Assurances

Assurances

THE CRITERION OF A *NORMALLY PROVIDENT INSURED*: AN INTERPRETATION

Daniel Cooper

Volume 64, numéro 4, 1997

URI : https://id.erudit.org/iderudit/1105118ar
DOI : https://doi.org/10.7202/1105118ar

Aller au sommaire du numéro

Éditeur(s)

HEC Montréal

ISSN

0004-6027 (imprimé)
2817-3465 (numérique)

Découvrir la revue

Citer cet article

Cooper, D. (1997). THE CRITERION OF A *NORMALLY PROVIDENT INSURED*: AN INTERPRETATION. *Assurances*, *64*(4), 579–599. https://doi.org/10.7202/1105118ar

Résumé de l'article

Cet article possède deux facettes. Dans la première partie. l'auteur examine l'obligation de renseignements du preneur envers l'assureur, son fondement et les exceptions à cette obligation, en comparant le droit québécois, canadien et étranger. Dans la seconde partie, l'auteur interprète le nouveau critère institue par le législateur en vertu de l'article 2409 du Code civil du Québec, celui de *l'assuré normalement prévoyant.*

THE CRITERION OF A *NORMALLY PROVIDENT INSURED* : AN INTERPRETATION

by Daniel Cooper

RÉSUMÉ

Cet article possède deux facettes. Dans la première partie, l'auteur examine l'obligation de renseignements du preneur envers l'assureur, son fondement et les exceptions à cette obligation, en comparant le droit québécois, canadien et étranger. Dans la seconde partie, l'auteur interprète le nouveau critère institué par le législateur en vertu de l'article 2409 du Code civil du Québec, celui de l'assuré normalement prévoyant.

ABSTRACT

This document is divided into two parts. The first examines the history of the duty of disclosure, and its exceptions, in the context of the reform of the new Civil Code of Quebec, and the applicable laws of other provinces in Canada, as well as the laws of France, England, and the United States. The second interprets the Civil Code's new disclosure criterion : that of the normally provident insured, *founded at article 2409 of the new Civil Code of Quebec.*

The author:

Daniel Cooper, LL.B., Law Faculty, Montreal University, will be on a vocational training course at Robic-Léger, Robic, Richard.

INTRODUCTION

There is no class of documents for which the strictest good faith is more rigidly required in the courts of law than policies of assurance[1]. For well over two hundred years, the doctrine of *uberimmae fidei,* the doctrine of utmost good faith, has been the rule that underpins the duty of disclosure between the insured and the insurer. Breach of this duty by the insured has resulted in the draconian rule that, irrespective of the insured's innocence, the insurer can nullify the contract.

An exception to this general rule about nullifying[2] the contract is found at article 2409 of the new Civil code of Quebec:

> *2409.* The obligation respecting representations is deemed properly met if the representations are such as a normally provident insured would make, if they were made without material concealment and if the facts are substantially as represented.

The legislator has introduced a new term to article 2409 C.c.Q., that of the *normally provident insured.* In this paper, I will attempt to construe what Legislature had in mind.

This document is divided into two parts. The first examines the history of the duty of disclosure, and its exceptions. The second interprets the Civil Code's new disclosure criterion: that of the *normally provident insured*[3]. My proposition is a simple one: the words *normally provident insured,* by reasonable and necessary implication, concur with the civil liability standard of community conduct[4].

I. THE CLASSICAL DOCTRINE OF *UBERIMMAE FIDEI* DISCLOSURE

The general rule is that an insured party, upon applying for insurance, must not only tell the truth in the positive representations which he makes, but must not conceal the truth by remaining silent upon matters which have an important bearing on the risk[5]. The classic exposition of the *uberrimae fidei* principle can be found in the old English case of *Carter* v. *Boehm*, where Lord Mansfield made the following statement regarding the insured's broad duty of disclosure:

Insurance is a contract upon speculation.

The special facts, upon which the contingent chance is to be computed, lie most commonly in the true knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.

The keeping back [of] such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement[6].

This doctrine is a product of mid-18th century marine insurance law, when vessels' owners were far more likely than the insurers to know of information about the hazards of a particular voyage. According to Professor Besson[7]: «l'assureur est à la merci de l'assuré.»

To encourage fair dealings, it is understandable that, originally, the strict sanction for breach of the duty of disclosure was required. However, the legislator has since then, on various occasions, intervened to mitigate the harsh consequences of this rule, as well as prevent abuses by insurers.

To show the trend in legislative intervention affecting the sanctions aimed at breach of disclosure, I will firstly examine the period prior to the reform of the Insurance Act in 1976[8]. Secondly, I will discuss the effects of the reform. Next, I will discuss the changes that are now in force with the adoption of the new Civil Code of Quebec. Then, I will briefly examine the applicable laws of other provinces in Canada, as well as the laws of France, England, and the United States.

☐ A. Legislative Intervention

1. Quebec

Prior to the reform of 1976, irrespective of the insured's good faith in his disclosure or abscence of disclosure, the general rule of nullity of contract was the sanction for misrepresentation[9].

In the reform of 1976, however, the legislator enacted a rule which reduced the severity of the sanction applicable to damage

insurance, if the insured's misrepresentation was one of good faith[10].

Art. 2488 C.c.B.-C. In damage insurance, **unless the bad faith of the proposer is established**, the insurer is liable for the risk in the proportion that the premium collected bears to that which it should have collected, except where it is established that it would not have covered the risk if it had known the true facts.

Inspired by the French Insurance code,[11] the legislator tempered the effects of the requirement of utmost good faith for the initial declaration of risk[12]. An insured who acted in good faith was now entitled to a proportional indemnity, rather than a vitiation of his contract.

Another attenuation to the duty of disclosure was the rule (added to art. 2485) that the insured must represent all the facts known to him[13]. Furthermore, the insured's representation was deemed met if the facts were substantially as represented[14]. Professor Belleau writes:

The legislator has unequivocally reaffirmed that the facts declared by the insured must be substantially true, in obvious contrast to the former warranties which had to be absolutely correct if the insurer was to be bound. A minor mistake of detail or oversight of a non-essential fact do not now constitute failure to fulfill an already very heavy obligation[15].

Gleaned from this stream of legislative intervention are what Professor Lluelles refers to as rules that are in greater conformity with a certain contractual justice[16].

With the introduction of the new Civil Code in 1994, there were relatively few fundamental changes to insurance legislation; for the most part, there were only some readjustments and a codification of some of the jurisprudential interpretation from the reform of 1976[17].

From the period prior to the reform to the enactment of the new Civil code, one observes a clear trend of legislative intervention intended to protect the insured from the contractual superiority of insurers. This trend reflects and responds to the power, expertise, and sophistication which insurers have attained. In the context of this analysis, what is important is that this has manifested an attenuation to the strict voidance of contract rule for misrepresentation of risk.

The genesis of legislation is not found in a vacuum. Consequently, in order to draw a reasonable conclusion about

legislative intention, as well as to understand the context in which the insurance laws of Quebec have evolved, I will extend this analysis to the jurisdictions of other Canadian provinces, to France, to England, and the United States.

2. Canadian Common Law Provinces

In Canadian common law provinces, the duty of disclosure rules are set out in each province's Insurance Act. They are also expressed in the common law doctrine of *uberimmae fidei.*

Statutory provisions attenuating the rules of disclosure have been enacted in the areas of misrepresentation of age, and of incontestability periods. A misrepresentation of age, for example, in policies for accident, sickness and life insurance, does not breach the duty of disclosure[18]. An insurer may not contest an accident, sickness or life insurance contract for misrepresentation (with the exception of fraud or claims preceding the formation of contract) if the insurer has not elected to void the policy within 2 years[19].

3. France

Prior to the Insurance Act of 1930, all irregularities in a declaration resulted in cancellation of the contract, whether the insured was in good faith or not[20]. This sanction was deemed as being too rigorous, and thus the 1930 proportionality principle was introduced[21]. This allowed the insurer to maintain the contract with an increase in the premium to reflect the increased risk. The insured could accept or refuse the increase in the premium. If he refused, the contract was cancelled.

The insurer's other option was to cancel the contract. If cancelled, the insurer was obligated to restitute to the insured of good faith the proportion of the premium that corresponded to the period not guaranteed[22].

4. England

Unlike the Quebec and French proportionality principle for good faith misrepresentations, English law has operated harshly against the misrepresentation of material facts. An insured's breach of the duty to fully disclose gave the insurer the right to repudiate the contract.

English insurance law, however, has not been void of attempted reform. Recommendations for reform were made by the Law Reform Committee in 1957[23] and in 1980[24]. In particular, the Law

Commission's Working Paper of 1979 concluded that the ambit of the insured's duty of disclosure should be modified in that the insured only be under a duty to disclose facts which he either knows or which a reasonable man in his circumstances ought to know.[25]

The modified duty of disclosure is not a ground-breaking notion. Fletcher Moulton J. edicted this test in *Joel* v. *Law Union* when he wrote (in 1908):

The duty is a duty to disclose, and you can not disclose what you do not know. The obligation to disclose, therefore, necessarily depends upon the knowledge you possess[26].

Due to strong opposition from the insurance industry, the Law Commission's recommendations did not result in actual legal reform. What has evolved, however, are self-regulating measures undertaken by insurers who are members of the Association of British Insurers and of Lloyds.

5. The United States

In non-marine insurance, only the intentional concealment of a known material fact gives the insurer the right to vitiate the policy. A duty of disclosure independent of intention, as in England and Canada, took its roots in American marine insurance law only. One reason for this is that the duty of disclosure that was set forth in *Carter* v. *Boehm* was interpreted to be a more narrow[27] one than that construed and followed English courts. The reason for this is that:

> in marine insurance the subject of insurance is generally beyond the reach, and not open to the inspection of the underwriter, often in distant ports or upon the high seas, and the particular perils to which it may be exposed are too numerous to be anticipated or inquired about[28]

Whereas in non-marine insurance:

> no such necessity of reliance exists and if the underwriter assumes the risk without taking the trouble to either examine or inquire, he can not very well in the absence of all fraud, complain that it turns out greater than he anticipated[29].

In conclusion, one finds that the legislative enactments concerning the duty of disclosure in Quebec, other Canadian provinces, as well as France and England have attenuated the sanctions that were associated with the *uberimmae fidei* doctrine, whereas the courts in the United States have construed the duty of disclosure on the insured to be a narrow one.

■ II. A MODIFIED DUTY OF DISCLOSURE: AN INTERPRETATION

In this section, I will construe the legislative intention embodied in article 2409[30]. Firstly, I will examine the construction of article 2409 in general. Then, I will interpret the notion of a *normally provident insured* in particular.

□ A. Literal Interpretation

Is there any ambiguity in the words at article 2409. An exercise of statutory interpretation requires this question.

> *Art. 2409*The obligation respecting representations is deemed properly met if the representations are such as a normally provident insured would make, if they were made without material concealment and if the facts are substantially as represented.

In its essence, what is said is that the insured's duty of disclosure is deemed fulfilled if three conditions are concurrently met:

(1) That the representations are such as a **normally provident insured** would make.

(2) If they were made without material **concealment.**

(3) and if the facts are **substantially as represented.**

Underlined, are the operating and possibly ambiguous and vague words. Although the subject of this paper is to give meaning to the words *normally provident insured*, the construction and context of the article to which these words are entrenched must as well be considered. Accordingly, I will summarily evaluate the words *concealment,* and *substantially as represented.*

1. Concealment

The second condition, (if they were made without material concealment) seems to qualify and narrow the scope of the first condition of the *normally provident insured.* The word *concealment*, in this context, is the voluntary suppression of information upon which one has the duty to disclose. Professor Bout writes:

> réticence n'est pas l'omission. Elle implique la volenté de se taire alors que l'on a l'obligation de parler... L'auteur d'une réticence est nécessairement de mauvaise foi[31].

Thus, a normally provident insured cannot meet his duty of disclosure when acting in bad faith.

2. Substantially as Represented

The third condition at article 2409, that the facts are *substantially as represented*, protects the insured by discharging him from having to make representations that are absolutely correct. Rather, a disclosure that is relatively accurate will do.

3. A Normally Provident Insured

An insured whose disclosure is substantially as represented, without concealment, and who discloses as would a *normally provident insured* will thus be able to defeat an insurer's claim of misrepresentation.

The definition of provident (prévoyant) in the *Petit Robert* reads:

> Qui prend des dispositions en vue de ce qui doit ou peut arriver. Voir: diligent, prudent[32].

Oxford reads:

> Foreseeing; exercised or characterized by foresight; making provision for the future[33].

The operating word in both French and English definitions is foresight. Imposed upon the insured is a duty to make a declaration that is the product of a deliberation upon not only the immediate perception of risk, but, also, upon a reflection on future consequences.

Take, for example, an insured who, in making a declaration pertaining to home liability insurance, deliberates upon whether or not to declare the fact that he has a swimming pool in his backyard. If he does not have young children, his perception of risk in the immediate sense may be low. However, to exercise foresight, he should also consider whether his neighbors have children, he should consider the type of fencing that he has, he should think about all possible safety precautions.

The legislator's use of the word *normally,* to a certain extent, circumscribes the ambit to which how much foresight one must have. One must exercise average, not extraordinary, foresight. Clearly, one's foresight is dependent on the circumstances in general, as well as on the particular personal considerations of the person exercising the foresight. For example, a physician's declaration about, and exercise of foresight towards, the state of his own health, must be held to a different standard than that of the layman.

What is the ambit of this standard of a *normally provident insured*? Can this standard be assimilated to the civil liability standard and duty to be prudent and diligent? Notwithstanding a few jurisprudential exceptions[34], is the insured's opinion regarding the materiality of information not a breach from over 200 years of insurance case law decisions?

In my view, and it is the thesis of this paper, the words *are such as a normally provident insured would make* imply a comparison of the insured's representation to a standard of community conduct.

To further this proposition, I will examine how these words can be attributed an ordinary meaning and be assimilated with the civil liability standard of care[35]. Then, I will examine the legislative purpose in enacting this standard of a normally provident insured.

☐ B. Ordinary Meaning

Can we rely on a literal meaning only? Can we also attribute an ordinary meaning to the notion of a normally provident insured, rather than a technical meaning? Rules of interpretation prescribe a presumption in favour of the ordinary non-technical meaning of words.

Sullivan writes:

> The key consideration in determining whether the words should have their ordinary or technical meaning is not so much the subject dealt with as the understanding of the audience that has been targeted by the legislature[36].

For the most part, the audience here can include the legal community and insurer's. The words *normally provident insured*, on their face favour an ordinary meaning.

In addition to the dictionary definition, one can also make reference, by analogy, to the civil liability standard of a *bon père de famille* as previously referred to, or, to what is now more appropriately referred to at article 1457:

> Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances of usage or law[37].

This standard is the ordinary care that a diligent man should provide under the same circumstances; this care varies given the circumstances, always diverse, concerning the time and place of the person[38]. Parliament has charged the courts with the role of

evaluating an insured's representation against the standard of care that the courts, in the context of civil liability, have so often determined on in the past.

Professor Deslauriers, concerning a normally provident insured, writes:

> nous sommes d'avis que cette vision cadre mieux avec la réalité d'aujourd'hui. L'assureur, plus au fait de la pratique dans ce domaine, est en mesure de mieux diriger le preneur, et c'est ce dernier qui a besoin maintenant d'être mieux protégé, en considérant par exemple la pertinence selon ses propres attentes. Cela rejoint d'ailleurs le concept de personne normalement prudente et diligente du *Code civil*[39].

An insured's breach of this duty constitutes a fault. Mr. Nicholls writes:

> A fault is a mode of behaviour on the part of a person capable of realizing the nature and consequences of his act or omission that is contrary to an express provision of law or fails to measure up to the standard of care required by the courts in similar circumstances[40].

If an insured does not meet his duty of disclosure, as would a normally provident one, his behaviour will constitute a fault. Accordingly, there results an obligation to indemnify the injured party[41]. The courts have a great deal of experience in characterizing standards of conduct, and have done so in a vast number of domains; Medicine, Construction, Engineering, and Management - these are a few examples. The standard of a normally provident insured for a given circumstance should pose no problem.

Professor Merkin writes:

> A reasonable insured test is not hard to apply for it is merely a reasonable man test which judges have, through practice become fairly proficient in applying. But no judge can pretend to be a reasonable insurer[42].

Notwithstanding a plausible alternative, the words *normally provident* must be attributed their ordinary meaning. Their meaning, by reasonable and necessary implication, concurs with the civil liability standard of care. Nevertheless, to dispel doubt and harvest a more compelling proposal, I will now undertake a purposive interpretation.

☐ C. A Purposive Interpretation

In construing the express words used by the legislator, consideration must not only be given to the ordinary meaning of these words, but also, towards the purpose for which they are enacted. In other words, one defines the spirit of the law, rather than the letter of the law.

To unveil the legislative purpose, I will firstly explain the historical purpose justifying the strict sanction for misrepresentation. Secondly, I will explain how the original purpose, or legislative remedy sought, no longer reflected reality. Then, I will examine the intent behind the legislative reform. Finally, I will propose what is, in my view, the legislative purpose of the notion of a *normally provident insured.*

1. Historical Purpose

Insurance, in general, serves as protection from misfortune. It protects families, and contributes to social peace. Moreover, contracts of insurance are not only bilateral agreements, but, rather, also take into consideration the mutuality of insured parties. In 1766, insurance was indeed a contract of speculation upon which knowledge of the risk was held by the insured only. Accordingly, to safeguard the mutuality of insured parties, to serve as a deterrent against fraud, and to enforce a policy against wagering, strict sanctions for misrepresentation were enacted. The purpose of strict legislative sanctions was to strike a balance[43].

In this century, insurers have acquired sophisticated means of assessing risks and obtaining information. Competent insurers are now less vulnerable than they were in the 18th century. The balance of power has indeed shifted their way.

2. Legislative Reform

The law has responded. Legislative reform of the Quebec Insurance legislation took place in 1974, and was put into force in 1976. Also enacted at this time was the *Consumer Protection Act.* The philosophy behind much of this legislation was indeed a more consumer protectionist approach. In the context of insurance, four legislative modifications reflect the purpose of establishing a state of greater contractual justice between the insured and the insurer.

These are:

(1) The proportionality principle for good faith representations applies[44].

(2) Facts declared by the insured must be substantially true[45], rather than absolutely correct.

(3) Where there is a discrepancy between the policy and the application, the latter prevails[46].

(4) The character of absolute public order is conferred upon numerous articles of the Civil code[47].

3. The Purpose of the Reform

These legislative modifications protecting the insured better reflect reality. It is no longer the insurer who is at the mercy of the insured. Rather, insurers have available to them sophisticated methods of risk assessment. For example, they have computer data banks to enable them to make enquiries; they have the opportunity to arrange for the inspection of property; and, moreover, they use detailed questionnaires to elicit the information that they know is important to them. Thus, it is the insurers today that have the upper hand. In the context of the sanctions imposed for misrepresentation, both the legislator and the courts have evolved from an attitude where the insured is deemed to know every circumstance, to that of granting the insured the benefit of the doubt.

Professor Lluelles writes:

> La réforme de 1974 a eu pour objectif majeur le rééquilibrage du rapport des forces entre l'assureur et le preneur. Un esprit consumériste irradie l'ensemble des dispositions nouvelles. La position dominante de l'assureur justifie des règles protectrices dérogatoires du droit commun, puisque l'assuré ou le preneur, selon le cas, se trouve généralement dans la position du prestataire profane d'un service offert par une entreprise[48].

4. A Normally Provident Insured

I will now ascribe legislative purpose to the words *normally provident insured* at article 2409 of the new Civil Code. First, I will examine the *commentaires* made by the *ministre de la justice*. Then, inference of legislative purpose will be made through the construction of article 2409.

Descriptions of purpose can emanate from authoritative sources. The *commentaires* made by the *ministre de la justice* reveal faithfulness towards maintaining an equilibrium between the bargaining positions of consumers and insurers.

The general commentaries overseeing the provisions for insurance provide indicia of this philosophy:

> Généralement, les précisions et clarifications apportées aux règles antérieures et les nouvelles règles prescrites ont pour but de **protéger davantage** la victime d'un dommage, qu'il s'agisse de l'assuré lui-même, des tiers ou des bénéficiaires d'une assurance de personnes. Le contrat d'assurance constitue une protection importante du patrimoine des personnes dans notre société et, **pour favoriser cette protection**, certaines des nouvelles règles tendent vers une meilleure information de l'assuré quant à la nature et à l'étendue de ses obligations et de sa couverture d'assurance. Le nouveau code tient compte de la nature même du contrat d'assurance terrestre qui, dans les faits, constitue le plus souvent un **contrat d'adhésion** dont la lecture et la compréhension exigent une connaissance technique, soit des règles de droit applicables, soit des règles de mutalité ou d'évaluation des risques. Le code tient donc compte du fait qu'il s'agit là de connaissance spécialisées pour le **consommateur moyen**[49].

The first statement of purpose is that generally the goal of the Civil Code is to provide the victim of damages more protection. The words «pour favoriser cette protection» are further indicia of a consumerist philosophy. Moreover, the scope of the word *damage* is broad. Damage to an insured may result from the unfair voidance of an insurance contract by the insurer on the grounds of purportive misrepresentation.

In the second statement of purpose, it is stated that the new code takes into consideration that an insurance contract is often one of adhesion. This implies a recognition of the state of unbalanced affairs between insurers and the insured. Upon the formation of contract, it is the insurers that have the powerful advantage. For the new code to *take into consideration* that the insurance business is a complex field for laymen, or that an insurance contract is often one of adhesion, there must be a countervailing remedy. This remedy is embodied in a consumerist philosophy.

I have examined indicium of legislative purpose alluded to in the general commentaries to the insurance provisions in the new Civil Code. Now, I will refer to the commentaries at article 2409 in particular. The *commentaires* at the third paragraph read:

> Cet article n'a pas pour objet d'exiger de l'assuré un degré de connaissance élevé des critères d'évaluation des

> risques, ce qui constitue la spécialisation de l'assureur. Au contraire, il a pour objectif de poser un critère d'évaluation tel que les déclarations faites par une personne prudente, mais non spécialisée dans ce domaine, soient considérées suffisantes et qu'ainsi l'obligation de déclaration du risque soit remplie[50].

Gleaned from these words is, in my view, a clear indication of legislative purpose. As the commentaries indicate, the purpose of this provision is not to demand from the insured a high standard of conduct in evaluating risk criteria. Rather, on the contrary, the objective sought is a standard that demands no more than can be expected from an average, prudent and reasonable person. Take, for example, an insured who is refused an indemnity for the ruin of his home by fire for failing to disclose the instalation of a wood burning stove in his home. The average and reasonable insured is most likely unaware that an insurer may consider this a greater risk. Consequently, this standard will serve as a remedy to what has been an unequal contest between the insurer and the insured and as a countervailing force to the duty of utmost good faith.

Legislative purpose can also be inferred from the construction of the text, as well as from legislative modification. The predecessor to article 2409 was article 2486 C.c.B.-C., which in the first paragraph read:

> *Art. 2486* The obligation respecting representations is deemed met if the facts are substantially as represented and there is no material concealment.
>
> *Art. 2409* The obligation respecting representations is deemed **properly** met **if the representations are such as a normally provident insured would make**, if they were made without material concealment and if the facts are substantially as represented.

The underlined text indicates the additions to article 2409. The inclusion of the adverb *properly*[51] qualifies more clearly the provision's allowance for defeating a claim of misrepresentation. As the legislator does not use words gratuitously, one must assume the effect providing greater protection for the insured was intended.

The inclusion of *if the representations are such as a normally provident insured would make*[52] serves as a new and third condition. In the *Projet de Loi - 125, Code civil de Québec* at article 2394 the words *assuré avisé* (informed insured) were proposed[53]. The commentaries to article 2394 indicate that the criteria of an *assuré*

avisé was inserted to reduce the burden on the insured. Why was the criteria modified from that of an *assuré avisé* to that of a *normally provident insured*? What is the difference between an insured who is informed and one who is provident? The word informed is ambiguous. A narrow interpretation would construe the word *informed* to imply a question of fact. You are either knowledgeable or you are not. A home-owner who uses his fireplace a great deal either knows his chimney is in a hazardous condition or not. Broadly construed, however, to be informed can imply a state of what should be. The prudent home-owner will usually have his chimney flue cleaned once a year. The words *normally provident* indeed eliminate this ambiguity. They refer to the later interpretation. They impose the duty to exercise foresight, a duty to consider future consequences.

At law, the understanding of a word requires consideration of the rights and duties associated with it. A provident insured has the duty to execute disclosure with foresight. The ambit of this duty however, is circumscribed by a concomitant right. That being, the right to be exonerated from liability if a disclosure, albit not passing the reasonable insurer test, is one that a normally provident insured would make. In effect it is a reciprocal test. It is a norm, as the word *normally* implies. Passing it, manifests exoneration.

Now there is a balance between rights and duties. In the past, the insured was charged with a duty only. The duty of utmost good faith. Legislative intervention gradualy mitigated the harsh consequences of failing to meet this duty by granting rights. Now the *normally provident insured* criterion is indeed a democratization of the rights and duties concomitant with disclosure. The corollary to the duty of utmost good faith is the reciprocal right of protection from the untrammled and arbitrary voidance of contract sanctions.

Construed from the *commentaires* of the *ministre de la justice* and the modifications made to article 2409 is the legislative intent of protecting the consumer. The courts now have a legislative invitation to also take into consideration the insured's behavior when they cast judgement on his representations. The insured's behavior can now be compared to a societal norm[54], rather than only to what is likely to materially influence a reasonable insurer *in abstracto*.

In conclusion, it is my view that the legislative purpose embodied in article 2409 is as follows: Article 2409 seeks to encourage stability of contract. It seeks to prevent the voidance, based on a mere technicality, of an insured's vested right to indemnification. It seeks to generate parity between the vested rights and

incumbent duties on the insured. It seeks to protect the insurer, and especially protect the insured, from the contractual injustices that have been the consequence of blind and strict application of the doctrine of *uberimmae fidei.*

■ CONCLUSION

The doctrine of *uberimmae fidei* disclosure in insurance law is deeply rooted and dates back over 200 years. Up to now, the duty to disclose material facts with utmost good faith has been trite law, and has remained unflinchingly resolute.

Today insurers are a much more able and sophisticated lot. Because of this, the rules of disclosure have been modified. One such modification is the new criterion of the *normally provident insured.* In this paper, I have construed these words to mean that, as of now, an insured will be treated as having discharged his duty of disclosure if he discloses to the best of his knowledge and belief, having carried out all the enquiries which a *normally provident insured*, or reasonable person in his circumstances, would have carried out, regardless of whether his disclosure is in fact inaccurate.

I suggest that this interpretation is a correct one because the words *normally provident insured* not only convey this meaning literally, but they on their face, favour an ordinary non-technical meaning. Moreover, this interpretation is concordant with a clear legislative trend designed to provide adequate protection for the insured.

At the end of the day, it is the courts that will elaborate and circumscribe the ambit of this standard of community conduct. This standard opens the door for the courts not only to consider the circumstances from the insurer's point of view, but, also to take into consideration the circumstances of the insured as well. By doing so, the courts will be able to apply this new criterion in its spirit of flexibility rather than a blind faith application of the doctrine of *uberimmae fidei.*

□ Table of Legislation

Code civil du Bas Canada

Articles:
2478 al. 2.

2485
2486 al. 1.
2487
2488
2500

Code civil du Québec

Articles:
1379
1400
1400 al. 2.
1407
1432
1457
2409
2410

☐ Table of Cases

Bernier v. *Mutual Life Assurance Company of Canada*, [1973] C.A. 892.

Canadian Indemnity Co. v. *Canadian Johns-Manville Co.*, [1990] 2 S.C.R. 549.

Carter v. *Boehm*, (1766) 97 E.R. 1162 (K.B.)

Horne v. *Polland*, (1922) 2 K.B. 364.

Joel v. *Law Union and Crown*, [1908] 2 K.B. 863.

L'Oeuvre des Terrains de jeux de Québec c. *Canon*, (1940) 69 B.R. 112.

☐ Bibliography

Monographs and Commentaries

BARREAU DU QUÉBEC, *Commentaires sur l'avant-projet de loi portant réforme au Code civil du Québec du droit des obligations (de la rente et des assurances)*, Barreau du Québec, Service de recherche et de législation, 1988.

AUDOUIN, Jean-Louis, *Les Obligations*, 4e éd., Cowansville, Éditions Yvon Blais, 1993.

BIRDS, John, *Modern Insurance Law*, 2nd ed., London, Sweet & Maxwell, 1988.

BOUT, Roger, *Le contrat d'assurance en droit comparé français et québécois*, Montréal, C.R.D.P.C.Q., 1988.

BROWN, C. and J. MENEZES, *Insurance Law in Canada*, 2nd ed., Toronto, Carswell, 1991.

COLINVAUX, Raoul, *The Law of Insurance*, 5th ed., London, Sweet & Maxwell, 1984.

DESLAURIERS, Patrice, *La déclaration précontractuelle de risque en droit québécois*, Cowansville, Éditions Yvon Blais, 1994.

GOUVERNEMENT DU QUÉBEC, MINISTÈRE DE LA JUSTICE, *Commentaires du ministre de la Justice - Le Code civil du Québec*, 1993.

GOUVERNEMENT DU QUÉBEC, MINISTÈRE DE LA JUSTICE, *Projet de loi 125 - Code civil du Québec - Commentaires détaillés sur les dispositions du projet*, Livre V: Des obligations, Québec, Ministère de la Justice, 1991.

LAMBERT-FAIVRE, Yvonne, *Droit des assurances*, 8th ed., Paris, Éditions Dalloz, 1992.

LIUELLES, Didier, *Précis des assurances terrestres*, Montréal, Les Éditions Thémis, 1994.

NORWOOD, D. and J. WEIR, *Norwood on Life Insurance Law in Canada*, 2nd ed., Toronto, Carswell, 1993.

PICARD, M et A. BESSON, *Droit assurances terrestres*, t. 1, 5e éd., Paris, L.D.G.J., 1982.

ROBERT, Paul, *Le Nouveau Petit Robert Dictionnaire de la Langue Française*, Paris, Dictionnaires Le Robert, 1993.

SULLIVAN, Ruth, *Driedger on the Construction of Statutes*, 3rd ed., Toronto, Butterworths, 1994.

The Concise Oxford Dictionary of Current English, 8th ed., Oxford, Clarendon Press, 1990.

VANCE, W.R. and B. M. ANDERSON, *Handbook on the Law of Insurance*, 3rd ed., St. Paul, West Publishing Co., 1951.

Articles and Periodicals

BELLEAU, C., «New Rules Concerning Misrepresentation and Warranties», Meredith Memorial Lectures, *The New Quebec Insurance Act*, Toronto, Richard De Boo, 1979, p. 23.

BERGERON, J.G., «La déclaration du risque et les assurances -vie de non-fumeur», (1988) 48 *R. du B.*, 47.

BROWN, Craig, «Unfinished Business: Misrepresentation and Non-Disclosure in Insurance Proposals», (1994) 16 *New Zealand Universities Law Review*, 195.

DUBREUIL, Christianne, «L'assurance: un contrat de bonne foi à l'étape de la formation et de l'execution», (1992) 37 *McGill L. J.* 1087.

DUBREUIL, Christianne, «L'obligation de renseignement de l'assureur: vers une moralisation des relations entre assureurs et assurés», (1993) 27 *R.J.T.* 454.

ESTERBAUER, A. et A. HUGGINS, «The Insurer's Right to Information and the Insured's Duty to Co-operate: How Far Do They Go?», (1995) 5 *C.I.L.R.* 113.

FORTE, A. D. M., «The materiality test in Insurance», (1993) *Lloyd's Maritime and Commercial Law Quarterly (1993)* 557.

HARRIS, Roger, «Fraudulent Misrepresentations and the Insurer's Duty to Investigate», (1992) 20 C.B.L.J., 464.

HASSON, R. A., «Good Faith in Contract Law - Some Lessons From Insurance Law», (1987-88) 13 *C.B.L.J.*, 93.

HASSON, R.A., «The Doctine of Uberrima Fides in Insurance Law - A Critical Evaluation», (1969) 32 *M.L.R.*, 615.

JOBIN-LABERGE, Odette et Luc PLAMONDON, «Les assurances et les rentes», La réforme du Code civil, t. 2, Québec, *P.U.L.*, 1993, p.1093.

MERKIN, Robert, «Uberrimae Fidei Strikes Again», (1976) 39 *M.L.R.*, 478.

MOREAU, Rémi, «La plus entière bonne foi», (1993) 4 *Ass.* 577.

PINEAU, Jean, *La Réforme du Code civil*, t. 2, Québec, P.U.L., 1993, p. 9.

SIMARD, F.-X., «La déclaration initiale du risque dans le droit des assurances de la Province de Québec», (1973) 14 *C. de D.* 167.

THE LAW COMMISSION, *Insurance Law: Non-disclosure and breach of warranty, Working Paper No. 73,* London, Her Majesty's Stationery Office, 1979.

THE LAW COMMISSION, *Insurance Law: Non-disclosure and breach of warranty,* Fifth Report, Cmnd. 62.

THE LAW COMMISSION, *Insurance Law: Non-disclosure and breach of warranty,* Report No. 104, Cmnd. 8064.

☐ Endnotes

1 Raoul COLINVAUX, *The Law of Insurance*, 5th ed., London, Sweet & Maxwell, 1984, p. 92.

2 Articles 2411 and 2420 of the Civil Code as well moderate the sanction of nullifying the contract by allowing the insurer to remain liable towards the insured for such proportion of the indemnity as the premium he collected bears to the premium he should have collected.

3 *C.c.Q.* Art. 2409.

4 *Id.* Art. 1457.

5 David NORWOOD, and John P. WEIR, *Norwood on Life Insurance Law in Canada*, 2nd ed., Toronto, Carswell, 1993, p. 297.

6 *Carter* v. *Boehm*, (1766) 97 E.R. 1162, 1164 (K.B.)

7 Maurice PICARD et André BESSON, *Droit assurances terrestres*, t. I, 5e éd., Paris, L.D.G.J., 1982, p.69.

8 The reformed Insurance Act was enacted in 1974 and in force in 1976.

9 *C.c.Q.* Art. 2487.

10 *C.c.B.-C.* Art. 2488.

11 Art. L. 113-9 C. ass.

12 Christianne DUBREUIL, «L'assurance: un contrat de bonne foi à l'étape de la formation et de l'exécution», (1992) 37 McGill L. J. 1087, 1094.

13 *C.c.B.-C.* Art. 2485.

14 *Id.* Art. 2486 al. 1.

15 Claude BELLEAU, «New Rules Concerning Misrepresentation and Warranties», Meredith Memorial Lectures, *The New Quebec Insurance Act*, Toronto, Richard De Boo, 1979, p. 33.

16 Didier LLUELLES,*Précis des assurances terrestres*, Montréal, Les Éditions Thémis, 1994, p.13. (Hereafter: «D. Lluelles (1994)»)

17 Odette JOBIN-LABERGE, et Luc PLAMONDON, «Les assurances et les rentes», La réforme du Code civil, t. 2, Québec, P.U.L., 1993, p. 1096.

18 Craig BROWN and Julio MENEZES, *Insurance Law in Canada*, 2nd ed., Toronto, Carswell, 1991, p. 106. **Accident & Sickness**: Alberta, s. 369; B.C., s. 195; Manitoba, s. 223; New Brunswick, s. 206; Newfoundland, s. 22; Nova Scotia, s. 86; Ontario, s. 265; P.E.I., s. 195; Saskatchewan, s. 246. David NORWOOD, and John P. WEIR, *Norwood on Life Insurance Law in Canada*, 2nd ed., Toronto, Carswell, 1993, p. 322. **Life Insurance**: Ontario, s. 186(3).

19 *Id. Insurance Law in Canada*, p. 106. **Accident & Sickness:** Alberta, s. 368; B.C., s.

194; Manitoba, s. 222; New Brunswick, s. 205; Newfoundland, s. 21; Nova Scotia, s. 85; Ontario, s. 264; P.E.I., s. 194; Saskatchewan, s. 245. David NORWOOD, and John P. WEIR, *Norwood on Life Insurance Law in Canada*, 2nd ed., Toronto, Carswell, 1993, p. 316. Life Insurance: Ontario, s. 184.

20 Yvonne LAMBERT-FAIVRE, *Droit des assurances*, 8th éd., Paris, Éditions Dalloz, 1992, p. 218. (Hereafter: «Y. LAMBERT (1992)») Art . 348 of old Code de commerce assurance maritimes.

21 L.113-9 C. ass.

22 Y. LAMBERT (1992), p. 221.

23 *Id.* Fifth Report Cmnd. 62.

24 *Id.* Report No. 104, Cmnd. 8064.

25 *Id. Working Paper No. 73*, p. 56-57.

26 *Joel* v. *Law Union and Crown*, [1908] 2 K.B. 863, 884.

27 See note 5. Professor Hasson writes: «It is respectfully submitted that *Carter* v. *Boehm* (1766) 97 E.R. 1162 (K.B.) was correctly read by a number of American courts in the nineteenth century who read the case as stating a "narrow" rule of disclosure.»

28 W.R. VANCE and B. M. ANDERSON, *Handbook on the Law of Insurance*, 3rd ed., St. Paul, West Publishing Co., 1951, p. 371.

29 *Id. Handbook on the Law of Insurance*, p. 371.

30 *C.c.Q.* Art. 2409.

31 Roger BOUT, *Le contrat d'assurance en droit comparé français et québécois*, Montréal, C.R.D.P.C.Q., 1988, p. 69.

32 Paul ROBERT, *Le Nouveau Petit Robert Dictionnaire de la Langue Française*, Paris,

Dictionnaires Le Robert, 1993, p. 1777.

33 *The Concise Oxford Dictionary of Current English*, 8th ed., Oxford, Clarendon Press, 1990, p. 62.

34 *Joel* v. *Law Union and Crown*, [1908] 2 K.B. 863. *Horne* v. *Polland*, (1922) 2 K.B. 364. *Bernier* v. *Mutual Life Assurance Company of Canada*, [1973] C.A. 892.

35 *C.c.Q.* Art .1457.

36 Ruth SULLIVAN, *Driedger on the Construction of Statutes*, 3rd ed., Toronto, Butterworths, 1994, p. 20. (Hereafter: «R. SULLIVAN (1994)»).

37 *C.c.Q.* Art 1457. In the commentaries by the Minister of Justice at art. 2409, this standard is as well alluded to: «...il a pour objectif de poser un critère d'évaluation tel que les déclarations faites par une personne prudente, mais non-spécialisée...» MINISTÈRE DE LA JUSTICE, *Commentaires du ministre de la Justice - Le Code civil du Québec*, 1993, p. 796.

38 *L'Oeuvre des Terrains de jeux de Québec* c. *Canon*, (1940) 69 B.R. 112, 114. [Translation]

39 P. DESLAURIERS (1994) p. 47.

40 Jean-Louis BAUDOUIN, *La Responsabilité Civile*, 4e éd., Cowansville, Éditions Yvon Blais, 1994, p. 80. (Hereafter: «J. L. BEADOUIN (1994)»).

41 An important distinction between the standard of the normally provident insured and the civil liability standard of conduct should however be kept in mind. An obligation to repair is manifested in civil liability only when there is causality between the fault and the damage. In insurance however, causality is not a requirement (art. 2410). One must keep in mind as Professor Simard writes: « Le droit des assurances repose sur des principes qui lui sont propres. Ce sont des règles autonomes qui ont été empruntées aux droits français, americain, anglais et à certains vieilles décisions. Il s'agit donc de principes fondamentaux différents des nôtres ...» François-Xavier SIMARD, «La déclaration initiale du risque dans le droit des assurances de la Province de Québec», (1973) 14 *C. de D.* p. 178. (Hereafter: «F. X. SIMARD (1973)»). *Contra* In the past, the subjective knowledge of the insured was not considered. Can one now imply from the introduction of the term *normally provident insured*,

legislative intent to have the Insurance legislation of the new code be more faithful to Civil law traditions?

42 Robert MERKIN, «Uberrimae Fidei Strikes Again», (1976) 39 *M.L.R.*, p. 480.

43 F. X. SIMARD (1973), p. 184.

44 *C.c.B.-C.* Art. 2488.

45 *Id.* Art. 2485.

46 *Id.* Art. 2478 al. 2.

47 *Id.* Art. 2500.

48 D. LIUELLES, (1994), p. 30.

49 GOUVERNEMENT DU QUÉBEC, MINISTÉRE DE LA JUSTICE, *Commentaires du ministre de la Justice - Le Code civil du Québec*, 1993, p. 790.

50 *C.c.Q.* Art. 2409.

51 *C.c.Q.* 2409

52 *Id.*

53 GOUVERNEMENT DU QUÉBEC, MINISTÉRE DE LA JUSTICE, *Projet de loi 125 Code civil du Québec, Commentaires détaillés sur les dispositions du projet*, (1991) p. 832.

54 It is interesting to note that if Insurance companies want to raise the standard of the societal norm, they, their agents, and brokers, will have to duly inform the public of the duties of disclosure. As a result, the normally provident Insured will discharge his obligations to the liking of the insurers.