VERGATA v. *VERGATA AND THE MANITOBA PUBLIC INSURANCE CORPORATION*†

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Introduction

During the spring of 1977, the Canadian Supreme Court had its first opportunity to consider the Manitoba scheme of universal compulsory auto insurance, Autopac, established by *The Manitoba Public Insurance Corporation Act*[1] and the regulations thereunder.[2] The occasion provides an appropriate opportunity to consider the Autopac Plan and the effects of the decision on it.

Put briefly, the Manitoba Public Insurance Corporation[3] has, since November 1, 1971, administered a fund to compensate victims of auto accidents. The bulk of the fund is collected from persons who own Manitoba registered motor vehicles[4] and from persons who possess Manitoba driver's licences.[5] These groups of people, after paying premiums, receive respectively, "owner's certificates"[6] and "driver's certificates."[7]

The Corporation then pays money from the fund in four different types of instances:

1) It pays "Accident Insurance Benefits" to compensate for bodily injury or death. These benefits may go to owners, drivers, passengers, pedestrians, be they Manitobans or not, and in some instances regardless of whether the accident occurs in Manitoba.[8]
2) It pays, under "All Perils Insurance" coverage, money to compensate Manitoba vehicle owners named in "owners certificates" for loss of or damage to the owner's vehicle.[9]
3) It pays, under "Public Liability and Property Damage" coverage, money to indemnify owners and drivers for their legal liability arising out of the ownership, use, or operation of motor vehicles.[10]

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† [1976] 3 W.W.R. 544 (Man. Q.B.); rev'd. (1976), 67 D.L.R. (3d) 527, [1976] 4 W.W.R. 373 (Man. C.A.); rev'd [1978] 1 S.C.R. 289, 76 D.L.R. (3d) 470, [1977] 4 W.W.R. 491 (hereinafter referred to as *Vergata*).

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1. S.M. 1970, c. 102 (A180) (hereinafter referred to as *The MPIC Act*).
2. A Regulation under *The Manitoba Public Insurance Corporation Act*, Man. Reg. 333/74, as amended by Man. Reg. 10/75 and Man. Reg. 45/75 (hereinafter referred to as Man. Reg. 333/74).
3. Hereinafter referred to as the Corporation. The Corporation is established under *The MPIC Act*, *Supra* n. 1.
4. In the fiscal year ending October 31, 1976, 77% of the fund came from vehicle premiums. Manitoba Public Insurance Corporation *1976 Annual Report* 9.
5. In the fiscal year ending October 31, 1976, 11.3% of the fund came from driver's premiums. *Id.*, at 9. The remainder of the fund came from a tax on gasoline (6.9%) and from investment income (4.8%). The most recent report, the *1977 Annual Report* does not include a similar breakdown of sources of funds.
6. The procedures and costs for obtaining an owner's certificate are set out in Manitoba Regulation 332/74, Part III as amended each year to reflect changing premiums.
7. The procedures and costs for obtaining a driver's certificate are set out in Manitoba Regulation 332/74, Part II, as amended each year to reflect changing premiums.
8. Man. Reg. 333/74, Part II.
9. These payments are made under Man. Reg. 333/74, Part III.
10. These payments are made under Man. Reg. 333/74, Part IV.

> 4) It pays, under the "hit and run," "uninsured motor vehicle," and "absolute liability" schemes administered by it under the Plan, money to compensate victims who cannot make some third party liable and thus recover under item 3) above, and who qualify under one of these schemes.[11]

Broadly speaking, the nature and extent of these coverages are the same as in every other Province and Territory in Canada save Quebec.[12] In the words of the Ontario Select Committee on Company Laws:

> There is a popular misconception that the government automobile insurance corporations in Western Canada provide terms of coverage for the consumer that are unlike those provided in the private sector Provinces. It is quite clear that this is untrue. The terms of the traditional coverages, third-party liability coverage, Accident Benefits coverage and own-vehicle coverage, are substantially the same as those available in Ontario.[13]

Indeed the particular exlusion from coverage with which the Courts were occupied in *Vergata*, is common to automobile insurance policies in all common law jurisdictions in Canada. The distinctive features of the Autopac Plan (and of those in Saskatchewan and British Columbia) are first, that it is publicly administered, and secondly that it is compulsory. *The Highway Traffic Act*,[14] provides in Section 6(1) that the owner of every motor vehicle who seeks to drive it upon a highway in the Province must both register it with the Registrar of Motor Vehicles, and pay such insurance premium as is prescribed under *The MPIC Act*. And as indicated above, *The MPIC Act* provides that the Plan is to be administered exclusively by the Corporation. These parameters were not considered by any of the Courts which heard *Vergata*, although they deserved attention in the case.

Since the *Vergata* case dealt only with a claim for indemnity under the "Public Liability and Property Damage" coverage[15] under the Plan, a discussion of the other types of coverages will not be undertaken here.

The Case Itself: *Ratio Decidendi*

The facts may be shortly stated. On April 22, 1974, Benito Vergata while driving his brother Antonio's car, had an accident and Antonio, who was a passenger in his own car, was killed. Antonio's wife, Rita, claimed against Benito both on her own behalf under *The Fatal Accidents Act*,[16] and on behalf of the estate under *The Trustee Act*,[17] alleging gross negligence on Benito's part as driver. Benito

11. These payments are made under Man. Reg. 333/74, ss. 38, 39, 40, and *The MPIC Act*, ss. 33.1(1), 34.
12. In 1977 there was a partial abolition of the tort remedy in motor vehicle claims in the province of Quebec.
13. *Second Report on Automobile Insurance* (September, 1978) 171.
14. *The Highway Traffic Act*, R.S.M. 1970, c. H60.
15. Man. Reg. 333/74, Part IV.
16. *The Fatal Accidents Act*, R.S.M. 1970, c. F50.
17. *The Trustee Act*, R.S.M. 1970, c. T160.

sought protection from the Corporation under Part IV liability coverage. When the Corporation denied Benito this coverage, he sought a declaration that he was entitled to be indemnified under Part IV. The relevant portions of the Regulation provided:

> S.2(1) In this regulation, subject as hereinafter otherwise provided. . .
> (k) 'insured' means. . .
> (iii) a person to whom, or on whose behalf, insurance moneys are payable, if bodily injury to, or the death of, another, or damage to property, for which he is legally liable, results from one of the perils mentioned in Part IV, whether or not he is named in a certificate;
> S.30 In this Part,
> (a) 'insured' means a person who is named in a valid and subsisting owner's certificate, and includes a person who,
> (i) being named in a valid and subsisting driver's certificate; or
> (ii) . . .
> operates a vehicle designated in an owner's certificate with the consent of the person named therein;
> (b) 'insured vehicle' means a vehicle designated in a valid and subsisting owner's certificate;
> Coverage
> S.31(1) [C]overage is hereby provided to an insured. . .for damages. . .for liability. . .arising out of the ownership, use, or operation, of an insured vehicle by an insured. . . .
> Driver's Policy.
> S.31(2) Coverage under subsection (1) is extended to a person who is named in a valid and subsisting driver's certificate, while he personally uses or operates a motor vehicle that is not otherwise insured for legal liability imposed by law arising out of the ownership, use or, operation thereof. . . .
> but no coverage extends under this section, by reason of a breach of condition under a policy of other insurance by which the vehicle is insured.
> S.31(3) The Corporation shall not pay insurance moneys under this Part. . .
> (h) for loss or damage resulting from bodily injury to, or the death of, an insured;

Specifically, Benito was attempting to obtain coverage under Section 31(1) through the owner's certificate on the car owned by the deceased, Antonio, or under Section 31(2) through his own driver's certificate. The Corporation maintained by way of defence that both Antonio *and* Benito were "insureds" under Antonio's owner's certificate. By Section 30(a) "insured" means a person who is named in an owner's certificate (Antonio), and a driver holding a driver's certificate and operating the vehicle with the owner's consent (Benito). *Prima facie* then Benito was entitled to Section 31(1) coverage under Antonio's owner's certificate. Section 31(3)(h), however, has the effect of excluding from coverage a claim by one "insured" against another. By Section 30(a), said the Corporation, "insured" comprises three classes of persons: (1) the driver holding a driver's certificate, Benito, (2) a duly licensed out-of-province driver, and most obvious of all, (3) the person named in the owner's certificate, here, Antonio. Therefore, the argument went, Section 31(3)(h) was intended to exclude and here did exclude from liability coverage the claim of one insured (Antonio) against another (Benito).

Until *Vergata*, it had been considered that Section 31(3)(h) was designed to exclude coverage for the driver, Manitoban or otherwise, when the owner of the vehicle was claiming against the driver, as a result of the driver having injured or killed the owner. The exclusion applied if the owner was a passenger in his own vehicle as Antonio was here, or a passenger in another vehicle, or a pedestrian. Section 31(3)(h) would also, before the decision in *Vergata*, have excluded coverage when the driver was claiming against the owner for the driver's injuries or death where the owner had negligently maintained the vehicle, or as a passenger had negligently disrupted the driver in some way. It may be speculated that the rationale behind the refusal to cover the tortfeasor in these cases was due to the less-than-arm's-length relationship between these parties. They would never be complete strangers because Section 30(a) requires that the driver must have obtained the owner's consent to operate the vehicle. This suggests a risk of collusion in putting forward a claim as between the victim and the tortfeasor. While this may be the rationale, it is submitted that the propriety of such an assumption is highly questionable.

Failing a claim under the owner's certificate, Benito had an alternative argument: he sought indemnity from the Corporation under his own driver's certificate coverage in Section 31(2). It was admitted that all of the requirements of that subsection were met, with the exception of "a motor vehicle that is not otherwise insured for legal liability." The Corporation's position was that since Antonio's car was named in an owner's certificate then primary coverage under Section 31(1) applied (albeit subject to an exception in this case), and Section 31(2) was not of any use to Benito in this case. Alternatively the Corporation tried to argue that even if the requirements of Section 31(2) *were* met Antonio was "an insured" under Benito's Section 31(2) driver's coverage, and the exclusion in Section 31(3)(h) would deprive Benito of protection.

In turning to the judicial treatment of the case, it should be noted at the outset that all of the Judges were of the opinion that, however interpreted, the exclusion in Section 31(3)(h) must be construed with respect to a specific certificate of insurance — namely the one under which coverage is being sought in the particular case. The argument which was rejected by all the Judges was based on the fact that *each* owner or driver is "an insured" under an owner's certificate and/or a driver's certificate. Thus in *every* case in which one owner and/or driver claims against another, because the claimant is "an insured" under his own certificate, the tortfeasor might have no Part IV coverage under *his* certificate, by the operation of Section 31(3)(h). This result, the argument continued, was obviously

untenable, and thus the exclusion was ambiguous at best, or meaningless at worst, and could therefore be disregarded. The Courts held that "an insured" in Section 31(3)(h) means *only* an insured under the certificate of insurance under which the tortfeasor is seeking protection, and no other. In the words of de Grandpré, J., (dissenting in other respects), "the exclusion. . .cannot be made to apply to anything other than that liability, *i.e.*, the one attached to the operation of a particular vehicle mentioned in a particular certificate; to say that the exclusion applies to persons not connected with that car and that certificate is to forget all basic rules of construction."[18] Pigeon, J., for the majority, adopted the words of Dewar, C.J. Q.B., to the same effect.[19]

In dealing with the Corporation's defences set out above, the trial Judge, Dewar, C.J. Q.B., considered that "the narrow point for determination. . .is whether or not the deceased owner, Antonio Vergata, was 'an insured' within the meaning of the exclusion in Section 31(3)(h) in respect of both [owner's and driver's] contracts of insurance."[20] Beginning with coverage for Benito under Antonio's owner's certificate Section 31(1), Dewar, C.J. Q.B., "assumed" that the Section 31(3)(h) exclusion applied, Antonio being "an insured" under his own owner's certificate. The reason for the Court not actually *deciding* this point is not made clear. Turning to Section 31(2) as a source of coverage for Benito, the trial Judge reasoned:

> Assuming that the exclusion expressed in Section 31(3)(h) of the regulation applies to Antonio Vergata's contract in the circumstances of this case, the motor vehicle is not otherwise insured for that legal liability. The requirements of the rest of the section are met. . . .Accordingly, Benito Vergata's contract contains coverage entitling him to indemnification.[21]

Hall, J.A., who wrote the unanimous judgment of the Manitoba Court of Appeal, also found that Section 31(3)(h) operated to exclude liability coverage to Benito under the owner's certificate.[22] On the matter of Section 31(2) coverage for Benito, Hall, J.A. concluded:

> The fact that exclusion (h) applies because the claim is for the death of an insured does not bring into play Section 31(2), as the learned Chief Justice seems to have thought. That extended coverage does not arise when the driver is operating a motor vehicle designated in an owner's certificate. . . . The motor vehicle in the present case was and continued to be insured even though it was subject to certain exclusions.[23]

The majority opinion in the Supreme Court took a fresh tack in concluding that Benito was entitled to Part IV coverage. Pigeon, J.

18. [1978] 1 S.C.R. 289, at 302; 76 D.L.R. 470, at 479; [1977] 4 W.W.R. 491, at 500-01.
19. *Id.*, at 293-94; 76 D.L.R., at 473; [1977] 4 W.W.R., at 494.
20. [1976] 3 W.W.R. 544, at 548 (Man. Q.B.).
21. *Id.*, at 549.
22. (1976), 67 D.L.R. (3d) 527; [1976] 4 W.W.R. 373 (Man. C.A.).
23. *Id.*, at 531; [1976] 4 W.W.R., at 377.

spoke for the majority. Concurring with him were Laskin, C.J., Ritchie, Spence, and Beetz, JJ. Pigeon, J. examined the Plan as a whole and concluded that a driver's certificate provides liability coverage for the driver under both Section 31(1) *and* Section 31(2). This coverage is completely separate from and exclusive of the owner's certificate coverage under Section 31(1). The driver is not an insured under the owner's certificate and has no Part IV liability coverage under the owner's certificate. The definition of "insured" in Section 2(1)(k)(iii) establishes the driver as an insured under his *own* driver's certificate coverage in Section 31(1) and Section 31(2). The definition of an "insured" in Section 30(a)(i) is directed solely to the driver as an independent named insured under his own certificate. The Section 30(a)(i) definition of an insured does not establish the driver as an unnamed insured in the owner's certificate. Therefore Benito had no coverage under Antonio's owner's certificate not because it was excluded by Antonio being "an insured" under it, within the meaning of Section 31(3)(h), but rather because Benito was not insured under the general insuring provisions of Antonio's certificate in Section 31(1) in the first place.

By the same reasoning an owner is not "an insured" within the terms of Section 31(3)(h) under the driver's certificate. Because Antonio as owner was not "an insured" under Benito's separate driver's insurance certificate, the exclusion in Section 31(3)(h) did not operate against Benito in respect of his "driver's insurance." The only "insured" under Benito's driver's certificate was Benito himself. In the words of Pigeon, J., "The exclusion [in s.31(3)(h)] from the coverage under the driver's certificate cannot be read as referring to an insured under the owner's certificate [namely, Antonio] unless the driver is [also] considered as insured [as well as the owner] under the owner's contract [and therefore excluded by Section 31(3)(h) from qualifying for an indemnity]."[24]

As for the requirement of Section 31(2) that the "vehicle not [be] otherwise insured for legal liability," Pigeon, J., makes no reference to it at all. This follows from his reasoning regarding the source of coverage for Benito — the indemnity was founded under Benito's driver's certificate coverage in Section 31(1). In the circumstances of the case therefore, it was unnecessary to resort to the Section 31(2) branch of the two-pronged driver's certificate coverage. And thus the issue of whether the requirements of Section 31(2) were met never arose.

It now remains to examine the bases of the court's conclusion, and some of the implications of the *Vergata* decision for the Autopac Plan beyond the boundaries of the case itself.

24. *Supra* n. 18, at 294; 76 D.L.R., at 473; [1977] 4 W.W.R., at 494. Words in brackets added by author.

The Owner's Certificate and the Driver's Certificate: Two Primary Sources of Liability Coverage.

As a result of the majority of opinions the Supreme Court of Canada in the *Vergata* case, it is now clear that there are two independent primary sources of liability coverage established under Part IV of the Regulations. Each of the driver's certificate and the owner's certificate will provide an indemnity to the person named therein, in differing circumstances, against damages for liability imposed upon him arising out of the use or operation of a motor vehicle. In considering the general nature of the Autopac Plan, Pigeon, J. stated:

> Although neither owners' policies nor drivers' policies are issued, the owner's and the driver's certificates evidence separate contracts which provide distinct coverages and must be construed as if the terms of each were separately set forth instead of having to be gathered from the Act and the regulation. . . .[25]

He went on to say:

> The difference between the Manitoba scheme and the coverage under ordinary commercial motor vehicle owner liability policies is that, in the latter case, the contract insures a person named therein and every other person who, with his consent, personally drives the automobile. Under the Manitoba scheme coverage is provided to an 'insured' and an 'insured' includes the holder of a driver's certificate *as such*. Even under an ordinary commercial policy [it has been held] . . .that the stipulation in favour of other drivers was to be construed 'as creating a new contract' . . .*A fortiori* must it be so when there is a separate driver's certificate involving a distinct coverage called a 'DRIVER'S POLICY' for which a separate premium is collected and, in the case of a bad driving record, an additional premium is charged.[26]

As he indicates, Pigeon, J. based his conclusion upon an interpretation of the terms of the Plan as a whole. In particular he was influenced by three factors. First, drivers are provided with separate insurance certificates for which a separate premium is charged. Driving convictions will result in an additional premium being assessed against the driver's certificate. "The provision for an increased premium based on each driver's record is cogent evidence that in the Manitoba scheme the driver's certificate involves coverage separate from the owner's."[27] Although Pigeon, J. makes no mention of it, the *only* mechanism in the Plan for assessing vehicle owners on the basis of the liability record of their vehicles is the "fleet surcharge," for the owner of ten or more vehicles.[28] Second, in Section 31(1) basic liability coverage is provided to "an insured," who in Section 30(a)(i) includes a person named in a valid and subsisting driver's certificate, while operating a vehicle designated in an owner's certificate with the owner's consent.

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25. *Id.*
26. *Id.*, at 296; 76 D.L.R., at 475; [1977] 4 W.W.R., at 496.
27. *Id.*, at 295; 76 D.L.R., at 474; [1977] 4 W.W.R., at 495.
28. Man. Reg. 332/74, s. 28.

> This wording clearly indicates that the holder of a driver's certificate is insured as such. It is true that, as a rule, it is a condition of his coverage that he must be driving a vehicle covered by an owner's certificate, but s. 31(2) shows that his coverage does not come from the owner's contract because it will exist even when there is no such contract if [the requirements of Section 31(2) are met]. . . .[29]

Third,

> That the driver's certificate is a separate contract also appears from the caption 'DRIVER'S POLICY' above s. 31(2) of the Regulation. This caption cannot be considered as limiting to the cases contemplated in s. 31(2) the extent of the driver's policy. This would be contrary to the opening words: 'Coverage under subsection (1) is extended. . .' It would not be an extension unless there was already a primary coverage under s. 31(1) [to the driver under his own driver's certificate] by virtue of the definition of 'insured' in s. 30(a).[30]

Thus what Pigeon, J. has done is to take the caption over Section 31(2), and place it over Section 31(1), preceded by the words "Coverage under Owner's Policy and. . . ."

There are at least two aspects of the Plan which were not referred to by Pigeon, J. which touch upon the question of whether the driver's certificate coverage in Part IV was intended by the Legislature to be primary or subsidiary to the owner's certificate protection. The first is *The Insurance Act*, Section 272(1).[31] Section 272(1), incorporated into Autopac by Man. Reg. 333/74, s.3(1), provides that insurance which is evidenced by a valid owner's policy of the kind mentioned in *The Insurance Act*, Section 2(43) is first loss insurance. "Owner's policy" is defined in s. 2(43) as a motor vehicle liability policy which insures a person in respect of the ownership, use, or operation of a described or defined automobile owned by him, and, if the contract provides, in respect of the use or operation of any other automobile. This means Part IV coverage under an owner's certificate, when Section 272(1) is placed in the context of Autopac, is a first loss insurance, and insurance attaching under any other valid motor vehicle liability policy is excess insurance only. A "motor vehicle liability policy" is defined in *The Insurance Act*, Section 2(37) as a policy or part of a policy insuring (i) the owner or driver of an automobile, or (ii) a person who is not the owner or driver where the automobile is being used by his employee or any other person on his behalf, against liability for damages arising out of the use or operation of the automobile.

It could be argued that Section 272(1) was intended to ensure that the owner's certificate coverage in Part IV was "a first loss insurance," and that the driver's certificate coverage in Part IV was

29. *Supra* n. 18, at 295-96; 76 D.L.R., at 474; [1977] 4 W.W.R., at 495-96. Words in brackets added by author.
30. *Id.*, at 296; 76 D.L.R., at 474-75; [1977] 4 W.W.R., at 496.
31. *The Insurance Act*, R.S.M. 1970, c. 140.

"excess insurance only." It must be said however first that Section 272(1) is hardly clear and unambiguous in accomplishing this result in the Autopac regime. The words "any other valid motor vehicle liability policy" could be construed as referring to a "non-owned" policy of insurance, described in *The Insurance Act*, Section 2(37)(ii), and defined in *The Insurance Act*, Section 2(41), rather than capturing in its net the driver's certificate coverage in Part IV. Furthermore, it is submitted that the express terms of the Plan itself take priority over as vague a provision as Section 272(1). The express terms of the Plan to which Pigeon, J. referred certainly support the view of the status of the driver's certificate in Part IV which was taken by him. If the Legislature wished to establish the owner's certificate as first loss insurance and the driver's certificate as excess insurance in all circumstances except Man. Reg. 333/74, Section 31(2), it did not communicate that intention unequivocally by incorporating *The Insurance Act*,Section 272(1) into the Plan.

The second aspect of the Plan which is apposite in this context and was not mentioned by Pigeon, J. is Man. Reg. 333/74, Part V, Sections 48-58. Part V provides for the extension of, or increase in the limit of liability coverage in part IV from $50,000 to amounts from $100,000 to $2,000,000. The Part IV coverage upon which Part V builds is that in the *owner's* certificate. No mention of extending the "basic" Part IV coverage of the driver's certificate is made in Part V or in any other part of the Autopac plan. In particular, Section 56 in Part V allows the increased limits of liability coverage on an owner's certificate to be carried over and apply to another vehicle which the person named in the owner's certificate (or his spouse) drives or operates on a temporary basis. The terms of this "carry over," or temporary substitute vehicle coverage are that it is excess or added on to the amount of coverage which is provided to the driver under the owner's certificate on the temporary substitute vehicle itself. The clear underwriting presumption in Section 56 is that this owner who is driving a temporary substitute vehicle which is designated in an owner's certificate, is an "insured" under that temporary substitute vehicle's owner's certificate, and thus that resort would be had *first* to the limit of liability insurance under Part IV and V on the owner's certificate of the temporary substitute vehicle. Then and *only* then would the temporary substitute vehicle coverage on the driver's *own* owner's certificate in Section 56 be looked to for indemnity. To be consistent with Pigeon J.'s characterization of the driver's certificate coverage, the pre-occupation in Part V with the extension of the *owner's* certificate coverage to the exclusion of the driver's certificate could be described as a policy or drafting (underwriting) decision made by the Legislators when the terms of the Plan

were formulated. The provisions of Part V, the argument would go, do not directly and as a matter of law compel the conclusion that the driver's certificate in Part IV has a subsidiary status to that of the owner's certificate. The decision to confer the option of purchasing this additional vehicle-related coverage does not affect the ambit of the driver's certificate protection which is set out in Part IV, Section 31(2).

What then are the sources of liability coverage under the "Pigeon Plan"? The "insured," defined in Section 30(a) under an owner's certificate is provided with the coverage described in Section 31(1). As a result of *Vergata* the classes of persons falling within the ambit of the owner's certificate have been reduced. According to the *Vergata* interpretation of the heads of Part IV coverage, the holder of a driver's certificate is not an insured under the owner's certificate. And the owner is not an insured under the driver's certificate when someone else is driving his vehicle.[33] Dewar, C.J.Q.B. stated "The narrow point for determination, then, is whether or not the deceased owner. . .was 'an insured' . . .in respect of both [the owner's and the driver's] contracts of insurance."[34] He continued, "[The owner] cannot be regarded as 'an insured' under this [the driver's] contract."[35] The result at trial was restored by the Supreme Court of Canada.

When will the owner's certificate operate to provide coverage? Clearly when the owner is sought to be made vicariously liable under *The Highway Traffic Act*,[36] the owner himself will have coverage under his owner's certificate. Also, the remarks of Pigeon, J. *in obiter* in *Vergata*,[37] indicate that a licensed driver from another jurisdiction, when operating with the owner's consent, will have owner's certificate coverage.

Which coverage applies when the owner of a vehicle designated in an owner's certificate is operating his *own* vehicle? As neither the owner's certificate nor the driver's certificate is subsidiary to the other as a source of coverage, *prina facie*, either could apply in this situation. Looking to the definition of "insured" in Section 30(a), "insured" means a person who is named in a valid and subsisting owner's certificate including an out-of-province licensed driver, and a Manitoba licensed driver operating with the owner's consent. As it would be straining the language to place the owner-driver into the

32. Man. Reg. 333/74, s. 56(2).
33. *Supra* n. 18, at 294, 302; 76 D.L.R., at 473, 479; [1977] 4 W.W.R., at 494, 501.
34. *Supra* n. 20, at 548. Words in brackets added by author.
35. *Id.*, at 549. Words in brackets added by author.
36. *The Highway Traffic Act*, R.S.M. 1970, c. H60, s. 144(3). *i.e.*, the owner was not driving his vehicle.
37. *Supra* n. 18, at 297; 76 D.L.R., at 475; [1977] 4 W.W.R., at 497.

position of an insured under his driver's certificate (it would require a finding that the owner was operating his vehicle with his own consent), it is submitted that the source of Part IV coverage on an owner-operated vehicle is the owner's certificate.

As for the driver's certificate, the *Vergata* case has conferred upon the holder of a driver's certificate liability coverage under Section 31(1) which is independent of and separate from the coverage created by the owner's certificate on the vehicle. This coverage will only apply when the holder of a driver's certificate: (i) is operating a vehicle designated in an owner's certificate with the consent of the owner,[38] or (ii) is operating an uninsured vehicle and meets the requirements of Section 31(2). In neither of these circumstances is the driver an "insured" under the owner's certificate, and he has no insurance in respect of it.

The Consequences for the Plan

What significance does the *Vergata* interpretation of the Plan carry with it beyond the general insuring provisions just discussed? It must be emphasized that the new interpretation does not affect the coverages under Part II (Accident Insurance Benefits) or Part III (All Perils). Only Part IV is involved and it is only the *source* of the "Public Liability and Property Damage" coverage in Part IV which has changed. The scope of the general insuring provisions in Part IV[39] was not touched. Furthermore, the application of the general terms and conditions in Sections 32 to 37 is not affected. The limits of the coverage remain at $50,000. There is no basis in the "*Vergata* Version" of Part IV for attempting, for example, to double the limit in respect of one incident by invoking both a driver's certificate and an owner's certificate. Indeed, the thrust of the majority opinion in *Vergata* is that these sources of coverage are mutually exclusive.

There are however, at least six areas which are substantially influenced by the *Vergata* decision. First, it enabled the plaintiff in *Vergata* to obtain liability coverage under his own driver's certificate when it was not available to him under the certificate of insurance held by the owner of the car because of the exclusion in Section 31(3)(h) nor under Section 31(2) because the requirements of that provision were not met. Second, this interpretation of Part IV of the Plan is completely contrary to the view which had been held until this time by those concerned with the scheme both within and outside the Corporation. The former view of the Plan was that, although it was publicly-administered, it was basically a replication of a conventional

38. Man. Reg. 333/74, ss. 30(a)(1), 31(1).
39. Man. Reg. 333/74, ss. 31(1), 31(2), 35.

private[40] motor vehicle liability insurance mechanism. That is, the owner's certificate was thought to provide the foundation for coverage in connection with any liability incurred which arose out of the use or operation of the vehicle. Accordingly, the driver, whether the owner or any other duly licensed driver who was driving with the owner's consent, was covered under the owner's certificate through Section 31(1). However, the Plan was intended to extend coverage not available under private motor vehicle insurance contracts. Through Section 31(2) the holder of a Manitoba driver's certificate would have coverage when operating an uninsured vehicle which the driver reasonably believed was insured. This interpretation is succinctly expressed in the dissenting opinion of de Grandpré, J., on behalf of himself, Martland, Judson, and Dickson, JJ.:

> Although the scheme is universal and compulsory, it is still basically automobile insurance. A comparison of Part IV of the Regulation and of s. 239 and following of *The Insurance Act*, c. 140, makes it abundantly clear. Under that Act, the driver is the unnamed insured under the owner's policy which is primary; the driver's policy only comes into the picture as excess. Under the [Autopac] scheme, there is no need for the excess protection of the driver's policy because there is a uniform ceiling of $50,000 applicable to all certificates. It follows that there is no need to consider the driver's certificate as separate insurance under the plan, except in the narrow circumstances of s. 31(2).[41]

The third area touched by *Vergata* is the underwriting and claims procedure of the Corporation. The premium rates for driver's certificates ($30 and $15 respectively for males and females 16-24 years; $15 and $10 for males and females over 24 years) reflect the very narrow exposure of the pre-*Vergata* view of Section 31(1)(2). Now that the driver's certificate has been held to be an independent source of coverage on a par with the owner's certificate, these premium levels look rather modest to say the least. As for claims procedures, if it were true to *Vergata*, the Corporation would be coding and programming its Part IV claims (reserves, pay-outs, accounting practices, etc.) under the insured's *driver's* certificate where there is a non-owner driver, rather than under the owner's certificate as is now still the case.

Fourth, and among the most serious consequence of *Vergata* is that it has probably rendered many drivers substantially underinsured. Because *Vergata* establishes the driver's certificate as the exclusive source of liability coverage under Part IV when someone holding a Manitoba driver's certificate, but not the owner of the vehicle, is operating a Manitoba-insured vehicle; it would appear that the maximum limit of liability coverage available to the driver under Part IV is $50,000. This would be true even where the owner's cer-

40. Or "commercial," in the words of the Judges in *Vergata*. *Supra* n. 18, at 296, 302; 76 D.L.R., at 475, 479; [1977] 4 W.W.R., at 496, 501.
41. *Id.*, at 303; 76 D.L.R., at 479; [1977] W.W.R., at 501.

tificate on the vehicle carries coverage beyond $50,000 which is available under Part V. This is because the Corporation, assuming that exclusive driver's coverage under the Plan was confined to "the narrow circumstances of Section 31(2),"[42] does not offer "extension" insurance beyond $50,000 exclusively for the holder of a driver's certificate under the Autopac Plan. There is a very limited form of extension liability coverage available under Part V of the Plan but it can hardly be said to adequately meet the kind of risk of loss to which *Vergata* has now exposed a driver *qua* driver. Section 56 of Part V provides that for the driver of a vehicle other than one he owns to bring himself within the Part V "temporary substitute vehicle coverage" he must (i) own a vehicle himself and have had it designated in a current owner's certificate (*i.e.* registered and insured); (ii) have purchased Part V liability extension insurance in respect of his own vehicle; (iii) have been using this substitute vehicle temporarily, in place of, instead of, or in substitution for his own duly insured vehicle, (iv) not have been using the substitute vehicle in a car sales, repair or parking business; (v) show that the substitute vehicle is not owned by his employer, his spouse, nor by anyone living in the same dwelling premises as the driver; and finally (vi) not, nor must his spouse, have "frequently" used the substitute vehicle. The most serious gaps in this coverage from the perspective of the *Vergata* decision are first in respect to someone who holds a driver's certificate but who (or whose spouse) is not designated in an owner's certificate, *i.e.* does not own a vehicle. And secondly, in respect to someone who holds a driver's certificate and who (or whose spouse) *is* designated in an owner's certificate, but has purchased no Part V liability extension coverage.

A driver who wishes to obtain a broadly-based extension of Section 31(1) liability coverage exclusively *as a driver*, of any vehicle but his own, must make a separate application via an agent to the automobile and personal lines underwriting department of the Corporation, located at the Corporation's Head Office in Brandon, for special risks extension coverage to be added to his driver's certificate. Such coverage indemnifies the insured against liability arising out of the operation of any automobile not owned by or designated in an owner's certificate in the name of the insured, while the insured is personally driving the vehicle. The premium rate varies with the type of vehicle which the driver anticipates operating.[43] Although such extension coverage is available to any holder of a driver's certificate, it is almost exclusively purchased by employees who drive their

42. *Id.*
43. Namely, private passenger vehicle, taxi, bus, truck or truck tractor power unit, and semi-trailer.

employer's or other persons' vehicles in the course of their employment, and by businessmen and others who drive leased vehicles especially in jurisdictions outside Manitoba, without specifically knowing in each case whether the liability insurance for the vehicle they are operating carries with it any extension of the basic limit of coverage provided for in the vehicle policy. Thus the underwriting and marketing mechanisms supporting this type of extension coverage were not developed to deal with the greatly increased risk to which *Vergata* has exposed the driver of a vehicle other than his own.

Therefore it is submitted that at present many "non-owning drivers" in Manitoba are substantially under-insured because they now do not automatically have access to the extension of liability coverage under the owner's certificate on any vehicle they operate except their own. Of course the *owner* whose vehicle is being driven by someone else does have this extended coverage to meet his vicarious liability under *The Highway Traffic Act*, Section 144(3).

Fifthly, the *Vergata* decision has given several of the exclusions in Section 31(3) a different and more qualified meaning. In this context, what is left of the exclusion in Section 31(3)(h) will be examined here. In the words of Pigeon, J.,:

> I should point out that to construe 'an insured' in exclusion (h) as referring only to a person insured by the certificate under which indemnity is claimed does not render the provision useless. It will be applicable in the case of a driver from another jurisdiction who is an 'insured' by virtue of cl. (ii) of the definition.[44]

What Pigeon, J. is saying is that since the driver is not insured by the owner's certificate, that only leaves the owner and an out-of-Province driver[45] as insureds under Section 31(3)(h). And since the owner cannot sue himself, Section 31(3)(h) will now only apply when an out-of-Province driver seeks coverage for a claim against him by the owner whose motor vehicle he was operating. As for the application of Section 31(3)(h) under the driver's certificate, the exclusion is meaningless because only the driver is "an insured" therein, and he cannot sue himself for the consequences of his own negligent driving.

As mentioned earlier, no reference was made in the majority opinion of the Supreme Court to whether Benito, as the driver seeking coverage under Part IV, was entitled to any protection in these circumstances under the "extended" driver's coverage in Section 31(2). Under this provision the holder of a driver's certificate while personally using or operating a vehicle which is not otherwise insured for legal liability arising out of its ownership, use, or operation has Section 31(1) coverage if he reasonably believes that the vehicle is

44. *Supra* n. 18, at 297; 76 D.L.R., at 475; [1977] 4 W.W.R., at 497.
45. Man. Reg. 333/74, s. 30(a)(ii).

properly insured. But he will not be covered even if he reasonably believes that the vehicle is so insured where:

(a) he or his spouse or anyone living with him owns the uninsured vehicle[46] or,
(b) the reason that the vehicle is not insured is that there has been a breach of a condition in a policy on the vehicle provided by a person other than the Corporation.[47]

It was held by Dewar, C.J. Q.B. that the motor vehicle in question in *Vergata* was not otherwise insured for legal liability because the Court found that Section 31(3)(h) applied to exclude Benito, the driver, from liability coverage under the owner's certificate.[48] Hall, J.A., in giving the unanimous judgment of the Manitoba Court of Appeal found that this interpretation of the meaning of the expression "not otherwise insured for legal liability" was wrong. In speaking of Section 31(2), he said:

> That extended coverage does not arise when the driver is operating a motor vehicle designated in an owner's certificate. In support of this view are the words of s-s. (2) of s. 31 which read in part, 'operates a motor vehicle that is not otherwise insured'. The motor vehicle in the present case was and continued to be insured even though it was subject to certain exclusions. Added support is to be gained by the nature of the conditions annexed to extended coverage; these quite clearly contemplate a holder of a driver's certificate operating a vehicle not designated in an owner's certificate, which he had reasonable grounds to believe would be the case, but the present vehicle was so designated.[49]

Although the majority of the Supreme Court of Canada restored the decision of Dewar, C.J.Q.B., it is submitted that they clearly and consciously did so without approving of the trial Judge's reasoning in respect to the meaning of the words "not otherwise insured for legal liability" in Section 31(2). It is submitted that the interpretation placed by Hall, J.A. on Section 31(2) is the correct one as a matter of insurance law. And for the reasons just mentioned, it is submitted that that is the state of the law in Manitoba.

The sixth and final aspect of the Plan affected by the *Vergata* decision is the temporary substitute vehicle coverage in Part V, Section 56.[50]

Conclusion

It remains merely to make a few general observations about the manner in which the Autopac Plan was dealt with by the Supreme Court of Canada. The interpretation by the majority of the Court of the words in the general insuring provisions of the liability portion of

46. Man. Reg. 333/74, s. 31(2)(b).
47. "Other insurance" is defined in *The MPIC Act*, s. 1(aa) as insurance provided by a person other than the Corporation.
48. *Supra* n. 20, at 549.
49. *Supra* n. 22, at 531; [1976] 4 W.W.R., at 377.
50. The limitations imposed by the present format do not permit the discussion of this provision at this time.

the Plan is entirely reasonable and logical. What is fascinating to observe is how a form of words which anyone schooled in the business and practice of motor vehicle liability insurance[51] has taken "clearly" to indicate a minor addition to a basically vehicle-related owner's insurance has been transformed to an entirely separate and independent source of liability coverage. There is a lesson here for draughtsmen in technical areas where "presumed intention" cannot be taken for granted. If the conventional wisdom of the trade does not find clear expression in the words used, it may be passed by completely, as occurred in *Vergata*.

One aspect of the opinions of the Supreme Court deserves castigation. There is a common assumption, without any explanation or analysis, that the relationship between the Corporation and one who benefits from the Autopac Plan is contractual. A review of the quotations taken from the majority and dissenting judgments extracted above demonstrates the point. There was however no *conscious* attempt whatever to characterize the status of the "insured" and the "insurer" in the Plan. *The MPIC Act* itself speaks of "a contract;"[52] however, the Regulations setting out the terms of the coverages nowhere refer to a "contract," although the word "policy" is used in several section headings.[53] Indeed, by the manner in which the word "contract" is used in *The MPIC Act* it appears that the Plan itself is rather equivocal on the matter. For example, on the one hand, *The MPIC Act*, Section 1(1)(m) defines a "contract of insurance" as insurance provided by the Corporation and evidenced by an owner's or driver's certificate, yet on the other, *The MPIC Act*, Section 6(2)(g) empowers the Corporation, *inter alia*, to do all things necessary for the purpose of dealing with "claims made in respect of contracts by which the corporation may be liable as insurer, *or* in respect of any plan established. . ." under *The MPIC Act* (emphasis added). Furthermore, it is a basic tenet of contract law that whether a contract exists in law is a matter of legal principle for the courts, and the parties or the Legislature cannot merely by using the word "contract," necessarily create such a relationship.

The question of the nature of the relationship, which is left open by the terms of *The MPIC Act* and Regulations, is an important one for the scheme as a whole. It comes to the fore in many different circumstances — everything from whether general damages may be recovered from the Corporation for the breach by it of a

51. This includes the formulators of the Autopac Regulations and the dissenting members of The Supreme Court of Canada.
52. S.M. 1970, c. 102 (A180), ss. 1(1)(l), (n), (u), (ff), 6(2)(c), (e), (f), (g), 14.
53. Man. Reg. 333/74, ss. 22(1), 31(2).

"condition" in the Regulations[54] to when the limitation period against the Corporation begins to run.[55] The choice is between seeing the insured as a statutory beneficiary, like a recipient of Canada Pension Plan, Family Allowance, or Manitoba Health Services Plan benefits on the one hand, or as a party to an insurance contract in the common law sense on the other. Various arguments may be put to support each view, but they deserve to be treated in a separate monograph.

No Court which had tried an issue under the Autopac Plan, or under the Plan in Saskatchewan had ever addressed itself to this obviously fundamental issue. And the questions raised by the *Vergata* case, as to the source and extent of the liability coverage under the Plan, clearly invited a thorough analysis of the nature of the "insured-insurer" nexus. Although, however, both Pigeon, J. for the majority, and de Grandpré, J. for the dissenters persisted in employing the word "contract" to describe the owner's and driver's certificates, there was not a line of either judgment devoted to an examination of the appropriateness of doing so. It is submitted that this omission was a substantial disservice to the people of Manitoba.

On balance then, how does the treatment of the *Vergata* case by the Supreme Court of Canada stand up? There is a humane element in the result. A widow who was otherwise of very limited means[56] was able to realize fully upon her claim in the tort action against her brother-in-law. The sources of coverage in the liability portion of the Plan have been widened, and the exclusions narrowed substantially. It is submitted that for a universal, compulsory scheme such as Autopac, this is a healthy development. As for the loss by "non-owning" drivers of access to extension insurance on the vehicle they are driving, it is likely in practice that the Corporation will rarely enforce the letter of *Vergata* to that extent.

54. *See Bedard* v. *Saskatchewan Government Insurance Office*, [1966] S.C.R. 548.
55. *See Garner* v. *State Farm Mutual Automobile Insurance Co.*, [1975] W.W.D. 67 (B.C.S.C.) and Man. Reg. 333/74, s. 22(18).
56. A point disclosed informally to the author by both counsel in the case.