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Insurance Law (Law 519)

Professor Billingsley

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# Nature of Insurance

## Introduction

* **In determining whether insurer must pay claim, determine:**
	+ **(1) Whether properly formed insurance contract exists**
		- **(a) Formation of Contract**
			* **Offer/Acceptance**
			* **Consensus ad idem**
			* **Consideration**
		- **(b) Commencement**
		- **(c) Termination**
		- **(d) Insurable interest**
		- **(e) Insurance does not run with property**
	+ **(2) Whether insurance contract covers loss in question – whether risk is insured**
		- **(a) Indemnity and public policy**
	+ **(3) How much is insurance company required to pay**
		- **(a) What is covered**
			* **(i) Interpretation Principles**
		- **(b) What is value of loss**
			* **Open vs. Valued policies**
	+ **(4) Whether breach of policy occurred, such that insurer not required to pay**
		- **Duty to disclose**
			* **Misrepresentation, non-disclosure**
			* **Changes material to risk**
		- **Notice of Loss**
		- **Proof of Loss**
		- **Whether any exceptions apply**
			* **Limitations**
			* **Waiver/Estoppel**

## Definition

* **Insurance: contract between insurer and insured, regarding fortuitous loss or unexpected events**
	+ **(1) Insurance covers events not guaranteed to happen – don’t know when or if event will happen**
		- **(a) Exception: life insurance – we know event will happen, just don’t know when**
	+ **(2) Purpose of insurance is to ‘pool’ risks – spread risk of misfortune by pooling funds, wherein everyone pays amount to ensure indemnification to an individual upon loss**
		- **(a) Society has interest in having insurance – must ensure contracts fair to both insurer and insured**
			* **(i) Insurance contracts are ‘contracts of adhesion’ – insured agrees to contract drafted in advance**
				+ Results in power imbalance between insurer and insured
		- **(b) Insurer must know risk it is insuring – determines premiums to be paid**
			* **(i) Insurer considers risk factors, history, statistics**
			* **(ii) Insurer assesses risk based on information given by applicant**
* **Insurance contracts regulated by specialized statutory provisions and common law rules**
* **Insurance is provincially regulated under ‘property and civil rights’** (*Constitution Act, 1867*, s. 92(16))
	+ Provinces coordinate to create uniformity in provincial law through Canadian Council of Insurance Regulators
	+ **(1) Exception: marine insurance**
	+ **(2) Provincial statues and regulations govern:**
		- **(a) Status of insurance companies;**
		- **(b) Conduct of parties to insurance contract; and**
		- **(c) Content of insurance contracts**
* **Legislation may be influenced by:**
	+ **Lobby groups:** Insurance Bureau of Canada, Canadian Health & Life Insurance Association
	+ **Inter-Company Agreements:** insurers may voluntarily enter agreements with each other
* **Definitions of Common Insurance Terms:**
	+ **(1) People impacted by insurance contract:**
		- **(a) Insurer:** party who promises to provide indemnity
		- **(b) Insurer:** party who receives indemnity in case of loss
			* Not necessarily person who buys insurance – assured may purchase another person insurance
		- **(c) Assured:** person who is buying insurance that impacts insured
			* Assured buys life insurance policy for husband
		- **(d) Beneficiary:** person who receives insurance proceeds if loss/damage occurs
			* On life insurance policy, may be children
		- **(e) Named Insured:** person who receives insurance coverage – name is on policy
		- **(f) Unnamed Insured:** person not named in contract, but has right to be protected under contract through description of permitted individuals
			* **(i)** Auto policy covers all people who named insured consents to drive vehicle
	+ **(2) Parts of Contract**
		- **(a) Policy:** only evidence of terms of insurance contract – not insurance contract itself
			* **(i)** Insurance contract still requires offer/agreement/consideration
		- **(b) Policy Limits: maximum amount insurer agrees to pay if total loss occurs**
			* **(i)** Applies even if market value of insured property has increased
		- **(c) Premium:** how much insured pays insurer for indemnity
		- **(d) Deductible:** amount of loss insured agrees to pay, before insurer’s obligation to pay is triggered
			* **(i)** Higher deductible may lower premiums
		- **(e) Term of Insurance:**
			* **(i) Term of insurance contract:** provision in contract
			* **(ii) Term of insurance coverage:** duration of insurance contract
		- **(f) Statutory Condition:** contractual provision mandated by statute – must be part of every contract
		- **(g) Coverage:** who coverage is given to, what property is covered, what risks are covered, what amounts are covered
		- **(h) Subject Matter of Insurance:** item/property being insured
			* **(i)** Life, health, automobile, house, pet, liability, etc.
		- **(i) Subject Matter of Contract of Insurance:** money – financial compensation
			* **(i)** Ensures monetary indemnity available to insured if harm does occur to subject matter
				+ Pay a little, to guard against risk you might have to pay a lot
	+ **(3) Personnel & Policies**
		- **(a) Agent:** employee of insurer – sells insurance on behalf of insurer
		- **(b) Broker:** sells products for multiple insurers
		- **(c) Underwriter:** employee of insurer – estimates how much to charge for insurance coverage
		- **(d) Adjuster/Claims Examiner:** after loss/damage, individual who investigates loss
		- **(e) Policy of Adhesion:** insurance contracts drafted ahead of time – not drafted case-by-case basis
			* Courts consider this when interpreting policy – insured did not negotiate terms freely
		- **(f) Manuscript Policy:** insurance contracts negotiated between insurer and insured
			* Usually only applies for larger/unique risks
		- **(g) Standard Automobile Policy:** policy that is standardized by government – all insurers must use same standardized agreement
		- **(h) Endorsement:** mini-contract, added on to larger insurance contract
			* Home insurance contract may not cover swimming pool liability
* **Common Elements of Insurance Contract:**
	+ **(1) Insurance Policy**
		- **(a) Insuring Agreement:** explains what insurer is providing coverage for
		- **(b) Exclusions:** items that narrow coverage
		- **(c) Definitions:** terms being used are defined
	+ **(2) Declarations Page:** personalizes contract – name, amount of coverage, premiums
	+ **(3) Endorsements:** attached to contract

### *Re Bendix Automotive*

**Ratio**

* **For contract to be insurance contract, following elements required:** (*Re Bendix Automotive*)
	+ **(1) Undertaking by one person – insurer makes promise**
	+ **(2) To indemnify another person**
	+ **(3) In exchange for agreed-upon consideration**
		- **(a) Whether contract is aleatory in nature, not character of consideration** (*California Physicians’ Service*)
			* **(i) Usually, consideration is a cash premium**
			* **(ii) Consideration may be property or other services**
				+ Medical services (*California Physicians’ Service*)
				+ Employee’s covenants in collective agreement (*Re Bendix Automotive*)
	+ **(4) For loss/liability resulting from an event; and**
		- **(a) Loss/damage to property; or**
		- **(b) Liability attributed to insured when third-party injured**
	+ **(5) Happening of event is uncertain**
		- **(a) Insurance covers fortuitous events – not sure if/when they will occur**
* **Statutory definition of ‘insurance’: undertaking by one person to indemnify another person against loss/liability, in respect of certain risk or peril to which object of insurance might be exposed, or to pay sum of money or other thing of value on happening of a certain event** (*Insurance Act*, s. 1(aa))
	+ **Includes life insurance**

### *Ferme Vi-Ber Inc v La Financiere Agricole due Quebec*

**Ratio**

* **Must know whether contract is an insurance contract, to determine if insurance principles apply** (*Ferme Vi-Ber Inc*)
	+ **(1) Under insurance law, insurers may discriminate in specific circumstances** (*Cooperators General Insurance*)
		- Charging higher premiums to young male drivers than young female drivers is discrimination, but ‘reasonable and justifiable’ due to unique nature of insurance (*Cooperators General Insurance*)
* **Characteristics of insurance contracts:** (*Ferme Vi-Ber Inc*)
	+ **Use of insurance terminology not determinative**
	+ **(1) Client’s obligation to pay premium or assessment;**
		- Not affected by government providing most of payment
		- **(a) Client must continue to be debtor for premiums, even if risk does not occur**
			* **(i) If no contributions made in certain circumstances, insurance concept does not exist**
				+ **(1) Irrelevant whether government provides most of payment**
	+ **(2) Occurrence of a risk: uncertain event, that does not depend exclusively on parties’ will; and**
		- **(a) Risk is foreseeable in occurrence and time of its occurrence**
			* **(i) If payment based on event that is certain in terms of occurrence/prematurity/severity, not insurance**
	+ **(3) Insurer’s obligation to pay client if insured risk occurs**

**Facts:** P paid contributions to D, in exchange for D protecting P from income fluctuations in agricultural market. In determining how much to pay P, D considered P’s additional income as farm financial assistance from federal government.  **Issue:** Whether contract is contract of insurance? **Analysis:** Program not contract of insurance. Purpose of program to guarantee that P’s income never drops below certain amount. P has obligation to pay premium or assessment.

## Classification of Insurance

* **Insurance classified according to subject-matter of insurance:** (*Insurance Act*, Part V)
	+ **(1) Subpart 1: Insurance Contracts (general)**
		- **(a) Unless excluded by statutory provision, apply to all insurance contracts**
	+ **(2) Subpart 2: Automobile Insurance**
		- **(a) Subpart 1 does not apply to automobile insurance**
	+ **(5) Subpart 5: Life Insurance**
* **Statutory provisions may override classifications**
* **Classification impacts substantive rights of insured – *Insurance Act* has different rules for different categories of insurance** (*KP Pacific Holdings*)

### *KP Pacific Holdings v Guardian Insurance Co of Canada*

**Ratio**

* ***Insurance Act* lays down rules based on different categories of insurance** (*KP Pacific Holdings*)
* **Comprehensive policies covering multiple perils governed by general application provisions** (*KP Pacific Holdings*)
	+ All-Risks/Multi-Peril Policy: covers multiple perils, minimizing number of policies one needs to buy
	+ **Cannot classify insurance based on how loss was caused – parties would not know which rules apply until loss occurs**
	+ **Parties must know which category insurance contract falls into – affects substantive rights of parties**

**Facts:** P’s hotel damaged by fire. D argued claim not brought within limitation period, according to ‘Fire Insurance’ category of Act. P argues general provisions of Act apply, providing for different limitation period.  **Holding:** Appeal allowed. Claim is not statute-barred.

### *Churchland v Gore Mutual Insurance*

**Ratio**

* **Comprehensive policies cannot be neatly classified into categories based on subject matter** (*Churchland*)
	+ **Where both categories might apply, specific insuring agreement prevails over general ‘multi-peril’ wording** (*Dudelzak and Landry*)

**Facts:** Property stolen from P’s residence. More than one year after break-in, but less than one year after filing proof of loss, P brings action against D, insurer, based on homeowners’ insurance policy, which covered theft.  **Issue:** Whether comprehensive policy can be policy of fire insurance?

### Classification of Auto Insurance

* **Automobile insurance systems regulated by provincial governments**
	+ **Provincial legislation makes liability insurance mandatory for vehicle being operated on public roads** (*Traffic Safety Act*)
* **Automobile insurance can be:**
	+ Alberta is primarily tort-based, with some no-fault components
		- Provided by private insurers, but content of policy heavily regulated by government
	+ **(1) Fault-based or no-fault**
		- **(a) No-Fault: no reason to determine who is at-fault in accident, because each party’s insurer pays person their losses**
		- **(b) Fault-Based: tort action exists and parties may sue to determine which insurer pays**
			* **(i) Tort Action: injured driver sues tortfeasor**
	+ **(2) Provided by government insurer or private insurance company**
* **Alberta’s Standard Auto Policy (SFP #1 – Owner’s Policy)**
	+ **(1) Standard form contract -- only auto policy sold by all insurers in Alberta**
	+ **(2) All provisions fall under ‘auto’ classification of statute** (*Insurance Act*, Subpart 2)
		- **(a) Section A -- third-party liability insurance (mandatory)**
			* Only relevant if you are party being sued
			* **(i) Provides coverage for intentional acts, unintentional acts, impaired driving**
				+ **(1) If you are sued, insurer will hire lawyer to defend you in lawsuit**
				+ **(2) If settlement/judgment against you, insurer will cover, up to policy limits**
			* **(ii) Required minimum policy limit of $200,000**
			* **(iii) Can agree to higher minimum policy limit to protect assets**
				+ If claimant obtains judgment for more than policy limit, can come after insured for excess
		- **(b) Section A.1 -- direct compensation for property damage to insured vehicle itself (mandatory)**
			* **(i) Provides coverage for damage to insured’s vehicle – recover from own insurer**
			* **(ii) Only applies if collision with another vehicle, where other driver caused accident**
			* **(iii) If insured 50% at fault, 50% claimed under this section and 50% under Section C**
		- **(c) Section B -- Accident Benefits: medical, funeral and death, disability (mandatory)**
			* Relevant to person doing suing
			* **(i) Provides coverage for insured’s bodily injuries, up to policy limits – recover from own**
			* **(ii) Benefits insurer agrees to pay insured if injured in accident**
				+ **(1) No-fault benefits – insurer must pay even if insured caused accident**
				+ **(2) Up to $50,000 for medical benefits (physio, chiropractor, etc.)**
				+ **(3) Death benefits are akin to life insurance – amount depends on role in household**
				+ **(4) Disability: if unable to work for number of weeks, small amount covered**
			* **(iii) Partly excludes coverage for loss caused by insured’s own impaired driving**
			* **(iv) If injured party has losses exceeding what he receives under Section B, will sue other driver in tort for excess amount not covered**
				+ **(1) Other driver’s insurer will defend him and will pay any judgment obtained against its insured, up to policy limits**
		- **(d) Section C -- collision coverage for loss/damage to insured vehicle itself (optional)**
			* **(i) Provides coverage for damage to insured’s vehicle – recover from own insurer**
			* **(ii) Only applies if loss was accidental, damage to insured car, and insured responsible**
			* **(iii) Excludes coverage for:**
				+ **(1) Loss intentionally caused by insured**
				+ **(2) Loss caused while insured was impaired**
			* **(iv) If insured 50% at fault, 50% claimed under this section and 50% under Section A.1**
		- **(e) Individuals have guaranteed minimum coverage for loss caused by another driver**
			* **(1) Excludes loss to insured vehicle and its contents**
			* **(2) $200,000 statutory minimum s. A limits** (*Insurance Act*, s. 571)
			* **(3) Protection against uninsured drivers available** (*Motor Vehicle Accident Claims Act*)
				+ **(a) Injured party can make claim against Motor Vehicle Accident Claims Fund for amount up to $200,000**
			* **(4) Protection against underinsured drivers available**
				+ **(a) If claim exceeds other driver’s policy limits, may purchase *SEF 44 Family Protection Endorsement***

**(i) Own insurance company will top up, up to policy limit in endorsement**

## Insurable Interest

* **At common law, insured must have insurable interest in subject matter of insurance contract**
	+ **Requirement may be modified by statute, depending on type of insurance**
	+ **(1) Insurable Interest: insured must stand in relation to subject matter of insurance so as to suffer loss/detriment if specified event occurs – prevents people from insuring something without insurable interest**
		- If it were possible to insure something without having insurable interest:
			* Moral hazard increases -- person with insurance would *want* something bad to happen
			* Becomes wager in favor of loss
			* Belies indemnity principle – person would profit, rather than be made whole
		- Distinct and necessary element of insurance contract
			* Distinct: only insurance contracts require insurable interest
			* Necessary: promotes society’s interest in promoting personal property and wealth acquisition, and minimizes risk of moral hazard
		- **(a) Must exist independently from insurance contract – cannot be created by paying premiums**
			* **(i) Must suffer loss, even if no insurance contract existed** (*Kosmopoulos*)
		- **(b) Must exist at time of loss – otherwise, insured does not suffer financial loss**
			* **(i) Exception: life insurance – only required when contract takes effect** (*Insurance Act*, s. 646)
				+ **(1) Even if spouses get divorced, and one party continues to pay premiums, insurer must pay**
	+ **(2) Features of Insurable Interest**
		- **(a) Interest must be pecuniary – must have financial loss/detriment, not emotional one**
		- **(b) Legally enforceable interest, even if presently vested future interest**
			* **(i) May enter contract to receive property in future**
		- **(c) Merely having legal title is not sufficient – may be evidence of insurable interest**
			* Parent who registers car in their name, to keep child’s premiums down, does not have insurable interest – amounts to fraud
	+ **(3) Onus of establishing insurable interest is on insured**
		- **(a) Court may favor finding insurable interest if doubt exists**
* **Life Insurance: contract not void for lack of insurable interest, if person whose life is insured consent in writing to insurance being placed on his life** (*Insurance Act*, s. 646(2))
	+ **(1) Person has insurable interest in life of: his own life;** **child; grandchild; spouse/partner; anyone on whom that person is dependent for support or education; employee; and, anyone in duration of whose life the person has pecuniary interest** (*Insurance Act*, s. 647)
		- Parties in litigation have pecuniary interest in judge being alive – otherwise, trial must start over
		- **(a) Factual Expectancy Test does not need to be applied in life insurance**

### *Constitution Insurance v Kosmopoulos*

**Ratio**

* **Factual Expectancy Test: insurable interest exists if insured stands in relation to subject-matter of insurance, so as to suffer loss or detriment if event insured against occurs** (*Kosmopoulos*)
	+ **(1) Does not require insured have a right to whole/part of a thing**
		- **(a) Insurable interest may exist, even without legal title**
			* Father has insurable interest in property bought for his son – feeling bound to replace lost articles would result in pecuniary loss (*Spencer*)
			* Sole shareholder may have insurable interest in corporation’s assets (*Kosmopoulos*)
			* May have insurable interest in car, even before legal registration as title-holder (*Laratta*)
	+ **(2) For life insurance, insurable interest may be presumed on basis of specific relationships** (*Kosmopoulos*)
		- **(a) Insurable interest not required if person whose life is being insured consents to placement of life insurance on his life**
	+ **(3) Test may be defeated on public policy grounds:** (*Kosmopoulos*)
		- **(a) No insurable interest if P demonstrates bad faith and wilfully blind to fact that property was stolen at time of purchase** (*Assaad*)
* **Policy reasons for requiring insurable interest:** (*Kosmopoulos*)
	+ **(1) Policy against wagering under guise of insurance**
		- Courts reluctant to enforce insurance contract if appears to be wagering transaction
		- Occurs when insured has no valuable relationship to property, or insurance in excess of insured’s interest
	+ **(2) Policy favoring limitation of indemnity**
	+ **(3) Policy to prevent temptation to destroy insured property**
		- If insured has not interest in subject matter of insurance, likely to destroy subject matter to get money
		- Shareholders will not be tempted to destroy corporation’s property
			* Courts may apply trust of insurance proceeds in favor of corporation; lift corporate veil and impose constructive trust in favor of corporation; or, lift corporate veil in favor of third-parties

**Facts:** D, sole shareholder of corporation, obtained insurance in personal name for corporation. Fire destroyed corporation’s property. **Issue:** Whether sole shareholder of corporation has insurable interest in corporation’s assets? **Analysis:** Rejects ‘legal title’ test from *Macaura*: even if insured has legal title, may prefer property damaged to collect on policy ;sole shareholder does not have legal/equitable interest in corporate assets to get insurance (*Macaura*). Corporation is legal entity distinct from shareholders. Corporate veil should not be lifted – corporation, not D, owned business assets. Restrictive definition of insurable interest inappropriate. **Holding:** Appeal dismissed.

### Insuring Others’ Interests

* **Individual can always insure extent of their own insurable interest**
* **May insure interests of others, if**
	+ **(1) Person has insurable interest in property**
	+ **(2) Insurance contract allows it;**
	+ **(3) Person intends to do so; and**
	+ **(4) Insured’s relationship to other party requires or authorizes insured to obtain insurance for other party’s interest**
		- **(a) May happen before contract, or ratify it after contract signed**
* **Because insurance is a contract, rules of privity apply – only those insured under contract can benefit from insurance, or enforce insurer’s obligations**
	+ **(1) Third-parties may claim contractual benefit if particular conditions met:** (*Sanofi Pasteur*)
		- Intention may be express or implied in circumstances (*London Drugs*)
		- **(a) Whether parties to contract intended to extend benefits to third-party seeking to rely on provision; and**
		- **(b) Whether parties’ intentions indicate third-party’s activities are same activities contemplated as coming within scope of contract in general, or provision in particular**

#### *Keefer and Quebec Bank v Phoenix Insurance*

**Ratio**

* **Person with limited interest in property may nevertheless recover whole value if:**
	+ **(1) Policy allows him to recover whole value; and** (*Castellain*)
		- **(a) Insured must have interest at time of execution of policy and date of loss** (*Caldwell*)
	+ **(2) Person intended to insure whole value at time** (*Castellain*)
		- **(a) Person with limited interest may insure to cover his own value only, or interest of all others who have interest in property**
		- **(b) Whether premium is for an insurance on whole property, or partial interest only**

**Facts:** Person bought land from P for $2000, to be paid in installments. P maintained title and insurance until all payments made. Fire occurred. D, insurer, only paid P $1200, being amount of interest he had remaining in property. **Issue:** Whether unpaid vendor may recover beneficial interest of buyer? **Analysis:** P intended to insure whole property, not merely beneficial interest – premium for absolute interest.

#### *Spencer v Continental Ins Co*

**Ratio**

* **Four rules for making policy available for benefit of persons not named:**
	+ **(1) Policy must have clause indicating contract is for more than mere personal indemnity on behalf named insured;**
	+ **(2) Person for whose benefit contract is made must be in existence and ascertainable at time contract is made;**
	+ **(3) Named insured must have intention to insure on other person’s behalf; and**
	+ **(4) Other person must have authorized or subsequently ratified contract**

#### *Dudelzak and Landry v Non-Marine Underwriters*

**Ratio**

* **Insurer not liable for loss or damage to property owned by person other than insured, unless:** (*Insurance Act*, s. 540, Statutory Condition #2)
	+ **(1) Specifically stated in contract; or**
	+ **(2) Insured’s interest in that property is stated in contract**
		- **(a) ‘Owner’ is any person with insurable interest in property**
		- **(b) Insurer not obligated to pay insurance proceeds if another party has ownership interest in insured property, and insured has not disclosed its limited interest in property to insurer** (*Marks*)
	+ **As long as insured has insurable interest in property, provision is complied with** (*Dudelzak and Landry*)
		- But, likely Legislature intended it as disclosure obligation
* **Mere possession of subject matter of insurance may be sufficient for insurable interest**
	+ Proprietary interest or ownership not necessary for insurable interest
	+ **(a) Possession entailing legal liability for goods (ie. bailment) sufficient for insurable interest**
		- **(i) Insured may have insurable interest in client’s legal documents**
			* Lawyer responsible for safekeeping of will – legal obligation to prepare new ill if lost or destroyed
		- **(ii) If insured has insurable interest, must insure against loss/damage for full insurable value, or value of insured’s interest**
	+ **(b) Possession with no right of enjoyment or liability not sufficient for insurable interest**
* **If insured has insurable interest in property, entitled to insure it for its full insurable value, even if owned by another**
	+ **Irrelevant whether insured’s limited interest in property is not stated in contract**

**Facts:** P, insured, is law firm. Insurance policy states two types of coverage: office equipment and comprehensive general liability. Office theft occurs and wills stolen. **Issue:** Whether wills are property under office equipment coverage?
**Analysis:** Records should be given ordinary, common-sense meaning: account of facts/events preserved in writing or other permanent form. Valuable papers merely describes specific type of record – original wills are ‘records’. As long as firm has insurable interest in property, statutory condition #2 complied with.

### Insurance Does Not Run With Property

* **Insurance does not run with the property – insurance is personal contract** (*Rayner*)
	+ **(1) Unless assignment of contract occurs, no action may be brought under contract, except between original parties**
* **Purchaser of real property assumes risk of loss from date of interim agreement, until title passes** (*Denesuk*)
	+ **Unless contrary agreement made**
	+ **However, standard form interim agreement states all property remains at vendor’s risk until title passes, and all insurance policies and proceeds thereof held in trust for parties**
* **Vendor may have valid insurance policy even after tile has transferred**
	+ **Full value of insurance payable to insured, who holds it in trust for others’ interests** (*Caledonian Insurance Co*)

# Insurer’s Obligation to Indemnify

* **Indemnity: compensation for person’s insured loss, so he is financially restored to pre-loss condition**
	+ May refer to two different things:
		- General: insurer’s obligation to pay for a loss
		- Specific: amount insurer must pay
	+ **(1) Principle of Indemnity: insured should not profit from existence of insurance**
	+ **(2) Open Policy: insured is restored to pre-loss financial position, subject to policy limit**
		- **(a) To claim under open policy, insured must prove:**
			* **(i) Valid contract exists**
			* **(ii) Loss occurred**
			* **(iii) Contract covers loss; and**
			* **(iv) Amount of loss suffered**
	+ **(3) Valued Policy: non-indemnity contract**
		- **(a) To claim under valued policy, insured must prove:**
			* **(i) Valid contract exists**
			* **(ii) Loss occurred**
			* **(iii) Contract covers loss; and**
			* **(iv) Amount payable by terms of contract**
		- **(b) Life Insurance: amount payable set by contractual terms – does not depend upon proof of pecuniary value of loss actually suffered**
		- **(c) Specialized Items: insurer will assess value when contract made**

## Indemnity and Public Policy

* **Even if insurance contract covers particular loss, Court may deny insured indemnity for policy reasons**
	+ **(1) Public policy interest must convincingly outweigh insurer’s contractual obligation to pay -- policy considerations make indemnity unconscionable**
	+ **(2) Insurer has onus of proving public policy considerations outweigh obligation to pay**
	+ **(3) Courts reluctant to deny coverage for public policy – insurer could have expressly excluded coverage**
	+ **(4) In considering whether indemnity denied for public policy reasons, determine:**
		- **(a) Contract provisions**
			* **(i) Provisions may be superseded by public policy considerations, imposed by Court**
				+ **(1) Public policy considerations may be superseded by legislation**

### i. Insurance for Illegal Activity

* **Court may refuse to enforce insurance contract if coverage would encourage illegal activity** (*Nakata*)
	+ Fire insurance policy not enforced for brothel (*Nakata*)

### ii. Criminal Acts

#### *Oldfield v Transamerica Life Insurance Co of Canada*

**Ratio**

* **Under common law, public policy prohibits recovery by insured because criminal should not benefit from his crime**
	+ **(1) Insurer must prove on balance of probabilities that insured committed criminal act** (*Hanes*)
	+ **(2) Applies to two types of criminal acts:**
		- **(a) Intentionally caused loss, by insured’s criminal act; and**
			* Ex. Murder or arson
		- **(b) Unintentionally caused loss, by insured’s criminal act**
			* Ex. Only arson intended, but death occurred in fire
	+ **(3) Applies to insured’s estate and beneficiaries of estate – state cannot benefit any more than insured** (*Cleaver*)
	+ **(4) Does not apply to innocent beneficiary under insurance contract** (*Oldfield*)
		- **(a) Neither criminals, nor claim through criminal’s estate**
	+ **(5) Does not apply if insured found not criminally responsible due to mental disorder** (*Dhingra*)
	+ **(6) Contract exclusion for loss intentionally caused by insured’s criminal act does not prevent recovery by innocent co-insured** (*Insurance Act*, s. 541)
	+ **(7) Rule modified by statute – unless insurance contract provides otherwise, contravention of criminal or other law in force in Alberta or elsewhere does not render unenforceable a claim for indemnity** (*Insurance Act*, s. 533(2))
		- Statute only modifies coverage for unintended loss from criminal act – coverage unless contract states otherwise
		- **(a) Except when contravention committed with intent to bring loss or damage by insured, or someone acting with insured’s consent:** (*Insurance Act*, s. 533(2))
		- **(b) Loss unintentionally caused by criminal act committed by insured, or colluded in by insured, does not void coverage, unless contract expressly excludes coverage in circumstances**
			* **(i) Loss to insured vehicle not covered if loss occurs when insured driving impaired** (*Standard Auto Policy SPF #1*, s. C)

**Facts:** Insured smuggling cocaine, when bags accidentally burst internally, causing death.  **Analysis:** Insurer seeks public policy rules because they have failed to provide for contingency that gives rise to dispute.

### iii. Suicide

* **At common law, no coverage under life insurance contract for suicide, even if contract expressly covered suicide**
	+ **(1) Modified by statute: if contract includes undertaking that insurance money paid if person whose life is insured commits suicide, undertaking is lawful and enforceable** (*Insurance Act*, s. 657(1))
		- **(a) Undertaking may be express or implied**
		- **(b) If contract provides that person whose life is insured commits suicide within certain period of time the contract is void or amount payable is reduced, and contract lapses and is subsequently re-instated, period of time commences to run from date of latest reinstatement** (*Insurance Act*, s. 657(2))
			* Prevents insurer from taking advantage of people in state of despair

## Valuation

* **Definitions:**
	+ **(1) Replacement Cost Endorsement:** if policy provides actual cash value, but insured prefers replacement cost, may ask for ‘replacement cost endorsement’
	+ **(2) Constructive Total Loss:** cost of repairing insured item is higher than item’s worth
	+ **(3) Salvage:** upon paying actual cash value of insured vehicle, insurer gets wreck(*Insurance Act*, s. 556, Statutory Condition #4(8))
		- **(a)** Applies to all auto insurance policies
	+ **(4) Abandonment:** insured cannot abandon damaged property to insurer without its consent – only insurer has right to declare something ‘constructive total loss’
		- **(a) General Property** (*Insurance Act*, s. 540, Statutory Condition #10)
		- **(b) Auto** (*Insurance Act*, s. 556, Statutory Condition #4(7))
	+ **(5) Optional Repair Clause:** permits insurer to choose to fix item, rather than pay actual cash value
		- **(a)** If insurer elects to fix item, but then finds it will cost more than paying actual cash value, insurer cannot change its mind
* **Insurance contracts classified as ‘open’ or ‘valued’ policies:**
	+ **(1) Open Policy: Insured’s right to recover depends on actual pecuniary loss suffered up to policy limits – insurable value to be subsequently ascertained**
		- **(a) Must determine value of property at date of loss, up to policy limits**
		- **(a) Valuation determined by combination of factors:**
			* **(i) Method described in contract: Actual Cash Value vs. Replacement Cost**
				+ **(1) Actual Cash Value: intrinsic value to insured on date of loss – replacement cost minus depreciation**

**(a)** Most policies provide for actual cash value, up to policy limits

* + - * + **(2) Replacement Cost: cost of replacing item with one of like kind/quality**

**(a)** Does not account for depreciation

* + - * **(ii) Policy limit**
			* **(iii) Extent of loss suffered: (1) whole or partial interest; and (2) extent of insurable interest**
	+ **(2) Valued Policy: pre-determined value to be paid upon destruction of insured item**
		- **(a) Amount payable depends on actual value of insured item – actual value determined as of date of insurance contract, rather than date of loss**
			* Useful for goods difficult to accurately value after loss occurs (ie. artwork)
			* In case of life insurance, upon insured’s death

### i. Open Policies

* **Valuation may be altered by contract terms or endorsements**
	+ Guaranteed replacement cost endorsement may state that insurer will pay full cost of building repairs, regardless of policy limits, if certain conditions met
	+ Scheduled loss endorsement may state payment made of replacement cost or assigned value, without reference to actual value of loss
* **Where insurer elects to repair/rebuild, rather than pay compensation, insurer bound to that choice even if cost exceeds actual cash value of damage** (*North West Electric*)
* **Where insurer acquires salvage rights in insured vehicle upon paying actual cash value, ‘actual cash value’ means value of vehicle minus deductible payable by insured** (*Pauli*)
* **Where parties cannot agree on value of insured loss, *Insurance Act* provides for dispute resolution procedure**
* **Constructive Total Loss: goods treated as totally lost if totally destroyed, or cost to repair exceeds value when repaired**

#### *Leger v Royal Insurance*

**Ratio**

* **Court will look at multiple possibilities of determining actual cash value of property, depending on circumstances:**
	+ **(a) Only consider value at date of loss -- do not consider what may happen to property in future**
	+ **(b) Replacement cost, minus reduction for depreciation**
		- Assessed value for taxation purposes inconclusive – assessors are not experts in view of Court
		- Appraisal may be evidence of value of property
		- No allowance made for loss of rentals or other consequential damage
	+ **(c) Investment value based on capitalized value of income**
	+ **(d) Extent of insured’s interest in property; or**
	+ **(e) Sum set out in policy**

**Facts:** P agreed to purchase lot, with agreement to purchase property insurance. Property was destroyed in fire. Insurance company refused to pay. Possible future value of property irrelevant.

#### *Machtinger v CAA Insurance Co*

**Ratio**

* **Two types of ‘open value’ policies:**
	+ **(1) Actual Cash Value Coverage: property insured to extent of actual cash value**
		- **(a) Insurer may deduct reasonable depreciation from value of loss**
		- Pure indemnity contract – puts insured in position he was in before the loss
		- Equivalent to replacement cost, minus depreciation
			* Prevents insureds from profiting or benefiting from loss
	+ **(2) Replacement Cost Coverage: insured entitled to full cost of repair or replacement**
		- **(a) No deduction made for depreciation**
			* Recognizes that deterioration of property is insurable risk – insures difference between replacement cost and actual cash value
			* Can replace old with new
				+ Violates indemnity principle, but justified to cover shortfall caused by depreciation
		- **(b) Insurers typically offer replacement cost coverage only if insureds actually repair/replace property with new property of similar kind and quality, without deduction for depreciation**
			* **If not, only receive actual cash value**
		- **(c) Typically limited to amount defined in insurance policy**

### ii. Valued Policies

#### *Raymond v US Fire*

**Ratio**

* **In valued policy, amount paid by insurer determined by:** (*Raymond*)
	+ **(1) Amount agreed under contract; and**
		- **(a) Amount need not be related to actual pre-loss value of subject matter of insurance**
	+ **(2) Extent of loss**
		- **(a) If item only partially damaged, insurer pays for partial damage in proportion to agreed upon amount** (*Re Art Gallery of Toronto*)
			* **(i) [Lost value/undamaged value] x insured value** (*Re Art Gallery of Toronto*)
* **In determining amount of open policy, amount assessed by insurer or agent is likely *prima facie* proof of value**
	+ **(1) If amount set without insurer appraisal, insured takes risk of paying excessive premiums**

**Facts:** D issued insurance policy on P’s model of Notre Dame. Appraiser valued model at $85,000. **Analysis:** Model was clearly unique. Item was completely destroyed at time claim was made.

#### *Re Art Gallery of Toronto*

**Ratio**

* **In valued policy, insurer must make good any partial loss within policy limits** (*Re Art Gallery of Toronto*)
	+ **(1) Policy must not contain condition providing a portion of loss is borne by insured**
	+ **(2) To calculate amount insurer owes for partial loss under valued policy: [Lost value/undamaged value] x insured value**

**Facts:** Insurance company issued policy to art gallery. Six paintings stolen. At time of theft, cash value was $1M, but value of paintings when recovered was $600,000. Insured claimed for loss of $400,000. Under valued policy, insurer agreed to pay $600,000.

## Sue and Labour Clauses

* **Sue and Labour Clause: after loss has occurred, insured must take all reasonable steps to prevent further loss from same risk**
	+ Purpose to benefit insurer by giving insured incentive to protect damaged property
	+ **(1) Insurer must pay for these steps, even if they fail to prevent further loss – may require insurer to pay more than policy limits**
	+ **(2) If insured fails to fulfill this obligation, insurer can avoid paying for further loss**
	+ **(3) Must distinguish between steps taken to protect against risk which has already materialized, and steps taken to reduce a future risk**
	+ **(4) Applies only to expenses that:**
		- **(a) Protect property against risk covered by policy**
		- **(b) Relate to a materialized risk – risk that has already happened; and**
		- **(c) Are reasonable**
	+ **(5) Modified by statute**
		- **(a) Property Insurance: insured must take all reasonable steps to prevent further loss/damage to property and other property insured under contract, including removing property to prevent loss/damage, or further loss/damage** (*Insurance Act*, s. 540, Statutory Condition #9(1))
			* **(i) Insurer must contribute on prorated basis towards reasonable and proper expenses – insurer only pays all costs associated with sue and labour if entire property value insured** (*Insurance Act*, s. 540, Statutory Condition #9(1))
		- **(b) Auto Insurance: When loss/damage occurs and is covered under contract (ie. Section C coverage), insured must as far as reasonably possible, protect automobile from further loss/damage** (*Insurance Act*, Statutory Condition #4(1)(b))
			* **(i) Any further loss/damage occurring directly/indirectly from failure to protect it is not recoverable** (*Insurance Act*, Statutory Condition #4(2))

### *Office Garages v Phoenix Insurance*

**Ratio**

* **In event of loss/damage to insured property, insured must take all reasonable steps to prevent further loss/damage to that property, and prevent loss/damage to other property insured, including removing property** (*Insurance Act*, Statutory Condition #9(1))
	+ **(1) In deciding whether amount spent to prevent further loss/damage is reasonable, look at value of potential loss/damage if step is not taken**
		- **(a) Do not consider loss that has already occurred**

**Facts:** D insured P’s garage against loss or damage by fire or explosion. Gasoline contaminated soil and needed to be removed to avoid risk of explosion. Total cost of work was $45,000.
**Analysis:** Insurer argued insured spent more than total loss in preventing further loss/damage.

### *Hartford Fire Insurance Company v Benson & Hedges (Canada) Limited*

**Ratio**

* **Insured has duty to mitigate loss, but not minimize future risk of loss**
	+ **(1) Damage to be mitigated must result from contingency that has occurred, not a contingency yet to occur**
		- Fact-dependent analysis
		- **(a) Cost of detecting cause of damage/loss is part of loss suffered and is recoverable**
			* Insured cannot be expected to repair damaged property without knowing cause of damage
		- **(b) Inspection of damaged property is recoverable – necessary to correcting defective workmanship**
	+ **(2) Insurance does not cover correcting issues to reduce risk of loss/damage that has not occurred**

**Facts:** R’s brewery tank exploded. R brought in expert to determine cause. Insurer refused to pay for expert investigation. **Issue:** What is a ‘materialized risk’?
**Dissent (Dickson):** Not reasonable for insurer to contribute to cost of replacing equipment at risk of normal wear and tear, which caused one piece to explode. To determine whether steps taken by insured to minimize loss/damage were reasonable, consider whether: steps taken provide insured with valuable information regarding cause of loss/damage; and, whether steps taken helped insurer by permitting repairs to be commenced at early date, reducing time during which insurer would be liable for loss/damage.

# Subrogation

* **Subrogation: after paying insured for covered loss, insurer steps into insured’s shoes and recovers from third-party legally responsible for insured’s loss**
	+ **(1) When insured and uninsured losses occur from a particular cause, coordination required between insured and insurer**
		- **(a) Single Cause of Action Rule:** **P can only obtain one judgment for all losses from particular cause**
	+ **(2) Auto Policies: after January 1, 2022, no subrogated claims in Alberta for damage to automobile**
		- **(a) No subrogation under Section A.1**
		- **(b) No subrogation under Section B benefits – no-fault benefits** (*Insurance Act*, s. 587-588)
	+ **(3) Under life insurance contract, right of subrogation does not arise automatically after indemnification**
	+ **(4) Common Law: right of subrogation arises after insured is fully indemnified – insurer may recover any amount insured would have been legally entitled to recover from party causing loss** (*Douglas*)
		- Benefits: no over-indemnification of insured; no benefit to party responsible for causing loss – wrongdoer remains responsible
		- **(a) Equitable doctrine – insurer precluded from subrogation if not acting in utmost good faith**
		- **(b) Fully Indemnified: loss to insured property, not loss to uninsured property** (*Willumsen*)
			* **(i) Includes losses exceeding policy limits, or loss not covered by policy** (*Douglas*)
		- **(c) Before being fully indemnified, insured must pursue any claim it has against third-party in good faith** (*Somersall*)
		- **(d) Insurer keeps any amount recovered under subrogated claim**
			* **(i) Any shortfall in recovery borne by insurer**
		- **(e) If insured claims against tortfeasor without telling insurer, and insurer subsequently pays insured, insurer may claim money back from insured**
		- **(f) If insured claims against tortfeasor and insurer knows, insurer does not have to pay insured**
		- **(g) Insurer controls subrogated action – cannot subrogate until full indemnification**
		- **(h) Subrogated claim is derivative claim – insurer only has same legal rights against third-party as insured**
		- **(i) Insured has duty to cooperate with insurer’s subrogated claim**
		- **(j) Insurer cannot subrogate against its own insured – cannot pay insured, then try to recover it**
	+ **(5) Modified by Statute: right of subrogation arises after insurer makes any payment to insured** (*Insurance Act*, s. 546(1))
		- After insured pays deductible, have not been fully indemnified
		- **(a) Legislation must exhibit clear intention to alter common law rules of subrogation** (*Hammond*)
		- **(b) If recovery not full indemnity, insurer and insured divide amount recovered on pro rata basis** (*Insurance Act*, s. 546(2))
			* **(i) How much coverage was there, relative to whole value of property**
		- **(c) To determine who controls action against third-party:**
			* **(i) If insurer has not fully indemnified insured, they must coordinate – if they can’t agree, Court decides** (*Insurance Act*, s. 546(4))
			* **(ii) If insurer has fully indemnified insured, insurer controls action** (*Insurance Act*, s. 546(3))
			* **(iii) Neither insurer nor insured bound by settlement or release, unless they have agreed to it** (*Insurance Act*, s. 546(6))
		- **(d) Provides for method of apportioning funds between insurer and insured if recovery from third-party not sufficient to fully cover loss, and insurer has not fully indemnified insured**
			* **(i) When amount insufficient to provide complete indemnity, amount remaining must be divided between insurer and insured, in proportion in which loss/damage borne by them** (*Insurance Act*, s. 546(2))
		- **(e) Subrogated claim is derivative claim – insurer only has same legal rights against third-party as insured**
		- **(f) Insured has duty to cooperate with insurer’s subrogated claim**
		- **(j) Insurer cannot subrogate against its own insured – cannot pay insured, then try to recover it**
* **Non-insurance contract may require party to obtain insurance coverage for another**
	+ Ex. tenancy agreement may require landlord to purchase insurance for tenant’s property
	+ **Prevents insurer from exercising subrogation rights against party who receives benefit of insurance coverage** (*Agnew-Surpass Shoe Stores*)
	+ **Where party to lease obtains insurance, that party assumes risks associated with insured losses** (*Orion Interiors*)
		- **Party cannot claim damages against other party to lease, even if caused by other party’s negligence**
		- **Explicit provision to contrary is required**

## *Douglas v Stan Fergusson Fuels Ltd*

**Ratio**

* **Insurer cannot exercise right of subrogation if insured lacks capacity to bring action himself – insurer can only advance same claims insured could advance if insurance did not exist**
	+ **(1) Insurer does not have right of subrogation if insured is undischarged bankrupt and cause of action vested in trustee in bankruptcy**
		- **(a) Insurer may commence subrogated claim in name of trustee in bankruptcy**
* **Under common law, insurer gets control of litigation (*dominus litis*) after full indemnification of insured**
	+ **Insured in control of litigation until being fully indemnified for insured and uninsured losses** (*Zurich*)
* **Subrogated claims are ‘derivative’ – insurer in same position as insured, as against the third-party**
	+ **(1) Any restriction or limit on insured’s right of recovery against third-party applies equally to insurer** (*Matt (Litigation Guardian of)*)
	+ **(2) Where insurer is subrogated, claim still remains that of insured in whose name and with whose rights the claim must be advanced** (*Mason (Litigation Guardian of*))
* **Recoveries by insurer beyond indemnified losses are payable to insured**
* **Recoveries by insured for indemnified losses are held in trust for insurer**

**Facts:** P’s property contaminated with oil. At time of contamination, P’s interest in property vested in trustee in bankruptcy. Insurance company paid $800,000 to remediate property. Insurance company commenced action against third-party in name of P.  **Issue:** Whether insurer entitled to subrogation?

## *Tree-Techol Tree Technology and Research v VIA Rail Canada*

**Ratio**

* **Insured need not include insurer’s subrogated claim in its action against third-party – insured need not notify insurer**
	+ **(1) Unless statute or contract states otherwise, or insured acts in bad faith by obstructing subrogation**
	+ **If insurer chooses to pursue a claim, insured is required to cooperate**
		- Common to discuss legal counsel, sharing of costs, procedures (*Zurich Insurance*)
	+ **If insurer misses limitation period, cannot apply for intervener status**
		- **Person who is not party to proceeding may apply to be intervener if person claims:** (*Rules of Court*, r. 13.01)
			* Whether intervention will unduly delay or prejudice determination or parties’ rights
			* **(1) Interest in subject matter of proceeding;**
				+ **(a) Insurer does not have interest in subject matter if claim is merely for uninsured losses**
			* **(2) He may be adversely affected by judgment in proceeding; or**
				+ **(a) Insured does not have obligation to protect insurer**
			* **(3) Exists between person and another party in proceeding a question of law or fact in common with question in proceeding**
* **Once right of subrogation occurs, insured cannot prejudice person subrogated** (*Globe & Rutgers Fire Insurance*)
* **Where insured’s loss exceeds amount of insurance money he has received, insurers not subrogated to full rights of assured** (*Globe & Rutgers Fire Insurance*)
	+ **Insurer merely has interest – but, insured not required to maintain action on behalf of insurer**
	+ **Insurer cannot interfere or control insured in his claim against third-parties – but, insured must act with diligence and in good faith**
		- **If insured receives sum in settlement that, combined with insurance money paid, is sufficient to wholly indemnify him, must pay to insurers the surplus money to the extent of payment made by insurer**
		- **If insured does not act diligently or in good faith, must make good to insurer any loss occasioned to them due to lack of good faith, honesty, or diligence**
		- Insured does not act in bad faith when pursuing only uninsured losses

**Facts:** Train derailed, causing damage to P’s property. Insurer paid P. Insurance company failed to seek subrogation within limitation period, then seeks order to compel P to amend statement of claim. **Issue:** Whether intervener status may be granted? **Analysis:** Insured’s loss exceeds amount of insurance proceeds received – insurer not fully subrogated. Insurance company has no interest in action and cannot complain when P insists on pursuing own claim.  **Holding:** Application dismissed.

## *Confederation Life Insurance v Causton*

**Ratio**

* **Under common law, insurer cannot commence subrogated claim until full indemnity – fully compensated for his loss**
	+ **(1) Unless contract states otherwise**
	+ **(2) Insured only entitled to indemnification for his loss – after that is achieved from payment of insurance monies, insurer entitled to subrogated claim**
		- **(a) If insured not fully indemnified, no money goes to insurer**
	+ **(3) If insurer pays partial indemnity, not entitled to subrogation**
		- **(a) No obligation on insured to share *pro rata* in proceeds – unless provided in policy** (*Ledingham*)
		- **Where policy only provides partial indemnification for insured’s loss, insured remains *dominus titus* – free to pursue claims as he considers appropriate to recoup his loss**
			* **Insurer subrogated to rights of insured to surplus monies, if any**
			* **Insured must include in claim against third-parties a claim for that portion of loss which insurer had indemnified the insured**
		- **Insured’s costs incurred in recovering from third-parties taken into account when determining amount of indemnification insured receives** (*McLaren*)
* **Under statute, insurer entitled to subrogation after paying any amount to insured**
	+ **(1) Shares pro rata in recovery from third-party – prorate amount of insurance coverage over entire loss**
		- **(a) Formula for how much insurer gets in pro rata sharing: [Insurance coverage/total loss] x amount of insured’s actual recovery against third-party (after fees, etc.)**

**Facts:** D suffered injuries and lost wages in amount of $100,000 from car accident. P, insurer, paid $18,000, pursuant to policy limits. P recovered $75,000 from guilty party. P sought recovery of monies paid under policies to D.  **Issue:** Does subrogation arise when insured recovers portion of loss suffered, or only when insured recovers full loss? **Analysis:** Insured never received total wage loss – was not fully indemnified. Insurer’s right to subrogation did not arise.  **Holding:** Appeal dismissed.

## *Somersall v Friedman*

**Ratio**

* **If insured enters agreement with tortfeasor, or abandons claim against tortfeasor unable to pay, insurer has lost nothing by inability to be subrogated**
	+ **(1) Unless evidence of actual or probable loss, insurer cannot raise alleged breach of subrogation rights to bar claim made in good faith by insured**
	+ **(2) Only way insured is responsible for not cooperating with insurer in bringing subrogated claim, is if in insured acting in bad faith**
		- Dissent: subrogated rights should not be determined by whether recovery is available
* **P must be legally entitled to recover damages from underinsured motorist to access their own insurer’s pool of coverage for such circumstances** (*SEF 44 Endorsement*, s. 2)
	+ **Insurer must indemnify each eligible claimant for amount the claimant is legally entitled to recover from inadequately insured motorist as compensatory damages for bodily injury or death due to operation of motor vehicle** (*SEF 44 Endorsement*, s. 2)
* **If there is no danger of insured being overcompensated, and tortfeasor has exhausted capacity to compensate insured, no reason to invoke subrogation**
* **Insured must pursue any claim against third-party in good faith, up until time insurer entitled to subrogation**
	+ **Insured does not have obligation to obtain best deal possible – may enter agreement with tortfeasor if doing so in good faith**
* **Subrogation rights against underinsured or uninsured drivers rarely valuable to insurer, in contrast to value of indemnity payment to insured**
	+ **Insurer likely only gains exemption from very payment which insured has faithfully paid monthly premiums to ensure entitlement to**
* **Where insured settles with tortfeasor for less than insured’s policy limits, insured forfeits right to claim indemnity from own insurer – precludes insurer from pursuing subrogation rights** (*Sadhu*)

**Facts:** P injured in car accident with D. Agreement reached wherein P’s claim limited to D’s policy limits. P’s insurer sought to recover remaining damages from insurance company according to SEF 44 coverage. **Analysis:** Subrogation did not arise – insurer has not fully indemnified P.  **Dissent (Binnie):** Insurance industry tries to recover losses from wrongdoers to save money. To add requirement of actual or probable loss unnecessary.

# Contribution

* **Contribution: if two or more policies cover same insured for same risk, insurers each liable to insured for proportion of loss**
	+ **(1) Common Law:**
		- Equitable doctrine – ensures fairness to insurers and insured
		- **(a) Must be more than one policy covering loss, including:**
			* **(i) Same subject matter**
			* **(ii) Same insured**
			* **(iii) Same interest in subject matter; and**
			* **(iv) Same risk**
				+ **(1) Same risk of loss: theft, fire, vandalism, etc.**
				+ **(2) Both policies have to be policy coverage, or excess coverage – cannot be one of each**
				+ **(3) Cannot be ‘other’ insurance clause: insurer contracting out of contribution, by stating if insurer buys another policy, contribution not available**
		- **(b) Insurer, upon paying full value of loss to insured, may recover part of payment from other insurer**
			* Prevents insured from being over-indemnified or profiting – cannot claim from each insurer
			* Ensures each insurer fulfills contractual obligation to indemnify insured’
			* **(i) Equitable doctrine – division by whatever method is most fair**
				+ **(1) Default is pro rata, unless policies not concurrent**
		- **(c) Insured collects in full from insurer of his choice – insurer seeks ‘contribution’ from other insurer**
		- **(d) Does not apply to life insurance – if two life insurance contracts, gets all money**
	+ **(2) Contract between insurer and insured cannot alter common law contribution apportionment**
		- **(a) But, contract may state contribution does not apply at all**
	+ **(3) Statute: may codify or alter common law**
		- **(a) Unless expressly agreed in writing, each insurer liable to insured for rateable proportion of loss** (*Insurance Act*, s. 544(1))
			* Merely codifies common law principle for apportionment
		- **(b) Insurance on Identified Articles: first loss insurance, as against all other insurance** (*Insurance Act*, s. 544(6))
			* **(i) Where there is insurance policy for specific item, that insurer must pay first**
				+ Ex. Policy for piano, but fire burns down house and piano
		- **(c) Auto Insurance:**
			* **(i) Where person has insurance for liability when driving any car, policy that relates to the vehicle (and not the person) is first loss insurance – insurance covering vehicle must pay first** (*Insurance Act*, s. 596(1))
			* **(ii) Section C Coverage (damage to own vehicle): if insured has two or more insurers, each insurer only liable for its rateable proportion** (*Insurance Act*, s. 596(2))
				+ **(1) If same policy limits, each insurer shares equally in loss/damage** (*Insurance Act*, s. 596(3)(a))
				+ **(2) If different policy limits, insurers liable to share equally up to limit of smaller policy limit** (*Insurance Act*, s. 596(3)(b))

## *Clarke v Fidelity-Phoenix Insurance Co*

**Ratio**

* **Contribution does not apply where two different insureds and two distinct proprietary interests**
	+ **Owner and mortgagee of same property have two distinct proprietary interests**

## *Continental Insurance Company v Prudential Insurance Company*

**Ratio**

* **Under common law, contribution is equitable doctrine**
	+ **Even if available, may be refused if one insurer acts in unfair manner**
* **Statute does not give insurer right to claim contribution from another insurer – merely limits insurer’s liability to insured**
* **Contribution makes each insurer responsible for given portion of total insurance on property – limits original liability of insurer, instead of requiring them to seek contribution from each other**
	+ **Insurer can only be sued for its ratable proportion**
	+ **Insurer who has paid more than its *pro rata* share does not have right to claim contribution from other insurer under *Insurance Act*, s. 544**
		- **Right to claim contribution is equitable right, apart from s. 544 – in fairness, one insurer has paid more than they ought to**

**Facts:** At time of fire, two insurers had policy in force insuring building against fire damage. Insurer sues other insurer for contribution.
**Issue:** Does insurer have to pay under common law or statute? **Analysis:** Insured terminated one policy before fire. Insurer not required to contribute.

## *Musca v Wawanesa Mutual Insurance Co*

**Ratio**

* **If insured has more than one policy that covers same risk, insured may select policy under which he claims indemnity**
	+ **That insurer then entitled to contribution from other insurer**
* **Where insured’s loss exceeds policy limits under both policies, insured may rely on coverage from each insurer**
	+ **Each insurer may have to pay full amount of policy limits, if claim is that high**

**Facts:** P had insurance with one company. Got insurance with another company. Got into accident.  **Issue:** Whether both companies obliged to indemnify P? Are both policies first-loss policies, or is one for excess coverage only? **Analysis:** Each company liable. P’s intention to cancel one insurance did not come to that insurer’s attention prior to accident.

## *Family Insurance Corp v Lombard Canada*

**Ratio**

* **For contribution to be available:**
	+ **(1) All policies must comprise same subject matter, and be effected against same peril**
	+ **(2) All policies must be effected by or on behalf of same insured**
	+ **(3) All policies must be legal contracts of insurance and in force at time of loss**
	+ **(4) No policy can contain provision that excludes itself from contribution**
* **‘Other Insurance’ Clause: alters terms of contract, if another insurance contract in place at time**
	+ **(1) Voids contract, or makes it excess coverage**
	+ **(2) If both policies contain ‘other insurance’ clause and claim to be ‘excess insurance’ only:**
		- **(a) Determine intentions of insurers, as relating to insured – whether one insurer intended to limit its obligation to contribute, or whether one policy indicates intention to provide primary coverage**
			* **(i) If no evidence of intent, equity demands each insurer shares burden equally**
				+ **(1) If competing policies cannot be read in harmony, clauses mutually repugnant -- both policies provide insured with primary coverage**

Where both parties have sought to limit liability, to endorse intentions of one insurer over the other does not respect obligation of each insurer to contribute

* **Independent Liability Approach: if two insurers have different upper limits for claim, insurers equally share liability up to lower limit** (*Hayden*)
	+ **(1) Burden of meeting that part of claim above lower limit falls on insurer who accepted higher limit**

**Facts:** Woman sued after person falls from horse at her stable. Woman was insured under homeowner policy and commercial general liability policy. Both policies declared themselves to be ‘excess insurance’.  **Issue:** What is extent of each insurer’s liability? **Analysis:** Minnesota approach no longer viable – does not accord with principles of equitable consideration and does not respect insurer’s intentions.  **Holding:** Appeal allowed.

## Subrogation vs. Contribution

### *Cameco Corp v Insurance Co of State of Pennsylvania*

**Ratio**

* **Subrogation and contribution have common features:**
	+ Go hand-in-hand with principle of indemnity
	+ Intended to prevent over-indemnification of insured
	+ Provide way for insurer to avoid paying insured, or method for recouping money they paid insured
* **Distinction between subrogation claim and contribution claim:**
	+ **(1) Subrogation applies in relation to insured’s relation to tortfeasor**
	+ **(2) Contribution applies in relation to insured’s relation to another insurer**
		- **(a) Claim for contribution between insurers cannot be brought as subrogated claim – must be brought in name of insurer**
		- **(b) In contribution, paying insurer recovers from other insurers only such amount as exceeds his proportionate share**
			* **(i) Unlike subrogation claim, permits court to determine proportionate liability to indemnify insured’s loss as among insurers**
			* **(ii) Subrogation claim depends entirely on liability of insurers to insured – liability for whole of loss, not portion, up to policy limits**
* **Insurer cannot bring subrogated claim against non-paying insurer**
	+ **(1) Once insured fully indemnified by one insurer, other insurers no longer have legal obligation to pay insured**
		- **(a) Insured no longer has legally enforceable claim against other insurers – subrogation is derivative and only allows first insurer to enforce legal right insured has against other insurers**
		- If insurer could bring subrogated claim against another insurer, it would be in position to recover whole amount it had paid and entire loss would fall on second insurer

**Facts:** P’s helicopter crashed, killing all on board. P sued by family members of deceased. P held three insurance policies: aviation policy and two general liability policies. One insurer pays all damages and P sues other insurers for coverage. **Issue:** Whether paying insurer can bring subrogated claim against non-paying insurer?

# Formation of Contract

* **Insurance Contracts vs. Regular Contracts**
	+ **(1) Insurance contracts generally governed by rules of contract law – may be modified by *Insurance Act***
		- **(a) Formation of insurance contract depends on parties’ intentions**
			* **(i) Must be *consensus ad idem* on essential terms**
				+ **(1) Must be offer and acceptance of essential terms:**

**(a) Essential Terms:**

**(a) Subject Matter and scope of coverage, including endorsements**

**(i) What is being insured, and what are risks being covered**

**(b) Duration of coverage**

**(c) Policy limits**

**(d) Premium amounts**

**(i) Payment of premium not necessary for contract to be formed, unless payment of premium deemed to be acceptance of contract** (*Insurance Act*, s. 522)

**(ii) Life Insurance: (1) first premium payment must be made; (2) policy must be delivered; and (3) No change in insured’s insurability between first payment and delivery of policy** (*Insurance Act*, s. 649

**(b) To determine whether ‘offer’ occurred:**

**(i) Generally, application for insurance is ‘offer’**

**(ii) Insurer asking for payment before insurance takes effect is ‘offer’**

**(iii) If policy being renewed, ‘notice of renewal’ is ‘offer’**

**(c) To determine whether ‘acceptance’ occurred:**

**(i) Generally, issuing insurance policy is ‘acceptance’**

**(ii) Sending payment in order for insurance to take effect is ‘acceptance’**

**(iii) If policy being renewed, continuing to pay premium is ‘acceptance’**

* + - **(b) Consideration between parties required**
			* **(i) Insurer: promise to pay if covered loss occurs, up to maximum policy limit**
			* **(ii) Insured: promise to pay premium**
	+ **(2) Insurance contracts are unique contracts:**
		- **(a) Contracts of Adhesion: most insurance contracts drafted in advance and sold to clients**
		- **(b) Statutory requirements address unequal power balance between insurers and clients**
			* **(i) Insurer often required to use standard form contracts, or endorsements approved by government**

## *Van Huizen v Trisura Guarantee Insurance Company*

**Ratio**

* **Distinction between ‘insurance contract’ and ‘insurance policy’**
	+ **(1) Insurance Contract: includes any policy, certificate, interim receipt, renewal receipt or writing evidence the contract, whether sealed or not, and a binding oral agreement** (*Insurance Act*, s. 1(j))
		- **(a) Creates contractual obligations between parties**
			* **(i) When determining parties’ rights and obligations, look to contract**
		- **(b) Formation governed by law of contracts**
			* **(i) Must be offer and acceptance**
			* **(ii) Must be agreement on all material terms, including:** (*McCunn Estate*)
				+ **Premiums**

In determining whether to enter into insurance contract, insurer assesses risk and determines acceptable premium based on representations made by applicant

* + - * + **Nature and duration of risk to be covered**
				+ **Extent of liability**
	+ **(2) Insurance Policy: instrument that recites terms/conditions not attaching to particular person or item** (*Insurance Act*, s. 1(pp))
		- **(a) No legal obligations created by mere existence of written insurance policy**
		- **(b) Evidence of existence of insurance contract – parties agree to be bound by terms/conditions as part of contract**
			* **(i) Contract of insurance not created merely by insurer supplying pink card (ie. in offer to renew)**
		- **(c) Insurer may issue ‘certificate of insurance’ as proof of underlying contract on terms set out in policy**

## *Davidson v Global Insurance Co and Ocean Accident & Guarantee Corporation*

**Ratio**

* **Delivering policy to individual, without more, does not constitute acceptance** (*Davidson*)
* **No contract in place unless parties agree on essential terms: risks covered, duration of risk, premium, and amount of insurance**
	+ **Must be consensus ad idem: express agreement, or reasonable inference parties agreed**

**Facts:** P had policy with D. D admitted liability, but claimed D also liable for proportionate amount.

## *McCunn Estate v Canadian Imperial Bank of Commerce*

**Ratio**

* **To extend insurance contract beyond its termination date, must be agreement between parties**
	+ If insurer collects premiums mistakenly, did not intend to extend contract
* **Where party knows of another’s mistake, or should reasonably know about, cannot take advantage of it in law**
	+ **Money transferred by mistake is recoverable to extent that the transferee enjoys unjustified enrichment** (*McMaster University*)
* **Offer may be accepted by conduct** (*St John Tug Boat*)

**Facts:** D, insurer, canceled P’s life insurance but mistakenly continued to charge monthly premiums. **Issue:** Whether insurance contract still in effect? **Analysis:** No offer and acceptance occurred. No agreement on material terms.  **Holding:** Appeal allowed.
**Dissent (Feldman):** Offer may be accepted by conduct. Offer was deduction of premiums, while acceptance was lack of continuing to object. Application of premiums was consideration for contract. Acceptance of premiums after life insurance policy should terminate serves as waiver of policy eligibility requirements.

## *Brochu (Next Friend of) v Vachon*

**Ratio**

* **Even if commencing date/hour listed in policy, policy not effective until issued** (*Laurentian Casualty Co of Canada*)
	+ **Acceptance of proposal does not take place until policy issued**
	+ **If policy not issued until after commencement date/hour, losses occurring before its issue not covered, even if antedated**
* **Insurance contract may be backdated to extend to claims occurring before policy was issued** (*Ashton*)
	+ **If policy is clear, not appropriate to consider reasonable expectation of parties**
		- If insurer wished to leave open start/end time of coverage, could have drafted policy accordingly
	+ **Where policy is ambiguous, give effect to reasonable expectation of parties** (*Reid Crowther*)
		- **Consider circumstances to determine whether parties’ intended to cover losses pre-dating issuance of policy**
	+ **Fact that parties not aware accident already occurred does not exempt insurer**
* **Rectification: correcting policy, when both insurer and insured intended to contract upon same terms, by policy item not stated correctly**
	+ **Must establish beyond doubt that parties sought to insert something different than what appears**
	+ No mutual mistake if parties do not consider the error

**Facts:** Individual received insurance on ATV, without knowing that prior to insurance being issued, son had been in accident on ATV. **Issue:** Whether coverage extends to event which occurred prior to insurance policy being issued? **Analysis:** Unclear when parties intended for coverage to begin. Policy itself states commencement time.

# Duration of Contract

* **Duration: period of time during which contract provides coverage for loss**
	+ **(1) Commencement: contract commences at time parties intend for it to commence**
	+ **(2) Termination:**
		- **(a) Contract terminates by:**
			* **(i) Expiration of time period agreed upon by parties**
				+ Similar to other types of contracts
			* **(ii) Early, by mutual agreement; or**
				+ Similar to other types of contracts
			* **(ii) Early, by unilateral action of insurer or insured, in accordance with statute**
				+ Different than regular contracts
				+ **(1) Reason for unilateral termination irrelevant – statute only has procedural requirements**

**(1) Auto Insurance: insurer’s ability to terminate limited by s. 555 and *Adverse Contractual Action Regulation***

* + - * + **(2) Unilateral termination by insured:** (*Insurance Act*, s. 540, Statutory Condition #5 (General); *Insurance Act*, s. 556, Statutory Condition #8 (Auto))

**(a) May terminate any time upon request – must be communicated and come to attention of insurer** (*Musca*)

**(b) Insurer must refund unused premium as soon as practicable**

* + - * + **(3) Unilateral termination by insurer:** (*Insurance Act*, s. 540, Statutory Condition #5 (General); *Insurance Act*, s. 556, Statutory Condition #8 (Auto))

**(a) Must provide insured with 15 ‘ notice of termination by registered mail, or 5 days written notice of termination personally delivered**

**(i) 15 days runs from date of delivery to insured’s address**

**(ii) Irrelevant whether insured actually receives notice**

**(b) Insurer must, as soon as practicable:**

**(i) Refund unused premium; and**

**(ii) Deliver termination notice**

* + - **(b) Termination different than voiding a contract – voiding means contract never existed**
		- **(c) Life Insurance has statutory grace period: if premium, other than initial premium, not paid when due, may be paid within 30 days after it is due, or number of days specified in contract for paying undue premium, whichever is longer** (*Insurance Act*, s. 651(3))
			* People may not consider insurance coverage when distraught if someone dies
			* **(i) If person whose life is insured dies during grace period, contract deemed to be in effect – amount of premium is deducted from insurance money** (*Insurance Act*, s. 651(4))
* **When insurance contract commences/ends depends on parties’ intentions, as expressed in contract**
	+ **(1) *Insurance Act* provides unilateral termination mechanism for certain types of insurance** (*Insurance Act*, Statutory Condition #5)
		- Conditions must be strictly followed and complied with (*Orfino*)
			* **(i) Insurer must refund excess of premium actually paid over prorated premium for expired time – cannot be less than minimum retained premium in contract**
				+ **(1) Refund must accompany notice, unless subject to adjustment or determination as to amount, in which case refund made as soon as practicable**

**(a) Providing refund five weeks after purported termination is not as soon as practicable, unless good reason** (*Krupich*)

* + **(2) Breach of statutory/contractual condition may render policy void, or claim invalid**

## *Ellis v London-Canada Insurance Co*

**Ratio**

* **Parties may terminate contract by mutual agreement if insured surrenders policy and accepts refund of premiums**
	+ **If insured refuses to do so, insurer may invoke statutory right to unilateral termination**

**Facts:** P brought action against D, tortfeasor’s insurer. D argued its insurance policy was void due to tortfeasor’s fraud.  **Analysis:** D told tortfeasor to return policy and D would remit premium paid.

## *Ontario (Minister of Finance) v Traders General Insurance*

**Ratio**

* **Termination must follow procedural requirements in statute – insurer must comply with requirements strictly**
	+ **Notice of termination must be sent to insured**

**Facts:** Insurer purported to cancel insurance policy on vehicle for non-payment of premiums. Insurer sent termination notice to named insured, and not owner of vehicle. Insured got into accident. **Issue:** Whether termination notice was effective?  **Analysis:** Named insured knew husband was vehicle owner, but was not asked – had she been asked, would have answered truthfully.

# Uberrima Fides – Insured’s Duty to Disclose

* **Ubberima Fides: insurance contract is contract of ‘utmost good faith’**
	+ **(1) Duty of Disclosure: at time of entering contract, insured must fully and honestly disclose facts within insured’s knowledge and which are material to insurer’s assessment of risk covered by contract**
		- Pre-loss conduct affects post-loss claims
		- **(a) Facts regarding insurable risk often known only to insured – insurer trusts representations and trusts insured did not mislead** (*Carter*)
		- **(b) Insured need only disclose facts, not opinions**
		- **(c) Insured need only disclose facts within his exclusive knowledge**
		- **(d) Insured need not mention:** (*Carter*)
			* **(i) What insurer already knows, however insurer came to that knowledge**
			* **(ii) Information the insurer waives being informed of**
			* **(iii) What may lessen risk agreed to**
			* **(iv) General topics of speculation – assume insurer knows of:**
				+ **(1) Relevant natural perils, political perils, probability of safety**
	+ **(2) Contract voidable if all material facts bearing on risk to be insured are not disclosed** (*Badenhorst*)
		- **(a) Irrelevant if non-disclosure was intentional or unintentional – strict duty** (*Carter*)
		- **(b) Undisclosed information need not be causally connected to loss**
		- **(c) Irrelevant whether insured knew facts were material or not**
		- **(d) To determine whether material fact was not disclosed, apply ‘material fact test’: information which would have caused reasonable insurer to refuse coverage, or increase premium for coverage** (*Ont. Metal Products*)
	+ **(3) If insured fails to fulfill disclosure obligation, insurer may:**
		- **(a) Treat policy as valid anyway**
		- **(b) Treat policy as valid, but terminate contract going forward; or**
		- **(c) Treat policy as void ab initio (ie. repudiate contract) and refuse to pay loss** (*Badenhorst*)
			* **(i) Premiums must be returned**
			* **(ii) Subject to defences of waiver or estoppel**
				+ **(1) Waiver: if insurer knew of non-disclosure prior to loss, insurer cannot then void**
* **Duty of disclosure has requirements under common law and statute**

## Common Law

### *Mutual Life v Ontario Metal Products*

**Ratio**

* **Material Fact Test: to determine whether non-disclosure renders contract voidable, determine whether reasonable insurer would have refused risk or changed premiums if fact had been disclose**
	+ **(a) Court may rely on testimony of insurer**
	+ **(b) Merely because insurer asks question on application, does not render fact material**

**Facts:** D, insured, informally given medical treatment. Did not disclose medical treatment in application form.  **Issue:** Whether policy void for misrepresentation or omission?

### *Carter v Boehm*

**Ratio**

* **Duty of disclosure requires insured to disclose information he knows, or which he reasonably ought to know**
	+ **Even if insured does not know information is material to insurance contract**
	+ **Scope of duty limited by insurer’s knowledge – insured does not have obligation to disclose facts that:**
		- **Are matters of common knowledge**
		- **Insurer waives knowledge of**
		- **Insurer undertakes to discover by other means**
		- **Are already known to insurer**
* **Insurer breaches duty of good faith by failing to ask insured for particular information, then denying coverage on basis that information not disclosed by insured** (*Sagl*)
	+ **Insurer owes duty of good faith to expressly advise insured of circumstances that are material** (*Thomas*)

### *Badenhorst v Great-West Life Assurance*

**Ratio**

* **Application questions interpreted objectively, and contextually in accordance with purpose/object of legislation**
* **Insured’s subjective belief as to whether fact is material is irrelevant**
* **‘Material Fact Test is objective in that it refers to any prudent insurer in normal practice of insurance business** (*Kruska*)
	+ In applying for life insurance, must disclose symptoms, medical tests, consultations/treatments

**Facts:** R sought psychiatric help for marriage difficulties. R later applied for disability insurance and denied to having received counseling therapy. A, insurer, voided policy.  **Issue:** Whether R failed to disclose material facts in application for disability insurance? **Analysis:** Reasonable insurer would not issue policy if questions answered correctly.  **Holding:** Appeal allowed.

### *Henwood v The Prudential Insurance Co*

**Ratio**

* **Applicant for life insurance must disclose every fact within his knowledge that is material** (*Insurance Act*, s. 652(1))
	+ **(1) Must disclose to insurer, medical examiner, and in any written statements**
	+ **(2) Failure to disclose renders contract voidable by insurer** (*Insurance Act*, s. 652(2))
	+ **(3) Failure to disclose, or misrepresentation of, fact relating to additional coverage, increase in insurance, or any other change, renders contract voidable by insurer, but only in relation to the change** (*Insurance Act*, s. 652(3))
* **To avoid payment due to non-disclosure or misrepresentation, insurer must prove:**
	+ **(1) Non-disclosure or misrepresentation of fact**
	+ **(2) Fact was material; and**
		- **(a) Apply ‘material fact test’**
			* **(i) Objective test**
			* **(ii) In absence of contrary evidence, Court can accept evidence of particular insurer’s conduct/expectations as representative of what reasonable insurer would have done**
	+ **(3) Insurer relied on non-disclosure or misrepresentation – information was material to this particular insurer’s decision-making**
		- **(a) Subjective test**

**Facts:** P applied for life insurance, but did not indicate prior medical issues. P killed in unrelated vehicle accident.  **Issue:** Whether insured concealed material facts, rendering contract voidable by insurer? **Analysis:** If true information available to insurer, policy would have been higher.  **Holding:** Appeal dismissed.

## Statutory Modifications

### Property Insurance

#### Misdescription, Non-Disclosure & Misrepresentation

* **If applicant falsely describes property to insurer’s prejudice, or misrepresents or fraudulently omits to communicate any circumstances material to insurer to enable it to judge risk to be undertaken, contract void as to any property in relation to which misrepresentation or omission is material** (*Insurance Act*, s. 540, Statutory Condition #1)
	+ **(1) Falsely describing property: description of property, where it is located, what it is made of**
	+ **(2) To prejudice of insurer: information must have detrimental impact upon insurer – would have caused insurer to refuse risk or increase premiums**
		- **(a) If premium would have been lowered, not to prejudice of insurer**
	+ **(3) Insured must not misrepresent or fraudulently omit**
		- **(a) Misrepresentation: irrelevant whether misrepresentation is intentional or unintentional** (*Taylor*)
		- **(b) Omission: insurer must prove actual fraud – applicant intentionally omitted information to gain advantage** (*Taylor*)
			* Changes common law
	+ Cancellation of previous policy for non-payment is material fact(*Bowes*)

##### *Nagy v BCCA Insurance Corp*

**Ratio**

* **If person applying for insurance falsely describes property to prejudice of insurer, or misrepresents or fraudulently omits to communicate any material circumstance to be made known to insurer to enable it to judge risk to be undertaken, contract is void** (*Insurance Act*, Statutory Condition #1)
	+ At common law, policy void if material facts misrepresented or omitted, regardless of fraudulent intent
	+ **(1) Existence of previous claims, or refusal by previous insurer to renew insurance, are matters material**
	+ **(2) To void contract, omission of material fact must be fraudulent**
		- **(a) Omission: passive in operation**
			* **(i) If half-truth given (true, but incomplete statement), *prima facie* is an omission**
		- **(b) Focus is on applicant’s intention, not insurer’s knowledge**
	+ **(3) Misrepresentation of material fact voids contract, regardless of fraudulent intent**
		- **(a) Focus is on insurer’s understanding**
		- **(b) Misrepresentation: false representation of fact – an assertion that something is so when it is not, or something is not so when it is**
	+ **(4) Distinction between omission and misrepresentation unclear in some cases**
		- **(a) Partial statement of facts is generally considered an omission**
* **If insurer receives materials to correct misrepresentation or omission, and continued coverage, initial inaccuracies no longer material**

**Facts:** In application for insurance policy, R did not disclose complete list of previous losses in past 10 years. After submitting application, R sends additional documents to correct inaccuracy. A maintains it never saw additional documents. **Issue:** Whether admitted inaccuracies constitute misrepresentations?

##### *Bowes v Fire Insurance Co of Canada*

**Ratio**

* **Only an omission must be fraudulent**
	+ **Misrepresentation does not need to be intentional**
		- **Misrepresentation must be material**

#### Changes Material to the Risk

* **Changes Material to Risk: insured has ongoing duty of disclosure**
	+ **(1) Insured must promptly give notice in writing to insurer or its agent of change that is:** (*Insurance Act*, s. 540, Statutory Condition #4(1))
		- **(a) Material to risk; and**
			* Whether property became vacant may be material to risk – depends on ‘material fact test’ (*Nahayowski*)
		- **(b) Within insured’s knowledge and control**
			* **(i) Control: actual, physical control over property** (*Nahayowski*)
				+ **(1) Whether insured could have taken physical possession at any time** (*Nahayowski*)

Arranging to have broken windows covered up is ‘control’ (*Nahayowski*)

Mere right to evict tenant does not amount to control (*Watkins*)

Fact that insured could have physically removed tenant from premises is not ‘control’ (*Watkins*)

* + - **(c) If prompt notice not given, contract void as to part affected by change** (*Insurance Act*, s. 540, Statutory Condition #4(2))
	+ **(2) If insurer or its agent notified of change, insurer may:** (*Nahayowski*)
		- **(a) Terminate contract; or**
		- **(b) Notify insured, in writing, must pay additional premium within 15 days of notice, for contract to remain in force** (*Insurance Act*, Statutory Condition #4(3))

##### *Nahayowski v Pearl Assurance*

**Ratio**

**Facts:** P insured building and chattels against loss by fire with D, insurer. P did not inform D that premises were vacant.  **Issue:** Whether vacancy was in P’s control? **Analysis:** P entitled to take possession at any time and arranged to have broken windows boarded up. **Holding:** Action dismissed.

##### *Marche v Halifax Insurance Co*

**Ratio**

* **If insurance contract contains provision that is or may be material to risk, not binding on insured if unjust or unreasonable** (*Insurance Act*, s. 545(1))
	+ Broad interpretation – purpose to provide relief from unjust or unreasonable policy conditions (*Marche*)
	+ **(1) Applies to both negotiated contract provisions and Statutory Conditions in *Insurance Act*** (*Marche*)
		- **(a) Includes provisions relating to: use, condition, location, or maintenance of insured property**
	+ **(2) Provision may be *prima facie* reasonable, but unreasonable and unjust in its application** (*Marche*)
		- **(a) Provision may be unreasonable or unjust if issue rectified prior to when loss occurred** (*Marche*)
			* **(i) If ‘change material to risk’ not causally related to loss, may be unreasonable to enforce**
				+ **(1) But, if insured intentionally does not report ‘change material to risk’, irrelevant whether ‘change’ was causally related to loss** (*Schellenberg*)

Inequitable to allow insured to avoid paying higher premiums

* + - **(b) Merely excluding coverage because property is vacant is just and reasonable**
		- **(c) In coverage for loss/damage by fire, insurer cannot exclude coverage for cause or circumstances of fire** (*Insurance Act*, s. 545(3))
	+ **(3) In determining whether condition is reasonable, consider circumstances at time policy issued** (*Smith*)
* **Common for multi-risk policies to include exclusion for loss/damage occurring when insured premises vacant or unoccupied for more than 30 consecutive days**
	+ **Vacant: must be devoid of inanimate objects** (*Cody*)
	+ **Unoccupied: absence of people residing** (*Cody*)
	+ **Under this provision, vacancy or unoccupancy during this 30 day period does not constitute change material to risk** (*Davidson*)
		- **May be varied by clearly worded policy definitions** (*Taylor*)

**Facts:** P did not inform D, insurer, they left property vacant. Tenant later moved in. Fire occurred. D denied claim on basis that P did not inform them of earlier vacancy.  **Issue:** Whether vacancy prior to tenant moving in was change material to risk, that voided policy? Whether s. 545 of *Insurance Act* applies to Statutory Conditions? **Analysis:** Applying statutory condition would be unreasonable and unjust in circumstances, given vacancy was rectified prior to loss.  **Holding:** Appeal allowed.
**Dissent (Bastarache):** s. 545 does not apply to statutory conditions. P left property vacant. Statutory Conditions are just and reasonable so as to ensure balance of regime. Ignorance of obligation to disclose does not excuse insured.

##### *Schellenberg v Wawanesa Mutual Insurance Company*

**Ratio**

* **Licensed medical marijuana grow operation, with electrical upgrades, is ‘change material to risk’** (*Schellenberg*)
* **No need for ‘change material to risk’ to be causally related to loss**
	+ **(a) If insured intentionally does not report ‘change material to risk’, irrelevant whether ‘change material to risk’ causally related to loss**

**Facts:** P purchased property insurance from D. P later started licensed medical marijuana operation and upgraded electrical service. Fire occurred. D voided policy for change material to risk. **Issue:** Was grow op and electrical upgrade change material to risk?
**Analysis:**

### Automobile Insurance

#### Non-Disclosure & Misrepresentation

* **Insured’s claim is invalid and right of insured to recover indemnity is forfeited if insured:** (*Insurance Act*, s. 554(1)(a))
	+ **Contract not voided – insurer simply does not have to pay claim**
	+ **(1) Gives false particulars of described automobile to prejudice of insurer**
		- **(a) Material Fact Test: whether reasonable insurer, given correct information, would have refused risk or raised premiums**
		- **(b) ‘Particulars of described automobile’:**
			* Color of vehicle matters – affects statistics insurer uses
			* Getting year of vehicle wrong may matter – depends on if car drastically changed
	+ **(2) Knowingly misrepresents or fails to disclose any fact required to be stated in application**
		- **(a) Any information in application form is deemed to be ‘material’ -- do not apply ‘material fact test’**
			* Application forms used by insurers approved by government – highly regulated
		- **(b) ‘Knowingly’ does not imply intentional malice – merely requires applicant to know truth, but give different information to insurer** (*Sleigh*)
			* Codifies common law
			* **(i) By signing application form, applicant authenticates information in it – irrelevant whether another individual filled out form** (*Sleigh*)
		- **(c) If existing fact known to insurer, insurer cannot avoid paying on basis of non-disclosure** (*Moxness*)
		- **(d) If insurer or agent impliedly represents they will get material facts elsewhere, insurer waives right of receiving that information – cannot avoid paying claim** (*Moxness*)
	+ **(3) Contravenes term of contract or commits fraud; or**
	+ **(4) Wilfully makes false statement in respect of claim under contract**

##### *Sleigh v Stevenson*

**Ratio**

* **By signing application form, applicant authenticates statements contained in form – irrelevant whether another individual actually filled out application form**
	+ **Applicant cannot argue he was unaware of applications’ contents**

**Facts:** R issued car insurance to A. A incurred liability to third-party after son got into accident. Car actually purchased by A’s son. **Issue:** Whether contract void because A not owner of vehicle? **Holding:** Appeal dismissed.

##### *Moxness v Cooperative Casualty Co*

**Ratio**

* **Obligation to disclose depends on insured’s knowledge** (*Joel*)
* **If existing fact known to insurer, risk materialized and insurer cannot void contract on basis of non-disclosure**
* **Where insurer or its agent mistakenly introduces erroneous answers to application, insurer bound** (*Blanchette*)
* **Where insurer’s agent impliedly represents he will get material facts elsewhere, and insured relies on this information in signing form, insurer bound** (*Stone*)

**Facts:** P received car insurance from D, insurer. P did not disclose speeding tickets, but D said he would get information elsewhere. D later voided policy. **Issue:** Whether policy void for misrepresentation?

#### Adverse Contractual Action

* **Insurer cannot take adverse contractual action against insured for any reason, unless expressly permitted under this section or *Adverse Contractual Action Regulation*** (*Insurance Act*, s. 555)
	+ Prevents insurers from making it difficult to get auto insurance
	+ Changes common law
	+ **(1) Adverse Contractual Action: termination, cancellation, or action that adversely affects insured’s ability to get automobile insurance**
		- **(a) Under statute, termination means insurer must give 5 or 15 days’ notice**
	+ **(2) Only applies to ‘basic insurance coverage’:**
		- **Insurer may continue to unilaterally terminate or cancel coverage in Section C**
		- **(i) Section A Coverage – up to $200,000**
		- **(ii) Section A.1**
		- **(iii) Section B (ie. mandatory coverage)**
	+ **(3) Insurer may take adverse contractual action against insured, if insured misrepresents or non-discloses on application form** (*Adverse Contractual Action Regulation*, s. 1(2))
	+ **(4) Breach of Statutory Condition #1 (not promptly notifying insurer of ‘change material to risk’), not permitted basis for taking adverse contractual action**
		- For most breaches of SC#1, insurer can only refuse to pay claim and reduce to basic coverage (ie. statutory minimums)
		- **(a) Unless insured fails to notify insurer of: who is principal driver, or suspension/cancellation of license**

##### *Merino v ING Insurance Company of Canada*

**Ratio**

* **Insurer cannot unilaterally void contract of insurance at common law – bound by statutory scheme in s. 554**
	+ **(1) Unclear whether this applies in Alberta – if cancellation the same as termination, applicable in Alberta**
	+ **Where there is misrepresentation, insurer can only treat claim as invalid, then terminate using termination provisions in statute (ie. 5 to 15 days’ notice)**
	+ **When insured knowingly misrepresents or omits fact in application:**
		- **(1) Insured’s claim is invalid -- insurer not obligated to compensate insured for losses**
		- **(2) Insured’s right to recover indemnity is forfeited – insurer not obligated to indemnify insured’s obligations to third-parties**
		- **(3) Insured remains entitled to certain statutory accident benefits – contract remains in effect**
			* **(a) Insured has notice period to allow him time and opportunity to obtain alternative coverage when receiving notice that insurance is going to be terminated or renewed**
			* **(b) Third-parties injured by insured retain right to recover losses from insured’s insurer**

**Facts:** Insurer did not terminate policy properly, as it failed to give 15 days’ notice.  **Issue:** Whether automobile insurer may void insurance policy for misrepresentation?

#### Changes Material to Risk

* **Insured must promptly notify insurer or its agent of change that is:** (*Insurance Act*, s. 556, Statutory Condition #1(1))
	+ **(1) Material to risk; and**
		- **(a) Apply ‘material fact test’**
		- **(b) Change in insurable interest of insured named in contract: sale, assignment, or otherwise** (s. 556, SC #1(2)(a))
			* **(i) Not including change of title by succession, death, or proceedings under *Bankruptcy and Insolvency Act***
		- **(c) For insurance against loss/damage to automobile, must promptly notify insurer of:** (s. 556, SC #1(2)(b))
			* **(i) Mortgage, lien, or encumbrance affecting vehicle after application for contract; and**
			* **(ii) Any other insurance of same interest covering loss/damage, whether valid or not**
	+ **(2) Within insured’s knowledge**

##### *Seetaram v Allstate Insurance*

**Ratio**

* **Policy renewal represents separate and distinct contract with its own offer and acceptance** (*Patterson*)
* **Fact that policy is void for misrepresentation (Statutory Condition #1) is deemed to be known to all insureds as part of auto insurance** (*DeKoning*)
* **Duty to disclose all material facts applies even in absence of questions from insurer** (*Sagl*)
	+ **Absence of question by insurer may be evidence that insurer does not consider fact to be material**
* **Obligation of good faith requires applicant to carefully read application questions and carefully consider and search his memory before answering** (*Stewart*)
	+ **Insured cannot rely on carelessness/forgetfulness if reasonable care would have resulted in different answer**
	+ **Applicant cannot escape misrepresentation in application by stating or proving he did not read document before signing** (*Dalton*)
* **Insured’s application is his own application, not insurer or agent’s application** (*Salata*)
	+ **Insurer/agent has no legal duty to ensure accuracy of contents of application**
* **Number of licensed drivers living in insured’s household within insured’s special knowledge** (*Schoff*)
	+ **Insurer entitled to rely on this representation without further investigation** (*Schoff*)
* **Failure to disclose existence of other licensed drivers in household constitutes material misrepresentation** (*Mailloux*)
* **If ‘change material to risk’ found, insurer not required to prove insured knew change would be considered material**
	+ **Insurer only required to prove insured was aware of change and change was within his control**
		- **Fact of changed circumstances must be within insured’s knowledge, not materiality of change** (*Thompson*)
* **Insurer not required to explain to insured what might constitute ‘material change in risk’**

**Facts:** P received auto policy from D. In policy renewal, P denied having other persons in household licensed to drive. P gets in car accident and D denies claim. **Issue:** Whether misrepresentation or omission occurred? **Analysis:** Had P disclosed additional drivers in household, D would have raised premium. Policy is void back to date of material change (date of renewal).

### Life Insurance

#### Misrepresentation

##### *Murphy v Sun Life Assurance*

**Ratio**

* **Applicant for life insurance and person whose life is to be insured must disclose every fact within applicant/person’s knowledge that is material to insurance and is not disclosed by other person** (*Insurance Act*, s. 652(1))
	+ **(1) Disclosure must be made in: application, medical examination, and any written statements or answers furnished as evidence of insurability** (*Insurance Act*, s. 652(1))
	+ **(2) Must be merely within person’s knowledge – need not prove applicant/person intended to defraud insurer**
		- **(a) Irrelevant whether applicant/person thought information was not material**
			* Must disclose electrocardiogram, even if person thought it was immaterial (*Murphy*)
		- **(b) Signing application form may be evidence of authentication of information**
	+ **(4) Need not be causal relationship between non-disclosure/misrepresentation and cause of death**
	+ **(3) ‘Material fact test’: whether reasonable insurer would have refused risk or increased premium if it knew truth**
	+ **(4) Failure to disclose, or misrepresentation, renders contract voidable by insurer** (*Insurance Act*, s. 652(1))
		- **(a) If non-disclosure or misrepresentation relates to additional coverage, increase in insurance, or any other change, contract voidable by insurer, but only in relation to the change** (*Insurance Act*, s. 652(3))
	+ **(5) Onus of proving omission or misrepresentation, and that it was material to contract, on insurer** (*Shields*)
		- **(a) Insurer cannot merely produce application signed by applicant, unless insurer insisted answers be in applicant’s handwriting or multiple questions incorrectly answered** (*Murphy*)
		- **(b) Intention to defraud irrelevant** (*Jordan*)

**Facts:** P is beneficiary of husband’s life insurance. Husband took electrocardiogram after fainting, then applied for life insurance with insurer, D. Husband did not disclose health conditions or doctors’ exams in application. Husband died and D denied P’s claim.  **Issue:** Whether misrepresentation renders policy void? **Analysis:** Cause of death irrelevant. **Holding:** Claim dismissed.

##### *Mohammad v The Manufacturers Life Insurance Company*

**Ratio**

* **Applicant for insurance must reveal any material information to insurer in application** (*Carter*)
	+ **(1) Even if not expressly asked during application** (*Mohammad*)
		- Past terrorist activity is ‘material fact’

**Facts:** Husband did not disclose terrorist involvement or manslaughter conviction when applying for life insurance. Husband dies.

#### Incontestability Clause

* **Incontestability Clause: if contract or change to contract is in effect for 2 years during lifetime of life insurance, non-disclosure or misrepresentation of material fact does not render contract voidable** (*Insurance Act*, s. 653(2))
	+ **(1) Does not apply to misstatement of age of person whose life is insured** (*Insurance Act*, s. 653(1))
		- Insurer may increase/decrease premiums to account for what premiums would be
	+ **(2) Does not apply if insurer can prove non-disclosure or misrepresentation was fraudulent** (*Insurance Act*, s. 653(2))
		- **(a) Must consider all facts/circumstances to determine whether fraud exists** (*Bureau*)
			* Not disclosing illness believed to be minor/temporary is not fraudulent (*Bureau*)
			* Claiming to be unaware of answer, despite being asked multiple times, may lead to inference of intentionally non-disclosing information (*35445 Alberta Ltd*)
* **Contract for life insurance does not take effect until:** (*Insurance Act*, s. 649(1))
	+ **(1) Policy delivered to insured, his assign or agent, or beneficiary**
	+ **(2) Payment of initial premium made to insurer or authorized agent; and**
	+ **(3) No change has taken place in insurability of life to be insured between time application was completed and time policy was delivered**

##### *Bureau v Manufacturers Life*

**Ratio**

* **Must consider all facts and circumstances to determine whether fraud exists** (*Bureau*)
	+ Not disclosing illness believed to be minor/temporary is not fraudulent (*Bureau*)

**Facts:** P claims life insurance payment from D, insurer, for son’s death.
**Issue:** Whether fraud took place?

##### *35445 Alberta Ltd v TransAmerica Life Insurance*

**Ratio**

* **Policy may contain phrase: “Policy with the application makes the entire contract…we will not use any statement in defense of a claim unless it is made in the application”**
	+ **Does not make all other types of evidence inadmissible – insurer simply cannot raise new alleged misrepresentation, unless that misrepresentation is contained in application that is attached to policy**

# Interpretation of Terms

## General Principles

* Frequently, insurers and insured dispute what policy actually covers
	+ Coverage issue: was the risk which occurred the risk that was insured?
	+ Causation issue: Even if risk was insured, did losses claimed flow from that risk
* **Main objective of interpretation principles is to give effect to parties’ intentions at time contract was formed, in context of insurance contracts often being ‘contracts of adhesion’**
* **Insured has burden of proving a given loss falls within insuring agreement** (*Tien Lung Taekwon-Do Club*)
	+ **(1) Burden then shifts to insurer to prove a given loss falls within policy exclusion**
* **Where meaning of contract term is in dispute, apply two-step interpretation process:** (*Ledcor Construction Limited*)
	+ **(1) Interpret contract provisions in way that promotes parties’ reasonable intentions at time contract entered**
		- **(a) Give undefined words their plain and ordinary meaning**
		- **(b) If undefined words have more than one meaning, choose one most reasonable in promoting parties’ intentions; and**
		- **(c) Interpret contract as a whole, so as not to give unintended benefit (windfall) to either party**
			* What would reasonable parties have intended word to mean, given entirety of contract
		- **(d) *Amos* test for ‘use and operation’ of vehicle included – parties must have reasonably intended prior caselaw to apply**
	+ **(2) If term is still ambiguous (ie. capable of more than one meaning), apply ‘general rules of contract construction’ to resolve ambiguity**
		- **(a) Apply interpretation reflecting parties’ reasonable expectations, supported by text of contract**
			* **(i) *Amos* test for ‘use and operation’ of vehicle – parties must have reasonably expected precedent would apply**
		- **(b) Avoid interpretations that provide unrealistic results; and**
			* **(i) Avoid windfalls to a party**
		- **(c) Strive for consistency with prior interpretations of similar provisions, based on prior caselaw**
			* Parties reasonably expect that words will be given same meaning it was given in prior cases
	+ **(3) If ambiguity still remains:**
		- **(a) Apply *contra proferentum* in favor of insured – interpret against party that drafted it; or**
			* Recognizes unequal bargaining positions of parties – most are ‘contracts of adhesion’ (*Jesuit Fathers of Upper Canada*)
		- **(b) Construe coverage provisions broadly, and exclusion clauses narrowly**
* **Test for interpreting insurance contract terms:** (*Consolidated Bathurst Export*)
	+ **(1) Determine parties’ intentions at time contract was formed, as revealed by wording of contract, and give effect to those intentions;** **and**
		- **(a) Interpretation of insurance policies should make commercial sense** (*Consolidated-Bathurst*)
			* **(i) Literal meaning should not be applied if unrealistic result, or result would not be contemplated in commercial atmosphere**
			* **(ii) Do not apply construction that enables insurer to pocket premium without risk, or insured to achieve recovery that was not sought or anticipated at time of contract**

### *Jesuit Fathers of Upper Canada v Guardian Insurance Company*

**Ratio**

* **To determine parties’ intent, policy terms must be examined in light of context/surrounding circumstances**
	+ **Where policy terms are clear, context will not override**
* **Where terms of policy are ambiguous, context of particular risk must be taken into account**
	+ Purpose of builders’ risk insurance is to provide broad coverage for construction projects, which are uniquely susceptible to accidents and errors – provides certainty and stability by reducing need for litigation

### *Brissette Estate v Westbury Life Insurance*

**Ratio**

* **Public policy should apply to insurance contracts to ensure wrongdoer will not profit from his wrongdoing**
* **Merely because public policy avoids intended result in contract, contract is not ambiguous**

**Facts:** Couple purchased life insurance policy. Husband murdered wife. Husband sought to recover as beneficiary. **Issue:** Where joint policy of insurance with proceeds payable to survivor exists, does murder of wife by husband void policy? **Analysis:** No ambiguity exists, but event not contemplated by contract. **Holding:** Appeal dismissed.  **Dissent (Cory):** Policy did not contain exclusion clause for murder. Ambiguity exists and should be resolved in favor of insured. While public policy should not allow wrongdoer to benefit from his wrongdoing, insurer should not be able to escape liability. Proceeds should be paid by insurance company and held in constructive trust for children.

### *Ledcor Construction Limited v Northbridge Indemnity Insurance*

**Ratio**

* **Interpretation of Standard Form Contract**
	+ Interpretation principles also apply to government approved standard form contract, like SEF 44 Family Protection Endorsement (*Sabean*)
	+ Interpretation of standard form contract is generally question of law – interpretation is of precedential value(*JW*)
	+ **Builders’ Risk Insurance: all-risk property insurance covering physical damage on construction site**
		- **(1) Faulty Workmanship Exclusion Clause: no coverage for ‘cost of making good faulty workmanship’**
			* Cost of redoing faulty work not covered
			* **(a) However, coverage provided for physical damage resulting from faulty workmanship**
			* **(b) Does not necessarily include physical damage – perfect mutual exclusivity between exclusions and grant of coverage not required** (*Progressive Homes*)
			* **(c) Language of exclusion clause ambiguous – applying rules of construction, clause only excludes cost of redoing faulty work**
				+ Aligns with commercial reality and leads to realistic and sensible results
		- **(2) Onus on insured to establish loss/damage falls within coverage**
		- **(3) Onus shifts to insurer to establish exclusion applies**
		- **(4) Onus shifts to insured to prove exception to exclusion applies**
			* **(a) Resulting Damage Exception: coverage provided for physical damage resulting from faulty workmanship**
				+ **(i) Courts generally interpret exception as including damage done to something other than property which is faultily designed**
				+ Whether certain damage falls within resulting damage exception to exclusion depends on scope of contractual obligation to which the faulty workmanship was carried out
				+ If contractor fails to take adequate measures, resulting in failure to comply with contractual obligations, damage cannot be considered ‘resulting damage’ (*Sayers & Associates*)
				+ Cost of redoing work encompasses cost of replacing tubing (*Ontario Hydro*)
				+ Cost of repairing truss is part of cost of redoing work – does not fall within exception (*Bird Construction*)
	+ **Where language of contract is unambiguous, effect should be given to that clear language, reading contract as a whole** (*Progressive Homes*)
	+ **Where language of contract is ambiguous, general rules of contract construction apply**
		- **(1) Interpretation should be consistent with parties’ reasonable expectations, so long as that interpretation is supported by language of policy**
			* Purpose of builders’ risk policies to provide broad coverage for construction projects, which are uniquely susceptible to accidents/errors – contractors believe indemnity available for accident/damage arising as result of party’s carelessness or negligence
		- **(2) Interpretation should not give rise to results that are unrealistic or parties would not have contemplated in commercial atmosphere in which insurance policy was contract**

**Facts:** All-risk property insurance covered physical damage on construction site. Contractor scratched building’s windows. Insurer denied coverage on basis of exclusion clause, providing for no coverage for ‘cost of making good faulty workmanship’. **Issue:** Where windows of construction project damaged by contractor, whether cost of replacement excluded under faulty workmanship exclusion? **Analysis:** Whether certain damage falls within damage exception to faulty workmanship exclusion clause depends on scope of contractual obligation. **Holding:** Appeal allowed.

### Standard Form Contracts

#### Funk v Wawanesa Mutual Insurance

**Ratio**

* **Specific language required if statutory amendment is to apply retroactively** (*Interpretation Act*, s. 4-5)
* **Little room to find a provision of automobile insurance policy ‘unjust or unreasonable’ – terms of such policies are highly regulated**
* **(4) SEF 44 Family Protection Endorsement: indemnifies eligible claimant for amounts he is legally entitled to recover from inadequately insured motorist for damages relating to injury/death sustained ‘by accident arising out of use or operation of vehicle’**
	+ - As endorsement, mini-policy attaching to main policy
		- **(1) Applies if damages for insured’s injury/death exceed policy limits of tortfeasor’s Section A coverage**
			* **(i) Insurer pays difference to injured insured, up to insured’s policy limits in SEF 44**
* **(3) Uninsured Motorist Coverage: provides payment to insured for damages suffered by ‘uninsured’ or ‘unidentified’ third-party motorist** (*Section B(3))*
	+ - **(a) Coverage not available when insured has access to unsatisfied judgment fund, including Motor Vehicle Accident Claims Fund**
		- **(b) Insured limited to ‘minimum limit for automobile bodily injury liability insurance’**
			* In Alberta, limited to $200,000
		- **(c) For claim involving ‘unidentified’ motorist, must be physical contract with automobile**
		- **(d) Insured may purchase additional insurance:**
			* **(i) SEF No. 44 Family Protection Endorsement: provides coverage when policyholder involved in accident with ‘inadequately insured motorist’, including ‘unidentified automobiles’**
				+ No ambiguity in policy wording
				+ **(2) Coverage provided when uninsured motorist causes damage in excess of amount available from Motor Vehicle Accident Claims Fund**

SEF No. 44 Endorsement covers any amount above $200,000

* + - * + **(3) Coverage provided where unknown motorist causes damage in excess of amount available from Motor Vehicle Accident Claims Fund**

Suffering loss/damage from risk not covered by policy is not ‘failure to perform a covenant’ that justifies relief from forfeiture (*Kozel*)

**(a) Must be physical contact with automobile; and**

**(b) Insured must provide independent corroborating evidence of involvement of unknown vehicle**

**(i) Cannot use evidence of spouse or dependent relative**

**Facts:** R purchased standard auto policy from insurer, A. Policy included SEF No. 44 Family Protection Endorsement. R swerved to avoid impact, but suffered serious injuries. R makes claim under SEF No. 44 Family Protection Endorsement. **Issue:** Whether SEF No. 44 Endorsement on insurance policy entitles R to indemnity for damages in auto accident? **Analysis:** R purchased insurance triggered by physical contact – plain meaning means actual, physical touching. Because no such contact occurred, he does not have coverage. **Holding:** Appeal allowed.
**Dissent (Berger):** Insurance contracts characterized as being contracts of ‘utmost good faith’. SEF No. 44 Endorsement must be read as a whole. Physical contact by another car not required – R had reasonable expectation he purchased insurance overage that would apply when he was in accident with unidentified motorist, provided he was able to provide physical evidence indicating the involvement of such a vehicle. In some cases, Court may recognize freestanding nullification of coverage doctrine – insurer should not undertake to cover specific risk and subsequently rely on broadly worded exclusionary provision in order to deny said undertaking. Inconsistent with insurer’s obligation of utmost good faith (*Scott*).

#### *Cardinal v Alberta Motor Association Insurance*

**Ratio**

* **Automobile insurance policies, including endorsements, approved by Legislature**
	+ **Must determine meaning of policy in entire context, in its grammatical and ordinary sense harmoniously with scheme of legislation, object of legislation, and intention of Legislature**
* **Cannot read in element not present on plain reading of provision – ambiguity cannot be created by external means**
	+ **Merely because another jurisdiction’s provision is clearer, does not make another one ambiguous**

**Facts:** R injured when riding as passenger in vehicle driven without owner’s consent. R’s mother had SEF No. 44 Endorsement.  **Issue:** Whether injured passenger may claim under mother’s SEF No. 44 Family Protection Endorsement? **Analysis:** No ambiguity in provision. Nothing in language of exclusion that suggests knowledge is relevant. **Holding:** Appeal allowed.

## Use and Operation

### *Amos v Insurance Corp of British Columbia*

**Ratio**

* **Under certain sections of Alberta’s Standard Auto Policy SPF No. 1, for coverage to be provided, loss/damage must relate to use and/or operation of vehicle**
	+ **(1) Section A -- Coverage for Third-Party Liability: provides indemnification for ‘loss or damage arising from ownership, use or operation of vehicle’**
	+ **(2) Section B -- Accident Benefits: pays for bodily injury/death sustained ‘directly and independently of all other causes by accident arising out of use and operation of vehicle’**
	+ **(3) SEF 44 Family Protection Endorsement: indemnifies eligible claimant for amounts he is legally entitled to recover from inadequately insured motorist for damages relating to injury/death sustained ‘by accident arising out of use or operation of vehicle’**
* ***Amos* Test: to determine whether loss/damage arises from ‘use and operation’ of motor vehicle…** (*Amos*)
	+ **(1) Purpose Test: whether loss resulted from ordinary and well-known activities for which automobiles are used; and**
		- **(a) Limits coverage to motor vehicles being driven as motor vehicles** (*Vytlingam*)
			* **(i) Does not require vehicle to be in active use** (*Caughy*)
				+ Parking well-known activity(*Caughy*)
				+ Tripping over parked motorcycle result from ‘use and operation’ (*Caughy*)
				+ Injuries from car falling on parked car are ‘use and operation’ of vehicle (*Richard Rossy*)
		- **(b) Coverage cannot be denied merely because of criminality** (*Vytlingam*)
		- Driving down street is clearly ‘ordinary and well-known activity to which automobile is put’ (*Amos*)
	+ **(2) Causation Test: whether there exists some nexus or causal relationship between loss and use/operation of vehicle**
		- **(a) Not necessarily direct or proximate relationship – but, vehicle must be more than mere location where event occurred**
		- **(b) Must be able to trace continuous chain of causation, unbroken by interposition of new act of negligence** (*Moore’s Taxi*)
			* **(i) Generally, if use or operation of vehicle in some manner contributes to injury, insured is entitled to coverage**
				+ If use/operation of vehicle put insured in harm’s way, coverage may ensue (*Amos*)
			* **(ii) Connection between injury and ownership/use/operation must be more than merely incidental, fortuitous, or ‘but for’** (*Kangas*)
				+ **(i) Someone who uses vehicle for non-motoring purpose cannot expect to collect motor vehicle insurance** (*Amos*)
				+ **(ii) Use/operation exists where:**

Shot because using vehicle – carjacking (*Amos*)

Passenger grabbing steering wheel (*McEvoy*)

Injuries after being dragged by passing van after purse-jacking (*Hannah*)

Injury from hood of car falling (*Davis*)

Injury from egg being thrown from moving vehicle -- vehicle contributed to velocity and danger of egg (*Gilbraith*)

Injured securing boat to trailer (*Axa Insurance*)

* + - * + **(iii) Use/operation does not exist where:**

Use vehicle to get to hunting scene and accidentally shooting another hunter (*Herbison*)

Drive-by shooting – shooting is intervening act (*Russo*)

Injuries suffered when attempting to arrest driver after pulling him over (*Letkeman*)

Death from shooting in parked vehicle (*Manuel*)

Driver leaving vehicle to threaten another (*Chu*)

Using vehicle, getting out, and throwing rocks (*Vytlingam*)

Attacked while standing outside car from accident (*Arruda*)

Throwing brick from car (*Chan*)

Vehicle stationary at time, and child injured getting out (*Moore’s Taxi*)

Leaving vehicle and suffering frostbite (*Greenhalgh*)

Random gunshots enter car by unknown assailant (*Chisholm*)

Assailant reached into vehicle to commit assault (*Tench*)

* + - **(c) Direct or proximate causal connection not required – injury must be foreseeably identifiable with normal**
		- **(d) Insured need not prove assailant’s intent – Court may draw reasonable inferences of causation from facts**
		- **(e) Vehicle need not be instrument of injury – injuries not arising from negligent use of motor vehicle may be covered**
			* Shooting that arises out of insured’s ownership/use/operation of vehicle is covered (*Amos*)

**Facts:** A attacked and shot while driving, injuring spinal cord. A claimed Section B benefits. **Issue:** Is causal connection required between accident and use of vehicle? **Analysis:** A’s vehicle merely site of shooting, but resulted from using vehicle. No intervening act.  **Holding:** Appeal allowed.

### *Citadel General Assurance Co v Vytlingam*

**Ratio**

* **Modifies ‘causation test’ of *Amos* test for ‘Section A liability coverage’ in Alberta** (*Vytlingam*)
	+ **(1) Whether loss causally connected to use and operation of vehicle as a motor vehicle**
		- **(a) Requires unbroken chain of causation between loss and driver’s use of car as motorist**
			* Section A must be interpreted strictly, or else insurer must pay every time a loss happens in a location you drove to
			* Using car to drive to commit a crime is not causally connected to use and operation of vehicle as a motor vehicle (*Vytlingam*)
* **Modifies ‘causation test’ of *Amos* test for ‘Section B accident benefits coverage’** (*Arruda*)
	+ **(1) Whether loss causally connected to use and operation of vehicle as a motor vehicle**
		- **(a) Requires unbroken chain of causation between loss and driver’s use of car as motorist**
			* Applies because of wording of Section B: ‘independent act’
* **Coverage under SEF 44 Family Protection Endorsement requires there to be liability of tortfeasor ‘as a motorist’ who is inadequately insured**
	+ **Merely using vehicle to get to scene where crime/tort takes place does not suffice**

**Facts:** R’s vehicle struck by boulder dropped on overpass. Assailants used vehicle to get to crime scene. **Issue:** Whether use of vehicle to get to crime scene sufficiently connected to use and operation of vehicle?

### *Derksen v 539938 Ontario Ltd*

**Ratio**

* **Intervening act will not normally clear D from further responsibility, if fairly considered ‘part of the ordinary course of things’ -- a not abnormal incident of the risk created by him**
* **If there are multiple causes of loss/damage, cannot say loss/damage arose from ‘use or operation’ of vehicle**
	+ **(1) Undesirable to determine which one was proximate cause**
	+ If loss/damage arose from use/operation of vehicle and negligence

**Facts:**. P placed steel unsecured on truck, which flew off and killed and injured children. P’s supply truck covered by auto policy with D, insurer. General accident policy with $1M coverage, and excess coverage for $4M to cover shortfalls under other policy. General accident policy excluded coverage for bodily injury or property damage arising from use or operation of vehicle.  **Issue:** Whether loss/damage arose from use/operation of vehicle so that claims fall within exclusion? **Analysis:** Accident resulted from two concurrent sources of causation – was not solely ‘use or operation’ of automobile. Exclusion clause is ambiguous -- loss arose partly from use or operation of automobile. Exclusion clause applies, but only for that portion of loss attributable to auto-related cause.  **Holding:** Appeal dismissed.

## Accident

* **Under what circumstances can loss triggered by deliberate act constitute loss caused by ‘accident’?**
* **Continuum of intentional vs. unintentional acts**
	+ Purely fortuitous event 🡪 negligence 🡪 gross negligence 🡪 recklessness 🡪 intentional act
* **Onus on P to establish *prima facie* case that death was accidental – evidence permitting trier of fact to infer, on balance of probabilities, death was accidental** (*Martin*)
	+ **(a) Tactical burden shifts to insurer to displace these inferences -- burden of proof remains with P**
* **In auto policies, whether loss/damage caused by ‘accident’ relevant to Section C -- collision coverage for loss/damage to insured vehicle itself (optional)**
	+ **(1) Provides coverage for damage to insured’s vehicle caused by ‘accident’ – recover from own insurer**
		- **(a) Only applies if: (1) loss was accidental; (2) damage to insured car; and (3) insured responsible**
		- **(b) Excludes coverage for non-accidents:**
			* **(i) Loss/damage intentionally caused by insured**
			* **(ii) Loss/damage caused while insured was impaired**
* **To determine whether loss/damage caused by ‘accident’, consider whether event falls into following categories:**
	+ **(1) Mishap external to person, that results in disease or illness, is ‘accident’**
		- Mishap leads to injury, which leads to infection
	+ **(2) Mishap due to insured’s miscalculation of risk can be ‘accident’ if consequence unexpected** (*Martin*)
		- **(a) Even if leading to bodily malfunction**
	+ **(3) Disease resulting from ordinary way disease is transmitted, is not ‘accident’** (*Gibbens*)
		- **(a) Even if involving intentional action**
			* Unprotected intercourse
	+ **(4) Ordinary activity that triggers underlying disease is not ‘accident’** (*Nelson*)

### *Martin v American International Assurance Life*

**Ratio**

* **Expectation Test: to determine whether loss caused by ‘accident’, determine whether consequences were unexpected – unlooked for mishap or untoward event which is not expected or designed** (*Fenton*)
	+ **(1) Consider chain of events as a whole, to determine whether insured subjectively expected loss/damage to be possible consequence of his actions and circumstances –whether insured expected loss to occur; and**
		- **(a) Loss/damage can still be ‘accident’, even if intentional act**
		- **(b) Consider insured’s actions and statements**
			* **(i)** Circumstances may permit inferences regarding actual expectations or intentions
			* Finding body in dishevelled state inappropriate for someone expecting to die does not indicate expectation to die (*Martin*)
			* Speaking to friends enthusiastically and planning for future indicates no expectation to die (*Martin*)
			* Whether dosage at low end of scale (*Martin*)
	+ **(2) If insured’s subjective expectations unclear, determine whether reasonable person in insured’s position and with insured’s belief would have expected loss/damage to be consequence of actions/circumstances** (*Candler*)
		- **(a) Objective/subject analysis: reasonable person in insured’s position**
			* **(i)** Whether insured has professional experience and history of that behavior (*Johnson*)
			* **(ii)** If rescuer dies, we do not say death was intended or expected – high social value
		- **(b) Reckless abandon and exposure to known and obvious danger cannot be accidental** (*Thompson*)
			* At some point, decision to ‘court the risk’ of death becomes equivalent to intention to die
		- **(c) Loss/damage can still be accidental, even if:**
			* **(i) Insured could have prevented death by taking greater care;**
				+ Accidental when failing to notice oncoming train (*Cornish*)
			* **(ii) Mishap reasonably foreseeable; or**
			* **(iii) Person engaged in dangerous or risky activity**
				+ Accident if mistakenly inhaling more chloroform that expected (*Brown*)
				+ Accident if failing to remove mask of nitrous oxide in timely fashion (*Bertalan Estate*)
	+ **(3) Insurer may limit coverage for loss caused by accident, if done clearly, explicitly, and in manner that does not unfairly leave insured uncertain or unaware of extent of coverage**

**Facts:** P, insured, was doctor with addiction to opiates. Died from overdose. Accidental death benefit provision granted coverage for ‘death effected through accidental means’. **Issue:** Whether P’s death falls within coverage? **Analysis:** P did not intend to die. Body was found in dishevelled state inappropriate for someone anticipating death. Sounded enthusiastic and planning for future. Dosage at low end of scale. **Holding:** Appeal dismissed.

### *Cooperators Life Insurance v Gibbens*

**Ratio**

* **Restricts *Martin* – does not easily apply when loss/damage caused by illness due to intentional act**
* **Bodily malfunction may be ‘accident’, even if caused by disease**
	+ Ex. Choking
* **To determine whether a loss/damage is ‘accident’, look to entire chain of events – not just end result**
	+ If separate coverage provided for some diseases, parties do not expect policy to cover all loss or bodily injury
	+ **(1) ‘Accident’ involves something fortuitous and unexpected**
	+ **(2) ‘Accident’ does not include:**
		- Must avoid accident policies becoming comprehensive health policies
		- **(a) Bodily injury from processes that occur naturally within body in ordinary course of events; and**
			* **(i) Unless bodily injury arises from mishap/trauma not in ordinary course of events**
			* Injured after acquiring herpes is not an accident – no mishap or trauma outside ordinary course of events (*Gibbens*)
			* Acquiring virus after riding on plan or bus, or failing to wash hands, or smacking mosquito, is not ‘accident’ (*Gibbens*)
		- **(b) Diseases transmitted in ordinary way without associated mishap or trauma, except for spread or inception of disease itself**
			* Acquiring herpes from unprotected intercourse is simply ‘inception of disease’ in ordinary course of events (*Gibbens*)
			* **(i) Disease: departure from normal state of health, or unlooked for mishap – sum total of reactions, physical and mental, made by person to:**
				+ Noxious agent entering his body from without or arising within (such as a micro-organism or poison)
				+ Injury
				+ Congenital or hereditary defect
				+ Metabolic disorder
				+ Food deficiency
				+ Degenerative process
			* **(ii) Someone picking up disease in ordinary course of events is not in ‘accident’**
				+ **(1)** Diseases transferred from person-to-person through natural processes, such as coughing or sneezing
			* **(iii) Ailments may be covered as ‘accidents’ if caused by antecedent event**
				+ **(1)** No coverage if antecedent event simply provided occasion for disease to manifest itself – insurer only pays if disease is produced by accidental event
	+ **(3) Merely because outcome is unexpected, does not establish ‘accident’**
		- **(a) Expectations are relevant, but considered in context of circumstances**
* **Violent: that which is unusual or extreme**

**Facts:** P injured after acquiring herpes from unprotected intercourse. P claimed compensation on policy that provided coverage for injury resulting ‘directly and independently of all other causes from bodily injuries occasioned solely through external, violent, and accidental means, without negligence’. D, insurer, denied claim.  **Issue:** Whether P injured accidentally? **Analysis:** P did not know other women had herpes, but knew of risk of unprotected intercourse. Herpes requires outsider’s participation.  **Holding:** Appeal allowed.

### *Nelson v Industrial-Alliance Pacific Life Insurance*

**Ratio**

* **If insured’s pre-existing health condition triggered by ordinary, normal activity, no ‘accident’** (*Nelson*)
	+ Merely death by ordinary means
	+ Cardiac event while swimming with pre-existing health condition, not accident (*Nelson*)

**Facts:** P died while swimming from cardiac event. Insurance policy covered ‘bodily injury caused by accident’. D, insurer, denied coverage. **Issue:** Whether death caused by ‘accident’?

## Intentionally & Willfully-Caused Loss

### *Cooperative Fire & Casualty Co v Saindon*

**Ratio**

* **For loss/damage to be ‘intentional’ or ‘willfully-caused’, insured merely needs to have intended some damage/loss**
	+ **(1) Insured need not have intended/anticipated precise loss/damage that occurred**
		- Lifting lawnmower up to person, even if not meaning to cause precise type of damage (*Saindon*)
		- May include act committed with reckless indifference in face of duty to know (*Peracomo*)

**Facts:** R, insured, intentionally raised lawnmower up to face of person, but accidentally caused injury. R asks insurer to cover claim. **Issue:** Whether exclusion in policy for ‘intentional and reckless acts’ applies? **Analysis:** Intentional act of R in raising lawnmower was cause of accident. R’s act was criminal, with intent to cause loss or damage, even if precise damage not anticipated.  **Holding:** Appeal allowed.
**Dissent (Laskin):** Difference between injury caused intentionally and injury caused recklessly.

## Criminal Acts

### *Wong Estate v Liberty Mutual Insurance Co*

**Ratio**

* **Contravention of any criminal law or other law in force, in Alberta or elsewhere, does not make claim for indemnity unenforceable** (*Insurance Act*, s. 533(2))
	+ Changes common law
	+ **(1) But, claim for indemnity unenforceable if:**
		- **(a) Contravention committed by insured, or by another person with insured’s consent, with intent to bring about loss/damage; or**
		- **(b) Contract states otherwise – policy may state insured not covered for loss caused by criminal act**
			* **(i) Criminal conviction not required – conviction is *prima facie* proof of the fact** (*RE*)
			* **(ii) All that is required is criminal act caused the loss – criminal act need not be intentional or willful** (*RE*)
				+ Includes criminal negligence (*Wong Estate*)

Criminal negligence causing death: everyone is criminally negligent who, in doing anything or omitting to do something that it is his duty to do, shows wanton or reckless disregard for lives or safety of others(*CC*, s. 219(1))

Duty must be imposed by law(*CC*, s. 219(2))

**Facts:** P died after injuries caused by daycare. Daycare operator convicted of criminal offence. Daycare had policy, but D, insurer, denied claim.
**Analysis:** ‘Criminal act’ not ambiguous.

# Claims on Policy

## Duties of Insured

### i. Notice of Loss

* **Notice of Loss: insured obligated to report loss to insurer, so insurer can investigate and respond to loss**
	+ **(1) Written notice may be sent to insurer by:**
		- **(a) Delivery to chief agency of insurer in province; or** (s. 530(3)(a))
		- **(b) Sending by recorded mail addressed to insurer, or its manager/agent at chief agency** (s. 530(3)(b))
		- **(b) Sending to insurer’s authorized agent in any manner** (s. 530(3)(c))
			* **(i) Notice need not be written if insurer acknowledges it received notice of loss**
	+ **(2) Whether insured has complied with this requirement is question of fact** (*Glenburn Dairy*)
	+ **(3) When to give notice of loss:**
		- Must be given promptly, so insurer can properly investigate and respond to loss
		- **(a) Property: on happening of loss/damage to insured property, insured must immediately give notice in writing to insurer** (s. 540, SC#6(1)(a))
		- **(b) Auto:**
			* **Section A/B: insured must promptly give insurer written notice, with all available particulars, of accident involving loss/damage to persons or property and of any claim made on account of the accident** (s. 556, SC#3(1)(a))
				+ Relevant where parties initially walk away, and insured does not turn mind to reporting
			* **Section C: when loss/damage to insured’s own vehicle occurs, insured must promptly give notice of in writing to insurer, with fullest information obtainable at time** (s. 556, SC#4(1)(a))

#### *Parent v Northbridge General Insurance*

**Ratio**

* **If person insured against liability for injury/damage to persons or property has failed to satisfy judgment obtained by claimant for that injury or damage, and writ of enforcement against insured remains unsatisfied, enforcement creditor has right of action against insurer to recover amount not exceeding amount of insurance under policy or amount of judgment, in same manner and subject to same equities as insured would have if judgment had been satisfied** (*Insurance Act*, s. 534(1))
	+ **(1) Avoids ‘rule of privity of contract’ – injured person, after obtaining judgment against tortfeasor, may commence separate lawsuit against liability insurance company**
	+ **(2) Does not apply to contracts of motor vehicle liability insurance** (*Insurance Act*, s. 534(2))
	+ **(3) Applicant must prove:** (*Raywalt Construction*)
		- **(a) Existence of agreement to indemnify;**
		- **(b) Damage occurred within terms of policy; and**
			* **(i) Insured has duty to notify insurer of loss promptly or as soon as practicable – otherwise, insurer suffers prejudice**
			* **(ii) Insured has duty to cooperate with insurer and notify insurer of loss as condition precedent to right to recover** (*Travellers Indemnity*)
				+ **(1) Must assist willingly and to best of his judgment and ability**
				+ **(2) If insured fails in duty, insurer entitled to refuse to defend an action**

**(a) Lack of cooperation must be substantial – insurer must be prejudiced**

**(i) Whether insurer unable to conduct significant investigation into incident**

Evidence lost, witnesses disappeared, faded memories

* + - **(c) Insured legally liable to judgment creditor**
	+ **(4) Insurer may raise any defences it could have had against its insured**
		- **(a) If insured did not provide property notice of loss, claim cannot succeed**
			* Seven-year lapse of time before notice of loss given prejudices insurer (*Parent*)
* **If Court considers it inequitable there has been forfeiture or avoidance of insurance, on ground there has been imperfect compliance with statutory condition or condition/term of contract, Court may relieve against forfeiture of avoidance regarding insured or claimant’s loss** (*Insurance Act*, s. 520)
	+ **(1) Court exercises discretion to relieve against forfeiture in favor of insured where:**
		- **(a) Claimant not guilty of fraud or willfull misconduct; and**
			* **(i) Court will relieve against forfeiture if insured made honest and reasonable mistake** (*Hogan*)
		- **(b) Insurer has not been seriously prejudiced by imperfect compliance with Statutory Condition**
			* **(i) Whether insurer would have acted differently if it had been given notice when it should have been given notice**
				+ Insurer not likely prejudiced if delay only 28 days (*Hogan*)
				+ 7 year of delay substantially prejudices insurer (*Parent*)

**Facts:** P suffered injuries on dance floor at bar. Bar never told its insurer, D. D denied P’s claim. **Issue:** Whether claim can be enforced against D? **Analysis:** Bar’s lack of cooperation was substantial. Owner of insured company now deceased. Seven year lapse of time occurred before notice given. **Holding:** Application dismissed.

### ii. Proof of Loss

* **After receiving notice of loss, insurer must provide required forms on which to make proof of loss not later than 60 days after receiving ‘notice of loss’** (s. 523(1))
	+ **(1) By providing forms, insurer not deemed to have admitted a valid contract in force, or coverage provided** (s. 523(4))
	+ **(2) Proof of Loss: sworn evidence provided by insured to allow insurer to verify…**
		- **(a) Loss occurred**
		- **(b) Loss falls within policy coverage; and**
		- **(c) Value of loss**
	+ **(3) Property Insurance: upon loss/damage to insured property, insured must deliver proof of loss to insurer as soon as practicable** (s. 540, SC#6(1)(b))
		- **(a) ‘Proof of loss’ must include:**
			* **(i) Inventory of property: detailed quantities, costs, particular amounts claimed**
			* **(i) When and how loss occurred, as far as insured knows or believes**
			* **(iii) Details of other insurance**
			* **(iv) Interest of insured in property, including liens/encumbrances/charges on property**
			* **(v) Changes in title, use, occupation, location, possession of property since contract issued**
			* **(vi) State that loss did not occur through insured’s wilful act/neglect or connivance**
			* **(vii) If practicable and required by insurer, insured must produce**
				+ Books of account and inventory lists
				+ Invoices and other vouchers verified by statutory declaration
				+ Copies of written portions of any other relevant contracts
		- **(b) Fraud or willfully false statement in ‘proof of loss’ statutory declaration invalidates claim of person who made declaration** (s. 540, SC#7)
			* Including property in inventory of ‘proof of loss’, that was not actually present, is willfully false statement(*Swan Hills Emporium*)
			* **(i) Fraud or willfully false statement vitiates entire claim – entire claim is rejected** (*Swan Hills Emporium*)
				+ **(1) Does not merely impact particular property relating to false statement**
				+ **(1) Irrelevant whether fraud only for amount that exceeds coverage under policy limits**
		- **(c) If Court considers it inequitable there has been forfeiture or avoidance of insurance, on ground there was imperfect compliance with Statutory Condition or provision of contract relating to ‘proof of loss’, Court may relieve against forfeiture or avoidance** (s. 520)
			* **(i) As equitable doctrine, insured must come with clean hands**
			* **(ii) Willfully false statement is more than ‘imperfect compliance’ – Court will not grant relief** (*Swan Hills Emporium*)
	+ **(4) Auto Insurance:**
		- **(a) Section A Liability Coverage: if required by insurer, insured must verify by ‘proof of loss’ form that claim arose out of use and operation of vehicle, and that person operating or responsible for operation at time of accident is person insured under contract** (s. 556, SC#3(1)(b))
			* **(i) Must be insured who used vehicle, or someone driving with insured’s permission**
		- **(b) Section C Damage to Own Vehicle: if loss/damage to vehicle occurs, insured must deliver ‘proof of loss’ form to insurer within 90 days, stating to best of insured’s knowledge and belief** (s. 556, SC#4(1)(c))
			* **Place/time/cause of loss or damage**
			* **Amount of loss/damage**
			* **Insured’s interests and other’s interests in vehicle**
			* **Encumbrances on vehicle**
			* **Other insurance, whether valid or not**
			* **Loss/damage did not occur through insured’s wilful act or neglect, procurement, means or connivance**

#### *Swan Hills Emporium & Lumber Co v Royal General Insurance Co of Canada*

**Ratio**

**Facts:** A, insurer, insured R’s hardware store against loss or damage by fire. R’s stock was seized, but left in R’s possession. Fire destroyed store and stock. R tried to claim more than what was actually in his possession. A denied claim on basis of fraud or willfully false statements in proof of loss.

### iii. Duty to Cooperate

* **Duty to Cooperate: insured obligated to provide notice and proof of loss, provide information about claim, give evidence for trail in third-party claim on liability policy or subrogated action**
	+ **(1) May be imposed by contract, statute, or common law**
	+ **(2) Auto Insurance:**
		- **(a) Section A -- Liability Coverage: insured must immediately forward to insurer every letter, document, advice, or writ he receives from, or on behalf of, claimant** (s. 556, SC#3(1)(c))
			* Insured has general duty to cooperate in defence of an action
			* **(i) If requested by insurer, insured must aid in securing information and evidence and attendance of any witness** (s. 556, SC#3(3))
			* **(ii) Insured must cooperate with insurer in defence of any action or proceeding, or in prosecuting an appeal** (s. 556, SC#3(3))
				+ **(1) Not obligated to assist in pecuniary way**
			* **(iii) Insured must not:** (s. 556, SC#3(2))
				+ **(1) Voluntarily assume any liability or settle any claim, except at his own cost; or**
				+ **(2) Interfere in any legal proceeding or negotiations for settlement**
		- **(b) Section C – Damage to Own Vehicle Coverage: insured must…** (s. 556, SC#4)
			* **(i) Submit to examination under oath; and**
			* **(ii) Produce for examination at reasonable place/time designated by insurer all documents in insured’s possession or control that relate to matters in question**
				+ **(1) Insured must permit extracts and copies of documents to be made**
	+ **(3) Breach of duty to cooperate must be substantial** (*Ruddell*)
		- **(a) Onus on insurer – must prove breach of contract on balance of probabilities** (*Ruddell*)
		- **(b) Court considers all circumstances, including interactions between insurer and insured**
			* If only relevant information has is witness’s address, failing to provide address does not amount to substantial failure to cooperate (*Ruddell*)
		- **(c) Breach of duty to cooperate at common law includes defiant actions:** (*Ruddell*)
			* Arbitrary refusal by insured to act
			* Conditional cooperation
			* Failure to notify insurer of accident
			* Friendly relations with injured party regarding lawsuit – disclosing insurer’s strategy, etc.
			* Giving false testimony
			* Interposing over insurer’s objections – substituting own strategy for that of insurer
			* Confessing judgment
			* Refusing insurer to defend in insured’s name
			* Willfully falsifying material facts, or varying testimony
	+ **(4) Where insurer provides coverage, insurer hires lawyer to defend insured**
		- **(a) Lawyer has two masters – hired by insurer, but representing insured**
			* **(i) To cooperate, insured must tell lawyer everything about loss – believes it is his lawyer**
				+ Solicitor-client privilege
			* **(ii) If insured gives information to lawyer that indicates insurer should not cover claim, lawyer can only include information in report to insurer – cannot ‘flag it’**
				+ Hired to defend claim, not give advice about contract to insurer

#### *Ruddell v Gore Mutual Insurance Co*

**Ratio**

**Facts:** P suffered injuries as passenger in vehicle accident. Owner was mother of driver. Owner provided statement to insurer, D, but offered no details regarding accident. Owner moved and did not tell insurer.  **Issue:** Whether owner breached policy by failing to assist in obtaining son’s cooperation?

### iv. Limitations

#### After Proof of Loss

* **To determine how soon insured may bring action against insurer for insurance proceeds:**
	+ **No action lies for recovery of money payable under contract until expiration of 60 days (unless shorter time period fixed by contract) after proof of: (1) loss; or (2) of happening of event on which insurance money to become payable** (s. 524)
		- **(1) Insured cannot sue insurer for insurance money, until specified time period passes**
			* Gives insurer opportunity to properly review a claim
		- **(2) Property Insurance: insurance proceeds payable within 60 days of insurer receiving ‘proof of loss’** (s. 540, SC#12)
		- **(3) Auto Insurance** (s. 556, SC#6)
			* **(a) Insurer must pay insurance proceeds within 60 days of ‘proof of loss’, or 15 days after dispute resolution process; and**
			* **(b) Insured cannot sue insurer, unless:**
				+ **(i) Statutory Conditions #3 and #4 complied with; or**
				+ **(ii) Amount of loss ascertained**
		- **(4) Life Insurance: insurer must pay within 30 days after receiving sufficient evidence of…** (s. 674)
			* **(a) Happening of insured against event**
			* **(b) Age of person insured**
			* **(c) Right of claimant to receive proceeds; and**
			* **(d) Name and age of any beneficiary**

#### On Actions

* **To determine last possible date at which insured may commence action against insurer to receive insurance proceeds:**
	+ **(1) *Insurance Act* limitation periods apply to insurance contract claims** (*Limitations Act*, s. 2(4))
	+ **(2) Insurer must give written notice to claimant of applicable limitation period** (*Fair Practices Regulation*, s. 5.3)
		- Purpose is to address relationship’s power imbalance
		- **(1) Unless insurer knows claimant represented by legal counsel**
		- **(2) To start limitation period, insurer must inform claimant of dispute resolution process in straightforward and clear language** (*Smith*)
			* Insured is still required to prove her claim (*Stranges*)
			* **(a) Insurer must describe important points of process** (*Smith*)
				+ **(i) Right to seek mediation**
				+ **(ii) Right to arbitrate or litigate if mediation fails**
				+ **(iii) Mediation must be attempted before resorting to arbitration or litigation; and**

**(1) Where insured had been involved in mediation prior, insurer may not be required to inform** (*Golic*)

* + - * + **(iv) Relevant time limits governing process**

**(1) Must provide more than mere communication of limitation period**

* + **(3) Applicable limitation period depends on type of insurance policy:**
		- **(a) General Insurance: insured must commence action against insurer…** (s. 526)
			* **(i) If loss/damage to insured property, not later than 2 years after date insured knew, or ought to have known, loss/damage occurred**
			* **(ii) In any other case, not later than 2 years after date cause of action against insurer arose**
		- **(b) Auto Insurance: insured must commence action against insurer…** (s. 558)
			* **(i) Section C Coverage: if loss/damage to vehicle, not later than 2 years after occurrence of loss/damage**
			* **(ii) Section A Coverage: if loss/damage to persons/property, not later than 2 years after cause of action against insurer arose**
		- **(c) Life Insurance: action must be commenced not later than the earlier of…** (s. 677)
			* **(i) 2 years after date evidence is furnished of death under s. 674, including; or**
				+ **(a) Happening of insured against event**
				+ **(b) Age of person insured**
				+ **(c) Right of claimant to receive proceeds; and**
				+ **(d) Name and age of any beneficiary**
			* **(ii) 6 years after date of death**

##### *Smith v Cooperators General Insurance*

**Ratio**

* **To start limitation period, insurer must inform claimant of dispute resolution process in straightforward and clear language** (*Smith*)
	+ Insured is still required to prove her claim (*Stranges*)
	+ **(1) Insurer must describe important points of process**
		- **(a) Right to seek mediation**
		- **(b) Right to arbitrate or litigate if mediation fails**
		- **(c) Mediation must be attempted before resorting to arbitration or litigation; and**
			* **(i) Where insured had been involved in mediation prior, insurer may not be required to inform** (*Golic*)
		- **(d) Relevant time limits governing process**
			* **(i) Insurer must provide more than mere communication of limitation period**

**Facts:** A injured in vehicle accident. Received Section B benefits from insurer. Insurer ceased paying.  **Dissent (Bastarache):** Form used by R was approved for purpose of advising claimant of refusal of benefits. R not required to inform insured of dispute resolution as part of refusal of benefits. A not denied access to dispute resolution procedures or from bringing civil claim.

### Exceptions

#### Relief Against Forfeiture

* **Relief Against Forfeiture: unfair to hold insured to obligations because insured’s failure to comply was not serious**
	+ **(1) Purpose to prevent hardship to beneficiaries where there is failure to comply with condition for receipt of insurance proceeds, but leniency towards strict compliance with condition will not prejudice insurer** (*Falk Bros Industries*)
	+ **(2) To determine whether ‘relief against forfeiture’ is available:** (*Monk*)
		- **(a) Threshold Questions of Law: whether relief is available as remedy in circumstances; and**
			* **(i) Whether court has jurisdiction to grant ‘relief against forfeiture’; and**
				+ **(1) If Court considers it inequitable there has been forfeiture or avoidance of insurance, on ground there has been imperfect compliance with statutory condition or provision of contract as to ‘proof of loss’, or another matter done or omitted to be done by insured/claimant, may relieve against forfeiture or avoidance on any terms it considers just** (*Insurance Act*, s. 520)

**(a) Only applies to insured’s post-loss conduct**

**(b) Must be imperfect non-compliance, not total non-compliance**

* + - * + **(2) Court may relieve against all penalties and forfeitures** (*Judicature Act*, s. 10)

**(a) Applies to any breach by insured – pre-loss or post-loss**

* + - * **(ii) Whether this type of breach attracts ‘relief against forfeiture’**
				+ **(1) Must be imperfect compliance with policy term -- breach of condition precedent to bringing claim under policy**

Delayed notices of claims (*Falk Bros*)

* + - * + **(2) For ‘relief against forfeiture’ to be available, contract must already exist – cannot be used to remedy non-compliance with condition precedents to contract**

**(a) ‘Relief against forfeiture’ not available if:**

**(i) Insured failed to report change material to risk** (*Seetaram*)

**(ii) Insured failed to report insurance premiums – results in lapse of policy** (*Pluzak*)

**(iii) Missed limitation period** (*Presco Industrial*)

**(iv) Insured failed to report claim, where coverage limited to claims made within particular period of time** (*Sawyer*)

* + - **(b) Discretion Based on Facts: whether relief appropriate in circumstances, considering:** (*Monk*)
			* **(i) Reasonability of insured’s conduct, considering all circumstances:**
				+ **(1) Nature of breach, what caused it, and what insured attempted to do about it**

**(a) Whether insured has clean hands – party displaying unreasonable conduct cannot hope to obtain relief against forfeiture** (*McDougall*)

Whether insured failed to provide notice because of emotional difficulties

Knowing subject of life insurance terminally ill, but collecting mail only intermittently, resulting in missed premiums (*Saskatchewan River Bungalows*)

* + - * **(ii) Gravity of breach: whether breach was prejudicial/detrimental to insurer; and**
				+ Whether breach affected scope of loss(*Kozel*)
				+ Whether breach prevented insurer from seeking timely subrogation of loss(*Kozel*)
			* **(iii) Disparity between prejudice to insurer and insured’s loss of coverage**
				+ **(1) Proportionality analysis: compare disparity between loss of coverage and extent of damage caused by insured’s breach** (*Kozel*)
				+ Whether timely reporting would have enabled insurer to act, unburdened by other party’s strong limitations defence (*Monk*)

##### *Monk v Farmers Mutual Insurance*

**Facts:** P refinished house exterior, but noticed damage. Did not inform D, insurer, until 3 years later. **Issue:** Whether relief against forfeiture available?
**Analysis:** Relief not available: insured knew of issue, but intentionally did not report for long period of time. Insurer not prejudiced.

#### Waiver/Estoppel

* **Waiver/Estoppel: insurer’s conduct makes it unfair to hold insured to obligations**
	+ **(1) Waiver: party intentionally consents to give up right to rely on a privilege/right/power – insurer gives notice in writing that insured’s compliance with requirement is excused, in whole or in part, subject to terms specified in notice in waiver** (s. 521(1)(a))
		- **(a) Waiver requires:** (*Saskatchewan River Bungalows*)
			* **(i) Full knowledge of rights and deficiency which might be relied upon;** **and**
			* **(ii) Unequivocal and conscious intention to abandon rights**
				+ **(1) Consent may be express or implicit**
				+ Saying policy is ‘technically out of force’ indicates waiver – removes meaning from ‘out of force’ (*Saskatchewan River Bungalows*)
				+ Whether communication from insurer mentions evidence of insurability or reinstatement (*Saskatchewan River Bungalows*)
				+ Insurer does not waive insured’s obligation to disclose by not insisting upon written application(*Gregory*)
				+ Insurer may waive right to rely on missed limitation period (*Oliver*)
		- **(b) Non-Waiver Agreement: waiver does not include…** (s. 521(2))
			* Insurer protects itself against waiver/estoppel – insurer agrees to act, while indicating it has not waived its right to rely on privileges/rights/powers
			* **(i) Dispute resolution process participation**
			* **(ii) Deliver of ‘proof of loss’ form**
			* **(iii) Investigation or adjustment of any contract claim**
		- **(c) If waiver given, may be retracted if reasonable notice given to insured** (*Saskatchewan River Bungalows*)
			* **(i) Informal communication sufficient** (*Guillaume*)
			* **(ii) What is ‘reasonable notice’ depends on facts**
	+ **(2) Estoppel: party cannot act in contradiction to representation of fact which it made, and which another party relies on to its detriment**
		- **(a) Insurer’s conduct reasonably causes insured to believe insured’s compliance with requirement is excused, in whole or in part, and insured acts on belief to insured’s detriment** (s. 521(1)(b))

##### *Saskatchewan River Bungalows v Maritime Life Assurance*

**Ratio**

**Facts:** Insurer issued life insurance policy on Fikowski to P. P failed to pay premium on time. D told P policy is technically no longer in force until premium paid, but P unaware of letter. P sent replacement cheque, which D refused. Fikowski died and D refused claim under policy.  **Issue:** Whether D waived its right to compel timely payment in accordance with terms of policy? **Analysis:** D’s waiver no longer in effect when respondents sought to make payment – D had no obligation to accept cheque and policy had lapsed. Relief against forfeiture not available – P knew Fikowski was terminally ill and chose to collect mail only intermittently.

### Enforcement Mechanisms

* **In seeking to recover benefits paid to insured, insurer may rely on organizing principle of good faith: parties must perform obligations honestly and reasonably, not capriciously or arbitrarily** (*Bhasini)*
	+ **(1) Insurer may recover punitive damages if insured intentionally breaches duty of good faith** (*Field*)
		- Prevents insured from simply not getting paid for claim, but otherwise no disincentive
		- **(1) Where insured makes false statements or fabricates documents**

#### *RBC General Insurance v Field*

**Ratio**

**Facts:** D, insured, operated vehicle while license suspended. P, insurer, seeks amounts it paid to D.  **Analysis:** D did not make claim for property loss or accident benefits under policy of insurance fairly, honestly, or in good faith. D made false statements and fabricated documents.

## Duties of Insurer

### i. Duty to Respond

* **‘Duty to respond’ governed by:**
	+ **(1) Contract: establishes condition that triggers duty to respond; and**
		- **(a) Contract/statute may define what insurer must do to fulfill duty to respond**
		- Ex. insurer must respond to claims that fall within coverage provided by policy
	+ **(2) Common law duty of utmost good faith: establishes scope of duty to respond, beyond express requirements of contract/statue**
		- **(a) Insurer must act reasonably when responding to claim**
			* **(i) Must treat insured fairly when investigating claim**
			* **(ii) Must pay claim within reasonable period of time, at fair value**
		- **(b) Breaches of duty of utmost good faith include:**
			* **(i) Denying coverage without adequate reasons**
			* **(ii) Making insured take unnecessarily onerous steps to prove loss**
			* **(iii) Acting belligerently towards insured**
			* **(iv) Wrongful denial of coverage does not necessarily equate to breach of duty of utmost good faith** (*Fidler*)
				+ Insurer not necessarily obligated to be correct in denying claim
		- **(c) Remedy for breach of duty of utmost good faith includes:**
			* **(i) Ordinary/General Damages: compensatory for damage caused by contract breach – may include damages for emotional/mental suffering if within reasonable contemplation of parties as possible consequence of contractual breach**
				+ **(1) Damages for emotional/mental suffering, only for breach of contract**
				+ **(2) ‘Peace of mind’ contracts**
			* **(ii) Aggravated Damages: compensatory for emotional/mental suffering (mental distress/humiliation) caused by ‘actionable wrong’ and contractual breach**
			* **(iii) Punitive Damages: non-compensatory damages, awarded for ‘actionable wrong’ and breach of contract**
				+ **(1) Designed to punish and deter inappropriate conduct – only awarded for egregious breaches of duty of utmost good faith** (*Whiten*)
				+ **(2) Punitive damages awardable for breach of contract, where breach constitutes ‘independent actionable wrong’** (*Vorvis*)

**(a) Insurer’s breach of duty to respond to claim in utmost good faith is independent actionable wrong** (*Whiten*)

* + - * + **(3) To determine amount of punitive damages, consider:**

**(a) Degree of blameworthiness**

**(b) Insured’s vulnerability; and**

**(c) Value needed to achieve deterrence**

* **If insurer wrongly denies coverage, insurer:**
	+ **(1) Liable to pay coverage amount owed under contract; and**
	+ **(2) May be liable to pay ordinary/general damages as compensation for mental distress, if contract is ‘peace of mind’ contract and distress is significant**
* **If insurer breached ‘duty of utmost good faith’ in manner it denied coverage (ie. committed ‘independent actionable wrong’), insurer:**
	+ **(1) May be liable for aggravated damages, if breach of duty of utmost good faith caused significant mental distress to insured**
	+ **(2) May be liable for punitive damages, if breach of duty of utmost good faith was sufficiently egregious**
* **Statutory Duties of Insurer When Responding to Claim:**
	+ **(1) Under Section A vehicle coverage: if insurer determines insured liable for accident, and insurer wants to settle with third-party, insurer must notify insured within 30 days of forming opinion insured is liable** (*Fair Practices Regulation*, s. 2)
	+ **(2) Where insured notifies insured of loss/damage to property, and insurer recommends particular service provider to insured, must advise insured in writing that insured may have repairs estimated and completed by service provider of insured’s choice** (*Fair Practices Regulation*, s. 3)
		- **(a) Except where insurer exercises its right to undertake repairs**
	+ **(3) Auto Insurance: where injured third-party sues insured and hires lawyer, lawyer must within 30 days of filing suit against tortfeasor, must contact tortfeasor’s insurer to notify them of lawsuit** (*Fair Practices Regulation*, s. 5.1)
		- Prevents tortfeasor from simply not notifying insurer
		- **(a) Insurer must determine whether liability coverage in place – if so, insurer must disclose limits of policy** (s. 5.1(2))
	+ **(4) Insurer must give written notice to insured of dispute resolution process…** (*Fair Practices Regulation*, s. 5.2)
		- **(a) Within 10 days after insurer determines dispute arisen between insurer and insured about matter in Statutory Condition 11 or 4(9); or**
		- **(b) Within 70 days after insured has submitted ‘proof of loss’, if insurer has not yet made decision as to validity of amount payable in respect of claim**
	+ **(5) Insurer must give written notice of applicable limitation period within 5 days of denying claim** (*Fair Practices Regulation*, s. 5.3)
		- Does not apply in common law – *Limitations Act* governs
		- Imposes new obligation on insurer to provide advice to claimant (*Dhillon*)
		- **(a) Notice not required if insurer knows claimant represented by counsel**
		- **(b) If insurer fails to give notice, claimant may apply for court order that applicable limitation period be extended** (*Fair Practices Regulation*, s. 5.3(7))

#### *Vorvis v Insurance Corporation of British Columbia*

**Ratio**

* **Aggravated Damages: compensatory in nature**
	+ **(1) Account for intangible injuries**
* **Punitive Damages: designed to punish, where conduct is of such nature that it merits punishment because of harsh, vindictive, reprehensible and malicious nature – conduct markedly departs from standards of decent behavior** (*Whiten*)
	+ Focus is not on P’s loss, but D’s misconduct
	+ **(1) Exception to common law rule that damages designed to compensate injured**
	+ **(2) Discretion to award punitive damages should be cautiously exercised**
		- **(a) Court should ask how facts of case and purposes of punitive damages would further objectives of the law** (*Whiten*)
		- **(b) Rational to use punitive damages to relieve wrongdoer of its profit, where compensatory damages would merely result in wrongdoer earning greater profits through disregard of others’ rights** (*Whiten*)
	+ **(3) Must be independent, actionable wrong that caused injury complained of**
		- **(a) Intentional tort causing or materially contributing to injury** (*Robitaille*)
			* Negligent disregard of duty to provide care (*Robitalle*)
			* Conspiracy that led to breach of contract (*HL Weiss Forwarding*)
		- **(b) Breach of fiduciary duty** (*M(K)*)
		- **(c) In exceptional cases, may be awarded for breach of contract** (*Vorvis*)
		- **(d) Breach of contractual duty of good faith is independent, actionable wrong** (*Whiten*)
	+ **(4) Rationality Test:** (*Whiten*)
		- **(a) Whether award of punitive damages rationally serves its objectives: punishment, deterrence, and denunciation; and**
		- **(b) If so, what is the lowest rational award that would serve those objectives**
			* **(i) If punitive damages, when added to compensatory damages, produces total sum inordinately large that exceeds what is rationally required to punish, must be reduced**
	+ **(5) Proper award for punitive damages must look at proportionality:** (*Whiten*)
		- **(a) Proportionate to blameworthiness of D’s conduct**
			* **(i) More reprehensible conduct, higher the rational limits to potential award**
			* **(ii) Whether conduct persisted over long period of time without any rational justification, despite D’s awareness of hardship it was inflicting**
			* **(iii) Consider:**
				+ **(1) Whether misconduct was planned and deliberate** (*Patennaude*)
				+ **(2) D’s intent and motive** (*Recovery Production Equipment*)
				+ **(3) Whether D persisted in outrageous conduct for lengthy period of time** (*Mustaji*)
				+ **(4) Whether D concealed or attempted to cover up misconduct** (*Gerula*)
				+ **(5) D’s awareness that what he was doing was wrong** (*Williams*)
				+ **(6) Whether D profited from misconduct** (*Claiborne*)
				+ **(7) Whether interest violated by misconduct was deeply personal to P**

**(a) Professional reputation** (*Hill*)

**(b) Irreplaceable property**

**(i) Mature trees** (*Horseshoe Bay Retirement Society*)

**(ii) Reproductive capacity** (*Muir*)

**(iii) Publication of informant’s identity** (*R(L*))

**(iv) Family pets** (*Weinstein*)

* + - **(b) Proportionate to Degree of Vulnerability of P: whether P vulnerable financially or in another way**
			* **(i) Relevant where power imbalance exists**
				+ Physician used access to drugs to purchase intercourse (*Norberg*)
			* **(ii) Militates against award in most commercial situations**
			* **(iii) Emotional distress only relevant insofar as it helps to assess D’s conduct**
		- **(c) Proportionate to Harm or Potential Harm Directed Specifically at P**
			* **(i) Irrational to provide P with windfall if P only minor or peripheral victim**
			* **(ii) Malicious conduct expected to cause harm to P not excused, merely because little damage actually resulted**
		- **(d) Proportionate to Need for Deterrence**
			* **(i) D’s financial power may be relevant where:**
				+ **(1) D chooses to argue financial hardship;**
				+ **(2) Directly relevant to D’s misconduct; or**
				+ **(3) Circumstances where lesser award would fail to achieve deterrence**
		- **(e) Proportionate, even after considering other penalties, civil or criminal, which have been or will likely be imposed on D for same misconduct**
			* **(i) Awarded if, but only if, all other penalties considered and found to be inadequate to accomplish objectives of retribution, deterrence, denunciation**
		- **(f) Proportionate to Advantage Wrongfully Gained by D from Misconduct**
			* **(i) Whether D decided benefit from its misconduct would outweigh any compensation it would be required to pay** (*Horseshoe Bay Retirement Society*)

**Facts:** P wrongfully dismissed.  **Issue:** Whether punitive or aggravated damages may be awarded for breach of contract? **Analysis:** P’s boss treated him in offensive manner. But, no actionable wrong to justify punitive damages.

#### *Whiten v Pilot Insurance*

**Ratio**

* **Insurer must compensate in timely manner**
* **Insurer has duty to investigate claims, but must do so fairly and diligently**

**Facts:** P’s house burns down accidentally. D denied claim and extended trial in attempt to settle for less.  **Issue:** Whether punitive damages warranted? **Analysis:** Given D’s conduct, $1M award reasonable. **Holding:** Appeal allowed.
**Dissent (LeBel):** Award is irrational. Does not address widespread practice in insurance industry.

#### *Fidler v Sun Life Assurance Co of Canada*

**Ratio**

* **Damages for mental distress available for ‘peace of mind’ contracts** (*Fidler*)
	+ **(1) To claim for damages for breach of ‘peace of mind’ contract, claimant must demonstrate:** (*Fidler*)
		- **(a) Object of contract to secure psychological benefit so as to bring mental distress upon breach within parties’ reasonable contemplation; and**
		- **(b) Degree of mental suffering caused was sufficient to warrant compensation**
	+ **(2) Aggravated damages available if mental distress arises from ‘independent actionable wrong’**
		- **(a) Includes breach of ‘utmost good faith duty’**
	+ **Peace of Mind Exception: damages awarded where object of contract – very essence of promise -- was contracting party’s peace of mind – to secure a particular psychological benefit** (*Watts*)
		- **(a) Independent, actionable wrong not required**
		- **(b) Determine what contract promised and provide compensation for that breach**
		- **(c) Damages subject to remoteness principles – damages must be in reasonable contemplation of parties at time contract was made**
			* **(i) Need not be dominant aspect of bargain – just needs to be part of bargain**
		- **(d) Not all mental distress associated with breach of contract is recoverable**
			* **(i) In normal commercial contracts, mental distress not normally contemplated by parties**
		- **(e) P must prove his loss:**
			* **(i) Object of contract was to secure psychological benefit that brings mental distress upon breach within reasonable contemplation of parties; and**
			* **(ii) Degree of mental suffering caused by breach was of degree sufficient to warrant compensation**
		- Breach of vacation contract
		- Breach of contract for wedding services (*Wilson*)
		- Breach of contract for luxury chattel (*Wharton*)
		- Breach of contract for disability insurance (*Warrington*)
* **Aggravated Damages: compensation that takes account of intangible injuries caused by D’s insulting behavior, such as distress and humiliation**
	+ **(1) Two types of aggravated damages:**
		- **(a) True aggravated damages: arise from aggravating circumstances**
			* **(i) Based on separate cause of action**
				+ Tort: defamation, oppression, fraud
		- **(b) Mental distress damages: arise from contractual breach itself**
			* **(i) Exist independent of aggravating circumstances – based completely on parties’ expectations at time of contract formation**
			* **(ii) Based on rule in *Hadley***
* **Purpose of disability insurance contract to secure psychological benefit, in which mental distress damages within parties’ reasonable contemplation at time contract made**
	+ **Not mere commercial contract – people enter disability insurance contract to protect themselves from financial/emotional stress and insecurity**
		- **Unwarranted delay in receiving such protection causes mental distress**
* **For punitive damages to be awarded for breach of contract:**
	+ **(1) Conduct must be marked departure from ordinary standards of decency; and**
	+ **(2) Must be independently actionable**
		- **(a) If denial of insurance benefits, breach by insurer of contractual duty to act in good faith will suffice**
			* **(i) Duty of good faith requires insurer to deal with insured’s claim fairly in:**
				+ **(1) Investigating and assessing claim; and**

**(a) Insurer must assess merits of claim in balanced and reasonable manner**

**(b) Insurer cannot deny coverage or delay payment to take advantage of insured’s economic vulnerability or gain bargaining leverage in negotiating settlement**

* + - * + **(2) Decision whether or not to pay claim**

**(a) Insurer’s decision must be based on reasonable interpretation of its policy obligations**

**(b) Does not necessarily require insurer to be correct in making decision**

**Facts:** P eligible to receive long-term disability benefits if ‘totally disabled’.D, insurer, denied long-term disability benefits to P for five years.  **Issue:** Whether object of disability insurance to secure psychological benefit? **Analysis:** D’s breach caused P substantial mental distress. D made misstatements that do not indicate it fairly and carefully considered insured’s claim. P’s conduct did indicate she may have been able to work – D’s conduct not sufficiently troubling to justify bad faith. No punitive damages awarded, but entitled to compensation for mental distress.  **Holding:** Appeal allowed.

#### *Usanovic v Capitale Life Insurance*

**Ratio**

* **Under common law, advising insured of existence of limitation period is not part of ‘duty of utmost good faith’**
	+ **(1) Duty arises by statute only**
* **Duty of good faith is distinct from fiduciary duty**
	+ **Insurer need not treat insured’s interests as paramount – instead, must give as much consideration to insured’s welfare as its own interests** (*Bullock*)
		- Based on recognition that insured usually in vulnerable position when making claim
* **Insurer has duty of good faith to act promptly and fairly when handling insured’s claim**
	+ **(1) When investigating, assessing, and attempting to resolve claims, insurer must:** (*702535 Ontario Inc*)
		- **(a) Act promptly**
			* **(i) Delay in payment may disadvantage insured**
			* **(ii) Insurer must act with reasonable promptness during each step of claims process**
			* **(iii) Insurer must pay claim in timely manner when no reasonable basis to contest coverage or withhold payment**
		- **(b) Act fairly, in manner in which insurer investigates claim and decision whether or not to pay claim**
			* **(i) Assess merits of claim in balanced and reasonable manner**
			* **(ii) Must not deny coverage or delay payment in order to take advantage of insured’s economic vulnerability, or gain bargaining leverage in negotiating settlement**
			* **(iii) Insurer’s decision to refuse payment must be based on reasonable interpretation of its obligations under policy**
			* **(iv) Does not require insure be correct in making decision**
			* **(v) Insurer obligated to inform insured of nature of benefits available under policy**
			* **(vi) Insurer must give written notice of applicable limitation period within 5 days of denying claim** (*Fair Practices Regulation*, s. 5.3)
				+ Does not apply in common law – *Limitations Act* governs
				+ Imposes new obligation on insurer to provide advice to claimant (*Dhillon*)
				+ **(1) Notice not required if insurer knows claimant represented by counsel**
				+ **(2) If insurer fails to give notice, claimant may apply for court order that applicable limitation period be extended** (*Fair Practices Regulation*, s. 5.3(7))

**Facts:** P, eavestrough installer, bought disability insurance from D for disability arising from accident. P’s benefits terminated. P alleges that, had D told him of limitation period when denying claim, he would have brought action earlier.  **Analysis:** Legislation does not include insurer’s requirement to mention limitations period – common law should not do so and override *Limitations Act*. **Holding:** Appeal dismissed.

### ii. Duty to Defend

* **Duty to defend only arises in context of liability insurance**
	+ If insured does not have liability insurance policy, no issues with ‘duty to defend’
	+ **(1) Auto Policy: Section A coverage – third-party liability coverage**
		- **(a) Every contract for motor vehicle liability policy must provide that insurer must defend in name of, and on behalf of, insured and at cost of insurer any civil action brought against insured on account of loss/damage to persons or property** (s. 564(b))
* **‘Duty to defend’ triggered by:**
	+ **(1) Injured party’s allegations in pleadings in the action commenced against insured; and**
		- **(a) Assume allegations are true**
		- **(b) If multiple claims pleaded, insurer only has duty to defend claims relevant to policy coverage** (*Delcor Enterprises*)
	+ **(2) Whether coverage is provided for what insured is being sued for**
		- **(a) If coverage not provided, ‘duty to defend’ not triggered**
	+ **(3) To avoid parties triggering coverage by drafting pleadings to ensure coverage in place, court must determine:** (*Scalera*)
		- **(a) Whether allegations properly pleaded**
			* **(i) All pleadings considered – most weight placed on pleadings against potential insured** (*Virani*)
				+ **(1) Consider extrinsic documents explicitly referred to in pleadings** (*Monenco*)
				+ **(2) Recent caselaw states only plaintiff’s pleadings can be looked at** (*WiLan*)
				+ **(3) Allegations in underlying Statement of Claim may be referenced, if allegations made by third-party notice** (*Tarrabain*)
		- **(b) If so, are any claims or allegations derivative (ie. essentially the same); and**
			* **(i) Whether allegations framed as negligence, but actually result from intentional act** (*Scalera*)
		- **(c) Whether the non-derivative/distinct claims are covered**
			* **(i) Assuming they are true, whether allegations are covered**
			* **(ii) Apply interpretation principles**

#### *Progressive Homes v Lombard General Insurance*

**Ratio**

* **Insure must defend a claim where facts alleged in pleadings, if true, would require insurer to indemnify insured for the claim**
	+ **(1) Requires mere possibility that claim falls within insurance policy**
		- **(a) Irrelevant whether allegations can be proven in evidence – duty to defend does not depend on insured actually being liable and insurer actually being required to indemnify**
		- **(b) No duty to defend if clear that claim falls outside policy, by not being covered or excluded by exclusion clause**
	+ **(2) In determining whether claims fall within scope of coverage, parties to insurance contract not bound by labels selected by plaintiff in pleadings** (*Scalera*)
		- **(a) Use or absence of particular term does not determine whether duty to defend**
		- **(b) Look to true nature of substance of claim**

#### *Markham (City) v AIG Insurance Company*

**Ratio**

* **Determine liability of insurer by looking at contract itself**
* **Insurer must explicitly state basis on which coverage is limited** (*Hanis*)
* **Insurer not obligated to pay costs incurred solely to defend uncovered claims** (*Hanis*)
* **Difference between primary and excess coverage:**
	+ **Primary Coverage: liability attaches immediately upon happening of event that gives rise to liability**
	+ **Excess Coverage: insurer liable for excess, above and beyond that collected on primary coverage**
* **Where two insurers cover same risk, both insurers have duty to defend**
	+ **To determine priority where two insurers cover same risk:**
		- **(1) Both policies must cover same risk**
		- **(2) Where there is both primary and excess insurance coverage:**
			* **(a) Limit of primary insurance must be exhausted before primary carrier has right to require excess carrier to contribute to settlement**
		- **(3) Fact that one insurer has duty to defend, does not excuse another insurer from its duty to defend**
* **If insured has two or more insurers:**
	+ **If claim not covered by one insurer, but covered by another insurer, that insurer must defend insured**
* **Where two insurers have obligation to defend same claim, insured entitled to select policy under which to claim indemnity** (*Family Insurance*)
	+ **(1) Subject to any conditions in policy to contrary**
	+ **(2) Insurer selected by insured may be entitled to contribution from all other insurers who have concurrent duty to defend insured**
		- Inequitable for one insurer to pay all costs
		- Full and early participation of all insurers who are potentially liable promotes settlement and expedites trial (*Alie*)
		- **(a) Where there is no contract between them, obligations governed by principles of equity**
			* **(i) Equal share of defence costs may be granted**
* **Insurer who has duty to defend has *prima facie* right to control conduct of defence** (*Brockton*)
	+ **(1) To remove insurer’s contractual right to defend, must be reasonable apprehension of conflict of interest on part of counsel appointed by insurer** (*Brockton*)
		- **(a) Whether counsel’s mandate from insurer can reasonably be said to conflict with mandate to defend insured in civil action**
		- **(b) Counsel must meet legal and ethical obligations to represent and protect insured’s interests** (*Hoang*)
	+ **(2) Insurer merely reserving its rights on coverage does not lose its right to control defence and appoint counsel**
	+ **(3) Where there is conflict of interest between two insurers, or insurer and insured, Court may place mechanisms to minimize conflict of interest and provide meaningful protections to party not having control of defence** (*PCL Constructors*)
		- **(a) Determine how all parties can know of and address concerns in timely manner**
			* Counsel appointed may need to fully and promptly inform other insurer of all steps taken in litigation
			* Counsel must provide identical and concurrent reports to insured and both insurers regarding defence

**Facts:** Plaintiff injured when hockey puck hit him. City insured under two policies: general liability policy and as additional insured on Hockey Canada’s insurance policy with AIG. AIG claims insure under general liability policy also has concurrent duty to defend. **Issue:** Whether both insurers must defend action? **Analysis:** Lloyd’s has duty to defend City against claims in action not covered by AIG. Each has duty to defend, so each is responsible to contribute to City’s defence costs. Insured elected to have AIG defend action.

### iii. Duty to Settle

* **Duty to settle only arises if insured has liability insurance policy**
* **Insurer has ‘good faith duty’ not to leave insured exposed to uninsured loss, if insurer could have reasonably settled claim within policy limits** (*Dillon*)
	+ **(1) Insurer must act in good faith by making reasonable settlement offers, if insured likely to be liable**
		- Cannot refuse to settle for merely $2000 more than it expects probable damages to be
	+ **(2) If insurer breaches ‘good faith duty to settle’, insurer must pay uninsured portion of claim against insured**

#### *Dillon v Guardian Insurance*

**Ratio**

**Facts:** Child suffered injuries after struck by vehicle owned by P. P had insurance policy with D. Before trial, child’s lawyer made settlement offer to D’s lawyer. D’s lawyer rejected offer.  **Analysis:** D could have settled for only $2000 more than D’s lawyer believed probable damages to be. Overwhelming probability P would be found liable.

# Assignees

* **Difference between assignment of ‘insurance proceeds’ and assignment of ‘insurance contract’**
	+ **(1) Insurance is personal contract -- does not ‘run’ with transfer of insured property or subject-matter of insurance**
	+ **(2) Assignment of Proceeds: assignment of post-loss payment to third-party**
		- **(a) Does not require insurer’s consent – only changes recipient of insurance funds**
		- **(b) Contract not changed (risk factors) – insurer’s obligation to pay assignee subject to any defences insurer could raise against insured, including policy breaches by insured**
			* Assignee takes risk that insured will continue to abide by obligations of contract
	+ **(3) Assignment of Contract: assignment of insurance contract to new insured**
		- Assignment of contract is substitution for purchaser obtaining own insurance contract – more efficient
		- **(a) Requires:**
			* **(i) Insurer’s consent -- insured person (risk factors) changes** (*Peters*)
				+ **(1) Insurer only undertakes to indemnify policyholder against liability – inherent personal element** (*Peters*)
				+ Insurer entitled to consider whether risk run is same
				+ Insurer considers whether it is willing to give up any possible breaches of contract
			* **(ii) Assignee must have insurable interest in assigned contract; and**
			* **(iii) Assignment must take place at same time as property transfer**
		- **(b) If insurer consents, results in *contract de novo* – not subject to any defences insurer might have raised against original insured**

## *Springfield Fire and Marine Insurance v Maxim*

**Ratio**

* **Assignment of insurance contract is a *contract de novo*: by consenting to assignment of insurance contract, new insurance contract created**
	+ **(1) Insurer cannot hold assignee responsible for original insured’s misrepresentations**
	+ **(2) Insurer may ask for any information desirable before given consent**
	+ **(3) If insurer does not request new information from assignee, deemed to have given consent**

**Facts:** Husband takes out homeowners’ insurance, but makes misrepresentations. Property conveyed to wife by husband, with insurance policy. R attempted to claim under policies.

# Mortgagees

* **Mortgagee/Lender: party taking security interest in property owned by borrower (mortgagor), in exchange for providing loan**
	+ **(1) To protect value of mortgagee’s security:**
		- **(a) Mortgagee may obtain own insurance contract on mortgaged property**
			* **(i) Lender has no power over what other insured does with property**
		- **(b) Mortgagee obtains assignment of proceeds from mortgagor – if loss/damage, insurance proceeds go to mortgagee; or**
			* **(i) Lender reliant on fact that insured hasn’t breached contract in some way**
		- **(c) Mortgagee protected under ‘Standard Mortgage Clause’: separate, independent contract of insurance between mortgagee and insurer, to protect mortgagee’s security on its loan to mortgagor** (*National Bank of Canada*)
			* **(i) ‘Standard mortgage clause’ added to mortgagor’s insurance contract – creates collateral contract between mortgagee and mortgagor’s insurer**
				+ **(1)** Collateral contract deemed to exist
			* **(ii) Mortgagees require ‘standard mortgage clause’ become part of insurance policy on mortgaged property – costs additional premium**
				+ **(1)** Protects mortgagee’s right to recover loan from insurance policy on property
				+ **(2)** Mortgagee not subject to defences available against insured
			* **(iii) Insurer’s obligation to pay mortgagee lasts only as long as mortgagee retains insurable interest in property**
				+ **(1)** Once mortgagor pays debt, standard mortgage clause extinguished (*Huntley*)
			* **(iv) ‘Contribution’ principles apply: mortgagee may have two insurers obligated to pay**
				+ **(1)** Mortgagee may opt for own insurance and ‘standard mortgage clause’
			* **(v) Mortgagee must tell insurer of changes that increase hazard, if mortgagee aware**
			* **(vi) Where ‘standard mortgage clause’ omitted by mistake, rectification available** (*National Bank of Canada*)
				+ **(1) Rectification: claimant asserts he has contract with another party which, by common mistake, not accurately recorded in written document**
				+ **(2) Virtually all mortgages granted with ‘standard mortgage clause’ – all parties aware of this**

**(a) Agency of borrower to effect insurance on behalf of lender is implicit in borrower’s covenant to insure**

* + - * + **(3) Consideration between insurer and mortgagee is mutual covenants in mortgage clause itself – mortgagee promises:**

**(a) To advise insurer of changes in occupancy or increase in hazard which comes to his knowledge**

**(b) Pay insurer any additional premium required for increase in hazard; and**

**(c) Under subrogation, make over his mortgage and any collateral security to insurer on payment to him of his interest in property in event of loss**

* + - * **(vii) Insurer must pay mortgagee, even if mortgagor breaches contract**
				+ **(1) Insurer must pay lender, regardless of any breach by insured** (*Royal Bank of Canada*)

**(a) Even if insured breaches Statutory Condition**

* + - * + **(2) But, insurer may recover from insured to recover amounts paid**

**(a) Subrogation: insurer stands in position of mortgagee to recover from insured mortgagor**

* + - * + **(3) If insured not covered because loss/damage falls under exclusion clause, insurer still must pay lender** (*Hum*)
			* **(viii) Insurer must give mortgagee notice of alteration/cancellation of contract that is to mortgagee’s prejudice** (s. 539)
				+ **(1) Mortgagee entitled to same termination notice that insurer required to give insured under Statutory Conditions** (s. 539)

## *Cooperators General Insurance v National Bank of Canada*

**Ratio**

* **Where ‘standard mortgage clause’ in contract, whether orally or in writing, two contracts of insurance exist**
	+ **(1) Main contract between insurer and insured**
	+ **(2) Collateral contract between insurer and lender**
		- **(a) Breach of main contract does not require insurer to pay under collateral contract**

**Facts:** Company obtained loan from D. D required company to insure against all hazards, with insurance payable to bank. P, insurer, forgot to include mortgage clause. Company’s building damaged by fire. P denied liability to D on basis no mortgage clause present. **Issue:** Whether mortgagee whose mortgage clause omitted from policy by error may recover?

## *Royal Bank of Canada v State Farm Fire and Casualty Co*

**Ratio**

* **Insurer must pay lender, regardless of any breach by insured**

**Facts:** Owners defaulted on mortgage with bank. Bank takes control of house. Nobody told insurer house was vacant. Fire destroys house.  **Issue:** Whether D may void policy because P did not notify house was vacant?

## *Hum v Grain Insurance and Guarantee Co*

**Ratio**

* **Even if claim falls under exclusion provisions, still must pay lender**
* **‘Standard mortgage clause’ protects mortgagees from any act attributable to owner or occupant of property**
	+ **Terms of policy that conflict with standard mortgage clause, including exclusions to mortgagor’s coverage, do not affect mortgagee’s coverage**
		- **Mortgagee should be able to rely on word ‘any’ – not interpreted to mean ‘some’**

**Facts:** P sought declaration of coverage as mortgagees under standard mortgage clause in fire insurance policy. Exclusion for loss caused by insured’s tenants. Insured’s tenant causes fire.  **Issue:** Whether standard mortgage clause expressly supersedes exclusion?

# Automobile Liability Claims by Third-Parties

* **Three possible actions arise from loss caused by tortfeasor in motor vehicle accident:**
	+ **(1) Tort Action: establishes liability and damages for accident**
		- **(a) Vehicle owner liable for loss/damage caused by:** (*Traffic Safety Act*, s. 187)
			* **(i) Anyone operating vehicle with owner’s consent; and**
			* **(ii) Anyone living with and as member of owner’s family**
	+ **(2) Judgment Creditor Action: permits judgment creditor from tort action to claim recovery directly from tortfeasor’s liability insurer** (s. 579(1))
		- **Unnamed insured may claim under Section A of SPF#1 – anyone driving with named insured’s consent** (s. 563)
		- **Statutory minimum limit is $200,000 for Section A Coverage** (s. 571)
			* **Property damage limited to maximum $10,000 – remainder goes to personal injury** (s. 571)
		- **(a) After obtaining judgment, injured party attempting to get money from tortfeasor’s insurer**
		- **(b) Tortfeasor’s insurer limited in defences it can raise for statutory minimum coverage and claims above statutory minimum**
		- **(c) Tortfeasor’s insurer may raise defences going to existence/application of contract**
			* **(i) Defences permitted to be raised by tortfeasor’s insurer include following – can be raised for any amount claimed by injured party, including statutory minimum of $200,000**
				+ **(1) Parties never entered into contract because no *consensus ad idem* on essential terms**
				+ **(2) Contract terminated prior to loss; or**
				+ **(3) Loss did not arise from ‘use and operation’ of vehicle**
			* **(ii) Tortfeasor’s insurer cannot raise tortfeasor’s breach of contract as defence, for any amount claimed up to statutory minimum of $200,000**
				+ **(1) May raise breach of contract as defence for amount above $200,000**
			* **(iii) Tortfeasor’s insurer cannot raise ‘prohibited use’ of vehicle as defence** (s. 556, SC#2)
	+ **(3) Statutory Recovery Action: after paying injured party in judgment creditor action, tortfeasor’s insurer may recover that amount from tortfeasor** (s. 579(13))
		- **(a) Recovery available because tortfeasor’s insurer statutorily prevented from raising certain defences against judgment creditor, that it could have raised against its own insured**
		- **(b) Insurer and insured may enter non-waiver agreement** (s. 576)
		- **(c) Must successfully prove defences**
			* **(i) Prohibited use of vehicle** (s. 556, SC#2)
* **Claiming under Section C Coverage – Damage to Own Vehicle**
	+ *Tortfeasor v Tortfeasor’s Insurer*
	+ **(1) First party claim: insured claims against own insurer**
	+ **(2) Insurer may avoid paying claim if it can prove:**
		- **(a) Contract not in existence at date of loss;**
		- **(b) Policy does not cover loss; or**
		- **(c) Insured breached insurance contract**
* **Claiming under Section A.1 Coverage – Damage to Vehicle Caused by Another Driver**
	+ *Injured Party v Injured Party’s Insurer*
	+ **(1) First party claim: insured claims against own insurer**
	+ **(2) Insurer may avoid paying claim if it can prove:**
		- **(a) Contract not in existence at date of loss**
		- **(b) Policy does not cover loss; or**
		- **(c) Insured breached insurance contract**
* **Claiming under Section B Coverage – Accident Benefits**
	+ *Injured Party v Injured Party’s Insurer*
	+ **(1) First party claim: insured claims against own insurer**
		- **(a) May recover Section B benefits if:**
			* **(i) Driver or passenger in insured vehicle; or**
			* **(ii) Pedestrian struck by insured vehicle**
	+ **(2) Insurer may avoid paying claim if it can prove:**
		- **(a) Contract not in existence at date of loss**
		- **(b) Policy does not cover loss; or**
		- **(c) Insured breached insurance contract**
	+ **(3) Injured party’s insurer cannot subrogate against tortfeasor to recover Section B payouts** (s. 587)
* **Claiming under Section A Coverage – Third-Party Liability Insurance**
	+ *Tortfeasor v Tortfeasor’s Insurer*
	+ **(1) First-Party claim: insured claims against own insurer**
	+ **(2) Insurer may avoid paying claim if it can prove:**
		- **(a) Contract not in existence at date of loss**
		- **(b) Policy does not cover loss; or**
		- **(c) Insured breached insurance contract**
	+ **(3) Insured may have uncompensated losses: General/special damages, future cost of care, future loss of wages**
		- **(a) Tort Action: insured may sue tortfeasor for damages relating to personal injury, which are not fully compensated by insured’s insurer**
			* *Injured Party v Tortfeasor*
			* **(i) Under Section A Liability Coverage, tortfeasor claims defence costs and indemnity from own insurer**
				+ *Tortfeasor v Tortfeasor’s Insurer*
				+ **(1) First party claim: insured claims against own insurer**
				+ **(2) Insurer may avoid paying claim if it can prove:**

**(a) Contract not in existence on date of loss**

**(b) Policy does not cover loss; or**

**(c) Tortfeasor breached insurance contract**

* + - * + **(3) To avoid triggering waiver/estoppel, insurer may:**

**(a) Have tortfeasor sign ‘non-waiver agreement’; or**

**(i) Used even if insurer undecided regarding its coverage position**

**(ii) Agreement should clearly provide:**

**(1) Ability to defend and settle tort claim on behalf of insured, without prejudice to its right to later deny coverage; and**

**(2) Right to recover defence costs and indemnity from insured, assuming insurer can prove policy breach by insured**

**(b) Apply to court to be named as ‘third-party by order’ in tort action** (s. 579(14-16))

*Injured party v. Tortfeasor (Defendant) and Tortfeasor’s Insurer (Third Party by Order*)

**(i) Obtained if liability insurer has denied coverage to insured**

**(ii) Upon being made third-party by order, insurer:**

**(1) Participates in tort action as though it was a defendant** (s. 579(15))

**(2) Entitled, upon injured party obtaining judgment, to recover defence costs and indemnity from insured, assuming insurer can prove policy breach by insured** (s. 579(13))

**(iii) If third-party order not granted, insurer must provide coverage**

* + - * **(ii) If insurer able to avoid indemnifying tortfeasor, injured party will not have access to insurance funds to satisfy judgment he obtains against tortfeasor**
				+ **(1) Judgment Creditor Claim: after obtaining judgment against tortfeasor, injured party may claim directly from tortfeasor’s insurer** (s. 579(1))

Exception to ‘doctrine of privity’

*Injured Party v Tortfeasor’s Insurer*

**(a) Third-party claim: injured party claims against tortfeasor’s insurer**

**(b) Action must be commenced within one year of injured party obtaining judgment in tort action** (s. 579(2))

**(c) Tortfeasor’s liability must relate to ‘use and operation’ of vehicle** (s. 579(3))

**(d) Statute limits defences that can be raised by tortfeasor’s insurer**

**(i) Tortfeasor’s insurer cannot argue as a defence:**

**(1) Tortfeasor’s breach of contract, for first $200,000 of judgment** (s. 579(4))

Non-disclosure, misrepresentation, failure to report material change, failure to notify insurer of loss

**(2) Tortfeasor’s lack of insurable interest in vehicle; and** (s. 579(5))

**(3) Tortfeasor used vehicle in prohibited manner under s. 556, SC #2, for any portion of claim** (s. 579(11))

**Insured must not operate insured vehicle: (i) Unless qualified by law to do so; (ii) While insured’s license is suspended; (iii) While under age of 16 or other prescribed age; (iv) For illicit or prohibited trade or transport; or (v) in any race or speed test** (s. 556(2))

**(ii) Tortfeasor’s insurer can argue policy not in existence at date of loss**

**(iii) Tortfeasor’s insurer can argue loss does not fall within policy coverage: not caused by ‘use and operation’ of vehicle**

**(iv) Any defence by tortfeasor’s insurer subject to, as between tortfeasor and tortfeasor’s insurer:**

**(1) Relief from Forfeiture**

**(2) Waiver/Estoppel**

**(e) Most insurer will have to pay is amount under policy limits**

* + - * **(iii) But, unfair that tortfeasor’s insurer must pay under contract tortfeasor breached**
				+ **(1) If insurer must pay judgment creditor because it is prohibited from raising insured’s conduct as defence, insurer may recover from its own insured for amount it paid to injured third-party** (s. 579(13))

*Tortfeasor’s Insurer v Tortfeasor*

**(a) Statutory recovery action: avoids rule that insurer cannot recover insurance payout from own insured**

* **‘Judgment creditor claim’ also available in non-automobile liability insurance contracts**
	+ **(1) Where insured under liability insurance fails to satisfy judgment obtained by claimant for loss/damage which falls within policy coverage, judgment creditor has direct cause of action against liability insurer** (s. 534)
		- **(a) Insurer may rely on any defences it could have raised against insured**
* **Where injured party obtains judgment against tortfeasor, and tortfeasor’s insurer denies coverage to tortfeasor because it is able to prove:**
	+ **In all scenarios:**
		- **(i) Injured party collects from insurers for judgment obtained against tortfeasor; and**
		- **(ii) Tortfeasor remains responsible for reimbursing insurers**
		- **If injured party’s judgment against tortfeasor exceeds amount payable by tortfeasor’s insurer/MVA fund, and injured party’s own insurer under SEF 44 Endorsement, injured party may pursue tortfeasor personally for any unrecovered portion of judgment**
			* **All parties become unsecured judgment creditors pursuing tortfeasor for recovery**
	+ **(1) Misrepresentation, failure to give notice of loss, or failure to report material change, tortfeasor’s insurer must pay injured party the statutory minimum limit of $200,000** (s. 579(4), (11))
		- **(a) Tortfeasor’s insurer can only rely on breach of contract for amounts owed above $200,000**
		- **(b) If injured party has SEF 44 Endorsement, injured party’s insurer must cover any judgment obtained above $200,000**
		- **(c) Tortfeasor’s insurer may recover from tortfeasor for money paid to injured party by:**
			* **(a) Non-Waiver Agreement, if signed by tortfeasor; or**
			* **(b) Statutory Recovery Action** (s. 579(13))
				+ **(i) Must be judgment obtained in ‘judgment creditor action’ before tortfeasor’s insurer paid injured party**
	+ **(2) Tortfeasor operated vehicle in violation of s. 556, SC #2, tortfeasor’s insurer must still pay injured party’s entire judgment** (s. 579(11))
		- **(a) Injured party’s insurer will not have to pay under injured party’s SEF 44 endorsement**
		- **(b) Insured must not operate insured vehicle:** (s. 556(2))
			* **(i) Unless qualified by law to do so**
			* **(ii) While insured’s license is suspended**
			* **(iii) While under age of 16 or other prescribed age**
			* **(iv) For illicit or prohibited trade or transport; or**
			* **(v) in any race or speed test**
		- **(c) tortfeasor’s insurer may recover from tortfeasor for money paid to injured party by:**
			* **(a) Non-Waiver Agreement, if signed by tortfeasor; or**
			* **(b) Statutory Recovery Action** (s. 579(13))
				+ **(i) Must be judgment obtained in ‘judgment creditor action’ before tortfeasor’s insurer paid injured party**
	+ **(3) Both tortfeasor’s breach of contract and violation of s. 556, SC #2, must still pay injured party statutory minimum limit of $200,000** (s. 579(4)(11))
		- **(a) May rely on breach of contract for any claim over $200,000**
		- **(b) Cannot rely on violation of s. 556, SC #2 at all**
		- **(c) Under SEF 44 Endorsement, injured party’s insurer must pay any amount over $200,000**
			* Insurer has interest in paying little under SEF 44 – may hire lawyer to ensure amount kept low
			* **(i) Injured party’s insurer will seek recovery from tortfeasor using subrogation provisions of SEF 44 Endorsement**
		- **(d) tortfeasor’s insurer may recover from tortfeasor for money paid to injured party by:**
			* **(a) Non-Waiver Agreement, if signed by tortfeasor; or**
			* **(b) Statutory Recovery Action** (s. 579(13))
				+ **(i) Must be judgment obtained in ‘judgment creditor action’ before tortfeasor’s insurer paid injured party**
	+ **(4) Insurance contract not in existence on date of loss (ie. proper termination had taken place), tortfeasor’s insurer not required to pay injured party**
		- **(a) Injured party can only claim $200,000 from Motor Vehicle Accident claims fund**
			* **(i) Fund Administrator may claim repayment from tortfeasor** (*MVA Claims Act*, s. 5(4))
		- **(b) Under SEF 44, injured party’s insurer must pay any amount above $200,000, up to policy limits**
			* Insurer has interest in paying little under SEF 44 – may hire lawyer to ensure amount kept low
			* **(i) Injured party’s insurer may claim repayment from tortfeasor, using subrogation provisions in SEF 44 Endorsement**
* **If tortfeasor’s insurer denied coverage to tortfeasor on basis loss did not arise from ‘use and operation’ of insured vehicle, tortfeasor’s insurer need not pay injured party anything**
	+ **(1) Injured party cannot recover from Motor Vehicle Accident Claims Fund, or own insurer under SEF 44 Endorsement**
		- **(i) Both MVA Claims Fund and SEF 44 predicated on ‘use and operation’ of vehicle**
	+ **(2) Injured party can only pursue tortfeasor personally**

## Tort Action

### Claims for Deductibles and Premiums

#### *Lenkewich v Landry*

**Ratio**

* **Injured party cannot claim increased premiums in action against tortfeasor, if no conclusive evidence that increase in premium directly related to accident**
	+ **(1) Many reasons insurer may raise premiums – even if injured party not at fault, insurer may discover new items when look at file**
* **Injured party may claim deductible against tortfeasor – uninsured loss, as insurer will not cover it**

**Facts:** P sought reimbursement for deductible and increased premiums after D collided with her in parking lot.  **Analysis:** Cannot know why premiums increased – simply too many factors to consider.

### Non-Waiver and Reservation of Rights

* **Liability insurers may involve themselves in tort action without waiving right to deny coverage to its insured by:**
	+ Insurer wishes to do so because of existence of ‘judgment creditor action’ – even if breach by insured
	+ **(1) Non-Waiver Agreement: voluntary contract between insurer and insured; or**
	+ **(2) Third-Party by Order: discretionary order of court** (s. 579)

#### *Halifax Insurance v Williams*

**Ratio**

* **If third-party takes insured’s vehicle without his consent, express or implied:**
	+ **(1) Insurer not liable to compensate defendant for third-party claim; and**
	+ **(2) Insured not liable for third-party’s loss**
* **Judgment creditor action may be taken by injured party’s own behalf, or on behalf of all persons with such claims**
* **Non-waiver agreement cannot be obtained by insurer’s misrepresentation**
	+ **(1) If so, insurer found to be acting on its on behalf, rather than insured’s, in settling injured party’s claim**
* **If injured party sues tortfeasor and tortfeasor’s insurer believes breach of contract may exist, or other issue with tortfeasor’s insurance policy, may ask tortfeasor to sign non-waiver agreement**
	+ **(1) Gives tortfeasor’s insurer the right to recovery any amounts paid against tortfeasor -- acting on tortfeasor’s behalf does not constitute waiver**
	+ **(2) Non-waiver agreement cannot be obtained by insurer’s misrepresentation – unenforceable contract**

**Facts:** Owner’s car taken by friend without consent and got in accident. Owner tells insurer he gave friend permission. Owner’s insurer claimed reimbursement from tortfeasor after paying damages to injured party. **Analysis:** If owner had been honest with insurer and explained it was stolen without consent, insurer would not have had to cover. But, insurer believes owner breached contract. Insurer asked owner to sign ‘non-waiver agreement’. Nature of document misrepresented by P’s insurer. P then sought reimbursement from D, in circumstances in which D would not have been liable.

#### *Allstate Insurance v Foster*

**Ratio**

* **Reservation of Rights Letter: tortfeasor’s insurer notifies tortfeasor that any steps taken is not considered a ‘waiver’**
	+ **(1) ‘Reservation of rights letter’ does not entitled insurer to recover against tortfeasor, even if insured breached contract**
		- **(a) Cannot force unilateral agreement on insured**

**Facts:** Tortfeasor convicted of impaired driving after accident. Insurer defended tortfeasor, and sent reservation of rights letter. Insurer then Tortfeasor applied for order striking insurer’s claim on ground that it discloses no reasonable cause of action.  **Issue:** Whether ‘reservation of rights’ sufficient to maintain cause of action by insurer against insured? **Analysis:** Unilateral arrangement – insured did not agree to terms.  **Holding:** Action dismissed.

### Third-Party by Order

#### *Giese v Hunking*

**Ratio**

* **If insurer denies liability under policy, must be made a third-party in any action in which insured is a party** (*Insurance Act*, s. 579(14))
	+ Enables insurer to raise defences, as if they were acting for insured – enables insurer to keep judgment low
	+ **(1) Upon being made third-party, insurer may:** (*Insurance Act*, s. 579(15))
		- **(a) Contest insured’s liability to any party claiming against insured**
		- **(b) Contest amount of any claim against insured**
		- **(c) Deliver any pleadings in respect of claim of any party claiming against insured**
	+ **(2) Requires insurer to swear it is denying coverage to insured** (*Giese*)
		- **(a) If insurer does not deny liability, bound by contractual obligation to defend claim on behalf of insured**
		- **(b) Court cannot authorize breach of this duty by allowing insurer to defend in its own name, independently of insured**

**Facts:** Injured party got default judgment against tortfeasor. Tortfeasor’s insurer applied for order that it be made third-party to action, in which its insured was sued for accident.  **Analysis:** Insurer must present evidence it has already denied coverage to insured. Application to be added as third-party dismissed.

#### *Re Perfaniuk*

**Ratio**

* **Insured may apply to be made ‘third-party by order’ to set aside default judgment against insured**
	+ **(1) Court has inherent power to set aside any of its judgments** (*vide Toronto General Trusts Corpn*)
	+ **(2) If insurer had no knowledge of action until after judgment, may apply to be entered as third-party**
		- **(a) Insurer must pay costs – assumed risk of such occurrence under policy**

**Facts:** A injured when motorcycle collided with D’s truck. D had insurance with R, insurer. D did not notify R of lawsuit, in breach of policy. After judgment against D, R applied to be entered as third-party.

## Judgment Creditor Action

### Distinct from Tort Action

#### *Bourbonnie v Union Insurance*

**Ratio**

* **Judgment creditor action arises because tort action took place**
	+ **(1) Allows injured party to sue tortfeasor’s insurer, as if injured party were insured**
* **Insurer cannot raise tort defences in ‘judgment creditor action’ – merely claim under contract**
	+ *Violenti* and contributory negligence
* **Any person with claim against insured, for which indemnity provided by contract in motor vehicle liability policy may, upon recovering a judgment in any province or territory, in respect of claim against insured, have insurance money payable applied in satisfaction of judgment or claims against insured** (*Insurance Act*, s. 579(1))
	+ **(3) Action may be maintained against insurer to have insurance money so applied**
	+ **(5) Insured must reimburse insurer on demand, in amount insurer has paid** (*Insurance Act*, s. 579(13))
	+ **(6) Only defences insurer has available are those under statute**
		- **(a) Insurer not actually an insurer**
		- **(b) Alleged insured is not person insured**
		- **(c) No judgment in fact recovered against insured by plaintiff**
		- **(d) Judgment has been satisfied**
	+ **(7) If policy provides for excess coverage or extended coverage, insurer may avail itself of defences insurer is entitled to raise against insured**

**Facts:** P recovered against insured, who was insured by D. P brought action against D after insured did not pay.  **Analysis:** Policy provided for extended coverage. Contributory negligence not available as defence by insured against insurer.

### Only Applies to a Judgment

#### *Scale Estate v Cooperators General Insurance*

**Ratio**

* **‘Judgment creditor action’ requires judgment against tortfeasor**
* **Judgment Creditor Action: any person with claim against insured, for which indemnity provided by contract in motor vehicle liability policy may, upon recovering a judgment in any province or territory, in respect of claim against insured, have insurance money payable applied in satisfaction of judgment or claims against insured and may maintain action against insurer** (*Insurance Act*, s. 579(1))
	+ **(1) Injured party may claim on own behalf, or on behalf of all persons with such claims**
	+ **(2) Right of person to have insurance money applied toward person’s judgment/claim not prejudiced by:** (*Insurance Act*, s. 579(4))
		- **(a) Assignment, waiver, surrender, cancellation, or discharge of contract, or of any interest in proceeds of contract, made by insured after event giving rise to claim**
		- **(b) Insured’s default, before or after event in contravention of this section or insurance policy**
		- **(c) Any contravention of *Criminal Code* or statute**
	+ **(3) When person has recovered judgment against insured and is entitled to maintain action against insurer, and insurer admits liability to pay insurance money under contract, insurer may apply to Court *ex parte* for order for payment of money into Court, if insurer believes there are or may be other claimants, or no person capable of giving and authorized to give valid discharge for payment, who is willing to do so:** (*Insurance Act*, s. 579(7))
		- **(a) After proceeds paid into Court, Court may determine whether, and to what extent, other potential claimants should be included**
		- **(b) Total policy limits distributed on pro rata basis amongst all claimants – one claimant not entitled to entire limits of policy**
		- **(c) Insurer can still settle competing claims in excess of policy limits**
			* **(i) Arrange to have total policy limits paid int Court and having Court give directions regarding all potential claims and deciding allocation**
		- **(d) Insurer obligated to investigate all potential claims against insured, and attempt to resolve them for purpose of avoiding potential exposure of its insured claims in excess of policy limits**
		- **(e) If insurer opts not to have judgment entered against it when settling claims, risks other parties advancing claims in future**
			* **(i) If so, other claims not limited to amount it could have paid out on pro rata basis – insurer may be liable up to policy limits for new claimants**
				+ Otherwise, insurer could avoid having to pay injured parties
* **Person injured by insured has, from time of injury, immediate actionable interest in money payable under contract** (*Harrison*)
	+ **(1) Time of payment suspended until after judgment establishes claim against insured**
	+ **(2) Right given to injured person is a charge upon insurance money**
	+ **(3) Insurer cannot raise any defence it has against its insured against the injured party’s claim – confirms statutory entitlement to insurance proceeds**
		- **(a) Even where insured would not be entitled to indemnity for his liability for such acts**
	+ **(4) Total claims for injured parties in an accident may exceed total amount of insured’s policy limits**
		- **(a) If insurer settles with some claimants, may be liable to other claimants for amounts of their claims in excess of policy limits**

**Facts:** Insured in accident, where passenger, P, died. D, insurer, settled claims before notifying P. D did not have parties it settled with obtain a judgment against it. P’s estate sought order that insurance money on policy issued by D should be obtained by P. **Analysis:** Total damages, if pursued by all potential claimants, would exceed policy limits. D, before notifying P’s family, settled claims. D always aware of risk of P’s claim. D chose to settle without requiring judgment and paying proceeds into court.

### Defences Not Available in ‘Judgment Creditor Action’

* **Every auto policy must have Section A coverage for statutory minimum limit of $200,000**
* **Where there is sham ownership arrangement, insurer liable for $200,000 minimum**
* **In ‘judgment creditor action’, insurer limited in defences it may raise – insurer cannot argue:** (s. 579)
	+ **(1) ‘Breach of contract’ by insured, only for first $200,000 of coverage** (s. 579(4))
		- **(a) For any amount over $200,000, insurer may argue insured’s ‘breach of contract’ as defence**
		- **(b) Breach of contract includes:**
			* **(i) Misrepresentation**
	+ **(2) Instrument issued as policy is not a motor vehicle liability policy, for amounts above or below $200,000** (s. 579(5))
		- **(i) Insurer cannot argue insured did not have insurable interest – essentially argues there is no contract** (*Jivraj*)
		- **(ii) If insurer agrees to backdate policy, which provides coverage for accident, cannot argue it was not valid policy** (*Ashton*)

#### *Jivraj v Edwards*

**Facts:** Insurer issued auto policy to mother. Car actually owned and driven by her son, who was not allowed license after DUI. Son gets in accident. Insurer denied claim.

#### *Ashton v Tu*

**Ratio**

* **Insured’s claim is invalid and right to recover indemnity is forfeited if:** (*Insurance Act*, s. 554(1))
	+ **(1) Applicant gives false particulars of described automobile to be insured, to insurer’s prejudice**
		- **(a) Fact that insurer backdated application irrelevant** (*Ashton*)
			* **(i) Insurer cannot defend third-party claim on basis that insured made fraudulent misrepresentations or non-disclosure** (*Insurance Act*, s. 579(5))
	+ **(2) Applicant knowingly misrepresents or fails to disclose in application a required fact**
		- **(a) Fact that insurer backdated application irrelevant** (*Ashton*)
			* **(i) Insurer cannot defend third-party claim on basis that insured made fraudulent misrepresentations or non-disclosure** (*Insurance Act*, s. 579(5))
	+ **(3) Insured contravenes term of contract or commits a fraud; or**
	+ **(4) Insured willfully makes false statement in respect of claim under contract**
* **Where insurer accepts premium and provides insured with liability certificate, contract of insurance exists** (*Buske*)
	+ **(1) Even if insurance agent exceeded actual authority or acts contrary to insurer’s policy** (*Ashton*)
		- **(a) Agent acting within extensible authority binds insurer to policy of insurance when providing insured with liability insurance certificate** (*Code*)
	+ **(2) Insurer cannot argue policy was void because it insured an accident that already happened**
	+ **(3) Insurer do not have to deliver copy of policy to insured**

**Facts:** D’s sister-in-law applied for auto insurance on his behalf, requesting policy be backdated. Car had already been in accident that injured P. **Issue:** Whether insurer must pay injured third-party, when accident occurs before policy applied for, but after effective date of policy? **Analysis:** Application made three days after accident. Sister-in-law willfully and fraudulent failed to disclose accident.

### Defences Available for Amounts Above Statutory Minimum Limits

* **‘Relief from forfeiture’ may be relied on by judgment creditor** (*Markus*)
	+ **(1) If insured could have successfully relied on ‘relief from forfeiture’ in first-party claim, judgment creditor may rely on it in judgment creditor claim**
	+ May be granted due to insured’s failure to forward statements of claim to insurer

#### *Markus v Western Union Insurance*

**Facts:** P injured as passenger in vehicle. P purported to sue on behalf of himself and other persons having judgment against insured. D, driver’s insurer, alleged that insured that coverage as under ‘extended insurance’ and insured failed to comply with policy. **Analysis:** Insurer not prejudiced by insured’s failure to forward statements.

#### *McKinnon v Canadian General Insurance Company*

**Ratio**

* **When one or more insurance contracts provide for coverage in excess of $200,000, insurer may, with respect to coverage in excess of those limits and as against a claimant, avail itself of any defence it has against insured** (*Insurance Act*, s. 579(11))
	+ **(1) If another insurer pays first $200,000, another insurer cannot raise defences it would have against insured**

**Facts:** Third-party suffered injury. Judgment went unsatisfied. Third-party applied to have insurers satisfy judgment. One insurer paid minimum limit, leaving balance owing.  **Issue:** Whether other insurer must pay balance, without being entitled to raise defences it would have against insured?

#### *Schoff v Royal Insurance Co of Canada*

**Ratio**

* **Even where insured’s claim rendered invalid due to fraud or misrepresentation, insurer liable to third-party up to $200,000 minimum limit**
	+ **(1) Statutory scheme removes insurer’s defences otherwise available, as against third-party judgment creditor, but only to extent of minimum statutory limit**
		- **(a) Above this amount, insurer may avail itself of any defence it has against insured to judgment creditor**
			* **(i) May deny third-party’s claim on basis of insured’s misrepresentations or non-disclosure, but only for amounts above $200,000**

**Facts:** Insured fraudulently misrepresented facts in application for insurance.  **Issue:** Whether D can deny coverage to third-party as result of insured’s fraud and refuse to pay judgment creditor? **Analysis:** Third-party liability limit is $500,000. Insured misrepresented number of licensed drivers and cars in household. Driver drove with insured’s consent.

### Defences Always Available

* **Defences regarding existence of contract are always available:**
	+ **(1) Whether termination of contract occurred prior to loss/damage – no policy in existence** (*Merino*)
	+ **(2) Whether loss/damage is covered under policy – if insured drove in violation of policy, no coverage** (*Winch*)
		- **(a) Whether loss/damage did not arise from ‘use and operation’ of vehicle**

#### *Winch v Keogh*

**Ratio**

* + **(1) Triggered only when person has claim against insured, for which indemnity provided by motor vehicle policy**
		- * **(b) Following sections only apply after possibility of indemnity to insured has been established**
				+ **(i) Right of person to have insurance money applied toward person’s judgment/claim not prejudiced by:** (*Insurance Act*, s. 579(4))

**(a) Assignment, waiver, surrender, cancellation, or discharge of contract, or of any interest in proceeds of contract, made by insured after event giving rise to claim**

**(b) Insured’s default, before or after event in contravention of this section or insurance policy**

**(c) Any contravention of *Criminal Code* or statute**

**Facts:** P injured in accident with D. D in violation of policy by driving vehicle weighing more than allowed.

## Statutory Recovery Claim

### *Terrigno v Peace Hills General Insurance*

**Ratio**

* **Statutory Recovery Claim: if insurer paid judgment creditor, because they could not raise defences as against its insured, insurer may seek reimbursement from insured** (*Insurance Act*, s. 579(13))
	+ **(1) Judgement against insured must be obtained prior to insurer having right of reimbursement** (*Mawere*)
		- **(a) Insurer cannot unilaterally deprive insured of opportunity to contest liability and quantum of damages**
	+ **(2) Insurer and insured may agree to avoid this claim – insured may agree liability and amount of damages for which he is responsible may be determined by means other than third-party judgment against him** (*Terrigno*)
		- **(a) Judgment must be entered against insured when insured and insurer enter into non-waiver agreement before settlement with third-party** (*Jonassen*)

**Facts:** A was unnamed insured in policy issued by R. A was prohibited from driving vehicle, but was involved in accident. R settled claims and claimed reimbursement from A.  **Issue:** Whether judgment against insured is required for reimbursement to insurer?

### *State Farm Mutual Automobile Insurance v Mawere*

**Ratio**

* **For insurer to have statutory right to recovery against its insured, must be:** (*Mawere*)
	+ **(1) Judgment against insured in tort action; or**
	+ **(2) Express non-waiver or reimbursement agreement between insured and insurer, regarding amounts paid by insured to third-party in respect of claim against insured**
		- **(a) Insurer may recover settlement amount from insured if insured admits liability to third-party claimant – through admission, insured acquiesces to insurer settling third-party claim**

**Facts:** D made claim for damage to motorcycle. Insurer made payment to D. Insurer later seeks reimbursement from D on basis he breached terms of insurance policy.