1976

Manitoba Law Reform Commission Working Paper on Fire Insurance

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Source Publication:
Canadian Business Law Journal. Volume 1, Issue 2 (1976), p. 253-258.

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Proposals for the reform of automobile insurance to one side, it is only very infrequently that one sees suggestions put forward for the reform of any branch of insurance law. For this reason alone, one is pleased to see the report of the Manitoba Law Reform Commission on Fire Insurance. The report is an interesting one but its tentative character makes it a difficult one to evaluate. The report itself states that it is a preliminary to a wider and more ambitious survey. In pointing out gaps in the Commission's analysis, one runs the risk of dealing with matters with which the full report will deal.

The Commission begins by making the recommendation that an unnamed insured should be given the right to sue on a policy. It is impossible to disagree with this recommendation but surely, the problem here is only part of the wider problem of defining insurable interest in property insurance. The extremely unsatisfactory nature of the law relating to insurable interest is noted in the conclusion[1] but no recommendation is made. It is difficult to see that the problem is either very difficult, or that the correct solution is particularly difficult to find. All that has to be done is to codify Lawrence, J.'s statement of the principle in *Lucena v. Craufurd*.[2] To do this would do no more than bring the law into line with commercial reality and common sense.[3]

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* Of the Ontario Bar.

[1] See pp. 93-94.

[2] (1808), 1 Taunt. 325, 127 E.R. 858.

[3] See Bertram Harnett and John Thornton, "Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept", 48 Colum. L. Rev. 1162 (1948).

The Commission then proposes that the distinction between "hostile" and "friendly" fires should be abolished[4] and it is impossible to quarrel with this recommendation. The Commission does not deal as well with the question of non-occupancy; here it recommends retention of the existing law. Most policies provide that non-occupancy of premises for more than 30 days will defeat the occupier's recovery. The Commission seems to recognize the difficulty that most people would think that non-occupancy would tend to *decrease* the risk but the Commission makes no proposals for change. One would like to have seen the Commission explore with the insurance industry the possibility of providing that non-occupancy provisions did not defeat recovery but individual companies could, if they desired, provide that they were not to be liable for fires deliberately caused by third parties. The Commission would also allow insurers to defeat recovery, even in the absence of a specified period of non-occupancy, by showing that the risk had in fact increased because of non-occupancy.[5] Two comments suggest themselves here: first, if non-occupancy is to be treated as increasing the risk, the insured should be given notice of this. Second, consideration should be given in an increase-of-risk situation to the adoption of a proportionate recovery rule, as is done in accident and sickness insurance.

In dealing with the assignment of insurance policies, the Commission endorses the decision of the Supreme Court of Canada in *Springfield Fire and Marine Insurance Co. v. Maxim Eagle Fire Co. of New York v. Maxim*,[6] and recommends that the effect of that decision be translated into legislation. According to the Commission the effect of *Maxim* is to make the insurance policy assignable to the purchaser who takes the benefit of the policy but is not subject to any of the defences which might have been raised against the vendor. Unfortunately, the Commission has misunderstood the *Maxim* case; that case did not deal with assignment at all, but rather with *novation*. There is no need to have a statutory provision which allows for a novation to take place. What one would like to see is the codification of James, L.J.'s dissenting judgment in *Rayner v. Preston*,[7] the effect of which would be to make the vendor a

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[4] Compare *Harris v. Poland*, [1941] 1 K.B. 462 with *Young v. Waterloo Mutual Fire Insurance Co.*, [1955] I.L.R. para. 1-202.

[5] See *Sun Insurance Office of London, England v. Roy; Guardian Life Assurance Company of London, England v. Roy*, [1927] 1 D.L.R. 17, [1927] S.C.R. 8.

[6] [1946] 4 D.L.R. 369, [1946] S.C.R. 604, 13 I.L.R. 108.

[7] (1881), 18 Ch.D. 1 (C.A.).

constructive trustee with regard to the purchaser of any monies received from the insurer. It may well be that s. 40 of the Law of Property Act, R.S.M. 1970, c. L90 which gives the Court of Queen's Bench power to direct the application of any monies received or receivable under any insurance policy, achieves the same result as James, L.J.'s dissent in *Rayner v. Preston* but it would be helpful if the court were to be given guidelines in deciding how to apply the monies. It would also be helpful if s. 40 of the Law of Property Act could be placed in the relevant part of the Insurance Act.

The Commission's analysis of subrogation is disappointing; we are told that subrogation "serves, in part, to prevent an insured from being owner-indemnified for a loss".[8] This function is a highly desirable one with which it is impossible to quarrel. But subrogation also serves the function — in a very expensive manner — of shifting losses to other insurers and to uninsured persons who often cannot be expected to shoulder the very heavy burden which is imposed on them. Perhaps the best example of a class of persons who cannot reasonably be expected to shoulder the burdens that subrogation imposes are tenants.[9] It is remarkable that the Commission does not consider this aspect of the doctrine. Instead, the Commission spends all its time discussing the position of the insurer who has indemnified someone who has under-insured his property. At present, the insurer may in such a situation sue the tortfeasor and the proceeds of recovery are to be divided between the insurer and the insured in proportion to their loss. The Commission wishes to change this rule so that, in future, the proceeds of recovery will be applied to indemnify the insured fully for the loss he has suffered and the balance (if any) will go to the insurer. This change will, most likely, act as a disincentive to insurers from pursuing their subrogation rights. If insurers do not pursue their subrogation rights, will they be liable to their insureds for breach of duty? It is suggested that the most satisfactory rule is the old common law rule which gave the insurer no subrogation rights in a case of under-insurance.[10]

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[8] See Report at p. 27.

[9] See, generally, Milton R. Friedman, "Landlords, Tenants and Fires — Insurer's Right of Subrogation", 43 Cornell L.Q. 225 (1957), and note the unfortunate Ontario decisions in *Pyrotech Prod. Ltd. v. Ross Southward Tire Ltd.* (1971), 21 D.L.R. (3d) 168, and *Cummer-Yonge Inv. Ltd. v. Agnew-Surpass Shoe Stores Ltd.*, [1972] I.L.R. 1461, 25 D.L.R. (3d) 501, [1972] 2 O.R. 341, revd in part 55 D.L.R. (3d) 676, 4 N.R. 547 (S.C.C.).

[10] See *Globe & Rutgers Fire Insurance Co. v. Truedell*, [1927] 2 D.L.R. 659, 60 O.L.R. 227 (Ont. C.A.).

The Commission is on sounder ground when it recommends a number of other changes; instead of notice of loss having to be given "forthwith", it is recommended that it should be given "within a reasonable time". Further, notice of loss need no longer be given in writing.

The Commission also, rightly, recommends that the limitation period be increased from one year to two years. Even with a two-year limitation period, it would be wise to give the courts a dispensing power so as to enable the insured to bring his action even after two years, where it was "not reasonably practicable" for him to bring his action within the two-year period.[11]

The discussion of the limitation period leads, naturally enough, to the question of relief from forfeiture. Here, the Commission is very ambitious. It would replace the present anti-forfeiture provisions which apply only to duties imposed on the insured after loss with the general s. 63, Rule 7 of the Queen's Bench Act, R.S.M. 1970, c. C180, which would give the courts a general power to relieve against forfeitures. The difficulty with this solution is that it would give too much discretion to the courts and make the law overly complex; the courts would be given a dispensing power in the areas, for example, of misrepresentation and increase of risk when it should be possible to devise fair rules for these areas without the need for a general dispensing power as a back-up. It is submitted that all the difficulties the Commission instances could be dealt with by making two minor verbal changes to s. 130 of the Insurance Act, R.S.M. 1970, c. I40. First, instead of "imperfect compliance", the statute should provide "imperfect compliance or a failure to comply". Second, "statutory condition" should be changed so that it provides for all conditions — statutory and non-statutory.

The Report is at its best when discussing the present chaos surrounding waiver and estoppel. It shows how some courts have contorted the law in order to evade the statutory rule that a waiver must be in writing. The Commission sensibly recommends the abolition of the rule and a prohibition of any waiver-in-writing clauses in future policies.

Unfortunately this excellent discussion is followed by a thoroughly unsatisfactory analysis of misrepresentations and warranties. The

[11] One example of where it would not be "reasonably practicable" for the insured to bring a claim within the requisite period is the situation where the insurer persuades the insured not to bring an action because the company says it will settle without the need for litigation. If the insured does not begin an action in these circumstances and the limitation period has run out without the insurer having paid, relief should be given to the insured.

Commission recommends that before an insurer can avoid a policy for misrepresentation it must show that the misrepresentation was made fraudulently. The Commission takes this view because, otherwise, an insured might be penalized for making an innocent misrepresentation. But "innocent" misrepresentations come in all shapes and forms and it seems wrong not to distinguish between them. Surely, there is a difference between a man who writes down an incorrect answer after making reasonable inquiries and the man who writes down an incorrect answer without bothering to make any inquiries. Both men are "innocent" in that neither intends to defraud the insurance company but their merits are very different. It is submitted that the first insured should receive full recovery and the second insured should — at most — receive proportionate recovery. One's sense of mystification deepens when the Commission proposes that for warranties, as opposed to misrepresentations, the insurer can avoid simply on grounds of materiality! Why there should be such a vast difference in the legal consequences between warranties and misrepresentations when the two concepts are functionally identical, defies comprehension.

With regard to non-disclosure, the Commission wishes to undertake a study to determine whether the doctrine of *uberrima fides* has outlived its usefulness but in the meanwhile, it supports the present rule whereby fraudulent non-disclosure entitles the insurer to avoid the policy.[12] It is difficult to believe that insurers feel strongly about this; had they done so, they would have made efforts (as they have done successfully in the field of subrogation) to have the law changed. It is difficult to believe that the notion is of much use to insurers. There does not appear to be a reported case since 1935[13] where the defence has been successfully invoked. Perhaps this is due, in part, to the fact that the whole notion of fraudulent non-disclosure is a curious one. Fraud, at least in its normal meaning, suggests the doing of a positive act with the intention of misleading someone and in the fraudulent non-disclosure cases, the insurer cannot point to such a positive act.

The Commission ends its report by discussing the legal status of intermediaries (agents and brokers). The Commission is, rightly, highly critical of the pernicious rule in *Newsholme's*[14] case which holds that when an agent fills in the proposal form he is acting as an agent for the

[12] See *Taylor v. London Assurance Corp.*, [1935] 3 D.L.R. 129, [1935] S.C.R. 422, 2 I.L.R. 252.
[13] This is the date of the *Taylor* case (see previous note) when the present law was laid down.
[14] *Newsholme Bros. v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K.B. 356.

insured. The decision in *Newsholme's* case rests, not as the Commission seems to think, on any notions of authority, but rather on the notion that insureds should be bound by documents they sign. As Scrutton, L.J., said in *Newsholme:*

> . . . I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true, and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed.[15]

There can be no doubt that if *Newsholme* were reversed there would be some undeserving beneficiaries from the change, but the Commission is entirely correct in suggesting that the time has come for insurance companies to be answerable for the misdeeds of their agents. In view of the fact that the courts seem to regard brokers, as opposed to agents, as being agents of the insured,[16] it would probably be advisable to make an express reference to brokers in the statute. Unfortunately, statutory provisions such as the one proposed by the Commission, have been rendered of no value by some remarkably myopic interpretation by the courts.[17]

Conclusion

Whatever disagreements one might have about particular recommendations, the Report is to be welcomed as a serious attempt to deal with a difficult and neglected branch of the law. It is to be hoped that Law Reform Commissions in other provinces will emulate the Manitoba example and review their insurance law. Platitudes about "highly regulated industries" are no substitute for searching and critical analyses.[18]

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[15] *Ibid.*, at p. 376.

[16] See, *e.g.*, *Anglo-African Merchants v. Bayley*, [1970] 1 Q.B. 311. But *cf.* the decision of the Supreme Court of Canada in *Canadian Indemnity Co. v. Okanagan Mainline Real Estate Board* (1970), 16 D.L.R. (3d) 715, [1971] S.C.R. 493, [1971] 1 W.W.R. 289, which indicates that, for some purposes at least, the courts will treat a broker as an agent of the insurer.

[17] See, *e.g.*, *Sleigh v. Stevenson*, [1943] 4 D.L.R. 433, 10 I.L.R. 287, [1943] O.W.N. 287 and *Boutilier v. Traders General Insurance Co.*, (1969), 7 D.L.R. (3d) 220, [1966-70] I.L.R. 815, [1969] I.L.R. 1-299, in which decisions the Ontario Court of Appeal and the Nova Scotia Court of Appeal, respectively, nullified statutory provisions similar to the one recommended by the Commission.

[18] Although I have tried in the present note to comment on matters dealt with by the Commission I cannot forbear from mentioning one glaring omission from the Commission's Report. There is no discussion of the extremely important problem of valuation. It is greatly to be hoped that the Commission will deal with this extremely important subject in their final report.

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