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In Depth

AGENTS' AND BROKERS' LIABILITY:

The Continuing Legacy of Fine's Flowers'

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AGENTS' AND BROKERS' LIABILITY:
The Continuing Legacy of Fine's Flowers*

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I. INTRODUCTION

This paper is an attempt to summarize developments in the law of agents' and brokers' liability in the decade and a half that has now passed since the trial judgment in Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada[1] was affirmed by the Ontario Court of Appeal. Some suggestions will also be made as to how agents, brokers and insurers can avoid liability to insureds and to one another.

This paper will first consider the various theories of liability, including similarities and differences between contract and negligence cases. Some agency issues will be considered, as well as by whom and to whom obligations are owed. The next section will canvass the role of instructions and representations in determining the nature of these obligations. The longest section of the paper will consider the types of conduct by agents and insurers which will create liability. Out of this discussion a number of basic principles will emerge. The next sections will deal with the defences which are available, including contributory negligence. Damages will also be considered, as will evidentiary matters and procedural issues. The paper will conclude with some practical recommendations for avoiding liability.

The paper only considers reported Canadian cases, and will deal almost exclusively with decisions since Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada (*supra*). It will quickly become apparent that there have been an increasing number of cases in this area, all of which have turned on their own particular facts. It will be suggested that the trend has been to broaden the categories of agents', brokers' and, indeed, insurers' liability, and to make the successful defence of claims by insureds increasingly difficult.

By way of example, should an agent be held liable for failing to obtain a given type of coverage, in the absence of clear evidence that it was available in the market? How quickly do you think an agent should be required to place coverage in response to a telephone request from an existing commercial client? What do you think might happen if an agent sues for unpaid premiums? Should an agent advise an insured not to cancel underinsured motorist coverage, when the insured has already made a tentative decision to do so? Is an agent obliged to assist an insured in making a claim under his policy? What if an insured suffers serious but

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1 (1978) 81 D.L.R. (3d) 139 (Ont. C.A.), affirming (1974) 49 D.L.R. (3d) 641 (Ont. H.C.)

uninsured consequential business or even personal financial losses between the date of a fire and ultimate recovery against his agent for failing to place fire coverage? To find out, read on.

II. THEORIES OF LIABILITY

This section will only outline the theories of liability. Specific issues will be dealt with later.

The two most common theories, as well as one which remains largely untested, were identified by Estey, C.J.O. (as he then was) in the following passage from His Lordship's reasons in Fine's Flowers:[2]

> "In order for the defendant agent to be liable in contract there must, of course, first be a contract...
>
> [However], because of the different concept in the minds of the representatives of the plaintiff and the defendant agent of the term "full coverage" there does not appear to have been any meeting of the minds on this essential term. Lacking an *animus contrahendi*, no contract could have arisen between the parties to affect the type of insurance coverage contemplated by the plaintiff and, thus, no contract arose between the plaintiff and the defendant to obtain the insurance coverage described by the plaintiff.
>
> Given the findings of fact made by the learned trial Judge on the evidence lead before him **it is possible to circumvent the complex line of reasoning necessary to lead to liability in contract and to establish liability in the defendant agent either in the field of negligence or by reason of a special relationship giving rise to liability in the law of equity**." (emphasis added)

In that now famous case, the insurer denied coverage under a wear and tear exclusion when the insured's pumps ceased operating and his greenhouses froze up. There had been no specific discussions between the insured and the agent about the policy, let alone this exclusion, and there was no clear evidence that an exception to that exclusion could have been obtained in the marketplace.

The first two theories are therefore contract and tort (ie. negligence). With respect to "liability in the law of equity", His Lordship went on to find that fiduciary duties may be owed by agents, with the result that insureds and insurers may be entitled to equitable relief against their agents.[3]

There are at least two other theories, although negligence is the only one that has been discussed in any detail in the recent cases (i.e. since the original version of this paper was

2 *Ibid*., pp. 144-5
3 *Ibid*., p. 145

prepared, in 1991).[4] The courts and texts have also identified a contract-related doctrine, breach of "warranty of authority", and estoppel. In addition, insurers may be held vicariously liable for their agents' conduct.

1. Contract

Insureds often sue upon what they maintain is a valid contract of insurance. They usually sue their agent, in the alternative, for failing to obtain any or adequate coverage. It is therefore somewhat ironic that insureds will sometimes sue their agents not merely for negligence but also for breach of a contract to insure.

Three issues arise in these cases. First, was there a contract of insurance? Second, was there, in the alternative, a contract with the agent whereby he agreed to obtain coverage? Finally, does the agent's failure to provide coverage constitute a breach of that contract?

The first issue is usually settled by determining whether the agent had authority to enter into the contract. This will be considered in the section of the paper on agency.

The second issue will usually be resolved by determining whether there was consideration for any agreement between the insured and the agent. In two of the earlier (ie. before Fine's Flowers) cases an issue was raised as to whether the agent was acting gratuitously. If so, there would be no contractual liability. In Fairbrother v. Dawson,[5] the Ontario High Court held that because a car dealers' undertaking to obtain insurance had been assumed as part of the consideration for the purchase, the agent was not acting gratuitously and was contractually liable. In Kostiuk v. The Union Acceptance Corporation,[6] the Saskatchewan Court of Queen's Bench came to the contrary conclusion, in similar circumstances.

However, this issue now appears to have been resolved by the Ontario and Saskatchewan Courts of Appeal. In Cosyns v. Smith,[7] the Ontario case, the insured had requested that his agent place additional coverage on a greenhouse. Oral but not written confirmation of coverage was provided by the agent, but an additional premium was neither requested nor paid. The trial Judge had found on these facts that there was no consideration and therefore no contract, and had proceeded to award partial judgment on the alternative basis of contributory negligence. Lacourciere, J.A. stated the following, in reversing the trial decision:[8]

> "In my opinion, the learned trial Judge erred in finding that there was no consideration to support the contract between the plaintiff and the defendants. The defendants, as general insurance agents, undertook to take steps to insure that the insurance policy would be amended in order to provide

4 Only two subsequent decisions have so much as referred to the fact that agents and brokers may be liable in contract or breach of fiduciary duty, as well as negligence. These were Niagara Frontier Caterers Ltd. v. Continental Insurance of Canada (*infra* – note 170), which was decided on negligence grounds, and Danielson v. Reed Stenhouse Ltd. (*infra* – note 234) as for breach of warranty of authority, and estoppel, these doctrines have not even been discussed in any of the recent cases.

5 [1954] O.W.N. 129 (Ont. H.C.)

6 (1968) 66 D.L.R. (2d) 430 (Sask. Q.B.)

7 (1983) 1 C.C.L.I. 101 (Ont. C.A.)

8 *Ibid*., p. 104

> the additional protection requested. They assured the plaintiff that nothing more was needed and that he was covered in respect of the greenhouse. **This undertaking and this assurance were not gratuitous, as found by the learned trial Judge, but were based on the expressed or implied undertaking of the plaintiff to be responsible for the payment of the additional premium**. I find that valid consideration in law moved from the plaintiff to the defendants: **the exchange of promises in** (sic) **the consideration moving from each party sufficient to support a contract**." (emphasis added)

The agents were therefore liable in contract.

In the other decision, Piggott Construction (1969) Ltd. v. Saskatchewan Government Insurance Office,[9] the insurers themselves were held liable. This case was decided after, but without reference to Cosyns v. Smith (*supra*). The Court held, without detailed reasons, that "an oral contract of insurance came into being", pursuant to which S.G.I.O. became obligated to indemnify Piggott against "all … losses … customarily embraced by the expression "builders all risk"", and "to issue a policy substantially in conformity with the oral contract", in return for which Piggott "was bound … to pay the agreed premium".[10] In other words, an oral contract of insurance, with either an insurer or an agent, may be found even though the insured has not paid a penny of premiums.

As noted by one of the authors,[11] the final issue, as to whether the agent has breached a contract to obtain coverage, is often resolved by answering the following question posed by Swinfen-Eady, L.J. in Hood v. West End Motor Car Packing Co., a decision of the English Court of Appeal:[12]

> "Was it a contract by which the defendants only **agreed to take all reasonable steps to procure an effective insurance** on the car, or was it a contract by which they **undertook to procure an effective insurance** on the car?" (emphasis added)

On the one hand, if the agent only agreed to take "all reasonable steps", then liability is to be determined on the basis of the negligence standard of "reasonable" care. On the other hand, if the agent "under[took] to procure an effective insurance", liability is to be determined according to contractual principles, under which reasonableness and fault are not in issue. If so, the agent will be held to have virtually "guaranteed" that insurance would be placed. More will be said of this in the section on instructions and representations.

2. Tort (Negligence)

Almost all of the cases involve allegations of negligence, and most awards are based on this theory of tort liability, as opposed to the "equitable tort" of breach of fiduciary duty. The textwriters identify two general duties of care on the part of agents, firstly, to obey their

9 (1986) 16 C.C.L.I 204 (Sask. C.A.), reversing (1984) 3 C.C.L.I. 101 (Sask. Q.B.)
10 *Ibid*., p. 104 (Q.B.)
11 Richard E. Shibley, "Actions Against Agents and Brokers", *Claims Under Insurance Policies*, Special Lectures
12 [1917] 2 K.B. 38 (C.A.), p. 44

instructions and carry out the transaction requested and, secondly, to use proper skill in doing so.[13] It can be seen that this is more or less equivalent to the "reasonable steps" approach in the first half of Lord Swinfen-Eady's test in Hood v. West End Motor Car Packing Co. (*supra*). These same authors have identified the following specific examples of using proper skill:[14]

- ascertaining the insureds' needs;
- explaining the policy and advising the insured as to coverage;
- accurately representing coverage, including the availability of coverage, to the insured;
- accurately representing the risk to the insurer; and
- obtaining coverage with reasonable speed.

Although we will later consider breaches by agents under different and more specific categories, all of these examples of "proper skill" will be covered.

Depending upon the circumstances, there will usually be a third general duty, to properly advise insureds. This arises out the law of "negligent misrepresentation" or "duty to warn", of which more will be said later, in the section which compares contractual and negligence liability.

Perhaps the most useful recent discussion of negligence is found in Dueck v. Manitoba Mennonite Mutual Insurance Co.[15] which will be considered later. The focus in that case was on the "duty to warn" the insured.

3. Equity (Breach of Fiduciary Duty)

This theory has only been specifically discussed in two reported Canadian cases since Fine's Flowers. In Hornburg v. Toole Peet & Co. Ltd.,[16] the Alberta Court of Queen's Bench noted the plaintiff's submission:[17]

> "… that there was **a relationship of trust** or contract between the insured and the agents **such that the agent owes a duty to the insured to take some initiative or precautions** to ensure that the client has adequate coverage." (emphasis added)

Power J. continued at the same page by stating that:

> "I do not think this is too hard a standard to oppose upon an agent who knows that his client is relying upon him **to see that he is protected from all foreseeable, insurable risks**." (emphasis added)

13 Ivamy, *General Principles of Insurance Law*, 4th Ed., pp. 549-55; McGillivray & Parkington, *Insurance Law*, 8th Ed., pp. 150-4; and Shibley pp. 244-53, note 11

14 Ivamy, *Ibid*., pp. 549-55; McGillivray & Parkington, *Ibid*., pp. 150-4; and Shibley, *Ibid*., pp. 244-53

15 (1992) 11 C.C.L.I. (2d) 87 (Man. Q.B.), affirmed (1993) 13 C.C.L.I. (2d) 155 (Man. C.A.)

16 1981] I.L.R. 1-1309, p. 21 (Alta. Q.B.)

17 *Ibid*., p. 25

However, the overall tenor of His Lordship's reasons suggests that he was relying upon mere negligence and not breach of fiduciary duty.

In Roy v. Atlantic Underwriters Ltd.,[18] a decision of the New Brunswick Court of Appeal, the dissenting Judge cited Fine's Flowers and would have held that:[19]

> "The appellant ... as a knowledgeable and experienced agent aware of his responsibilities to his customer, Mr. Roy, [owed Mr. Roy a fiduciary duty and] failed to exercise the degree of due care required of him in the circumstances."

However, Angers, J.A. (Stratton, C.J.N.B. concurring), stated as follows:[20]

> "It is settled law that in the absence of a contract or an undertaking to renew, there is no duty on an insurance agent to automatically renew policies of insurance...
>
> In the present case, the trial Judge did not identify any duty on the part of the appellant to renew the policies...
>
> The trial Judge did not make a finding on [the issue of an equitable duty arising out of the fiduciary relationship of the parties]. **In the Fine's Flowers case there was an undertaking upon which the equitable duty was based; we do not have such an undertaking in this case**." (emphasis added)

What remains unclear from these three cases (ie. including Fine's) is whether there is any meaningful distinction between the fiduciary duty they describe and the contractual "under[taking] to procure an effective insurance" described in Hood v. West End. This will also be dealt with the section comparing contractual and negligence liability.

4. Breach of Warranty of Authority

Although this theory is canvassed by one set of textwriters,[21] there do not appear to be any recent reported cases applying it in the insurance context.[22] In essence, it provides that an insured can recover from an agent who "warrants" that he has the insurer's authority to bind coverage, when he does not. Practically speaking, there is little difference between this theory and breach of an oral contract of the type found in Cosyns v. Smith or Piggott v. Saskatchewan Government Insurance Office (*supra*).

5. Estoppel

Estoppel, in this context, may be seen as a branch of negligent misrepresentation. The doctrine is discussed in detail in one of the author's papers titled "*When A Denial Is Not A*

18 (1986) 17 C.C.L.I. 266 (N.B.C.A.), reversing (1985) 9 C.C.L.I. 77 (N.B.Q.B.)
19 *Ibid*., p. 275 (C.A.)
20 *Ibid*., p. 269 (C.A.)
21 Brown, Craig and Menezes, Julio, *Insurance Law in Canada*, 1982, pp. 60-1
22 Although it was earlier discussed in Wandlyn Motels Ltd. v. Commerce General Insurance Co., [1967] I.L.R. 1-190, p. 200 (N.B.Q.B.) affirmed [1969] I.L.R. 1-251, p. 603 (N.B.C.A.), affirmed [1970] I.L.R. 1-352, p. 1017 (S.C.C.)

Denial: Waiver and Estoppel of Defences and Confirmation of Causes of Action Under Insurance Policies".[23] In a nutshell, representations as to the existence of coverage by both agents and insurers have created liability by effectively providing coverage where none had existed.

In Colony Lincoln Mercury Sales Ltd. v. Haber Insurance Broker Ltd.,[24] a 1985 decision of the Ontario District Court, the agent advised that he would issue a binder on the understanding that he would be sent a deposit of $100.00. The deposit was not sent and the agent, unable to contact the insured, advised the insurer not to proceed with the application. The binder expired before the date of the (inevitable) accident, and the insured sued the agent. Although he rejected a claim in contract, Filer, D.C.J. found the agent liable for contributory negligence, stating as follows:[25]

> "Having induced the plaintiff to act in a certain way, to its detriment, the defendant [agent] had a duty to advise [the applicant] Colony that it was proceeding to terminate the application for insurance and that the binder was either being cancelled or that it was about to expire … The plaintiff relied on the defendant … to proceed in a reasonable and business-like manner to secure insurance on the automobile. As a direct result of assurances by the defendant, it released possession of the automobile …"

Although couched in the language of estoppel, His Honour's reasons did not refer to the doctrine by name. Nevertheless, coverage was effectively created without any premium being paid.

In two 1984 decisions insurers were expressly estopped from denying coverage. Capital Crane Ltd. v. Atlantic Insurance Co.[26] was a decision of the Newfoundland Supreme Court. The plaintiff claimed damages for the collapse of the boom on its crane. The insurer denied coverage on the basis of an overloading exclusion. Although Steele, J. ultimately concluded that there was insufficient evidence of overloading, he dealt first with the plaintiff's allegations that the insurer was estopped from relying on the exclusion. The plaintiff's representative had,[27]

> "… repeatedly emphasized [to the agent's representative] that he wanted to be covered for boom collapse whatever the cause and for everything except fraud."

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23 Available from the author on request. This is an updated and substantially revised version of a paper which was first prepared and copyrighted by the author in 1991. The original version was presented both at a B.C. Adjuster's Association meeting in February of 1991, and at C.L.E.'s "Insurance Potpourri" on February 28, 1992, in Vancouver. It was also published, in its original form, in *C.J.I.L.*, Vol. 9, Nos. 4-6 (Butterworths Canada Ltd. – edited by Lazar Sarna), and *C.I.L.R.*, Vol. 2, No. 3, August, 1991 (Carswell). The current version of the paper was presented at "Liability Insurance and Coverage Disputes", the fourth annual major seminar on selected topics sponsored by the Insurance Institute of B.C., on April 15, 1994, in Vancouver.

24 (1985) 11 C.C.L.I. 157 (Ont. D.C.)

25 *Ibid*., p. 163

26 (1985) 20 C.C.L.I. 177 (Nfld. S.C.)

27 *Ibid*., p. 182

Although the agent's representative "understood that [the plaintiff] wanted the broadest coverage possible", he had said to the insured's representative that "you cannot cover anything for everything".[28] Nevertheless, His Lordship concluded as follows:[29]

> "[The agent,] Woolley should have spoken up and made [the insured,] Taylor aware of [the overloading] exclusion 3(a) if, in fact, it had been his intention to let that exclusion remain in the policy."

He later reiterated that,[30]

> "… Woolley, throughout the negotiations but particularly during and immediately after the meeting with Taylor, by his conduct of silence or inaction misled Taylor into believing that the policy would provide coverage for loss or damage whatever the circumstances and that Taylor was thereby induced to award him the insurance contract."

Estevan Brick v. Gerling Global General Insurance Company[31] was a decision of the Saskatchewan Court of Queen's Bench. As in Capital Crane Ltd. v. Atlantic Insurance Co. (*supra*), Halvorson, J. was compelled to assess the credibility of witnesses who had given conflicting evidence as to the discussions preceding the issuance of coverage for a brick manufacturing plant. His Lordship ultimately accepted the insured's evidence that specific assurances were made by a representative of the insurer that the gear-boxes in question would be covered, and held that the insurer therefore could not deny coverage.

Although the theory was not explicitly referred to, estoppel also formed the basis of liability in the recent case of Random Ford Mercury Sales Ltd. v. Noseworthy.[32] That decision will be discussed later.

In only one of the estoppel cases was the insured's claim dismissed. In Roy v. Atlantic Underwriters Ltd. (*supra*) the New Brunswick Court of Queen's Bench dismissed a claim of negligence against an agent and the insurers on the basis of a lack of authority to bind coverage. However, Jean, J. did find as follows:[33]

> "From the course of conduct of the parties I find that [the insured] Roy was justified in believing that [the agency] Edmond Viennau Assurance Ltd. had undertaken to renew all of his policies as they became due and in relying on him for so advising the general agent. I therefore find that the agent was negligent. I further find that Roy was justified in treating the notice as evidence of the renewed and following the established procedure of waiting for the statement."

28 *Ibid*., p. 183
29 *Ibid*., p. 189
30 *Ibid*., p. 191
31 (1985) 9 C.C.L.I. 229 (Sask. Q.B.)
32 (1992) 95 D.L.R. (4th) 168 (Nfld. S.C.)
33 note 18, p. 83 (Q.B.)

The "course of conduct" referred to was that,[34]

> "… from 1979 to the time of the fire loss in 1982 the policies for all of the six items covered were renewed and systematically billed one month or so after the renewal date."

However, the Court of Appeal overturned the trial decision, holding as follows:[35]

> "[I]t is settled law that in the absence of a contract or an undertaking to renew, there is no duty on an insurance agent to automatically renew policy of insurance..."

With respect, this begs the question as to whether estoppel may be available to fill the void left by the absence of any such general duty. The above cases suggest that, depending on the circumstances, it may.

6. Vicarious Liability

There is no doubt that an agency will be held vicariously liable for the negligence of its employees.[36] In addition, an insurer will be held vicariously liable for the conduct of its agent, depending upon who the agent was acting for with respect to what he did or did not do. This is complicated by the fact that agents may act for more than one party in respect of a given transaction. In a nutshell, insurers will generally be held vicariously liable for all conduct of the agent undertaken within the scope of the agency agreement.[37]

A three-step analysis is required. First, was the agent acting for the insurer? Second, if so, was the agent acting for the insurer when he did or failed to do the impugned thing? Finally, was he acting within the scope of his authority at the time? These analytical steps will be considered in more detail below, the first two in the agency section and the last two in the section on who may be liable to who. As one of the authors has noted,[38] a practical consideration in all of this is whether an insurer would, as a matter of business, want to sue an agent upon which it depends to increase its underwriting. It will be seen that the answer, increasingly, is "yes".

Recent examples of cases in which insurance companies have been held vicariously liable for the errors and omissions of agents include Rivard v. The Mutual Life Insurance Co. of Canada[39] and Theophanus v. Mutual of Omaha Insurance Co..[40]

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34 *Ibid*., p. 82 (Q.B.)
35 *Ibid*., p. 269 (C.A.)
36 For example, see 533476 Ontario Ltd. v. Southern Counties Insurance Managers Ltd., [1990] I.L.R. 1-2534, p. 9859 (Ont. D.C.); Ataya v. Mutual of Omaha Insurance Company, [1988] I.L.R. 1-2316, p. 8958 (B.C.S.C.); and Coyle v. Ray F. Fredericks Insurance Ltd., (1984) 7 C.C.L.I. 223 (N.S.S.C.)
37 Shibley, note 11, p. 253
38 *Ibid*., p. 258
39 [1993] I.L.R. 93 – 411, June 12, 1992 (Ont. Ct. – Gen. Div.)
40 (1991) 2 C.C.L.I. (2d) 107 (Ont. C.J. – Gen. Div.)

III. CONTRACTUAL AND NEGLIGENCE LIABILITY

There are significant similarities and differences between the principles governing liability and damages in contract and negligence. There has been a debate as to the availability of contributory negligence in contract actions, although this is now largely settled. There has also been some issue as to whether liability is concurrently available in both contract and negligence.

1. Similarities

Contractual and negligence liability of agents and brokers have traditionally been considered similar firstly, because generally the same standard of care is owed and, secondly, because the measure of damages is generally the same.

With respect to the standard of care, this traditional view is illustrated in Norlympia Seafoods Ltd. v. Dale & Co. Ltd.,[41] a 1983 decision of the British Columbia Supreme Court. In that decision, McLachlin, J. (as she then was) noted that although a claim against an agent may be framed in contract, it is the law which imposes a duty of care, by means of an implied term of the contract,[42] and that "liability may be found either in tort or contract."[43] Hence, the inevitable similarity.

However, the law is not quite as simple as this. It is suggested that there are really two distinct standards of care, one in negligence and one in fiduciary duty, and that the one that applies will depend not on whether there is a contract to obtain coverage or not, but upon the extent of the obligations that an agent assumes on behalf of a client. These obligations may be pursuant to a contract, a mere duty of care (ie. negligence) or a fiduciary (ie. higher) duty.

As we will see, this issue generally arises in one of two situations. The first is where the agent fails to place the coverage requested by the applicant. In that situation the issue is generally resolved by answering Lord Swinfen-Eady's question in Hood, referred to above. If the contract was one by which the agent "agreed to take all reasonable steps to procure … effective insurance …", the relevant standard of care is identical to that in negligence. If the contract was one by which the agent "**undertook** to procure … effective insurance …", then the existence of any fault on the agent's part, let alone its degree, is not in issue at all. Liability is, to that extent, "strict", and perhaps even higher than that of a fiduciary.

The second situation is where the insured claims that the coverage which the agent placed is inadequate for his purposes. To use Lord Swinfen-Eady's turn of phrase, it was not "an effective insurance". In these types of cases, similarly, liability may be determined according to either a negligence standard or a fiduciary or even strict standard. In Fine's Flowers, Estey, C.J.O. had this to say about the applicable standard of care:[44]

41 [1983] I.L.R. 1-1688, p. 6475 (B.C.S.C.)
42 *Ibid*., p. 6494
43 *Ibid*., p. 6491
44 note 1, p. 141 (C.A.)

> "[I]f there was indeed a contract in law to cover "all insurable risks", then the plaintiff [insured] must show that the contract was breached by the defendant [agent] and that the loss was suffered by reason of an insurable risk for which the plaintiff should have been covered. On the other hand, if the arrangement was to procure "adequate coverage" for all "foreseeable" risks, to use some of the language in the judgment below, and if the defendant, in being unable to obtain such insurance coverage, failed to go back and report such difficulty to the plaintiff, then it may be said that the defendant was negligent in the performance of the duty it had undertaken to perform for the plaintiff for consideration."

Wilson, J.A. also compared the two standards, stating as follows:[45]

> "In many instances, an insurance agent will be asked to obtain a specific type of coverage and his duty in those circumstances will be to use a reasonable degree of skill and care in doing so or, if he is unable to do so, "to inform the principal promptly in order to prevent him from suffering loss through relying upon the successful completion of the transaction by the agent" …
>
> But there are other cases, and in my view this is one of them, in which the agent gives no such specific instructions but rather relies upon his agent to see that he is protected and, if the agent agrees to do business with him on those terms, then he cannot afterwards, when an uninsured loss arises, shrug off the responsibility he has assumed. If this requires him to inform himself about his clients business in order to assess the foreseeable risks and insure his client against them, then this he must do. It goes without saying that an agent does not have the requisite skills to understand the nature of his client's business and assess the risks that should be insured against should not be offering this kind of service … I do not think that this is too high a standard to impose upon an agent who knows that his client is relying upon him to see if he protected against **all foreseeable, insurable risks**." (emphasis added)

What Estey, C.J.O. and Wilson, J.A. (in the second paragraph) described in the above passages was a form of fiduciary or even strict liability. In the first paragraph, Wilson J.A. described a negligence standard.

To place all of this in context, this is what Fraser J., had said in the trial judgment:[46]

> "In the instant case I find the facts were such that while it may not have been formulated in precise terms the only reasonable inference is that there was a contractual undertaking binding on the defendant [agency] that it would keep the plaintiff [applicant] covered for **all foreseeable, insurable and normal risks** to the property used in connection with its business and that this would include the loss now in question.
>
> …
>
> I find on the facts that throughout the period in question the plaintiff looked to [the agency,] Ault to keep it fully covered, that Ault knew that and had

45 *Ibid*., p. 149
46 *Ibid*., pp. 650-1 (Q.B.)

> undertaken the responsibility of doing so … Needless to say, when I speak of being fully covered I do not mean it in the literal sense but in the sense of covering **all insurable risks** likely to arise in connection with the properties and business in question. The loss in question was such a risk." (emphasis added)

Where does this leave us? The key is the limiting term "normal risks" which was used by the trial Judge, but left out by the Court of Appeal. What this clearly connotes is the negligence concept of "reasonable foreseeability". In other words, under this standard agents would not be held liable for the omission of risks that were not "normal" or "reasonably foreseeable". However, this is not the standard that the Court of Appeal imposed. They considered, in effect, that the agent had "guaranteed" not merely that insurance would be placed, but that it would cover virtually all risks.

This is so because two of the three Court of Appeal judges held that the contract for "full coverage" included in its terms:[47]

> "… coverage against all **foreseeable insurable risks** of the plaintiff's [applicant] business and [that] the risk which [the agent] Mr. Campbell failed to protect the [insured] against was both **foreseeable and insurable**." (emphasis added)

This was in answer the following question which Wilson J.A. had posed:[48]

> "A more difficult question is whether when the parties used the term "coverage" they meant coverage on everything, which would include the pumps and motors, but only for the risks covered by an ordinary objects policy. Counsel for the [agent] submitted that, if an objects policy insuring against the wear and tear could have been obtained on the pumps and motors, it would be "**extraordinary coverage**" and, if the plaintiff wanted such coverage, it should have made this absolutely clear because otherwise the agent's duty is only to insure his principal against **normal risks**." (emphasis added)

In other words, "full coverage" extends well beyond "an ordinary … policy", and may include "extraordinary coverage". What makes this even more worrisome for agents is the following statement of Estey C.J.O.:[49]

> "There is no clear evidence in the record before this Court that the insurance market afforded coverage against an accident occasioned by a failure of these pumps and motors due to "wear and tear.""

This was even though, in His Lordship's view, the burden was on the insured "to demonstrate that [his] loss arose out of an "insurable" risk.[50] As a result, absent clear evidence that the coverage promised is not available, an agent will be obligated to obtain "full coverage" against "all foreseeable risks", without limitation as to whether the coverage is "extraordinary" or the risk is even "insurable" in the marketplace.

47 *Ibid*., p. 153 (C.A.)
48 *Ibid*., p. 151
49 *Ibid*., p. 142
50 *Ibid*., p. 142

This being the case, there would seem to be a little, if anything, to chose between the applicable standards of care in contract or negligence, whether the court finds, on the one hand, a mere duty of care or, on the other hand, a contractual undertaking or fiduciary duty. In this sense, therefore, there is no separate contractual standard, but rather standards in negligence and fiduciary duty, the applicability of which may be governed by the terms of the contract to obtain coverage, if any.

With respect to the obligation to obtain insurance, the standard which applies will be determined by which of the Hood terms the Court either finds expressed or itself implies. With respect to the obligation to ensure that coverage is adequate, the standard will depend on whether the applicant's instructions were specific, in which case only "normal risks" need be covered, or general, in which case even "extraordinary coverage" may be required. More will be said of this when we consider instructions by applicants.

The second issue, namely, the measure of damages, is also dealt with implicitly in McLachlin J.'s reasons in Norlympia Seafoods Ltd. v. Dale & Co. Ltd. (*supra*). Regardless of whether a claim is made in contract, negligence or, for that matter, breach of fiduciary duty, the essential fact giving rise to the action will be the loss of an anticipated benefit under a contract of insurance. As such, the same principles of damages will generally apply, regardless of the legal basis for the claim. The insured will be seeking indemnity or third party liability coverage under the insurance policy that he is alleging either exists or ought to have been issued.

Finally, it was not clear until relatively recently whether the defence of contributory negligence was available in contract as well as negligence. However, this has now been considered in a number of non-insurance cases,[51] and adopted in the insurance context. In Wyeth v. Henry McWilliams and Wallace Ltd.,[52] the Ontario District Court concluded that there could be "an apportionment of liability in a case of contract in appropriate circumstances."[53]

2. Differences

There are at least three traditional differences between contractual and negligence liability. First, although insurers may be directly or vicariously liable in contract or negligence, they do not generally owe insureds an independent duty of care. Second, although there is no general liability in negligence for nonfeasance (ie. failing to act), there may be in contract. However, the exceptions may now be the rule on this point. Finally, the onus of proof with respect to the availability of coverage is quite different. We have already considered the two major standards of care, and how they differ. There is also a very practical difference, involving the availability of reinsurance.

51 For example, in Ontario, see Tompkins Hardware Ltd. v. North Western Flying Services Ltd., (1982) 139 D.L.R. (3d) 329 (Ont. H.C.); and in British Columbia, see District of Surrey v. Carroll-Hatch & Associates Ltd., (1979) 101 D.L.R. (3d) 218 (B.C.S.C.)

52 (1986) 18 C.C.L.I. 257 (Ont. D.C.)

53 *Ibid*., p. 266

With respect to an insurer's duty of care to its insured, the Ontario Supreme Court, in G.K.N. Keller Ltd. v. Hartford Fire Insurance Co.,[54] was prepared to hold an insurer directly liable for providing deficient coverage under a comprehensive general liability policy. However, the Court of Appeal overturned the judgment against the insurer, in one brief sentence.[55] Nevertheless, there is at least one category of exceptions, which will be dealt with in the section on who may be liable to who.

With respect to nonfeasance, liability for not acting only arises where there is a duty to act, and this is most likely to arise where there is a contract or a fiduciary duty. This was well illustrated in Roy v. Atlantic Underwriters, where the agent was held not liable for failing to renew a policy "… in the absence of a contract or an undertaking to renew …".[56]

However, that the exceptions may have become the rule was underscored in Fine's Flowers itself, as well, more recently, in Fletcher v. Manitoba Public Insurance Corporation.[57] In Fine's, Estey, C.J.O. stated as follows:[58]

> "Finally, when the defendant [agent] knew that complete insurance against a failure of the heating system for any reason would not be available, as the evidence in part infers, he failed to report this fact to the plaintiff [insured]. By reason of the relationship between the plaintiff and the defendant agent, as found to exist by the trial Judge, the defendant owed duty to the plaintiff to report this gap in insurance."

It is unclear from his reasons whether His Lordship was basing this "duty" on negligence principles or the "special [ie. fiduciary] relationship" which he had earlier found to exist.

However, Wilson J. (by then a judge of the Supreme Court of Canada) had an opportunity to revisit these issues in Fletcher v. Manitoba Public Insurance Corporation (*supra*). That case involved a failure to advise the applicants of the availability of under-insured motorist coverage. After considering various cases, including Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.,[59] the seminal English decision on negligent misrepresentation, Her Ladyship stated as follows:[60]

> "These cases support the proposition that individuals or corporations whose business involved the provision of information or advice to others owe a duty of care in communicating that information or advice to those whom they know will reasonably rely on it. As Slade L.J. said, where the information is provided in the course of doing business, the "assumption of responsibility may be readily inferred."

54 (1983) 1 C.C.L.I. 34 (Ont. S.C.), reversed (1984) 6 C.C.L.I. xxxvii
55 *Ibid*.
56 note 18, p. 269 (C.A.)
57 [1990] I.L.R. 1 – 2672, p. 10,547 (S.C.C.), reversing (1989) 36 C.C.L.I. 157 (Ont. C.A.), reversing (1987) 26 C.C.L.I. 236 (Ont. S.C.)
58 *Ibid*., p. 144
59 [1964] A.C. 465 (H.L.)
60 *Ibid*., p. 10,554

In my view, the sale of automobile insurance is a business in the course of which information is routinely provided to prospective customers in the expectation that they will rely on it and who do in fact reasonably rely on it. It follows, therefore, that the principle in *Hedley Byrne* implies that MPIC will owe a duty of care to its customers if: (i) such customers rely on the information; (ii) their reliance is reasonable, and (iii) MPIC knew or ought to have known that they would rely on the information." (emphasis added)

In other words, notwithstanding the traditional view, illustrated in Roy v. Atlantic, it is open to the courts to find a duty to act, and specifically, a "duty to warn", in most any relationship between an agent and a client, whether fiduciary or not.

Finally, and relatedly, the onus of proof with respect to the availability of coverage is on the agent in contract, but on the insured in negligence. In Markal Investments Ltd. v. Morley Shafron Agencies Ltd.,[61] the plaintiff carried on a flea market business in a tent. He sought coverage through the defendant agency, which inquired of the eight "standard market" insurers with whom it primarily dealt. Only one of the insurers was willing to issue coverage to protect against snowload (which was the cause of the loss ultimately suffered), but none were prepared to accept the applicant's risk. The agent accordingly advised the applicant that it would not be possible to obtain insurance that would protect against snowload. When the tent collapsed under an accumulation of snow, the applicant sued the agent for failure to obtain insurance. At trial, Lysyk J. awarded the plaintiff damages, holding that:[62]

> "… there was, at a minimum, **a real possibility** that all-risk insurance covering collapse due to snowload could have been obtained prior to the collapse from an insurer outside the Shafron Group. Mr. Shafron did not alert [the applicant] Markal to that possibility or make clear the limited nature of his inquiries. On the contrary, as I have found, he lead Markal to believe that pursuing inquiries beyond the Shafron Group of underwriters would be fruitless. It is, perhaps, unnecessary for the plaintiff to demonstrate on the balance of probabilities that such coverage could have been found from an insurer outside the Shafron Group … I would …, if necessary to do so, … find on the evidence taken as a whole that it is more probable than not than the coverage sought by Markal could have been obtained had Mr. Shafron pursued his inquiries beyond his own group of underwriters." (emphasis added)

The Court of Appeal came to a contrary conclusion. Wallace and Southin, J.J.A. both relied upon the recent House of Lords decision in Wilsher v. Essex Area Health Authority[63] for what Southin J.A. described as,[64]

> "… the simple proposition that a plaintiff must prove every ingredient of his cause of action on a balance of probability."

Wallace, J.A., in turn, considered the trial Judge's finding, relying upon Fine's Flowers, that:[65]

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61 (1990) 43 B.C.L.R. (2d) 348 (C.A.), p. 359, reversing (1988) 30 C.C.L.I. 292 (B.C.S.C.)
62 *Ibid*., pp. 299-300 (S.C.)
63 [1988] 1 All E.R. 871 (H.L.)
64 note 61, p. 359 (C.A.)

> "… the normal onus does not apply when an insured is suing an agent for losses caused flowing from the agents' failure to obtain insurance."

His Lordship then stated the following with respect to the reasons of Wilson, J.A. in Fine's, where a contractual undertaking to provide coverage had been found and strict liability therefore applied:[66]

> "Madam Justice Wilson based her analysis in that case on the existence of a contract whereby the insurance agent agreed to obtain full coverage. When such coverage was not provided, she held that the agent was *prima facie* in breach of its contract. That, she held, shifted the onus to the agent to show coverage was not available and could not be obtained - i.e., impossibility of performance of the contract. The ruling supports the proposition that **the onus of proving that a contract is impossible to perform rests on the party who raises that as a defence to a claim for a breach of contract. It does not, in my view, deal with the question of whether or not in the negligence case the onus to prove damages, due to the alleged negligence act of the insurance agent, has been shifted to the insurance agent, who is thereby required to assume the burden of disproving that the plaintiff has suffered the damages claimed**." (emphasis added)

What Wilson J.A. had said in Fine's was:[67]

> "*Prima facie* "full coverage" would have required insurance against the loss that happened. This being so, it seems to me that the plaintiff [insured], having established the existence of a contract between itself and [the agency,] Ault for the obtaining of full coverage for the plaintiff's properties and business, the burden of introducing evidence to show that coverage for the loss that happened was not available and could not be obtained shifted to [the agent,] Mr. Campbell"

In other words, the onus of proving that where coverage was not placed, it could have been, will depend on whether the court is prepared to find a contractual undertaking to provide coverage. However, this can be very difficult to predict with certainty. Indeed, it virtually leaves the courts with a discretion as to which party they wish to place the burden of proof upon.

As a practical matter, the distinction between contract and negligence can also be important from the insurer's prospective. As one of the authors points out,[68] most underwriters will reinsure substantial risks. If the insured recovers in contract, such re-insurance would be available to mitigate the primary insurer's loss. However, if the insured only recovers in negligence, the underwriters' re-insurance coverage would likely not respond. The prospect of vicarious liability for the agent's negligence therefore creates a contingent risk far in excess of any claim under the alleged policy.

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65 *Ibid*., p. 353
66 *Ibid*., p. 354
67 note 1, p. 150 (C.A.)
68 Shibley, note 11, pp. 257-8

3. Concurrent Liability

Although the issue does not appear to have been squarely addressed in any recently reported insurance decisions, the better view is that liability is concurrently available in

both contract and negligence. As we have seen, in Norlympia v. Dale, the British Columbia Supreme Court has indicated the "view that liability may be found either in tort or contract".[69] Mere months later, the Ontario Supreme Court in Gilmore Farm Supply Inc. v. Waterloo Mutual Insurance Co.,[70] found the defendant agent liable in both contract and negligence, without any detailed reasons.

One would have thought that all this would have been put to rest in the non-insurance case of Central & Eastern Trust Co. v. Rafuse.[71] There, the Supreme Court of Canada stated in the clearest possible terms that professional people are subject to concurrent liability in contract and tort, with respect to the negligent performance of their duties.

However, Madame Justice Southin may have revived the issue in her reasons in Markal Investments Ltd. v. Morley Shafron Agencies Ltd. (*supra*) where she stated:[72]

> "In my opinion, it is a very nice question, not addressed by counsel in this case, whether an action by a person who has sought coverage from an insurance agent against that agent for failing to obtain the coverage, or giving bad advice about it, sounds only in tort or also sounds in contract.
>
> The importance of the question lies in this: Every breach of contract entitles the innocent party to damages albeit the damages may be nominal. Damage is not the gist of an action in contract, but it is the gist of an action in tort for negligence -- what was once an action on the case."

This question would, of course, also be important with respect to the differences between contractual and negligence liability outlined above.

IV. WHO THE AGENT IS ACTING FOR

In determining liability, courts will consider both the nature and the scope of any agency relationship. The nature of the relationship will be determined by examining who the agent is acting for. The scope of the relationship will be determined by examining the instructions given by the insured and any representations made by the agent. This will be dealt with in a later section. Determining the nature of the relationship may involve considering the types of agency which exist at law, as well as the categories of agents found in the insurance industry.

To complicate matters, agents may, as a matter of law, act for more than one party in respect of any given transaction. For example, in Theophanus v. Mutual of Omaha Insurance Co. (*supra*), the insurance company was the only defendant, and the agent involved was not an

69 note 41, p. 6491
70 (1984) 3 C.C.L.I. 221 (Ont. H.C.)
71 (1986) 31 D.L.R. (4th) 481 (S.C.C.)
72 note 61, pp. 358-9 (C.A.)

independent broker, but a representative of the insurer. When the agent failed to properly advise or "warn" the applicant, the insurance company, as principal, was held vicariously liable. Similarly, in Wohl v. Grain Insurance & Guarantee Co.,[73] the agent was found to have had express authority to cancel coverage on behalf of the insurer, while having also been, for other purposes, the agent of the teachers association to which the plaintiff belonged.

1. Types of Agency At Law

Insureds will generally try to prove that an agent was acting for the insurer, at least in some capacity, in order to establish either contractual liability on the part of the insurer or at least vicarious liability for the agent's conduct. There are two broad types of agency at law. The first is based upon "actual" authority given by the insurer, and the second is variously referred to as "apparent", "implied" or "ostensible" agency. The latter is sometimes referred to as "agency by estoppel".[74] Other cases treat agency by estoppel as a third and separate category.[75]

An actual agency is created by agreement between the agent and the insurer. This will usually be in the form of a written agency contract. The insured does not have to know about the agreement to rely upon it. Apparent, implied or ostensible authority is not so readily ascertainable. In La Ferme de la Vallee St. Jean Ltee v. Fairweathers,[76] the New Brunswick Court of Appeal stated as follows:[77]

> "To enforce against [the general agent,] Fairweathers, a contract entered into on its behalf by [the local agent,] Brunswick, which had no actual authority to do so, it is necessary for [the insured,] La Ferme to prove:
>
> 1. That a representation that Brunswick had authority to enter on behalf of Fairweathers into a contract of insurance was made to La Ferme;
>
> 2. That such representation was made a person or persons who had "actual" authority to manage business of Fairweathers either generally or in respect to those matters to which the contract relates; and
>
> 3. That La Ferme was induced by such representation to enter into the contract that is, that La Ferme in fact relied upon it; or
>
> 4. That Fairweathers permitted Brunswick to hold itself out as having that authority.
>
> As Bowstead points out, **the representation necessary to create the "apparent" authority of an agent to act on behalf of a principal may be expressed, or it may be implied in the course of dealings between the principal and the third party, or it may be made by conduct, that is, by permitting the agent to act in some way in the conduct of the principals**

73 (1993) 6 W.W.R. 108 (Man. Q.B.)
74 La Ferme de la Vallee St. Jean Ltee. v. Fairweathers, [1982] I.L.R. 1-1583, p. 1101 (N.B.C.A.) pp. 1108-9
75 D. Vaughan Contracting Inc. v. Don Stobbe Insurance Agencies Ltd., [1982] I.L.R. 1-1503, p. 758 (B.C.S.C.)
76 note 74
77 *Ibid*., p. 1109

> **business with other persons**. And, of course, the third party must have relied on the representation." (emphasis added)

In other words, the courts may find that an insurer that has given only limited authority to an agent will be held liable as if there was a general agency relationship.

Stratton, J.A., went on to find as follows:[78]

> "… La Ferme failed to prove that Fairweathers, either expressly, or impliedly, or by conduct, made any representation to La Ferme that Brunswick had authority to bind Fairweather to a contract of insurance as intended by La Ferme, or that La Ferme relied upon any such representation by Fairweathers but indeed, the evidence is yet away. There never was any direct representation by anyone at Fairweathers to Mr. Durette [the president] of La Ferme nor, indeed, was there any direct contact between these two parties at any time. Mr. Durette could not even recall if [the agent] Mr. Bellefleur had told him the name of the company with which he was dealing and, in any event, he testified, that it was not a detail he would normally spend any time on."

However, it can be seen from the previous passage that no "direct contact" between the insurer and the client is necessary to create an apparent agency. All that is necessary is for the court to find that the insurer let the agency "hold itself out" as having actual authority. As with findings of contractual undertakings, when the courts will do this can be difficult to predict.

Statements made in two recent decisions indicate just how easy it can be for a client to convince a judge that an agent had apparent authority. In Wendeb Properties Inc. v. Elite Insurance Management Ltd.,[79] a 1990 decision of the British Columbia Supreme Court, Maczko J. made the following statement:[80]

> "It was admitted that there was an agency agreement between Coastal and Elite. Coastal was the agent that arranged insurance with Elite for the preceding year. Coastal is the only agent that dealt with the plaintiff. Elite wrote to Coastal stating it would renew coverage on existing terms. If Coastal exceeded its authority in extending coverage there is no evidence that the plaintiff knew or could have known about it. The plaintiff believed Coastal had authority to extend coverage, and acted on it. The plaintiff could not have even suspected that Coastal was exceeding its authority, if it was. There was clearly ostensible authority on which the plaintiff acted and the defendant Elite cannot deny coverage."

In Steinman v. Snarey,[81] a 1988 decision of the Ontario Supreme Court, Sutherland J. stated:[82]

78 *Ibid*., p. 1109
79 [1990] I.L.R. 1-2573, p. 10,023 (B.C.S.C.)
80 *Ibid*., p. 10,024
81 [1989] I.L.R. 1-2440, p. 9441 (Ont. S.C.)
82 *Ibid*., p. 9442

> "[W]here the transaction is of the general type that the agent is authorized to transact on behalf of the principal and a reasonable man would be led to believe, on the basis of ostensible authority, that the agent had actual authority to enter into it, the principal will be bound unless the other contracting party knew or ought to have known the agent did not have authority to enter into the particular transaction on behalf of the principal. But the principal will not be liable if the transaction is one that is so unusual for the agent to have entered into on behalf of the principal that, in the circumstances, a reasonable man, in the position of the plaintiff, would be put to his enquiry or could not reasonably believe that the agent had authority to bind the principal to the transaction."

In Beers v. Murphy,[83] a 1982 decision of the New Brunswick Court of Queen's Bench, the insurer's "past dealings" with the insured, through the agent, was held to be sufficient to create an apparent agency.

It can therefore be seen that many relationships between agents and insurers, irrespective of actual authority to bind coverage, will have the potential to create contractual liability on the part of the insurer as if the agency agreement was a general one.

2. Categories of Agents in the Industry

One of the authors has classified insurance agents into four groups:[84]

i. General or managing agents, being persons or corporations directly representing the company in the sense of a branch office of the insurer and who can issue policies, interim receipts and give oral coverage (for example, the agents in O'Donnell v. Lumbermen's Mutual Casualty Company[85] and Weldon v. Commercial Union Assurance Co.[86]);

ii. Recording agents, who are independent of the company but have the power to bind by the issuance of policies, interim receipts and even oral coverage (for example, the agents in Blanchette v. C.I.S. Ltd.[87] and Woodside v. Gibraltar General Insurance Company[88]);

iii. Soliciting agents, who submit applications to the insurer for acceptance or rejection but who have no power to bind the company (for example, the agent in Dormer v. Royal Insurance Company,[89] La Ferme de la Vallee St. Jean Ltee. v. Fairweathers (*supra*) and McLeod v. Lunenberg Insurance Agencies Ltd.[90]); and

83 (1982) 37 N.B.R. (2d) 279 (N.B.Q.B.), p. 379
84 Shibley, note 11, pp. 253-4
85 [1979] I.L.R. 1-1057, p. 8 (Ont. Co. Ct.)
86 (1985) 11 C.C.L.I. 165 (B.C.S.C.)
87 (1973) 36 D.L.R. (3d) 561 (S.C.C.)
88 [1988] I.L.R. 1-2385, p. 9213 (Ont. S.C.)
89 [1979] I.L.R. 1-1142, p. 379 (Ont. S.C.)
90 [1980] I.L.R. 1-1171, p. 563 (N.S.S.C.)

iv. Brokers, in the strict sense of that term, being the agent of the insured alone for the purpose of procuring a policy of insurance (for example, the brokers in Luft v. M.G. Zorkin & Co. Ltd.[91] and Systems Management Ltd. v. Royal Insurance Co.[92]).

As to apparent authority, the approximate dividing line will be between recording and soliciting agents. The latter, and particularly brokers, will less likely be found to have apparent authority.

3. Agents For More Than One Party

To complicate matters, agents may "wear more than one hat" with respect to a given application or policy. In Gilmore Farm Supply Inc. v. Waterloo Mutual Insurance Co. (*supra*), the insured claimed for a fire loss against the insurer, under an equipment dealers rider in a multi-peril policy, and also against the agent who had placed the coverage. The insurer defended on the basis of fraudulent misrepresentation or non-disclosure of material facts, namely, with respect to the storage of goods in an old barn rather than the insured building. At the time the policy was arranged, the agent was aware of the location of the goods.

O'Brien J. stated as follows:[93]

> "In considering the application of statutory condition 1, the onus is on the insurer to establish the misrepresentation or fraudulent omission. In considering whether this onus has been met, it is first necessary to consider whose agent [the defendant] Wylie was at the material times. In my view, he was a dual agent, acting for both parties. I believe Wylie was entrusted with various duties by both the plaintiff [applicant] and the defendant insurers, and in many instances these duties overlapped. There is clear judicial support for the proposition that an insurance agent may be an agent for both the insured and the insurer …
>
> Comments made by Master J. in the Gabel v. Howick case …, are particularly appropriate to this case:
>
> > "Fallis [the insurance agent] was thus in a dual capacity. He was the agent of the insured to complete and file his written application, and as such it was his duty to answer the question regarding incendiarism …
> >
> > On the other hand, Fallis is a general agent of the company; his duty as such was to disclose to the directors the material facts which have been made known to him bearing on threatened incendiarism …""

His Lordship therefore held that there was no fraudulent misrepresentation or non-disclosure at the time the policy was obtained, because the agent had received the information

91 [1982] I.L.R. 1-1565, p. 1020 (B.C. Co. Ct.)
92 (1986) 16 C.C.L.I. 113 (N.B.Q.B.)
93 note 70, pp. 229-30

regarding the location of the equipment in his capacity as the insurer's agent. This was notwithstanding that he was acting as the insured's agent for the purpose of the policy application. In other words, he was wearing two hats.

However, it does not follow that such dual agency will always enable an applicant to establish joint liability on the part of both the agent and the insurer. In Systems Management Ltd. v. Royal Insurance Co., (*supra*) the agent was held liable for negligently reducing coverage to a maximum of $75,000.00, rather than the $100,000.00 requested by the insured. The agent sought indemnification from the insurer, but was denied.

Richard C.J.Q.B., made the following statement:[94]

> "In summary, one can be agent of an insurer for, among other things, the purpose of soliciting proposals for the insurer. When he does so he is in fact the agent of the insurer. However, such as is the case here, when one simply sells insurance to his clients, on demand, and places the policies that he sells with the various companies, in so doing he acts as the agent of the insured whose directives and instructions he must follow and execute with diligence. If, through negligence or otherwise, he commits an error in effecting the instructions of his principal, the insured, it follows that he is liable to the insured. The insurer in such cases has made no error, it has simply contracted to the extent and in the manner that it was requested to do. In such circumstances there are no principles of law to hold an insurer liable for more than it has contracted for."

In other words, the agent was a mere soliciting agent, without power to bind the insurer, and therefore only "wore the client's hat" for the purpose of submitting the application.

The general rule in these cases was established in Kelly v. Wawanesa Mutual Insurance Co.[95] It is that:[96]

> "[A] person who completes on behalf of an applicant for insurance, [a policy] application … is acting, not as agent for the insurance company, but as agent for the applicants …"

In that case, the Nova Scotia Court of Appeal found the agency to be local or independent, as opposed to general. Although it had a contract with the insurer, it could only bind "subject to [its] underwriting instructions".[97] MacDonald J.A. therefore held that the agent was acting for his clients and not the insurer for the purpose of the policy application. The insurer was therefore not vicariously liable for the acts of the agent. However, this decision does not squarely address the problems of apparent agency, nor does it address imputation of knowledge.

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94 note 92, p. 117

95 (1979) 98 D.L.R. (3d) 29 (N.S.C.A.)

96 Boutilier v. Traders General Insurance Co. (1968) 1 D.L.R. (3d) 379, (N.S.S.C.) p. 386, affirmed (1968) 7 D.L.R. (3d) 220 (N.S.C.A.), quoted in Kelly v. Wawanesa Mutual Insurance Co., *Ibid*., p. 38

97 note 95, p. 31

V. LIABILITY BY WHOM AND TO WHOM

Very different considerations can arise depending upon who is alleging liability against who. The cases can involve liability by agents to insureds, by insurers to insureds, by agents to insurers, by insurers to agents and by agents or insurers to others. Each of these scenarios will be considered in turn.

1. Agents to Insureds

As we will see, this is the most common scenario. As we have already seen, all of the theories of liability we have discussed apply here, with the obvious exception of vicarious liability.

2. Insurers to Insureds

We will now consider each of the applicable theories of liability, in turn.

a. Contract

Three issues arise in these cases. First, was there a *prima facie* contract of insurance? Second, is the insurer entitled to avoid the contract? Finally, if not, what are the terms of the policy? We have already seen that, even if an agent has authority, an oral contract may be created. However, it does not follow that, so long as an agent had actual or apparent authority, a contract will always be found to exist. In David v. Pilot Insurance Company,[98] the agent had actual authority and did purport to bind coverage with respect to at least one of two vehicles. However, Maloney J. found that the agreement between the agent and its client was to delay coverage of the second vehicle until a certificate of worthiness had been obtained.

The second issue, as to avoiding coverage, usually involves allegations of fraudulent misrepresentation or non-disclosure, and will depend upon who the agent was acting for, and in what capacity. The cases generally involve one or more of the following fact patterns:

- incorrect answers given by the applicant;
- untrue statements in the application made by the agent; and
- information provided by the applicant but not disclosed by the agent.

Incorrect Answers By Applicant

Of the recent cases in which insurers have attempted to avoid their contractual obligations under a policy on the basis of material misrepresentation or non-disclosure, the results have varied widely. In Kehoe v. B.C. Insurance Co.,[99] the plaintiff misrepresented his previous

98 [1990] I.L.R. 1-2667, p. 10,517 (Ont. S.C.)
99 (1991) 8 C.C.L.I. (2d) 134 (B.C.S.C.), overturned on appeal [1993] B.C.J. No. 1172, May 18, 1993, Wallace, J.A.

claims history when he applied for homeowner's insurance. Nevertheless, the trial judge held that the insurer had failed to meet the onus of demonstrating that its underwriting practices had a "reasonable basis" and, therefore, that the misrepresentation was material to the risk. However, this holding was reversed on appeal, for reasons which will be discussed in the section on evidence.

Kanhoffen v. Martino[100] involved an application for life insurance. When Mr. Kanhoffen and his wife met with the agent, they both knew that he was recovering from pneumonia, for which he had been hospitalized, and that his doctor was concerned about a spot on his lung which had been revealed by an X-ray taken during his stay at the hospital. However, the application form contained none of this information and, indeed, the question about whether the deceased had ever suffered from pneumonia was answered in the negative. By the date that the policy was delivered, they also knew that Mr. Kanhoffen had been diagnosed with cancer which was almost certainly inoperable and terminal within a short time. As such, the new policy which they were applying for was void for misrepresentation. This decision has since been upheld on appeal.

Another case, Rivard v. The Mutual Life Insurance Co. of Canada (*supra*), also concerned an application for life insurance. The plaintiff and a Mr. Bouw were partners in a business who were making joint applications for "key man" coverage. During their initial application, Bouw had told both the plaintiff and the agent that he was a smoker. The application was therefore made for a policy at regular rates, with a doctor's letter to follow. Although his doctor knew that Bouw did smoke, he nevertheless answered "no" to this question in the application materials which he provided. Coverage was denied and a supplementary application was made. The insured requested that the agent obtain a statement from Bouw and the agent advised them, incorrectly, that he did not smoke, and that regular rates had been used in error. The agent subsequently met with Bouw who, on that occasion, unequivocally, and in writing, stated that he was a non-smoker. As Yates, J. of the Ontario Court (General Division) stated with respect to that meeting:[101]

> [O]n June 12, 1987, Bouw had an opportunity to set the record straight as to whether he was a smoker or non-smoker for insurance purposes. By stating "I have never smoked cigarettes or marijuana" he made a statement which, I find on the evidence, was not true and is therefore a misrepresentation as contemplated in s. 160 of the *Act*. Therefore, Mutual Life had the right to void the policy which they did by letter to Rivard on December 2, 1987.

However, for reasons which will be discussed in the section on types of breaches (and, specifically, misrepresentations as to risk and related problems), the agent was held liable in negligence. This case is presently under appeal.

100 (1993) 14 C.C.L.I. (2d) 102 (B.C.S.C.)
101 note 39, pp. 10-11

Untrue Statements By Agent

The first case that we will consider in this category involved a fairly extreme set of facts. In 533476 Ontario Ltd. v. Southern Counties Insurance Managers Ltd.,[102] the Ontario District Court declined to void a policy where clearly material and fraudulent misrepresentations had been made by the agents, without the knowledge or participation of the insureds. However, the agents, quite properly, were ordered to indemnify the insurer for the amount of the loss.

The next three cases with respect to application forms are not as clear-cut as 533476 Ontario Ltd. v. Southern Counties Insurance Managers Ltd. (*supra*). Blanchette v. C.I.S. Ltd. (*supra*), was a Supreme Court of Canada decision which predated Fine's Flowers. The client had signed an application for one type of insurance and requested that the agent apply for another type by filling in blank sections of the form that he had already signed. Since the agent had some authority to bind the insurer, he was held not to be a mere soliciting agent, but to have at least apparent authority to commit the insurer to the policy in question. Consequently, the insurer could not rely upon an inaccuracy in the answers provided by the agent.

In Weldon v. Commercial Union Assurance Co., (*supra*) the British Columbia Supreme Court found that the agent had general authority from the insurer and that the latter could not rely upon any material misrepresentation in the application form which the former had completed. By contrast, the British Columbia Court of Appeal affirmed the trial court's finding in Van Schilt v. Gore Mutual Insurance Co.,[103] that the agent was acting for the insured when he filled in the form which the insured had already signed. As such, the insured could not rely upon the policy, in the face of a material misrepresentation in the form.

Information Provided By Applicant But Not Disclosed By Agent

Given the general rule in Kelly v. Wawanesa Mutual Insurance Co. (*supra*), Van Schilt v. Gore Mutual Insurance Co. (*supra*) may represent what should be the more usual result in these cases. To that extent, the contrary results in the next three cases may be explained by the fact that they concern information which the agent had obtained but did not include in the application particulars.

In Gilmore v. Waterloo Mutual the insurer sought to void the policy because the goods destroyed in a fire loss had been stored in an old barn instead of the insured building. The agent was found to have some authority to bind coverage. Although he had not been told where the equipment was stored, he was inside the barn sometime in 1976 or 1977, and O'Brien J. found that he must have seen it. Further, the insured had, prior to the policy renewal, gestured to the barn and told the agent to "make sure that all that in the barn is covered". Consequently, although the agent had not provided the information to the insurer, this knowledge was imputed to the

102 note 36
103 (1988) 29 C.C.L.I. 181 (B.C.C.A.), affirming (1987) 25 C.C.L.I. 267 (B.C.S.C.)

insurer because the agent was acting in a dual capacity and was the insurer's agent for the purpose of receiving information.[104]

In Moxness v. Co-Operative Fire and Casualty Company,[105] the insurer's ground for voiding coverage was the insured's alleged failure to provide details of his previous driving convictions. During a telephone conversation with the agent, the insured had disclosed his poor driving record, at least in general terms. The agent had assured him that he would obtain information about the dates and other details, for the purpose of the application. However, he had neglected to do so. Nevertheless, the Court found that the agent had both apparent and actual authority and therefore that:[106]

> "… the insurer was not permitted to disassociate itself from the knowledge of the agent and so vitiate the contract."

Another, and somewhat unusual case suggests that there may be limits to the imputation of knowledge. In Kruska v. Manufacturers Life Insurance Co.,[107] the knowledge of both the agent and a doctor were in issue. Unfortunately, the agent's evidence was not very clear, and Finch J. could not make any findings as to his state of knowledge. The doctor had examined the applicant and completed the medical examination form for the insured's life insurance application. Less than six months before, the same doctor had been the insured's attending physician when she had been admitted to hospital with a provisional diagnosis of acute alcoholism. She had previously been admitted to a detoxification centre, and the doctor knew this as well. None of this information had been disclosed to the insurer, which relied on this to deny coverage. His Lordship concluded that the doctor had been the insured's agent for the purpose of the previous medical attendances. The insurer was therefore not deemed to have the doctor's prior knowledge, for the purpose of the application.[108] It would therefore appear that the double agency discussed earlier will not always have negative consequences for insurers. However, one wonders what the result would be if an agent acquired certain knowledge while processing one application for an insurer which he could not bind, and subsequently failed to disclose that information on an application for an insurer he could bind. Would the court treat the agent differently than the doctor in this case?

The agent was similarly given the benefit of the doubt in one of the more recent decisions. In Giantsopoulos v. Employers Insurance of Wausau,[109] the policy was upheld on the basis that the facts which the agent had decided not to disclose did not mislead the insurer as to the nature of the risk. The insureds' son was not listed as one of the drivers of one car, because he was the principal driver of another car. The Court considered that the agent's failure to list the son was a "judgment call".

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104 note 70, p. 230
105 [1979] I.L.R. 1-1087, p. 134 (Alta. S.C.)
106 *Ibid*., p. 137
107 (1984) 6 C.C.L.I. 299 (B.C.S.C.)
108 *Ibid*., p. 313
109 [1991] I.L.R. 1-2744 (Ont. Ct. – Gen. Div.)

The final issue in this category of cases, namely, what the terms of valid policies are, was dealt with in two of the decisions. They indicate that, so long as the agent has actual or apparent authority, his acts and his understanding of the policy may govern its terms.

In Guardian Insurance Company of Canada v. Victoria Tire Sales Ltd.,[110] the insurer had deleted public liability coverage when it renewed the insured's garage policy. The fleet policy which the insured also had indicated that for details of the public liability coverage on the fleet, reference should be made to the garage policy. A claim was made under the fleet policy and the insured took the position that there was, by reference, no public liability coverage under that policy either. However, the agent had issued "pink cards" to the insured, as required by statute, certifying that third party liability coverage was in place. As such, the Supreme Court of Canada affirmed the ruling of the Quebec Court of Appeal that the insurer, because of the agent's conduct, could not deny coverage.[111]

Another interpretation problem arose in Firestone Canada Inc. v. American Home Assurance Company,[112] which concerned insurance on a rebate promotion known as "Pay No Dough If It Doesn't Snow". The premium was to be based upon sales, the insured taking the position that the only sales to be included were those documented by a "validation certificate" together with a sales receipt. The insurer maintained that the premium should be calculated by reference to total retail sales. Setting aside the party's views, their respective agents had a shared understanding that total retail sales governed, and this was the method of calculation that the Ontario Supreme Court upheld.

b. Negligence

We have already seen that there is no general duty of care owed by an insurer to an applicant. However, there is at least one category of exceptions. The Ontario, Nova Scotia and Alberta trial courts have held that once a request for coverage is received, it must be handled with an acceptable standard of care. If the insurer is negligent in this regard it may be liable to indemnify the applicant as if the coverage had been granted.

In Stewart v. Lanark Mutual Insurance Company,[113] the insurer had failed either to provide wind coverage that did not include the usual construction exclusion or to definitively advise that it would not do so. The Ontario District Court found that, in these circumstances, the application "was negligently handled by the underwriting and endorsement departments of the defendant insurer."[114]

110 [1979] I.L.R. 1-1154, p. 471 (S.C.C.)
111 [1979] I.L.R. 1-1154, p. 471 (S.C.C.)
112 [1989] I.L.R. 1-2403, p. 9268 (Ont. S.C.)
113 (1988) 29 C.C.L.I. 213 (Ont. Dist. Ct.)
114 *Ibid*., p. 223

In Jessett v. Conacher,[115] the Alberta Court of Queen's Bench held the insurer liable when it inadvertently returned an application form and cheque to the agent, with the result that the application was never processed the application.

In McLeod v. Lunenburg Insurance Agencies (*supra*), one insurer had subscribed for 60% of the risk under a multi-peril policy, with another insurer as the 40% subscriber. After a series of renewals and one change in the second subscriber, the second subscriber went out of the insurance business in Nova Scotia but was never replaced on the policy. The Supreme Court of that province found the first (ie. 60%) subscriber to have been "negligent in its processing of this particular policy."[116]

It was also recently and similarly held, in the Theophanus case, that both the insurer and the agent had breached their duty to properly explain the limits on the coverage which is being placed.

c. Estoppel

We have already seen that insurers, as well as agents, can be held liable on the basis of estoppel. However, there have not been any recent cases on this point.

d. Vicarious Liability

We have also seen that agents may wear two hats and will not generally be held to have acted for the insurer with respect to completing the policy application. As such, the insurer will not generally be found vicariously liable for a negligent application by its agent. However, the cases are somewhat divided. Reading between the lines, it would appear that insurers will not be held vicariously liable where, as in Kelly v. Wawanesa, no policy was issued. By contrast, they may be vicariously liable where a policy is issued but coverage is somehow inadequate.

Three of the cases fall in to the former category and two more, both decided in British Columbia, fall into the latter. In Reardon v. King's Mutual Insurance Co.,[117] and O'Donnell v. Lumbermen's Mutual Casualty Company (*supra*), the Nova Scotia and Ontario trial courts, respectively, referred to a "rather illogical development"[118] in the history of vicarious liability:[119]

> "The law has evolved that an employer is liable for the negligent acts of his **servant** committed during the course of his employment, but an employer is not liable for the negligence of an independent contractor except under limited circumstances.
>
> Into what category does an agent fall? …

115 [1981] I.L.R. 1-1429, p. 472 (Alta. Q.B.)
116 *Ibid*., p. 570
117 (1981) 120 D.L.R. (3d) 196 (N.S.S.C.)
118 *Ibid*., p. 211
119 *Ibid*., pp. 212-3

> [T]he category of "agent" partially overlaps the categories of both "servant" and "independent contractor" … An agent may or may not be subject to that degree of control which will make him a servant …
>
> … If an agent is held out by the principal to have authority to make **representations** and those representations prove to be untrue, the principal has been held liable in deceit. Such misrepresentations are so intimately associated with the contractual relation to which the agent is directed, that they are in fact contractual." (emphasis by the Court)

After stating these principles, Hallett J., in Reardon v. King's Mutual Insurance Co. (*supra*), went on to find that:[120]

> "… Mr. Gollan, although an agent for [the insurer] King's Mutual was not the servant (as opposed to the independent contractor) of King's Mutual … because King's Mutual did not exercise control over **the manner** in which he operated his insurance agency …
>
> It is clear that in this case, King's Mutual did not control how Mr. Gollan ran his insurance agency. Mr. Gollan worked for another insurer; worked when he pleased and wrote business for whom he pleased; he had no quotas; he was paid only by commission by the two companies for whom he acted and was not subject to the day-to-day control of King's Mutual. He was therefore not a servant so as to make King's mutual liable for his failure to advise Mr. Reardon that the risk had been declined." (emphasis by the Court)

In that case, the agent, but not the insurer, was held liable for not informing the client that coverage had not been provided.

In O'Donnell v. Lumbermen's Mutual the agent had not listed a new car under a standard automobile policy, and was held liable for not providing coverage. The claim against the insurer was dismissed. Similarly, in Quickway Aviation v. British Aviation Insurance Company Limited,[121] the insurer was not held vicariously liable where the agent failed to advise the client that coverage had not been placed.

The two British Columbia cases are G.R. Young Ltd. v. Dominion Insurance Corporation[122] and Antonesen v. Wawanesa Mutual Insurance Co.[123] In the first of these cases the insurer declined to accept a fire risk on an actual cash value basis, and limited their liability by means of a wreckage value endorsement. In the second case, a policy with respect to a mobile home was amended to provide coverage at a new location while the client moved to a house in another town. The insured's main concern was loss by theft. However, the policy contained a 30 day vacancy exclusion which was not brought to the client's attention.

120 *Ibid*., p. 213
121 (1981) A.R. 255 (Alta. C.A.), affirming [1980] I.L.R. 1-1261, p. 969 (Alta. Q.B.)
122 (1989) 41 C.C.L.I. 59 (B.C. Co. Ct.)
123 [1979] I.L.R. 1-1157, p. 498 (B.C.S.C.)

In both of these cases, the Supreme and County Courts, respectively, held the insurer vicariously liable, in one mere sentence each. The servant/independent contractor distinction in Reardon v. King's Mutual does not appear to explain the different result in these two cases. A more likely explanation is found in the general principle in Kelly v. Wawanesa (ie. that agents act for the applicants with respect to completing the policy application). On this analysis, in G.R. Young Ltd. v. Dominion Insurance Corporation (*supra*) and Antonesen v. Wawanesa Mutual Insurance Co. (*supra*) the agents were clearly acting for the insurer when they issued coverage. As the other three cases involved negligence at the application stage, the general rule in Kelly v. Wawanesa would appear to have saved the insurers from vicarious liability.

The recent decisions in Rivard and Theophanous also support this doctrine.

3. Agents to Insurers

Agents may be held liable to insurers, as well as their clients. First, they may be obligated to indemnify insurers for claims brought by clients. Second, they may be liable for breach of an independent duty of care to an insurer.

a. Indemnification

By far the greatest number of these cases concern indemnification and by far the majority of these involve issues of misrepresentation or non-disclosure. The insurer's claim against the agent can take the form of third party proceedings in an action by a client, or a separate action, after the client has obtained judgment against the insurer.

A good example of the latter scenario is North Waterloo Farmer's Mutual Insurance Co. v. Wylie.[124] This was the companion action to Gilmore v. Waterloo Mutual, where the insured had succeeded in a claim against the insurer in respect of a fire loss. The insurers had defended that action on the basis that the subject equipment was not located in the insured building, but in a nearby barn. The insurer had denied coverage on the basis of misrepresentation or non-disclosure, but the agent's knowledge as to the location of the equipment was imputed to the insurer and the insured's right to indemnity was upheld. The insurer then sued its agent, maintaining that it would not have gone on the risk if the agent had disclosed the true state of affairs. The Ontario Supreme Court held that the agent was liable to indemnify the insured for the full amount of the loss.

At least three similar claims, all involving third party proceedings, have yielded similar results.[125] In fact, in at least one, Crawford Ditching & Dozing Ltd. v. Canadian Surety Co.,[126] the agency was ordered to indemnify the insured for the entire loss, even though the evidence was not clear that the insurer would not have issued coverage if it had been aware of the insured's

124 [1989] I.L.R. 1-2515, p. 9760 (Ont. S.C.)

125 G.R. Young Ltd. v. Dominion Insurance Corporation, note 121; Crawford Ditching & Dozing Ltd. v. Canadian Surety Co., (1986) 15 C.C.L.I. (Alta. Q.B.); Yorkshire Trust Co. v. Laurentian Pacific Insurance Co., (1987) 28 C.C.L.I. 368 (B.C.S.C.); 533476 Ontario Ltd. v. Southern Countries Insurance Managers Ltd., note 36; MacLean v. Canadian General Insurance Co., [1990] I.L.R. 1-2549, p. 10,043 (N.B.Q.B.); and Mahoney v. Kent General Insurance Corp., (1992) 7 C.P.C. (3d) 33 (N.B.Q.B.)

126 *Ibid*.

demolition operations. Sinclair J. could only find that the insurer would, at a minimum, "have charged a higher premium."[127]

In the recent case of Mahoney v. Kent General Insurance Corp.,[128] the agent failed to disclose to the insurer his knowledge that the applicant's common-law spouse had had his license suspended. If the insurer had been aware of this fact, they would have in all likelihood placed coverage in a facility program or risk-sharing pool with other insurers. This would have substantially reduced the insurer's liability on the risk.

However, in Western Union Insurance Co. v. R.H.C. Insurance Agencies Ltd.,[129] the result was quite different from those cases. The insurer had paid out on a fire loss despite its knowledge of several valid defences it could have raised in denying the claim. When the insurer sought to recover the amount of its payment from the agent, on the basis of the agent's alleged failure to properly complete the application form, the claim was denied. Mackoff J. held that since the insurer was not under any legal obligation to the insured, its payment was voluntary and could not be recovered from the agent, even if the latter had been negligent.

One of the more recent decisions involved a very different set of facts. In Zanatta Installations Ltd. v. Elite Insurance Co.[130] it was the agency which was held ultimately responsible for failing to limit the insurers liability by endorsing the policy according to the requirements of Section 14 of the B.C. *Insurance Act*.

b. Breach of Independent Duty

Three of these cases resulted in agents being held liable to insurers. Only one of them offers any real hope for a better result.

In Northwestern Mutual Insurance Company v. J.T. O'Bryan & Company,[131] the insurer repeatedly instructed its agent to cancel that portion of its policy that covered a fruit processing plant which it had discovered to have been closed down and vandalized. The agent agreed to do so and eventually assured the insurer that it had, but this was incorrect. Although the insurer had to pay out on the fire loss that occurred long afterwards, it was able to recover against the agent.

In Gore Mutual Insurance Company v. Barton Black and Robertson Ltd.,[132] the agent's conduct was much less flagrant. The insurer had advanced $20,000.00 to its insured for damages done to his mobile home as a result of a wind storm. The insurer then sued the agent, alleging that it had failed to disclose a change in location of the mobile home subsequent to coverage being placed. The insured had advised the agent of the changed address and the agency

127 note 125, p. 7
128 (1992) 7 C.P.C. (3d) 327 (N.B.Q.B.)
129 (1984) 5 C.C.L.I. 43 (B.C.S.C.)
130 (1991) 3 C.C.L.I. (2d) 159 (B.C.S.C.)
131 [1974] I.L.R. 1-639, p. 1018 (B.C.S.C.)
132 [1979] I.L.R. 1-1158, p. 501 (B.C.S.C.)

had reported the change to the insurer, indicating that it was merely a numerical change and not a change in location. In reality, the mobile home had been moved from a trailer park to a commercial area several blocks away. The insurer maintained that this was a material change in the risk and sued the agent in contract. There was a specific provision in the agency agreement as to notification of any changes in risk, and Fawcus J. found that this provision of the agreement had clearly been breached.

In the recent case of Tsalis v. Phoenix Continental,[133] the agent placed coverage with the insurer for a risk which was categorized in its underlying guidelines as being "generally unacceptable". If this had been the extent of the agents' knowledge about the type of business that the insurer did not wish to write, the Court would have dismissed the claim. However, the insurance company had also made it specifically known to the agency's staff that it did not wish to write such a risk. In light of these additional representations, Coo, J. held that the agency had breached its contractual obligations to the insurer

It is only Negash v. H. Later & Company Limited[134] which offers agents any cause for optimism. In that case, the limits on the agent's binding authority provided that he was not to bind risks previously cancelled or declined by another company. The agent exceeded his authority in that the applicant had previously had coverage cancelled by another insurance company for non-payment of premiums. However, when the insurer rejected the application it cited not only the prior cancellation but previous claims as well. Although the agent was in breach of his contractual duties and duty of care to the insurer, this was held to "merely technical". The cancellation for non-payment of premium was found not to be the real reason that the insurer rejected the application. The real reason was the previous claims, which was not a factor which limited the agent's binding authority in any way.

4. Insurers to Agents

In Systems v. Royal, the agent admitted liability to the insured and sought indemnification from the insurer. The New Brunswick Court of Queen's Bench held that the agent was acting for the insured and not the insurer, with respect to the policy application. As a result, the insurer could not be held responsible for the agent's negligence.

However, the agent will not always be solely responsible. In both McLeod v. Lunenburg and Stewart v. Lanark Mutual Insurance Company (*supra*) the agent and the insurer were each held 50% liable for failing to insure that the requested coverage was provided. Again, in light of the general rule in Kelly v. Wawanesa, agents can only reasonably anticipate contribution from the insurer where the client's claim does not relate to the completion of the application itself, but relates to the insurer's subsequent processing of the policy.

133 [1991] I.L.R. 1-2694 (Ont. Ct. – Gen. Div.)
134 [1985] I.L.R. 1-1856 (Ont. Co. Ct.)

5. Others

Depending upon the circumstances, an agent or an insurer may owe a duty of care, for example, to a mortgagee seeking the benefit of a mortgage clause. In three of these cases no liability was found, but in another four it was. As we will see, most of these types of cases do involve loss payees.

However, one decision that fell outside of this category was Newson v. The Excelsior Life Insurance Co.[135] In that case, Mr. Newson, in separate matrimonial proceedings had been ordered to keep in good standing insurance on his life with his former wife as beneficiary. The defendant insurer was not aware of such order. On April 17, 1975, Mrs. Newson's solicitor received from counsel for Mr. Newson a certificate from the insurer, dated March 21, 1975, indicating that he had $55,000.00 coverage on his life. However, the terms of the policy provided that this amount would be reduced by 50% when Mr. Newson reached the age of 65. This he did on March 11, 1975, approximately 10 days before the certificate was issued.

> With respect to whether there was a "sufficient relationship of proximity" between the insurer and Mrs. Newson as to current imposed a duty of care, Munroe, J. noted both that the policy did not entitle the wife, as beneficiary, to notice of any change in the policy, and that she did not have any vested interest in it.

Toronto-Dominion Bank v. Allstate Insurance Co. of Canada,[136] is one of the decisions that did involve a mortgage clause. In that case, the insured sustained a fire loss, but was charged and ultimately convicted of arson. His bank found that although there was a mortgage clause which would normally protect it from an arson defence under the policy, it was not named as the mortgagee. The insurer therefore refused payment and the bank sued. The Ontario High Court found that the agent was acting for the insured, and not his bank, and had not had any contact with the bank respecting the fire insurance requirements in the mortgage. As such, the agent owed no duty to the bank.

In Amherst Credit Union Limited v. Quebec Assurance & Casualty Company of Canada,[137] the insured's credit union had the opposite problem. Although it was named as the loss payee in the fire policy, there was no mortgage clause to ensure that a wrongful act of the insured would not be used as a defence to any claim by it as mortgagee. However, the Nova Scotia Supreme Court found that the credit union had not requested a mortgage clause, and the Court of Appeal affirmed the trial judge's finding that the practice in Nova Scotia was not to endorse the fire policy with the mortgage clause unless it was requested.

By contrast, there was such a request made in Federal Business Development Bank v. American Home Assurance Co.[138] The bank had instructed its broker to obtain coverage,

135 [1981] I.L.R. 1-1422 (B.C.S.C.)
136 (1988) 30 C.C.L.I. 218 (Ont. H.C.)
137 [1982] I.L.R. 1-1566, p. 1027 (N.S.C.A.)
138 [1986] I.L.R. 1-2083, p. 8024 (Ont. S.C.)

including a mortgage clause, and the agent had passed this request along to the insurer's agent. Holland J., of the Ontario Supreme Court, held as follows:[139]

> "If the insurers, through [the agent] Price were requested to provide a standard mortgage clause they were under a legal duty to do so, **or to clearly and timely advise that such request would not be honoured**. Apart from anything else which may be controversial, there is **no doubt** that the defendant insurers **never** advised at any time prior to the fire that the standard mortgage clause was not provided, nor that it would not be provided." (emphasis added)

As such, the insurer, but not the agent, was ordered to pay. The agent had discharged its duty by passing along the bank's request.

In Bank of Nova Scotia v. Khalek,[140] an application for mortgage insurance on a mobile home was denied, after the agent had advised the bank that the application and premium had been submitted to the insurer, and assured them that they would receive a copy of the policy showing them as loss payee. It was only when the mobile home was destroyed by fire that the bank learned there was no coverage. In light of the agent's representations, the Nova Scotia Supreme Court held him liable to make good on the loss. The most recent decision involving loss payees is Random Ford Mercury Sales Ltd. v. Noseworthy (*supra*). In that case, the unpaid seller of a boat contacted the purchaser's insurance agents to confirm that its interest was insured. The agents did so and, upon receiving that confirmation, the seller released the boat to the purchaser, which subsequently burnt and sank. However, no policy had been issued and the agent was held liable to the intended loss payee.

It can be seen that, in the last three of these cases, the contact between the agent and the mortgagees was sufficient to create a relationship of "neighbourhood", and therefore a duty of care.

Three other cases are worth noting. Two involved "key man" life insurance. Industrial Mechanical Specialties Limited v. Citadel General Insurance Company[141] concerned a policy arranged through the Commercial Traveller's Association. When the association changed carriers a new policy was issued, which deleted the employer as the beneficiary. When the insured passed away the proceeds went to his estate and the employer sued, alleging that the association owed him a duty as beneficiary under the original policy to preserve his rights. The Ontario Supreme Court held that no such duty was owed.

The result was exactly the opposite in Rivard. That case involved a policy on the life of one of the two partners, Mr. Bouw, which was voided for misrepresentation. However, the intended beneficiary was his other partner, Mr. Rivard. Rivard had sought to place his and his partner's life insurance policies through the same agent that he had dealt with almost exclusively for more than a decade. In all of the circumstances, namely, the joint nature of the two

139 *Ibid*., p. 8029
140 [1990] I.L.R. 1-2671, p. 10,542 (N.S.S.C.)
141 [1989] I.L.R. 1-2508, p. 9724 (Ont. S.C.)

applications and the special relationship between the two men, Yates, J. held that the agent owed Rivard, as the beneficiary, a duty of care. This duty he had breached through his negligent handling of the issue regarding Bouw's smoking or non-smoking status.

Finally, in Diggs v. Royal Insurance Company,[142] the plaintiff, who had been injured while riding as a passenger on a motorcycle, discovered that the owner's insurance had lapsed. She sued the insurer and the broker, claiming that they were negligent for failing to obtain insurance or to advise the owner that coverage had lapsed. The broker applied to dismiss the action on the basis that an injured third party has no right to claim damages for an agent's failure to place coverage for his client. That application was dismissed, keeping alive the prospect that such a novel claim could be advanced.

As such, agents may also owe duty of care to direct or even indirect beneficiaries under a policy of insurance. This is an area in which the law could expand further, and to the detriment of agents and brokers.

VI. INSTRUCTIONS AND REPRESENTATIONS

An agent's standard of care will be determined, in part, by the instructions he receives from his client and the representations he makes. As we have seen, Wilson J.A., in Fine's Flowers distinguished between situations where the client instructs the agent to "obtain a specific type of coverage", and those in which he gives "no specific instructions but rather relies upon his agent to see that he is protected". In the former situation, the agent's duty will be to "use a reasonable degree of skill and care in doing so". This is the negligence standard of care, discussed earlier.

In the latter situation, his duty will be to "inform himself about his client's business in order to assess the foreseeable risks and insure his client against them". This is the fiduciary standard of care. It will be seen that, although there may be a middle ground, in which the client provides some general instructions, this does not appear to lower the agent's standard of care.

1. Specific Instructions

Although specific instructions arguably limit the agent's standard of care, they also create a form of strict liability for the specific coverage which is sought. Indeed, only one of the reported cases of specific instructions since Fine's has been successfully defended on the basis of compliance with the standard of care. And only one other case places any real onus on the applicant, with respect to giving instructions.

In Johnson v. W.G. Barton Ltd.,[143] the client had his bookkeeper telephone the agent, in Prince George, to obtain liability coverage. The agent suggested that she speak to someone closer by, in Smithers, which she declined to do. The request was for a liability policy

142 [1987] I.L.R. 1-2162, p. 8365
143 (1986) 21 C.C.L.I. 73 (B.C.S.C.)

which was required in order to obtain a contract for a particular job with a lumber company. After two telephone conversations, and several questions, the agent determined that the client needed a comprehensive liability policy and advised her that the usual forms excluded off-premises welding, which she assured him they did not do. The agent also recommended an I.C.B.C. garage policy, which she said they would place through their Smithers agent if that was necessary. The fire loss suffered was of course ignited by the insured's off-premises welding work.

Referring to the Fine's case, Drost, L.J.S.C. stated as follows:[144]

> "[The bookkeeper,] Mrs. McDonald, on behalf of the plaintiff, did not instruct [the agent] Mr. Taylor to obtain full coverage for all of its foreseeable, insurable risks, nor did they undertake to do so. Neither did she request, or Mr. Taylor undertake to provide, coverage with respect to off-premises welding and licensed vehicles or other property in the position or custody of the plaintiff. Accordingly, I find the defendant was not in breach of any contractual obligation to the plaintiff, nor was it negligent, in failing to arrange for the plaintiff the type of insurance that would cover the particular loss that was suffered by the plaintiff."

As mentioned, this case is a rare exception.

By contrast, agents have been held liable, for example, for failing to provide disability coverage that "would not be limited by worker's compensation benefits", where an exclusion clause reduced benefits by the amount of any workers' compensation payments;[145] for failing to provide, *inter alia*, theft coverage, as set out in a competitor's premium quotation, where the policy did not include the necessary endorsement;[146] for failing to provide "basically the same coverage", "preferably for a lesser premium", as the insured had had previously (and which included contents coverage on a tool shop), where the necessary endorsement was similarly omitted;[147] for failing to obtain the same coverage as the insurer had before, where the agent replaced an "all risks" with a "specific perils" policy;[148] and for failing to procure additional coverage for the risk of a river's level rising and flooding a construction project, where flooding was an excluded peril.[149]

However, in Shenkar v. Midpark Insurance Inc.,[150] the Alberta Provincial Court did note that there is at least some onus on an applicant to either give specific instructions or make it clear that the agent is being relied upon more generally to assess foreseeable risks and provide adequate coverage. However, the applicant in that case was a sophisticated realtor, and it is suggested that the onus will, generally speaking, still remain on the agent to either elicit specific instructions or accept what amounts to strict liability in the event of an uncovered loss. This is

144 *Ibid*., p. 81
145 Gibbs v. Claridge, [1985] I.L.R. 1-1871, p. 7185 (B.C.S.C.)
146 Luft v. M.G. Zorkin & Co. Ltd., note 91
147 Pond v. Dovell, [1981] I.L.R. 1-1343, p. 133 (B.C. Co. Ct.), dismissed on other grounds, notwithstanding finding of "probably" negligence (p. 135)
148 Dueck v. Manitoba Mennonite Mutual Insurance Co., note 15
149 McNicol v. Insurance Unlimited (Calgary) Ltd., (1993) 5 Alta. L.R. (3d) 158 (Q.B.)
150 (1992) 11 C.C.L.I. (2d) 32 (Alta. Prov. Ct.)

supported by Zanatta Installations Ltd. v. Elite Insurance Ltd. (*supra*), in which the B.C. Supreme Court underscored the obligation of agents to seek and obtain adequate instructions, and not to make assumptions about the nature of the risk.

2. General Instructions or the "Blank Cheque"

In Fine's Flowers, two of the three Court of Appeal judges found that there was,[151]

> "… a contract between the plaintiff [client] and [the agent,] for the obtaining of the whole coverage for the [plaintiff's] properties and business …"

The other judge, Estey, C.J.O., found that the agent was negligent, because he did not discharge his,[152]

> "… undertaking … to provide the [plaintiff] with insurance protection against "foreseeable" loss or to see that he was "adequately covered with insurance."

These findings are significant for three reasons. First, although there was no express contractual agreement, two of the three judges (as well as the trial judge) were prepared to infer the terms of a contract, in the absence of any general, let alone specific instructions.[153]

This was even though, in the view of Estey, C.J.O., the burden was on the plaintiff "to demonstrate that [his] loss arose out of an "insurable" risk."[154] It was for this reason that he resorted to negligence and fiduciary duty to award judgment to the insured. The other two Court of Appeal judges, by finding a contract, shifted the burden of proof to the agent. As a result, absent clear evidence that the coverage promised is unavailable, the test can become one of "all foreseeable risks", without limitation as to the "extraordinary" nature of the coverage or even its availability in the market.

Second, even though no instructions at all may be given, an agent will be required to "understand the nature of his client's business and assess the risks that should be insured against…". That is what is meant by "all foreseeable risks", and this is what may be referred to as the "know your client" rule.

Finally, as we have seen, the result is that agents may be fixed with strict liability for failing to obtain even "extraordinary" coverage.

An analysis of three cases, from three jurisdictions, decided over a period of eight years, illustrates the significance of these three principles. In Bar-Don Holdings Ltd. v. Reed Stenhouse Limited,[155] the client sought coverage for its proposed mobile home business. When one of its mobile homes was damaged by fire while parked outside the office of a trailer park, the

151 note 1, p. 150 (C.A.)
152 *Ibid*., p. 143
153 *Ibid*., pp. 139 & 150
154 *Ibid*., p. 142
155 [1983] I.L.R. 1-1637, p. 6282 (Alta. Q.B.)

insured denied coverage on the basis that the loss occurred at a location which was not specified in the policy endorsements. After citing Fine's, MacNaughton, J., of the Alberta Court of Queen's Bench, quoted the following version of the know your client rule, as stated in an earlier case:[156]

> "… I am firmly of the opinion that every underwriter or insurer is bound to know the nature and practice of the trade or business to which the policy relates.
>
> …
>
> The insured also is entitled to presume that the insurer knows all of the facts which the insurers in the ordinary course of their business as such ought to know, including the general course of the particular trade, and also other facts connected with the trade which could have been discovered by inquiry."

In other words, quite clearly, the agent could and should have appreciated that the location of its client's mobile homes, by their very nature, would be subject to change. As such, the endorsement for coverage at unnamed locations (which was subsequently added, at no increased premium cost) should have been included from the outset.

In Carousel Travel Inc. v. Livio Ricci Insurance Broker Ltd.,[157] the insurer refused to indemnify the insured travel agency in respect of a third party claim advanced by the passengers of a taxi that the insured had hired to carry them to the airport in Montego Bay, Jamaica. The refusal was based on grounds that the policy did not cover "offshore" risks and that there was no "non-owned auto" coverage. The insured had given the defendant a "general mandate" to "take over the account" from its existing broker. Reid J., of the Ontario High Court, phrased the general rule in this way:[158]

> "In the absence of some special or peculiar circumstances, full coverage is what [the client] would wish to have, even if he did not explicitly ask for it."

In other words, absent specific instructions, agents can only be certain of avoiding liability for deficient coverage if they can prove that none was available.

By contrast, there is the decision in L.B. Martin Construction Ltd. v. Gaglardi,[159] which was decided after but does not refer to the Fine's case. The insureds rented a 30-ton mobile crane for use in constructing an egg-sorting facility at their premises. Before moving it to the site, they approached their agent regarding insurance. The agent took details of the equipment over the telephone and advised that it was insured from noon that day. With that assurance the crane was moved on to the site and, of course, collapsed the next morning while making its first lift. In fact, no policy had been issued. The agent defended on the basis that even if one had, the loss would not have been covered, due to the usual overloading exclusion.

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156 Anderson v. Canadian Mercantile Insurance Company, (1965) 51 W.W.R. 129 (Alta. Q.B.) pp. 155 & 144, affirmed (1965) 53 W.W.R. 446 (Alta. C.A.), quoted *Ibid*., p. 6286

157 (1987) 23 C.C.L.I. 218 (Ont. H.C.)

158 *Ibid*., p. 220

159 [1979] I.L.R. 1-1061, p. 22 (B.C.S.C.)

Taylor, J., of the British Columbia Supreme Court, stated the following, in accepting that defence:[160]

> "[T]hose who obtain insurance coverage in general terms by telephone … must surely intend no more than that the agent will place insurance on the best terms reasonably available to him and that by his assurance of coverage the agent means that he has placed such coverage. The customer must be content to be bound by the terms of that coverage, whatever they may be, unless he specifically draws to the attention of the agent the fact that he wants something else.
>
> In the present case, I find that nothing was said to the agent's representative which would lead him to believe that [the applicant,] Fraser Valley was seeking special, or extended coverage. If words were used to indicate that "complete coverage" was required, I do not think they were such as to suggest more than that the customer wanted a complete range of coverage available to the agent. While coverage apparently could be obtained in the market which would not be subject to exclusion of loss due to overloading, I accept that it would not have been reasonable to expect the agents to obtain such coverage and I find it improbable that it could have been obtained for a customer such as Fraser Valley."

However, in light of Fine's, Bar-Don Holdings Ltd. v. Reed Stenhouse Limited (*supra*) and Carousel Travel Inc. v. Livio Ricci Insurance Broker Ltd. (*supra*), the courts are unlikely to hold agents to the lower standard of placing "reasonable" coverage, as sensible as this may seem.

This is illustrated in numerous cases. By way of some examples, the courts have held agents responsible for obtaining coverage for "all foreseeable insurable risks," in cases where the instructions were to obtain coverage for "any "boom collapse" except if fraud was involved", where coverage was denied under an overloading exclusion;[161] for a van to be used for work and pleasure by the insured and his family of five, where the policy included a passenger restriction;[162] for the "maximum available coverage" on an automobile, where under-insured motorist protection was not included;[163] for the latest aircraft that an aviation company had leased, where coverage was denied under a subleasing exclusion;[164] for "all that [pointing over shoulder] in the barn", where coverage was denied for non-disclosure of the location of the goods;[165] for "comprehensive liability insurance" for a foundation contractor's operation, where the policy excluded contractual liability;[166] and for "coverage which would indemnify [the insured] for any liability arising out of his company's operations including any liability for damages resulting from excavation operations", where coverage was denied under an excavation exclusion.[167] Further examples of statements held to constitute contractual undertakings include that "your request will be taken care of";[168] and that

160 *Ibid*., p. 25
161 Capital Crane Ltd. v. Atlantic Insurance Co., note 26
162 Dormer v. Royal Insurance Company, note 89
163 Fletcher v. M.P.I.C., note 57
164 Gerber v. Eagle Star Insurance Company Limited, [1987] I.L.R. 1-1442, p. 514 (B.C.S.C.)
165 Gilmore Farm Supply Inc. v. Waterloo Mutual Insurance Co., note 70
166 G.K.N. Keller Canada Ltd. v. Hartford Fire Insurance Co., note 54
167 Peter Unruh Construction Company Limited v. Kelly-Lucy & Cameron Adjusters Ltd., [1976] 4 W.W.R. 419 (Alta. Q.B.)
168 Chocian v. Stony Plain Agencies Ltd., (1985) 12 C.C.L.I. 39 (Alta. Q.B.)

the agent "would look after the coverage increase".[169] Some of these instructions have been paraphrased.

Consistent with the previous cases, most of the recent decisions have involved agents who accepted general instructions or gave a "blank cheque" to their customers.[170]

3. Representations

Setting aside the risks inherent in accepting general instructions from clients, agents have also encountered claims problems because of their own representations. In two cases they did so by advising clients not to purchase specific coverage, because the risks were covered under existing policies. In Elliot v. Ron Dawson & Associates (1972) Ltd.,[171] the clients sought luggage insurance but were advised not to, for the reason that they were already covered to the full face value of their tenants' policy, being $15,000.00. However, the agent had not read the policy, which provided a limit of $1,000.00. In Estevan Brick v. Gerling Global General Insurance Company, (*supra*) an officer of the insurer represented that certain gear-boxes were covered under an existing policy. The insured refrained from obtaining extended insurance and the insurer was therefore estopped from denying coverage on the gear-boxes.

In D. Vaughan Contracting Inc. v. Don Stobbe Insurance Agencies Ltd.,[172] the agent told his client that coverage was effective immediately, when in fact it had not been placed and never was. It took McLachlin J. (as she then was) all of three sentences to find the agent liable on the basis of Fine's Flowers.

One of the more recent decisions on liability for the making of representations, as opposed to not following general or specific instructions, was Random Ford. As we have seen, the representations by the agent in that case resulted in liability to the beneficiary on the basis of an estoppel.

From all of these cases flow two more "golden rules". First, "know the policy". If it does not provide "full coverage" the agent must, at the very least, advise the client and seek further instructions. Second, "know yourself". Agents must know who they are acting for and, particularly, whether they have authority to bind coverage.

VII. TYPES OF BREACHES

There are almost more ways than one can possibly imagine for agents and insurers to breach the onerous duties which they may owe to clients and insureds. Particularly as most

169 Rockey v. Sutherland, (1978) 27 N.S.R. (2d) 504 (N.S.C.A.)

170 Agincourt Motor Hotel Limited v. Tomenson Sauders, Whitehead Limited, [1982] I.L.R. 1-1590, p. 1142 (Ont. S.C.); Block Bros. Industries Ltd. v. Westland Insurance Centre Ltd., (1992) 8 C.C.L.I. (2d) 110 (B.C.S.C.); Niagara Frontier Caterers, Ltd. v. Continental Insurance Co. of Canada, (1990) 5 C.C.L.I. (2d) 54 (Ont. S.C.); Roundy v. Green Insurance & Guarantee Co., (1992) 5 C.C.L.I. (2d) 144 (Sask. Q.B.); Theophanus, and Zanatta. Far fewer cases, namely Dueck v. Manitoba Mennonite Mutual Insurance Co., note 15, McNicol v. Insurance Unlimited (Calgary) Ltd., note 149 and Webster v. Robinson, (1991) 4 C.C.L.I. (2d) 256 (B.C.S.C.), have involved specific instructions.

171 [1982] I.L.R. 1-1564, p. 1017 (B.C.S.C.)

172 note 75

cases involve agents' and brokers', as opposed to insurers' liability, the textwriters' examples of failure to use proper skill will now be expanded over the rough sequence of events which is involved in dealing with clients. This section will therefore deal with the following types of breaches, in order:

(a) Not placing any, adequate or timely coverage;

(i) no coverage at all;

(ii) inadequate amount;

(iii) incomplete subscription;

(iv) limited subject matter;

(v) exclusions and exemptions;

(vi) co-insurance and "other insurance" clauses;

(vii) other disadvantageous terms; and

(viii) placing too late;

(b) Not advising the client as to coverage or its status;

(c) Not correctly advising the client as to the availability of coverage;

(i) not advising that available;

(ii) advising that not available; and

(iii) no insurable interest;

(d) Placing coverage with a financially unsound insurer;

(e) Misrepresenting the risk to the insurer;

(i) voiding coverage by misrepresentation;

(ii) not adequately informing insurer; and

(iii) other cases;

(f) Not increasing coverage, as instructed;

(g) Not renewing any or adequate coverage or warning of expiry;

(i) not renewing at all;

(ii) not renewing adequate coverage; and

(iii) not warning of pending expiry;

(h) Cancelling or limiting coverage, without instructions;

(i) Not warning about the consequences of cancellation; and

(j) Not advising to sue under the policy.

1. Not Placing Any, Adequate or Timely Coverage

a. No Coverage At All

There are three general categories of these cases. First, as we have seen, the agent may recommend against placing coverage on the erroneous assumption that the risk is already insured. Second, the agent may not pursue the application and fail to advise his client. Examples in this category are Colony Lincoln Mercury Sales Ltd. v. Haber Insurance Broker Ltd., (*supra*) where the agent advised the insurer not to proceed with the application when it did not receive a $100.00 deposit, and Chocian v. Stony Plain Agencies Ltd.,[173] where the agent did not insure certain truck trailers because the client had not provided the required serial numbers. Both agents were held liable, primarily on the ground of failing to advise their clients that the applications would not be proceeding.

Finally, there are the cases where coverage somehow slips through the cracks. In McLeod v. Lunenburg, as we have seen, the insurer had assumed 60% of the risk but neglected to show the new subscriber for the remaining 40% on the policy when the original second subscriber went out of business in the province. This admittedly clerical error was never noticed by either the insurer or the agent, notwithstanding at least two renewals of the policy.

In Quickway Aviation Ltd. v. British Aviation Insurance Co. Ltd. , (*supra*) as in Stewart v. Lanark Mutual, the insurers never provided the requested coverage, and the client recovered against the agents, who had failed to notice that the policy had not been issued, In the latter case, the client recovered against the insurer as well.

In Stewart, Stortini, D.C.J., followed Fine's and found as follows:[174]

> "[T]he defendant agent was negligent in not obtaining the specific coverage requested, not confirming coverage by the insurer, not verifying the coverage upon receipt of the policy endorsement, and in not advising the plaintiffs of the lack of windstorm coverage, if such were the case."

Two other cases in this category, and where insurers were held directly liable, are Jessett v. Conacher (*supra*) and McLeod v. Lunenburg.

173 note 168
174 note 113, p. 222

Another such case was Wyeth v. Henry McWilliams and Wallace Ltd., (*supra*) where the agent failed to follow up on a written notice to the insured that an appraisal of his motorcycle was required before specified perils coverage would be added. The motorcycle was stolen and the agency was held contributorily liable for 60% of the loss.

Simply put, agents cannot leave applications in the hands of the insurer but must periodically follow up both with their clients and the insurers, and advise their clients accordingly. This requires adequate checklists and diarization.

b. Inadequate Amount

Here there are three categories of cases. First, as in Gilmore v. Waterloo Mutual, there may simply a shortfall, for which the agent will be liable. Second, the agent might not have taken steps to determine the value of the subject matter. However, there is authority that an agent is not required to inspect a property or advise that an appraisal be obtained before agreeing on the amount of coverage for a non-replacement cost policy. In Green v. Donald T. Ritchie Insurance Agencies Ltd.,[175] Holland J. decided that, in these circumstances, the insured, with:[176]

> "… his special knowledge [of the property] was in the best position to determine the adequacy [of the coverage] for his purposes."

Finally, the agent may obtain coverage on the wrong basis. In Coyle v. Ray F. Fredericks Insurance Ltd.,[177] the agent was held liable for the difference between replacement cost and actual cash value, when he had undertaken to obtain coverage on the former basis but actually did so on the latter.

c. Incomplete Subscription

As in Block Bros. Industries Ltd. v. Westland Insurance Centre Ltd.,[178] the agent may also fail to follow up on one of the subscribers to the policy. In that case, 20% of the risk remained uninsured when the plaintiff's golf course clubhouse was destroyed by fire.

d. Limited Subject Matter

Some examples of failure to cover all of the required subject matter are insuring a truck but not the trailers it would be hauling;[179] not adding to an auto policy the latest vehicle purchased for the insured's business;[180] and not adding to an existing aviation insurance policy coverage for the latest aircraft that the insured had leased.[181]

175 (1984) 2 C.C.L.I. 182 (Ont. H.C.)
176 *Ibid*., p. 192
177 note 36
178 note 170
179 Chocian v. Stony Plain Agencies Ltd., note 168
180 O'Donnell v. Lumbermen's Mutual Casualty Company, note 85
181 Quickway Aviation Ltd. v. British Aviation & Insurance Co., note 121

Two recent examples include not insuring that rental losses would be covered (in Block Bros. Industries Ltd. v. Westland Insurance Centre Ltd. (*supra*)) and endorsing a policy to delete coverage at one of the insured's locations, after a certain date (in Zanatta Installations). In the Block Bros. case, the plaintiff had done business with the agent for a long time, and the agent was very familiar with its business. Specifically, the agent knew that the restaurant in the golf course clubhouse was leased out. Furthermore, the plaintiff had also insured rentals from other properties, in policies previously placed with the agent.

In Zanatta, the agent mistakenly assumed that the goods at one of the insured's locations would be moved after a certain date. As in Theophanus, a wrong assumption cost the agent dearly.

e. Exclusions and Exemptions

The single largest category of agents' and brokers' liability cases stem from denials of coverage based upon policy exclusions. In some of the cases, the exclusions are so fundamental to the coverage the client was seeking that the policy was virtually worthless. At least a half dozen examples fall into this category. They also make a very basic point about loss prevention practices.

In Stewart v. Lanark Mutual, the clients specifically requested $35,000.00 in "wind coverage" during the construction of a quonset-type steel building on their farm. The building was, naturally, partially blown down in a windstorm, shortly thereafter. The insurer, naturally, denied coverage under a course of construction exclusion, and the insureds sued both the insurer and the agent. As we have seen, both were found negligent in their respective handling of the insured's application.

In Peter Unruh Construction Company Limited v. Kelly-Lucy & Cameron Adjusters Ltd.,[182] a general contractor asked the agent to obtain liability coverage for any loss or damage resulting from their operations. The contractor had specifically told the agent that he would be engaging in excavation work. From time to time afterwards, the contractor would call the agent and give him details of new projects they were working on. On each occasion, the agent assured the contractor that he was covered for those projects. One of those projects involved the excavation of a basement for an extension to an existing building. The adjoining property wall began to crack, and ultimately collapsed. Both the agent and the adjuster assured the contractor that they were completely covered, but the insurer denied coverage, relying on an exclusion for building collapse due to excavation. Not surprisingly, Quigley J. stated as follows:[183]

> "[The contractor], Unruh was not relying on his own expertise in preparing, submitting or reviewing the contents of the policy he sought to obtain through his agent Swift. He was relying on Swift and Swift knew or ought to have known this to be so and should therefore have exercised that degree of care which would insure that his client got what he clearly sought. There was a

182 note 167
183 *Ibid*., pp. 423-4

> clear duty upon Swift to carefully read the policy to insure that it contained the coverage the plaintiff required and requested."

These cases are two more illustrations of the second golden rule, namely, know the policy.

Another particularly instructive case is Gerber v. Eagle Star Insurance Company Limited.[184] An owner leased an aircraft to another party, and required the lessee to place insurance coverage with the owner named as loss payee. As the parties intended that the aircraft would be sublet, they deleted from the lease the usual term prohibiting subletting. Coverage was sought through an agency that specialized in aviation insurance. The agent met the applicant at a coffee shop at the Vancouver Airport. During the meeting, the lessee advised the agent that the aircraft was currently being subleased. The aircraft subsequently disappeared and the insurer denied coverage on the basis of a provision in the policy that the aircraft was not to be sublet. Dohm J., stated the following in finding the agent negligent:[185]

> "[H]e did not follow the accepted practice of having [the applicant] Fox complete a formal application and to request coverage on the basis of an application. Instead he chose to make a few "spotty or sketchy notes" and he failed to take into consideration the instrument which gave rise to the policy namely, the lease between the Plaintiff [owner] and [the lessee] Fox Aviation. Surely these are marked departures from the norm."

This is another excellent example of the know your client rule. As the lessee was applying for insurance on the basis of its lease with the owner, it was incumbent on the agent to read the lease, such that it would understand the nature of the business and therefore the risks involved.

This case also suggests a fourth golden rule, namely "know what you are doing". This is not meant to be tongue-in-cheek. It is intended to make an important point. Follow proper practices and procedures. Complete a formal application form and use a checklist, if appropriate. Do not use the back of an envelope, cocktail napkin, or a post-it note, however convenient it may be to do so.

There are also three recent examples, including Agincourt Motor Hotel Limited v. Tomenson, Sauders, Whitehead Limited,[186] in which a miscellaneous electrical apparatus rider was omitted from a policy of boiler insurance. In Dueck v. Manitoba Mennonite Mutual Insurance Co. (*supra*), the agent arranged for specific as opposed to all perils coverage. The Manitoba Courts held that the agent did not understand either the plaintiff's insurance needs or the available coverage. The agent switched the plaintiff from one insurance company to another, which did not offer all risk coverage. However, that type of policy could have been obtained from another insurer, through a competing insurance brokerage firm. When the insureds' barn collapsed, the

184 note 164
185 *Ibid*., p. 516
186 note 170

insured denied coverage on the basis that it had not been proved that the loss had been caused by any of the specified perils.

Finally, in Roundy v. Grain Insurance & Guarantee Co.,[187] it was a vacancy clause which excluded coverage for the loss of the cabin due to fire. Regardless of whether the applicant had expressly advised him, the Saskatchewan Court at Queen's Bench held that the agent ought to have realized that the cabin might remain vacant, and should have asked the appropriate questions. Had he done so, and ascertained the true nature of the risk, he could then have explained the various coverage options which were available, and obtained specific instructions.

There have also been numerous other examples of exclusions or missing exemptions that got agents into errors and emissions difficulties, including the "wear and tear" exclusion in Fine's; exclusions against loss while a crane was hired out, where the agent knew that 85% of the insured's business was subleasing cranes;[188] a vacancy exclusion for theft coverage, where the client's main concern was theft and the home was going to be left vacant;[189] a 180-day exclusion under a travel medical policy;[190] an overloading exclusion for a crane;[191] exclusions for off-shore risks and non-owned auto, where the insured was a travel agency;[192] an exclusion for more than three persons travelling in a vehicle, when the agent knew that the insured had a wife and five children and that the vehicle was intended for both business and pleasure use;[193] an exclusion for construction liability under a C.G.L. policy, where the insurer was a foundation contractor;[194] an exclusion for loss to structures used for commercial purposes and property pertaining to business, where the agent knew that one or more of the buildings on the insured premises would be used in conjunction with the insured's business;[195] and a flood exclusion, where the insured contractor had requested additional coverage for the risk of a river's level rising and flooding a project.[196]

f. Co-Insurance and "Other Insurance" Clauses

Two recent decisions involved new fact patterns with respect to agents failing to ensure that there were no gaps in coverage. In Niagara Frontier Caterers Ltd. v. Continental Insurance Co. of Canada,[197] the policy contained a 90% co-insurance clause, which the agent did not bring to the attention of the insured. In Theophanus, it was an "integration of benefits" clause which the agent did not explain. Such a clause provides for a reduction of coverage in the event that the insured received accident or sickness benefits from any other sources. This is a type of contribution or "other insurance" clause, which is the subject matter of one of the author's other

187 note 170
188 All-Lift Consultants v. Adam Crane Service (1980) Ltd., [1988] I.L.R. 1-2353, p. 9099 (Alta. Q.B.)
189 Antonesen v. Wawanesa Mutual Insurance Co., note 123
190 Ataya v. Mutual of Omaha Insurance Company, note 36
191 Capital Crane Ltd. v. Atlantic Insurance Co., note 26
192 Carousel Travel Inc. v. Livio Ricci Insurance Broker Ltd., note 157
193 Dormer v. Royal Insurance Company, note 89
194 G.K.N. Keller Canada Ltd. v. Hartford Fire Insurance Co., note 54
195 Kelly v. Wawanesa Mutual Insurance Co., note 95; and McCann v. Western Farmers Mutual Insurance Company, [1978] I.L.R. 1-1022, p. 1227 (Ont. S.C.)
196 McNicol v. Insurance Unlimited (Calgary) Ltd., note 149
197 note 170

papers, titled "**Who's On The Risk (And For How Much?)**: *Allocating and Apportioning Indemnity and Defence Costs Among Insurers in Canada*."[198]

g. Other Disadvantageous Terms

In New Forty Four Mines Ltd. v. St. Paul Fire & Marine Insurance Co.,[199] the broker, without the instructions of his client, represented that the inactive mine being insured was under 24 hour watch. This was untrue. Nevertheless, a warranty to this effect was incorporated into the policy, although the insured was never advised. When a loss occurred, the insurer successfully denied coverage, but the agent was held liable.

In an unusual case, Tynan v. Dextraze,[200] the agent sued one of its clients on a promissory note for unpaid premiums. The client counter-claimed, alleging that the agent had failed to advise it of a more suitable and less expensive policy that was available. Who won? As you might have guessed, the customer recovered the premium difference between the two policies.

h. Placing Too Late

How long should it take an agent to honour a telephone request for fire insurance? How about two hours? In Fraser Valley Mushroom Growers Co-operative Association v. McNaughton & Ward Ltd.,[201] the insured called his agent at 9:50 a.m. and asked him to place $100,000.00 worth of fire coverage on the straw at its compost dock. The agent quoted a price, the insured told him to "write it up" and the agent said "I'll take care of it". At 11:50 a.m. a fire consumed $123,000.00 worth of straw. Although the agent had not yet placed the coverage, there was evidence that on two other occasions the agent had placed similar insurance within 15 minutes by making a series of telephone calls. Based upon this rather limited practice, Berger J. found that the agent had breached an implied term of the contract to immediately place coverage.

2. Not Advising as to Coverage or Status

In many of the cases already cited agents were held negligent not merely for failing to place any or adequate coverage, but also for not advising the insured as to the adequacy of coverage[202] (including Fine's itself) or the status of the application.[203] In some cases, the insurer

198 Copies available from the author upon request. This is a paper which was prepared and copyrighted by the author in 1993. It was presented both at CLE's "Insurance Issues – The Business of Risk", Vancouver, October 15, 1993, and the Insurance Institute of B.C.'s fourth annual major seminar on selected topics, "Liability Insurance and Coverage Disputes", April 15, 1994, both in Vancouver. It has been submitted for publication by *C.J.I.L.* (Butterworths Canada Ltd. – edited by Lazar Sarna).

199 (1985) 9 C.C.L.I. 91 (Alta. Q.B.)

200 [1978] I.L.R. 1-1018, p. 1211 (B.C. Co. Ct.)

201 (1985) 9 C.C.L.I. 91 (Alta. Q.B.)

202 All-Lift Consultants Ltd. v. Adam Crane Service Ltd., note 188; Antonesen v. Wawanesa Mutual Insurance Co., note 123

203 Colony Lincoln Mercury Sales Ltd. v. Haber Insurance Broker Ltd., note 24; F.B.D.B. v. American Home Assurance Co., note 138; Quickway Aviation Ltd. v. British Aviation & Insurance Co., note 121

has even erroneously advised that coverage was in place.[204] In others, the agent did not provide the insured with a copy of the policy.[205]

What is so unfortunate is that each of these actions was completely avoidable. In Curry Construction (1973) Ltd. v. Reed Stenhouse Ltd.,[206] the agent was dealing with an applicant with a "total lack of interest in the contents of the policy" and whom he had difficulty "in even getting to see". In these circumstances, De Weerdt J. gave this question and answer:[207]

> "Was it, then, enough for the broker in the present case to warn a customer to read the policy, paying particular attention to the exclusions? In my view the answer is "yes"; that was all [the agent,] Mr. Ross could do … I find that, on a balance of probability, Mr. Ross did give such a warning to [the applicant,] Mr. Curry …
>
> …
>
> [T]he broker and Mr. Ross did all that could reasonably be required of them to provide that advice."

This was clearly an extreme case, but one that indicates that the courts are not entirely lacking in sympathy for agents and brokers. The preferred course of action would, of course, be to provide a copy of the policy to the insured and to review with the insured the contents of the policy, in detail, ideally with the aid of a checklist.

The Zanatta case, in which the agent failed to properly endorse the policy, provides a recent example of not advising the customer as to coverage or the status of the application. So does Block Bros., where the agent did not follow up on the subscription for 20% of the risk.

It should also be borne in mind that the agent's obligation is an ongoing one. For example, if the policy wording changes,[208] or the insurer declines to grant any more vacancy permits,[209] the agent has a continuing duty to warn the insured, so that other arrangements may be made.

3. Not Correctly Advising as to Availability

Some of the most recent developments have been in this narrow area of the law. One category of cases which has grown in recent years is where the agent either fails to advise that the coverage is available or incorrectly advises that it is not available. A related category involves agents failing to ascertain that the applicant has no insurable interest in the subject property.

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204 McLeod v. Lunenberg Insurance Agencies Ltd., note 90; Norlympia Seafoods Ltd. v. Dale & Co. Ltd., note 41; and D. Vaughan Contracting Inc. v. Don Stobbe Insurance Agencies Ltd., note 75

205 Antonesen v. Wawanesa Mutual Insurance Company, note 123; and Waldmans Fish Company, Inc. v. Anderson Insurance and Burton Finch and Company Inc., [1979] I.L.R. 1-1145, p. 397 (N.B.C.A.)

206 (1988) 35 C.C.L.I. 275 (N.W.T.S.C.)

207 *Ibid*., pp. 281-2

208 Waldmans Fish Company, Inc. v. Anderson Insurance and Burton Finch and Company Inc., note 205

209 Grainary Restaurant Ltd. v. American Home Assurance Co. (1986) 19 C.C.L.I. 218 (N.B.Q.B.), affirmed

a. Not Advising That Available

In Fletcher v. M.P.I.C., the Supreme Court of Canada held M.P.I.C. liable for not informing the applicant about U.M.P. coverage. The British Columbia Court of Appeal had come to a contrary conclusion in Sjodin v. Insurance Corporation of British Columbia.[210] How can these cases be reconciled? Wilson J., speaking for the Supreme Court, in Fletcher v. M.P.I.C. made the following observations:[211]

> "The trial judge found that MPIC had not set up a public education program similar to the one established by [ICBC]. No large scale advertising campaign was launched in Manitoba to explain the new UMC option which became available for the first time in Manitoba in March of 1982. Furthermore, MPIC's employees did not ask customers as a matter of course whether they wanted UMC. The trial judge noted that the extensive public education programme had been successful in B.C. as evidenced by the relatively high acceptance rate (97% of eligible B.C. drivers purchased it) compared to Manitoba. In Sjodin this evidence was viewed as crucial to the court's finding that I.C.B.C. had not failed in its duty to inform the plaintiff." (emphasis by Wilson J.)

What then is the scope of the insurer's duty? Wilson J. had this to say:[212]

> "The insurer's duty is to provide sufficient timely, clear and accurate information to its customers about the various options so that they can make informed choices about what level of risk beyond that required by law they want to insure themselves against. At issue in this appeal, then, is the question whether MPIC's communication was clear enough."

Unlike Mr. Sjodin, Mr. Fletcher received an application and a certificate that made no mention of UMC. Although he received a one page flyer several months after he had purchased his insurance, and which included some small print indicating that UMC was available, the words "not applic." had been typed in the box designated for UMC on the renewal certificate accompanying the flyer. Mr. Fletcher took this to mean that coverage was not applicable to him.

Other examples include Agincourt Motor Hotel Limited v. Tomenson, Saunders, Whitehead Limited (*supra)*, Block Bros., Dueck and Roundy v. Grain Insurance & Guarantee Co. (*supra*), all of which have been considered above. Only the first of these cases was successfully defended, when the court was convinced that the electrical apparatus rider had in fact been offered.

These cases suggest a corollary to the "know your client rule, namely, "let your client know". Once the agent has ascertained the client's needs he should then clearly advise as to all the coverage options available.

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210 (1989) 35 C.C.L.I. 155 (B.C.C.A.), affirming (1986) 24 C.C.L.I. 70 (B.C.S.C.)
211 note 57, pp. 10,557-8
212 *Ibid*., pp. 10,558-9

b. Advising That Not Available

In Markal v. Morley Shafron, the trial judge had held the agent negligent for advising that snowload coverage was not available in the market for his client's tent. Although this decision was reversed by the Court of Appeal, that was only on the basis that the applicant had failed to prove, on a balance of probabilities, that coverage was available and that he had therefore been negligently advised.

In Martinelli v. Co-Operators General Insurance Company,[213] the applicant requested public liability, property damage and insurance coverage for his motorcycle from the insurer's agent. Although the reasons are not clear on this point, it would appear that the agent was an employee or exclusive agent of the insurer. The applicant was told that collision coverage for his motorcycle was not available through the insurer. This was because they had an underwriting policy not to supply collision coverage for motorcycles over 700 c.c. capacity or where the owner had less than one year's riding experience. Stortini D.C.J. found as follows:[214]

> "There is no evidence to indicate that the agent misrepresented to the plaintiff that collision coverage was not available elsewhere. Furthermore, he did not by adopting any remarks made by the plaintiff or by skilful silence intentionally mislead the plaintiff in believing that collision coverage was not available elsewhere. There is no indication by the evidence that at the material time the agent was aware of the plaintiff's impression that such coverage was not available elsewhere. One cannot read the mind of another and should not be faulted for failing to correct a misunderstanding lodged there. It would be a different matter, of course, if the misunderstanding was caused by a misrepresentation, a wilful act or omission on the part of the other person."

Had the evidence been less clear, however, the agent's statement could have been held as a misrepresentation as to availability generally, and the insurer may have been held liable.

c. No Insurable Interest

In Knowles v. General Accident Assurance Co. of Canada[215] the agent had known the applicant for many years, and had arranged insurance not only for his business but for his home and his and his wife's cars as well. The agent became aware that the applicant was opening a new business, under the name of Mr. Corn Beef. He had, in partnership with another businessman, operated a nearby restaurant under the same name for many years. The agent had insured that business as well. A policy was written up in the name of the old partnership, "operating as Mr. Corn Beef", although the partner's name was deleted before the policy was issued, because he and Mr. Knowles were no longer doing business together.

It was, of course, only after the restaurant burned down that Mr. Knowles informed the agent that he had only financed the restaurant, which was being run by a partnership of his wife

213 [1990] I.L.R. 1-2587, p. 10,077 (Ont. D.C.)
214 *Ibid*., p. 10,079
215 (1985) 8 C.C.L.I. 197 (Ont. H.C.)

and her sister, the premises being owned by a company in which the two sisters were the only shareholders. Notwithstanding Mr. Knowles' loan, Osler J. held that he did not have an insurable interest in the restaurant premises. His Honour also went on to hold as follows:[216]

> "[I]t did not occur to [the agent,] Stevenson to investigate the true ownership or operation of the business he had caused to be insured until after the fire when he was alerted by the memorandum written on the endorsement and returned to him.
>
> …
>
> [W]hen the moving spirit in an enterprise is an old and accustomed client of the agent, and when the agent requests the opportunity to insure a new venture with which that client's name is associated, there is a duty on the agent to ascertain the interest of the client and to see that a policy is issued in such a form as to secure the client's interest."

This suggests another corollary to the know your client rule, "know who your client is". Not only must an agent ascertain the nature of his client's business, but he must ascertain who his client is, namely, who has an insurable interest in the subject property.

4. Placing With Financially Unsound Insurer

In both Norlympia v. Dale and Chidley v. Thompson, Osen & Sherban Canada Ltd.,[217] the agent expressly advised the insured as to the financial soundness of the insurer. In Norlympia, the agent said that the insurer was Lloyd's of London, when it was not. In Chidley v. Thompson, Osen & Sherban Canada Ltd. (*supra*), the agency which had originally placed coverage with the insurer wrote all of its clients who were underwritten by that company recommending that they change to older and more established underwriters, notwithstanding the higher premiums. The plaintiff insureds had continued to deal with a former employee of the agency, who responded by issuing a form letter to all of his clients, indicating that their security was not in question. Naturally, by the time the plaintiff's vessel was lost in a fire, the insurer was in bankruptcy. Catliff, L.J.S.C., had "no hesitation" in finding that the former employee had been "negligent, if not deceitful".[218]

5. Misrepresentations As To Risk, and Related Problems

Another large category of cases involves misrepresentations of the risk by the agent. Depending upon who the agent is acting for, this can result either in a claim against the agent by the insured, on the basis that the agent has voided the insured's coverage, or a claim by the insurer against the agent, on the basis that the agent did not adequately inform the insurer, who would otherwise have declined the risk. There are also other ways in which the agent can void coverage, and become liable to the insured.

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216 *Ibid*., p. 10,079
217 (1987) 28 C.C.L.I. 267 (B.C.S.C.)
218 *Ibid*., pp. 271-3

a. Voiding Coverage By Misrepresentation

A fraudulent misrepresentation will void a policy, whether it is made by the insured or his agent. Some examples include representations that there was always someone on the premises of a private home used in part as an art gallery when both of the occupants worked during the day and were often away on weekends, that all the windows were sealed when they were merely tacked into place, that there was a watchdog on the premises which was actually a small puppy, and that the Vancouver City Police provided particular surveillance because of friendship with the proprietors when the policeman boyfriend of one of the employees dropped by now and again;[219] that the insured had not had his driver's licence cancelled within the previous three years when it had been one month before;[220] and that no insurable losses had been sustained during the past three years and no insurance on the insured's property had ever been cancelled when there had been at least one claim and, in one case, this had resulted in cancellation of coverage.[221]

Non-disclosure, where a representation was not elicited by the application form, has also voided coverage. One example is Hornburg v. Toole Peet & Co. Ltd. *(supra)*, where the agent ought to have known that his client would only be using the subject residence on a seasonal or casual basis, but this was not disclosed to the insurers. The Alberta Court of Queens Bench found that the difference between the legal description of the property, and the client's mailing address, ought to have alerted the agent to this possible loss. Power J. also noted that the agent's application questionnaire did not address the client's intended use. Although it seems onerous to require an agent to review his file so closely as to notice this difference in locations, a property detailed checklist would have readily determined the client's intended use, and avoided any errors and omissions problems.

Another classic example is non-disclosure of previous fire losses, as in W.E. Acres Crabmeal Ltd. v. Non-Marine Underwriters, Lloyd's, London.[222] In all of the above cases, just as these two, the agent was held to be acting for the applicant, and not the insurer.

In of each Blanchette v. C.I.S., Gilmore and Moxness v. Co-Operative Fire and Casualty Company (*supra*), by contrast, the agent was acting for the insurer. As such, misrepresentations with respect to the intended use of the subject property and non-disclosure of the location of the subject property (in an old barn), and details of the applicant's criminal record (several prior convictions), respectively, did not avoid the policy, because the truth was fully known to the agent. In both cases, the insurer was fixed with its agent's knowledge. Again, the importance of who the agent is acting for is readily apparent.

However, even a misrepresentation by an agent who is clearly acting for the applicant may not avoid coverage. In 533476 Ontario v. Southern Counties, the representations were made without the knowledge or consent of the insured. The claim under the policy was

219 Bell v. Buschlen Mowatt Fine Art Investments Ltd., (1989) 34 C.C.L.I. 174 (B.C.C.A.), reversing in part (1988) 39 D.L.R. (4th) 595 (B.C.S.C.)
220 Edwards v. Kent General Insurance Corporation, (1987) 29 C.C.L.I. 317 (N.B.Q.B.)
221 Hicks v. Saskatchewan Mutual Insurance Co., (1985) 20 C.C.L.I. 223 (Sask. Q.B.) and Van Schilt v. Gore Mutual Insurance Co., note 103
222 (1988) 32 C.C.L.I. 169 (N.B.Q.B.)

therefore upheld although, as we have seen, the insurer was able to recover against the agent as a result of his fraudulent conduct.

By contrast, in Giantsopolous v. Employers Insurance of Wausau (*supra*), the Court held that the facts which the agent had not disclosed did not amount to a representation. Reference has also been made above to three recent cases in which it was the applicant and not the agent who made the untrue statements or gave the incorrect answers, in the policy application. These were Kanhoffen v. Martino (*supra*), Kehoe v. B.C.I.C. and Rivard.

In each of Kanhoffen and Kehoe, however, the B.C. Supreme Court found that the customer, and not the agent, had misrepresented the risk or failed to disclose material facts. However, a comparison of the facts and results in these cases with those in Rivard gives some indication of both the high standard of care which will be imposed upon agents, and the reluctance which the courts have to ascribe responsibility to someone other than the agent.

A strong argument could be made that, in Rivard, it was the contributory negligence, if not fraud of Bouw that resulted in the policy being voided. Granted that the agent owed a duty of care to Rivard as Bouw's partner and beneficiary under his policy. However, it is submitted that Bouw also owed a duty to Rivard as his partner and legal "neighbour", because of their own special relationship. As it was Bouw who incorrectly stated that he was a non-smoker when the issue of his status came to a head when he signed the false statement, surely it could be argued that at least some of the liability for Rivard's loss should have been apportioned to Bouw, as opposed to the agent. As we will see, there is no general duty on an agent to question the instructions which he receives. For this and other reasons it is questionable whether the agent in this case should have been held completely or even partially liable in this case. It will be interesting to read the reasons for judgment on appeal, when they are available.

b. Not Adequately Informing Insurer

As we have seen, in many cases in addition to 533476 Ontario, agents have been held liable to indemnify insurers, where misrepresentations did not void the insured's coverage. Agents have been required to indemnify insurers for the full amount claimed, where the evidence was that the insurer would not have accepted the risk,[223] might not have accepted the risk,[224] or would simply have charged a higher premium.[225]

c. Other Cases

As we have seen, in New Forty Four Mines Ltd. v. St. Paul Fire & Marine Insurance Co. (*supra*), an agent can also void coverage by the inclusion of an unauthorized warranty in a policy.

223 Gore Mutual Insurance Company v. Barton, Black & Robertson Ltd., note 132; MacLean v. Canadian General Insurance Co., note 125
224 North Waterloo Farmers Mutual Fire Insurance Ltd. v. Wylie, note 124
225 Crawford Ditching & Dozing Ltd. v. Canadian Surety Co., note 125

6. Not Increasing Coverage, As Instructed

A new category of negligence has been suggested by one of the recent cases. In Foley v. Swick, Bauman & Associates Insurance Agency Ltd.,[226] the insured alleged that she had mailed a notice to the agent notifying of an additional jewellery purchase to be scheduled under her homeowner's policy. The evidence established that the memorandum had been mailed, which gave rise to a presumption that it had been received by the agency. However, that presumption was easily rebutted, through the evidence of various agency personnel.

7. Not Renewing Any or Adequate Coverage or Warning of Expiry

Another large category of cases involves policy renewals, most of which involve failing to warn of the pending expiry of policies. We will later see that this is one of the areas in which the defence of contributory negligence most often arises.

a. Not Renewing At All

The law is quite clear that, in the absence of a contract or an undertaking to do so, there is no duty on an agent to automatically renew coverage.[227] However, as we have seen, contracts and undertakings to insure can be inferred from a course of conduct. The same is true of agreements to renew coverage. Nevertheless, two recent cases do offer some hope to agents.

In Wilcox v. Norberg & Wiggins Insurance Agencies Ltd.,[228] the insured had dealt with the agent for several years, and had come to rely on him to automatically renew his policies and generally take care of his insurance needs. When the insurer refused to renew coverage the agent did not replace the insurance, and the client's residence was destroyed by a fire. The agent was found negligent on the basis that he owed a duty to renew or replace the insurance because of his long-standing course of conduct.

Similar circumstances arose in Grove Service Ltd. v. Lenhardt Agencies Ltd.[229] In that case, the agent made one further mistake, which was to assure his client that alternative coverage would be obtained. However, his file was misplaced and, more than a year later, the subject vessel was destroyed. Needless to say, he was found negligent.

More recently, in Smith v. Royal Trust Corporation of Canada,[230] a trust company was held liable for failing to renew mortgage insurance for one of its customers. The mortgagee had assured the mortgagor that they would "look after" the renewal, and, later, that the insurance was in fact in place. Of course, this was never done. Russell, J. found that the mortgagee was the mortgagor's agent and had been negligent.

226 (1990) 47 C.C.L.I. 260 (Ont. Dist. Ct.)
227 Roy v. Atlantic Underwriters Ltd., note 18; and Lindholt v. Rochester Insurance Agency Limited, [1978] I.L.R. 1-970, p. 1016 (B.C.S.C.)
228 [1979] 1 W.W.R. 414 (B.C.S.C.)
229 (1979) 10 C.C.L.I. 101 (B.C.S.C.)
230 (1977) 16 N.B.R. (2d) 70 (N.B.Q.B.)

However, two of the more recent cases do place at least some limits on the renewal obligations of agents. In Bos v. Brauer,[231] the trial judge made the following findings with respect to the prior course of conduct regarding renewal policies:[232]

> "[T]he relationship between the insurer and the agent was such that renewal policies were issued automatically by the insurer and sent to the agent to be authenticated. The insured had adopted and followed a practise whereby the sole responsibility for the collection of the premium attracted by such renewals was that of the agent. The agent's obligation was to pay the required premium to the insurer within 60 days of the renewal date. Insofar as the insurer was concerned, they considered themselves to be bound by the policy according to its terms and were not concerned about how the agent collected the premium from the insured. The practise followed by the insurer was to deliver the policy to the agent for authentification which was accomplished by the agent signing the policy as the insurer's authorized agent. The conditions prerequisite to creating binding policy insofar as the insurer was concerned were complete when the agent authenticated the policy by signing it on behalf of the insurer.
>
> The final step in creating a binding obligation between the insured and the insurer lies completely in the hands of the agent. At this stage, the agent's relationship to the insured gives rise to certain duties and obligations. In this case, the relationship was one where the agent carried the insured for various periods of time in relation to the payment of premiums, notwithstanding the terms of the agent's letter of May 6, 1986 to the insured. It is clear that the agent did extend credit to the insured in the past. The evidence is also clear that the agent was hoping that the insured would come in and pay was still trying to contact the insured up to August 14 when the policy was cancelled. On that kind of evidence, I am satisfied that the agent considered the policy to be in force and was, in the past, extending credit to the insured in relation to the payment of the premium."

However, the Court of Appeal stated as follows:[233]

> "The reasons for judgment after trial find that there was a relationship where the broker did carry the Defendant for various periods of time in respect of premiums, and in the past had extended credit for insurance. That is true to a degree, for the premiums for the previous policy, which expired almost three months before the accident, were not completely paid until after the accident! Whether that **past conduct standing alone would lead a reasonable person in the shoes of the Defendant [insured] to think that there was a renewal of the insurance here, we tend to doubt. Nor did the trial judge make any such finding or indeed any finding about the state of mind of the Defendant**." (emphasis added)

These *obiter* comments are to be compared with the reasons in Wilcox v. Norberg & Wiggins Insurance Agencies Ltd. (*supra*).

231 (1990) 48 C.C.L.I. 16 (Alta. Q.B.)
232 pp. 19-20
233 pp. 162-3

The other recent case, Danielson v. Reed Stenhouse Ltd.[234] involved facts almost at the other end of the spectrum, in terms of the agent having gone above and beyond the call of duty. At the request of the insurer, the agent asked the insured to complete a wood stove questionnaire before her homeowners policy would be renewed. Several copies of the questionnaire were sent to the insured, together with written requests that it be completed. The requests included warnings that the policy would not be renewed without it. The insured had both a history of being late in making premium payments and a habit of ignoring her mail concerning insurance requirements. In addition to the letters, the agent made at least one telephone call to advise that the policy would not be renewed without a completed questionnaire.

When her home burned to the ground after her insurance coverage had expired, Ms. Danielson sued the agent alleging, firstly, that she had been negligent in failing to advise in advance of the expiry date of the policy. Secondly, she alleged that the agent had breached her fiduciary duty by failing to provide her with information in its possession that would have allowed her to renew the insurance.

With respect to the allegation of negligence, Proudfoot, J. of the Northwest Territories Supreme Court described the agent's obligations as follows:[235]

> "Their duty was to inform the Plaintiff, as they did, to complete the questionnaire. They, in my view, went as far as they had to in the circumstances they were confronted with in this case. It was the Plaintiff's negligence, not the Defendant's which caused this insurance policy to lapse resulting in any loss to the Plaintiff."

With respect to fiduciary duty, the agent had not told the plaintiff that the insurer would be prepared to renew, without the questionnaire being completed, if she was prepared to have a 33% surcharge added to the premium. The agent had testified that she was not prepared to renew the policy without the questionnaire. In other words, she was insisting upon this, and was not prepared to offer the alternative of paying a higher premium. Her Ladyship stated as follows, with respect to this issue:[236]

> "In my view, it was well within the power of the Defendants to take that position. Collection of premiums was an additional problem which certainly would not improve with the implementation of a higher premium.
>
> Throughout this entire period, the Defendants were consistent in their treatment of the Plaintiff, they exercised an extraordinary amount of tolerance and assistance to the Plaintiff, which was more than required. As I stated, they were entitled to end this relationship provided they discharge their duty and inform the Plaintiff that they would not renew unless certain conditions were met. They met that obligation. If [the agent] Jensen decided she would not deal with the Plaintiff further it was within the power of the Defendants to take that position. Bearing in mind the problems related to the collection of

234 (1992) 11 C.C.L.I. (2d) 112 (N.W.T. S.C.)
235 p. 128
236 p. 127

> premiums, why would a broker add to the grief of trying to collect the larger premium? There was no breach of fiduciary duty. The claim cannot succeed on that basis."

As hopeful as these reasons may be to agents, they are open to question. It is well established in the jurisprudence that agents do have a duty to warn. It is submitted that such duty was not discharged in this case, but that the same result could have been achieved on more supportable grounds. Namely, in light of the history of the relationship it seems highly unlikely that, if the insured was not prepared to fill out a simple questionnaire, neither would she have been prepared to pay a higher (by 33%) premium. In other words, it could have been held that, even if there had been a breach of fiduciary duty, it was the plaintiff's own conduct which was the cause of her loss.

Alternatively, the agency could, of course, have expressly severed its relationship with the insured. As Proudfoot J. stated:[237]

> "In the case at bar, the relationship which existed between the Plaintiffs and the Defendants was that of an insured and an insurance broker. The relationship existed for the purpose of the broker procuring for the insured insurance coverage. In these circumstances, because of the past history, which I will not repeat, the Defendant had every right to refuse to continue to do business with the Plaintiff, and refused to continue the relationship. As defence counsel said, "enough is enough". The Plaintiffs made their position clear on so many occasions when they failed to comply with the requirements thus, the Defendants elected to sever the business relationship - that they could do. The letter of March 9, 1988 did just that. The policy was not renewed after ample warning that would occur if the elusive questionnaire was not completed."

Although no one could disagree with these sentiments, it is submitted that the relationship was not in fact severed by any act of the agency. Had they wished to do so, they could have advised the insured, both orally and in writing, that they would not be taking any further steps to renew coverage period. Instead they did, and clearly went above and beyond the call of duty. It is suggested that this case should be taken as a warning by agents and brokers of the hazards of continuing to do business with a bad customer, as well as what to do in those circumstance. They should sever the relationship, clearly and unequivocally.

b. Not Renewing Adequate Coverage

There is, however, a duty to insure that, when coverage is renewed, it is adequate to meet the insured's present needs. In Johnson v. W.G. Barton Ltd. (*supra*), as we have seen, Drost, L.J.S.C., dismissed a claim that coverage had been negligently placed in the first instance. However, he found that the agent had been negligent in failing,[238]

237 p. 127
238 (1986) 21 C.C.L.I. 73 (B.C.S.C.)

> "… to review the existing coverage and find out whether any significant changes had taken place during the previous year …".

Stratton, J. came to a similar result in Landry v. Anderson.[239] In that case, the agent had been particularly attentive to the cost of his client's insurance, suggesting that coverage for certain perils be deleted on his trucks during breakdown periods and in the spring when the roads were closed. However, he then "dropped the ball" by failing to restore this coverage when the policy was renewed, and was found liable when the insured sustained a claim. The moral here is that if someone is going to "go the extra mile" for his client, as the agent did here, then he has to follow through. An extra level of service on behalf of a client can create a higher level of risk, and impose a more onerous standard of care, for the agent.

One situation which warrants particular caution is where an agent takes over an existing policy, regardless of whether it is up for renewal. As we have seen, the agent was held liable as a result of inadequate coverage in Carousel Travel v. Ricci. In finding liability, Reid J. adopted expert evidence that,[240]

> "… a reasonably careful broker should interview a new client sufficiently to be able to advise on what insurance was appropriate in light of the client's exposure to liability. This event beyond the simple maintenance of an existing insurance policy …"

Recent examples of not renewing adequate coverage are found in Block Bros. and Dueck.

The moral here is not to rely on your competitor's advice to your new client. Do it yourself. Get to know your client.

c. Not Warning of Pending Expiry

Although the cases are not entirely clear, it is suggested that the rule is that agents should remind insureds of the pending expiry of coverage. This will certainly be the case where a contract or undertaking to do so can be inferred from a course of conduct in mailing renewal policies or notices.[241] However, forwarding a renewal notice should adequately discharge any such duty.[242]

8. Cancelling or Limiting Coverage, Without Instructions

Another new category of claim has been created by the Kanhoffen decision. The misrepresentation and non-disclosure aspect of that case has been considered above. However, the result was actually determined on another basis. Namely, the agent arranged to surrender the

239 (1977) 16 N.B.R. (2d) 70 (N.B.Q.B.)
240 note 157, p. 221
241 Lewis v. C.M. & M. Insurance Services Ltd., (1984) 4 C.C.L.I. 1 (N.B.Q.B.); and Morash v. Lockhart & Ritchie Ltd., (1979) 48 A.P.R. 180 (N.B.C.A.)
242 Lawrence v. Roy V. Curtis Insurance Agency Limited, [1979] I.L.R. 1-1090, p. 144 (Ont. H.C.)

insured's existing life insurance policy before he was certain that the replacement coverage would actually come into effect. On the same date that the new policy was issued and delivered, the agent learned of the seriousness of the husband's illness. Had the agent done what he ought to have, the old policy would still have been in force and he could have avoided both the plaintiff's loss, and his own liability for it, simply by not cancelling it.

It was on that fateful day that the agent would have realized the new policy was voidable for misrepresentation or non-disclosure. If the old policy had not already been cancelled, Mrs. Kanhoffen would still have been able to recover under the it instead of the new policy. But what the agent had done was cancel the old policy as soon as the new one was approved. That was approximately three weeks before it was delivered, and well before he became aware of Mr. Kanhoffen's true state of ill health. Huddart, J. of the B.C. Supreme Court found (and the Court of Appeal agreed) that the agent's duty in these circumstances was no less than to follow the advice implicit in the application and the new policy itself, and explicit in the disclosure statement. The disclosure statement included the following words:

> "In the event that you decide to replace an existing contract(s) of life insurance you should make sure that the new contract(s) has been delivered to you, is in force and is acceptable to you before you take any action to terminate the existing contracts."

The new policy contained an option to cancel within 10 days of receipt. As a result, if the agent had not surrendered the old policies when he did, he would have had a 10 day "window" in which to assess the significance of the new information and cancel the new policy. This would have preserved the Kanhoffen's coverage under the existing life insurance and prevented any loss. As mentioned above, the case is under appeal.

9. Not Warning About Consequences of Cancellation

In Engel v. Janzen,[243] the insureds were going to Hawaii for two months. Before they left, the husband went into an insurance agency in Kelowna, taking his and his wife's licence plates and insurance papers. Mr. Engel asked the agent how much of a refund they would get on their Autoplan policies if they cancelled them, and the answer was a total of $154.00. He then asked the agent a question as to what she would do if she were in his shoes. After some discussion, the agent's response was to the effect that she would use the refund as spending money on the trip.

While in Hawaii, the insureds were seriously injured when they were struck down by a drunk, impecunious and uninsured driver. Mrs. Engel was rendered a paraplegic. She and her husband sued the agent, maintaining that if they had at least kept one of their policies, and retained the UMP coverage, they could have recovered their devastating losses. Spencer J. posed the following question:[244]

243 (1989) 39 C.C.L.I. 297 (B.C.S.C.) affirmed (1990) 42 B.C.L.R. (2d) 223 (B.C.C.A.)
244 (1989) 39 C.C.L.I. 297 (B.C.S.C.) p. 300

> "[I]s it too high a standard to expect the defendant, an average insurance agent in an interior city of the province, to have taken the plaintiff step by step through his auto plan coverage in response to his request for advice whether or not he should cancel it under the circumstances of this case. Should she have pointed out to him that both the plaintiffs carried $1 million coverage which would protect them and their immediate family living with them both as passengers or as pedestrians against the risk of loss or injury caused by under-insured driver in a motor-vehicle accident in Hawaii?"

His Lordship's answer was "yes", even though Mr. Engel "had probably … already made at least a tentative decision to cancel the coverage."[245] His Lordship's conclusion, which the Court of Appeal upheld, was that having elected to give the advice that Mr. Engel sought the agent failed to exercise reasonable skill and care in doing so.

A recent case dealing with an alleged failure to warn of the pending expiry date of a policy was Danielson v. Reed Stenhouse Ltd. (*supra*).

10. Not Advising to Sue Under the Policy

Another new category of claim was considered, but rejected, in Eddy's Bulldozing Ltd. v. B.H. Rowbottom & Associates Ltd.[246] In that case, the insured suffered a loss and, as is usually the case, contacted its agent first with respect to a potential claim under its policy. The B.C. Supreme Court found that the best that could be said on the insured's behalf was that the agent and left the impression that it was doubtful that there was a valid claim under their policy. Moreover, at no time did a representative of the insured direct or request the agent to advance a claim on his behalf. The action against the agent was therefore dismissed, on the grounds that neither was there a continuing agency relationship at the time of the loss, nor had the agent been negligent, even assuming that he owed a duty of care. The rule in Hedley Byrne did not apply and, even if a claim had been made, under the policy, it was probable that the loss would have been excluded from coverage in any event.

VIII. DEFENCES

Fortunately, there are some defences available to agents, brokers and insurers. This section will deal with the following types of defences:

(a) Defences to claims in contract;

(i) impossibility, namely, that coverage was not available;

(ii) agency defences; and

(iii) defences to the policy, namely misrepresentation and non-disclosure;

245 *Ibid*., p. 300
246 (1991) 2 C.C.L.I. (2d) 38 (B.C.S.C.)

(b) Defences to claims in negligence;

(i) no duty of care; and

(ii) compliance with standard of care including different standard of care for public insurers;

(c) Causation defences, namely, that there was no reliance by the insured on the agent;

(i) because the insured is sophisticated in insurance matters;

(ii) because the insured had actual knowledge of the problem; and

(iii) because the insured had constructive knowledge, namely, he had a duty to look after his own interests;

(d) Contributory negligence;

(i) between agents and insureds;

(ii) between agents and insurers; and

(iii) between agents;

(e) Defences under the policy, namely, that lack of coverage has not resulted in any loss;

(f) Defence on the basis that the "real cause" of the denial was on grounds unrelated to any act or omission by the agent; and

(g) Defence on the basis that the insured settled the claim against the insurer on improvident terms.

2. Contract Defences

Where a contractual undertaking to insure can be inferred, the only real defence to a claim against an agent is that the contract was impossible to perform because coverage was unavailable. With respect to claims directly against insurers, for the acts of the agent, the nature of the agency relationship may also provide some defences.

a. Impossibility - Coverage Not Available

As we have seen, in Fine's and Markal, the difficulty here is that, where the claim is in contract, the onus shifts to the insurer to prove that no coverage was available. However, where the court dismisses a contract claim, this onus remains on the insured, in order to make out an alternative claim in negligence. As such, the "impossibility" defence is also, and more readily, available in negligence.

b. Agency Defences

Insurers will generally respond to contractual claims by maintaining that the agent did not have authority to bind coverage. As we have seen, this defence will not often succeed, for a number of reasons. First, even if the agent had no actual authority, apparent authority will always suffice. Second, although the agent may be acting for the insured in some capacity, he may be acting for the insurer in others. The glimmer of hope for insurers is that, as we have seen, agents will generally be found to be acting for the insured for the purpose of the policy application. As such, insurers will be much more likely than agents to escape contractual liability.

c. Defences to Policy - Misrepresentation and Non-Disclosure

We have already seen how policy defences may be limited, and that insureds may be entitled, in the alternative, to recover against their agents. However, insureds are not totally lacking in responsibility either. In Edwards v. Kent General Insurance Corporation,[247] the agent filled out the application form, and sent it to his client for his signature. When the client claimed a loss the insurer denied coverage on the basis of misrepresentations in the form. The New Brunswick Court of Queens Bench held that the insured ought to have known that the agent had not written down the answers he had given, and should have taken the time to read the form. This is consistent with Hicks v. Saskatchewan Mutual Insurance Co.[248] In that case, the Saskatchewan Court of Queens Bench held that, although the insurer has the burden of proving that a policy is void, the insured has the burden of proving that false answers in an application resulted from the agent's failure to properly record the information he had provided.

In addition, the recent cases of Kanhoffen and Kehoe both illustrate that applicants cannot recover from agents where it is their own material misrepresentation or non-disclosure which has resulted in the insurer voiding coverage.

3. Negligence Defences

Some of the negligence defences below may also be available in contract, so long as there was no undertaking to obtain effective coverage, and therefore no strict liability. Setting aside impossibility, these defences include the lack of a duty of care and compliance with the requisite standard of care. The defence of non-feasance, as opposed to misfeasance, has, as we have seen, been effectively extinguished. It will also be seen that there is a different standard of care for public insurers.

a. No Duty of Care

As we have seen, agents clearly owe a duty to applicants, as may insurers, at least with respect to the processing of policy applications. However, as we have also seen, non-parties to the policy, including beneficiaries such as loss payees or even third-party claimants, will generally be

247 (1987) 29 C.C.L.I. 317 (N.B.Q.B.)
248 (1986) 20 C.C.L.I. 223 (Sask. Q.B.)

owed a duty only if there has been some direct contact between them and the agent or the insurer which creates a relationship of neighbourhood.

Recent cases in which the Courts have held that the agent did not owe the insured a duty of care are Bos v. Brauer (*supra*) and Eddy's Bulldozing Ltd. v. B.H. Rowbottom & Associates Ltd. (*supra*).

b. Standard of Care Complied With

There have been a handful of cases where agents have escaped liability simply because, on the facts, they had done enough to discharge their duty of care. In Ester v. Philip Abbey Inc.,[249] the Quebec Superior Court found that the agent had offered the insured the additional coverage in dispute, for a further premium, but that this had been refused. In Curry Construction (1973) Ltd. v. Reed Stenhouse Ltd. (*supra*), it was held that warning the insured to read the policy, paying particular attention to the exclusions, was sufficient, where the client was very difficult to get hold of and virtually indifferent to his insurance needs. In Sjodin v. I.C.B.C. (*supra*), the standard procedure, which included offering UMP coverage, was held to be sufficient. The trial Judge held that the agent was not obliged to try to persuade the applicant to buy more coverage,[250] and the Court of Appeal agreed. In Heney v. Reed Stenhouse Ltd.,[251] the Ontario High Court dismissed a claim against the agent for failing to arrange for UMP coverage, where the coverage was not yet generally available in the industry.

Recent examples include Danielson and Foley v. Swick, Bauman & Associates Insurance Agency Ltd. (*supra*), Giantsopolous, Kehoe and Webster v. Robinson.[252]

A Different Standard for Public Insurers

However, the most significant development in this area has been in Fletcher v. M.P.I.C. Although the reason for the insurer was held liable, Wilson J. concluded that public, as opposed to private insurers had a duty merely "to inform customers of the available range of coverage."[253] Her Ladyship gave a number of reasons why public insurers should have a lower standard of care:[254]

> "The institutional setting in which the public insurance is sold affords considerably less scope for privacy and individualized attention than that provided by a private agency. As the trial judge has noted, an MPIC employee may serve as many as 60 people a day. Further, the employees who serve the customers do not hold themselves out as specialists in risk assessment and insurance advice. The service they provide is more sales and clerical than that provided by an insurance agent … In my opinion MPIC's employees were not

249 [1976] I.L.R. 1-802, p. 327 (Que. S.C.)
250 (1987) 24 C.C.L.I. 70 (B.C.S.C.), pp. 75-6 & 81
251 (1990) 44 C.C.L.I. 113 (Ont. H.C.)
252 (1991) 4 C.C.L.I. (2d) 256 (B.C.S.C.)
253 note 57, p. 10,556
254 *Ibid*., p. 10,556

> intended to sit down with their customers and inquire into their personal, family and business affairs so as to provide individualized insurance advice."

Her Ladyship adopted the following statement of Blair J.A. of the Ontario Court of Appeal:[255]

> "Autopac's duty was limited to insuring that the necessary information, upon which applicants could make their decisions, was placed before them. The duty did not extend to advise them or persuading them to take the optional coverage nor did Fletcher's counsel contend that it did."

Nevertheless, as we saw in Engel v. Janzen (*supra*), if the agent undertakes to give general advice, then he or she will be held to the higher standard of care generally imposed on private insurers. In a sense, Fletcher is not so much good news for public carriers and their agents, as bad news for private carriers and theirs. This is because it underscores the willingness of our highest court to infer a contractual undertaking and impose a fiduciary standard of care on most agents, in most circumstances. This is the rule, and no longer an exception.

However, there is also some good news. There is the prospect of liability being denied where the reason for the lack of coverage originated with the insured. Fairview Enterprises Ltd. v. United States Fidelity & Guarantee Company,[256] and Johnson v. Barton provide two clear examples. In the former case, the insured had represented that construction would start right away, such that the vacancy exclusion in their policy would not pose any problem. In the latter case, the insured advised that they did not do off-site welding, so that the exclusion regarding those activities would not cause a problem.

Further, there is authority that an agent will not be responsible for a misconception or lack of understanding on the part of an applicant. In I.C.B.C. v. Ross,[257] the applicants had moved from Florida to British Columbia, and went to the office of the government agent in Valemont to purchase insurance for their motorhome. The government agent could only sell I.C.B.C. coverage and advised that, since the motorhome was not a home, he could not insure its contents. The applicant was left with the understanding that such coverage was not available anywhere, because he was under the mistaken impression that only I.C.B.C. could issue insurance coverage in British Columbia. The Court of Appeal was satisfied that the insured had been misled, not by the agent, but by others who had induced him to believe that only I.C.B.C. could provide insurance. The dismissal of the claim was therefore upheld.

A similar case was Ed Dobler Contracting Ltd. v. Wightman & Smith Insurance Agencies Ltd.,[258] where one of the insured's trucks had been covered for work use. As a consequence of some shifting around of insurance policies on various vehicles, the truck in question had come to be insured for pleasure only. When the policy was renewed, there was no discussion

255 *Ibid*., pp. 10,556-7
256 [1979] I.L.R. 1-1088, p. 138 (B.C.S.C.)
257 (1985) 12 C.C.L.I. 29 (B.C.C.A.)
258 (1987) 28 C.C.L.I. 21 (B.C.S.C.)

between the insured and the agent regarding the rate classification, and that it was renewed for pleasure use only. When the truck was later damaged, I.C.B.C. denied coverage. Errico, Co. Ct. J., found that the insured did not understand the significance of the rate classification criteria, and stated as follows:[259]

> "I do not think there is a duty on an agent or its employee to make inquiry as to the deficiency of the understanding of the applicant as to the meaning or significance of the language used in the insurance being acquired, at least without a request for that information coming from the client. In those circumstances, liability would only arise if that request from the client acted on by the agent."

Although the result in this case has been questioned,[260] it appears consistent with the court's finding that there was no contractual undertaking. As such, the agent's inquiry on the renewal application as to whether there were any changes (to which the answer was "no") was a reasonable exercise of skill and care.

4. Causation

Much of the recent judicial discussion of defences has focused on the issue of causation. This defence is also available both in negligence and, where there is no undertaking, in contract. The defence is based upon the reliance and knowledge, whether actual or constructive, of the insured.

a. "Sophisticated Insureds"

In Town of Rosetown v. Wilson Agencies Ltd.,[261] the insured had received but ignored its agent's advice with respect to increasing excess liability coverage, and had put its insurance coverage out to tender. In these circumstances, the Saskatchewan Court of Queen's Bench had no difficulty in finding that the insured had taken responsibility for its own insurance program, and was the author of its own misfortune, when it suffered an excess claim.

Similarly, in Green v. Donald T. Ritchie Insurance Agencies Ltd. (*supra*), the Ontario High Court found that the insured was in the best position to determine the value of his property and therefore the adequacy of the amount of his coverage.

However, it is only in the clearest of cases that even so-called "sophisticated insureds" will be found not to have relied on their agents for advice. As an example, in Norlympia v. Dale, the insured had its own insurance staff, which was obliged to analyze the situation. However, as they were not privy to the details of the agent's dealings, they were entitled to accept the agent's representation that coverage was in place.

259 *Ibid*., p. 27
260 in the annotation to the report, *Ibid*., pp. 21-2
261 (1989) 43 C.C.L.I. 135 (Sask. Q.B.)

However, in Olanick v. R. Cholkan & Co. Limited,[262] the insured real estate lawyer was unsuccessful when he sued his agent with respect to a claim which was denied on the basis of a vacancy exclusion. It did not help that he had not read the policy. Nevertheless, in New Forty Four Mines v. St. Paul Fire the insured succeeded, even though the president of the company, who had cursorily reviewed the policy, was a lawyer who was familiar with insurance contracts. Clearly, this defence has only limited availability.

The recent cases of Shenkar v. Midpark Insurance Inc. (*supra*), Siemens v. Unrau[263] and Webster v. Robinson (*supra*) all involved sophisticated insureds. In the latter of these cases, the insured owned a truck fitted with hoists and winches to make it a tow truck or wrecker. It was insured by ICBC in 1986, pursuant to an application that described the truck, for rating purposes, as a wrecker under code 071. When the insurance was renewed in 1987, the insured told the agent that he proposed to use the truck "to and from work", which indicated a rating code of 002. Between then and the previous application, Webster's garage policy had lapsed and he could not use the truck for commercial towing under code 002. The agent was not aware of this fact at the time of the renewal application. However, the agent did know, but did not inform the insured, that the reclassification of "to and from work, school, pleasure" would not provide fire insurance coverage on the towing equipment if the insured used the truck to tow his own vehicles. This was the purpose for which he did use the truck. The insured also bought and sold approximately 30 vehicles each year and had often placed insurance coverage.

Bouck, J. found that the insured has behaved as though, from his own experience, he was sufficiently knowledgeable about insurance that he did not need advice. Furthermore, he had had an opportunity to correct the agent's understanding of his proposed use of the vehicle. However, by initialling the application form he confirmed the agent's understanding of its use. In all of the circumstances, the agent was entitled to rely on the insured's representations as to use, and it was not reasonable to expect her to "ferret out" other possible uses.

b. Actual Knowledge of Problem

Actual knowledge by the insured or applicant will more readily avoid liability. One of the more recent cases contains a very useful discussion.

For example, if the insured is aware of his policy limits, he cannot complain that the agent did not obtain adequate coverage;[264] and if the applicant learns that collision coverage is available from other insurers, he cannot say that he was misled by an agent's representation that coverage was not available from one particular insurer.[265] Similarly, if the insured fails to obtain the appraisal which he knows is a prerequisite for specified perils coverage, he may be found at least contributorily negligent.[266] The more difficult cases are those involving constructive knowledge.

262 [1980] I.L.R. 1-1282, p. 1079 (Ont. H.C.)
263 (1990) 44 C.C.L.I. 70 (B.C.S.C.), affirmed (1991) 4 C.C.L.I. (2d) (C.A.)
264 Bon Portage Fisheries Ltd. v. L.G. Trask Agency Ltd., (1987) 23 C.C.L.I. 299 (N.S.C.A.)
265 Martinelli v. Co-Operators General Insurance Company, note 213
266 Wyeth v. Henry McWilliams and Wallace, note 52, where the insured was found 40% liable.

In the recent decision of Siemens v. Unrau (*supra*), 10,000 hens were asphyxiated when an electrical power interruption, resulting from a blown fuse, caused ventilation fans to stop in the insured's laying barn. An endorsement in the insurance policy excluded coverage for electrical power interruptions where the loss resulted from the operation of a circuit breaker or fuses.

On appeal, the insureds raised an issue which had not been argued at the trial. They contended that, although the insurers represented by the agency did not provide electrical power interruption coverage, the agent was under a duty to inform them that such coverage was available from an association known as CEMA. On the evidence the agent did not know that CEMA did provide that type of coverage, although the insurers did. The B.C. Court of Appeal dismissed this ground, stating as follows:[267]

> "It is difficult to conceive of a duty upon a person ignorant of critical facts to give advice of the critical facts of which he is ignorant to another person who is himself informed of these facts. Even the broad scope of the duty upon a private insurance agent discussed [in] Fletcher v. Manitoba Public Insurance Corp. … does not go that far.
>
> Given the trial judge's finding that Mr. Siemens knew, or ought to have known, of the electrical power interruption restriction, and given Mr. Siemens' knowledge of the availability of CEMA coverage which would bridge that gap, there can be no liability upon Mr. Unrau under this contention by the Appellants. The failure to arrange with CEMA to bridge the gap is Mr. Siemens' failure and he must abide the consequences."

One of the commentators has criticized these reasons on the basis that it should not necessarily be a complete answer for an agent to say that he or she was unaware of the availability of coverage as follows:[268]

> "Surely there are situations in which an agent **should know** things which he does not know, and which he may fail in his duty to his client, if in ignorance, he fails to inform the client of those "critical facts." (emphasis added)

However, these observations do not limit the precedent value of the decision, as a case in which the insured alleges that the agent ought to have advised him of the availability of coverage which he was in fact already aware of.

c. Constructive Knowledge - Duty to Look After Own Interests

There are at least three situations in which courts may find that an insured ought to have known about a coverage problem. To put it another way, as some practitioners have, insurers may have a duty to look after their own interests, in certain circumstances.[269] These include

267 p. 217 (C.A.)

268 Rendall, James A., annotation (1991) 4 C.C.L.I. (2d) 213, at pp. 214-5

269 William M. Holburn "*The Liability of Agents and Brokers for Negligence and Misadventure*", for Continuing Legal Education, *Insurance Law 1982*, and Donald W. Yule, "*Liability of Agents and Brokers*" for C.L.E., *Insurance Law 1985*, and "*Duty to Read the Policy*", also for C.L.E., *Insurance Law 1988*

following up on an application, reading the terms of the policy and attending to renewal. This is one of the largest categories of cases, and suggests a trend to limit the availability of this defence, as well.

With respect to following up on an application, one of the leading cases is Cosyns v. Smith. In that case, Lacourciere, J.A., made the following pronouncement:[270]

> "[F]ailing to check up on the agent is not, in law, conduct which can amount to contributory negligence; the plaintiff is not, in this manner, the author of his own misfortune … There could be no negligence in law in his failure to make further inquiries or obtain written confirmation."

However, in the earlier case of Helpard v. Atkinson Marine and General Insurance Ltd.,[271] the applicant was held 50% contributorily negligent for not having followed up on her application, when a loss occurred more than one year after the policy was to have been issued. In Reardon v. King's Mutual, the applicant was aware that his risk might not be accepted by the insurer. As such, when the loss occurred only four months after the policy should have been issued, he was held 75% contributory negligent for having failed to follow up.

There are three other cases on following up where the applicants failed to take certain steps to facilitate their application. In Beers v. Murphy (*supra*), the applicant did not pay the deposit which he knew was a precondition for the issuance of his policy, and was held 50% contributorily negligent. In Colony v. Haber, the applicant's failure to pay a deposit resulted in a finding of 35% contributory negligence.

The moral of these cases is that agents should keep their clients informed. They should tell them if there is a chance that a policy will not be issued, and they should make it abundantly clear that no coverage will issue and that they will not be held responsible if the applicant does not meet the policy conditions.

With respect to reading the policy, there are even more cases. Perhaps the most often cited one is Peter Unruh Construction Company Limited v. Kelly-Lucy & Cameron Adjusters Ltd. (*supra*), where Quigley J. of the Alberta Supreme Court stated the general rule, as follows:[272]

> "In the present case neither Unruh nor [the agent,] Swift read the insurance policy when they each received it. The defendant urges that the failure of Unruh to read the policy contributed to his loss. I cannot agree. Unruh was not relying on his own expertise in preparing, submitting or revealing the contents for the policy he sought to obtain to his agent Swift. He was relying on Swift and Swift knew or ought to have known this to be so and should therefore have exercised that degree of care which would insure that his client got what he clearly sought. There was a clear duty upon Swift to carefully read the policy to insure that it contained the coverage the plaintiff required and requested."

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270 *Ibid*., p. 109
271 [1981] I.L.R. 1-1337, p. 121 (N.S.S.C.)
272 note 167, pp. 423-4

This case has been cited on a number of occasions,[273] and a similar approach has been taken in still other cases.[274] However, in two 1980 decisions Ontario and British Columbia courts dismissed claims by insureds, on the basis that they had not troubled to read their policies and notice the gaps in the coverage that they sought. In one of these cases, Olanick v. R. Cholkan & Co. Limited (*supra*), the insured was a real estate lawyer. However, as we have seen, one of the cases where no contributory negligence was found, namely, New Forty Four Mines also involved a lawyer as the insured. On balance, this is a defence which is enjoying less success as the years pass.

The case that is usually cited for the contrary proposition is Pond v. Dovell,[275] a decision of the British Columbia County Court. In that case, Hardinge, Co. Ct. J., made these startlingly different comments:[276]

> "[T]he fire out of which the claim arose did not occur until some ten months after the renewal policy was issued. If during that time the plaintiff never saw fit to read over, if not the fine print, at least those portions that were set out in **that describe what buildings and what contents were insured, [and therefore by necessary implication, what was not insured] he has only himself to blame**." (emphasis added)

However, Pond v. Dovell (*supra*) is usually distinguished, and Unruh v. Kelly-Lucy followed, in most jurisdictions.[277] Some judges have also recognized that even if insureds were to read their policies, the terms in issue might be difficult to find, let alone understand.[278]

The Manitoba Court of Appeal, in Dueck, has recently underscored the prevailing view that, even if the insured's did read their policies, they would not likely understand them. However, by contrast, the B.C. Court of Appeal in Siemens, declined to overturn the following findings of fact by the trial judge:[279]

> "[T]he policy limitations would have been caught by the Plaintiff, Siemens, as he candidly admitted, if he had opened the envelopes, read the covering letters (more properly described as memoranda), the summary of coverage and, the endorsement contained with the certificate of renewal which was mailed to him annually."

Two other cases indicate the close connection between the constructive knowledge and sophisticated insured defences. As noted above, the decisive factor in Webster was that it was not reasonable to expect an agent to question representations made by a very sophisticated insured. By contrast, the insureds in Theophanus were immigrants, with a limited command of the English language. An issue arose as to whether the insured or agent was responsible for incorrect

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273 Carousel Travel Inc. v. Livio Ricci Insurance Broker Ltd., note 157, Luft v. M.G. Zorkin & Co. Ltd., note 91; and New Forty Four Mines v. St. Paul Fire & Marine Insurance Ltd., note 199

274 Elliott v. Ron Dawson & Associates (1972) Ltd., note 171, and Gibbs v. Claridge, note 145

275 note 147

276 *Ibid*., p. 135

277 for example, Antonesen v. Wawanesa Mutual Insurance Company, note 123; and Carousel Travel v. Livio Ricci Insurance Broker Ltd., note 157

278 Antonesen v. Wawanesa Mutual Insurance Company, note 123; and Gibbs v. Claridge, note 145

279 p. 217 (C.A.) quoting p. 104 (S.C.)

information with respect to the plaintiff's salary which was included in his application for accident and sickness insurance. West, J. held that the agent drew his own conclusion as to the amount of income the plaintiff was earning, and that he both should and could easily have verified these figures before the policy was issued. The single fact which was perhaps most determinative of the result was that it was the agent who had made the income calculation and included his results in the application form. Had he made it clear to the insureds that he was relying on the accuracy of the information which they were providing, and obtained their agreement with respect to the figures he had calculated, the result might have been quite different.

Nevertheless, a sophisticated insured, such as the lawyer in Olanick v. R. Cholkan, although not the one in New Forty Four Mines, may have an obligation to read the policy. The likelihood of such an obligation being imposed is increased, as we have seen, in Curry v. Reed Stenhouse, where the agent gives a clear warning to do so.

On balance, these cases therefore underscore agents' obligation to advise their clients as to the contents and exclusions in their policies. They also highlight the possible benefit of plain language policies.

With respect to attending to renewal, we have seen that there is a general duty on agents to advise as to pending expiry of policies, but not to actually renew. It is therefore not surprising that, in Lewis v. C.M. & M. Insurance Service Ltd.,[280] the insured was held 75% contributorily negligent for not checking up on her coverage, which had lapsed almost two years before the loss in question. In Johnson v. Barton the insured was held 50% contributorily negligent for not identifying a gap in the policy coverage, when it came up for renewal. However, this case seems an exception to the general rule in Unruh v. Kelly-Lucy.

d. Fault of Third Party

We have already seen that, for example, insurers may avoid liability completely, by shifting the blame to the agent. However, in limited circumstances, the agent may be able to do the same.

In Bell v. Buschlen Mowatt Fine Art Investments Ltd.,[281] the British Columbia Court of Appeal granted the agent's appeal from the trial judge's finding of liability. The agents had obtained the misleading information which the insurer relied upon to deny coverage, from the owners of the gallery where the insured was having his art work displayed. Carrothers, J.A. (Seaton J.A. concurring) stated as follows:[282]

> "In my opinion, it was clear error on the whole of the evidence to impose liability on [the agents,] Adshead and Harbord, whether in contract or in tort. As above quoted, the trial Judge applied the same standard of care applicable to Adshead and Harbord in both contract and tort. Adshead and Harbord are

280 note 241
281 *Ibid*., note 195
282 note 219, pp. 196-7

> not insurers warranting insurance coverage. As insurance agents their duty is "to exercise a reasonable degree of skill and care to obtain policies in the terms bargained for and to service those policies as circumstances might require"
>
> … In the present case, it is not a reasonably foreseeable and normal insurable risk itself that is in issue but rather an alleged misrepresentation of an accepted risk. There was not a gap in the risks covered but an alleged misrepresentation of an aspect of security of the gallery, the subject insured, which affected the risk of theft. Adshead and Harbord in fact obtained coverage of the risk of theft which in this case actually materialized, but Lloyds become entitled to deny that coverage through misrepresentations of gallery security attributable not to Adshead and Harbord but rather to Mowatt and Buschlen and their gallery.
>
> Adshead and Harbord were not, in my view, careless in ascertaining the particulars of gallery security and protection nor in failing to take a physical inspection of the gallery premises. Adshead and Harbord exercised an appropriate degree of care and skill."

Although the issue was not expressly discussed, it would seem open for the appellants in Rivard to argue that the cause of the insured's loss was completely or at least partially attributable to the fault of his partner, Bouw.

5. Contributory Negligence

Somewhat surprisingly, none of the recent decisions have resulted in a finding of contributory negligence. Any apportionment of liability was rejected in Theophanus and, for reasons which are not clear in the judgment, contributory negligence appears not to have even been argued in the Kanhoffen case.

a. Between Agents and Insureds

As we have seen, this is the most common category of contributory negligence case. To the extent that the defence is available, the most extreme split on liability has been 25%/75% in favour of insureds[283] and agents,[284] respectively.

b. As Between Agents and Insurers

This is the next most common scenario, with most of the decisions resulting in a 50%/50% split, often, as with the cases involving agents and insured, in reliance upon the statutory presumption in the *Negligence Acts*.[285]

283 Reardon v. Kings Mutual Insurance Co., note 117
284 Lewis v. C.M. & M. Insurance Agencies Ltd., note 241
285 for example, R.S.B.C. 1979, c. 298, s. 1(a)

c. Between Agents

In Grainary Restaurant Ltd. v. American Home Assurance Co.,[286] three agents were involved. The insured had requested coverage from one agent, who in turn requested coverage from the insurers local agent, who in turn dealt with the insurer's general agent. Both the insurer and its general agent escaped liability. However, the insured's agent was held 100% liable, although he was able to recover 50% of the loss as against the local agent, who he had third partied.

6. Under Policy - No Loss

We have already seen the difficulties that can arise when an insurer, but more particularly an agent, relies upon policy exclusions or other provisions to deny that it was responsible for any loss to the insured. To compound the problem, the British Columbia Supreme Court has handed down divergent decisions as to whether an insured may be entitled to at least partial recovery even if he got the coverage he specifically requested but his loss still fell outside coverage.

In L.B. Martin Construction Ltd. v. Gaglardi (*supra*), the agent had failed to obtain coverage for the insured's crane, but Taylor J., concluded that the loss would have been excluded by an "overloading" clause, in any event. However, his Lordship then went on to state as follows:[287]

> "But I do not conclude that the agents are absolved of liability to their customer for their obvious negligence in such circumstances because I do not accept that the customer lost nothing of value by their default.
>
> A contract of insurance such as [the insured,] Fraser Valley was entitled to have is a special type of contract in which strict legal rights are not necessarily determinative of whether or not benefits will accrue to the insureds. Reputable insurers do not litigate every questionable claim, nor do they necessarily deny liability in every case in which they have a right under the policy to do so. An insurer is obligated to protect its reputation in its dealings with insured [sic] who have honestly suffered loss under circumstances in which their seems to be an arguable claim. Fraser Valley were entitled to a policy of insurance with a reputable insurer and to have the chance settling by compromise an arguable claim such as that which would have arisen out of the accident in question.
>
> …
>
> While I have been unable to find Canadian authorities to support this proposition … I am of the view that a reputable insurer would probably have been willing to compromise a claim under the Contractor's Equipment Floater in the circumstances of the present case at 50 percent of the actual loss sustained and that the defendants, had they had a policy, would have been well advised except such an offer of settlement."

286 note 209
287 note 159, pp. 25-6

This "settlement value" approach is often used, for example, in solicitor's negligence cases. As a result, yet another defence was limited.

However, in the subsequent case of Eddy's Bulldozing, Murphy, J. (also of the B.C. Supreme Court) came to a different conclusion, albeit on somewhat different facts. In that case, coverage had been placed over the insured's bulldozer subject to several exclusions, including losses sustained while the property insured was actually being worked upon and directly resulting from either that work or any repairing, adjusting or servicing. The bulldozer broke down by reason of dust entering through a faulty filter and was out of operation for 12 days.

His Lordship distinguished L.B. Martin v. Gaglardi on two grounds. First, he was able to find, unequivocally, that the loss would have been excluded under the policy. Second, regardless of whether a reputable insurer might have been prepared to compromise the claim, there was a specific insurance company involved in the case before him, but there was no evidence as to whether that insurer would have been prepared to settle. Whereas he was dealing with an actual policy with an actual insurance company, Taylor, J. had only been dealing with "what might have been".[288]

7. The "Real Cause"

The decision in Negash has created a new type of causation defence. As we have seen, that was the case when the court held that if it was not the agent's breach which had resulted in the insurer's loss, because the insurance company had denied coverage on grounds unrelated to the limits on the agent's binding authority.

8. Improvident Settlement of the Claim

Another new potential defence has been raised, albeit rejected on the facts, in Niagara Frontier Caterers Ltd. v. Continental Insurance Co. of Canada (*supra*). In that case, the agent disputed the allegations of negligence and, in the alternative, argued that the settlement which the insured had made with its insurer was an improvident one. The agent argued that the co-insurance clause was unintelligible and that the insured ought to have proceeded to trial with its claim, in which case it would have obtained full recovery from the insurer. This, of course, would have meant that the insured would not have suffered any damages as a consequence of the gent's alleged negligence. However, the Court held that it was not unreasonable for the insured to have settled the claim and pursued the agent for the balance of its loss.

IX. DAMAGES

The general measure of an insured's damages will be the amount of the loss that ought to have been covered. As we have just seen, the insured may even by entitled to some measure of damages where the loss was not covered. However, where an insured settles a claim against an insurer, before proceeding against the insured, the courts may inquire as to the

288 *Ibid*., p. 51

reasonableness of the settlement, in determining whether the insured can claim the full balance of its loss from the agent.[289]

The most interesting damage issue, however, is what, if anything, the courts will do with the fiduciary duty created in Fine's Flowers. In other areas of law, a breach of fiduciary duty has opened up the prospect of almost unlimited recovery, in the sense that damages do not have to be "reasonable foreseeable" in order to be recoverable.[290] At least two possibilities come to mind. What if an agent neglected to place fire coverage, and by the time the insured had obtained judgment, substantial and uncovered business losses had been incurred? What if the business had gone into receivership or bankruptcy? What if the principal of the insured, who was a long-standing client of the agent, had lost his home when his business's bank realized on his guarantee or collateral mortgage? These consequential losses may not be recoverable in either contract or negligence, but they might if the court found the agent to have breached a fiduciary duty. This unresolved issue may become a major legacy of the Fine's case.

X. EVIDENTIARY MATTERS

The two most important evidentiary matters relate to the "paper trail" of documents that agents and broker should create and maintain, as well as the indispensable role of expert witnesses at trial.

1. The "Paper Trail"

In Gerber v. Eagle Star Insurance Company Limited (*supra*), the trial judge pointedly criticized the agent for the "spotty or sketchy" notes he had made, instead of preparing a formal application, using the appropriate forms. The necessity of using these types of documents goes without saying.

One of the most significant decisions discussed in the original version of this paper was Sjodin v. I.C.B.C. That case highlights the importance of establishing and rigidly adhering to application and other procedures. Moreover, the positive result in that case has also been achieved in a handful of subsequent cases. In Sjodin, as in Gerber v. Eagle Star and many of the other cases, a serious credibility issue arose with respect to what the insured and the agent recalled of their one meeting. The Court of Appeal upheld the trial judge's finding that the agent had advised the insured of the availability of UMP coverage. This was even though none of the three lay witnesses called by I.C.B.C. had any specific recollection of their discussions with the insured. Their evidence was based on what "their normal practice" or "set routine" would be, and the evidence included three standard application forms, including a box in the form signed by the insured showing "no" for UMP. The moral of this case does not need stating.

289 Niagara Frontier Caterers Ltd. v. Continental Insurance Company of Canada, note 170

290 for example, Canson Enterprises Ltd. v. Boughton & Company, (1989) 61 D.L.R. (4th) 732 (B.C.C.A.)

A similar approach has also been taken in three subsequent cases, although none of them actually refer to Sjodin. In Pielici v. Carmichael & Associates Insurance Brokers Ltd.,[291] the central issue was whether the agent asked the insured about any prior fire losses, and therefore who was responsible for any material representation or non-disclosure. The agent was a gentlemen who was well into his 70s, and had retired a couple of years before the case was heard. His recollection of some details was imprecise and he admitted, in cross-examination, that there was some doubt in his mind about whether he had talked to the plaintiff in person or by phone with respect to the placing of his homeowner's insurance.

However, he was definite that he had followed his usual practise of asking all questions contained on the insurance application form. The form included this question: "Give details of any previous losses during the past five years (insurance policy number and date of loss, et cetera". The written answer was "none", and the agent was certain in his evidence that that was the answer given by the plaintiff, whether the application was made in person or over the telephone, although the insured did not sign it.

In a similar vein, favourable comments about the agent's notes were made in both Danielson and Webster. By contrast, the decision in McNicol v. Insurance Unlimited (Calgary) Ltd.[292] includes comments on the incompleteness and unreliability of the agent's notes, similar to those made in Gerber v. Eagle Star.

In the second of these cases, Agincourt Motor Hotel, the Ontario Supreme Court looked beyond the agent's standard application procedure to the contents of similar policies. The insured in that case claimed that the agent had been negligent in failing to recommend the inclusion of a miscellaneous electrical apparatus endorsement, in the policy. However, the agent was able to testify that he was certain that he had recommended the endorsement because he normally did so. In that regard, Dupont, J. found it most significant both that the agent had spent the better part of a day at the insured's premises, considering their insurance requirements, and that 95% of boiler policies issued by the agents did contain such coverage. His Lordship was satisfied that "in all probability" the endorsement was both explained and recommended as an option, but was refused on the basis of expense.

Finally, a similar approach was taken in Shenkar v. Midpark Insurance Inc. That case concerned a burst water pipe which caused a loss that was not covered under the insured's policy. The evidence included the fact that none of the insured's houses contained coverage for water escape, and that the insurance company which had provided the policy in question would not do so with respect to any of the houses.

291 [1993] I.L.R. 1-2930 (Ont. Ct. – Gen. Div.)
292 note 149

2. Expert Witnesses

Expert witnesses are virtually indispensable. In one of the leading cases, Engel v. Janzen, the trial judge pointed out that no evidence had been led from experienced members of the insurance industry about their usual practice. He was therefore "left to decide the case by applying [his] own view of what is a reasonable standard of behaviour." It should also be pointed out that in Markal v. Morley Shafron, the applicant led his only evidence as to availability of snowload coverage through an experienced broker who had not prepared an expert report, but rather testified under subpoena. It will be recalled that the insured's trial judgment was successfully appealed on the basis that he had not discharged the onus of proving that coverage was available in the market.

By contrast, expert evidence has been enthusiastically accepted and generally adopted in those cases where it has been led. The courts have adopted expert evidence, *inter alia,* as to the appropriate standard of care on the renewal of policies,[293] and on a broker taking over an existing account,[294] as well as the local standard of care which might be applicable in a given case.[295]

In a similar vein, two of the other recent cases have resulted in dismissals essentially on the basis of the insured's failure to establish the standard of care which the agent had allegedly breached. In Webster, Bouck, J. stated the following *dicta*:[296]

> "Ms. Robinson helped applicants complete the necessary forms to obtain insurance, transfer insurance from one car to the next, and work of a similar nature. As such, she held herself out as a person with a particular skill and ability. It was not a skill or ability whose standard of performance could easily be assessed by an average person. Whether she was negligent or not depended upon the common practise of persons doing a similar type of work.
>
> In other words, the plaintiff had to prove as a matter of fact that Ms. Robinson failed to meet the standard of care of an ordinary competent insurance agent. Lacking any evidence that Ms. Robinson acted other than in an ordinary competent fashion, would be wrong for me to find the standard of care expected of her extended as far as the plaintiff suggests. I would then be in the position of prescribing standard of practise for insurance agents based on my own opinion of what they should do. That would be incorrect since my opinion would not be founded on any facts as to what constituted inappropriate standard. It would be akin to me finding the standard of care for a professional man, such as a doctor, an engineer, an accountant, or a lawyer without hearing any evidence as to what is the ordinary reasonable standard in similar situations. Of course, there may be instances where the facts are so obvious that no additional expert or customary evidence is necessary. For example, a claim against a surgeon for amputating the wrong limb of a patient or one

293 Johnson v. W.G. Barton Ltd., note 143
294 Carousel Travel Inc. v. Livio Ricci Insurance Broker Ltd., note 157
295 Amherst Credit Union Limited v. Quebec Assurance & Casualty Company of Canada, note 137
296 note 252, p. 264

> against a lawyer for missing on a limitation period do not require additional expert or customary evidence …
>
> But if the alleged fault is beyond the knowledge of everyday understanding, then evidence of custom is necessary to establish the appropriate standard of care.
>
> Therefore, I cannot find that it was reasonable in the circumstances to expect Ms. Robinson to inquire whether Mr. Webster intended to use the vehicle for towing his own automobiles. That was the standard of care the law expected of Ms. Robinson, and the burden was on the plaintiff to adduce evidence of custom to that effect."

Murphy, J. made similar observations in Eddy's Bulldozing as follows:[297]

> "[S]ince coverage was placed with a specific insurer, evidence should have been given by that insurance that it may well have compromised the claim under the circumstances. For all I know Phoenix Continental may well have taken the position that any loss resulting from theirs is not covered under their policy. Here we are dealing with a specific policy with specific coverage and specific exclusions …
>
> Without some evidence from the actual insurance insurers in this case of what its position would have been with respect to this claim, I do not think I am entitled to conclude that it might have either paid the claim or compromised it."

Not only do these cases provide some encouragement to agents and brokers, but they may mark somewhat of a departure from the B.C. trial judgment in Engel v. Janzen. In that case, Spencer, J. pointed out that no evidence had been lead from experienced members of the insurance industry about the usual practise. This left him to decide the case by applying his own view of what was a reasonable standard of behaviour.

XI. PROCEDURAL ISSUES

Four of the recent decisions prompt the inclusion of a short new section, on procedural issues.

1. Discovery

In 328866 Alberta Ltd. v. Prudential Assurance Co.,[298] Master Funduk ordered that an agent answer questions on discovery as to what he thought, at the time of the loss, was covered by the policy. This was considered to be relevant to the instructions he had given and what coverage he thought he had obtained.

297 note 246, p. 51
298 (1991) 7 C.C.L.I. (2d) 139 (Alta. Q.B.)

2. Pleadings

In Crate Marine Sales Ltd. v. Graham Neale Insurance Brokers Ltd.,[299] the insured's Statement of Claim was struck out for failing to allege all of the elements essential to a claim in negligence.

3. Summary Trials

The Block Bros. case has resulted in the first reported judgment by way of summary trial, under Rule 18A of the B.C. *Supreme Court Rules*.

4. Costs

In Bos v. Brauer, the agent was penalized in costs, although only nominal damages of $5.00 were awarded against him. The Judge described his business practices as "sloppy" and "unbusinesslike".

XII. CONCLUSIONS

The "golden rules" suggested above bear restating and some elaboration.

First, know yourself. With respect to the ramifications of agency law, know who you are acting for and appreciate who you may appear to be acting for, and in what capacity. Know the limits of your actual authority to bind and stay within them. Know who in your office has what authority. This will enable you both to stay within your actual limits and to make a conscious decision as to how you want to hold yourself out. Relatedly, know your own limitations, in terms of your experience, knowledge and skills in the industry. Then you will be able to decide whether to present yourself merely as an insurance salesman, who makes no promises and has no authority, or a skilled and experienced professional, who can solve all of his clients' risk problems and who has authority. This will also make you think about when you should be requesting assistance from someone else in your office, or perhaps even referring the client to a competitor who may have the specialized expertise the client requires.

Second, know the policies you are selling. Read them. Understand them. Ask the insurers questions about them. Improve your level of skills and knowledge. Do not pretend to know more than you do. Your clients want insurance, not assurances, and you do not want to end up personally underwriting their risks.

Third, know your client. Assume that you are going to have to obtain "full coverage" for "all insurable risks". Be particularly attentive with commercial clients. Learn their business. Know the risks they face. Request and read the contracts or other underlying documents pertaining to particular risks. Determine who has an insurable interest. In other words, know who your client

299 [1990] I.L.R. 1-2611 (Ont. S.C.)

is. At renewal time, review your client's needs, point out any changes in risks, and seek further instructions.

As a corollary, let your client know whether or not you have authority and can solve all of his risk problems, whether a particular policy would do so, or whether "full coverage" simply is not available because there will always be uninsurable risks. Part and parcel of this is keeping your clients informed, for example, of pending expiries and changes in coverage.

Fifth, practice "defensive underwriting". Liability generally arises where the client does not really know what he wants and the agent either gives broad or sweeping assurances, or simply accepts a general request for coverage without question. Do not make these kinds of representations. But, more than that, try to focus your client's instructions from the general to the specific. Through the process of eliciting information, describing available coverage and estimating the cost of insurance, ensure that while you are an advisor, your client is the ultimate and informed decision maker. In this way, you avoid having to comply with the higher, fiduciary standard of care. If the client will simply not provide specific instructions, then clearly explain the policy, including the exclusions, and disclaim "full coverage" as the myth that it is.

Finally, know what you are doing. Establish invariable practices and procedures. Use checklists and other standard forms. Not only does this protect you against errors and omissions claims, but it creates invaluable evidence for you and your insurers and your lawyers; in the event of a claim. For these same reasons, document all conversations, as well as transactions. Be accurate, and as thorough as the situation demands. Be timely and follow up. This requires checklists and diarization. This is also true of binders and renewals, which can easily slip through the cracks. As a double-check, practices and procedures should be reviewed on a periodic basis.

In a nutshell, errors and omissions all too often result in claims, lawsuits and damaged reputations they may seem like an inevitable cost of doing business, but they are not. They are eminently preventable.

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EXECUTIVE SUMMARY

INTRODUCTION

There have been an increasing number of cases involving agents' and brokers' liability since the appeal decision in *Fine's Flowers Ltd. v. General Accident Assurance Co.* (Ont. C.A.) The trend has been to broaden the categories of liability, and to make the successful defence of claims against agents, brokers and even insurers increasingly difficult.

THEORIES OF LIABILITY

Contract

The first issue is whether there is a contract of insurance. This will usually be settled by determining whether the agent had authority to bind coverage on behalf of the insurer.

The second issue is whether, in the alternative, there was a contract with the agent whereby he agreed to obtain coverage. This will usually be resolved by determining whether there was consideration for any agreement between the insured and the agent. The Ontario and Saskatchewan Courts of Appeal, in *Cosyns v. Smith* and *Piggott Construction (1969) Ltd. v. S.G.I.O.*, have established that a promise by the applicant to pay the policy premium is sufficient to uphold an oral contract to obtain coverage. In the *Piggott* case, the insurers themselves were held liable under such an oral contract.

The final issue is whether the agent's failure to provide coverage constitutes a breach of contract. This is often resolved by answering Lord Swinfen-Eady's question in *Hood v. West End Motor Car Packing Co.* (Eng. C.A.). Namely, "was it a contract by which the [agents] only agreed to take all reasonable steps to procure an effective insurance"? If so, the negligence standard of "reasonable care" applies. Or "was it a contract by which they undertook to procure an effective insurance"? If so, liability is determined according to a contractual standard, whereby the agent will be held to have virtually "guaranteed" that insurance would be placed.

Tort (Negligence)

Agents have two or three general duties. The first is to obey their instructions and carry out the transaction, the second is to use proper skill in doing so and an additional one, in most cases, is to properly advise insureds.

Equity (Breach of Fiduciary Duty)

This theory was first introduced in *Fine's Flowers*, but has not yet resulted in any major changes to the law.

Breach of Warranty of Authority

This provides that a client can recover from an agent who "warrants" that he has authority to bind coverage. However, it is little different from breach of the kind of oral contract found in *Cosyns* or *Piggott*.

Estoppel

Representations as to the existence of coverage by both agents and insurers have resulted in liability by effectively creating coverage where none had existed. This may be seen as a branch of negligent misrepresentation.

Vicarious Liability

Just as agencies will be held liable for the negligence of their employees, insurers will be held liable for the acts or omissions of agents which are undertaken within the scope of their actual or "apparent" authority.

CONTRACTUAL AND NEGLIGENCE LIABILITY

Similarities

It is generally accepted that both the standard of care and the measure of damages are generally the same whether in contract or negligence (*Norlympia Seafoods Ltd. v. Dale & Co. Ltd.* (B.C.S.C.)). However, it is suggested that there are really two distinct standards of care, one in negligence and one in fiduciary duty, and that the one that applies will depend upon the extent of the obligations that an agent assumes on behalf of a client.

The first situation in which this issue arises is where the agent fails to place the coverage requested. The applicable standard will then depend on the answer to Lord Swinfen-Eady's question in the *Hood* case.

The second situation is where the insured claims that the coverage placed is inadequate. A close reading of the *Fine's* case indicates that the negligence standard will only apply where the client has given specific instructions. In those cases the agent must cover all "foreseeable" and "normal" insurable risks. Where the instructions are general, the fiduciary standard applies. In these cases, the agent must cover all insurable risks, even if they are "extraordinary". Further, as the burden of proof, in contract cases, is on the agent or the insurer to demonstrate that adequate coverage was not available, the agent may be held to have undertaken to obtain "full coverage" even if it was not clearly available in the market place. In other words, the agent may be to taken to have "guaranteed" that the insurance would cover virtually all risks.

With respect to damages, the claim will almost invariably be for the loss of an anticipated benefit under a contract of insurance (*Norlympia*).

Finally, the defence of contributory negligence is available in both contract and negligence (*Wyeth v. Henry McWilliams and Wallace Ltd.* (Ont. D.C.)).

Differences

First, insurers, unlike agents, do not generally owe insureds an independent duty of care (*G.K.N. Keller Canada Ltd. v. Hartford Fire Insurance Co.* (Ont. C.A.)). Second, the traditional distinction that there is no general liability in negligence, as opposed to contract, for failing to act, has given way to a general "duty to warn" (*Fletcher v. M.P.I.C.* (S.C.C.)).

Finally, the onus of proving the availability of coverage is on the insured in negligence cases, but on the agent in contract cases (*Fine's* and *Markal Investments Ltd. v. Morley Shafron Agencies Ltd.* (B.C.C.A.)). As a result, who has the burden of proof will depend on whether the court is prepared to find a contractual undertaking to provide coverage. This can be difficult to predict and leaves the courts with a virtual discretion.

Which theory applies may also determine whether the underwriter's re-insurance coverage will respond.

Concurrent Liability

Although there is some lingering uncertainty, the better view is that liability is concurrently available in both contract and negligence (*Norlympia* and *Gilmore Farm Supply Inc. v. Waterloo Mutual Insurance Co.* (Ont. S.C.)).

WHO THE AGENT IS ACTING FOR

Types of Agency at Law

In addition to actual authority given by the insurer, there may be an "apparent", "implied" or "ostensible" agency (sometimes called "agency by estoppel"). An actual agency is created by agreement, usually in the form of a written agency contract. Apparent agency may be created without any direct contract between the insurer and the client. All that is necessary is for the insured to let the agency "hold itself out" as having actual authority (*La Ferme de la Vallee St. Jean Ltee. v. Fairweathers* (N.B.C.A.)). Many relationships between agents and insurers will therefore have the potential to create a contractual liability on the part of the insurer as if the agency agreement was a general, as opposed to a limited one.

Categories of Agents and Brokers in the Industry

There are four categories of insurance agents and brokers:

1. general or managing agents;

2. recording agents;

3. soliciting agents; and

4. brokers.

Only soliciting agents or brokers will be unlikely to have apparent authority.

Agents for More Than One Party

Agents may also act for more than one party in respect of a given transaction (*Gilmore*). The general rule is that an agent who completes the policy application is acting for his client for that purpose (*Kelly v. Wawanesa Mutual Insurance Co.* (N.S.C.A.)). In this situation, an agent will not generally have apparent authority to bind coverage. However, as the agent may be acting for the insurer in another capacity, any information which he receives regarding the risk, but does not actually disclose, may be imputed to the insurer, such that coverage cannot be voided for misrepresentation or non-disclosure.

LIABILITY BY WHOM AND TO WHOM

Agents to Insureds

This is the most common scenario, and involves all the theories of liability except vicarious liability.

Insurers to Insureds

1. Contract

The first issue is whether there was a *prima facie* contract of insurance. The second is whether the insurer is entitled to void the contract. This usually involves misrepresentation or non-disclosure, and will depend upon who the agent was acting for. Given the general rule in *Kelly*, it may still be difficult for insureds to blame their agents for misrepresentations in policy applications. However, because of the potential for "dual agency", information known to the agent but not disclosed to the insurer may nevertheless be imputed, depriving the insurer of its right to avoid the policy.

Finally, so long as the agent has actual or apparent authority, his acts and understanding of the policy may govern its terms, to the extent that they are uncertain (*Guardian Insurance Company of Canada v. Victoria Fire Sales Ltd.* (S.C.C.) and *Firestone Canada Inc. v. American Home Assurance Company* (Ont. S.C.)).

As for the second issue, namely, avoiding coverage, the cases generally involve one or more of these fact patterns:

- incorrect answers given by the applicant;
- untrue statements in the application made by the agent; and
- information provided by the applicant but not disclosed by the agent.

The results have varied widely.

2. Negligence

Although there is no general duty of care owed by an insurer to an applicant, this is not the case where the insurer negligently processes a policy application (*Stewart v. Lanark Mutual Insurance Company* (Ont. D.C.), *Jessett v. Conacher* (Alta. Q.B.) and *McLeod v. Lunenburg Insurance Agencies* (N.S.S.C.)).

3. Estoppel

Insurers, as well as agents, can be estopped from denying coverage.

4. Vicarious Liability

The general rule in *Kelly* also suggests that, although insurers may be held vicariously liable where inadequate coverage is issued, they will not be held liable where no policy was issued at all (*Reardon v. King's Mutual Insurance Co.* (N.S.S.C.)).

Agents to Insurers

1. Indemnification

Agents may be obligated to indemnify insurers for claims brought by clients. They may also be liable for breach of an independent duty of care. Most indemnity claims arise out of claims by clients, and most of these involve third party proceedings. A common type of claim is where the agent failed to disclose knowledge which was imputed by law to the insurer (ex. *North Waterloo Farmer's Mutual Insurance Co. v. Wylie* (Ont. S.C.)).

2. Breach of Independent Duty

A good example of breaching an independent duty of care to an insurer is exceeding binding authority when placing coverage. Another is failing to cancel coverage when instructed to do so (*Northwestern Mutual Insurance Company v. J.T. O'Bryan & Company* (B.C.S.C.)).

Insurers to Agents

The general rule in *Kelly* also dictates that insurers will generally share liability with their agents when the claim relates to processing the policy, as opposed to completing the application itself (*McLeod* and *Stewart*).

Others

Agents and insurers have also been held to owe a duty of care to beneficiaries under coverage which is placed as part of a financing transaction. One example is a duty to a mortgagee seeking the benefit of a mortgage clause, if the mortgagee makes an independent request for coverage

(*Amherst Credit Union Limited v. Quebec Assurance & Casualty Company of Canada* (N.S.C.A.), (*F.B.D.B. v. American Home Assurance Co.* (Ont. S.C.) and *Bank of Nova Scotia v. Khalek* (N.S.S.C.)). Two recent examples involved a business partner who was the loss payee under a "key man" life insurance policy, and who succeeded in his claim against the agent (*Rivard v. The Mutual Life insurance Co. of Canada* (Ont. C. J.)), and a spouse who was a beneficiary under her husband's life coverage, but did not succeed (*Newson v. The Excelsior Life Insurance Co.* (B.C.S.C.). There is even the prospect that an indirect beneficiary (such as an injured third party) may be owed a duty of care. This represents an area of further expansion for the law.

INSTRUCTIONS AND REPRESENTATIONS

Specific Instructions

Specific instructions create a form of strict liability for the specific coverage sought. Otherwise, they impose only a negligence standard of care. Nevertheless, agents are often held liable for not following specific instructions.

General Instructions or the "Blank Cheque"

The *Fine's* case makes it clear that the courts will infer the terms of a contract in the absence of any general, let alone specific instructions. If they do so, the onus shifts to the agent to prove that coverage was not available (*Markal*). Even though no instructions at all may be given, an agent will be required to understand the nature of his client's business and assess the risks that should be insured against. This can result in liability for failing to obtain even extraordinary coverage. There are numerous examples of this type of case. By contrast, the British Columbia Supreme Court in *L.B. Martin Construction Ltd. v. Gaglardi* , only imposed an obligation on the agent to place "reasonably available", as opposed to "special" coverage. In light of *Fine's*, and all the other cases, this is no longer strong authority.

Representations

Agents also encounter claims problems because they over-represent the existence (*Elliot v. Ron Dawson & Associates (1972) Ltd.* (B.C.S.C.) and *D. Vaughan Contracting Inc. v. Don Stobbe Insurance Agencies Ltd.* (B.C.S.C.)) or nature (*Estevan Brick v. Gerling Global General Insurance Company* (Sask. Q.B.) of coverage.

TYPES OF BREACHES - Agents to Insureds

Not Placing Any, Adequate or Timely Coverage

1. No Coverage At All

First, agents may negligently recommend against placing coverage on the erroneous assumption that the risk is already insured (*Elliot*). Second, an agent may not pursue an application but fail to

advise his client (*Colony Lincoln Mercury Sales Ltd. v. Haber Insurance Broker Ltd.* (Alta. Q.B.)). Finally, coverage may simply "slip through the cracks", through a clerical or other error.

2. Inadequate Amount

First, there may a shortfall, for which the agent will be liable (*Gilmore*). Second, the agent might not have taken steps to determine the value of the subject matter. Finally, an agent may obtain coverage on the wrong basis (ex. *Coyle v. Ray F. Fredericks Insurance Ltd.* (N.S.S.C.) -was actual cash value and should have been replacement cost).

3. Incomplete Subscription

If an agent does not follow up on all of the subscriptions to a policy, he will be liable for the uncovered portion (*Block Bros. Industries Ltd. v. Westland Insurance Centre Ltd.* (B.C.S.C.))

4. Limited Subject Matter

Agents may also fail to cover all of the required subject matter.

5. Exclusions and Exemptions

This is the single largest category of agents and brokers liability cases. The policy exclusions may be so fundamental to the coverage sought that the policy is virtually worthless, for example, where coverage is sought during the construction of a building, and the policy contains a course of construction exclusion (*Stewart*); where coverage for a general contractor excludes building collapse due to excavation work (*Peter Unruh Construction Company Limited v. Kelly-Lucy & Cameron Adjusters Ltd.* (Alta. S.C.)); and where a policy covering an airplane which is to be sub-let includes a provision prohibiting sub-leasing (*Gerber v. Eagle Star Insurance Company Limited* (B.C.S.C.)).

6. Co-insurance and "Other Insurance" clauses

Both co-insurance (ex. *Niagara Frontier Caterers Ltd. v. Continental Insurance Co. of Canada* (Ont. S.C.)) and "other insurance" (ex. *Theophanous v. Mutual of Omaha Insurance Co.* (Ont. C.J.)) clauses may also result in gaps in coverage and therefore liability to agents.

7. Other Disadvantageous Terms

Agents may also be liable for incorporating an unauthorized warranty in a policy (*New Forty Four Mines Ltd. v. St. Paul Fire & Marine Insurance Co.* (Alta. Q.B.)) or recommending a policy which is simply too expensive for the client's needs (*Tynan v. Dextraze* (B.C. Co. Ct.))

8. Placing Too Late

An agent may be required to honour a telephone request for insurance within as little as two hours (*Fraser Valley Mushroom Growers Co-Operative Association v. McNaughton & Ward Ltd.* (B.C.C.A.)).

Not Advising as to Coverage or Status

Even if an agent fails to place coverage, liability may be avoided by promptly advising the client, so that other arrangements can be made (*Fine's*).

Not Correctly Advising as to Availability

1. Not Advising that Available

Agents must also advise their clients as to the existence of, for example, under-insured motorist coverage, so that they can receive specific instructions (*Fletcher*).

2. Advising That Not Available

Agents may also be held liable for advising that coverage was not available (*Markal*). If the court finds a contract to insure, as opposed to mere negligence, the agent may be held liable even without clear evidence that coverage was available.

3. No Insurable Interest

Agents may also be obliged to determine whether their client has an insurable interest in the subject property (*Knowles v. General Accident Assurance Co. of Canada* (Ont. H.C)).

Placing With Financially Unsound Insurer

Particularly where the agent advises the insured as to the financial soundness of the insurer, liability may attach when a claim is not honoured due to insolvency (*Norlympia* and *Chidley v. Thompson, Osen & Sherban Canada Ltd.* (B.C.S.C.)).

Misrepresentations as to Risk, and Related Problems

1. Voiding Coverage by Misrepresentation

This is one of the worst possible situations for agents. Not only may they find themselves voiding coverage due to misrepresentation or non-disclosure, and face a claim by their client, but they face claims by insurers where coverage was not voided but the insurer was nevertheless inadequately informed as to the risk. In one case (*Hornburg v. Toole Peet & Co. Ltd.* (Alta. Q.B.)), the court held that the agent should have noticed the difference between the client's mailing address and the legal description of the subject property, and deduced that it might only be used on a casual or seasonal basis. As such, he should have ensured that the vacancy exclusion in the policy was waived.

2. Not Adequately Informing Insurer

Even where the best evidence is that the insurer would simply have charged a higher premium for the risk, the agent may be liable to indemnify for the entire loss (*Crawford Ditching & Dozing Ltd. v. Canadian Surety Co.* (Ont. H.C.)).

Not Increasing Coverage, As Instructed

This is a new category of negligence, which was suggested in a recent case (*Foley v. Swick, Bauman & Associates Insurance Ltd.* (Ont. D.C.)) which was dismissed on the grounds that the evidence rebutted the presumption that the insured's written instruction had been received by the agent in the normal course of the mails.

Not Renewing Any or Adequate Coverage or Warning of Expiry

1. Not Renewing At All

There is no general duty on an agent to automatically renew coverage (*Roy v. Atlantic Underwriters Ltd.* (N.B.C.A.)). However, contracts or undertakings to do so may be inferred from a course of conduct (*Wilcox v. Norberg & Wiggins Insurance Agencies Ltd.* (B.C.S.C.)).

2. Not Renewing Adequate Coverage

Where an agent does renew, he must insure that coverage is adequate to meet the insured's present needs (*Johnson v. W.G. Barton Ltd.* (B.C.S.C.)). This includes a situation where an agent takes over an existing policy. He is obliged to re-assess the adequacy of coverage. (*Carousel* and *Johnson*)

3. Not Warning of Pending Expiry

It is suggested that the rule is that agents should remind insureds of the pending expiry of coverage.

Cancelling or Limiting Coverage, Without Instructions

This is another new category of negligence, which was allowed in a recent case where the agent surrendered the insured's existing life insurance policy before he was certain that the replacement coverage would come into effect (*Kanhoffen v. Martino* (B.C.S.C.)). The replacement policy was void for misrepresentation but, if the agent had not cancelled it, the insured's spouse would have received benefits under the coverage which was being replaced.

Not Warning About Consequences of Cancellation

Even where an insured has made a tentative decision to cancel coverage, the agent may be liable for not warning about the potential consequences, if he agrees to offer the insured such advice (*Engel v. Janzen* (B.C.C.A.)).

Not Advising to Sue Under the Policy

Finally, another new category of negligence has been rejected, in a case where the trial court held that an agent does not having a continuing duty which obligates him to advise the insured to sue if a claim under the policy is being denied (*Eddy's Bulldozing Ltd. v. B.H. Rowbottom & Associates Ltd.* (B.C.S.C.)).

DEFENCES

Contract Defences

1. Impossibility - Coverage Not Available

Although this defence is readily available in negligence, the onus of proof is on the agent in contract (*Fine's* and *Markal*).

2. Agency Defences

The general rule in *Kelly* suggests that insurers will be much more likely than agents to escape contractual liability.

3. Defences to Policy - Misrepresentation and Non-Disclosure

Notwithstanding the agent's obligations, insureds remain responsible for reviewing application forms which they sign (*Edwards v. Kent General Insurance Corporation* (N.B.Q.B.)). This is although the insurer has the initial burden of proving that a policy is void (*Hicks v. Saskatchewan Mutual Insurance Co.* (Sask. Q.B.)).

Negligence Defences

1. No Duty of Care

Even non-parties to the policy may be owed a duty if a relationship of "neighbourhood" can be established (*F.B.D.B. v. American Home* and *Khalek*).

2. Standard of Care Complied With

This is the best possible defence, but one that rarely succeeds.

A Different Standard for Public Insurers

In *Fletcher*, the Supreme Court of Canada held that public insurers have a lower standard of care, which includes a duty to adequately inform the client, but not to advise or persuade them to take optional coverage. However, what *Fletcher* really does is underscore the willingness of the courts to infer contractual undertakings and impose a fiduciary standard on agents of private insurers.

Nevertheless, agents may not be held liable where the lack of coverage originated with a misconception or lack of understanding on the part of the applicant (*I.C.B.C. v. Ross* (B.C.C.A.) and *Ed Dobler Contracting Ltd. v. Wightman & Smith Insurance Agencies Ltd.* (B.C.S.C.)).

Causation

1. "Sophisticated Insureds"

It is only in the clearest of cases that so-called "sophisticated insureds" will be found not to have relied on their agents for advice. For example, although an insured real estate lawyer in *Olanick v. R. Cholkan & Co. Limited* (Ont. H.C.) was unsuccessful in a claim involving a vacancy exclusion, the agent was held liable in *New Forty*, even though the president of the insured was a lawyer, familiar with insurance contracts, who had cursorily reviewed the policy but overlooked the unauthorized warranty. The Manitoba Court of Appeal has also recently underscored the prevailing view that, even if they did read them, insureds would not likely understand their insurance policies (*Dueck v. Mennonite Mutual Insurance Co.*).

2. Actual Knowledge of Problem

However, actual knowledge by the insurer applicant may avoid liability (*Bon Portage Fisheries Ltd. v. Trask Agency Ltd.* (N.S.C.A.) and *Martinelli v. Co-Operators General Insurance Company* (Ont. D.C.)).

3. Constructive Knowledge - Duty to Look After Own Interests

The more difficult cases involve constructive knowledge. First, applicants may fail to follow-up on their own applications. However, the Ontario Court of Appeal, in *Cosyns*, has held that this does not amount to contributory negligence. Nevertheless, there have been some contrary results, including cases where the insureds failed to pay deposits which they knew were pre-conditions to the issuance of coverage (*Beers* and *Colony*).

Second, insureds may fail to read their policy. The general rule is set out in *Unruh v. Kelly-Lucy*. It is that insureds are not obligated to read their policies to ensure that it contains the desired coverage. The contrary case is *Pond v. Dovell* (B.C. Co. Ct.). However, this defence is enjoying less success as the years pass.

Finally, insureds may be held contributorily negligent for not attending to their own policy renewal (*Lewis v. C.M. & M. Insurance Services Ltd.* (N.B.Q.B.)).

4. Fault of Third Party

Agents may also be able to avoid liability if they can blame another party, for example, for the misleading information, which was provided to the insurer, and which resulted in coverage being voided (*Bell v. Buschlen Mowatt Fine Art Investments Ltd.* (B.C.C.A.)).

Contributory Negligence

1. Between Agents and Insureds

This is the most common category, resulting in splits on liability of 25%/75% in favour of both insureds and agents.

2. Between Agents and Insureds

This is the next most common scenario, with most decisions resulting in a 50%/50% split.

3. Between Agents

One agent may also be able to shift some of the blame to another agent or broker involved in the transaction (*Grainary Restaurant Ltd. v. American Home Assurance Co.* (Ont. C.A.)).

Under Policy - No Loss

In addition to the difficulty in enforcing exclusions against clients who sought "full coverage", the courts may even award partial recovery against the agent where the loss is outside the required coverage (*Martin*). This is because the insured will have lost the opportunity to recover part of his loss through settlement with his insurer.

The "Real Cause" Defence

The courts have recently recognized a new variation of the causation defence, namely, that even where an agent has breached his duty to the insured he may not be liable if the insurer would have denied coverage on other and unrelated grounds (*Negash v. H. Later & Company Limited* (Ont. Co.Ct.).

Improvident Settlement

Another new defence, which has been raised but rejected on the facts, is that the insured entered into a settlement with its insurer on improvident terms (*Niagara Frontier Caterers v. Continental*).

DAMAGES

The general measure of an insured's damages will be the amount of the loss which ought to have been covered. The most interesting issue is whether the courts will use the fiduciary duty theory to expand recovery beyond what was "reasonably foreseeable," which is the test in contract or negligence.

EVIDENTIARY MATTERS

The "Paper Trail"

The British Columbia courts, in particular, have criticized agents for not properly documenting applications, (*Gerber*) and have paid heed to evidence of usual practice or routine, even where an agent could not recall specific discussions (*Sjodin v. I.C.B.C.* (B.C.C.A.)) and subsequent cases.

Expert Witness

Expert evidence is virtually indispensable. Judges have commented on the lack of such evidence (*Engel*) and, where it has been available, it has been very well received and generally adopted.

PROCEDURAL ISSUES

As for the procedures that can be involved in these types of cases, agents can, in effect, be asked to interpret the policy in question when they are examined for discovery. Further, a plaintiff was recently awarded a summary form of judgement (i.e. without the defendant's usual right to a full trial) under Rule 18A of the B.C. *Supreme Court Rules* (in *Block Bros. v. Westland*).

CONCLUSIONS

Most errors and omission claims can be avoided if agents and brokers adhere to the following half dozen "golden rules":

1. Know yourself. Know who you are acting for and whether you can bind. Know your limitations, and do not be afraid to get help from inside, or even outside your office.

2. Know the policy. Do not pretend to know more than you do.

3. Know your client. Learn his business and his risks, and review his needs at renewal time.

4. As a corollary, let your client know if you cannot bind or advise as to all of his needs. Keep your client informed.

5. Practice "defensive underwriting". Avoid accepting general instructions and the higher fiduciary standard of care that goes with them. Try to elicit more specific instructions from your client. Debunk the myth of "full coverage".

6. Know what you are doing. Adhere to procedures and use checklists. This protects you and creates invaluable evidence in the event of a claim. Document conversations and periodically review your practices.

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Neo Tuytel is a senior business litigator whose practice emphasizes insurance coverage, contractual disputes of all kinds, and environmental matters. He routinely litigates and negotiates to completion complex, high value cases, and has had notable successes in the Supreme Court of Canada. He also acts as co-counsel with lawyers from other firms, and as a consultant to other lawyers.

Neo's insurance practice is conducted mainly on behalf of policyholders, enforcing insurance companies' duty to defend liability claims and obligation to indemnify property losses, as well as prosecuting claims for negligence against insurance brokers. His environmental practice focuses on liability for the cost of clean-up and remediation of contaminated sites.

Neo is a recognized authority on insurance coverage and, as described below, a prolific author and speaker, the editor of a national insurance law publication, and an executive member of the coverage committee for Canada's leading insurance and defence lawyer's organization.

The balance of Neo's practice involves claims for breach of contract, fiduciary duty, appellate advocacy, mediation, and commercial arbitration.

Neo obtained his LL.B. from the University of British Columbia in 1984, was called to the B.C. Bar in 1985, and was accredited as a mediator in 1994.

Before joining Fraser Litigation Group as a founding partner, Neo practiced as associate counsel at a Vancouver-based firm specializing in insurance and maritime law.

Representative Work

- *Shafron v. KRG Insurance Brokers* (2009): Successful appeal to the Supreme Court of Canada on behalf of a well-known Vancouver-area insurance broker. This is the leading case in Canada on the enforceability of restrictive covenants, severance of clauses in employment contracts, and rectification of contracts generally.

- *Family Insurance v. Lombard Canada* (2002): Successful appeal to the Supreme Court of Canada on behalf of a personal lines insurer, setting a precedent with respect to overlapping coverage between insurance policies (in this case, between residential and group liability insurance, for an equestrian accident which caused catastrophic injuries).
- *Kruger Products v. First Choice Logistics* (2013) and *North Newton Warehouses v. Alliance Woodcraft Manufacturing* (2005): Successful appeals to the B.C. Court of Appeal (*Kruger v. First Choice* being worth more than $16 million), and dismissal of applications for leave to appeal to the Supreme Court of Canada. These are the two leading B.C. cases on insurance covenants in contracts, 'tort immunity', and the resulting bar to subrogation for loss or damage to premises or contents.
- Britannia Mine remediation order process and settlement of all claims (under B.C. *Environmental Management Act*) – see Bar Association newsletter and BC government powerpoint backgrounder (2001): As lead counsel for a potentially responsible party (a former Canadian subsidiary), orchestrating a precedent-setting, multi-party agreement to solve one of North America's worst pollution problems: approximately $75 million clean-up of acid rock drainage into Howe Sound from the historic Britannia Mine; thereby avoiding court proceedings and pre-empting the issuance of a remediation order,
- Arbitration of product handling rate at marine terminal (2010): As lead counsel for a shipper of specialized products for overseas markets, arbitrating the rate for handling products at a multi-purpose bulk cargo terminal during an optional contract extension period, obtaining an award at less than half of the 'costs plus profit' rate sought by the terminal, and recovering the vast majority of the client's actual legal costs.

Professional and Community Affiliations

Canadian Journal of Insurance Law, General Editor (2008)

Canadian Bar Association and B.C. Branch (Civil Litigation, Insurance, Environmental, and ADR subsections), member

Member of the Law Society of British Columbia (1985)

B.C. Lawyers Assistance Program, volunteer (2006) and Director (2011)

Our Lady of Perpetual Help, Parish Council (former member)

Canadian Defence Lawyers, Insurance Coverage Committee, Vice-Chair (former)

Publications

"Restrictive Covenants In Employment Contracts: The Latest Developments You Need to Know to Protect Your Interests", 2009 - with Gary Luftspring and Sam Sasso of Ricketts Harris LLP, Toronto

"Who's on the Risk (and for How Much?): Allocating and Apportioning Indemnity and Defence Costs Among Insurers in Canada", updated 2008

"Environmental Liability and Insurance Coverage in British Columbia", updated 2006 - with Jon Hodes of Miller Thomson LLP, Vancouver

"Fraudulent Property Insurance Claims", updated 2006 - with Krista Prockiw of Alexander Holburn Beaudin & Lang LLP, Vancouver

"Design Professionals' Errors and Omissions Coverage", updated 2004

"Sexual Misconduct Claims and Insurance Coverage", 1997