# GENERAL INSURANCE POLICIES

1. Who are we advising?
    1. if insured—coverage, policy is not void
    2. if insurer—exclusion, policy is void
2. What type of policy is in question?
    1. Life/accidental death
    2. Property
    3. Broad form
    4. CGL
    5. Professional liability
    6. Homeowner's liability
3. What is the claimed loss?
    1. Death
    2. Property damage
    3. TPL
4. Is the claimed loss excluded?
    1. How does the policy define the claimed loss?
        1. Does the claimant fall under definition of insured under the policy?
5. If ambiguity or undefined, apply the rules of construction
    1. Plain, ordinary meaning + CL definition
    2. reasonable expectations of the parties
    3. Commercial efficacy
6. If ambiguity persists, contra proferentem
7. Is there a reason to void the entire policy or the impugned part?
    1. Failure to disclose scope of risk
    2. Material misrepresentation
8. Does DTD or DTI arise?
9. Is either party in bad faith?
    1. If insured—k is void
    2. If insurer—punitive damages
10. If policy survives and claim is successful, indemnify and subrogate

In the event of litigation, any argument will necessarily be determined by the relevant party's interests. The insured will always argue for coverage, whereas it is likely an insurer will argue for an exclusion, or to void the entire policy. The first point is determining the type of policy and the claimed loss. Next, the insured will argue that claimed loss is covered, while the insurer will argue it is excluded. If the claimed loss is not defined within the policy, the parties follow the approach to interpretation as elucidated in **Progressive Homes**.
Paragraph about interpretation

If accident—>paragraph(s) about fortuity and accident
Reasonable expectations of the parties, commercial efficacy
If accident persists, contra proferentem

## GENERAL PRINCIPLES

- Insurance is purchasing protection against an unforeseen contingency, not inevitable fact
- Insurance k definitions
    - Declaration: identities of parties, property, period, premium, deductible
    - Risk: what is being insured (business, home, professional liability)
    - Perils: cause of loss
    - Deductible: the upfront cost of the policy, what the policy does not cover
    - Self-insured Retention: a certain amount that will come out of insured's pocket
- Property insurance: first party coverage
    - risk of physical damage, physical loss, and consequential damage
    - named peril vs all risk policies
- CGL: third party coverage against claims from third parties (ie clients, patients)

Insurance policies provide protection against an unforeseen contingency. For a small price, individuals can purchase protection against an unexpected event. This event cannot be an inevitable fact. It must be fortuitous. Insurance law is based mostly in k law. Insurance policies are aleatory in that they may never be executed due to the protected event never occurring.

## FORTUITY AND RISK

- Fortuity: fundamental concept in insurance law, things that happen **by chance**
    - Was loss caused by interaction between object and environment or result of internal qualities?
        - Something that is an uncertainty or mishap
- All risk policies: insured establishes the loss happened through causality/accident—onus shifts to insurer to show exclusion (**Gaunt, Brennan**)
- onus is on insured to show fortuity (**Gaunt**)
- event is not an accident if it is bound to happen in the normal occurrence of events (**Brennan**)
- fortuity limited by the foreseeability of the actions

Fortuity is a fundamental concept in insurance law. It refers to things that happen by chance. When determining whether to provide coverage for a loss, an insurer must ask if the loss was an inevitable result. For a loss to attract coverage under most policies, it has to occur from without rather than within.

All risk policies insure all risks of physical loss except where excluded in the policy. The insured establishes that the loss happened by a casualty or accident, thereby rendering it fortuitous. This shifts the onus to insurer to show the loss falls under an exclusion (**Gaunt**). An event is not fortuitous if it is bound to happen in the normal course of events (**Brennan**).

### British and Foreign Marine Insurance Co v Gaunt

F: Wool gets wet on ship damage.
I: Is the damage covered?
H: Yes
R: Insurance policy was all risk, but these policies do not cover ordinary wear and tear and inevitable depreciation. Coverable damage must be caused by fortuitous circumstances of casualty. All risk covers a RISK, not a certainty, something that happens from without rather than within.

### Brennan v Economical Mutual Insurance Company

F: Soot left over from tenants.
I: Coverable damage?
H: No
R: Necessity of fortuity comes from recognition that insurance ks are commercial transactions—both parties intend to conclude a commcerially sensible arrangement. To trigger all risk insurance, P has to establish that damage was due to casualty or accident. D can rebut by disproving the facts that triggered coverage or proving additional facts that might take it outside the coverage. Landlords must accept that tenants will use the premises in a certain way, including lighting candles, so the soot was not fortuitous.

### What is an accident?

- Accident is any unlooked for mishap or occurrence that typically results in damage/injury (**Celestica**)
    - look at definition of accident in insurance k
- Synonym for fortuitous event (**CBG**)—damage resulting from unintended defect is an accident
- Look at entire facts of case and contents k of to determine meaning of accident within the policy (**Progressive Homes**)
    - probably overrules Celestica

**Progressive Homes** is the leading case in interpreting accidents in insurance ks. Following the framework of PH, judges must look at the entire facts of each individual case and the contents of the insurance k to ascertain the meaning of accident within that particular policy. In general, an accident is any unlooked for mishap or occurrence that typically results in damage or injury (**Walkem**, **Celestica**). If the policy does not define accident, there will be

an ambiguity in the policy. In this scenario, judges will have to interpret the k according to rules of k construction. If these rules do not resolve the ambiguity, contra proferentem will apply to absolve any ambiguity, reading exclusion clauses narrowly and coverage broadly (**PH**).

When determining whether the loss was fortuitous, and therefore accidental, the parties' state of mind at the time the policy was drafted is the relevant measuring point (**CBG**).

### Celestica Inc v Ace Ina

F: Supplier of photocopiers gives out shoddy devices and is sued, tries to recover costs from insurance.
I: Coverage?
H: No
R: Accident is any unlooked for mishap or occurrence. Court must find that there was accidental damage to third party property. Good policy reasons to find that shoddy manufacturing does not constitute accidental damage.

### Progressive Homes

Leaky condo case goes to SCC

- even if third party claim is dismissed, insured still owes duty to defend if the statements, possibly true, could attract coverage
- Ambiguity—>k construction rules—>coverage broadly + exclusion narrowly (contra proferentem)
- whether defective workmanship is an accident is necessarily a case-specific determination depending on the circumstances of the defective workmanship and the way "accident" is defined in the policy

## Subjectivity Requirement

- Parties' state of mind at time policy was drafted is relevant for determining fortuity (**CBG**)

### CBG

F: CBG held all risk insurance in primary and excess, wants to recover for machinery failure. Damage was caused by incompetent engineers.
I: Coverage?
H: Maybe
R: Accident is synonymous with fortuitous event. A loss can occur due to fortuitous event and still be excluded under k.

## Accident vs intention exclusion

- Something is not an accident if the individual deliberately and intentionally courts the risk that results in reasonably foreseeable consequence (**Crisp**)
    - reckless conduct is deliberately courting the risk
- Court looks at nexus of foreseeability of result from the actions (**Candler**)
    - immaterial whether the insured intended the consequence itself, but what was the reasonable expectations of the party at the time of the k (**Soucek**)
    - Intentional act that causes accident is not an accident in and of itself, even if the injury is unintentional (**Sainden**)
    - Court looks at entire chain of events and decide whether insured considered whether actions would create the claimed consequences (ie whether insured expected to die) **Martin**
        - intentional harm exclusion: generally universal, measured from standpoint of the insured, exception for self-defence of person or property
    - Unexpected occurrence resulting from expected consequence of an activity is not an accident (**Gibbens**)
- Any unlooked for mishap or occurrence is an accident

Any unlooked for mishap or occurrence is an accident (**Walkem**). The onus is on the plaintiff to show the incident fell within coverage (**Soucek**). Deliberately and intentionally courting a risk that results in a reasonably foreseeable consequence is not an accident (**Crisp**). However, an error in judgment will not amount to deliberate courting of the risk (**Trynor**). In accidental death policies, the court will look to see whether the deceased understood his or her actions would foreseeably lead to an incident excluded under the policy. (**Candler**) For example, in **Candler** the court found that the deceased could have foreseen that climbing up a balcony railing would preclude him from the coverage he reasonably expected upon obtaining the accidental death policy. As a contrast,

the deceased professional stuntman in **Soucek** likely had reasonable expectations at the time of obtaining the accidental policy that accidents arising from his professional stunt activity would be covered. In **Martin**, the deceased was a doctor who had an adverse reaction from a self-administered injection of demerol. The SCC held that to determine whether a death is accidental as a result from an intentional act, one must ask whether the deceased intended the consequences. The deceased in **Martin** was found not to have intended the consequence of self-inflicted death, as he understood the dosage to be minimal and was not aware the medication would create a fatal reaction. An intentional act that causes an accident is not an accident in and of itself, even if the resulting harm is unintentional (**Saindon**). Intentional harm exclusions are generally universal and are measured from the insured's standpoint. These policies often include an exception for self-defence of person or property. Therefore, because the claimant in **Saindon** was not under threat of harm from his neighbour, the damage that resulted from his intentional action was excluded under his home owner's policy. Accidental death policies are not comprehensive health insurance policies, and will not cover unexpected consequences arising from the ordinary course of events (**Gibbens**). The claimant in **Gibbens** suffered from transverse myelitis, a complication of herpes, which the claimant contracted from having unprotected sex. The SCC found the transverse myelitis to be not accidental because it was a disease contracted in the ordinary course of events. These cases illustrate the **Progressive Homes** standard for evaluating the definition of accident according to the individual insurance policies.

### Crisp v Great American Indemnity

F: Dust gets into house while installing terrazzo floors. Owner tries to tell workman to close door while mixing terazzo, but workman deliberately opens it, then workman uses fan to blow dust.
I: Coverage against insurer?
H: Yes
R: Nothing in k about dust. The work was very careless. Liability imposed by law for damage caused by accident can only be so imposed if the accident occurs by reason of a wrongful act of the insured or its servants or officers. If no wrongful act, no liability. Damage is only accidental if wrongful act of the insured was not done knowingly or intentionally ot wilfully. Wrongful act cannot constitute crime.

**Crisp v Great American Indemnity Co (appeal from Delta Tile)**
I: Coverage against insurer?
H: No
R: Workmen knew beyond any doubt what would happen and did not take precautions. The event was the natural, foreseeable, and probable consequence of D's acts, therefore D is liable for all the costs.

### Candler v London & Lancashire Guarantee

F: Guy had life insurance in the event of accidental death that resulted directly and independently of all other causes from bodily injuries. Guy died after falling off of balcony while drunk and showing off.
I: Coverage?
H: No
R: Whether death results from accident or accidental means is determined by the foreseeability of the result naturally following the deceased's voluntary actions—if fall was not unusual or unexpected, then it was not by accidental means. Guy's conduct indicated he knew that what he was doing was dangerous, and his death was a probable, not accidental, result.

### Trynor v  Construction

F: Bridge collapses and destroys tractor.
I: Coverage?
H: Yes
R: Unexpectedness is the overriding element before one can say there has been an accident. Test to apply whether an event was unexpected is whether or not it was the reasonably foreseeable consequence of the act of the person to whom it happens. Deliberate courting of risk precludes recovery in accidental policies. In this case, there was an error of judgment that did not amount to assumption of risk.

### Soucek Estate v Atlantic Mutual Life Assurance Co

F: Guy performs dumbass barrel stunt and dies, has accidental death insurance.
I: Coverage?

H: Yes
R: Onus is P to prove facts show coverage. When construing insurance policies one must resolve doubt and ambiguities in favor of the insured. Guy's intention was the the barrel would drop into the tank, so his death was an accident.

### Walkem Machinery

F: Repairs on a crane were inadequate and caused a collapse.
I: Coverage?
H: Yes
R: Proper test for accident is any unlooked for mishap or occurrence.

### Saindon

F: Guy throws lawn mower at his neighbour.
I: Coverage?
H: No
R Dissent: An act or omission that involves calculated risk or amounts to a dangerous operation from which injury or damage results cannot be done with intent to cause the injury in the absence of a specify finding of intent.
Majority: Dominant cause of the injury was the deliberate act of throwing the lawn mower, which constituted criminal conduct and in breach of public policy. Accident involves something fortuitous or unexpected, but does not necessarily include wilful and culpable act.

### Martin v American International Assurance Life

F: Guy gets addicted to opiates after getting treatment for ulcer, later dies from OD on demerol.
I: Accidental death coverage?
H: Yes because he did not expect to die.
R: Accidental means coveys the idea that the consequences of the actions and events that produced death were unexpected. Means refers to one or more actions or events seen under the causal relation to the events they bring about. To determine whether death is accidental requires determining whether the consequences were expected. Death by accidental means is death that has been brought about unexpectedly. Pivotal question is whether the insured expected to die.

### Gibbens

Unprotected sex leads to herpes, herpes leads to severe physical illness

- accidental policy is not a comprehensive health insurance policy
    - contracting disease occurs in ordinary course of events, so not an accident
        - severe complication still results from ordinary course of events (unprotected sex)

## Externality

- For incident to attract coverage, something naturally happening is insufficient (**Triple Five**)
    - ie most broad form will exclude latent defect because it is internal rather than external
    - accidental death policies exclude death from natural causes and consequences of natural causes (**Wang**)
    - Injury is accidental when insured assumes voluntary act and injury requires no other cause than the voluntary act (**Guillet, Voisin**)
    - Unexpected or tragic consequences of a natural occurrence (being bitten by mosquito) are not accidental in their own right (**Kolbuc**)

For an incident to attract coverage under a broad form policy, loss caused by an inherent and internal defect in the equipment will likely be excluded (**Triple Five**). In accidental death or injury policies, the SCC has held that an unforeseeable complication arising from a foreseeable consequence of a naturally occurring event does not constitute an accident (**Gibbens**). In **Wang**, the complication of death resulted from the foreseeable, albeit statistically improbable, consequence of an amniotic fluid embolus, which itself arose from the natural process of childbirth. Therefore, the death, while an unforeseen complication, was not accidental as it arose from an internal consequence. **Guillet** can be distinguished on the facts from **Wang**. The claimant in **Guillet** experienced persistent disability after suffering a stroke from trauma likely caused by neck torsion. It was not reasonably foreseeable that the natural and voluntary action of turning one's neck would result in the consequence of a stroke and resulting

complication of a disability (**Voisin**). This loss was found to be covered under the claimant's accidental injury policy. Finally, in **Kolbuc** the claimant became paraplegic after contracting West Nile virus from a mosquito bite. While the paraplegia was a tragic complication, it arose from a foreseeable consequence (ie West Nile virus) of a naturally occurring event (ie being bitten by a mosquito). Therefore the loss was not accidental under the definition of the claimant's policy. **Gibbens** establishes the standard for accidental injury/death policies, and implies that a coverable loss in these policies requires an element of externality and objectively reasonable foreseeability. The expectation test from **Martin** is only applicable when the insured undertakes a positive physical action that leads to the loss (**Guillet**).

### Triple Five v Simcoe

F: Mall roller coaster goes off track and kills a bunch of people. Claim is for repair of roller coaster.
I: Coverage?
H: No
R: All risk policies only insure against perils external to the property. Courts put external limit because business sense of the matter is that this was a policy designated to warrant the fitness of the property when purchased or built.

### Wang v Metropolitan Life

F: Woman dies from amniotic embolism during childbirth, husband tries to claim life insurance.
I: Accident?
H: No
R: Accident is something fortuitous and unexpected. . Amniotic fluid embolism is rare, unpredictable, and non-preventable. Almost all accidents have some deliberate actions among their immediate causes. Accidental nature of someone's death depends on the consequences that the insured had or did not have in mind. Expectation test is not appropriate in a case where death results from a natural cause. Woman's death was only a figurative accident of nature.

### Guillet v American Home Co

F: Guy has stroke while playing basketball, permanently disabled, trying to benefit under accident policy.
I: Accident?
H: Yes
R: New approach to determining if death occurred by accidental means is to look at chain of events as a whole and determine whether the insured expected death to be a consequence. An injury can be accidental where an insured engages in a voluntary act not intending to cause himself harm and the consequent harm could not reasonably have been foreseen or expected. Insurers can change their policies if they don't want things like this covered.

### Kolbuc v Ace Ina Insurance

F: Guy gets West Nile, becomes paraplegic, tries to recover from accidental policy.
I: Accident?
H: No
R: There is a distinction between accidental injuries and injuries that result from natural causes. The rarity of the consequences is not determinative of whether something is accidental. Policy included injuries resulting from hazardous exposure to the elements, but the loss has to be accidental. Affirms Wang.

## Scope of Risk

- Accident is something out of the ordinary, not within the scope of the insured risk (**Andrews/George**)
- Interpret policy by looking at actual wording (**Crest Homes**)—public policy not an interpretive tool anymore (**Privest**)
- Unforeseen failure of state of the art novel equipment is not inherent vice (**CNR**)

An accident is not within the scope of the insured risk because it is unexpected and out of the ordinary (**Andrews**). Courts once used public policy to interpret the meaning of accident within CGL policies (**Privest Celestica**). However, the prevailing trend is to interpret the term from the wording of the k itself rather than rely on public policy (**Crest Homes, Progressive Homes**). The dissent in **CNR**, later adopted by the majority in **PH**, stated that defining the scope of risk was a matter of k interpretation instead of balancing public policy interests.

### Andrews & George v Canadian Indemnity

F: Defective glue, affected company wants to recover from accident insurance.
I: Coverage?
H: No
R: Where a k expressly or by implication of fact provides for a performance with care, general duty is not displaced and injured party may sue in k or tort. The damage for which indemnity is given by the endorsement is damage caused by an accident which occurs during the term of the policy and which arises after the goods have the left the insured's premises.

### Privest Properties v Foundation Company of Canada

F: Asbestos case.
I: Coverage?
H: No
R: A contractor has effective control over all project work and materials, building damage caused by faulty workmanship or use of defective materials constitutes a business risk to be borne by the general contractor and by the contractor's CGL insurer.

### CNR v Royal Sun Alliance

F: Boring equipment gets damage, CNR has all risk policy that excluded faulty design or inherent vice.
R: Coverage provisions should be construed broadly and exclusion clauses narrowly. Contra proferentem applies if and only if when all other rules of construction fail. Canadian courts have traditionally conflated faulty with designer negligence. It is not necessary for insurers to show exactly how the failure occurred or to demonstrate negligence on the part of the design team.

## Occurrence/Claims Made Policies

- Liability is governed by chain of causation—look at where chain began, but also where the actual accident occurred (**Pickford Black**)
    - a continuous process without intervening inextricably bound up with the damage is cause of the accident (**Cansulex**)
- event which gives rise to obligation to indemnify under terms of the policy is relevant occurrence of loss or damage (**U Sask**)
- no particular theory of when damage occurred will apply, always dependent on the facts of the case and depends on when the damage is complete (**Alie**)
- claims made policies will always be determined by the particular policy (**Reid Crowther**)

Liability is governed by the chain of causation. The court must consider where the chain began and where the actually accident occurred (**Pickford Black**). A single continuous process inextricably bound up with the resulting loss will likely constitute the cause of the accident (**Cansulex**).

There are several damage theories that can be argued in insurance k interpretation (**Privest**). In cases where there is a significant lapse of time between the exposure to the peril and the manifestation of damage, courts are almost unanimous in apply exposure theory (**U Sask**). Exposure theory is based on the premise that exposure alone to the harmful condition is sufficient to cause damage within the meaning of a CGL (**Privest**)

Insurer's obligations under a claims made policy depends on when the claim is made instead of when the negligent act giving rise to the claim occurred (**Reid Crowther**). Liability for negligent acts under a claims made policy that predate the current policy is covered provided the claim is made during the policy period (**RC**). Occurrence policies require the insurer to indemnify the insured for all loss arising from it, regardless of when is a claim is made for that loss (**RC**). Claims made policies are appropriate for professional liability policies, as the damage can become apparent many years after the negligent act. CM policies increase predictability for the insurer but decrease coverage for the insured, as the discovery of a claim may increase premiums prohibitively or result in a refusal to grant renewal. Insurers are able to to obtain extensive information about an insured's potential claims before granting coverage permits them to avoid indemnifying for these potential claims. (**RC**) Occurrence policies are more beneficial to automobile owners because the damage is often immediately known. (**Reid Crowther**)

### Pickford Black

F: Stevedorers loaded electric equipment that gets damaged and get sued for negligence. They sue insurers for coverage.

I: Coverage?
H: No
R: Policy did not cover anything happening outside of Canada or US. The accident was the shifting of cargo—one must be governed by where or when the chain of causation began (ie where did the chain of causation begin?). Even though the negligence began the chain of causation, it is not enough to locate the accident back in Canada.

### Cansulex

F: Wet sulphur, Cambridgeshire case.
I: Coverage?
H: Yes
R: Accident was not a a single dramatic event separated from subsequent damage as in Pickford Black, but an unexpected and unlooked for result of events at dockside which culminated in damage outside Canada. There was continuous ongoing process. The damage in this case was inextricably bound up with dockside negligence. Accident occurred when the sulphur was place in ship's hold—after possession had changed.

### Privest Properties v Foundation Company of Canada

R: Duty of the judge in the first instance to furnish a basis. Exposure theory is based on the premise that mere exposure to harmful conditions will be sufficient to cause damage within the meaning of a CGL. Manifestation theory holds that injury or damage does not occur until the injury or disease becomes apparent. Continuous theory is based on the premise that the developing injury or damage represents a continuous series of new injuries. Injury in fact asks when did the injury or damage actually occur—need not be manifest, just exist in fact.

### U Sask

F: Coverage against all risks of direct physical loss or damage from any cause subject to exclusions. Building starts to fall down due to state of the art design error.
I: Coverage?
H: No
R: Manifestation theory holds that no damage occurs until it manifests, while exposure theory fixes the loss at the time the property becomes exposed to the peril that later causes damage. Authorities are almost unanimous in applying the exposure theory to cases where there was a significant lapse of time between the occurrence of exposure to the peril and manifestation of damage. Policy insured against all risks of physical loss or damage—application of manifestation theory would change this to discovery of physical loss or damage. Manifestation theory would require the insurer to pay for loss and damage which occurred before it came on the risk, which is not indemnity.

### Reid Crowther

F: Engineering firm has claims made policy where indemnification only arose where a claim was first made against the insured during the policy period. Firm did shitty job designing sewer system.
I: Coverage?
H: Maybe
R: Occurrence policies cover liability inducing events occurring during the policy term, irrespective of when the claim is made, vice versa for discovery policies. Courts must treat each policy separately. Occurrence works well for property insurance, but claims made is more apropos for professionals where damage can result many years after the negligent act. Claims made policies increase predictability, but diminish coverage.

## INSURABLE INTEREST

- factual expectation test: insurable interest if benefit from existence, prejudice from destruction (**Kosmopoulos**)
    - policy will not allow thief or wilfully blind subsequent purchaser of stolen property to recover under factual expectancy test because not BFPV (**Assad**)
- Must be a pecuniary interest, must be real/presently vested in insured, not established by legal title alone

An individual cannot obtain an insurance policy unless he or she possesses an insurable interest (**Kosmopolous**). The interest must be pecuniary, real and presently vested in the insured, and cannot be established

through evidence of legal title alone. The court will apply the factual expectation test which regards something as an insurable interest if the would-be insured benefits from its existence and would prejudice from its destruction (**Kosmopolous**). However, the court will not allow a thief or wilfully blind subsequent purchaser of stolen property to recover under the factual expectancy test because the would-be insured obtained the interest in bad faith (**Assad).** Under s 46 of the Insurance Act, life insurance constitutes an insurable interest.

**Kosmopolous**

F: Guy incorporates his company and becomes sole shareholder and director, lessee of building was the guy not the company. He gets insurance in his own name. Building catches on fire.
I: Coverage?
H: Yes
R: Generally, a corporation is a legal entity distinct from its shareholders. The company in question was a legal entity distinct from K, and it legally owned the assets of the business. K was essentially a servant to the master corporation, so he cannot be a bailee. K was sole shareholder with neither legal nor equitable interest in the assets.

**Assad**

F: Guy's car gets stolen, he tries to recover from insurance company. Insurance company says he has no insurable interest because the car was already stolen when he bought it.
I: Coverage?
H: No
R: Factual expectancy test: dominion and control over the vehicle and an expectation of conned benefit from its use at the time it was stolen. Wilful blindness amounting to dishonesty and refusal to ask obvious questions will overturn the presumption of BFPV. The guy was clearly wilfully blind to the origin of the car and cannot rely on factual expectation as a basis for recovery.

## SUBROGATION AND INDEMNITY

- unless expressly excluded, indemnity is controlling principle of insurance ks, liability for indemnity limited to actual loss (**Glynn**)
    - recover full loss, but not more (**Castellain**)
- upon paying claim, insurer is surrogated to the rights of the insured (**Isaacs**)
    - when 2 insurers insure same thing, both can't be called upon to pay loss
- circumstances of subrogation
    - insurer pays loss in full—>subrogation—>all recovery to insurer
    - insurer pays loss in full—>insured sues/recovers—>insured gives recovery to insurer
    - insurer partially indemnifies insured—>insured recovers in full from tortfeasor—>insured pays insurer excess
    - insurer partially indemnifies insured—>insured has obligation to pursue subrogation in good faith
- at CL, no subrogation without full indemnity (**Truedell**)
- **Insurance Act s 36 (1)**: insurer surrogated to all rights of recovery and can bring action in name of insured to enforce these rights
    - (2): if net amount after costs of recovery is insufficient, amount is divided between insurer and insured in proportions in which loss or damage has been borne by them respectively
- Party cannot bring a subrogation action if it has suffered no loss (**Riverside**)
    - cannot subrogate against own insured (**Imperial Oil**)
    - no subrogation where a party agrees to provide and pay for insurance on subject matter of k (**Laing, First Choice**)
- Life insurance is not indemnity, accident insurance with fixed payment not k of indemnity (**Glynn**)
    - ie if there is a specific sum to be paid out, not indemnity

Indemnity is the controlling principle of insurance ks, unless it is excluded under the individual policy. An insurer's liability for indemnity is limited to the actual loss. (**Glynn**). The insurer may recover the loss, but cannot recover more (**Castellain**). When the insurer pays the claim, it obtains the right to surrogate the insured's rights to sue (**Isaacs**). If two insurers insure the same thing, both cannot be called upon the pay the loss (**Isaacs**). At common law, there could be no subrogation without full indemnity (**Truedell**). Under s 36 IA, the insurer is entitled to all

rights of recovery and can bring an action in the insured's name to enforce these rights. Subsection 2 provides that if the net amount after costs of recovery does not cover the loss, the insured and insurer will bear the loss pro rata. There are several bars to subrogation. An insurer cannot bring a surrogated action if it has suffered no loss (**Riverside**), and cannot subrogate against its own insured (**Imperial Oil**). There can be no subrogation where one party agrees to provide and pay for insurance on the subject matter of the k (**Laing, First Choice**). Life insurance policies and accident policies with fixed payments are not indemnity ks because they include a specific sum to be paid out on an established contingency.

**Glynn**

F: Guy gets into car accident, wife gets injured.
R: The mere happening of an event will not grant the insurer coverage. The event must in fact result in a pecuniary loss to entitle indemnity.

**Castellain**

F: K for sale of house that was already insured, but the insurance was not mentioned in the k. Before purchase was completed, house catches on fire. Sellers obtain insurance benefit.
R: Every k of marine or fire insurance is for indemnity only—assured is to receive full indemnity but never more. As between the underwriter and the assured, the underwriter is entitled to every right whether of k fulfilled or unfulfilled, or in tort, enforced or capable of being enforced, or to any other right legal or equitable, which has accrued to the assured, whereby the loss can be or has been diminished.

**Isaacs**

Guys insure a building for 800 pounds, fire loss of 100 pounds

**Truedell**

Guy grossly underinsures his house and barn

**Riverside Equipment**

Insurer brings action in name of third party against its own insurer, purportedly on the right of subrogation.

# INTERPRETATION

## RULES OF CONSTRUCTION

- Rules arise in every case, can be contradictory and largely depends on the judge
    - Intention of both parties is considered, court will look at entire k (**Art Gallery**)
    - K interpretation applies (**Art Gallery**)
    - Language is given plain, ordinary, popular meaning (**Art Gallery**)
- If two open interpretations, there is an ambiguity (**Bathurst**)—triggers interpretation maxims
    - apply all interpretive rules to resolve ambiguity before going to contra proferentem (**Stevenson**)
        - only apply CP to resolve ambiguity, not magnify it
    - accept most reasonable interpretation, intention that promotes sensible, commercial result
- If statement of claim is mixed, determine whether negligence allegations are illusory (**Scalera)**

While **Art Gallery** is not a leading case, it lists many of the guiding rules of construction in insurance ks. These canons of construction include giving effect to both parties' intention, the necessity of looking at the k as a whole document, and reading the k language in its plain, ordinary, and popular meaning. Where there are two possible interpretations of an insurance k, the court deems this an ambiguity (**Bathurst**). An ambiguity will trigger the rules of construction maxims. A court will accept the most reasonable interpretation that promotes a sensible, commercial result (**Bathurst**). A court will not apply contra proferentem to construe coverage broadly and exclusions narrowly until it has exhausted all other k interpretation tools (**Stevenson**). Application of contra proferentem must only be to clarify any ambiguity, rather than magnify it (**Bathurst**). If a statement of claim is

mixed with both intentional and negligent acts, a court will determine whether the negligent allegations are capable of supporting a claim (**Scalera**).

### Art Gallery

R: In insurance k, effect must be given to intention of parties. Insured must make out rights of recovery, insurer must make out any defences or exceptions. Court must interpret the words, not mindset. Document looked at as a whole, words are given their plain and ordinary meaning.

### Consolidated Bathurst

F: Paper product company in QC claim for failed heating equipment, policy excluded damage from corrosion or erosion.
I: Coverage?
H: Yes
R: First ascertain intention of parties from language of k. If there is an ambiguity, apply contra proferentem to favour the insured. Literal meaning should not be applied where doing so would bring about unrealistic result or one not contemplated. Courts should try not to support a construction which would either enable the insurer to pocket the premium without risk or the insured to recover which would not be sensibly sought or anticipated at time of k.

### Scalera

R: Insurance transfers fortuitous contingent risks. Even if literal reading might provide coverage, does not if the loss is from inherent nature of object or it results from intention (NOT NEGLIGENT) actions of insured. Standard practice to construe ambiguities against insurer. If k is not ambiguous, read with clear language and whole document.

## Commercial Efficacy

- Even clauses that would virtually nullify coverage not likely to survive court scrutiny if they would be contrary to expectations of a reasonable person (**Grace Farms, Cabell**)
- Court will use business efficacy to attract coverage (**Andreas Pizza**)
- When language is unambiguous, court will try to give effect to it after reading whole k
    - if ambiguous, look at reasonable intention of the parties—if no unrealistic result then solve the ambiguity (**Turpin**)

The interpretation that provides the most sensible, economic result will likely prevail over a conflicting interpretation of an insurance k (**Excel**). Clauses that would virtually nullify coverage are unlikely to survive juristic scrutiny because they are contrary to the expectations of a reasonable insured (**Grace Farms**). An interpretation that promotes commercial efficacy will often be the preferred option (**Andreas Pizza**). Where both the insured's and insurer's interpretations are reasonable, the court will apply contra proferentem to favour the insured (**Andreas Pizza**). The reasonable expectations of both parties at the time the k was made is relevant for resolving any ambiguity, and may only be considered when an ambiguity arises (**Palliser**). If an exclusion is nugatory, the onus shifts to the insurer to show it would not be contrary to the parties' reasonable expectations (**Cabell**). Nugatory exclusion is not a doctrine of mandatory application, but is an important interpretive tool in resolving ambiguity (**Turpin**). When an insurance k is unambiguous, the court must give effect to its language by reading it as a whole (**Turpin**).

### Excel Cleaning

F: Rug cleaners ruin rug.
I: Coverage?
H: Yes
R: Cleaners had de facto dominion over the rug, but not full control.

### Grace Farms

F: Hog farmer sues waste disposer for pumping manure into water supply. Disposer calls on insurance.
I: Coverage?
H: Yes

R: Policy should be interpreted in light of application of an exclusion clause should not result in a substantial nullification of coverage under the policy. The risk in the course of manure spreading was pervasive and obvious, but the entire point of the insurance k.

**Andreas Pizza**

F: Insurance k stipulated there be an alarm system—insured's son did not activate alarm one night and the restaurant burned down.
I: Coverage?
H: Yes
R: For business efficacy, consider what the parties actually agreed to. Court will try to find most reasonable meaning of agreement. If both are reasonable, give favour to insured.

**Palliser**

F: Town built school on same land as exposed coal bed.
I: Coverage
H: Yes
R: Not within reasonable expectation that operation of the school could or would result in the discharge of coal dust from coal bed. P was not involved in any activity that involved pollution either directly or derivative consequence of damage.

**Cabell**

Outdoor pool cracks due to hypostatic pressure—standard policy exclusion for outdoor swimming pools but insured got an endorsement to cover swimming pools—finding for insurer would virtually nullify the coverage
**If exclusion is nugatory, onus on insurer to show it would not be contrary to reasonable expectations**

**Turpin**

Travel insurance claim—when language of k is unambiguous, give effect to clear reading of k as a whole, reasonable expectations of parties only triggered when there is ambiguity

## INNOCENT INSURED

- Court is not willing to make too much of a jump to read in terms to the k if it benefits the insurer (**Stolberg**)
- s 35 Insurance Act: prevent insurer from denying coverage on basis of criminal intent or act, exclusion only applies to person as cause of loss
- Each person covered by policy is a separate insured with individual policies (**Godonoaga**)

In cases of innocent insureds, there is a general tendency towards coverage (**Stolberg**), particularly if the insurer's interpretation requires the court interpret a clause beneficial to the insurer broadly. However, the SCC will uphold an unambiguous, clear insurance k even if it is to the detriment of to the innocent insured (**Scott**). While **Scott** is a similar fact pattern to **Riordan**, every insurance policy will contain distinct provisions that require the court to read the k as a whole and consider the reasonable expectations of the party in the event of an ambiguity. The innocent insureds in **Scott** were excluded from coverage, but the somewhat analogous innocent insureds in **Riordan** were able to recover from their policy due to an interpretation unique to their particular policy. Furthermore, the policy in **Godonaga** permitted the judge to treat the insureds as separate entities under separate policies. Section 35 of the Insurance Act prevents an insurer from denying coverage under an intentional or criminal act exclusion to an innocent insured. These exclusions will apply to insureds who intentionally caused the damage, aided and abetted in causing the damage, consented to another causing the damage and who knew or ought to have known that this conduct would have caused the damage.

**Stolberg**

Employer sued by widow of one his employees—court willing to find for insured if the contrary would be too much of a jump to benefit insurer

**Scott**

F: Teenage son deliberately set fire to home.
I: Coverage?
H: No
R: Modern approach depends on whether insured has promised to preserve the property or protect the property. Absent unambiguous provision to the contrary, a reasonable person, unversed in the niceties of insurance, would expect that his individual interest in the policy was covered by a policy which named him without qualification as one of the persons insured.

**Riordan**

F: Foster child set fire to home.
I: Coverage?
H: No
R: Foster child was clearly covered by policy and fell within exclusion.

**Godonaga**

Kid gets beat up—separation of insured provision ensures each person under policy is separate insured under separate policies

## PROXIMATE CAUSE

- Question is whether an ordinary person would deem the peril a proximate cause (**Pavlovic**)
- look at all events that gave rise to the loss and whether it is fortuitous in the sense of but for or that it was not expected in the ordinary course of things (**CCR**)
- No compelling reason to favour an exclusion with 2 concurrent clauses because the insurer could have drafted an unambiguous clause (**Derksen**)
    - NO OVERARCHING PRINCIPLE OF PROXIMATE CAUSE—interpret each case individually on the specific words of the policy (**Derksen**)

Causation terminology in insurance policies indicates when the insurer will pay for the insured's claim. There is no compelling reason in Canadian insurance law to favour an exclusion clause when there are two competing and concurrent clauses (**Derksen**). Rather, the SCC has held that courts must take a principled approach to proximate causation. A truly proximate cause is one that is proximate in efficiency as an operating factor on the loss rather than proximate in time (**Leyland**).

**Thompson v Montreal Insurance Co**

F: Policy limit 1,000, actual damage was 4,000 but appraised to be 400.
I: Can P recover total loss?
H: Yes
R: Injuries to goods through secondary causes in the commotion of a fire are covered—P should describe the occasion and manner of the loss. First question is whether the fire was the proximate cause, and if so, then the damage is covered.

**Leyland Shipping v Norwich Union**

F: Policy excluded piracy and war. Boat struck by DE uboat and damaged in storm—sinks.
I: Coverage?
H: No
R: Proximate cause turns on question of fact. Look at the k as a whole and ascertain true meaning. Causation is not a chain but a net. A truly proximate cause is one that is proximate in efficiency as an opporating factor upon the result. With concurrent causes, select the one best suited for reality, predominance, and efficiency.

**Ford Motor v Prudential**

F: Loss caused by weather in strike shutdown.
I: Coverage?
H: No
R: Parties had in contemplation that a riot might cause direct physical damage and cessation of work. Liability for the consequences of what the court deems the proximate cause may be negatived by a properly framed clause of exclusion.

**Wayne Tank v Employers' Liability Assurance**

F: Fire caused by negligence
I: Coverage?
H: No
R: Cause of loss in insurance that which is the effective, or dominant cause of the occurrence. The negligence was not the proximate cause because it was only a trigger. If there are two equally dominant causes, if one of the causes is excepted in the k, the insurer is not liable.

**Pavlovic v Economical Mutual Insurance**

F: House damaged by soil subsidence caused by ruptured water line, policy excluded leakage.
I: Coverage?
H: Yes
R: Percolation of water was one of several links. Leakage of water was an indirect cause of loss out of many other causes. Loss was caused by whole chain of events set in motion but ruptured water pipe.

**Canevada Country Communities v GAN Canada**

F: Sprinklers rupture due to freezing, policy excluded damage from frost.
R: Leakage of water was covered. Exclusion clause contained direct and indirect damage. Terms directly and indirectly are intended to capture the sense in which an events leads straight or immediately to its consequence.

**CCR Fishing v British Reserve Insurance**

F: Ship sinks from corrosion and failure to close the corroded valve.
I: Coverage?
H: Yes
R: Fortuitous is not intentionally caused and not the inevitable result of deterioration. Nothing ordinary about the failure of the cap screws—it resulted from negligence. The installation caused the caps to fail, not their inherent vice—ie if the had been properly installed they wouldn't have corroded. Does not matter if one of the causes is inherent vice, provided that the other cause was fortutious. Sufficient to attract coverage if, within the context of the entire case, the loss is shown to be fortuitous in the sense that it would not have occurred but for an unusual, unexpected event. Determine cause by looking at all events which gave rise to it and ask whether it is fortuitous in the sense that it wouldn't have happened by but for an unexpected event.

**Triple Five v Simcoe**

F: Roller coaster fails at mall.
R: The test for fortuitousness may include what the insured knew, or what a reasonably prudent insured ought to have known. This case did not have two causes, but one.

**Derksen**

F: Contractor improperly placed equipment in truck, stuff flies out of truck and kills child.
R: Two separate acts of negligence caused the accident. An intervening cause will only break the chain of causation if it is not part of the ordinary course of things. A presumption that exclusion is covered is inconsistent with the established principle that exclusion clauses in insurance policies are to be interpreted narrowly in the event of an ambiguity. Insurers have language available to them that would remove all ambiguity—**rejects Wayne Tank**.

# CLASSIFICATION OF INSURANCE

## NEW INSURANCE ACT PROVISIONS

- Streamlined by *Insurance Amendment Act*
  - part 2 increased consumer protection: innocent co-insured, relief from forfeiture, waiver/ estoppel, unjust and unreasonable, limitation is 2 years, restriction on fire insurance exclusions, claims regulated, dispute resolution expanded
- **Innocent Co-Insured**

**s 35** (1) Despite section 5, if a contract contains a term or condition excluding coverage for loss or damage to property caused by a criminal or intentional act or omission of an insured or any other person, **the exclusion applies only to the claim of a person**

(a) whose act or omission **caused** the loss or damage,
(b) who **abetted or colluded** in the act or omission,
(c) who
(i) **consented** to the act or omission, and
(ii) **knew or ought to have known** that the act or omission would cause the loss or damage, or
(d) who is in a class prescribed by regulation.

(2) Nothing in subsection (1) allows a person whose property is insured under the contract to r**ecover more than their proportionate interest** in the lost or damaged property.

(3) A person whose coverage under a contract would be excluded but for subsection (1) must comply with any requirements prescribed by regulation.

- Relief from forfeiture: **s 13 IA**
  - **s 24 LEA**:court is authorized to relieve against all penalties and forfeitures, and in granting the relief to impose any terms as to costs, expenses, damages, compensations, other things court thinks fit
  - non-compliance under insurance k—>discretion to grant broader relief for non-compliance
  - non-compliance with stat condition—>not addressed in new act
- Waiver/estoppel: s **14 IA**
  - **(1)**waiver must be in writing, arises if conduct reasonably causes the insured to believe that the insured's compliance with the requirement is excused in whole/part, insured acts on detriment
  - (2)no deemed waiver: dispute resolution, delivery of proof, investigation of claim
- Unjust/unreasonable: **s 32 IA**
  - if k has term that may be material to risk, it is not binding if court says unjust or unreasonable
- Limitation provision: **s 23 IA**
  - 2 years, but varies with policy in issue
    - 23(1)(a): 2 years after insured knew/ought to have known damage occurred
    - s23(1)(b): 2 years after date COA against insurer arose
  - subject to s 6: disabilities and minors, all must contain statement that action is barred unless commenced within limitation period

**KP Pacific Holdings v Guardian Insurance**

F: Hotel damaged by fire, insurer says no coverage because limitation period lapsed.
R: Statutory regime spoke to specific insurance policies, but the trend is toward all risk policies.

## SCOPE OF RISK AND DISCLOSURE

- Insured has to disclose all the relevant information to ensure that it actually gets coverage on what it wants to cover
  - insurer always the advantage and ability of darting a policy more clearly (**Dobson**)
- Onus is on insurer to prove breach (**Metcalfe**)
- If there are facts that mislead the underwriter, this is fraud and a basis for voiding the policy (**Carter**)
  - even if it is a mistake because policy covers different risk than real situation
  - Test: **whether there was, under all the circumstances of the case, a concealment or fraudulent misrepresentation of the risk run**

        - time for measuring is when the policy was written, now statutory condition to notify upon change
- **Part 2, s 29 Insurance Act**: if applicant falsifies description of property or risk or omit material element, k is void
- Insured has to rely on professionalism and diligence of insurer to not void a k based on facts the insurer was fully capable of discovering (**Taku Air**)
- **ss 51, 52**: not void for life insurance if innocent misrepresentation and policy has been in effect >2 years
- Test: **Whether a reasonable insurer would decline the risk or ask for a higher premium** (**Henwood**)
- Fraud is more than innocent misrepresentation (**Derry v Peek**)
    - false representation made knowingly and recklessly to its veracity (**Kruska**)

When obtaining a policy, the insured must disclose all relevant information regarding the interest to get appropriate coverage. If the property is improperly described such that the actual risk is different from the listed risk, the insurer is not liable for any damage (**Dobson**). The onus is on the insurer to prove a breach of a statutory condition (**Metcalfe**). If the insured provides facts that mislead the underwriter, this is fraud and a basis for coding the policy (**Carter**). The appropriate test is whether there was, under all the circumstances of the case, a concealment or fraudulent misrepresentation of the risk run (**Carter**). The time to measure nondisclosure is when the policy was written. Under **s 29 IA**, an insurance k is void if the individual applying for insurance falsely describes the risk or omits a material circumstance. The insurer must perform its due diligence to discover facts it is fully capable of finding on its own (**Taku Air**).

**Sections 51 and 52** of IA provide that life insurance policies are not void when there has been an innocent misrepresentation and the policy has been in effect for 2 or more years. The test for innocent misrepresentation is whether a reasonable insurer would decline to underwrite the risk or ask for a higher premium. (**Henwood)**. A fraudulent misrepresentation is more than a mere innocent representation (**Derry**) because it is made knowingly and recklessly to its veracity (**Kruska**).

**Dobson v Sotheby**

F: P paid lowest payable premium
I: Coverage?
H: Yes
R: If insured property has not been properly described, the Ds are not liable, but the word barn was sufficient description.

**Cooper**

F: Policy stipulated coverage only when building was private premises—vacant when fire occurred.
I: Coverage?
H: No
R: The vacancy aspect describes the insured property.

**Metcalfe v General Accident Assurance**

F: Fire policy subject to statute without variation—insured was not in physical occupation during fire.
R: Onus is on insurer to establish breach of condition.

**Carter v Boehm**

F: Governor insures merchant post, but did not mention certain things at time of underwriting.
I: Fraud?
H: No
R: Special facts unique to contingency often lie with insured only—underwriter must proceed by trusting the insured is not misleading him. Keeping back circumstances that would alter the risk is fraud. If suppression occurs by mistake w/o intention for fraud, k is still void. Good faith forbids parties from drawing the other into a bargain believed to be contrary. Insured need not disclose what the underwriter already knew, or should have known. Question is always whether there was, under the circumstances at the time the policy was underwritten, a fair representation or a concealment that materially varies the object of the policy.

**Coronation Insurance v Taku Air**

F: Air company has a lot of accidents, insurer does not check record before underwriting.

I: Fraud?
H: Yes, k is void ab initio
R: TA only declared four seats, exclusion said that if there were more seats the there would be no liability. Uberrima fides holds parties to a k standard of utmost good faith, heavy burden on those seeking coverage to make full and complete disclosure of all relevant information. Insured has no obligation to supply readily available information. Insurer must take some basic steps to investigate the flying record of an air carrier applying for insurance. Insurer need not continuously monitor the number of passenger seats.

### Henwood v Prudential

F: Frail woman buys life insurance policy and does not mention nervous breakdown.
I: Fraud?
H: Yes
R: No evidence to suggest a reasonable insurance company would have taken a different attitude. Test for misrep hinges on whether the representation would influence the judgment of a prudent insurer. Had the insurer here known about the nervous breakdown, they would have requested a higher premium and the risk would have been different.

### Kruska v Manufacturers Life

F: Insured was alcoholic and did not disclose this on her application.
I: Fraud?
H: No
R: Insured likely did not believe her alcoholism was a disease. Test for materiality is whether the facts in question would influence the judgement of a prudent insurer in fixing the premium or deciding to accept the risk. Test is objective—opinion of insured is irrelevant. Fraud, in its broadest sense, encompasses material misrepresentation and innocent non-disclosure. Statute makes it clear that fraud must amount to something more than mere innocent material misrepresentation (changes CL Carter approach). There must be false representation knowingly made and reckless to it being true or false. Insurer must prove on BOP.

## Material Change and Compliance with Warranties

- **s 29 IA**: material change of risk
    - **Statutory Condition 4(1)**: insured must give notice in writing of material change within insured's control
        - **4(2)**: w/o prompt notification, k is void **as to part affected by change**
    - **SC 3**: insurer can opt to cancel policy ir increase premiums
- court will read entire to policy to determine what insurer intended to insure (**Lejeune**)
- failure to report material change does not automatically result in void k, statutory conditions must be reviewed for unjust and unreasonable applications (**Marche**)
- reduced occupancy is not a material change unless specified in the policy (**Laurention**, **Peebles**)
- if warranty is not complied with, insurer is relieved from duty to indemnify (**Dunningham**)
- just because policy calls something a warranty does not mean it is a true warranty (**Case Existological**)

Under Stat Condition 4(1), the insured must give prompt notice in writing of any material within his or her control. SC 4(2) provides that without prompt notification on the insured's part, the policy is void as to the part affected by the material chance. SC 3 permits an insurer to either cancel a policy in the event of a material change or to increase the premium. In the event of litigation, the court will read the entire policy to determine what the insurer intended to actually insure (**Lejeune**). A failure to report a material change will not automatically void the part of the policy affected by the change because a court can review the application of statutory conditions to the individual k as being unjust or unreasonable (**Marche**). In **Peebles**, the BCCA relied on **Laurention** to find that reduced occupancy is not a material change to the homeowner's policy unless otherwise specified in the policy. If an insured does not comply with a warranty, the insurer is relieved from its duty to indemnify (**Dunningham**). However, whether or not a term is a warranty is a matter of construction, and specific wording within the policy will not necessarily render terms warranties if the policy deems them such (**Case Existological**).

### Lejeune v Cumis Insurance

F: Fire destroys property, insurer refuses coverage because it claims the description changed without its knowledge or permission.

I: Coverage?
H: No
R: First task is to determine whether leasing the property transformed the risk or just a variation of the risk. Statute provides that insured must inform the insurer of any increase in risk that would influence a reasonable insurer, but the k will not necessarily be cancelled if insured fails to do this. Insurer is liable for risk in proportion that the premium bears to which it would have collected. To determine whether the risk was increased or excluded, have to determine what insurer actually intended to insure. K contemplated insurance for a residential building only.

**Marche v Halifax Insurance**

F: Property insured, but was vacant at the time of fire.
I: Material change?
H: Yes, no coverage
R: Occasional and brief vacancies can be expected in rental properties. Heat and hydro were off for at least two months, and no one was checking on the properties. These facts would have effected the insurer's assessment of risk and its determination of whether to stay on the risk and to change premium. The change was material, and the owners were obligated to notify the insurance company. K was void from the time of the breach, so it doesn't matter that the fire occurred at a time when the property was occupied.

**Marche SCC**

H: Coverage
R: s 171 of NSIA provides that a k exclusion will not be binding if a court finds it unjust or unreasonable—it applies to statutory conditions. Because the vacancy had been rectified by the time of the loss, it would be unjust and unreasonable to apply the statutory condition (saved under s 171).

**Peebles**

Insurer implicitly accepts vacancy for up to 30 days (**Laurention**), reduced occupancy was not grounds for material change, just because house was not occupied did not mean it was not vacant

**Dunningham v St Paul Fire**

F: K stated that 50% of the stock had to be kept in the safe and only 38.99% was in safe at the time of fire
I: Coverage?
H: No
R: Condition was definitely implied in the warranty because it was declared in a subsequent endorsement. Insured did not comply with the condition or the warranty, so the insured is not obliged to pay.

**Case Existological Laboratories Ltd v Century Insurance Co**

F: Deck valves opened and ship sank—clause stated a watchman was warranted.
I: Warranty or suspensive condition?
H: Suspensive condition
R: There is no magic in the word "warranted" used in a k. The clause only limited the risk.

# CLAIMS PROCESS

## DUTIES TO DEFEND AND INDEMNIFY

- DTD test: whether the suit suit is claiming damages that might be covered under policy (**Nichols**)
  - DTD broader than DTI
- With multiple claims in pleadings, determine which claims could potentially be supported by factual allegation to define the scope of DTD (**Scalera**)
  - ie if negligence and intentional actions involve the same facts, negligence is subsumed into intentional actions and no DTD
- Extrinsic evidence that has been explicitly referred to in pleadings can be used to find scope (**Monenco**)
  - limit on this evidence, no mini-trials (**Marjak**)

- Estoppel: knowledge of insurer that indicated no coverage and insured had to rely on this to detriment (**Rosenblood**)
- Insurer bears onus of establishing costs (**Modern Livestock**)

An insurer holds a duty to defend unless an exclusion applies. The test for determining whether the duty ot defend arises is whether the suit is claiming damages that might be covered under the policy (**Nichols**). The duty to defend is broader than the duty to indemnify, and it is not necessary to prove the duty to indemnify will arise in this preliminary stage (**Nichols**). The mere possibility of a successful claim for damages covered under the policy is sufficient (**Nichols**). If there are multiple claims in the pleadings, the insurer must determine which claims could potentially be supported by the facts to define the scope of the particular duty to defend (**Scalera**). For example, if the pleadings allege negligence and intentional actions that involve the same facts, it is likely that the negligence will be subsumed into the intentional action and extinguish any duty to defend (**Scalera**). There is a three part test from **Scalera** for considering whether the duty to defend arises. First, the court must determine which of the legal allegations are properly pleaded by examining the substance of the allegations. Then, the court will determine if any claims are entirely derivative in nature. Finally, the court must decide whether any of the properly pleaded, non-derivative claims could potentially trigger the duty to defend. The proper basis for determining whether the duty to defend arises requires an assessment of the pleadings to ascertain the substance and true nature of the claims (**Monenco**). The key question is whether the pleadings could possibly support the legal allegations without providing for a mini-trial on the merits (**Marjak**). If the insured brings a claim to the insurer, the insurer must promptly undertake an investigation and notify the insured whether or not it will provide any coverage, including a duty to defend (**Rosenblood**). In the event an insurer does act swiftly or does not cease to deal with the claim even after it believes there is no coverage, the insured may raise estoppel (**Rosenblood**). The onus for establishing costs rests with the insurer (**McCubbin, Kansa**).

**Nichols v American Home Assurance**

F: Lawyer sued for fraud, bank drops claim, lawyer wants full indemnification for his costs.
I: Coverage?
H: No
R: Obligation to defend arises only where a suit is brought against the insured alleging an act or omission under policy. The bank's act was for fraudulent damages, which would never be covered. Duty to defend should, unless k indicates otherwise, be confined to defence of claim which fall under the policy.

**Scalera**

R: Duty to defend is not so great that it is presumed to be independent of the duty to indemnify—extends only to claims that could trigger indemnity. Court must determine which of the allegations are properly pleaded. then determine if any of the claims are derivative in nature. If any properly pleaded, non-derivative claims could potentially trigger duty ot defend is final step in deciding whether indemnity could be triggered. Duty to defend is broader than indemnity insofar as it extends to groundless, false, or fraudulent claims. Court must ask if the allegations, properly construed, sound in intentional tort. When determining scope of DTD, take factual allegations as pleaded, but then ask which legal claims could be factually supported.

**Monenco**

F: Fire destroys tar sands, insurer refuses to defend.
I: Pay for costs?
H: No
R: Whether an insurer is found to defend a particular claim is addressed by relying on the allegations made in the pleadings—if the pleadings potentially fall under policy, have to defend. Where pleadings are ambiguous, DTD triggered where, on a reason reading of the pleadings, a claim within coverage could be inferred. Key question is whether the pleadings could possibly support the legal allegations. Extrinsic evidence explicitly referred to within the pleadings may be considered to determine the substance and true nature of the allegations.

**Marjak Services v ICBC**

F: Two employees driving in company car—one gets very ill but the other doesn't take him to the hospital until they get o BC.
R: Court cannot advocate an approach that will cause the duty to defence application to be mini-trial.

**Rosenblood Estate v LSUC**

F: Insurance company refuses to indemnify lawyer's widow for dead husband's "error".
R: Election leads to waiver and may be district from estoppel because waiver may not need prejudice. For estoppel to apply there must be knowledge on the part of the insurer of the facts which indicated lack of coverage, course of conduct by the insurer upon which insured relied to its detriment. When a claim is presented to an insurer the facts giving rise to the claim should be investigated.

**Modern Livestock v Kansa**

R: Insurer's obligation to defend is separate and distinct from its obligation to indemnify, Once a third party makes allegations which potentially fall within the coverage, insurer is obligated to defend until it can confine the allegations outside of the policy. Once third party advances one or more COAs which are potentially within coverage and some without—the insurer, if it refuses to defend, cannot deny responsibility for the costs of defending.

## ADDITIONAL INSURED

- When one party agrees to add other party as an additional insured under the policy, usually a term in k
- Pleadings have to connect the activity the insurer agreed to insure (**Cowichan**)
    - must be an unbroken chain of causation to engage potential liability (**Saanich**)
    -

## PROPERTY POLICIES

- If insured has been indemnified and saves anything on the loss, must give salvage to underwriter and reimburse insurer if recovers more than loss (**Dane**)
- **SC 9**: insured has to prevent further damage, indemnity is reasonable in respect of preventative action
    - relates to property that has already been damaged (**Benson**)
- A voluntary act to avoid a named peril is not a consequence thereof (**Canadian General Electric**)
    - Test: whether damage arose to avoid an **imminent named risk**
        - a mistaken risk to avoid non-existent peril is not an imminent peril
    - Insured must show the losses incurred to prevent a peril that imminent and inevitable

In the case of property policies, if the insured has been indemnified and saves anything on the loss, he or she must give the salvage to the underwriter and reimburse the insurer if the recovery is more than the loss (**Dane**). Under SC 9, the insured must prevent further damage to the property because any indemnity will be reasonable in respect of the insured's preventative action (**Thompson**). This condition only relates to property that has already been damaged, but does not imply any indemnification for making good defective workmanship not covered in the policy. (**Benson & Hedges**) A voluntary act undertaken to avoid a named peril is not a consequence of the named peril in its own right (**Canadian GE**). The appropriate test is whether the event was insured or whether the damage occasioned arose to avoid an imminent risk covered in the policy (**Canadian GE**). Therefore, the insured must show the losses were incurred to prevent a named peril that was imminent and inevitable.

**Dane v Mortgage Insurance Corporation**

F: Policy against risk of bank defaulting, bank defaults and statutorily settles with P.
R: Intention was the k to be insurance. Policy was not a guarantee that the bank would be able to pay. Underwriter directly promises to pay on a certain event—k is treated like an indemnity.

**Thompson v Montreal Insurance**

The clause was meant to encourage insured to make every exertion to save his goods. Can be the effect of the clause to make the insured bear without indemnity any portion of the values of goods actually lost, destroyed, or injured by the fire. Policy entitles insured to be made good whatever loss he has suffered from causes of damage within the policy.

**Canadian General Electric v Liver & London**

F: Resin tank has chemical exposure, corrosion damages factory.

I: Coverage?
H: No
R: Imminence of peril must be apparent, as would prompt a prudent uninsured person to remove the goods, inspire a conviction that to refrain from removing the goods would be the violation of a moral duty. Peril stated to be imment must be within the insured risks and that the insured risk had begun to operate as a peril at the time of taking the preventative action which in fact brought about the damage to the insured. Before liability arises there must be an operating peril of the type or category described in the k. Danger must be present in the sense that unless something is done, damage will ensue. If the peril has actually arisen and damage can be reasonably anticipated from the peril, the damage suffered as a result of the preventative measures taken by the insured will be recoverable.

### Benson & Hedges v Hartford Fire Insurance

F: Brewery room explodes due to poor workmanship in the welding, tries to recover costs of accident.
I: Coverage?
H: Some
R: Distinction is as between the obligation to minimize a loss and the obligation to minimize a risk that has yet to materialize. At CL, insured as duty to mitigate loss, but under no obligation to minimize the risk. Damage to be mitigated must result from the contingency that has occurred as opposed to being the consequence of another contingency that has yet to occur. No reason why the insured, who knows about the probability of the operation of a risk following a loss, should be under any greater obligation than if he had acquired the same information prior to any loss. Statutory condition 9 reiterates duty to mitigate.

## Coinsurance penalties

- **s 31 IA**: limitation of liability
    - insured has to insure at least the amount of actual cash value of property
- Multiply ACV with coinsurance amount (usually 90%)—$600,000 must have at least $540,00 coverage
    - (Actual insurance / (ACV*coinsurance)) x Amount of loss = coverage limit
        - 10,000/(15,000 x 90) x 10,000 = approx 7400
- Prevents insureds from placing all of the risk on the insurer—ie if they want to have inadequate coverage, they will have to carry some of the risk themselves

Many policies will contain a provision that penalizes an insured from underinsuring their interest. This is authorized in s 31 IA, whereby the insured has to purchase insurance equal to at least the amount of the actual cash value of the property. The ACV is the commercial, monetary worth of the insured property (**RBC**). Parties may agree upon a predetermined value of the interest (**Glynn**). An unvalued policy leaves the interest's ACV to be subsequently ascertained after the policy is made (**Art Gallery**). To determine the coinsurance penalty, first divide the amount of insurance purchased by the ACV x the coinsurance amount. This sum is then multiplied by the amount of loss. Finally, the deductible is subtracted from the resulting amount to show the insured's limit of coverage. Coinsurance penalties prevents insures from placing all of the risk on the insurer. If an insured wishes to have inadequate coverage, they must carry some of the risk themselves.

### RBC v Lloyds

F: Hotel burns down.
R: Actual cash value not determine from any analytical approach, but is the actual value of the insured property destroyed as determined from a consideration of a variety analysis to each of which, the appropriate weight in the circumstances must be given.

### Glynn

R: Parties may agree that the property insured, if lost or destroyed, shall be admitted by both to be at the date of loss or destruction of a predetermined value—waive the necessity of insured proving the amount of the loss. Still a k of indemnity.

### Art Gallery

R: A valued policy is one which specifies the agreed value of the subject matter insured, while an unvalued policy leaves the insurable value to be subsequently ascertained. In an unvalued policy with no co-insurance clause or clause apportion =ing loss to insured under some circumstances, the insured is not considered to stand on his own for the excess of the value of the insured property beyond the sum for which the insurance is effected—insurer must

make good the whole of any partial loss, provided it is within the limit. Indemnification for reasonable depreciation must account for any agree valuation.

## Simultaneous Death

- **s 83 IA**: presumed beneficiary of policy dies first in simultaneous accident—proceeds go into insured's estate not beneficiary's estate
    - insurance money is governed by IA not WESA (**Re Law**)
        - once the insurance money passes into insured's estate, then look at wills legislation (**Re Topliss**)

### Re Law Estate

F: Insurance policy named wife as beneficiary, but she dies as well. Policy holder had no will.
I: Who gets the money?
H: Mother of dead husband
R: Statue says if beneficiary dies in same accident, PF beneficiary died first, but other statute says older people deemed to have died first in common accident. Latter subject to former construction. Therefore, the money goes to the husband's estate rather than his wife's estate.

### Re Topliss

F: Beneficiary and policy holder die in same accident.
I: Who gets the money?
H: Wife
R: Case rejects Re Law—survivorship statute should not be construed so as to interfere in any way with operation of those sections of Insurance Act.

**Topliss CA**
R: Also rejects Re Law. At the moment of husband's death policy became payable on its maturity to the estate of the husband, insurers required to pay proceeds to husband's estate representative. The representative then has to distribute according to entitlement. To determine whether the wife survived her husband, the administrator would apply wills statute to say that she did.

## Misrepresentation of the Claim

- Insured must be honest at front end of getting policy and back end of making claim (**Anastasov**)
    - CL obligation of good faith: fraudulent claim cannot recover at all because k will be void
    - Material misrepresentation will vitiate a claim (**Inland Kenworth**)

The insured must always be honest when obtaining the policy and when making a claim on the policy (**Anastasov**). The CL obligation of good faith bars a fraudulent claim from recovering any amount because the k is void for bad faith. Any material, fraudulent misrepresentation will vitiate an insured's claim (**Inland Kenworth**)

### Anastasov v Halifax Insurance

F: Insureds may have misrepresented their claim.
I: Coverage?
H: No
R: TJ said conduct was purposefully misleading, but did not vitiate the claim because the statements were not material—he was wrong. Insureds knew that they were lying to get more money, intended for the insurer to pay when they would not actually have to pay. Actual payment need not be shown in order to establish that a claim is vitiated on the basis of fraud.

### Inland Kenworth v Commonwealth Insurance

F: Truck subject to chattel mortgage is insured, required to be inspected periodically. Insured did not get truck inspected and has a car accident. Creates a fraudulent inspection certificate.

I: Coverage?
H: No
R: Insured made false statement and acted fraudulently, but his conduct related to an endorsement that was already void because it conflicted with statutory condition. However, a representation about the condition of the subject matter of the insurance, the value of the vehicle, is a material representation. Test for materiality is whether the statement would affect the mind of the insurer. Not necessary to show actual prejudice.

## INSURER BAD FAITH

- TPL: insurer controls litigation and must conduct it in good faith (**Shea**)
    - relationship does not amount to fiduciary duty, but insurer must always act in good faith because insured is always at the mercy of the insurer
- Unfair, baseless insurer conduct can found claim for punitive damages (**Khazzaka**)
    - misconduct must be sufficiently in breach of good faith to warrant compensation (**Branco**)

In third party liability claims, the insurer controls the litigation and must always conduct it in good faith (**Shea**). The relationship between insured and insurer does not amount to a fiduciary duty. However, the insurer must always act in good faith because the insured is at the mercy of the insurer (**Shea**). Thus, if the insurer has an opportunity to settle a claim for less than the limits of coverage, insurer will likely be in bad faith if it does not take advantage of this opportunity (**Shea**). Unfair, baseless insurer conduct can found an insured's claim for punitive damages (**Khazzaka**). The insurer's misconduct must be sufficiently in breach of good faith warrant compensation (**Branco**).

### Shea v Manitoba Public Insurance Corp

F: Two guys get sued by one of their infant sons, they try to get insurance coverage and infant claimant tries to get assignee status.
I: Insurer bad faith?
H: Yes
R: When there is no reasonable prospect of settling a tort claim for less than the limits of coverage, an insurer can have no legitimate interest in trying to do so. DTD not limited to claims that fall only within the limits of coverage, includes duty to minimize the amount of any damaged to be assessed against the insured. Insurer does not owe FD to insured, but still has special obligations.

### Khazzaka v CGU

F: Autoshop burns down, fire inspector says no arson but insurer thinks arson and says no coverage.
I: Bad faith?
H: Yes
R: Insurer has obligation to treat insured fairly—clearly unfair to concoct evidence and make up story about arson. Unfairness compounded over and over again amounts to conduct that merits the condemnation of the court when visited by an insurer that owes a duty of good faith to its insured. Insurer knew that it was fucking up the insured's business for no reason, and should not have done that.

# MOTOR VEHICLE POLICIES

## AUTOMOBILE COMPENSATION IN BC

- MVI entirely determined by Insurance Vehicle Act and Regulations (15 parts and 10 schedules)
- Mandatory minimum coverage (ICBC): $200,000 TPL, no fault benefits (part 7), $1 mill UMP
    - drivers can increase this through ICBC (part 1) or optional insurance ks (parts 4, 13)
- in BC, victim has unfettered right to sue tortfeasor

- any no fault benefits obtained will be deducted from tort judgment (ie a portion of special damages)
    - you have to sue ICBC in k law if they do not give you any no fault benefits
- Limitation is 2 years from the accident, **LA s 6(1)—s 18(b)** minors have until 2 years after age of majority

## MOTOR VEHICLE ACT

- s 3(1): drivers must be licensed
- s 1: highway includes things used routinely as a thoroughfare (not necessarily a motorway, does not include industrial road)

## INSURANCE VEHICLE ACT

- s 22: ICBC has to be notified of action
- s 37(4): owner's certificate immediately lapses when owner gets certificate in other jurisdiction
- s 42.1(2): cannot materially misrepresent information relating to claim
- part 6 ss 95,97, 98: income loss claim is net of taxes
- s 99: structured settlements/judgments for future pecuniary loss

# VICARIOUS LIABILITY

- **Motor Vehicle Act s 86**: owner who allows another to drive expressly or impliedly is vicariously liable
    - does not address coverage, does not impose legal definition of consent opposed to its natural and ordinary meaning
- if you loan your car to someone else and they get into an accident, your insurance is on the hook and you are exposed if your insurance is inadequate

## IMPLIED CONSENT

- Test: whether consent, under all of the circumstances, would have been given had it been sought (**Godsman**)
    - general willingness is not sufficient, owner has to have actually thought about giving consent
    - possible to obtain car with consent and breach it (**Bliefernech**)
    - expectation and willingness must be shown (**Green**)—prior express prohibition, prior use without objection in similar circumstances, original borrower in the vehicle, actual driver known to owner, age of actual driver, valid reason for actual driver to be driving
- Members of household always have consent (**Rolleman**)

**Minister of Transport (Ontario) v Canadian General Insurance**
F: Minister brings action as assignee of judgment against insurance company. Automobile leased to family trust. Son allowed to drive the car, and lets his unlicensed friend drive the car and gets into accident.
I: Coverage for indemnity—implied consent?`
H: No
R: Trust did not consent to kid driving the car personally or explicitly. Primary trust shareholder never gave consideration to the specific question of extending son's authority to entitle him to let others drive the car. No indemnity to third party (unlicensed kid).

**Collrin**: NB statute allowed for possible vicarious liability
**Babichuck**: Implicit in the term gift is the idea that the recipient may do as he wishes with it.

The test for implied consent is whether, under all of the circumstances, the owner would have given consent had it been sought (**Godsman**). General willingness is insufficient, as the owner must have actually turned his or her mind giving consent to the particular person for a court to imply consent. (**Minster of Transport**). Therefore, expectation and willingness must be shown through prior express prohibition, prior use without objection in similar

circumstances, whether the original borrow was in the vehicle, whether the actual driver was known to the owner, the age of of the actual driver, and whether there were valid reasons for the actual driving to be operating the vehicle (**Green**). It is possible to obtain consent from the owner and breach this consent if the driver uses the vehicle in a prohibited manner (**Bliefernech**). Members of the household are deemed to have consent, but the court will interpret the circumstances from case-to-case to determine whether an individual is a member of the owner's household (**Rolleman**). Implicit in the gift of a vehicle is full consent that the recipient may do as he or she wishes with it (**Babichuck**).

## OWNERS' CERTIFICATES: REGULATION PART 2

- s 10 type of coverage (minimum limits and TPL), s 24 accidents in BC
- **MVA s (1)(c)**: must obtain insurance before vehicle is used/operated, obtain OC
    - **s 33(1)**: at time of obtaining licence, apply for OC/DC and pay premium to ICBC

## PRINCIPAL OPERATOR: REGULATION 3

- s 19(2): applicant for OC must give name, DL number
- principal operator is person who will operate vehicle for majority of time while certificate is valid, relevant because it affects the premium, misrepresentation is grounds for forfeiture
- **Rai:** relevant time to consider whether misrepresentation caused insurer to issue policy is date claimant applied to agent for coverage
    - onus is on ICBC
- **Deol**: ICBC must establish someone other than named PO had care, custody, control of vehicle
- **Lexus**: not putting down PO is same as material misrepresentation

An applicant for an OC must declare the principal operator (**reg 3 s 19(2)**) by giving the PO's name and DL number. The principal operator is the individual who will the vehicle for the majority of time the certificate is valid (**reg 1 s 1(1)**). The identity of the PO is relevant because it affects the premium (**Rai**). The relevant time to consider whether the PO has been misrepresented is the date the claimant applied to an agent for coverage (**Rai**). To establish PO misrepresentation, ICBC must prove someone other than the designated PO had care, custody, and control over the vehicle (**Deol**). Failing to furnish ICBC with a PO is a material misrepresentation (**Lexus**).

## MID TERM CHANGES: REGULATION PART 6

- ICBC must be notified of any PO changes at time of renewal (no obligation before)
- change of address or acquisition of substitute vehicle: within 10 days
- s 9(3) territory for primary use changes, within 30 days
- failure to report changes results in loss of coverage for TPL, forfeiture (**s 55(2))**

## THIRD PARTY LIABILITY: REGULATION PART 6

- applies to insured in **s 63** (named owner on OC, anyone operating w/ consent (**Minister of Transport, Babichuk**), member of household), someone operating another's vehicle, passenger operates part of the described vehicle
- TPL triggered by (1) use/operation (2) by the insured (3) of the described vehicle (4) in Canada or US
    - use/operation: purpose (**Stevenson**) + chain of causation test (**Law Union**), whether there was a continuous chain of causation between use/operation and injury (**Fraser Valley**)
        - (1) did accident result from ordinary activities and (2) is there a causal relationship between injuries and ownership, use/operation (**Amos**)
            - insurer not liable every time a car used to transport people to a tort **Vytlingham**
            - determine whether claim is in respect of tort committed by vehicle being used as a vehicle and whether chain is unbroken more than mere fortuity (**Herbison**)
- **Extension of TPL: s 65 ONLY WHEN DRIVING SOMEONE ELSE'S CAR, limit of 200k (s 67)**
    - (1) insured includes named insured, member of household, employee, spouse

    - (2) indemnity extended to insured operation someone's vehicle (unless w/o consent)
    - (3) multiple OCs, compensation comes from highest OC available
- s 66: passenger operating vehicle, only relates to PI/death of non occupant, property damage not in care/custody/control of the vehicle
- s 73: notify ICBC promptly (particulars, cooperate with investigation, do not settle yourself)
- s 74: ICBC negotiates settlement, defends any action; 74.1 ICBC can appoint counsel and admit liability on insured's behalf
- s 76: 2 years after claim is discovered, unless infant (2 years from attaining age of majority)
- s 77: cannot stack insurance policies

Third party liability is triggered by use or operation by the insured of the described vehicle in Canada or the US (**reg 6 s 64**). This applies to an insured, which includes the named owner on the OC, anyone operating the vehicle with consent (**Minister**), a member of the owner's household, the personal representative of a deceased owner, an employee of the owner provided the OC describes this use, or a household member of the employee who operates the vehicle with the owner's consent (**reg 6 s 63**).

The use and operation of the vehicle is determined by the purpose and chain of causation test **(Fraser Valley**, **Stevenson**). The test asks whether there was a continuous chain of causation between the use and operation of the vehicle and the resulting injury (**Law Union**). The court must ask whether the accident resulted from ordinary activities and whether there is a causal relationship between the injuries and the ownership, use, or operation (**Amos**). The insurer is not liable every time a vehicle is used to transport individuals to a tort (**Vytlingham**), as the vehicle itself must be part of the causal chain. Therefore, the use or operation test requires a determination of whether the claim is in respect of a tort committed by the vehicle the being used as a vehicle, and whether the harm is an unbroken chain of causation that is more than mere fortuity (**Herbison**). A vehicle may be instrumental to a separate assault, but this may not be sufficient to establish use or operation to attract coverage (**Martin**). Disassembling a vehicle may constitute as use of the vehicle, depending on the facts of the case (**Yip**, **Dabish**). Doing repairs on a vehicle may be considered a use (**Morowietz, Shelton, Munro Estate, Passmore**). Use or operation includes an intentional tort of using the vehicle as a weapon (**Connolly**).

Under **reg 6 s 65**, third party liability under the OC is extended to other individuals driving the vehicle described in the OC with the consent of the owner. The limit of coverage is 200k (**s 67**). For extension of indemnity, an insured includes the named owner in OC, member of owner's household, an employee of the owner provided this use is described in the OC, and the spouse of an employee provided the spouse resides with the employee (**s 65(1)**). Indemnity is extended to an insured operating a vehicle not described in the insured's OC unless the operation is without consent, the vehicle is regularly operated by the insured, the insured is carrying passengers for commercial use, or the vehicle is not actually licensed under MVA and the insured has no reasonable grounds to believe the vehicle insured (**s 65(2)**). The OC of the vehicle involved in the accident is the primary policy (**s 77(1)**). The holders of OC who are members of the household of the primary OC in the accident are not applicable for extension of TPL (**s 77(2)(a.1)**). If more than one OC is triggered after an accident, the insured is only compensated under the certificate that provides the highest limit possible (**s 65(3)**). A passenger operating part of the vehicle who causes third party personal injury or death of a non-occupant or property damage to something not in care/custody of vehicle will be indemnified (**s 66**).

In a third party action, the insured must promptly notify ICBC of the particulars and cooperate with the investigation (**s 73**). ICBC negotiates the settlement and will defend any action (**s 74**). ICBC can unilaterally appoint counsel and admit liability on the insured's behalf (**s 74**).

**FOR TPL**

11. Look at who is insured (s 63, owner/operator/member of household)
12. Go to s 64—indemnify if use/operation was by insured (s 63) of vehicle described in OC in CAN or US
    1. s 77(1) identifies OC for car involved in accident primary policy
13. Extension to someone other than owner if driving w/ owner's consent and in excess of vehicle in accident (s 65)
    1. s 77(1)(a.1) member of household of OC involved in accident not applicable
14. Extension passenger operating some part of vehicle (s 66)

## BREACHES: REGULATION PART 5

- general principle: insured has to behave with utmost good faith, disclose everything material at time of application and abide by all terms and conditions
- **Regulation Part 5**: breaches

- s 55(1.1) ICBC not liable in a breach
- s 55(2) nonpermitted use contrary to statements made in application (types of vehicle use, territory)—results in loss of s 49 DC indemnity and part 3 TPL
    - exceptions: if premium paid is equal/more than what it should have been, can operate for up to six nonconsecutive days in calendar month
        - time for measurement is time of the accident (**McKay**)
- s 55(3) loss of UMP, NFB, and TPL in own vehicle damage
    - qualified = competent, authorized = licensed (3)(a)
        - Verbeek, Blatter—strictly applied, but must be aware of no authorization (**Gosal**)
    - (3)(b) illicit trade/transport—has to be whole purpose of operating vehicle (**Blackstock**)
    - (3)(c) escaping/avoiding arrest
    - (3)(d) racing/speed test—more than one vehicle (**Grewal, McGill**), vehicle in an experimental way or against a clock (**Murray, Blackstock**)
- s 55(5): permitting prohibited operation is a breach unless you didn't know (**Co-Op Fire** wife was drunk)
    - intoxication: more than just breathalyzer reading, must be evidence of actual impairment to be incapable of actual control (**Troba**)
    - insured has positive duty to make sure driver is licensed
- s 55(7.1): intentional use of car as weapon, ICBC pays victim and recoups from driver
    - s 90 Act: ICBC not liable if cause of injury is a weapon or object (ie drive by shooting)
- s 55(8): intoxication to extent that driver is incapable of proper control, no TPL but retain UMP/NFB
    - onus on ICBC to establish driver did not have proper control (**Kulbaba**)
        - sufficiently high breathalyzer + circumstantial evidence = likely conviction (**Smissen**)

Breaches are addressed in **regulation part 5**. In the event of a breach ICBC is not liable (**s 55 (1.1)**). A non permitted use contrary to statements made in the application relating to the use (**McKay, Hudson**) or territory will result in s 49 benefits and part 3 third party liability (**s 55(2)**). The time for measuring non-permitted use is at the time of the accident (**McKay**). Breaches under **s 55(3)** result in loss UMP, NFB, and TPL for own vehicle damage. A qualified driver is a competent driver, and an authorized driver is a licensed driver ((**3)(a)**). S 55(3)(a) is strictly applied (**Verbeek, Blatter**), but the driver must be aware that there is no authorization (**Gosal**). The illicit trade or transport breach (**s 55(3)(b)**) is proven if the transport is the entire purpose of operating the vehicle (**Blackstock**). Drivers cannot use the vehicle to escape or avoid arrest (**s 55(3)(c), MacDougal**). It is a breach to engage in a race or speed test (**s 55(3)(d)**). Racing involves more than one vehicle (**Grewal, McGill**). Speed tests involve using the vehicle in an experimental manner or against a clock (**Murray, Blackstock**). Permitting prohibited operation of the vehicle is a breach (**s 55(5)**) unless the owner did not know the vehicle would be used for prohibited means (**Co-Op Fire**). The insured has a positive duty to confirm the driver is licensed (**Peters, Circle M, Nimmo).** Intoxication (**s 55(8)**) requires more than a breathalyzer reading to prove a breach (**Troha, Ondrik, Laurie**). There must be evidence that the driver was not capable of proper control over the vehicle (**Kulbaba**). If there is overwhelming circumstantial evidence that leads inescapably to the conclusion of intoxication, and the driver has exhibited symptoms of intoxication, there will be an inference of intoxication (**MacDonald**). If an insured uses a vehicle intentionally as a weapon, the victim is entitled to recover from ICBC, which will seek reimbursement from the driver (**s 55(7.1)**). However, ICBC is not liable if the cause of the injury is a weapon or object other than the vehicle (**s 90 the Act**).

## DRIVERS' CERTIFICATES REGULATION PART 4

- possession: person driving the vehicle, can be different from owner
- s 42: insured is resident named on DC (can be student outside province for study purposes)
- s 43(1)(a) valid license is DC
- s 49(1): TPL coverage when driver is operating another's vehicle and not a member of O's household
    - 49.1 limit is 200k
    - 49.2 90% for death/bodily injury, 10% for property damage
- s 50: any applicable OC is primary to DC

Driver's certificates are contained regulation part 4. Under **s 42** of the regulation, the insured is the individual named on the driver's certificate. A driver's certificate is incorporated under every valid driver's license

( **s 43(1)(a)**). The TPL coverage under a DC when the driver is operating another's vehicle with consent (**s 49(1)**)) is limited to 200k (**s 49.1**). If there is a DC and OC available for establishing TPL coverage, the OC coverage will take precedence over the the DC coverage (**s 50**).

# CLAIMS

## NO FAULT LIABILITY (PART 7 REGULATION)

- medical/rehab
  - s 88(1) mandatory—surgical, medical, dental, ambulance—strict interpretation
  - s 88(2) permissive—need prior approval, ICBC not liable for things covered under other plans, will not pay >medical college fee s 88(7), max 150k s 88(5) + Sch 3 s 3
- disability` for employed/homemaker
  - employed person (Reg 7 s 80): TPD from occupation/employment for which insured is reasonably suited due to training and experience, occur w/in 20 days of accident
    - mandatory payment for less duration of disability or 2 years, lesser of 75% average gross weekly earnings in 12 mos preceding or $300/week (schedule 3 s 2(a))
    - can include someone unemployed at date of accident, but employed for 6 mos in last yr
    - ss 82, 83 WBC/EI claimed and paid first, deductible from any NFB
  - homemaker: person who does majority of household duties regularly, based on reimbursement for obtaining help from non-family member (**Watson**: MIL traveled miles, this was covered), maximum $145/week for actual payment
  - s 86: benefits continue after 2 years for shorter of disability or age 65, deduct CPP
  - totally disabled is inability to do any substantial acts, have to be capable of actually doing a job to be disqualified, no requirement of continuous disability (**Halbauer**)
- death benefits
  - s 91 funeral expenses up to $2500
  - 92(2) lump sum based on age/ status: Sch 3 s 5 for scale
- exclusions
  - s 96: no coverage for person hit by vehicle cannot be licensed in BC, no coverage for consequences of preexisting conditions
- limitations: s 103 two years from latest of date of accident, date of last medical benefit receive, date of receipt by ICBC of notice of intent to claim
- s 97: notice of claim requirements
- deduction of NFB
  - s 83(2): release claim against tortfeasor to the extent of benefits (not) received or entitled
  - s 83(4): nondisclosure of benefits entitled/received until judgment
  - **Kumar**: have to apply for NFB within 2 years of accident
    - s 103: file NFB to avoid getting deduction at trial for benefits never received
  - **Schmidt**: ICBC does not have to give an undertaking to pay the benefits
  - **Souvani**: deduction is entitlement of tortfeasor
  - s 83 only applies to judgments, not settlements (but are considered in practice)

NFBs are contained within part 7 of the regulation. They are split into mandatory and permissive benefits. Mandatory NFBs include surgical, medical, dental benefits, and are strictly interpreted (**s 88(1)**). Permissive benefits require prior approval, and are not covered by ICBC if they are covered by other plans (**s 88(2)**). ICBC will not pay more than the medical college fee (s 88(7)) for permissive benefits. The maximum limit for permissive benefits is 150k (s 88(5), ached 3 s 3).

Disability for an employed person (s **80**) is total permanent disability from occupation or employment for which the insured is reasonably suited due to training and experience, and must occur within 20 days of the accident. The payments are lesser the duration of the disability or 2 years, and are less of 75% average gross weekly earnings in 12 months preceding or $300/week (sched 3 s 2(a)). The benefits can apply to a person unemployed at the time of the accident, provided the individual was employed for 6 months in the preceding year (s 78(a)(ii)). Any benefits obtained from WCB/EI are deductible from the NFB amount (ss 82, 83). A homemaker is the person who does the majority of household duties regularly (s 78). Disability benefits for homemakers is based on reimbursement for obtaining help from a non-family member, (s 84(1), 84(2)) or an individual who does not live in the home of the

claimant (**Watson**). The maximum benefit is $145/week for actual payment (sched 3 s 2). NFB continues after two years for shorter of the disability or age 65 (**s 86**), with deduction for CPP benefits (**s 86(2)**). An individual is totally disabled if they are unable to do any substantial acts, and are not capable of actually performing the duties of their employment (**Halbauer**).

Part 7 death benefits cover funeral benefits up to $2500 (s 91). There is a lump sum payment based on age and statuts (sched 5 s 3). There is no death benefit or coverage if the vehicle cannot be licensed in BC (s 96). The claimant must bring an action for NFB, if not obtained, within two years from the latest date of accident, date of the last medical benefit received, or the date of receipt by ICBC of notice of intent to claim (s 103). NFB is deducted from the heads of damages in a tort claim (s 83(2)). The NFBs entitled and received will not be disclosed to the court until judgment is obtained (**s 83(4)**). Claimants have to apply for NFB within 2 years of the accident (**Kumar**, s 103). ICBC does not have to provide a general undertaking to pay the benefits (**Schmidt**). The deduction is the entitlement of the tortfeasor (**Souvani**). Deduction of NFB applies only to judgments, not settlements (s 83).

## FORFEITURE: S 75 THE ACT

- applies to mandatory and optional ks
- forfeit if applicant falsely describes vehicle to prejudice of insurer or knowingly misrepresents, fails to disclose a fact required or violates term/condition of plan or makes wilfully false statement RE the claim
    - wilfully false: done intentionally, knowingly, or purposely without excuse, onus on insurer to show wilfully false (**Petersen**)
    - Test: whether the lie was capable of altering how the claim would be handled (**Brown**)
- materiality: statements capable of affecting the insurer's mind (**Inland Kenworth**)
- relief: s 19(2) ICBC has discretion to relieve, 19(3) ICBC has to relieve if insured is dead or permanently prevented from working

**Petersen v Bannon**
F: Tort action + action against ICBC for NFB.
I: Recoverable?
H: Some yes some no
R: Wilful act is one done intentionally, knowingly, and purposely without justifiable excuse. Onus is on insurer to prove BOP that statements were wilfully false. Insured's duty to act with utmost good faith is fundamental to insurance. Insured is also not obligated to assist another another in deceiving the insurer. If an insured makes a wilfully false statements about the subject matter of the claim, the insured risks forfeiture if the statement is material to any issue arising in the claim. Sufficient to determine whether claimant was disentitled for any reason under the statute or regulation.

**Brown v ICBC**
F: Guy gets into accident, tells ICBC that his car was stolen.
I: Any recovery?
H: No
R: A false statement must be **capable of** affecting the mind fo the insurer either in the management of the claim or in deciding to pay it.

Forfeiture under s 75 of the Act applies to mandatory ICBC ks and optional insurance ks. Coverage is forfeit if the applicant falsely describes the vehicle to the prejudice of the insurer or knowingly misrepresents, fails to disclose a fact required or violates a term or condition of the plan, or makes wilfully false statements regarding the claim (s 75). Wilfully false statements are done intentionally, knowingly, or purposely without excuse (**Petersen).** The onus is on the insurer to show the statements were wilfully false (**Petersen**). The misrepresentation must have been capable of altering how the claim would be handled (**Brown).** A material statement is capable of affecting the insurer's mind (**Inland Kenworth**). The applicant can obtain relief from forfeiture under s 19(2) applying for ICBC's discretion. If the applicant is dead or permanently prevented from working, ICBC must relieve from forfeiture (**s 19(3)**).

## UNINSURED MOTORIST CLAIMS: S 20 ACT, REGULATION PART 8

- restricted to accidents in BC on a highway (definition from MVA)

- file special application to ICBC s 20(2), Schedule 4—ICBC can settle or continue action
- 200k maximum amount payable—if motorist denies liability ICBC cannot get reimbursement until judgment at trial s 20(1)
- onus on ICBC to establish motorist is uninsured (**Ozdoba**)

Uninsured motorist claims are restricted to highways (MVA s 1) in BC (s 20 the Act). The applicant must file a particular form to ICBC (s 20(2), ached 4). The limit is 200k. If the uninsured party denies liability, ICBC cannot obtain reimbursement until the judgment is made at trial (**s 20(1)**). The onus is on ICBC to establish the motorist is uninsured (**Ozdoba**).

## Hit and Run Claims: s 24 Act, Regulation Part 8

- s 148: claim requires contact, s 24 of Act does not require physical contact
- s 24(1) Act: sue ICBC as nominal D, (2) give notice to ICBC within 6 mos of accident
    - time for notice runs from date victim knew/ought to know about involvement of unidentified driver (**Jamt**)
        - making statement to adjustor is notice (**Goltzman**), four days after accident to estimator is sufficient (**Hecker**)
- limitation 24(2): 2 years from day of accident
- s 24(5) claimant has to have made reasonable attempts to ascertain driver's identity (**Leggett**)—look at all facts of case (**Raisenen**), reasonable steps after treatment as well (**Becker**), important why claimant did not obtain identity (**Holloway, Larsen**)

1. Get into accident, make reasonable attempts to ascertain identity
2. Make report to police within 48 hours (s 107), within 6 months of accident, notify ICBC
3. Within 2 years sue ICBC as nominal D
4. Maximum coverage is 200k inclusive of interest (s 105), deduct anything gotten from WCB or EI (s 106)

**Leggett v ICBC**
F: Guy gets into accident, doesn't report it to ICBC because he didn't think it was bad.
I: Can he recover?
H: No
R: S 24 provides a means by which an injured person may obtain compensation even though the driver was at fault and other driver was not insured. Purpose of the section is to limit the exposure of the corporation to claims brought by persons who have done everything they reasonably could to protect their their interests and interests of ICBC. Claims under s 23 are limited to people who COULD NOT ascertain the identity, not to those who simply chose not to do so. Test is subjective insofar as claimant must know the vehicle has been in an accident and must have been in a position that would be reasonable to to discover and record the appropriate information.

Hit and run claims are covered under s 24 of the Act and regulation part 8. The victim sues ICBC as a nominal defendant (s 24(1)) after giving ICBC notice of the claim within 6 months of the accident (s 24(2)). The time for notice runs from the date the victim knew or ought to have known about the involvement of an unidentified driver (**Jamt**). Making a statement to an adjustor is sufficient notice (**Goltzman, Hecker**). The claimant must make reasonable attempts to ascertain the driver's identity (**Leggett**). All of the facts of the case are relevant to determining whether the applicant make reasonable attempts to identify the driver (**Raisenen**). The applicant must take reasonable steps after receiving treatment for their injuries (**Becker**). The relevant consideration for determining whether the applicant took reasonable steps is why they did not do so at the first instance (**Holloway, Larsen**).

## Third Party Rights: ss 76, 77, 78 Act

- gives victim a statutory cause of action against the insurer
- ss 76, 77: ICBC can settle directly with P and has to pay judgment obtained against insured
    - absolute liability of insurer to pay victim even when driver is in breach
- s 77(3): insurer can add itself as third party in action
- proof of breach must be tried in separate action (**Bliefernich**)

- **Hosseini**: did insurer follow all procedures, was insured liable to claims, was settlement reasonable, was insured in breach

## UNDERINSURED MOTORIST PROTECTION: REGULATION PART 10, DIVISION 2, SS 148.1-148.4

- mandatory minimum policy provides 1 million UMP
- s 148.1: insured is occupant of vehicle described in OC, person named as owner/lessee in OC, member of household of named OC, holds DC, member of someone holding DC, anyone entitled to sue on death of insureds
- s 148.1(2) ICBC will compensate insured or person claiming for death of insured
- s 148.1(3) exclusions
- s 148.1(5) calculation of compensation
    - damages are 1 million or less, minus sum of deductible amounts
        - 200k minimum
        - assets
        - NFB
        - EI/WCB, CPP
- s 148.2(1) has to be done through arbitration, not litigation