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Introduction to Insurance Law

- Purpose of insurance:
  - Manage risk in modern society
  - Financial protection in the case of an adverse event
  - Reflects neo-liberalism: encourage individuals to look after their own financial affairs rather than rely on the state or on family
- The private insurance industry is a business and therefore concerned with profitability
  - Group people by similar risks and charge premiums based on this – risk segmentation
  - Disconnect between the sales and claims visions of the companies
- The government can also provide insurance:
  - Usually for things that everyone should have and are mandatory. Ex car and health insurance
  - Acknowledges that there are limits to individual self-reliance
  - With large client pool risk segmentation is less required.
- Societal Perspective on Insurance:
  - Loss distribution
  - Random losses – the majority pay for the losses of the few
  - No correlation between premiums and recover

Definitions

- *BCIA* s1: "insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value on the happening of a certain event.
- The principle of indemnity states that the insured should not profit from the insurance coverage.
  - Indemnity is presumed
  - Non-indemnity (ie life and sometimes A&S) is different and does not require a connection between the loss and the insurance recovery
- Elements of an Insurance Contract:
  - Undertaking by one person – the insurer
  - Promise to indemnify
  - Agreed consideration for the promise – premium
  - Loss or liability for the insured event or subject matter
  - Occurrence of an uncertain event (fortuity required)
- How insurance differs from general contract law:
  - Specifically for transfer or risk
  - Duty of good faith
  - Fortuity
  - Indemnity
  - Consumer protection
  - Compensation for victims and third parties
- *Financial Institutions Act* ss. 77, 78
  - S77 – requires insurance companies to maintain certain reserves as calculated by the company's actuary
  - S78 – allows insurance companies to in accordance with regulations, reinsure to limit their liabilities.
    - Re Northern Union Ins Co: there is no privity of contract between an insured and a reinsurer
- *BCIA* s 10:

    - (1) a contract by way of gaming or wagering is void
    - (2) a contract is gaming or wagering if the insured has no interest in the subject matter of the contract.
- The purpose of wagering is to receive a windfall and the parties are neutral to the happening of the event which the wager is places on
    - Want to prevent it as a matter of public policy and for the prevention of moral hazard.

Regulation of the Insurance Industry

- The ultimate goal of regulation of the insurance industry is to protect customers and to maintain the integrity of the system.
- Reasons for regulations:
    - The insurance industry began as maritime insurance for vessels and cargo between sophisticated parties; however, insurance is no longer only used by sophisticated parties
    - Do not want exploitation of the vulnerable.
    - It is in the government's best interest that the system work as it keep people off of social assistance.
- In Canadian law insurance is primarily regulated in two ways:
    - Legislation controls the formation and operation of insurance companies
    - Legislation and common law regulate formation and enforcement of insurance contracts
- The Constitution (s91 and s92) dictates which level of government regulates which aspects of the insurance industry
    - The provinces under property and civil rights can legislate on insurance contracts and the operation of the industry within the province
    - The federal government can legislate on the incorporation of national insurance companies.
    - Note: Federally incorporated companies are still subject to provincial law on the operation of the industry within that province. (*Canadian Indemnity Co v BC*). Provincially incorporated companies are also subject to relevant federal legislation, such as on bankruptcy (*Ontario v. Policy Holders of Wentworth*)
- In *Canadian Indemnity Co v BC(AG)* it was held that provincial regulation does not affect interprovincial trade merely because it affects interprovincial companies.
    - A group of federally incorporated insurance companies previously licensed to sell auto insurance in BC unsuccessfully challenged the creation of ICBC as a monopoly government insurer.
- In *Ontario v. Policy Holders of Wentworth* it was held that provincially incorporated companies must follow federal legislation for matters within federal jurisdiction, such as the *Winding Up Act* for bankruptcy proceedings
    - Here policy holders of an insolvent insurance company wanted to follow the Ontario legislation as had stronger consumer protection provisions than the *Winding Up Act*.
- Licensing Regulations for insurance sales: BC Reg 375/90 s2(1)(b) exempts banks from licencing requirements for credit insurance which is incidental to their core business.
    - In Bank of Nova Scotia v BC it was held that credit insurance is incidental to the core business of banking and that there is no temporal requirement for this.
        - Use of telemarketers was also ok
    - *In Canadian Western Back v. Alberta* it was held that the sale of insurance products by a bank was not exempt from provincial licencing. In Alberta there is no exemption like in BC. An exemption to licencing must be explicitly granted.
- The court has rules that the following do NOT violate the *Charter*:
    - Suspension of a drivers licence to enforce auto insurance premiums (*Sims v. BC*)
    - Increased auto insurance premiums based on driving convictions (*Hardy v. Manitoba*)
    - Convictions under provincial insurance acts based on objective rather than subjective intent

    - Restrictions on the business conduct of licensed insurance agents. In BC see *Financial Institutions Act* s171(2).
    - Alberta and NS Courts of Appeal have ruled that regulatory caps on recovery do not violate equality rights (*Hartling v Nova Scotia*).
- In *Nova Scotia Human Rights Commission v Canada Life* it was held that life insurance does not qualify as a service "customarily provided to members of the public" and therefore denying service based on disability is not discrimination.
    - Physical disability is relevant to life insurance and irrelevant distinctions are required for discrimination.
    - Here a man was turned down for mortgage relief life insurance based on diabetes and polymyositis.
- In *Zurich Insurance Co v Ontario Human Rights Commission* it was held that distinctions may be drawn on enumerated grounds when they are based on a bona fide and reasonable ground. Here it was reasonable because it was based upon a sound and accepted practice and no reasonable alternative was available.
    - Challenge to insurance policy to give higher premiums to unmarried men under 25 compared to married men.
- In *Honda v. Keays* it was held that an employee with an invisible disability could be required to supply a note every time he missed work even though this was not required for employees with physical disabilities.

Nature of Insurance Contracts

Indemnity vs Non-Indemnity Contracts

- Indemnity insurance contracts provide an amount corresponding to the amount lost compared to non-indemnity contracts which provide a set amount upon the happening of a certain event.
- The principle of indemnity limits what can be recovered when the insured risk materializes
    - Requires: happening of the insured event, proof of loss, value of loss.
    - Do not want people to profit from being the victim of an unfortunate event
    - Assumed for most insurance contracts (not life) but can be altered by clear evidence using unequivocal language. The right of subrogation is also assumed for indemnity contracts unless it is specifically excluded.
    - Can have replacement cost endorsement policies which provide for the cost of new items, not just their current value but since this is more than actual loss it must be specifically contracted for
- In *Glynn v Scottish Union* it was held that the type of contract is based off of the terms of the contract not a categorization by the parties. There is a presumption of indemnity subject to the parties' intentions.
    - Subrogation is a corollary to the indemnity principle and also presumed in the case of an indemnity contract.
    - The exception to this is when the subject matter of the contract is not capable of financial qualification. Ie life insurance.
- When the disability benefit amount to be given is based of a percentage of the insured's earnings this is an income (or partial) replacement scheme which is an indemnity contract (*Gibson v. Sun Life*)
- When a disability policy pays a set amount independent of the insured's income it is a non-indemnity contract (*Tucker v Mutual Life*).
    - For non-indemnity contracts subrogation must be explicitly included or it is assumed not to apply.
- In *Wilson v Great West Life* the court states that long term disability contracts are presumed to be indemnity contracts but this can be varied based on the terms.

    - Also notes that the right of subrogation does not begin until the insured has been fully indemnified but this is modified by BCIA s36
- *BC Insurance (Vehicle) Regulations* 447/83 s81-83 prevent windfalls from mandatory auto insurance
    - S 81 – limits the payment of disability coverage by ICBC to when all other coverage amounts to less than 75% of the insured's earnings
    - S 81.1 – when an insured is able to work during the disability period they may only keep earnings up to 25% of their disability benefits
    - S 82 – When the *Workers Compensation Act* applies an insured cannot claim from ICBC unless the WCA claim is waived or the claim under this act would exceed the WCA claim
    - S 83 – same as s82 but for the *Employment Insurance Act*.

Classifications of Contracts

- Insurance Contracts can be characterized by who the beneficial is (1st or 3rd party)
    - In first party insurance the insured's interests are protected and the insured receives benefits
    - In third party of liability insurance the insured is protected against liability to others with benefits paid to a 3rd party. Here the insurer has a duty to defend and indemnify the insured.
    - Policies can be hybrid 1st and 3rd party insurance
- Insurance contracts can also be classified based on the peril or the subject matter they insure.
- Classification of an insurance policy can be pivotal to the ruling of a court as different types can have different limitation periods, loss reporting requirements, subrogation rules, co-insurance requirements.
- The old system of classifying insurance policies in BC was peril based and did not apply well to the modern reality of multi-peril policies
    - In *KP Pacific Holdings v Guardian Insurance* and *Churchland v Gore* the court held that multi-risk policies are to be governed by the general section of the legislation (not the fire part).
    - The effect of this was to limit the application of the fire part of the act to loss by fire in multi-peril policies.
- BC and Alberta have since undergone significant legislative reform:
    - There is now a set of general provisions applicable to everything except life, A&S and reinsurance
- BCIA s. 23: limitation periods
    - For property the limitation period is two years after the insured knew of ought to have known about the property damage
    - For everything else the limitation period is two years after the cause of action against the insured arose
- Notice of Limitation Period: Insurer must provide written notice of limitation period (Insurance Regulations. BC Reg. 403/2012, s. 4)
    - At time of claim or within 5 business days after denial of liability: s. 4(2)(a)
    - At or within 10 business days of first anniversary of claim: s. 4(2)(b)
    - Obligation to unrepresented claimants: s. 4(4)
    - Failure to give notice suspends running of limitation period: s 4 (6)
- BCIA s 6:
    - Ss 18-20 and 26 of the Limitation Act apply
    - Limitation periods may be lengthened by contract but not shortened.
- *Sander v Sun Life* also states that the insurer may grant a longer limitation period in the insurance contract and the act provides a minimum floor of protection.

Insurable Interests

- An insurable interest is required for an insurance contract to be legally binding to distinguish it from wagering. (BCIA s10)

- This requirement furthers the indemnity principle.
- The term is not defined by legislation

Character and Timing

- Factual Expediency Test: separate from the insurance contract, the insured would benefit from the continued existence of the subject matter of the contract and would suffer detriment if the insured risk materialized (*Kosmopoulos*)
    - In *Kosmopoulos* the factual expediency test allowed for a sole shareholder to have an insurable interest in the corporations property.
    - This is a fact based determination, and allows flexibility.
    - The old test required a legal right (Macaura Principle)
- Possession of the property is not required to have an insurable interest.
    - *Laratta v Peace Hills* – insurable interest arose when ownership transferred which was prior to possession.
    - Note it is also possible to own property and not have an insurable interest (*Rider v North Waterloo Farmers'*)
- Property can be owned by multiple persons. This does not threaten indemnity as actual loss is required in order to be able to recover under an insurance policy.
- The Factual Expectancy Test does not work well with life insurance or A&S so there are statutory modifications for these types.
    - It is offensive to put a dollar value on human life.
- BCIA on insurable interest for life and A&S:
    - S 45 and s 107: an insurable interest is required for life or A&S insurance
    - S 46 and s 108: give whose life you can insure (different for natural vs corporate persons).
        - Your own life, close family, spouse, persons who you are dependant on for support or education, employees, anyone whose life you have a pecuniary interest in, persons who consent in writing.
        - Corporate persons can insure: directors, officers, employees, persons who they have a pecuniary interest in.
        - Consent not required when the necessary statutory relationship exists.
        - Insurable interest is not required for group insurance.
        - No insurable interest: policy is void and premiums are to be returned unless there was fraud.
- An insured must prove that there was an insurable interest at the relevant time on the balance of probabilities.
    - In practice there is a presumption of an insurable interest.
- For indemnity contracts there must be an insurable interest at the time of loss.
    - Commercially prudent.
- For non-indemnity contracts there must be an insurable interest at the time of contract formation.
    - Upheld under common law as well in *Chantaim v Packhall Packaging*. Life insurance policy for a former employee found valid.
- Statutory modification for termination for life and A&S
    - S 47 and s 109: the court has discretion to grant an order when the person whose life is insured has reason to believe that their life or health maybe in danger.
    - The court can terminate the contract or reduce the amount.
    - The court may also waive the requirement to notify anyone with an interest in the contract except the insurer.
    - This protects people in abusive relationships but requires the person to know that there life is insured.

Insuring Other Interests

- Statutory Condition 1 (Misrepresentation): If a person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance that is material to be made known to the insurer in order to enable it to judge the risk to be undertaken, the contract is void as to any property in relation to which the misrepresentation or omission is material.
- Statutory Condition 2 (Property of others): The insurer is not liable for loss of damage of property owned by a person other than the insured unless (a) other specifically stated in the contract or (b) the interest of the insured in that property is stated in the contract.
- When an insured has an insurable interest in part of the subject matter they can obtain insurance for the other part for the other person's insurable interest
    - In the case of a reward these additional funds are held in trust for the other person.
- This was allowed in *Keefer v Pheonix Insurance* for fire insurance where the insurer knew the property was indented to be insured for its full value and was not prohibited by the contract. Note that statutory condition 2 is ignored here.
- In *Evergreen* the requirement for disclosing that property is owned by someone other than the insured was read down to only require this when the insurer suffered prejudice and was better dealt with under statutory condition 1 than 2.
    - Here a tenant was found to have a clear insurable interest in the building and knowledge of the owner was not relevant to the risk.
    - It is very difficult to prove breach of statutory condition 1 (*Taylor*).

Joint Ventures and Sub-Contractors

- In construction there are multiple person working on a project and each party has an insurable interest in the entire project.
- It is easier to have everyone under one policy rather than each party having their own.
    - Builder's All Risk Policy
- There is no right of subrogation between insureds (*Imperial Oil v. Commonwealth Construction*)
- Existing buildings are covered by the Builder's Risk Policy as those working on the project would have an insurable interest in them (*Medicine Hat College v Stark Plumbing*)
- Insured persons are only those whose contributions are necessary and integral to the construction project itself (*CP v Base Fort Security*)
    - This does not include security personnel.

Formation of an Insurance Contract

Requirements

- An insurance contract and policy are legally different
    - A policy contains the contract's terms and conditions but creates no legal obligations and is not attached to a specific person
    - The policy can be used as evidence of a contract but is not determinative (*Davie v Palliser Ins Co*)
- An insurance contract cover additional information not in a policy
    - Can incorporate a policy
    - Includes start and end of coverage, value, premiums, etc
    - Is legally binding
- Unless varied by statute the ordinary principles of contract law also apply
- Negotiations rarely happen over the terms of a contract but will occur over premiums, coverage limits and duration.
- Standard offer/acceptance model for insurance contracts:

    - Offer is made by the insured by way of an application
    - Acceptance by the insurer by issuing a policy or insurance certificate
    - Renewal offers are made by the insurer.
- *Statefarm Fire v General Accident Ins*: insured signs up for insurance with a different company but waits for receipt of renewal from old insurer before cancelling
    - Receives renewal offer from GAA on Sept 17 stating it took effect Sept 12. House burns down Sept 18.
    - Was willing to pay additional premiums for period of double insurance.
    - Court finds that GAA cannot cancel policy and that insured intended double coverage.
- When a policy has been delivered the contract is binding on the insurer as if the premiums have been paid.
- For a contract to be binding the parties must agree upon
    - Nature of the risk
    - Duration of the risk
    - Premium amount
    - Policy limits
- A contract cannot be renewed by an automated bank error without either party intending legal relations (*McCunn v Canadian Imperial Bank*)
- Electronic communications are covered by BCIA s 7
    - Electronic, personal or registered mail permitted for delivery
    - Electronic communication is restricted for termination.

Contents of the Insurance Policy

- BCIA requirements for an insurance policy (s 11, s 42(2) life, s 97(2) A&S)
    - Parties names, beneficiary, policy limit, method to determine amount (or actual amount), premiums, subject matter, exclusions, duration, terms limiting insured's rights, limitation periods
- BCIA s 15: Presumption that the policy is consistent with the application.
    - any changes from the application must be accepted by the insured explicitly.
    - Written notice is required for change in coverage
    - Insured must be given two weeks following receipt of notice to reject the policy when notified of a change. Insured can accept by acquiescence.
- Whether or not essential terms were agreed upon is a question of fact.
    - A promise of insurance without agreement over premiums or duration is not a binding contract (*Davidson v Global Insurance*)
- BCIA s 16: Contract terms and conditions must be included or physically attached to the policy or they cannot be used to the prejudice of the insured.
    - Renewals may reference original terms and conditions rather than reproducing them.
- There are statutory limits to freedom of contract for insurance.
    - Ex. Statutory conditions, scope of protection, excluded perils, discretionary perils.

Duration of the Contract

- Often an insured will want immediate insurance coverage before there is a full review. This is offered as interim coverage which is often less than the contract amount of coverage but with the premium adjusted accordingly.
    - Subject to standard policy terms and conditions of that insurer
    - Cannot impose special terms without notification and insured's consent (*0712914 BC v Avia Insurance*).
    - Interim coverage does not impose and obligation to issue full coverage
    - Notice must be given to vary the terms/conditions from the interim policy to the full policy to prevent unfair surprise (*Inn Cor International v American Home Ins*)

- Interim coverage expires when:
    - Full coverage is issued
    - Termination by either party
    - Expiry of stated time
    - A reasonable time has passed. Not much guidance for this but 5 months is not reasonable (*Kosituk v Union Acceptance Corp*)
- Premium payment is not required for coverage to take effect (BCIA s 18, s 106(1) A&S)
    - Exception is life insurance BCIA s 48(1) unless it is expressly added as a contract term
    - Delivery of policy indicated agreement by the insurer to provide coverage and this prevents fighting over when coverage begins due to delays in bank transfers etc.
- Termination of the insurance contract:
    - Upon a specific date or event
    - Mutual agreement. This does not require specific formalized steps and is based on conduct of the parties (*Ellis v London Canada Ins Co*)
    - Unilateral termination which is governed by statute.
- Termination by the insured:
    - Insurance regulations give a cooling off period for life and A&S contracts where an insured can rescind within 10 days, or longer if the contract permits.
    - Once the contract is in effect the insured must notify the insurer by registered mail to head office or chief agent in the province or by electronic notification. Termination is then effective upon receipt of notification.
        - Unused premium refunded upon surrender of the policy.
- Termination by the insurer:
    - Can terminate for non-payment of premiums either in accordance with statute or by giving notice via registered mail.
    - Can terminate for any reason: notice to last known address delivered personally or by registered mail.
        - Cannot use electronic notification
        - Termination is effective 5 days after personal delivery or 15 days after delivery by registered mail.
    - Other persons prejudiced by the termination must also be notified (BCIA s 28)
    - Notice does not take effect until premiums have been refunded
- Renewal extends the duration of the contract upon premium payment and the process depends on whether the original contract is continuous or non-continuous.
- Continuous policies come with an automatic right of renewal.
    - The renewal procedure will be in the original policy
    - Often found in life (effective until death) and in A&S (effective until a certain age)
    - For continuous polices renewal extends the original contract rather than commencing a new one which effects incontestability
        - Incontestability: after two years a policy cannot be void for misrepresentation unless it is fraudulent (s 51(2) life, s 111(2) A&S)
    - Unilateral renewal by insured continuing to pay premiums
- For non-continuous policies there is not automatic right of renewal
    - Insurer can send an offer of renewal which insured is not obligated to accept.
    - Renewal must be by mutual consent. Not unilateral.
    - Payment of premiums within a given time frame constitutes acceptance
    - Renewal creates a new contract, rather than extending the original one.
    - One-step process: insurer mails renewal offer with certificate of insurance and payment of premiums gives a binding contract

        - A pink card without a valid contract has no value but an insurer could be liable to third parties when there is detrimental reliance (*Patterson v Gallant*)
    - Two-step process: insurer mails renewal offer and after premium has been paid mails certificate.
- An insurer can grant a grace period which is extended coverage between expiry and due date for payment of premiums for renewal.
    - Only required for life and A&S (BCIA s 50(2), s106(2))
    - There is a presumption of termination at the original date of expiry if payment is not made during the grace period.
    - Grace period includes non-business days (*Firth v Western Life Assurance*), unless the due date falls on a non-business day, then it is the next business day (*Tiller v McCarthy*)
- Following the grace period a lapsed contract can be reinstated
    - Reinstatement begins a new contract and is not retroactive (*Parker v Constitution Ins Co*)
    - Cannot validly reinstate a life insurance contract after the insured has died (*Paul v CUMIS Life*).
    - For life insurance can reinstate within 30 days upon payment of overdue premiums, however the insurer is not obliged to (BCIA s 57(2))
    - For life insurance the insurer has an obligation to consider reinstatement within two years and with payment of premiums so long as the insured is in good health and is insurable (s 57(3)).

Duty of Good Faith and Disclosure Obligations

- Insurance contracts are contracts of utmost good faith, which is where the disclosure duty comes from.
    - Unlike in other settings *caveat emptor* does not apply to insurance contract.

Duty of Disclosure

- When the insurance industry first developed it was sophisticated parties seeking insurance. The insurer had limited access to information, which was required for underwriting and risk assessment.
    - This gave rise to the disclosure duty put on the insured.
    - Now the power imbalance has shifted, there is greater access to information, and many insureds are not sophisticated.
- The disclosure duty only applies to facts with in the insured's sole knowledge, and does not extend to speculation or general information an insurer could be expected to know (*Carter v Boehm*).
- BCIA s17 states that misrepresentation or non-disclosures must be material to the risk insured for the contract to be void.
    - This provision cannot be contracted out of

Test for Materiality

- The test for materiality is the reasonable insurer test: Would a reasonable insurer have acted differently, either by charging a higher premium or declining coverage, had there not been the misrepresentation or non-disclosure? (*Ontario Metals*)
    - This is a question of fact.
    - Materiality is determined at the time the contract is issued (*Henwood*)
- An insurers decision to ask a question does not automatically make the information material (*Ontario Metals*).
- The practice of a reasonable insurer can be established through use of only the insurer's employees as witnesses where there is no conflicting evidence (*Henwood*)
- The reasonable insurer test has been more recently confirmed in *Walsh,* where the insured did not disclose a series of health issues, any of which would have impacted his coverage.
    - Even if the non-disclosure or misrepresentation would have only resulted in less coverage the contract is void rather than read down.

- The insured's subjective views on whether the information is relevant to the insurance have no impact on materiality (*Walsh*)

Extend of and Insured's Duty to Disclose

- The disclosure duty is limited to facts which the insured knows or ought to know, but there is no obligation to disclose facts that were known to the insurer.
- Facts an insurer knows:
  - Information about the general political climate (*Carter v Boehm*)
  - Notorious facts in a given industry about health risks, such as asbestos (*Johns-Mansville*)
  - Information in the insurer's own records and publicly available safety data (*Taku*)
- When the insurance is for the benefit of the public and required to do business the insurer has an increased duty to investigate information in the public domain.
- *Pereira v Hamilton Insurance* reigns in the duty on the insurer to investigate. The insured is only relieved of the disclosure duty for facts the insurer actually knows and what is so notorious in the industry that the insurer has notice.
  - Here the insurer was entitled to rely on information that the farm was up and running even though they could have driven out to look at it.
- Concerns:
  - Privacy
  - Unfair surprise to applicants unaware of the disclosure duty
  - Provided incentive for insurer to not ask every question
    - However when the insurer is concerned and chooses to not follow up they cannot rely on breach of the disclosure duty (*Sagl*)
- In *Thomas*, the insurer was estopped from relying on a non-disclosure about wood stoves as their actions showed that they did not consider this information significant until after a claim was made.

Statutory Modification

General Insurance Contracts

- BCIA s16: terms not set out in the policy (unless they were securely attached to it when the policy issued) will not be enforceable against the insured. Changes are ok if they are agreed to by both parties in writing.
- BCIA s17: A contract cannot be void unless a misrepresentation is material which is a question of fact.
  - This abolishes warranties of truth, which had been used as an oppressive practice against insureds.
- BCIA s29 Statutory Condition 1: The insured it not to:
  - Describe the property to the detriment of the insurer;
  - Misrepresent material facts (strict liability);
  - Fraudulently omit information (here intention matters).
  - Note: While it is in the general section it only applies to property as that is all that is referred to in the wording of the section.
- In *Taylor* the court held that Stat. Cond 1 does require fraudulent intent for omissions made by the insured. Fraud requires the insured had a subjective awareness of what they are doing.
  - This was decided on lack of detrimental reliance rather than purely on the intent.
- *Bowes* held that intention is irrelevant to misrepresentation under Stat Cond 1.
  - Here he did not disclose that he had an old policy void for non-payment of premiums, and stated that he used non-flammable material (metal), when he in fact used flammable materials.
- This distinction in Stat Cond 1 makes the determination between an omission and misrepresentation very important.
  - The distinction is possibly based on the need for insureds to take more care with things that they say and are granted some ley way with things they have to realized need to be disclosed.

- The distinction between them is largely arbitrary, especially for half-truths like in *Taylor*. However, it does give insureds a break in some situations.
- Can be problematic in that uncertainty encourages litigation.

Automobile Insurance

- BC Insurance (Vehicle) Act s 75(a):
  - Insured must not falsely describe the vehicle to the insurers detriment
  - Knowingly misrepresent or fail to disclose facts required in the application
- *Berkowitz v MPIC* held that deliberate conduct was required for a "knowing" breach.
  - Here insured gave the farm he intended to use the truck at as his address even though it specified principle residence of the insured. This was not a breach as there was no intent to mislead.
- *Allen v MPIC* found a breach of statutory requirement when an insured deliberately made false declaration to conceal her primary address to obtain a cheaper premium.
- *Sleigh v Stevenson* from Ontario held that intent to mislead is not required. It is enough that the insured knows what the truth is and that there was a difference between that and the information given to the insurer.
- *Barsaloux v ICBC* (BC LAW) the court held that the relevant question is whether the insured knew at the time of applications the facts that would render the statements made untrue. *Sleigh* is explained as encouraging people to take responsibility for legal documents that they sign.
  - The information also must be relevant to the risk.

Life and A&S Insurance

- Misrepresentation and non-disclosure provisions are binding regardless of any contractual term BCIA s 39(1) life; s 94(1) A&S.
- The disclosure duty binds both the applicant and the life insured BCIA s 51 life, s 111 A&S.
- The disclosure duty is a codification of the common law and requires disclosure of all material facts with in that person's knowledge. BCIA s51(1) life, s111(1) A&S
  - The very strict disclosure duty is ameliorated by incontestability.
- Belief that information should not matter is not a defense to the breach of the disclosure duty. Here fraud was found, which voided the policy even though it had been in effect for over two year. Fraud must be actual fraud which requires that the false statements were made knowingly without any belief in their truth or recklessly as to whether they are true or not. (*McLean v Paul Revere*, A&S).
  - Here she failed to disclose that her last residence was jail and that she had seen psychiatrist. Only the medical information was found to be material.
- *Metcalfe* held that despite a misrepresentation on a form with regards to previous drug use there was absolutely no fraud as the insured had come clean to the agent and had relied on their statements. Here it had been over two years and incontestability applied.
- In Canada there are no laws with regard to genetic discrimination in insurance.
  - Due to the disclosure duty the insured must disclose any genetic tests they had undergone.
  - To provide protections only for genetic information would create inequality between genetic and non-genetic conditions. However, insurance is a social good which is required to partake in certain professions.
  - Adjin-Tetty recommends the two tiered European system where genetic information cannot be used to obtain basic insurance but can be for additional or luxury coverage.

Material Change in Risk

- This looks to the duration of the disclosure duty and varies depending on the type of insurance.
- BCIA s29 Statutory Condition 4 applies to general insurance contracts and requires the insured provide written notice of changes material to risk within the insured's knowledge.

    - If the change is not disclosed the part of the policy it affects is void
    - The insurer may choose to terminate as laid out in Stat Cond 5 or charge a higher premium and must give the insured 15 days to respond
- For non life of A&S policies the disclosure duty extends throughout the duration of the contract.
- For life insurance the disclosure duty ends when the policy is issued.

Proof of Breach of Disclosure Duty

- There is a presumption that the insured complied with the disclosure duty putting the onus on the insurer to prove there was a breach.
    - The insurer must prove that there was a breach
    - And that this breach prejudiced the insurer
- Issues can arise when the applicant provides information verbally, intermediary completes the form and then the applicant signs it.
- When the insured had the opportunity to review and signed the form the intermediary is presumed to be an agent for the insured (Newsholme principle).
    - This occurred in *Sleigh* were the insured signed the form without reading it.
    - The Newsholme principle also applies when it is not a part of the agent's job to fill out the form.
- Exceptions to the Newsholme principle:
    - The agent is given the authority to complete forms (*Stone v Reliance Mutual*)
    - The insured was not give an opportunity to review the information (*Blanchette*)
    - The courts will also make exceptions where it would be too unfair not to.
    - This still remains a very narrow exception. Not clear what would happen in other situations such as with an illiterate applicant.
- There is a statutory modification for life and A&S insurance:
    - Presumption against agency BCIA s90 life, s139 A&S
    - This is a rebuttable presumption. Note *Walsh* where the customer clearly should have reviewed the form.
- Challenges can also arise with regards to ambiguous questions where the customer answered as accurately as possible.
    - Insurers are not to presume that an insured has any sophisticated knowledge and should put questions in simple, plain, clear language.
    - The test is how a reasonable person in the insured's position would have understood the questions, which is mixed objective subjective. (*Stewart v Canada Life*). Here it was held that the average Canadian should not be expected to know the terms bowel, colon and rectum were a part of the intestines.
    - In *MacQuarrie* it was held that the applicant was not expected to appreciate that sleep apnea was a respiratory condition.

Proof of Materiality

- The burden of proof for materiality is on the insurer and the test is the reasonable insurer test (*Ontario Metals*).
    - The courts can however accept uncontradicted subjective evidence as being reflective of an objective practice.
- There is a presumption that the insurer is rational which can be quite onerous for an insured to overcome (*Hendwood*)
    - Effect is that subjective materiality is construed as being objective
    - Insurer is not required to bring proof of objective reasonableness
    - Here there was a dissent saying it is dangerous to rely upon the insurers own witnesses with nothing else.

- This was altered in *Walsh* were it was held that the insurer cannot rely only upon their own witnesses for reasonableness – self-interest and bias.
- Failure of an insurer to ask a question that a reasonable insurer would have considered material show that this insurer does not consider it to be and there is no breach for failing to disclose (*Sagl*).
- *Thomas v Avia* held that the insurer cannot void due to nondisclosure of info not requested when there is no indication the evidence was material to the risk
- Prejudice to the insurer:
    - This is required since the purpose of the test is to avoid prejudice to the insurer.
    - There is no prejudice when there was no inducement by nondisclosure
    - In this insurer would not have acted differently what a reasonable insurer would do is irrelevant (*Nuvo Electronics*)
    - The reasonableness of an insurers conduct is not question when it is consistent with industry standard (*Kehoe*)
- Adjin-Tetty suggestions:
    - Use a modified objective test from the insureds point of view
    - Where some coverage would have been provided read down the policy rather than voiding it
    - Nullification should be limited to fraud.

Consequences of a Breach

- The insurer has 3 options upon insured's breach of disclosure duty:
    - Repudiate and return premiums (not required for fraud)
    - Treat contract as valid (waiver and estoppel)
    - Treat contract as valid then use unilateral termination procedures.
- However this usually does not arise until after a loss has occurred.
- Repudiation results in the contract being void *ab initio* subject to any obligations to third parties.
- An insured has never had punitive damages awarded against them in Canada but the court have left the option open
- General insurance contracts Stat Cond 1 & 4:
    - The contract is void with respect to the property or risk that the breach was in relation to.
    - Insurer must notify insured of repudiation.
- Auto insurance s 75 Insurance (Vehicle) Act:
    - The contract is completely invalidated and recovery is forfeited.
    - No recovery for the insured or their dependents
- Life and A&S:
    - The contract is voidable s51(2) life, s111(2) A&S
    - Incontestability applies here: the ability to void the contract is limited by legislation to two years unless there is fraud s52(2), s112(2)
        - Note reinstatement restarts this clock
        - Does not apply to disability insurance or when the misrepresentation is about age (s51(1)). For a misstatement of age the policy is readjusted accordingly and is not void s54(2), s 115(1).
        - *McLean* was an A&S policy but fraud was found and the insurer was able to claim back all benefits previously paid out
        - In *Walsh* circumstantial evidence was used to show fraud. It is very unlikely a young health person could just forget significant parts of their health history.
        - Metcalfe shows incontestability used successfully for the insured.
    - Rationales for incontestability:
        - Puts an obligation on the insurer for timely and thorough review of applications.
        - Rectifies mistakes made by insurer's own employees
        - Reflects reasonable expectations and prevents a false sense of security.

Causation, Fairness and the Disclosure Duty

- It is possible to have a material change in risk and later rectify it entirely prior to an unrelated loss.
    - However, this would still violate Stat. Cond. 4
- BCIA s32 gives the courts discretion to relieve insured of unreasonable terms and conditions.
- S 32 has been applied by the SCC to relieve an insured of the effect of Stat Cond 4 when the material change in risk was rectified prior to the loss (*Marche v Halifax Ins Co*)
    - S 32 is not limited to contractual terms. A reasonable stat cond can have unreasonable application in certain circumstances
    - This is however a narrow exception for when the change in risk is rectified prior to the loss and unrelated to it.
    - Here the insured did not tell the insurer that the property was unoccupied in breach of stat cond 4; however at the time of the fire it was occupied.
    - Dissent: s32 can only apply to contract terms and conditions.
    - Problems: risk insured will not report material changes to the insurer, uncertainty over coverage, law undermines disclosure duty.

Legal Liability of Insurance Intermediaries

- Insurance agents hold themselves out as professionals who know what coverage is needed, which gives reasonable reliance upon their skills and puts them in a different position than a regular sales person. (Fines Flowers)
    - When the customer is relying upon the agent to determine what coverage they should have the agent should advise on the options and communicate what is and is not covered by the coverage obtained.
    - Here the insured requested coverage including for wear and tear which would never be available, however the agent should have communicated this.
    - Here the breach was in contract for an expectation remedy; courts have moved away from this using negligence which gives reliance remedy.
- When specific coverage is requested all that is required of the intermediary is to use reasonable skill and care to obtain that coverage or advise the client if it is unavailable (*Sandborn*).
    - Here the client requested only transportation coverage even when advised this would not cover wholesale storage and decline to purchase extra. This would have been sufficient even if "full coverage" had been requested.
- An insurance intermediary can also have an ongoing duty as they are used by the insurer to communicate with the insured. When an agent is aware of a change in risk to a client they must assess these changes and advise accordingly (*Beck Estates*)
- Private insurer's do not have a duty to advise an insured about the risk (*Ostenda*).
    - This is a duty of the intermediary not the insured. The insurer's risk assessment was clearly for underwriting. There was also a disclaimer stating the risk assessment was not to be relied upon to determine coverage.
- Public insurers have a different duty then do private intermediaries.
    - There is no intermediary in public insurance and the staff are not licensed agents.
    - Public insurers are not required to assess coverage needs but must provide full information about available coverage (Fletcher v MPIC)

Interpreting Insurance Policies

- Insurance policies are to be interpreted based on the basic principles of contract interpretation.
- This process must be contextualized to the power imbalance between the parties and the reliance by the consumer.
- Two-step process (Consolidated Bathurst):

    - Search for intention:
        - Unambiguous terms given terms normal and literal meaning
        - Read in the context of the whole contract when multiple meanings are possible
        - Do not use a technical definition to negate the purpose of the parties.
    - Resolution of ambiguity:
        - Only to be used if ambiguity remains following step one.
        - Contra proferentum
        - Broad coverage and narrow exclusion clause interpretation
        - Fulfil reasonable expectations of the parties
        - Judicial consistency
    - Note: public policy should not trump foundational principles of interpretation (*Jesuit Fathers of Upper Canada v Guardian Ins*)
- When a term is found to be unambiguous through a search for the intention of the parties, reasonable expectations are not considered (*Corbould v BCAA Ins*).
    - Here pollution was found to cover a leaky oil tank despite its normal use as th heating system.
- Critique of the search for intention:
    - There was no negotiation between parties.
    - Terms may be mandated by statute
    - A commercially sensible interpretation would work best.
- A policy has ambiguous language when there are multiple irreconcilable meanings
    - Ex *Reid Crowther & Partners*: used different triggering words in different parts of the policy making it unclear if it was limited to claims or occurrences within the coverage period. Referred to "a claim" and "the claim" which had different meaning.
- Resolution of ambiguity:
    - Contra proferentum: Ambiguous terms are interpreted against the drafter. Prevents the insurer from benefiting from purposeful ambiguity. It is irrelevant that the forms are approved by a statutory body. This does not apply to stat cond.
    - Give coverage provisions a broad interpretation and exclusion clauses a narrow one: similar rationale to contra proferentum. However, this does apply to stat conds.
    - Reasonable expectations of the parties: This allows the court to go beyond the written contract and make assumptions about the nature of agreement.
        - Limited to ambiguities except when the purpose of the contract is threatened. It must also be both parties whose reasonable expectations are considered. (*Corbould*)
- Focus on consumer protection does not always lead to coverage:
    - *Vytingam*: Unambiguous that only loss caused by another vehicle was to be covered. Coverage declined for damage from a rock pushed off an overpass.
- Despite clear tests the application of these principles in the case law can be messy.
    - *Consolidated Bathurst*: Despite no ambiguity of the word corrosion, the court held that the exclusion did not apply as it would encompass everything at a mill.
    - *Brissett Estate v Westbury Life*: Husband murders his wife, and now want the life insurance which he was the sole beneficiary of to go to her estate. Held to be unambiguous that it should not. However still a dissent.

Loss caused by accident

- Accidental loss clauses are coverage provisions and there for should have a broad and purposive interpretation.
- This goes back to first principles that insurance is for fortuitous events.
- The meaning of accident is to be determined using the average insured test (*Gibbens*).
    - This gives a contextual approach where an accident is an unlooked for mishap or occurrence.

    - An accident requires an external event, and something that is unexpected is not automatically an accident.
- The burden of proof is on the insured or beneficiary to bring enough evidence to establish a prima facie case on the balance of probabilities, then the tactical burden switches to the insurer.
- Accident can occur negligence and calculated risk taking, even though negligence involves some aspect of foreseeability. (*Canadian Indemnity v Walkem*)
    - This was for loss suffered by a third party.
- Accident is expanded to include gross negligence in *Stats v Mutual of Omaha*
- The court later states that accident is determined by the insured's subjective state of mind based upon the evidence surrounding the loss (*Martin*).
    - It is incorrect to focus on the end result or the particular conduct; the focus must instead be on the intention and chain of events.
    - Here a physician who was an IV drug user died of an overdose which was held to be an accident as he did not expect to dies. He had a very low dose to be lethal in his system.
- Defective and faulty workmanship of the leaky condos was left open to being accidental (*Progressive Homes*)
- EXCEPTION: A loss from a natural process is not an accident even if it was unexpected (*Gibbens*)
    - There must be a mishap or untoward event
    - Here the insured was paralyzed from a rare complication of genital herpes.
    - The court was mindful of not turning a much cheaper accident policy in to comprehensive health insurance.
    - The court criticized the decision in *Kolbuc* where coverage was allowed for West Nile as the cause was characterized as an external mosquito bite.
- Frame work for determining an accident from Neslon:
    - Prior external force or impact on insured's body triggering the loss
    - Voluntary movement causing unexpected injury or loss due to peculiarity of the insured
    - Deliberate conduct causing injury due to miscalculation or unforeseen consequence.
    - Excluded: Injury from natural process occurring with in the body.
    - An insured who died as a result of a heart condition while swimming was not covered under an accident policy along similar lines to *Gibbens*. The analysis must look to the triggering event. Here there was no external event.
- The courts tend to have sympathy for A&S / life insurance and third parties
    - Even in commercial settings where it is likely everyone has insurance.
- If negligence was excluded in liability insurance then nothing would be covered as the insured must be found liable to third parties for the duty to indemnify to occur, and there is an exclusion for intentional conduct.

Loss caused by intentional / criminal acts

- There is not sympathy for an insured who brings about a loss; however, the common law position went further preventing recovery for an intentional or criminal conduct even when the act was done by a third party.
    - This meant that the victims of crime could not recover from their insurers.
    - If the person who caused the loss did not have sufficient assets then the victim had no available recovery.
    - There was also no protection available for losses suffered by innocent co-insureds.
- BCIA s 5 alters the common law and states that recovery will not be precluded simply because loss or damage was from criminal conduct.
    - Does not apply if it was the insured's actions which caused the loss, but allows recovery by victims.
    - This is however a default and does not prevent the policy from precluding this.

- Intentional and criminal conduct exclusion applies to every breach of the criminal code regardless of if it was an intentional or negligent act. (*Eichmanis*).
    - A criminal conviction is not required would be prima facie proof of a criminal act
- The occurrence of a possible unrelated intentional / criminal act will not effect a properly pleaded negligence claim. There must deliberate conduct achieving the desired outcome. (*RDF v Co-operators Gen Ins*)
    - Here despite possible trespassing there was no indication the teenagers indented to burn down the school. Was only for a determination of whether there was a duty to defend.
- So long as some harm was intended from the deliberate conduct the scope or extent is irrelevant.
    - Threatening neighbour with lawnmower and accidentally cutting off finger is excluded (*Saindon*)
    - Attempted suicide by setting vehicle on fire and accidentally damaging third party property is also excluded (*Emeneau v Lombard*)
- Conduct will also be caught by the exclusion if it is inherently harmful (*Scalera*).
    - This was for sexual battery.
- Proving intention to cause harm (*Martin*)
    - Is the result that occurred substantially certain to follow from the conduct? If yes than presumption that it is intentional
    - First look to the subjective intent. However, this can be hard to prove.
    - Usually use a mixed subjective-objective test due to difficulties with proving subjective intent.
- Critique: The courts' approach to criminal exclusion is inconsistent with the principle or narrow interpretation for exclusion clauses. Use of the exclusion frequently bars recovery for victims as the perpetrator is unlikely to have sufficient assets to cover the loss.
- Erik Knutsen Critique: The criminal exclusion should only apply where there is a subjective mental element, which can occur with negligence offenses.
    - Not necessary to exclude situations where the insured never indented the harm to prevent moral hazard.

Automobile Insurance

- The purpose of auto insurance is to look after accident victims. All road users are exposed to potential harm, which provides a reason to cover a broad class of people.
- Who is covered:
    - Named insured, household member, persons operating the vehicle with consent (broadly interpreted).
    - No coverage where the vehicle is used without the insured's consent, ie theft.
    - No coverage when operated by an unauthorized person.
- Whether someone is authorized is a question of fact: Did the insured have actual or constructive knowledge that the person was no authorized? Would a reasonable person have known? (*Wawanesa v SC Construction*).
    - In SC Construction it was found that a reasonable person would not have known that a 10 year employee who always drives to work was not licensed in Canada. This allowed coverage.
- How to determine whether something is "loss of injury from use or operation of a motor vehicle" is done using the two-step *Amos* Test:
    - Purpose: Was the insured's vehicle engaged in a normal vehicle activity? This is not limited to driving on roads and can include off-roading (*Pender*), pushing a motorcycle (*V-Twins*), and use of a stripper poll on a party bus (*Whipple*).
        - This aspect of the test is identical for indemnity and no fault benefits.
    - Causation: Sufficient causal relationship between the insured's injury and use or ownership of a vehicle. Was the vehicle merely incidental?

        - No fault benefits: The vehicle does not need to be the instrument of harm, just that it put you in harms way. The focus is on what happened to the insured in their vehicle.
        - In *Amos* it was sufficient that he was injured in an attempted car-jacking for no fault benefits as it was his vehicle that placed him in danger.
        - Indemnity (under insured motorist protection): This requires that someone be at fault. A unbroken chain of chain of causation must link the tortfeaser's vehicle to the final injury.
        - In *Vytlingam* the tortfeaser dropped rocks off of an overpass which is not a motoring activity. In injury from a drive-by shooting, the tortfeasers use of a vehicle was incidental only (*Russo*). Using a car to travel to a hunting site and then shooting someone is also not causally connect to driving (*Herbison*).

Public Policy Restrictions

- Based upon the concept that there are some activities you cannot contract or have insurance for.
- When something violated public policy in most cases the insurance contract remains valid but there is no recovery for the loss in question.
    - However, this can effect innocent third parties.
- Relationship between policy and contract:
    - Generally independent
    - Presumed to reflect social values
    - Not subject to the parties' intentions
    - Resort to public policy when the contract is silent on the issue

Criminal Forfeiture Principle

- Cannot obtain insurance for criminal activities. Freedom of contract and parties' intentions are irrelevant. The contract would be illegal and unenforceable.
- When the loss or damage stems from criminal acts the loss in question is not covered but the policy is valid.
- In life insurance, the insured's death from illegal activities does not preclude recovery by innocent beneficiaries.
    - Two cases: *Oldfield* where the insured died from a heart attack from an unexpected cocaine explosion in his stomach. And *Goulet* where the insured died of an explosion while planting a car bomb.
    - Contracts were silent on the issue of criminal activity.
    - BCIA s5 does not apply to life insurance.
    - Beneficiaries were able to recover as they did not have any part in the criminal act, and the payment was not for the benefit of the guilty insured.
    - There is no recovery where the beneficiary brought about the insured's death (*Brissette Estate*)
    - Note independent versus derivative claims: Independent named beneficiaries are protected; however, derivative claims must be brought though the insured's estate which is viewed as the insured themselves which is not allowed here.
- When third parties suffer loss from criminal activities, public policy still prevented this.
    - Scott v Wawanesa: Homeowner's son who was an unnamed insured on their policy burns down the house which precludes recovery.
    - Beck Estate: Husband murder's wife and burns down house committing suicide. Wife estate was precluded from recovery.
    - Now s35 allows for recovery by innocent co-insureds for their proportionate share of the loss for property damage. Limited to natural persons.
        - The limitation to property is a gap which law reform will hopefully address.

- BC Ins (V) s 76(6)(c) Act modifies for auto insurance stating that a third parties claim is not effected by the insured's criminal activity.

Suicide

- Common law position was no recovery for death by suicide.
  - It is an intentional act, and was interpreted as not being within the scope of coverage (*Husak*)
  - The decriminalization of suicide had not effect on this.
- BCIA s 56(1) allows recovery for suicide where permitted by the contract.
  - Typically policies will have a time period with a suicide exclusion to prevent someone contemplating suicide to accumulate lots of insurance. This would restart upon reinstatement.
  - If the policy is silent the common law position remains. *Husak* – interim policy had no suicide clause.
- Quebec Civil Code Article 2441:
  - Presumption of validity; life insurance contract is not void for suicide
  - Insurer may expressly exclude payment for suicide but only up to two years.

Claims Process

- At this point there is a valid contract, and a loss has occurred. Looks at the rights and obligations of the parties at this point.

Obligations on the Insured

Notice of Loss

- An insured must provide timely notice of a loss and intention to make a claim
- Statutory requirements:
  - General insurance contracts BCIA s29 Stat Cond 6: "immediately give notice in writing to insurer"
  - Accident and Sickness BCIA, s. 101, stat. cond. 5: notification within 30 days after claim arises
  - Auto BC Ins (Vehicle) Reg. 477/83, Schedule 10, cond. 4 & 5: promptly give insurer written notice
- The notification requirement is triggered when a reasonable person would have known that a claim was possible (*Marcoux v Halifax*).
  - It is irrelevant that the insured acted in good faith.
  - Result: claim is forfeited
- There is no forfeiture for failing to notify the insurer unless they suffer prejudice (*Brisette v ICBC*)
  - Here the insurer was aware of the claim, had assigned a claim number, and begun investigating. Late notification did not prejudice ICBC.
- Insurer is required to provide proof of loss claims upon receipt of notice of loss, or within 60 days BCIA s 27(1)
  - BCIA s 27(4) providing the forms does not prejudice the insurer
    - Does not imply the insurer finds the claim to be valid or covered
  - BCIA s 27(2) failure to provide the forms prevents the insurer from relying upon a limitation period defence under s 23(2)
  - BCIA s 27(3) Insurer may be relieved of obligation to provide forms if loss adjusted to satisfaction of insured/payee within 30 days from notice of loss
- A&S BCIA s101 Stat. Cond. 6
  - Insurer must provide forms within 15 days of receipt of notice of loss of the insured may provide proof of loss in another form.

Proof of Loss

- This is a broader requirement than notice of loss.
- Timing:
  - Gen Ins Contracts BCIA s 29 Stat. Cond. 6: Statutory declaration of proof of loss as soon as practicable
  - A&S BCIA s 101 Stat Cond 5/6: Proof of loss as is reasonably possible in the circumstances within 90 days and in any event not exceeding 1 year
  - BC Ins (V) Reg 447/83 s 73: prompt written notice of all available particulars
- Purpose: to allow the insurer to assess the validity of the claims.
- Breach of a breach: the claim will be forfeited subject to waiver / estoppel, and the contract remains valid.

Duty to Cooperate

- The insured must assist the insurer in their investigation.
- In the context of liability insurance:
  - Insured is not to assume liability to a third party.
  - Assist insurer in defending the third party claim
  - Possibly let insurer take over the litigation
  - Provide necessary information for settlement
- Prejudice of insurer's interest could result in forfeiture but it must be material and substantial

Fraud by Insured

- Post loss obligations are informed by the duty of good faith.
- The insured is not to wilfully conceal material information or provide misinformation.
- The onus is on the insurer to prove fraud
  - This requires proof that the insured knowingly or recklessly made false representations – actual fraud.
  - Inadvertent mistake or omission is not sufficient for fraud.
  - The fraud must be material to the claim
  - There is a presumption of fraud when there are grossly overvalued claims, but this can be rebutted by proof of honest mistake.
- Consequence of finding fraud:
  - Claim is forfeited but contract remains valid (BCIA s 29 stat cond 7); Auto Ins. (Vehicle) Act s 75)
  - However, unilateral termination remains open to the insurer
  - The amount of fraudulent claim is irrelevant.
  - There is no relief against forfeiture for fraud (*Swan Hills*)
  - Punitive damages may be assigned against the insured.

Excusing a Breach by the Insured

- BCIA s. 13 allows for relief to be granted by the courts and incorporates s. 24 of the Law and Equity Act, which states "The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit."
- Section 13 allows for relief against forfeiture if it would be inequitable to allow it, or to relieve from termination if application is received within 90 days, in the following scenarios:
  - Imperfect compliance with post loss statutory conditions or contractual terms
  - Termination notice was not received due to the insured being absent from their address.
  - This does not cover pre-loos breaches or non-compliance (*Jackson v Canadain Northern Shield*) or expired limitation periods (*National Juice Co*)

- Section 13 requires a valid contract for which relief is to be granted upon:
    - Non-payment of premiums results in no relief (*Pluzak*)
    - Vehicle registration and licence are required for valid auto coverage.
- Relief must be fair and not prejudice the insurer. This means that it must be unintentional and reasonable. Example: waiting 12 years to claim is too long and not reasonable (*Pilotte*).
- If relief is not possible under s13, consider s. 32 and *Law and Equity Act* s. 24.

Waiver and Estoppel

- Section 14 of the BCIA cover waiver and estoppel, and are also applicable to life (s38) and A&S (s93) as well.
    - S. 14(1) excuses failure to comply with a condition that that the insured has indicated they do not intend to enforce by (a) written notice or (b) if it can be reasonably inferred from the insurer's conduct.
    - S. 14(2) states that there is not a waiver of terms by the insurer for participating in dispute resolution, delivering proof of loss forms, or investigating a claim.
    - There is no distinction between pre and post loss breaches under this section.
- This is a substantive legal doctrine and not based upon the discretion of the courts. There is also no consideration or prejudice to the insurer as these doctrines are based upon the insurer's own actions.
- Waiver requires written communication to the insured and does not require any detrimental reliance.
    - The insurer must knowingly abandon their rights. Paul v CUMIS: the insurer was unaware that Mr. Paul was no longer alive and could not have waived the right to rely upon the given term.
    - It would be unfair to allow the insurer to retract such a promise without notice.
    - Sask River Bungalows: Extended grace period and then reinstatement were sent; however the insured waited far to long to rely upon the waiver by the insuerer as it would not longer be reasonable.
- Estoppel does not require written communication but does require proof of detrimental reliance. It can be by representation or promissory estoppel.
    - When the insurer decided to defend despite having no duty this constituted waiver by representation. (*McConnell*)
        - Here there insured may have taken different steps had they known they were not covered.
    - There cannot be promissory estoppel where it is clear that the insured had not give up rights (*Maracle*).
    - In *Paul v CUMIS* there cannot be estoppel as detrimental reliance cannot occur once the insured is dead.
- Insurance industry practice has now lead to reservation of rights (unilateral communication) / non-waiver (mutual agreements) statements to prempt claims of waiver or estoppel.

Insurer's Obligation to Respond in Good Faith

- The insurer has a duty to respond to claims in good faith. This does not require the insurer to always be correct so long as their course of action was reasonable and in goof faith.
- Failure to comply with this can result in punitive damage awards in the millions. Example: *Branco* $4.5 million in punitive damages.
- Timely payment of claim is required if there no grounds upon which the claim could be contested. Putting forth allegations of arson when there is no evidence is a breach of this (*Whitten v Pilot*), which lead to a large award of punitive damages.
- Denial of benefits does not equate to a breach of the duty of good faith. (*Fidler v Sun Life*)
    - Was it based upon a balanced or reasonable assessment of the insured's claims?
    - No strategic exploitation of the insured's venerable position.

- Can have mental distress damages even when there was no breach as insurance contracts are for peace of mind (*Fidler*)

Duty to Defend

- The duty to defend stems from the duty to indemnify in liability insurance. It is however a broader duty.
  - The duty to defend is both an obligation and a right that is on the insurer.
  - Duty to defend is a separate duty from the duty to indemnify (*Great West*). This is because there is no determination on whether the insurer has a duty to defend until the conclusion of the litigation.
- Pleadings Rule: The pleadings govern the duty to defend, and require a mere possibility that a claim that is within the policy will succeed assuming that the pleadings are true. (*Nichols v American Home Assurance Co*)
  - This is based upon the true nature of the pleadings not what words the plaintiff has used to describe the claim (*Sclera*).
  - External evidence expressly referred to in the pleadings is allowed, however there has not been a definitive statement as to other external evidence (*Moneco*).
- The test for whether there is a duty to defend comes from *Sclera*:
  - Are the allegations properly pleaded?
  - If there are multiple claims are some derivative in nature?
  - Do the non-derivative claims fall within the scope of coverage?
- When the pleadings are ambiguous the duty is triggered if a reasonable reading of the hole pleadings gives rise to an inference of a claim with in the scope of coverage (*Moneco*)
  - The insurer can go forward using a non-waiver agreement rather than litigate against their own insured to determine this.
- Outstanding issues:
  - Can the defence statement be considered?
  - Severability of claims: there are both covered and not covered claims.
  - Use of extrinsic evidence not referred to in the pleadings.
- Severability:
  - In *Sommerfield v Lombard* the court apportioned 20% of the cost for defence of covered negligence claims which were in the same cause of action as abuse claims. This was based upon a dinging that the abuse claims are more complex will be the focus of the defence.
  - The insurer is liable to defend for covered claims regardless of if it also aids the defines of an uncovered claim (*Hanis v Teevan*).
- When there are overlapping polices there maybe be multiple insurers with a duty to defend.
  - When both polices are triggered the principles of fairness and equity are to be used to determine apportionment. (*Broadhurst*).
- Apportionment of defence cost for auto insurance is cover by BC Ins (V) Act s. 79(5) which states that there will be apportionment of defence const cased on liability for damages.
  - There is no strict rule as to who controls the defence. The court will determine who the most appropriate insurer is which is usually the insurer who has the most to loose.
  - Even when one insurer is at greater risk they still have a duty to consult with other at risk insurers (*Econ Mutual v ICBC*).
- The Insurance Bureau of Canada recommends that the primary insurer bear the duty and cost of defence. The excess insurer may participate but then they must split the cost 50-50.
- Remedy for breach of the duty to defend:
  - The insured can seek a declaration that the insurer is required to defend them.
  - It is a breach of the contract so the insurer would be liable for defence costs and indemnification.

    - The insurer is unable to resist the cost of indemnification on the basis that they did not control the proceedings.
    - If the insurer unreasonably refuses to defend they are not entitled to deny indemnification for a reasonably settlement. They have waived the right to insist upon compliance with condition that the insured not accept liability (*Stevenson v Reliance Petroleum*).

Duty to Settle Within Policy Limits

- The insurer controls the defence and settlement negotiations. Because of this they must act in good faith with respect to the insured's interests.
- This can involve proactive settlement offers to insure the insured's interests are looked after.
- The insured may also have non-financial interests which the insurer is to respect, such as reputation.
- The insurer is not to unreasonably refuse settlement offers within the policy limits (*Shea v MPIC*).
- The extend of the duty is for the insurer to act in a fair and open manner.
    - In *Fredrickson v ICBC*, the insured lied about having a good defence and had no desire to settle. There was no breach of the insurer's duty to settle here.
- Consequence of a breach of the duty to settle: the insurer is liable for the entire judgement (*Dillon*)
- There can be a conflict of interest between the insurer and insured being represented by the same council. When there is a reasonable apprehension of a conflict of interest independent counsel for the insured is appointed and paid by the insurer.

Overlapping Policies and Indemnity

- Only applies for indemnity insurance.
    - The insured's recovery from co-insurers is limited to the actual loss
- Issue of how to divide the cost of indemnity when there are multiple policies triggered.

Do the Policies Overlap

- Test to determine if all of the polices are triggered by a loss (*Lombard*):
    - Cover the same subject matter
    - For the same risk
    - For the benefit of the same person
    - All policies were effective at the time of loss
    - And there were no applicable exclusions
- Overlapping policies are not affected by different wording, limits or scope of coverage
- The nature of the interest in the property for polices held by a morgagor (as land owner) and morgagee (as security interest) were found to be sufficiently different as to not result in overlapping policies. (*Clarke v Findly-Fire*).
- A university residence president was not found to be covered by overlapping polices as his parents home insurance had a business exclusion. This left only the University's general liability policy (*Canadian University Ins v Halwell*). 250 634 3190
- When the nature of the interest protected is different the polices do not overlap. Here is was a primary and excess insurer. (*Mackenzie*)

Common Law Contribution

- At common law the insured is entitled to fully indemnity from the insurer of their choice. That insurer is then in turn entitled to equitable contribution from all other insurers (*Family Ins v Lombard*).
- Contribution is an equitable doctrine, and is therefore governed by fairness.
    - There is no contract between co-insurers, and therefore no contractual right to contribution.
    - When on insurer convinced the insured to change companies, but didn't meet the statutory termination requirements contribution was not granted. The insured did not intend to have both sets of coverage, and the insurer who convinced the insured to leave the other was not entitled to recovery in equity (*Continental Ins v Prudential*).

- Indemnification by other insurer's is not a defence.
- Contribution can not be sought under a subrogation claim (*Cameco v Pennsylvania*).
- Apportionment at common law is done using independent liability for liability insurance and maximum liability for property insurance. (*Commercial v Hayden*)
    - Independent liability is equal contribution up to policy limits (*Family Ins v Lombard*).
        - With liability insurance there is not a correlation between premiums and risk or policy limits.
    - Maximum liability is coverage proportionate to policy limits.
        - With property insurance there is a correlation between premiums, policy limits, and property values.
    - This can be varied by the wording of the contract or by agreement between insurers.

Modification by Statute and Contract

- Statutory modification for general insurance contracts (BCIA s30) and auto (BC Ins (V) Act s80(1)) states the insurers only have an obligation to the insured to pay a rateable share subject to express agreement between insurers.
    - Note there is not statutory modification for A&S which is generally indemnity insurance.
    - Result: several liability
    - Insured must seek coverage from each insurer and no co-insurer is required to pay for the entire loss.
    - If a co-insurer covers the entire loss: they can recover from the insured as they are indemnified by others, subrogate as claim against a third party, contribution may still be possibly as it is equitable and based upon unjust enrichment.
- Notice of co-insurance and amount is required by statute at time of loss.
    - General Ins: BCIA s 29 Stat Cond 6(1)(b)(iv)
    - Auto: BC Ins (V) Act s 80(2)
    - No statutory requirement for A&S; however it is usually included in the terms of the contract.
- BCIA s30 creates a system of primary and excess insurers to minimize the occurrence of overlapping policies.
    - S 30(6) Items specifically covered and named – this will be the primary coverage, and general policy will be treated as excess insurance.
    - It is irrelevant what is in the policies for this; however can be altered by mutual agreement of insurers.
- There is also a statutory scheme reducing policy overlap for auto insurance
    - If the vehicle and the driver have separate polices the primary insurance is the coverage for the vehicle, (Ins (V) Reg 447/83 ss 77, 104)
    - Compulsory auto insurance is primary coverage and optional coverage is excess (Ins (V) Reg 447/83 s 149(1)), except for:
        - Nuclear energy hazards (Ins (V) Reg 447/83 s 175(1))
        - Garage insurance (Ins (V) Reg 447/83 s 150.1)
- Contractual modification: other insurance clauses, which turn primary to excess insurance when there is a co-insurer.
    - Due to freedom of contract insurers may include such clauses subject only to the statute.
    - When both primary insurers have other insurance clauses in the contracts and refuse to pay the court will render the clauses inoperative (*Lombard*)
        - This is limited to a true impasse where to do otherwise would leave the customer without coverage.
    - When there is a primary policy with an other insurance clause and an excess insurance policy this is not irreconcilable and the primary policy stays as such (Mackenzie)

Subrogation

- Subrogation rights apply automatically to indemnity policies and do not require a separate clause (*Glynn v Scottish Union*).
- Purpose of subrogation is to preserve the principle of indemnity and to ensure that the loss falls to the part who is legally responsible (*Somersall v Friedman*).
- Operation:
    - Insurer indemnifies the insured, then the insurer sues the third party. If the insured was not fully indemnified they are entitled to that recovery.
    - Third party fully compensates the insured. No claim available against the insurer
    - Insured recovered from both insurer and the third party, then the insured must reimburse if the total recover exceeds the loss suffered (*Castellain*).

At Common Law

- There is no right to subrogation until the insured has been fully indemnified (*Ison* and *Causton*).
    - It must be carefully scrutinized whether payments from third parties are for insured or uninsured losses in making this determination (*Willumset v Royal Ins*)
    - In *Ison* it was held that the insured was not fully indemnified for losses at a car dealership by the insurer only paying for the factory prices as there also would have been lost profits.
    - Full indemnity also includes the reasonable cost of recovery, such as legal fees (*Confederation v Causton*).
- The manner in which the insured recovers from a third party is irrelevant. (*Castellain v Preston*)
    - Insured was required to repay money claimed under a fire policy where they also recovered the full value from a third party due to the terms of a purchase agreement.
- The insured is able to pursue the action against the third party, but has a duty of good faith and diligence with regards to the interest of the insurer (*Somersall v Friedman*)
    - There is no presumption of bad faith for settling less than for the full amount. The question is did the insured claim less than what they honestly and in good faith believe was wise? (*Trudell*).
    - It was found to be bad faith when an insured settled for less than he had claim to based entirely off of having the insurer cover the rest. This was also made the
- The insurer is entitled to subrogation if they paid the insured based upon an honest belief that they were liable under the policy (*Wellington Ins v Armac*).
- There is only one cause of action available against the third party.
    - This insurer cannot be in a better position than the insured would have been in (*Dwyer v Liberty Ins Co*)
    - Following fully indemnification the insurer controls the action for the subrogated claim, with the corollary being that until full indemnity has occurred the insured controls the litigation (*Somersall*)
    - The insurer is therefore interested in the outcome of the litigation if it is pursued by the insured.
- An insurer cannot subrogate against their own insured, this includes finding them vicariously liable for an uninsured third party (*Condominium Corp v Statesman*)

Modification by Statute of Contract

- For the common law to be altered by statute it must be very clear.
- BCIA s36 and BC Ins (V) Act s84(1): The insurer must only make a payment or assume liability to have the option to pursue the right of subrogation.
    - S 36 does not alter who has the right to control the litigation, so it remains the insured who does up until full indemnity but with the duty of good faith (*Ison*, *Farrell Estate*).

    - S 84(3) gives the insurer the right to control litigation where the loss is limited to the vehicle. For other loss the court may make an order based on the interests of both parties as to who controls the litigation (s84(4)).
    - S 84(6) for auto states that a release statement resulting from settlement by one party does not bind the other. *Dwyer* expressed concern over what this does to settlement agreements
    - Both generally and auto: Recovery from a third party is prorated based on interest of insured and insurer.
- The court has said that control possibly goes to the insurer when they have paid far more than the loss remaining uninsured (*Ison*)
- The court will not allow insurers to modify the common law without clear contractual terms as they are the more sophisticated party (*Somersall*)