

## Review of Insurance Law in the 1990s

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IN THE 1990S FOUR Manitoba insurance law cases found their way to the Supreme Court of Canada. In this review, I intend to examine and comment upon each of these cases.<sup>1</sup> They concern the following insurance areas: liability of insurance agents (*Fletcher v. M.P.I.C.*),<sup>2</sup> the doctrine of reasonable expectations (*Reid Crowther & Partners v. Simcoe & Erie General Insurance Co.*),<sup>3</sup> defining an "accident" (*Aguilar v. London Life Insurance Co.*),<sup>4</sup> and good faith for insurers (*Ford v. Dominion of Canada General Insurance Co.*)<sup>5</sup>.

### I. LIABILITY OF INSURANCE AGENTS: *FLETCHER V. MANITOBA PUBLIC INSURANCE CORPORATION*<sup>6</sup>

THERE ARE TWO IRONIES about the *Fletcher* case. First, although the case originated in the Ontario courts, it is concerned with the purchase of automobile insurance in Manitoba. Second, although it does not involve an action brought against an insurance agent, the key importance of the decision lies in what it says about the duties and obligations of insurance agents.

Mr. Fletcher moved to Winnipeg from Ontario in 1982. In insuring his car in Manitoba, he purchased his insurance directly from an M.P.I.C. office and not through an authorized agent. Mr. Fletcher

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<sup>1</sup> This article in part is taken from a series of lectures and materials prepared as an "Insurance Law Update" for the Law Society of Manitoba in the fall of 1992.

<sup>2</sup> (1990), 5 C.C.L.T. 1 (S.C.C.).

<sup>3</sup> [1993] 1 S.C.R. 252.

<sup>4</sup> (1991), 75 Man. R. (2d) 80 — leave granted to appeal to the Supreme Court of Canada from a decision of the Manitoba Court of Appeal, (1990), 65 Man. R. (2d) 221.

<sup>5</sup> (1991), 71 Man. R. (2d) 157 (S.C.C.).

<sup>6</sup> *Supra* note 2.

asked for the maximum coverage and received \$2,000,000 in third party liability insurance. He did not purchase underinsured motorist coverage (U.M.C.), which cost an extra \$15.

Underinsured motorist coverage gives added protection in the event that the insured is involved in an accident and the at-fault driver does not have sufficient insurance coverage to meet the damages caused. This is precisely what happened to Mr. Fletcher and his wife. In 1983 Mr. Fletcher and his wife were seriously injured in an automobile accident near Sault Ste. Marie, Ontario. Mrs. Fletcher was rendered a paraplegic. Damages were assessed at \$1,387,090. The driver of the other vehicle was totally at fault. He had \$500,000 in third party insurance, which left a shortfall of \$887,090. If the Fletchers had U.M.C. then M.P.I.C. would have covered the shortfall up to the policy limit of \$2,000,000. The Fletchers successfully sued M.P.I.C. for failing to inform them of the underinsured motorist coverage, which in these circumstances, would have fully compensated them.

Two legal issues dominated the trial:

- (i) Did M.P.I.C. have a duty of care to advise its customers of the existence, nature and extent of U.M.C.? and, if so,
- (ii) What was the scope of this duty of care?

To answer the first question, Madam Justice Wilson, who wrote the unanimous judgment, turned to basic tort law and the duty of care principle taken from *Hedley Byrne & Co. v. Heller*<sup>7</sup>. The essence of the duty of care principle under *Hedley Byrne* is the assumption of responsibility by the speaker and reasonable reliance by the listener. *Hedley Byrne* was a case of misstatement; *Fletcher* involved non-statement. Madam Justice Wilson refused to draw a distinction between misinformation and the failure to inform. Accordingly, M.P.I.C. owed a duty of care to inform Mr. Fletcher of "all available coverages, their purpose and their cost."<sup>8</sup>

The next issue was the scope of that duty. M.P.I.C. characterized its sales people as "clerks," mere processors and fillers of forms, in contrast to professional insurance agents, who were trained insurance advisors. The Fletchers argued that M.P.I.C. employees owed to their customers the same duty of care and quality of service as that

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<sup>7</sup> [1963] 2 All E.R. 575 (H.L.).

<sup>8</sup> *Supra* note 2 at 22.

provided by insurance agents. The Supreme Court chose a halfway approach.<sup>9</sup> The M.P.I.C. employees did not owe a duty of care as onerous as independent agents; nevertheless, they still owed a duty to inform customers of the available range of coverage."<sup>10</sup>

Was M.P.I.C. in breach of its duty? Yes. *Fletcher* underscores serious deficiencies in M.P.I.C.'s service to the public. M.P.I.C. had three opportunities to inform Mr. Fletcher about U.M.C. and the corporation failed to do so on each occasion. Mr. Fletcher first dealt with M.P.I.C. in person when he initially purchased the insurance and subsequently when he returned to renew his insurance. On both these occasions, the U.M.C. option was not brought to his attention. M.P.I.C. also relied heavily upon a flyer insert sent with its renewal mailing. The Court found that the small print and content of the insert was not sufficient to underscore the importance of U.M.C. to the public.<sup>11</sup>

M.P.I.C.'s procedures, or lack of procedures, were shown to be woefully inadequate in comparison to the initiatives undertaken by the Insurance Corporation of British Columbia, as described in *Sjodin v. Insurance Corp. of British Columbia*.<sup>12</sup> For example, the M.P.I.C. employees who served Mr. Fletcher could not rely on an established practice of advising each and every customer of the U.M.C. option, which was the practice in British Columbia.

However, as mentioned, the real importance of the *Fletcher* decision is that it confirms a stringent standard of care for private insurance agents.<sup>13</sup> Madam Justice Wilson wrote:

In my view, it is entirely appropriate to hold private insurance agents and brokers to a stringent duty to provide both information and advice to their customers. They are, after all, licensed professionals who specialize in helping clients with risk assessment and in tailoring insurance policies to fit the particular needs of their customers. Their service is highly personalized, concentrating on the specific circumstances of each client. Subtle differences in the forms of coverage available are frequently difficult for the average person to understand. Agents and brokers are trained to understand these differences and to provide individualized insurance advice. It is both reasonable and

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<sup>9</sup> For a critique of this aspect of the decision see, L. Stuesser, "A Confusing Case of Contradictions: *Fletcher v. Manitoba Public Insurance Corp.*" (1991), 5 C.C.L.T. (2d) 64.

<sup>10</sup> *Supra* note 2 at 25.

<sup>11</sup> *Ibid.* at 31.

<sup>12</sup> (1986), 24 C.C.L.I. 70, *aff'd.* (1988), 35 C.C.L.I. 155 (B.C.C.A.).

<sup>13</sup> The leading case on the liability of insurance agents is *Fine's Flowers Ltd. v. General Accident Assurance Co.* (1977), 17 O.R. (2d) 529 (C.A.), a decision in which Madam Justice Wilson wrote the majority judgment.

appropriate to impose upon them a duty not only to convey information but also to provide counsel and advice.<sup>14</sup>

Unquestionably had Mr. Fletcher been dealing with an insurance agent, liability would have been found.<sup>15</sup>

True, the comments concerning insurance agents are *obiter*, but the message is clear — a stringent duty of care attaches to insurance agents to adequately advise and inform their clients. As compared to the M.P.I.C. employees, insurance agents are “professionals,” and with professional status comes professional responsibility and liability.<sup>16</sup>

The recent Manitoba Court of Appeal decision in *Dueck v. Manitoba Mennonite Mutual Insurance Co.*<sup>17</sup> illustrates the impact of *Fletcher*. The Court of Appeal, as did Ferg J. in the court below, relied very heavily and quoted extensively from *Fletcher* in finding an insurance agent liable for failing to adequately inform his clients about the insurance coverage undertaken.

## II. THE DOCTRINE OF REASONABLE EXPECTATIONS:

### ***REID CROWTHER & PARTNERS LTD. V. SIMCOE & ERIE GENERAL INSURANCE CO.***<sup>18</sup>

THE DOCTRINE OF REASONABLE expectations has been used by American courts in the interpretation of insurance contracts for over 75 years.<sup>19</sup> Simply stated, the doctrine means that courts should honour the reasonable expectations of an insured. It evolved as one means to offset the inequality of bargaining power between insurance companies and the insuring public.<sup>20</sup> Contracts of insurance are

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<sup>14</sup> *Supra* note 2 at 25.

<sup>15</sup> See the comments of Blair J.A. in the Court of Appeal decision, *Fletcher v. Manitoba Public Insurance Co.* (1989), 68 O.R. (2d) 193 at 210.

<sup>16</sup> See C. Brown, “The Implications of Professional Status: New Directions in the Liability of Insurance Agents and Brokers” (1989) 1 C.I.L.R. 31.

<sup>17</sup> [1993] M.J. no. 13 (C.A.) (5 February 1993) [unreported]; aff’g. (1992), 80 Man. R. (2d) 173.

<sup>18</sup> *Supra* note 3.

<sup>19</sup> See the judgment of Justice Cardozo in *Bird v. St. Paul Fire & Marine Ins. Co.*, 120 N.E. 86 (1918).

<sup>20</sup> For a summary on the doctrine see K. Abraham, “Judge-Made Law and Judge-Made Insurance: Honoring The Reasonable Expectations of the Insured” (1981) 67 Virginia L. Rev. 1151 and S. Holz, “Insurance Law: The Doctrine of Reasonable Expectations” (1988) 37 Drake L. Rev. 741.

rarely negotiated; policies are prepared by the insurer and submitted to the insured on a take-it-or-leave-it basis.<sup>21</sup>

The doctrine manifests itself in three forms. The first, and least controversial version, is to use the doctrine to resolve ambiguities in the contract of insurance in favour of the reasonable expectations of the insured. The second version is intended to restrict the scope of exclusion clauses. It provides that an insured is entitled to receive all reasonably expected coverage in the contract of insurance. Insurers ought not to defeat this expectation of coverage unless the exclusions in the policy are conspicuous, clear and plain. The exclusion itself might well be unambiguous, but it would not be apparent to the insured unless a close and careful reading of the policy was undertaken.<sup>22</sup>

The third variation, and the most controversial, requires no ambiguity in the contract. The reasonable expectations of an insured override the clear and unambiguous terms of the contract. Professor Robert Keeton is the prime supporter of the use of the doctrine in this broad fashion. He stated the principle as follows:

The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.<sup>23</sup>

In Canada, Mr. Justice Cory has been the major proponent of the doctrine of reasonable expectations. As a member of the Ontario Court of Appeal, he wrote the leading decision on the doctrine in *Wigle v. Allstate Insurance Co.*<sup>24</sup> In the *Wigle* case there was ambiguity in the contract, and accordingly Mr. Justice Cory's judgment is confined to applying the doctrine of reasonable expectations to resolve the ambiguity. He left open the consideration of the doctrine in its broader forms. The doctrine of reasonable expectations has been raised in the Supreme Court by Mr. Justice Cory and by other justices,<sup>25</sup> but was

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<sup>21</sup> See Mr. Justice Cory's dissent in *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87.

<sup>22</sup> An example of this type of situation is found in *Selig v. 31390 Sask. Ltd.* (1986), 22 C.C.L.I. 175 (Sask.C.A.).

<sup>23</sup> R. Keeton, *Basic Text on Insurance Law* (St. Paul: West Pub. Co., 1971) at 351.

<sup>24</sup> (1985), 49 O.R. (2d) 101, leave to appeal refused [1985] 1 S.C.R. v.

<sup>25</sup> See Mr. Justice Cory's dissent in *Brissette*, *supra* note 21; Mr. Justice La Forest's dissent in *Scott v. Wawanesa Mutual Insurance* (1989), 59 D.L.R. (4th) 660 (S.C.C.).

never accepted by a majority of the Court until the unanimous decision in *Reid Crowther v. Simcoe & Erie Ins. Co.*<sup>26</sup>

*Reid Crowther* involved the interpretation of a professional liability insurance policy. Reid Crowther, an engineering firm, insured with the defendant for ten policy periods from 1971 to October 1, 1981. In 1974–75 the company was hired by the town of Stonewall to supervise the installation of new sewer and water works. Problems developed in the system. In 1978, the company admitted that its supervision of the construction was inadequate and a claim brought by the town was settled.

On September 25, 1981, some five days before the existing policy of insurance was to expire, further problems with the installation of the system were uncovered. Videotapes were taken of the sewer and water pipes indicating serious construction deficiencies, and these were brought to Reid Crowther's attention. On October 1, 1981, the day the policy expired, Reid Crowther in Winnipeg forwarded information on the problem to its head office in Calgary. The insurance company was notified of the problem on October 5, 1981.

Reid Crowther's policy with the defendant was a form of "claims-made" policy. In a "claims-made" policy, the "claim" or discovery of the problem triggers the insurance. These policies are to be distinguished from "occurrence" policies, where insurance coverage is triggered when the incident occurred — regardless of when the claim is made for the loss.

Madam Justice McLachlin, writing for the Court, provides a helpful review of "claims-made" versus "occurrence" policies. She noted that "claims-made" policies are the insurance industry's response to the problem of "long-tail" risks that are not discovered until years after the work or services were undertaken. She pointed out that "claims-made" policies provide diminished coverage as compared to "occurrence" policies. To illustrate, consider the example below:

The simplest way to illustrate the difference in coverage between claims-made and occurrence basis is to imagine a professional who practised for only one year. To be fully covered, he would need only one occurrence basis policy taken out the year he practised; but he would need several claims-made policies thereafter to protect himself against claims arising out of acts committed the one year he practised.<sup>27</sup>

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<sup>26</sup> *Supra* note 3.

<sup>27</sup> Taken from W. Cline, "Professional Liability Insurance: Retiring Lawyers" (1985) 35 F.I.C. Quarterly 255 at 273–74 as quoted in *Selig*, *supra* note 22 at 193.

Madam Justice McLachlin noted that policies could not simply be categorized as "claims-made" or "occurrence;" in fact, many policies were a hybrid of the two. The policy in *Reid Crowther* was one such hybrid in that the policy covered all claims except pre-existing acts of negligence of which the insured was aware at the commencement or renewal of the insurance. There were two issues of interpretation for the Court to resolve. First, was the additional damage discovered in 1981 caught by the claim made in 1978? If so, the claim was made within the insurance period. Second, if the damage discovered in 1981 was not part of the first claim and is to be regarded as a separate claim, was that claim made before the policy expired in 1981?

In construing the policy of insurance, Madam Justice McLachlin relied on three general principles:

- (1) the *contra proferentum* rule;
- (2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and
- (3) *the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.*<sup>28</sup> [Emphasis added]

The *contra proferentum* rule is well known to Canadian courts, but the express acceptance of the second two principles is most welcome. Far too often judges in construing insurance policies fail to differentiate between coverage and exclusion clauses. The Court's clear statement that coverage provisions are to be construed broadly and exclusion clauses narrowly is a helpful reminder of this difference.

As pointed out earlier, of more importance is the recognition of the doctrine of reasonable expectations by a majority judgment of the Supreme Court of Canada. Madam Justice McLachlin's comments on the doctrine are interesting. She accepted as "settled" the use of the reasonable expectations doctrine to resolve ambiguities in the insurance policy and referred to *Wigle*. However, she refused to pronounce on the reach of the doctrine, which leaves open for possible adoption into Canada Professor Keeton's broad use of the doctrine to override the unambiguous wording of an insurance policy.

Turning to the case on appeal, Madam Justice McLachlin found that the insured's reasonable expectation was "at a minimum, that the insurance plan will provide coverage for legitimate claims on an

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<sup>28</sup> *Supra* note 3 at 269.

ongoing basis.”<sup>29</sup> The defendant insurer’s position defeated this reasonable expectation. The insurer’s position was that the 1981 damage was not part of the 1978 claim, and as a separate “claim” was not made prior to the expiration of the policy on October 1, 1981. Madam Justice McLachlin pointed out that if this were the case, and Reid Crowther subsequently had renewed its policy with the defendant, the company still would not be covered for the 1981 damage because it now would be caught by the exclusion respecting pre-existing problems of which the insured was aware. Therefore, after eleven years of continuous coverage, Reid Crowther would find itself not covered for this loss.

In summary, the significance of this decision with respect to the doctrine of reasonable expectations is twofold. First, the actual recognition of the doctrine by the unanimous Court gives it a firm judicial foothold in Canada. What is left open is the further expansion of the doctrine in all its variations. The use of the doctrine to strike down or ignore unambiguous policy wording is not as radical a proposition as might appear at first glance. For example, s. 145 of the *Insurance Act*<sup>30</sup> of Manitoba already gives to courts the power with respect to policies of fire insurance to negate exclusions which are “unjust or unreasonable.” Up until now, courts have been reluctant to use this power; *Reid Crowther* may provide the impetus for more judicial intervention.

The second significant point about the adoption of the doctrine is the emphasis now placed on the perspective of the insured. It invites the sweeping aside of technical interpretations, understandable only to underwriters or lawyers, in favour of the reasonable meaning as would be understood by the reasonable insured.

### III. DEFINING AN “ACCIDENT”: *AGUILAR V. LONDON LIFE INSURANCE CO.*<sup>31</sup>

*AGUILAR* IS THE CASE that might have been. Unfortunately, it has been abandoned in the Supreme Court. Nevertheless, the issue upon which leave presumably was granted, the distinction between accidental causes and accidental results, remains very much alive and is worthy of comment.

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<sup>29</sup> *Ibid.* at 271.

<sup>30</sup> R.S.M. 1987, c. 140.

<sup>31</sup> *Supra* note 4.



Mr. Aguilar was insured under a disability policy which required that the bodily injury sustained had to be "caused directly and independently of all other causes by external, violent and accidental means." Mr. Aguilar lost the sight in his left eye. The trial judge found that the loss of sight was due to prolonged exposure to an arc light used at work.<sup>32</sup> The exposure was deliberate. Where was the accidental cause of the injury? The resultant loss of sight may well have been "accidental," but it was not caused by an accident.

The Manitoba Court of Appeal accepted the distinction between accidental cause and accidental result. However, in a confusing twist, the Court's "decision" in this regard is entirely *obiter* in that the Court rested its decision to dismiss the plaintiff's action on another provision in the policy that excluded injuries "of which there is no visible contusion or wound on the exterior of the body." Yet presumably the Supreme Court granted leave to address the *obiter* issue surrounding the meaning of accident in that this issue is one in need of resolution given conflicting Court of Appeal decisions across the country.

In accepting the distinction between accidental cause and accidental result, the Manitoba Court of Appeal followed the Alberta Court of Appeal decision in *Leontowicz v. Seaboard Life Insurance*,<sup>33</sup> which in turn relied upon the Supreme Court of Canada's decision in *Smith v. British Pacific Life Insurance*.<sup>34</sup> In opposition, the Courts of Appeal of Ontario,<sup>35</sup> Quebec<sup>36</sup> and Nova Scotia<sup>37</sup> reject the distinction.

Mr. Justice Cardozo wrote that "[t]he attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog."<sup>38</sup> As we have seen the Alberta and Manitoba Courts of Appeal have chosen to take the plunge. How then do we extricate ourselves? The answer lies in the reasonable expectations of the insured.

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<sup>32</sup> (1989), 60 Man. R. (2d) 215 at 222 (Q.B.).

<sup>33</sup> (1984), 8 C.C.L.I. 290 (Alta. C.A.).

<sup>34</sup> (1965), 51 D.L.R. (2d) 1 (S.C.C.).

<sup>35</sup> *Voisin v. Royal Insurance of Canada* (1988), 33 C.C.L.I. 1 (Ont. C.A.) and *Golding v. Citadel General Insurance* (1990), 49 C.C.L.I. 296 (Ont. C.A.).

<sup>36</sup> *Claxton v. Travellers Insurance Co. of Hartford* (1917), 36 D.L.R. 480 (Que. C.A.).

<sup>37</sup> *MacIsaac v. CNA Assurance Co.* (1979), 32 N.S.R. (2d) 380 (N.S.C.A.) and *Maritime Life Assurance Co. v. Tracy-Gould* (1992), 116 N.S.R. (2d) 62 (N.S.C.A.).

<sup>38</sup> *Landress v. Phoenix Mut. Life Ins. Co.*, 54 Sup. Ct. 461 at 463 (1933).

Mr. Justice Cardozo, after warning of the "Serbonian Bog," went on to write:

Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident .... On the other hand, the average man is convinced that there is, and so certainly is the man who takes out a policy of accident insurance. It is his reading of the policy that is to be accepted as our guide, with the help of the established rule that ambiguities and uncertainties are to be resolved against the company.

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When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means.<sup>39</sup>

The Supreme Court of Canada in *Stats v. Mutual of Omaha Insurance Co.* has already confirmed that in defining an "accident," the courts are to give the word its "ordinary" meaning.<sup>40</sup> Mr. Justice Spence, in an opinion reminiscent of Justice Cardozo, wrote:

A variety of dictionary definitions have been attempted and text writers have used very astute and logical analyses of what would constitute an accident, but remembering that it is an ordinary word to be interpreted in the ordinary language of the people, I ask myself what word would any one of the witnesses of this occurrence use in describing the occurrence.<sup>41</sup>

The *Stats* decision is a far better bench-mark to follow than the earlier Supreme Court of Canada decision in *Smith v. British Pacific Life Insurance*, the case which Stevenson J.A. felt bound by in *Leontowicz*. Yes, *Smith* was a case dealing directly with the issue of accidental means, but it was also a case that reeked of pre-existing disease. The deceased in the case had a heart condition and died of a heart attack while helping to remove a car stuck in a snow drift. In my view, a reasonable person looking at what occurred would say that the man died of a weak heart and not by way of an accident.

The difficulty that is apparent is that many accidental results flow from deliberate acts. The deceased in *Leontowicz* deliberately consumed a large quantity of alcohol and died as a result. The golfer

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<sup>39</sup> *Ibid.* at 463-64.

<sup>40</sup> (1978), 87 D.L.R. (3d) 169 (S.C.C.).

<sup>41</sup> *Ibid.* at 182.

in *Landress* deliberately set out to golf during the heat of the day and died of sun stroke.<sup>42</sup>

To recognize a distinction between accidental causes and accidental results requires a technical and narrow construction of the policy. It flies in the face of the reasonable expectations of those insured. Even if we were to accept that the wording is clear and there is no ambiguity, to give effect to the wording is an example of where a narrow exclusion essentially negates the broad coverage expected by the insured. The scope of coverage applying to injuries or death "caused by accident" is extremely limited. If it is the intention of the insurers to offer such restricted coverage surely this must be boldly brought to the attention of the insuring public — if not, then the insured ought to be freed from the limiting exclusion.

#### IV. GOOD FAITH FOR INSURERS: *FORD V. DOMINION OF CANADA GENERAL INSURANCE CO.*<sup>43</sup>

*FORD* IS A TYPICAL arson fraud case, except it raises an interesting question about how informed insurers should be about those they insure. Ford insured his farm property with Dominion. The farm was destroyed by fire. The fire was deliberately set. Dominion smelled fraud and denied coverage on a number of grounds including that Ford deliberately set the fire, submitted a fraudulent proof of loss and made misrepresentations or non-disclosure on material matters in the application for insurance. The trial judge, De Graves J., skirted the difficulties in finding fraud and denied Ford's claim on the basis of the material non-disclosures.

In applying for insurance, the insurer's licensed agent was informed that Ford had *a* prior fire loss and *a* prior cancellation. Ford's insurance history was far more extensive. He in fact had *two* prior insurance losses and *two* policies of insurance cancelled. He was also convicted for a prior insurance fraud and was associated with two other suspicious insurance claims.<sup>44</sup> Notwithstanding that De Graves J. found for the insurer, he was troubled by the insurer's ignorance as to its rather notorious customer.

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<sup>42</sup> See *Beckman v. Travelers Insurance Co.*, 225 A. 2d 532 at 537 (1967), per Musmanno J., for further illustrations of accidents flowing from deliberate acts.

<sup>43</sup> *Supra* note 5.

<sup>44</sup> See *Ford v. Dominion of Canada General Insurance* (1988), 34 C.C.L.I. 224 (Man. Q.B.) and the annotation prepared by Professor Rendall that accompanies the decision.

Ford succeeded on appeal.<sup>45</sup> Mr. Justice Huband (O'Sullivan J.A. concurring) was not satisfied that on the evidence the insurer's agent was told of *a* prior loss and *a* prior cancellation. Another view of the evidence was that the insurer was told of a customer with "some" insurance history. On this interpretation, the obligation rested with the insurer to make the necessary inquiries and there was no misrepresentation.

Professor Rendall saw another factor at work, "Under a very thin layer of varnish, it appears that what really divided the members of the Court is a different standard of expectation of the duty of the insurer to behave reasonably to protect itself from the depredations of larcenous insurance applicants."<sup>46</sup>

Philp J.A. dissented and accepted the findings of fact made by the trial judge. The Supreme Court of Canada allowed the appeal and accepted Mr. Justice Philp's dissenting judgment. In that judgment, Philp J.A. commented:

A contract of insurance is *uberrima fides*; utmost good faith must be observed by both parties. It has been said that the relationship between an insurer and an insured is one in which the insurer knows nothing of the risk to be undertaken, and the insured knows everything. From this relationship arises the obligation of the insured to disclose all material facts so that the risk the insurer undertakes will be the risk he intends to undertake.<sup>47</sup>

Of note is that Mr. Justice Philp did not absolve insurers of making inquiries. For example, under Mr. Justice Huband's interpretation of the facts, given the hint of "some" history it was then up to the insurer to "ask the appropriate questions and elicit the information."

Ford is not a sympathetic plaintiff; his actions reek of fraud. At the same time Dominion is not an overly sympathetic defendant; its actions reek of negligence. Insurers are in the business of risk assessment and surely it is not too much to ask for insurers to do some investigation of a risk when put on notice as to potential problems. On the facts most favourable to the insurer, Dominion was aware that Ford had *a* prior loss and *a* prior cancellation. Surely a reasonable insurer would have probed these prior matters. Insurers

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<sup>45</sup> *Ford v. Dominion of Canada General Insurance* (1989), 40 C.C.L.I. 313 (C.A.).

<sup>46</sup> *Ibid.* at 314.

<sup>47</sup> *Ibid.* at 322.

too have an obligation under the doctrine of utmost good faith to act sensibly.<sup>48</sup>

## V. CONCLUSION:

IN REVIEWING BUT FOUR cases, one which was never argued and one which essentially turned on its facts, it would be rash to speak of any perceived trend in the Supreme Court's handling of these cases. However, the Court's approach in *Fletcher* and in *Reid Crowther* is to be commended. In both of these cases, the Supreme Court used a principled approach, which is akin to the Court's purposive analysis in *Charter*<sup>49</sup> cases. The Supreme Court's decision in *Constitutional Insurance Co. of Canada v. Kosmopoulos* epitomizes this approach in insurance cases.<sup>50</sup> It is an approach that eschews literal and technical constructions in favour of finding the true purpose of the insurance at issue. This is not to say that the Supreme Court of Canada of late has always followed this approach, but it is certainly the desired path that our highest Court ought to follow.<sup>51</sup>

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<sup>48</sup> Two further recent decisions from the Supreme Court of Canada have considered the duty of insurers to become informed as to their insured and the risks insured: *Canadian Indemnity Co. v. Canadian Johns-Manville* (1990), 72 D.L.R. (4th) 478 (S.C.C.) and *Coronation Insurance Co. v. Taku Air Transport* (1991), 4 C.C.L.I. (2d) 115 (S.C.C.).

<sup>49</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.

<sup>50</sup> (1987), 34 D.L.R. (4th) 208 (S.C.C.).

<sup>51</sup> For an example of where the Supreme Court deviated from this approach see *Scott v. Wawanese Mutual Insurance* (1989), 59 D.L.R. (4th) 660 (S.C.C.).