

ADHESION CONTRACTS AND THE LAW OF INSURANCE

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Introduction

May I emphasize certain basic assumptions at the outset. This paper does *not* downplay the need for insurance; we could not get along in society without spreading risks among specialist risk-takers. Nor does this paper propose that the law extend rigorous control over each and every aspect of insurance activity; a competitive market is a necessary means towards improving the quality of insurance protection. Nevertheless, I do strongly advocate law reform. Innovation in the law of insurance is essential if we are to produce both a fair contractual process and a commercially expedient allocation of risks in the public domain of insurance.

Three areas of insurance law have been selected for discussion: the law as it affects warranty, exclusion and limitation of liability clauses; the legal position of the insurance agent; and the potential role of law reform as a mechanism of control over insurance practice. Each topic will be scrutinized critically; the intent will be to assess institutional strengths and weaknesses; the goal will be to identify deficiencies with a view towards innovation in law.

Warranty, Exclusion and Limitation of Liability Clauses

Few areas in the law of insurance have been more vigorously attacked than warranty and related fine print clauses in insurance contracts. They have been viewed as instruments that work undue hardship upon the insured, they have been condemned as adhesive in nature and unfair in effect and they have been attacked as unwarranted commercial practices. Thus scholar after scholar, law reform commission after law reform commission, even judge after judge, have protested against the wide use of fine print clauses in insurance contracts. Perhaps no criticism has been more emphatic than the Law Commission in the United Kingdom. Arguing against the legal sanction of warranty clauses, the commission was quite explicit in recommending that "... no provision in a proposal form whereby the insured promises that a state of affairs exists or has existed should be capable of constituting a warranty."¹ Currently, nine out of ten Canadian provinces prohibit, by legislation, the use of warranty clauses in some particular respect. Yet, and certainly in Canada, major deficiencies arising out of the use of fine print clauses remain unchecked and questions about the legal acceptability of such clauses remain unanswered.

Consider, first, the hardships that arise when warranty, exclusion and limitation of liability clauses are used in insurance contracts. From the insured's perspective, the meaning of, and the implications that stem from, such clauses are often unclear. Few insureds are likely to appreciate the extremely

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1. The Law Commission: *Insurance Law: Non-disclosure and Breach of Warranty* (London, 1980) at 93. See further Trakman, "The Unharnessed Insurer: A Foreboding Presence" (1981), 31 *Tor. L.J.* 318 at 328 *et seq.*; Belleau, *New Rules Concerning Misrepresentations and Warranties* (McGill 1968); Healey, "The Hull Policy: Warranties, Representations, Disclosures and Conditions" (1967), 41 *Tulane L.R.* 245; Patterson, "Warranties in Insurance Law" (1934), 34 *Colum. L.R.* 595; Vance, "The History of the Development of the Warranty in Insurance Law" (1911), 20 *Yale L.J.* 523. For founding precedents dealing with warranty and related fine print clauses, see esp. *Dawsons, Ltd. v. Bonnin*, [1922] 2 A.C. 413 (H.L.); *Mackay v. London General Insurance Co. Ltd.* (1935), 51 L.J. L. Rep. 201 (K.B.); *Glicksman v. Lancashire and General Assurance Co.*, [1927] A.C. 139 (H.L.); *Anderson v. Fitzgerald*, [1853] 4 H.L. Cas. 484; *Shamblen v. Modern Woodmen* (1928), 105 W. Va. 252, 142 S.E. 447; *Barker v. Metropolitan Life Ins. Co.* (1908), 198 Mass. 375, 84 N.E. 490.

onerous consequences that can occur when the phrase “[T]he information above shall constitute *the basis of the contract*” is integrated into the insurance application. Few insureds realize that such seemingly ambiguous phraseology has traditionally entitled insurance companies to cancel insurance policies for false or non-disclosure, no matter how minor or trivial the insured’s error, no matter how innocent, in fact, the insured might be, and no matter how unrelated the insured’s incorrect or nondisclosure is to the insurance risk. Yet, in the absence of legislation, countless cases have upheld the use of such practices; countless decision-makers have expressed sympathy with the insured’s state; few, very few, have struck such clauses down.² For instance, consider the troubled plight of Swift, J. in *Mackay v. London General Insurance Co. Ltd.*³ when he observed:

If he [the claimant] had stated the truth in its full detail, this insurance company would have jumped at receiving his premium. They would never have dreamed of rejecting his application, but after they have given him the policy and after the accident has happened and the liability is incurred, they seize upon these inaccuracies in the proposal form in order to repudiate their liability. *I am extremely sorry for the plaintiff in this case.* I think he has been very badly treated, shockingly badly treated. They have taken his premium. They have not been in the least bit misled by the answers which he has made. They would never have refused him his policy if they had known everything which they know now. But they have seized upon this opportunity in order to turn him down and leave him without any indemnity for the liability which he has incurred. *But I cannot help the position.* Sorry as I am for him there is nothing that I can do to help him. The law is quite plain.⁴

One might well ask: Why should insurance companies be entitled to exclude or limit this liability at will by using fine print — and often seemingly ambiguous — phraseology in their contracts of insurance. Why should they be able to invoke an unqualified promise of truthfulness by the insured in order to avoid responsibility in the event of a loss — especially when the insured has attempted to provide complete and accurate information to the insurance company, particularly when the insured’s error was inadvertent and often unknowingly made, and until recently, especially when the insured’s error had little bearing upon the loss that actually occurred and in respect of which recompensation was denied. Let me examine arguments favouring such exclusionary clauses.

To argue that clauses which impose unconditional liability upon the insured are the legitimate expression of freedom of contract is to gloss over the meaning of both “freedom” and “contract.” True freedom of contract only exists where the contract manifests two ingredients: the freedom to enter into the contract and the freedom to influence the terms of that contract. In truth, the average insured possesses none of the latter type of freedom and very little of the former. The insurance company dictates the terms of the contract, to these the insured must adhere. There is no real bargaining over contractual clauses, there is no serious haggling over terms. From the insurance companies’ perspective, the entire arrangement is predetermined. For the insured, terms contained in liability exclusion or limitation clauses are standardized penalties encountered in meeting a very definite, and almost irreversible, need for insurance.

2. See, hereon *infra* n. 9.

3. *Mackay v. London General Insurance Co. Ltd.*, n. 1.

4. *Id.*, at 202.

Consider the arguments that can readily be lodged against the use of such fine print clauses. They are frequently encountered amidst a myriad of other contract terms. Most often they are incomprehensible to the average insured. The insured is unlikely to comprehend what the obligations imposed by the contract entail. Indeed, as a recent study in Ontario suggests, ninety one percent of insureds find the wording of insurance policies too confusing to be understood;⁵ yet such contractual provision remain in wide use.

The critical view of fine print clauses is not without precedent before common law courts. Judges have recognized the legal tethers that *can* be imposed upon the use of exclusion and limitation of liability clauses. Consider Lord Wrenbury's still pertinent remarks in the case of *Glicksman v. Lancashire and General Assurance Co. Ltd.*⁶:

I think it is a mean and contemptible policy on the part of an insurance company that it should take the premiums and then refuse to pay upon a ground that no one says was really material. Here, upon purely technical grounds, they, having in point of fact not been deceived in any material particular, avail themselves of what seems to me the contemptible defence that although they have taken the premiums, they are protected from paying.⁷

As a result of such cases, fine print clauses have sometimes been construed restrictively; they have been interpreted against the draftsman in terms of the *contra proferentem* rule; and they have been narrowly conceived of in the interests of justice and fairness between the parties.⁸ Yet seldom have common law judges, at least in Canadian jurisdictions, been willing to attack limitation and exclusion of liability clauses directly, striking them down because they are inherently unacceptable, unconscionable or in fundamental breach of the insurer's obligations. As a result, legislation rather than judicial rulings has been instrumental in the justifiable denial of such fine print provisions as warranty clauses.⁹

I maintain that exclusion and limitation of liability clauses are directly objectionable in three fundamental respects in relation to insurance transactions. First, insurance companies should be denied the right to repudiate their

5. See, Ontario Consumer Issues, table 25, at 44 (Ministry of Consumer and Commercial Relations of Ontario, 1980). On the significance of so-called adhesion contracts, including contracts of insurance, see esp., Pound, "Liberty of Contract" (1909), 18 Yale L.J. 454; Williston, "Freedom of Contract" (1921), 6 Cornell L.Q. 365; Kessler, "Contracts of Adhesion — Some Thoughts about Freedom of Contract" (1943), 43 Colum. L.R. 629. For common law decisions dealing with such "adhesion" contracting, specifically in insurance, see, *Fitton v. Accidental Death Insurance Co.* (1864), 17 Common Bench (N.S.) 122 at 135, 144 E.R. 50 at 55; *In Re Ethington and the Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591 at 596 (C.A.); *Simmonds v. Cockell*, [1920] 1 K.B. 843 at 845; *English v. Western* [1940] 2 K.B. 156 at 165; *Co-operative Fire and Casualty Co. v. Twa* (1973), 39 D.L.R. (3d) 723; [1974] 1 W.W.R. 467 (S.C.C.); *Chu v. Madill* (1975), 51 D.L.R. (3d) 481, 5 O.R. 729, [1974] I.L.R. 1-631 (Ont. C.A.); *Co-operative Fire and Casualty Co. v. Sirois and Saindon*, [1976] 1 S.C.R. 735, (1975) 56 D.L.R. (3d) 556.
6. *Glicksman v. Lancashire and General Insurance Co.*, supra n. 1.
7. *Id.*, at 144-5.
8. On the significance of the *contra proferentem* rule in the construction of insurance contracts, see, *Co-operative Fire and Casualty Co. v. Twa*, supra n. 5; Richie, J., in reversing *Chu*, remarked that "*contra proferentem* does not apply to the interpretation of the exclusion here in question, as it is one which is required to be included in such a policy by virtue of the provision of schedule E" in *Madill v. Chu* (1976), 71 D.L.R. (3d) 295 at 299 (S.C.C.).
9. Such legislation usually reads as follows: "No contract of insurance shall contain or have endorsed upon it, or be made subject to any term, condition, stipulation, warranty or provision, 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 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 risk." (emphasis added). See, *Insurance Acts: Alberta*, R.S.A. 1980, c. I-5, s. 203; *British Columbia*, R.S. 1979, c. 200, s. 15; *Manitoba*, R.S.M. 1970, c. 88 (I 40), s. 117(4); *New Brunswick*, R.S.N.B. 1973, c. I-12, s. 98(5); *Insurance Contracts Acts, R.S. Nfld.* 1970, c. 178, s. 5(5); *Ontario*, R.S.O. 1980, c. 218, s. 101; *Prince Edward Island*, R.S.P.E.I. 1974, c. I-5, s. 86(4); *Saskatchewan*, s. 103(5). Note: There is no equivalent section in the Nova Scotia legislation.

entire responsibilities under insurance contracts unless the non- or false statement complained of is, in fact, reasonably material to the risk. Second, insurance companies should be denied the right to cancel such policies in circumstances in which the insured could not reasonably have known or appreciated that his or her accurate statements were, in fact, untrue. Finally, no trivial inaccuracy, innocently erred in by the insured and immaterial to the risk, should give rise to cancellation of the insurance policy at the instance of the insurance company. Such errors may conceivably give rise to lesser remedies, such as to a limited increase in insurance premiums, but cancellation is altogether unjustifiable as a remedy — indeed, it is unjust.

Nor are these comments mere isolated complaints. The condemnation of warranty clauses, the requirement that only non- or materially false disclosures give rise to cancellation of insurance policies, and the increased willingness of common law courts to construe adhesion contracts restrictively all have a foundation in legal precedent and all attest to a desire among common law courts to perpetuate fairness in insurance practice.¹⁰

To argue that insurance companies use such exclusion of liability clauses, not to cancel insurance arrangements, but rather to “discourage” insureds from carelessly completing insurance applications, is to ignore a salient reality: *so long as insurance companies are legally entitled to employ these types of provisions without suitable restraint, they are in a position to abuse that legal entitlement.* To contend that insurance contractors freely agree upon the terms of such exclusion of liability clauses is to disregard the fact that the average insured lacks real freedom to agree or disagree. Surely the maxim “ignorance of the law is no excuse” was not meant to go this far.

Agency

Agency is a further area in which the law of insurance has grown increasingly suspect. Undoubtedly, insurance agents fulfill useful functions. They are an important means by which insurance companies come into contact with the public. Agents are conduits, they provide information to the public about the availability of insurance options, and they assist members of the public to apply for insurance. Moreover, they advise insurance companies as to the suitability of particular insureds or specific insurance arrangements. Alongside those advantages that are associated with agency lie some very fundamental problems, both in insurance practice and in the law of insurance itself.¹¹

First, consider the difficulties produced by the commission sales system. The payment of the commission to an agent is not an inherently bad practice, for it encourages the agent to secure as many insurance applications as

10. See, *supra* n. 1, 5 and 9.

11. On the insurance agent in general, see Ivamy, *General Principles of the Law of Insurance* (2nd ed. 1970) Part VI; Vance, *Insurance* (3rd ed. 1951) ch. 8; Shibley, “Actions against Agents and Brokers” in *1962 L.S.U.C. Lectures* (1962) 241; Morse, “The Relationship between Insurer, Agent, Broker and Insured” in *1966 Pitblado Lectures*, 154; Dowrick, “The Relationship of Principal and Agent” (1954), 17 *Mod. L.R.* 24; Seavey, “The Rationale of Agency” (1920), 29 *Yale L.J.* 859; Hill, *Omissions and Misrepresentations Caused by Insurance Agents* (1974).

possible. The ideal result would be that the insurance company and the insured both acquire a desired benefit, namely, the sale and purchase of insurance.

However, the payment of a commission also poses a problem; for receipt of a commission does not necessarily encourage all agents to provide an efficient service to either the insured or the insurer, rather the contrary. In soliciting insurance, some agents may well be motivated to provide only such information as will ultimately give rise to an insurance contract and the commission, but not advice that might lead to a failure to apply for or a denial of an insurance application. This problem was identified by the Select Committee on Company Law in its Third Report on General Insurance to the Ontario Legislative Assembly in 1979: "[T]he payment of commission rates . . . create powerful incentives for an agent to place insurance with an insurer for reasons that have nothing to do with the consumer's interest or benefit."¹²

Illustrations of abuse of the agency commission are varied. Typically, the agent may mislead the insured as to the agent's authority to represent the insurance company or as to his knowledge about insurance practice or insurance law. The agent's intention is clear: he or she wishes to induce the insured into buying insurance, for insurance bought means a commission "earned." The insured often believes the agent for very understandable reasons. The insured has no reasonable cause to disbelieve the agent; the agent is convincing in his or her behaviour; and, as between agent and insured, the agent is often far more sophisticated in the nuances of insurance practice than the insured.¹³

Even more problematic is the fact that some agents, in seeking commissions, have considerable incentive to advise the insured to provide erroneous or incomplete information in order to render him or her a better insurance risk. Certain circumstances encourage such abuse. The insured frequently is unaware of the fact that he is providing erroneous information to the insurance company. The questions posed in the insurance application are often too complex for the insured to appreciate; and, altogether too often, the insured believes, quite reasonably, that the agent is to be trusted. After all, the agent *appears* to have authority from the insurance company; the agent *seems* to be quite knowledgeable in answering complex questions posed by the application; and the agent is so often persuasive in the solicitation process itself.¹⁴

These factual scenarios are not mere flights of fancy. They are borne out by a long line of cases, they are commented upon by judges, by lawyers and by law commissions, and they are a constant source of concern in the legal profession. We are told in reports to Superintendents of Insurance, as in the Carruther's Report,¹⁵ to be wary of deceptive agency practices in which

12. At 54.

13. See *esp.*, hereon Trakman, *supra* n. 1, at 334-339. On the responsibility of the insured for the agent's mal- or nonfeasance, see, *Blackburn v. Haslam* (1888), 21 Q.B.D. 144; *Hambrough v. Mutual Life Insurance Co.* (1895), 72 L.T. 140 (C.A.). On the reluctance of common law courts to construe insurance legislation in favour of the insured, thereby holding the insured liable for the agent's conduct, see, *Boutillier v. Traders General Insurance Co.* (1968), 1 D.L.R. (3d) 379 (N.S.S.C.); [1969] I.L.R. 1-262, at 1-299 (N.S.C.A.); *Sleigh v. Stevenson*, [1943] 4 D.L.R. 433, O.W.N. 465, 10 I.L.R. 246 at 248 *et seq.* (C.A.).

14. See *supra* n. 11 and 13. See also, Manitoba Law Reform Commission, Report, A Review of Certain Aspects of Fire Insurance Law in Manitoba (1976) at 52-7.

15. Report 1 on Insurance Law, submitted to the Superintendent of Insurance, Ministry of Consumer and Commercial Relations (Ontario, Dec., 1973) at 15 and 18-22.

authority to act is either suppressed or exaggerated in order to justify a single end, namely, the sale of insurance. We are told by select committees on company law studying insurance that agency abuse is a source of significant economic disequilibrium in the insurance industry which justifies government intervention.¹⁶ Indeed, we are even told by standing committees consisting of insurance agents, brokers and adjusters, that the conduct and competence of agents should be seriously examined and that more stringent licensing and testing standards should be imposed.¹⁷ The problems associated with agents have been widely recognized; the need for innovation has been repeatedly identified, yet the agency issue continues to plague the profession.

The legal system's ability to deal with this issue is lacking in several regards. Seldom is the insurance agent held liable in law for the consequences of his or her own acts. Those acts are most commonly imputed to the insured. Seldom is the insurance agent held accountable for the cancellation of an insurance policy solicited by that agent. The insured suffers the result of that cancellation.¹⁸ Seemingly logical reasons can be given for these apparent anomalies. Insurance agents, in general, are reputedly lacking in economic resources to compensate either the insured or the insurance company for the consequences of their acts. Errors and omissions policies are, as yet, not so widely held by insurance agents as to cover such eventualities in any magnitude.¹⁹ Moreover, it is always possible to attribute the fault of the agent to a principal, someone for whom the agent is allegedly acting. The improprieties of the agent are thereby deemed to be the improprieties of the principal.²⁰

Traditionally and far less palatably, common law courts have deemed that the insured is the principal of the agent. Aided by a long line of decision, cases like *Newsholme Bros. v. Road Transport and General Insurance Co.*²¹ reveal a consistent thread of reasoning: since the agent has to be acting for someone, it is appropriate that that someone be the insured. The agent comes into direct contact with the insured, the agent solicits information from the insured, the insured is in a position to accept or reject the agent's suggestions and recommendations regarding insurance, and most importantly, the insured *signs* the completed application form or *authorizes the agent to sign for him* — a seemingly conclusive indication that the agent is acting for the insured.²²

In point of fact, this reasoning is far from conclusive. Often, the agent could just as well be construed to be acting for the insurance company as for the insured, and for very similar reasons: the agent, whether or not an independent contractor, usually solicits insurance on behalf of the insurance company; and

16. See eg., Report on Life Insurance by the Select Committee on Company Law, submitted to the Ontario Legislative Assembly (1980) at 54 and 85.

17. See eg., Report of the Standing Committee of Insurance: Agents, Brokers and Adjusters (New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island), submitted to the Association of Superintendents of Insurance of the Provinces of Canada (October 1980, Vancouver) esp. at 93.

18. See, *supra* n. 13.

19. See, *supra* n. 11 and 13.

20. See, *supra* n. 11. See also, *infra* n. 22.

21. [1929] 2 K.B. 356. (1929). 98 L.J.K.B. 751, 141 L.T. 570 (C.A.).

22. On this construction, see in particular *Newsholme Bros. v. Road Transport and General Insurance Co.*, *ibid*: *Sleigh v. Stevenson*, *supra* n. 13; *Boutillier v. Traders General Insurance Co.*, *supra* n. 13; *Rocco v. Northwestern National Insurance Co.*, [1930] 1 D.L.R. 472 at 475. (1929) 64 O.L.R. 559 at 562 (C.A.).

in practical terms, the insurance company pays the agent, albeit in the form of a percentage of the insured's premium. Certainly the insurance company benefits when the agent solicits insurance from insureds and certainly the company is in a position to regulate the agent's behaviour: the agent sells insurance with the consent of the insurance company and the company determines the permissible realm of the agent's conduct.²³

None of this is to say that the insurance company *should* always be responsible for the improprieties perpetrated by its agents. Some agents *are* suitably held personally liable and others *do* act for insureds in specific cases. It is rather to say that there are good grounds, I suggest often better grounds, to hold the insurance company rather than the insured liable for the abuses of agents, except when the insured is clearly acting fraudulently or negligently. The insurance company is far more sophisticated than the average insured. It has the means to control the activities of insurance agents. The insured lacks such facilities. In addition, insurance companies can determine the significance of agency abuse far more readily than can most insureds.

For insurance companies to argue that they cannot sustain the economic burden of agency malfeasance is to disregard the fact that the majority of insureds are far less able to sustain the burden of a cancelled life or fire insurance policy — either the insured is too dead to complain or too economically impoverished by loss to bring litigation against the agent and/or the insurance company. For the insurance company to argue further that they cannot supervise the activities of agents, whereas the insured can supervise on a one to one basis, is to ignore the fact that the insured usually lacks both the knowledge and the skill to determine what is proper or improper conduct on the part of the agent. The insured generally relies on the agent's conduct and the insurance company relies on the insured's reliance.²⁴

As a result, insurance policies are often cancelled on the grounds that the fault of the agent in completing an insurance application is, in fact, the fault of the insured. Policies are cancelled despite the insured's good faith and notwithstanding his or her faithful payment of the premiums over time. Moreover cancellation usually occurs at a very convenient time for the insurance company and a very inconvenient time for the insured, namely at the time of the insured's loss.²⁵

Fortunately, some of these abuses have been remedied in recent years.²⁶ Legislation has sought to undermine some of the hardships suffered by insureds at the hands of soliciting agents. Insurance agents are sometimes

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23. For arguments to similar effect, see Trakman, *supra* n. at 337-9. See also, *supra* n. 11. Note how conveniently courts have allowed insurance companies to avoid responsibility for the acts of agents. "I . . . desire to emphasize one point: that notice to or knowledge of an agent is not notice to or knowledge by the company unless the circumstances are such as to justify the opinion that the agent would be likely to communicate the information to those in charge of the affairs of the company." *Per* Middleton, J. A. in *Rocco v. Northwestern National Insurance Co.*, *supra* n. 22. Little importance is attached to implied and ostensible tests of knowledge and authority. The insurance company has notice of the agent's acts, it seems, only when the agent actually or "likely" communicated such information to the company.
24. See, *supra* n. 13. Examine, too, *Biggar v. Rock Life Assurance Co.*, [1902] 1 K.B. 516; *Levy v. Scottish Employers' Ins. Co.* (1901), 17 T.L.R. 229 (K.B.); *New York Life Insurance Co. v. Fletcher* (1885), 117 U.S. 519.
25. This last statement appears, from an analysis of the case law, to be the norm. See, *supra* n. 13 and 24.
26. On the unwillingness of common law courts to impute the acts of the agent to the insured, see, *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K.B. 863 (C.A.); *Graham v. Ontario Mutual Insurance Co.* (1887), 14 O.R. 358 (C.A.); *Great West Life Assurance Co. v. Paris*, [1959] Que. Q.B. 349; [1959] 1 L.R. 1-339 (C.A.).

deemed *not* to be agents for the insured. This has occurred most notably in vehicle insurance.²⁷ There is some hope that this trend will transmit itself through the judicial process. Yet there is much to be done in the reform of both precedent and attitude.²⁸

These, then, are some proposals to that end. First, we have made significant strides in the area of self-regulation in insurance: many agents, for instance, do carry "errors and omissions" policies as a protection against personal liability; in Ontario brokers are expected to do so. However, the need to *require* agents in general to carry such cover grows ever more pressing in a world of expanding risks, multiple agency relationships and increased losses. So too, disclosure rules may suitably be applied to insurance agents. Agents may be required to disclose to the insured precisely how much authority they have to represent the insurance company; they may be required to make such disclosures before they solicit insurance; and they may be penalized for failing to comply with this duty. Cooperation between the insurance industry, various agency associations and the Superintendents of Insurance on such matters as errors and omissions can undermine many agency abuses. However, in the absence of voluntariness legal compulsion becomes necessary.

Second, it is important to reconsider the agency-principal relationship. Unlike most agencies in which a single principal can readily be identified, the insurance agent conceivably has two principals, the insured and the insurer; and courts of law can follow either construction with both conviction and some authority. In determining who is *the* principal in any one situation, it is necessary to scrutinize these variables: the authority of the agent, who gave it and subject to what limits, and the good or bad faith that can reasonably be attributed to each party to the insurance relationship. In reaching these determinations, the following guidelines apply. The fact that the agent *assisted* the insured to fill in the insurance application form, should not automatically be construed as authority from the insured: such *assistance* may well exceed the bounds of legitimate authority. In addition, such *assistance* may well be subordinated to the controls exerted over the agent by a more pervasive principal, namely the insurance company. Conversely, insurance companies should *not* be readily excused from responsibility for the fault of agents on the grounds that the agent did not receive explicit orders to act as he or she did; authority may well arise in other ways — as when the insurance company allowed the agent to hold him or herself out as agent of the company, or as when the company could reasonably have identified the agent's fault, but failed to do so. In such cases of implied or ostensible authority,²⁹ the insurance company is more properly the principal of the agent, not the insured.

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27. On legislation prescribing that the agent shall *not* be deemed to be the agent of the insured in motor vehicle insurance. see *Insurance Act*, 1910 (Can.) c. 32, ss. 84 and 195 (d) cited in *Bird v. N.Y. Life Insurance Co.* (1920), 47 O.L.R. 510 (H.C.J.). See also, *Insurance Act*, R.S.N.S., 1967, c.148, ss. 76 and 77; *Valgardson v. Continental Insurance Co.* [1955] 5 D.L.R. 649, (1955) 16 W.W.R. (N.S.) 177, 63 Man. R. 318 (Q.B.); The Select Committee on Company Law, The Insurance Industry, First Report on Automobile Insurance (Ontario, 1977), Second Report on Automobile Insurance (Ontario, 1977). For a judgment which conveniently sidesteps such legislative efforts. see *esp.*, Maybank, J. in *Valgardson v. Continental Insurance Co. Ltd.*, *supra* in this note at 649 *et seq.*; cited with approval in *Boutillier v. Traders General Insurance Co.*, *supra* n. 13.
28. For a glimmer of light in which the agent was *not* deemed to be agent of the insured. see the classic case of *Bawden v. London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534 (C.A.). See also, *Stone v. Reliance Mutual Insurance Society Ltd.*, [1972] 1 Lloyd's Rep. 469 (C.A.).
29. On the various "indicia" or indications of authority vested in agents by insurance companies. see *esp.*, *Porvin v. Glen Falls Insurance Co.*, [1931] 1 W.W.R. 380 (Alta. S.C.); *Berrinsken v. American National Fire Insurance Co.* (1967), 61 D.L.R. (2d) 499, 59 W.W.R. 462, [1967] 1 L.R. 1-184 (Sask. Q.B.); *Westside Construction Co. v. Saskatchewan General Insurance Office.* (1959) 18 D.L.R. (2d), 285 (Sask. C.A.). See also, *supra* n. 23.

Third, there is increasing practical justification for insureds and insurers to pursue actions for malfeasance directly against insurance agents, especially where agents are required to carry "errors and omissions" policies. The personal liability of the agent will hinge on these variables: the authority given to the agent, the person who gave that authority, and the manner in and extent to which the agent exceeded that authority. Agents who are held personally liable for exceeding their authority provide a salutary reminder that agents should not be entitled to act improperly and then hide behind the veil of a principal, whether it be the insured or the insurer. Nor would this proposal require major legal innovation; already there exists precedent for holding insurance agents liable for malfeasance in their own names.³⁰

Regulation Through Law Reform

No doubt, there are many additional ways in which to improve upon the interaction between insured, insurer, agent and the public at large.³¹ Insurance companies can introduce training programmes for agents (as some do). More testing examinations can be required of brokers and agents. Applicant insurance agents can be screened in order to assess commitment, ability and ethical values; and their performance can be evaluated with similar ends in mind.

Nor is this role of supervision and control necessarily restricted to insurance companies. Voluntary associations, created by insurance companies and agents themselves, can also enhance the good name and efficiency of the industry. Together they can exercise control over the activities of agents through codes of ethics, minimum standards of performance and testing of ability.

Law reform can also remedy deficiencies in the law of contract as it applies to insurance. Exclusion and limitation of liability can be permitted subject to very specific guidelines. Rules of construction can be enforced in favour of the insured and against the insurance company in instances of inequity; while a well developed concept of materiality can be instituted as *the* principal justification whereby insurance companies can cancel insurance policies because of the fault of the insured.³²

In the ultimate analysis, no matter how much we rely upon self-ordering in insurance, a governmental role remains necessary. Decisions have to be made about the validity of particular insurance practices; judgments must be exercised over the limits of acceptable insurance usage; and untenable insurance practices need to be stuck down. Yet, difficulties still arise in determining how these functions can be performed. Recognizing the problem is one hurdle; dealing with it is another.

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30. See, *Menna v. Guglietti et al.* (1969), 10 D.L.R. (3d) 132, [1970] 2 O.R. 146, [1970] 1 L.R. 1-308 (H.C.J.); *Fine's Flowers Ltd. v. The General Accident Assur. Co.* (1977), 81 D.L.R. (3d) 139, 17 O.R. (2d) 529, [1978] 1 L.R. 1-937, 2 B.L.R. 257 (C.A.).
31. On the public policy concerns surrounding reform in the insurance industry, see, Kimball, *Insurance Law and Public Policy* (1960); Keeton, "Insurance Law Rights at Variance with Policy Provisions" (1970), 83 Harv. L.R. 961; Willett, *The Economic Theory of Risk and Insurance* (1901); Denenberg, "Meeting the Insurance Crisis in Our Cities: An Industry in Revolution", [1970] Ins. L.J. 205; The Select Committee on Company Law, *The Insurance Industry, Third Report on General Insurance* (1979).
32. On interpretation and construction of insurance contracts, see, *supra* n. 5 and 8. See also, Saunders, "Formation and Interpretation of Insurance Policies Generally" in Meredith Memorial Lectures, 1963 at 9; Fyfe, "Interpretation of Insurance Contracts, Claims under Insurance Policies" in Law Soc. Upper Can., Lectures, 1962 at 19.

Regulation by legislation, in and of itself, does *not* ensure that abuses of insurance practice will either be identified or regulated in fact. Experience culled from the past demonstrates that legal bureaucracies often fail to identify the needs of the commercial sector. Alternatively, legal regulation may exist, but the form of that regulation may prove to be ineffective at best, or destructive at worst.³³ Any attempt to regulate the insurance industry by law must take account of the deficiencies in the commercial regime and the limitations in the legal regulation of those deficiencies. Thus legal regulation which restricts entry into and functioning within the insurance industry may discourage, rather than encourage, competition. Government intervention which is improperly applied to the insurance industry may promote rather than undermine barriers to trade. The result in each case may be the perpetuation of those very concerns which the legal system sought to remedy, namely, unfair trade practice, *de facto* collusion and price fixing within an oligopolistic market.

An even more subtle problem is that those same questionable practices that arise in the insurance industry might also come to exist in government itself. In the absence of a sophisticated body of insureds, armed with insurance know-how, it is almost inevitable and even quite natural that the government would staff its administrative arm, its Superintendent of Insurance Offices, at least in part, with ex-members of the insurance industry. The intent is not to purposefully bias the administration of insurance law in favour of insurance company interest; but the effect is precisely that: ex-members of insurance companies, quite understandably, appreciate issues of insurance from the perspective of the insurer, not the insured; such is human nature. When one couples this reality with the fact that the insurance lobby is so much *more* powerful and well-informed than the public at large, it is again quite axiomatic that practices such as exclusion of liability clauses and agency abuses have evolved in insurance usage and found so comfortable a niche in the law itself.³⁴

So often reforming commercial practice must commence with reform of the institutions of the law itself, and so often institutions of the law remain largely unchallenged.

Accordingly, I will pose these four questions, recognizing that each answer is subject to qualification and exceptions. Firstly, to what extent are the different offices of the Superintendents of Insurance across Canada providing the public with an information and complaint network that adequately responds to public need? The response, so often alluded to by Superintendents of Insurance themselves, is that lack of staff, lack of time, and, to some extent, lack of skill, often leaves such offices well short of satisfying public needs.

My second question is this: is the information gathered for the purpose of law reform sufficiently broadly based to encompass the attitudes and interests

33. On this "government role" in relation to insurance practice, see Kimball and Denenberg, *Insurance, Government and Social Policy — Studies in Insurance Regulation* (1960); Kimball, *The Case for State Regulation of Insurance, Government and Policy* (1969) 411; Donovan, "State Regulation of Insurance" [1956] *Ins. L.J.* 11; Kimball, "The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law" (1961), 45 *Minn. L.R.* 471. See, in general, Trakman, *supra* n. 1 and also *supra* n. 30.

34. On the activities of the insurance industry in Canada, see The Select Committee on Company Law: *The Insurance Industry, Reports on General Insurance* (annual, 1974-1981 esp.). On the activities of the office of the Superintendent of Insurance in the different provinces of Canada, see Association of Superintendents of Insurance of the Provinces of Canada, *Minutes of Annual Conferences* (annual, to present).

of *both* insurance companies and insureds in general, or do the interests of insurance companies predominate in the process of law reform? In response, I would suggest that, in the absence of a sophisticated consumer lobby in matters of insurance, an insurer orientation prevails. That is not to say that this state of affairs was purposefully contrived for the purpose of abuse; it is rather to say that it exists.

My third question is this: is the law of insurance sufficiently uniform across Canada to render the administration of that law into an expedient and predictable system. My suggestion is in the negative. Insurance legislation and administrative regulations are far from consistent in nature. Examples of this are endless. Warranty clauses are condemned in certain jurisdictions, but tolerated in others. Insurance brokers are required to carry "errors and omissions" policies in some provinces, but excused from doing so elsewhere. Superintendents of Insurance have extensive responsibilities in specific jurisdictions, but their mandates differ from locale to locale. The effect of such legal diversity is potentially harmful. The insured and the insurer both lose the benefit of predictability; neither can plan inter-provincial activities with any reasonable degree of certainty. Moreover, legal diversity also means increased cost for governments, insurance companies and insureds alike; for together they must bear the brunt of the legal insufficiencies that surround them.

My fourth question is this: in the event of no or very limited governmental intervention in the insurance industry, how likely is it that insurance companies, together with their agents and customers, will regulate their own affairs by *effective* and *just* means? My suggestion is that self-regulation would be ideal. However, it is only likely to prevail when some semblance of parity of bargaining exists in the marketplace *and* in the regulation of that marketplace. Commercial conditions must favour self-regulation if it is to be effective as a system; and legal restraints must be available to remedy abuses in self-regulation if it is to be just as a consequence. If there be but one inference drawn it is that *the very quality and effectiveness of self-regulation in insurance depends in some measure upon the quality of legal regulation which is imposed upon that process. Ineffective law and ineffective enforcement mechanisms are together unlikely to bring about effective commercial practice.*

Conclusion

In concluding, I would like to pose the following inquiry. How many times have we, as lawyers, justified by our conduct the current state of the law of insurance? And how many times have we rationalized our positions on the grounds that we have no choice: The law is clear; we must work within the context of the law. Certainly we must: we are not above the law; nor should we be. Yet the law of insurance is not immutable in character; its rules do not exist for all time without change; the law is not carved in stone. Its rules must be capable of adaptation; they *do* need to change with time, place and circumstance.

In this paper, I have attempted to demonstrate that such institutions as warranty and exclusion clauses are *not* automatically sacrosanct; indeed, they are increasingly challenged by legislators and by judges alike. Insurance agents are not inevitably held to be acting for the insured; courts of law do hold

agents liable in their own names and they do impute agency abuse to another principal, the insurance company. Through flexible interpretation and meaningful construction, through good judgment and resourceful argumentation, legislators, adjudicators and lawyers have paved the way to reform. No doubt the road is — and will continue to be — a long and hard one. Perfection is an ideal, not a reality; but it is a worthy goal to strive towards.