question. The court stated:

"The insurer could have required the applicant to submit to a medical examination or to give details of any hospitalization in the preceding five years or to provide the details of any consultations or attendance on doctors during that period. Any of these alternatives would have revealed all of the information which the insurer now says the applicant should have revealed upon completing the request for insurance.¹⁴

Another applicant was asked whether he had "any mental disorder requiring referral to a psychiatrist" in circumstances where he did suffer from a serious mental disorder but had not been referred to a psychiatrist.¹⁵

Similar examples exist in property insurance. For example, an insured was asked a question respecting previous fires. He answered that there were none notwithstanding a previous fire at a property other than the one to be insured as he understood the question to refer only to fires which had occurred only at the property to be insured. The court found that this was neither a misrepresentation nor a situation in which the insured was obligated to disclose effectively creating an onus on the insurer to ask the probing question directly and clearly.¹⁶

The courts have taken a similar approach where questions are left unanswered in applications. It has been held that where an insurer issues a policy having received an application form from the insured leaving a blank to a question, or a slash put through the section requiring particulars of prior

Taylor v. National Life Assurance Co. of Canada, [1990] I.L.R. 1-2646 (B.C. Court of Appeal)

Autner Estate v. Kumis Life Ins. Co. (1991), 6 C.C.L.I. 2nd 7 Sask. Queen's Bench

Fordchuck v. Car and General Ins. Corp. Ltd. (1931), 3 D.L.R. 387 (Alta. Supreme Court)

losses, the insurer has waived any right to have the information requested.¹⁷

Where an answer is incomplete an insurer may be under an obligation to make further inquiries where the facts disclosed by the insured are such as would alert a reasonably prudent insurer of the need to do so. However, the answer will be examined with some care. It may be found that the answer is not such that it obliges the insurer to make more specific inquiry¹⁸ or even that the answer is in fact a misrepresentation.

A certain amount of ambiguity may be inevitable in questions regarding complicated issues such as health. However, experience shows that most misunderstandings arising out of applications could be avoided by showing more care in preparing the questions and in obtaining and reviewing the answers.

4.3 Legislative Codification of Obligation not to Misrepresent and Duty to Disclose:

In dealing with the competing policy considerations the legislation has tried to strike a balance. In doing so distinctions have been drawn based on the kind of insurance, the nature of the misrepresentation, whether the insured's intent was innocent and whether the misrepresentation is material.

see Hamzeh v. Safeco Ins. Co. of America (1988), 32 C.C.L.I. 83 Alta. Queen's Bench and Jabel v. Holick Farmers Mutual Ins. Co. (1917), 38 D.L.R. 139 (Ont. High Court)

papo Estate v. Citadel Life Ins. Co. (1989), 37 C.C.L.I. 259 Man. Court of Appeal

The governing Ontario legislation regarding insurance policies and contracts is the *Insurance Act*¹⁹. The Act has codified and, in some cases, modified the fundamental common law principles governing insurance contracts.

The Act is divided into parts which deal with a wide variety of matters. Part III deals with insurance contracts in general and subsequent parts deal with specific types of insurance such as fire, automobile and accident and sickness. Marine insurance is governed by the *Marine Insurance Act*²⁰, which has codified the common law duty of disclosure.

Part III of the Act provides basic rules applying to every contract of insurance made in Ontario (the categories of accident and sickness, life and marine insurance are excluded from this section). Part III does not codify the basic duty to disclose. The parts dealing with specific insurance deal with misrepresentation and non disclosure in different ways, though there are similar approaches.

Although the legislation sets forth the duty to disclose, the common law approach remains relevant in that the decided cases help in interpreting the provisions of the legislation as well as supplementing the legislation where specific provisions do not exist.

4.3.1 General Provisions:

Section 124 of the Act governs insurance contracts in general and provides in part:

"(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 insofar as

Insurance Act, R.S.O. 1990, C.I. 8 as amended (the "Act")

Marine Insurance Act, R.S.O. 1980, c.255

the court determines that it contains a material representation by which the insurer was induced to enter into the contract.

(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 therefore, or inducing the entering into of the contract by the insurer, unless such term, condition, stipulation, warranty or proviso 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 inaccuracy of any such statement unless it is material to the contract.

(6) the question of materiality in a contract of insurance is a question of fact..."

One noteworthy change from the common law is that Section 124(5) has eliminated the use of warranties in the insurance policies. At common law, warranties were actual terms of the contract of insurance under which the insured would warrant the existence of specific facts. If the specific facts were inaccurate, this would entitle the insurer to declare the entire contract void. Insurers could incorporate terms in the policy warranting the truth of the information in the application.

Warranties were used by some insurers to such an extent that the policy of insurance was easily avoidable at their instance. Even trivial breaches of the warranty lead to insurers being allowed to declare the policy void. This practice lead to legislative intervention. Section 124(5) has eliminated the use of affirmative warranties and has deemed them to be representations. Thus, the insurer may no longer freely use application warranties to void the contract of insurance as any such attempt is limited by the requirement that statements in the application must be material to the contract.

To complement and support this provision, the insurer is also prevented from contracting with the insured regarding the materiality of specific facts. Section 124(6) states that the question of materiality is a question of fact to be determined by the court.

4.3.2 fire insurance:

The fire insurance provisions are the foundation of property insurance, though they are not necessarily applicable to much property insurance. Section 148 of the Act contains the statutory conditions and these deal with disclosure regarding policies of fire insurance. Statutory condition one of Section 148 provides:

"If a person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance that is material to be made known to the insurer in order to enable it to judge of the risk to be undertaking, the contract is void as to any property in relation to which the misrepresentation or omission is material."

There are several important points to note regarding Section 148. First, statutory condition one states that the non-disclosure must be made with fraudulent intent in order for the contract to be void. Second, the contract is only void as to any property in relation to which the misrepresentation or omission is material.

A similar approach is taken in statutory condition seven which deals with any fraud or wilfully false statement in a statutory declaration in relation to the proof of loss. The claim is forfeited, not just reduced to the proper amount. This condition therefore has the effect of punishment and deterrence.

However, there is no mention of materiality. Some courts have stated that the willfully false statement must be material. One approach is to adopt a relevance test: if the truth of the statement does not affect the amount of claim, why should the simple fact that it is made prejudice coverage. It is also easy to conceive of situations where a statement is made in regard to a relatively trivial amount notwithstanding the fact that the entire claim is a large one.

Interesting variations are situations where insureds provide false evidence of true facts or false statements which **understate** a loss²¹. These situations are likely to cause the courts some difficulty and some insureds may escape the consequences of the fraudulent statement.

However, while the consequences of a vigorous application of the provisions dealing with misrepresentation and non disclosure may sometime seem disproportionate to the gravity of the lie, to hold that the misstatement must be relevant to the determination of coverage with respect to a particular loss is to make these provisions redundant. If the only effect of the discovery of a false statement by the insured is to reduce the claim to its proper amount, then the insurer can rely on the provisions of the policy which established the extent of the indemnity and need not reply on any provision.

See for example how one Court dealt with this situation in **Bay Lee Supermarket Ltd. v. Herald Ins. Co., [1985] 1132 (N.S.S.C.)**.

4.3.3 life insurance:

Sections 183 and 184 of the Act deal with life insurance policies. They provide:

Duty To Disclose

183(1) An applicant for insurance and a person whose life is to be insured shall disclose to the insurer in the application, on a medical examination, if any, in any written statements or answers 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.

Failure To Disclose

(2) subject to Section 184, a failure to disclose, or a misrepresentation of, such a fact, renders the contract voidable by the insurer.

Exceptions

Section 184(1), This section does not apply to a misstatement of age or to disability insurance.

Incontestability

(2) subject to subsection (3), where a contract has been in effect for two years during the lifetime of the person whose life is insured, a failure to disclose or misrepresentation of fact required to be disclosed by Section 183 does not, in the absence of fraud, render the contract voidable.

Incontestability in Group Insurance

(3) in the case of a contract of group insurance, a failure to disclose or a misrepresentation of such a fact in respect of a person whose life is insured under the contract, does not render the contract voidable, but, if evidence of insurability is specifically requested by the insurer, the insurance in respect to that person is voidable by the insurer unless it has been effect for two years during the lifetime of

that person, in which event, it is not, in the absence of fraud, voidable.

We can see a variety of approaches on reading Sections 183 and 184. It is clear that a life insurance policy may be rendered void by an innocent non-disclosure, which is an extraordinarily demanding requirement to put on the insured when compared to the obligation in the case of other types of insurance. However, after a period of two years, such an innocent disclosure will not render the policy void. After the two year period, fraudulent intent must be shown. If a claim of fraudulent intent is made, the onus is on the insurer to prove its allegations and this in practice is often difficult. The onus to prove fraud is not easily met.²² The bare fact that an excess claim is made is not sufficient to support the defence.²³ Even a conviction for fraud is not conclusive.²⁴

4.3.4 Automobile Insurance

Section 233 of the Act deals with policies regarding automobile insurance and provides:

"Where,

(a) an applicant for a contract,

Chlebak v. Royal Ins. Co. Ltd., [1975] I.L.R. 1-683 (Ont.C.A.); Hanes v. Wawanesa Mut. Ins. Co., [1963 S.C.R. 1
Continental Ins. Co. v. Dalton Cartage Co. Ltd. et. al., [1982] 1 S.C.R. 164.

Kostuk v. Nat. Ben. Franklin Fire Ins. Co., (1926), 60 O.L.R. 56 (C.A.); Buckley et al. v. Liverpool, London Sun and Gl
Co., [1924] 4 D.L.R. 25 (NBCA).

Wawanesa Mut. v. Levesque (1939), 6 I.L.R. 139 (Ont C.A.).

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

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

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

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

a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.

Statutory Accident Benefits Protected

(2) subsection (1) does not invalidate such a statutory accident benefits as are set out in the *Statutory Accident Benefits Schedule*.

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 therefore 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 statements contained in a purported copy of the application, or parts 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 attributable to him in the purported application, or part thereof."

4.3.5 accident and sickness insurance:

Sections 308-312 of the Act deal with accident and sickness insurance in relation to the duty of

disclosure. The provisions found in these sections of the Act are similar to those regarding life insurance.

5 MATERIALITY:

5.1 Introduction:

The threshold requirement running throughout most of these provisions is materiality. The argument that a misstatement should not prejudice one person's coverage if it did not in any way prejudice the insurer is attractive to many. However, this simple statement does not fully reflect the complexity underlying the relationship between insurers and insureds.

First, insurers have a strong interest in the moral nature of the insured. An insured who deceives on one occasion may not be the same risk as an honest insured and for that reason alone may lead a rational insurer not to insure or to seek a higher premium.

Second, as a practical matter insureds are in a position in many cases to deceive insurers successfully. This is particularly true with property insurance. Therefore a provision which prejudices the dishonest even where such dishonesty may not be material to the loss in question, or

even the coverage on its face, may be desirable both to offer some balancing protection to insurers and to deter insureds from even attempting to deceive.

However, the legislation clearly favours limiting an insurer's reliance on misrepresentation and non disclosure to situations where they are material.

5.2 What is Material:

The legislation has stated that the question of materiality is a question of fact. This means, for example, that in a jury trial it is a matter to be determined by the jury. It also suggests that the Court should look at the particular facts in the case before it, including the particular parties, rather than applying general rules such as a statement as to the value of the insured property is material.

The test for materiality was stated in the case of *Ontario Metal Products Company v. Mutual Life Insurance Company of New York*.²⁵ In that case, the Court stated:

It is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have

Ontario Metal Products Company v. Mutual Life Insurance Company of New York [1925] A.C. 344, (1925) 1 D.L.R. 2.).

stipulated for a higher premium.

It should be noted that the test of materiality is not what a reasonable person in the position of the applicant would have thought material, but rather what would be material to a reasonable insurer.

The test of materiality was further developed by the English Courts in the case of *Lambert v. Co-Operative Insurance Society Limited*²⁶. The court, in that instance, stated that there must be a finding that the disclosure of fact would have influenced the judgment of a reasonable insurer either with respect to:

- (a) setting the premium payable for a particular policy; or
- (b) determining whether it would accept the risk; or
- (c) determining the extent of coverage which would be issued.

5.3 Evidence of Materiality:

The term "reasonable insurer" indicates that the courts will be applying an objective test regarding materiality. The insurer will have to lead evidence with regard to the effect that the non-disclosure or misrepresentation had upon their actions. This type of evidence may be introduced by testimony from their own employees and underwriters. In addition, evidence of the insurers' past underwriting

Lambert v. Co-Operative Insurance Society Limited [1975] 2 Lloyd's Rep. 485

practices and policies will be relevant. It is also important to lead evidence regarding the underwriting practices of other insurers in the same market if presented with a similar risk to be insured. Evidence regarding insurance industry practice may be enlisted through the testimony of other insurers who underwrites similar risks as well as any other insurance professional.

There have been instances when the court did not look to evidence regarding insurance industry practices in coming to its determination of materiality. In the case of *Henwood v. Prudential Insurance Company of America*²⁷, the only evidence presented to the Supreme Court of Canada regarding materiality was through the insurer's own underwriting experts. The evidence of the underwriting experts was that if the concealed information had been known, the insurer would have issued the policy only after further medical examination and then at a higher premium. The Supreme Court of Canada stated that there was no evidence that contradicted the insurer's underwriting experts and further stated that it was unnecessary for the insurer to lead evidence of insurance industry practices.

It should be noted that this decision by the Supreme Court of Canada was not unanimous. Spence, J. dissented and stated that the onus of establishing materiality was upon the insurer. Furthermore, the test for materiality is whether or not the misrepresentation or non-disclosure could have influenced the reasonable insurer. Since the insurer did not need evidence regarding insurance

1967), 64 D.L.R. (2d) 715 (S.C.C.)

industry practices, it had not established what would influence a reasonable insurer under the circumstances. As such, Spence, J. was of the opinion that the policy was not void for non-disclosure. Though this is a dissenting opinion, insurers would be wise to satisfy both tests by providing the necessary evidence.

5.4 Examples of Materiality:

5.4.1 fire insurance:

Examples of misrepresentations or fraudulent omissions which have not been found to be material include:

- denial of a small previous loss;²⁸
- omitting to advise of the presence of a moderate amount of gasoline where the insured knew that at least a smaller amount was being used;²⁹
- failure to advise that rooms were rented to alcoholics.³⁰

Anglo-Amer Fire Ins. Co. et al. v. Hendry (1913), 48 S.L.R. 577

Evangeline Fruit Co. et al. v Provincial Fire Ins. Co. of Can. (1915), 51 S.C.R. 474

Landmeyer v. Economical Mut. Ins. Co. et al. (1985), 12 C.C.L.I. 220 (N.S.C.A.)

The following misrepresentations and fraudulent omissions have been found material;

- failure to disclose a previous fire³¹;
- misrepresenting that two cancelled policies had expired and that flammable patterns were metal³²;
- misrepresentations of ownership³³.

As the Fire statutory conditions also require the insured to advise the insurer of any change material to the risk, the interpretation of that condition also provides many examples of what a Court may consider material, as the test is similar. Examples of changes held material include:

- changing a private dwelling to a grocery store³⁴
- a dwelling house to a gambling, bootlegging and "resort" business³⁵
- operating a small recording studio in a home basement³⁶
- converting a beauty salon to a tavern³⁷
- placing a drum from a mobile piece of equipment in a warehouse³⁸

Sherman v. Arner Insurance Company (1937), 4 I.L.R. 108 (Ont. H.C.)

Bowes v. Fine Insurance Company of Canada (1936), 3 I.L.R. 430 (Ont. H.C.)

Norwich Fire Insurance Company v. LeBell (1889), 29 S.C.R. 470.

Truglia et al v. Travelers Indemnity Co., [1966] 1 O.R. 364 (High Court)

Coleman & Coleman v. Northern Assurance Co. & Snider, [1950] O.R. 553 High Court

Hand et al v. York Fire & Casualty Ins. Co., [1986] I.L.R. 1-2037 (Ont. District Court)

Entertainment Enterprises Ltd. v. Maryland Casualty Co. and North Br. & Mercantile Ins. Co. Ltd. (1976), 11 Nfld. & P.E. (Nfld. S.C.)

A. Harvey & Co. Ltd. v. Continental Ins. Co. et al, [1982] I.L.R. 1-1543 (Nfld. S.C.)

- using a private dwelling for the sale of liquor³⁹
- a change in the type of heating⁴⁰
- failure to give notice of foreclosure proceedings⁴¹.

Examples of changes found not to be material include:

- taking in two friends to share a home after wife and children move out⁴²
- occasional illegal activities of the owner⁴³
- leaving a home in the care of an alcoholic spouse⁴⁴.

5.4.2 life insurance:

The following types of facts may be held to be material if not disclosed;

- seeing or treatment by a doctor⁴⁵;

Kozlik v. Northern Assur. Co., [1940] O.W.N. 21 (C.A.)

Salata v. Continental Ins. Co., [1948] O.R. 270 (C.A.)

Royal Bank of Can. v. Red River Valley Mut. Ins. Co., [1986] I.L.R. 1-2057 (Man. Q.B.)

Ryan v. Citadel General Assur. Co. et al. (1983), 42 O.R. (2d) 586 (H.C.)

Travelers Indemnity Co. of Can. v. Kehoe, [1985] I.L.R. 1-1914 (N.S.C.A.)

Lewandowski v. Waterloo Mut. Ins. Co., Lewandowski v. J.P. Mulvihill & Son Ltd. (1985), 12 C.C.L.I. 288 (Ont. H.C.)

McArthur et al. v. Prudential Ins. Co. Of Amer., [1969] 2 O.R. 689 (H.C.); Shields v. N. Amer. Life Assur. Co. (1950) R. 51 (Sask. C.A.); Murphy v. Sun Life Assur. Co. of Can., [1965] I.L.R. 1-142 (Alta. S.C.); Mut. Life Ins. CO. v. Ont. M ducts Co., [1925]1 D.L.R. 583 (P.C.); Turner v. B.C. Mut. Benefit Assn., [1927] 4 D.L.R. 541 (B.C.C.A.); Desjar

- good health⁴⁶;
- illness or pain⁴⁷;
- alcoholism⁴⁸;
- taking an electro cardiogram⁴⁹.

6 THE EFFECT OF A MATERIAL MISREPRESENTATION OR NON DISCLOSURE:

Where there has been a material misrepresentation or material non disclosure the policy is not necessarily void *ab initio*. The policy in question and relevant law must be considered. Depending on the particular circumstances, the insurer may elect to do one of three things:

- (a) retain the premium and treat the contract as valid; or
- (b) treat the claim as void or forfeited; or
- (c) reject the contract on the ground of material misrepresentation or non disclosure and return the premium to the insured; or

Grandmaison v. Royal Ins. Co., [1984] I.L.R. 1-1816 (Que. S.C.)

Shields v. N. Amer. Life Assur. Co. Ibid.; Byrne v. Prudential Ins. Co. of Amer. (1937), 4 I.L.R. 337 (N.B.C.A.); Prudential Ins. Co. of Amer. v. Tremblay (1934), 1 I.L.R. 33 (Que. C.A.); Desjardin-Grandmaison v. Royal Ins. Co. Ibid.

McArthur et al. v. Prudential Ins. Co. of Amer. Supra; Winter v. Equitable Life Ins. Co. of Can., [1976] I.L.R. 1-753 (Ont. S.C.) (heart disease); Fitzrandolph v. Mut Relief Society of N.S. (1890), 17 S.C.R. 333 (syphilis); Henwood v. Prudential Ins. Co. of Amer., [1976] S.C.R. 720 (nervous disorder); Vanini v. Prudential Ins. Co. of Amer., [1945] O.W.N. 500 (C.A.) (tuberculosis); Wright v. Prudential Ins. Co. of Amer. (1940), 8 I.L.R. 33 (S.C.C.) (vertigo); Zimmerman v. Northern Life Assur. Co. of Can., [1931] 2 D.L.R. 489 (Ont. H.C.) (appendicitis); Dillon v. Mut. Reserve Fund Life Assn. (1940), O.W.R. 351 (C.A.) (abscess); Man v. Metro. Life Ins. Co., [1925] S.C.R. 600 (throat cancer)

Kruska v. Mfrs. Life Ins. Co., [1984] I.L.R. 1-1825 (B.C.S.C.); Desjardin-Grandmaison v. Royal Ins. Co., [1984] I.L.R. 1-1816 (Que. S.C.)

Murphy v. Sun Life Assur. Co. of Can., [1965] I.L.R. 1-142 (Alta. S.C.)

- (d) cancel the policy and give the insured notice of cancellation.

6.0.1 waiver by the insurer after issuance of the policy:

An insurer may declare a policy void for misrepresentation or non disclosure after the discovery of the material fact in question. At this point, if the insurer does not declare the policy void promptly after the discovery is made, a Court may find that the insurer has waived the non disclosure or representation.

In the case of *Hansra v. York Fire & Casualty Insurance Company*⁵⁰, the insurer had discovered a misrepresentation in the application. However, the insurer did not rely upon the misrepresentation or cancel the policy. Instead, the insurer paid out a death claim submitted under the policy. When a second accident was reported to the insurer, the insurer attempted to declare the policy void for misrepresentation and return the premium.

It was held that when the insurer paid out the first claim while aware of the misrepresentation this was a positive election by the insurer not to exercise its right to void the policy. It followed, therefore, that the insurer was estopped from denying the policy on the basis of misrepresentation or non disclosure.

6.0.2 cancellation:

In the case of *Ellis v. London-Canada Insurance Company*⁵¹, the insurer found out that the insured

(1982), 38 O.R. (2d) 281 (County Court)

[1952] O.R. 644 (H. Ct.)

had misrepresented certain information in the insurance application. The insurer cancelled the policy and returned the premium to the insured. The insured accepted the premium and was involved in an accident shortly thereafter. This accident occurred within a 15 day grace period provided for in the statutory condition for notice of cancellation. The insurer took the position that the policy was not in effect at the date of the accident.

The Court noted that the insured could have repudiated the insurance policy for non disclosure. However, the insured did not elect that option but instead elected to cancel the policy. The Court further ruled that having chosen to cancel the policy, the insurer was bound by the 15 day grace period in the statutory condition⁵². Therefore the policy was still in effect at the time of the accident.

The decision in the *Ellis* Case has been followed in subsequent Ontario cases. In the case of *Grant v. The Prudential Assurance Company Limited*⁵³, the Court held that non disclosure did not render an insurance policy and coverage void *ab initio*. Rather, the policy was voidable at the option of the insurer and the Judge referred to the three options available to the insurer.

The reasoning in the *Ellis* case has a significant impact upon insurers. Insurers should carefully consider the course of action upon discovering a material misrepresentation or non disclosure. Any action, other than repudiation of the contract on the grounds of misrepresentation or non disclosure, may result in the finding of coverage for a loss.

7 RENEWAL OF POLICIES:

⁵²or fire insurance see statutory condition 5.

[1989] I.L.R. 1-2460 (District Court)

Where an insured renews or obtains a new contract, the insurer may rely on the original application. Problems arise where the original application was true at the time of the first application but not the second, or true at the time of the second application but not the first. Where there is a new contract the question is whether the application is true at the time of the new contract, not the old.⁵⁴

If the insurance purports to be a renewal of the original insurance, then it will be void if the original insurance was void, even though the basis for the original misrepresentation had since disappeared.

Where a new insured insures the same property, by obtaining an approval of an assignment of the contract of insurance, the new insured has a new contract which is not avoided by the misrepresentation of the original insured.⁵⁵

Related to the question of applications and renewals is the insured's obligation to advise of changes material to the risk which is dealt with in Statutory Condition 4 of the Fire Conditions.

8 AGENTS:

The role of agents or brokers in the placing of insurance can give rise to many difficulties. The agents' roles may include interpreting the questions for the insured or preparing the answers. Either may result in a misrepresentation or failure to disclose. In addition, an agent or broker may make representations to an insured or insurer which are untrue or give rise to misunderstandings. For example, an insurer may choose not to investigate based on assurances received from a broker

Chapman v. Gore Dist. Mut Ins. Co. (1876), 26 U.C.C.P. 89; Long v. Phoenix Ins. Co. (1897), 34 N.B.R. 223 (C.A.); and Martin v. Home Ins. Co. (1870), 20 U.C.C.P. 447.

Springfield Fire & Marine Ins. Co. v. Maxim; Eagle fire Ins. Co. v. Maxim (1946), 13 I.L.R. 108 (S.C.C.); Liverpool & Globe Ins. Co. v. Agricultural Savings & Loan Co. (1902), 33 S.C.R. 94

either expressed or implied.

Notwithstanding the obvious dangers inherent in the relationship of the insured, insurer and agent, courts have been very hard on insureds in some cases where applications have been completed by agents.⁵⁶

In many cases where the insurer relies upon this condition the insured states that he has given the agent the correct information but the agent completed the application improperly. Whether the misrepresentation will avoid the policy may depend upon whether the agent is the agent of the insurer, the agent of the insured or of both. In some cases courts have found the agent to have been the insurer's agent.⁵⁷ In other cases the agent has been found to have been the insured's agent.⁵⁸ Lastly, the agent may be found to have been acting for both the insurer and insured.⁵⁹

See for example Bonneville v. Progressive Ins. Co. of Can., [1955] O.R. 103 (C.A.); and Boutilier et al v. Traders Gen., [1969] I.L.R. 1-299 (N.S. C.A.)

Blanchette v. CIS Ltd., [1973] S.C.R. 833; Mahomed v. Anchor Fire & Marine Ins. Co. (1913), 48 S.C.R. 546; Guarur. Co. v. Connely (1891), 20 S.C.R. 208; Piggott Construction (1969) Ltd. v. Sask. Govt. Ins. Office, [1986] 2 W.W.R. 383 (S.C.A.); Jakimowich et al. v. Halifax Ins. Co., [1966] I.L.R. 1-169 (Man.Q.B.); Weldon et al. v. Commercial Union Assurance PLC et al. (1984), 11 C.C.L.I. (B.C.S.C.)

Salata v. Continental Ins. Co., [1948] O.R. 270 (C.A.); Billington v. Provincial Ins. Co. of Can. (1879), 3 S.C.R. 182

Gilmore Farm Supply Inc. v. Waterloo Mut. Ins. Co. et al. (1984), 3 C.C.L.I. 221 (Ont. H.C.)

9 MISREPRESENTATIONS OF ONE INSURED: The Problem of the Innocent Co-Insured:

Serious problems can arise where there are several co-insureds, or where the insured has several owners and entrusts the application to one person who improperly completes the application.

In some cases the policy may address this concern. For example, mortgage clauses may protect a mortgagee notwithstanding a misrepresentation by the applicant. Similarly, policies may provide that a misrepresentation on an application will not prejudice innocent insureds.

The problems are very real and the circumstances in which they can arise vary greatly. In each case it is necessary to review the nature of the misrepresentation or failure to disclose, the policy and the applicable legislation, and then analyze the consequences for each person potentially affected.

It may also be of assistance to review the substantial jurisprudence which now exists with respect to the effect on an innocent co-insured where the loss is caused by the intentional act of another co-insured.⁶⁰

10 SUMMARY:

In agreeing to insure insurers intend to insure a known risk. In order to assess the risk they require a variety of information. Much of this information is general and cannot be obtained from insureds. Some of this information can be obtained from insureds but can also be obtained from other sources. Lastly, some information can only be obtained from insureds.

See Winsor and Radomski, "The Insurance Act of Ontario Annotated", Butterworths 1987, pgs. 174 to 175 and John McI multiple Insureds", Canadian Ins. 1993.

It is often assumed by those in the insurance industry that a misrepresentation or failure to disclose by an insured in either of the last two circumstances will be sufficient to defeat the claim and possibly to void the policy.

A careful review of the most authoritative cases and of the applicable legislation demonstrates that this is an oversimplification and in many ways is misleading.

There are no simple rules which can be relied on safely. However, in simple terms, an insured who does not consciously seek to cheat an insurer by misleading it during the application process is unlikely to have a claim defeated as a result of a misrepresentation or failure to disclose in the application.

It is therefore important for insurers to take precautions to ensure that it is clear that an insured is not innocent with respect to a misrepresentation or failure to disclose.

Insurers should take more care in:

- 1 drafting questions for an application;
- 2 insuring that applications are properly and fully completed;
- 3 reviewing completed applications to detect ambiguous answers or answers which should give rise to further questions;
- 4 make certain that ambiguous answers are clarified and that any subsequent questions are asked and answered properly;
- 5 insure that underwriters stick to risks they understand as they will be held to this standard in any event;

6 that underwriters seek and review information from persons other than the insured where the insured is not the sole source of such information.

The more closely the insurer comes to meeting these requirements the more likely the insurer will properly assess the risks and be able to demonstrate that any misrepresentation or non-disclosure by the insured is sufficient to defeat the claim or void the policy.