INSURANCE LAW IN CANADA
By Craig Brown and Julio Menezes
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The variety and number of risks to which people are exposed in contemporary life exceed that of any previous time. In broad terms, the hazards range from bankruptcy or loss of employment, to physical damage to one's possessions, to personal injury and death. Insurance is the instrument by which those who are able transfer the burdens of such risks to others. A contract of insurance is one in which one party undertakes for good consideration to pay to another a sum of money (which may or may not be determined by the amount of the loss) upon the occurrence of the mischance insured against. The event insured against must be relatively uncertain as to either whether or when it will happen.[1]

At first blush it might appear the law of contract subsumes that of insurance. But, alas, it is not so simple. For some concepts, for example "warranty", which have one meaning in simple contract law, have another in the law of insurance; and other concepts, like "insurable interest", are of such ancient origin that they have become true farragos of jurisprudence. Moreover, superimposed upon the common law is a legislative scheme[2] which resembles nothing so much as a dog's breakfast. Further, since insurance companies generally act through agents, the law of agency is a crucial appendage to the law of insurance. Thus is the law of insurance imposing in its complexity.

Typically, the bargaining power of the party seeking insurance and the one providing it are grossly unequal. The terms on which the insurer will contract are offered in 'take it or leave it' fashion.[3] Fair it is to say that it would be difficult for the average consumer to *read*, much less *understand* the details of most insurance policies. It is also true to say that the law of insurance comprehends a plethora of technicalities the failure to satisfy any one of which permits the insurer to escape from (what otherwise would have been) his obligations. Almost always, valid policy reasons exist for these rules. Nevertheless, to the person who believed his house was insured, or to the 'beneficiary' who thought his or her spouse's life was insured, the stakes are high and the technical rules appear as cruel creations of small minds. The fact that insured parties have much to lose if the insurer avoids the contract means insurance is (for lawyers) a lucrative source of litigation (perhaps second only to banks). Because of the disparity of bargaining power, and the severe consequences attending avoidance of a contract by an insurer, courts are inclined to be sympathetic to insureds. In the end, this also increases the complexity of the law.

Given the complexity of the subject matter and what must be a sizeable potential audience, the dearth of texts on insurance law is surprising. There have been recent Canadian works on life insurance.[4] But there has been no

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1. For a fuller discussion of these requirements see Ivamy, *General Principles of Insurance Law*, 1979.
2. *The Insurance Act* R.S.M. 1970 c-140.
3. That is, insurance contracts are generally examples of so-called adhesion contracts.
4. E.g., David Norwood, *Life Insurance in Canada* (1977).

Canadian text on indemnity insurance for over forty years. Until now the student or practitioner was compelled to look at works from either the United States[5] or the United Kingdom[6]. This void has been admirably filled by Professors Brown and Menezes. Their text is limited to indemnity insurance (i.e. life insurance is excluded) in the common law provinces, but we are nonetheless in their debt for a considerable achievement.

They begin their work with characterizations of insurance in general and indemnity insurance in particular. Then, in Chapter 2, there is a discussion of the sources of insurance law as well as a lucid and appropriately succinct overview of the constitutional division of labour in the regulation of insurance companies and insurance contracts. The subject of the constitutional *status quo* is, I think, the last area in which there is much certainty. There follow chapters amply dealing with all of the 'essential' topics, including, *inter alia*: Insurable Interest; Subrogation; Causation, Accidental and Deliberate Losses; Notice and Proof of Loss; Disposal of Claims; Waiver and Estoppel; Agency Law in Insurance. Entire chapters are also devoted to fire insurance contracts and automobile insurance, though the latter may be only of minor assistance to Manitoba practitioners.

One of the many virtues of this book is that the clarity brought to the analysis of the case law (i.e. its black-letter aspect) is extended to the brief but illuminating discussions of the underlying competing policy considerations. But while I have no hesitation in recommending this text, I should not like to leave the reader with the impression it is a work *ne plus ultra*. So, with the understanding that this reviewer believes it an excellent work, the following three comments are proffered.

(1) In insurance law, "warranty" has a significantly different meaning from that which it possesses in ordinary contract law. In the latter, a warranty is a term collateral to the main purpose of the contract, the breach of which gives rise to a right to damages, but not a right to repudiate. But in insurance law a warranty is a term of the contract, the slightest non-compliance with which creates in the insurer the right to avoid the contract. This right obtains even if the matter to which the warranty relates is (in fact) immaterial to the risk and even if the breach of warranty is completely unrelated to the loss. Such a term is not part of the definition of the risk, since even if there is compliance at the time of the loss, an earlier breach avoids the contract.

One may readily imagine the attitude of the courts to such terms. But though Professors Brown and Menezes discuss warranties,[7] that discussion is all too brief, without reference being made to any of the prominent cases in this area.[8]

(2) Usually the purchase of insurance is through an agent. Individuals sometimes belatedly discover that a risk against which they believed them-

5. Vance, *Handbook on the Law of Insurance* (3d ed. 1951).

6. Ivamy, *General Principles of Insurance Law*; (1979). *MacGillivray and Parkington on Insurance Law*, (7th ed. 1981).

7. *Insurance Law in Canada*, e.g., p. 99 and p. 156.

8. *See, e.g.: Dawsons Ltd.* v. *Bonnin*, [1922] 2 A.C. 413 (H.L.); *Kirkbride* v. *Donner*, [1974] Lloyds L.R. 549 (M & C.L. Ct.); *Britsky* v. *The Dominion Insurance Corporation*, [1981] I.L.R. 5409 (Man. Cty. Ct.).

selves insured is not covered. If and when it becomes clear the insurer is faultless, the insured may look to the agent. Possible grounds of action include: breach of warranty of authority, breach of contract, breach of equitable duty, and tort. In their chapter on "agency in insurance law", the authors deal with each of these. Among other things, they have this to say about a claim in tort against an agent:

> There can be no liability in tort for non-feasance — complete non-involvement — only for misfeasance.[9]

With the greatest respect to the learned authors, there is authority to suggest this proposition understates the duties owed by an agent.[10] In *Morash* the plaintiff insured had dealt with the defendant agent for more than twenty years. Customarily, he would receive a renewal policy in the mail from the agent, which he would complete and send in with his premium. When the agent failed one year to send the renewal form, the insured's coverage lapsed without his knowledge. The house which had been the subject of the insurance burned down and the insured successfully sued the agent. The new Brunswick Court of Appeal held (per Hughes C.J.N.B.) that the agent was negligent in *omitting*

> to follow a practice in his dealings with the plaintiff which the defendant should have foreseen would be relied upon by the plaintiff and upon which the plaintiff in fact relied to his detriment.[11]

The theoretical foundation of what appears to be a duty imposed on an agent to warn an insured that his coverage is about to lapse, independent of both contract and any fiduciary relation which exists, is euphoniously discussed by Professor Irvine in his article.[12] The only point I wish to make here is that perhaps Professors Brown and Menezes ought to have been a little less sanguine regarding the scope of insurance agents' liability in tort.

(3) As one would expect, this work includes an index and a table of cases. But the index is only of *subjects* and includes no names; nor is there a separate index of names. Moreover, there is no comprehensive list of the texts and articles to which the authors refer. I would submit at least one of these ought to have been included.

Finally, by way of *obiter dictum*, it is interesting to note that the authors refer[13] to the *Manitoba Law Reform Report on Fire Insurance*[14] which has apparently been forgotten or ignored since it was published seven years ago. I should like to take this opportunity to remind interested parties of its existence and to suggest that perhaps it is time the recommendations therein were acted upon.

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9. *See* p. 63.
10. Judicial authority exists in the form of, e.g., *Morash* v. *Lockhart & Ritchie Ltd.* (1978), 24 N.B.R. (2d) 180 (C.A.) (hereinafter *Morash*); academic authority exists in the form of Professor John Irvine's article, "The Insurance Agent and His Duties" 10 C.C.L.T. 108, to which I am indebted.
11. See *Morash* at p. 183.
12. See note 10.
13. See pp. 300, 302, 304.
14. *Manitoba Law Reform Commission: Report on a Review of Certain Aspects of Fire Insurance in Manitoba* (1976).