COURT FILE NO.: 03-B6135 Barrie
DATE: 2009/08/19

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
DELORES DeKONING and TREVOR WAYNE BRYAN	James J. Feehely and Colleen Butler, for the Plaintiffs
Plaintiffs	
- and -	
VECTOR INSURANCE NETWORK (ONTARIO) LIMITED, formerly VECTOR INSURANCE BROKERS LIMITED and THE WAWANESA MUTUAL INSURANCE COMPANY	Chris Stribopoulos, for the Defendant Vector Insurance Network (Ontario) Limited, Donald Cormack for the Defendant Wawanesa Mutual Insurance Company
Defendants	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, KATHERINE-PAIGE MacNEIL, a minor under the age of 18 years by her Litigation Guardian GORD MacNEIL, GORD MacNEIL, KATHERINE MacNEIL and JAMIE MacNEIL	Michael Taylor, for the Intervener State Farm Mutual Automobile Insurance Company John McLeish and Rikin Morzaria, for the Interveners Katherine-Paige MacNeil, Gord MacNeil, Katherine MacNeil and Jamie MacNeil
Interveners	
	HEARD: June 8, 9, 10, 2009

Reasons for Decision

Howden J.:

Overview

[1] This case raises the issue whether the failure of an insured under an automobile liability policy to report her knowledge to the insurer of the driving record of a young man, listed on the policy as an occasional driver some ten months earlier, represents a breach of a statutory condition and permits the insurer to treat the policy as void *ab initio* and unenforceable. Statutory Condition 1 requires an insured to report to the insurer a change material to the risk that is known to the insured.

[2] This case also raises the issue whether, and to what extent, the insurer is obligated in law to inquire into matters it regards as material to the risk prior to a renewal of coverage where the insurer has added a male driver in a high-risk category to its coverage within the prior year, has access electronically to Ministry of Transportation (MTO) driving records, and neither inquires of the insured nor seeks a driving record from MTO before accepting what is in law a new insurance contract for the following annual term.

[3] Since 1997, the plaintiff Delores DeKoning has used the defendant Wawanesa Mutual Insurance Company (Wawanesa) to insure her two motor vehicles and to insure her against third party liability. She completed one application to Wawanesa through the licensed broker Vector Insurance Network (Ontario) Limited (Vector) in 1997. At that time only she and her former husband were listed in the policy as insureds, there were no occasional drivers. Her grandson Trevor Bryan, the other plaintiff in this action, has lived with Ms. DeKoning most of his life. He was born in 1984. In 2001, Bryan was over 16 years of age and had obtained his G2 driver's license, a temporary license usually in force for at least 12 months until a road test is passed. At Ms. DeKoning's request, Trevor Bryan was added by Wawanesa as an occasional driver in July 2001. Again, this was accomplished by telephone through the broker Vector. Wawanesa obtained the driving record (MVR) of Trevor Bryan prior to adding him to the policy, though nothing was said to or asked of Ms. DeKoning in that regard. The MVR at that time showed that his record was clear.

[4] By May 2002, Ms. DeKoning was made aware by Trevor that he had received a notice of suspension of his license by reason of demerit point accumulation. She also knew of two highway traffic convictions, speeding and either a seatbelt violation or a conviction for failing to stop. Also in May 2002, Ms. DeKoning received the Certificate of Insurance from Wawanesa, with an effective renewal date June 29, 2002. She took Trevor to the local Ministry office to turn in his license and ensure that all fines were paid, and she kept the motor vehicle that he had driven at her mechanic's garage until the suspension ended on July 19, 2002. She did not report what she knew of Trevor's MVR to Wawanesa or to Vector. She said that she did not know of a duty on her to do so. Wawanesa made no inquiry of her or of the MTO records to which it has access for a fee of $12, prior to renewing coverage June 29, 2002.

[5] On August 2, 2002, Trevor Bryan was driving at night with three passengers in his grandmother's vehicle (a 1989 Tempo) when a serious accident occurred. No other vehicle was involved. One of the passengers, Katherine-Paige MacNeil, suffered catastrophic injuries. In October 2002, Wawanesa completed its investigation and gave Ms. DeKoning notice of termination of the policy with a premium rebate to June 29, 2002. The termination purported to take effect *ab initio*, as of June 29, 2002.

[6] A judgment has since been obtained by the MacNeils against Ms. DeKoning and Mr. Bryan in the total sum, including *Family Law Act* claims, of $18,427,207.20. Wawanesa mounted no defence for the plaintiffs, though it was added as a statutory third party. It took the position throughout that the policy was void *ab initio*. The limit for third party claims on the Wawanesa policy was $1,000,000.

[7] The plaintiffs Delores DeKoning and Trevor Bryan brought this action against the broker, Vector Insurance Network (Ontario) Limited (formerly Vector Insurance Brokers Limited) and Wawanesa, claiming declaratory relief including a declaration that the policy of insurance is binding and enforceable against Wawanesa from June 29, 2002 and a declaration that Wawanesa was obligated to provide the plaintiffs with a defence in the MacNeil action. Bryan and DeKoning also claim indemnity by Wawanesa from all damages and costs assessed against them in the MacNeil action.

[8] In early May of this year, a trial management conference was held regarding this action and the MacNeil trial. An order had been made earlier for trial together or one after the other. It was agreed that the latter claim dealing with full indemnity was not ready for trial at this time. At the beginning of this trial, Mr. Feehely brought forward a motion to amend the statement of claim by pleading facts in support of allegations of bad faith in the conduct of Wawanesa towards his clients. He submitted that the foundation of the claim for full indemnity rested on these allegations. Bad faith on the part of Wawanesa had not been expressly pleaded or made the subject of the discovery process. The amendment to add the plaintiffs' claim for full indemnity on grounds of bad faith was allowed. Trial of that portion of the claim was left to a later date, following completion of document and oral discovery on the bad faith issues. Whether it proceeds to trial at all depends first on the result of this first trial phase.

[9] I was also informed that all issues involving Vector were resolved. Therefore counsel for Vector took no part in the trial.

The Parties and Their Positions

[10] The position of the plaintiffs is that only Ms. DeKoning dealt with the automobile insurance and that there is no evidence to support the defendant Wawanesa's allegation that she misrepresented any fact to that company. Second, as to Wawanesa's purported termination of the contract *ex post facto* as of the renewal date of June 29, 2002, the plaintiffs aver that Wawanesa failed to take the steps necessary to void the contract set out in subsections 236 (i)(ii)(iii) and (iv) of the *Insurance Act*; therefore the insurance contract remains in force pending these requirements being met.

[11] Third, the plaintiffs submit that no material change in the risk has been proven by Wawanesa. It is for Wawanesa to prove that a change material to accepting the risk has occurred, that there is a causal link between the alleged change and the loss suffered, and that the insured knew that the change is material to the risk. Insurance Law of Canada Vol. 1, by C. Brown and J. Menezes, Thomson Carswell, 2002 (loose leaf, modified to April 2, 2009) at p. 17-77. At no time after the 1997 application by Ms. DeKoning, or after Bryan was added in 2001, did Wawanesa ask a question of, or advise the insured that the highway traffic record of Trevor Bryan (his "MVR") was regarded as a fact material to Wawanesa's renewing the policy on June 29, 2002. In submitting this proposition, Mr. Feehely on the Plaintiffs' behalf suggests that, though the test of a "prudent insurer" is objective in part, it requires the insurer to act so that a reasonable person can discern what the objectives and criteria for reporting are. In essence, the plaintiffs characterize the approach of Wawanesa as a 'gottcha approach.'

[12] Finally, the principle of utmost good faith is historically, and remains now, an important obligation in insurance law. However, the plaintiffs submit that, for an insurer to rely on it today, the insurer must be seen to have taken reasonable steps to investigate relevant matters of which it has substantial knowledge and that are available to it in public records. In other words, a duty of due diligence applies to insurers as a condition precedent to an insured's liability, where matters of public record such as a motor vehicle record ("MVR") are involved. *Coronation Insurance Company v. Taku Air Transport Limited*, [1991] 3 S.C.R. 622; *Sagl v. Cosburn, Griffiths and Brandham Insurance Brokers Limited*, [2009] O.J. No. 1879 (O.C.A.). The plaintiffs seek judgment by way of a declaration that the insurance policy is valid, binding and enforceable against Wawanesa, and that the plaintiffs are entitled to indemnity up to the policy limit of $1,000,000 plus their costs in defending the claims arising out of the August 2, 2002 accident, without prejudice to their right to trial of their claim to full indemnity against Wawanesa on completion of pleadings and discovery processes.

[13] Prior to trial of this action, all parties and counsel were aware that this court had ordered that the MacNeil action and this one (referred to as the coverage action) were to be tried together, or one would be tried after the other, at a common sittings by the same judge. This was so due to the inter-related nature of the issues. Following the hearing of pre-trial motions, I ordered that:

(i) the MacNeil plaintiffs and State Farm (both parties to the MacNeil action with an interest in, and affected by, the coverage action) were to be added as intervenors in the coverage action, subject to limits on their ability to adduce any new issues due to the lateness of their moving for this relief; and

(ii) that the jury notice in the coverage action be struck, for reasons provided in the typed endorsement.

Therefore, submissions were heard and cross-examination was permitted, on the MacNeils and State Farm's behalf, in the coverage action.

[14] On behalf of the MacNeils and State Farm, Mr. Morzaria and Mr. Taylor submit that the relief sought by the plaintiffs in this action should be granted. As a family affected seriously by the issues in this action, the MacNeils' position is that the trend of judicial authority supports the plaintiffs' position on material change in the risk and the obligations properly owed by the

insurer to the insured as well as to the traveling public. In any event, Wawanesa failed in its duty of due diligence as interpreted by the Supreme Court of Canada judgment in *Coronation Insurance,* supra. Mr. Morzaria supplemented Mr. Feehely's factual submissions with legal authorities on statutory and contractual interpretation, the duty on insureds in seeking insurance coverage, onus of proof on the insurer to demonstrate materiality of any change in relevant facts, and the status in law of a "renewal" of an insurance policy.

[15] Mr. Morzaria submitted on behalf of the MacNeils that:

(i) the words in Statutory Condition 1 of the motor vehicle liability policy requiring disclosure of "any change in risk material to the contract", were meant to be interpreted narrowly in a sense confined to "the proprietary interest in the insured automobile" as the examples in the condition would indicate;

(ii) Wawanesa has failed to meet the onus on it to establish that its underwriting practices and guidelines meet ordinary standards of insurance generally and to demonstrate the essential components of materiality: L*achman Estate v. Norwich Union* (1999), 40 O.R. (3d) 393 at para 43; and

(iii) that Wawanesa failed in its duty of due diligence by not inquiring into Mr. Bryan's MVR prior to granting the renewal effective June 29, 2002, and failed to meet the standard of a "prudent insurer" by failing to investigate Bryan's driving record prior thereto, thus pre-empting the voiding of the policy by Wawanesa where it is part of a public scheme intended to benefit third party users of the roads and highways. See *Coronation Insurance,* supra.

[16] State Farm provided coverage to the MacNeil family which includes the underinsured driver endorsement, whereby it is liable to the policy limits for damages beyond coverage provided to the insured driver. Thus, if Wawanesa's assertion that its policy was void prior to or at the time of the accident date (August 2, 2002) were accepted, State Farm would be liable up to its policy limits for the damages adjudged as owing to K-P. MacNeil and her family. On behalf of State Farm, Mr. Taylor spoke to two issues:

(i) can Wawanesa void the policy as of June 29, 2002 due to material misrepresentation or non-disclosure?

(ii) can the policy be treated as void where Wawanesa failed to meet its due diligence obligation?

[17] Mr. Taylor submitted that the terms of the Certificate of Insurance, the standard form auto policy approved for Ontario (OAP1, Exhibit 2), and Statutory Condition 1 are relevant to the issue of material change and the insured's duty to disclose. Neither the relevant provision in the OAP1 form nor the "warning" clause in the general Certificate of Insurance assist Wawanesa; Statutory Condition 1 should be considered within a test of reasonable expectations arising from its terms and all one can draw from it is that only changes in insurable interest, or in the named insured's circumstances, can properly be regarded as material and falling within the duty to disclose to the insurer. If Wawanesa can rely on its own in-house underwriting

instructions as to when a contract should be terminated, entitled "General Rules", how can anyone meet an obligation (s)he does not know? No insured of Wawanesa has access to that document so it is a serious question as to how they could possibly comply with it.

[18] Furthermore, Mr. Taylor agreed that there is no evidence as to what a prudent insurer's practice would have been within the circumstances of this case. As stated in *Fidelity & Casualty Co. of New York v. General Structures Inc.*, [1977] 2 S.C.R. 1098, the proper test as to whether a fact must be disclosed is that of a reasonable insurer and whether, if the concealed facts had been disclosed, they would have influenced "a reasonable insurer" to decline the risk or increase the premium. Wawanesa has failed to meet its onus of addressing the standard of practice of the reasonable insurer. *Gregory v. Jolley et al*, (2001) 54 O.R. (3d) 481 (C.A.), at paras 30 to 36. It should now be regarded as accepted law that, apart from a factor basic to insurability as in *Gregory*, where an insurer does not inquire into relevant information which is accessible by it and pertinent to the risk, it runs counter to the good faith obligation that the insurer owes to the insured for it to accept the risk and then raise lack of information as a defence to a claim under the policy. *Sagl*, supra, at para 62.

[19] Mr. Taylor concluded that in the absence of any communication by Wawanesa regarding facts now raised by it as material, or of any inquiry into information available to it in the public record, neither materiality nor due diligence has been established and the Wawanesa policy insuring Ms. DeKoning (and, as an occasional driver, Mr. Bryan), should be declared valid.

[20] Wawanesa takes a very different view of this case from those asserted by the plaintiffs and interveners. Mr. Cormack, its counsel, submitted that the intent of the *Insurance Act* is to create a highly regulated process of contract formulation, content, renewal and claim processes. Only forms approved by the Superintendent of Financial Services (appointed under the *Financial Services Commission of Ontario Act* (FISCO), 1997) may be used as:

1. an application for automobile insurance;
2. a policy, endorsement or renewal;
3. a claims form; and
4. a continuation certificate.

There is no evidence that Wawanesa used forms of application, automobile policy or renewal certificates other than those required and approved under the *Insurance Act,* 1990, ch. I.8, as amended. Mr. Cormack argued that the obligation to report material changes in risk is statutory and no case authorities involving automobile liability insurance were cited requiring independent evidence as to the reasonableness of standards for interpreting materiality. Statutory Condition 1 and OAP1 (the standard auto policy form) set out the obligation to report changes material to the risk. The test of what is change material to the risk is an objective one because the scheme is mandated by statute and insureds are deemed to know the law, including the approved forms. They can request any of these forms including OAP1, a course which Ms. DeKoning never chose to take.

[21] Mr. Cormack argued that, if the effect of the decision in *Sagl* was to use a test involving some degree of subjectivity, it is not binding on this court because the Court of Appeal overturned the decision at trial and sent the case back for a new trial. From the evidence of Ms. DeKoning, it can be concluded that she, and the public generally, know that a person's driving record is important to the setting of insurance premium rates. Therefore, even if the test of materiality was in part subjective, it can be taken that any insured, and Ms. DeKoning in this case, knows that their driving record is relevant to the contract of insurance. See *Gregory v. Jolley*, supra, at para. 36 where "any reasonable person" was taken to know "the basic facts of insurability" in a case of disability insurance. As for Mr. Feehely's technical argument against invalidity, Mr. Cormack referred to para 1.7.2 of OAP1 to show that Wawanesa followed the required procedures.

[22] Mr. Cormack further stated that *Coronation Insurance*, not being an auto insurance case, requires caution in its application. He cited as a case that is more relevant and applicable to these circumstances the decision of the Alberta Court of Appeal in *Schoff v. Royal Insurance* [2004] A.B.C.A. 180 (Can. L.II). From it, Mr. Cormack submitted that there is a limit to an insurer's duty to investigate. In the same vein, he urged that there was no reason in this case for Wawanesa to check more than it did; that is, it checked Bryan's MVR when Ms. DeKoning asked for him to be added to the policy as an occasional driver, and his MVR was clear at that time. Why, Mr. Cormack asks, should it have checked again?

[23] In his view, the duty of due diligence relied on by the majority in *Coronation Insurance* should not apply to cases within the Ontario auto insurance scheme and does not apply to this case. Mr. Cormack did accept, however, that the past debate between the concepts of insurance coverage as continuous and as a newly created contract on each "renewal" was decided by the Supreme Court of Canada in favour of the latter proposition in *Patterson v.Gallant,* [1994] 3 S.C.R. 1080. That being the case, he answered a question from me by conceding that Wawanesa's case would have been stronger had Wawanesa required a signed application before its 2002 Certificate of Insurance renewal seeking material information similar to that required only once in 1997 from Ms. DeKoning, five years before.

[24] Finally, Mr. Cormack submitted that no test involving reasonable expectations or policy considerations should skew the interpretation of the duties of the parties in this case because of concerns for third party protection. The legislation in Ontario, like the legislation in Alberta referred to in *Schoff*, has provided in sections 251 and 258(4) for absolute liability under our auto insurance policies to at least $200,000 and for recovery by a judgment creditor against the 'at fault' party's insurer.

[25] In reply, Mr. Morzaria countered that he was not suggesting that the test of materiality should be purely subjective; rather, he was addressing the issue of the reasonableness of Wawanesa's conduct regarding the issue of material change. He agreed with Mr. Cormack, as did all counsel, that the insurance contract is newly formed on the effective date in the Certificate of Insurance each year. Therefore June 29, 2002 was the date of a new insurance contract with a term of one year, though the contractual relationship of Ms. DeKoning and Wawanesa was a continuing one from 1997.

Admissions

[26] I was informed at the commencement of the trial by Mr. Cormack that the defendant Wawanesa had served a Request to Admit upon the plaintiffs. The following admissions were made, most of which I have referred to in the Overview to these Reasons. They are set out in full hereafter.

1. The plaintiff Delores DeKoning was living at 108 Carter Street, Beeton with Trevor Bryan, her grandson, at the time of the loss on August 2, 2002.

2. Delores DeKoning owned two vehicles as of that date, a 1989 Tempo and a 1986 Jetta. Trevor Bryan owned no vehicle at that time.

3. In July 2001, Trevor Bryan obtained his G2 driver's license and was added to Ms. DeKoning's policy with Wawanesa as an occasional driver.

4. Wawanesa did a driver's license record search at the time of Ms. DeKoning's request to add Mr. Bryan to the policy. No prior driving offences were found at that time.

5. The Wawanesa policy was renewed effective June 29, 2002 and Trevor Bryan continued on the policy as an occasional driver.

6. Trevor Bryan's driver's license was suspended by the Ontario Registrar of Motor Vehicles between May 20, 2002 and July 19, 2002.

7. Delores DeKoning knew in May 2002 of Bryan's suspension and of two of the traffic convictions, some two months before renewal of the policy took effect.

8. Neither Trevor Bryan nor Delores DeKoning reported, prior to August 2, 2002, Trevor Bryan's driving record to Wawanesa.

Issues

[27] In the following analysis I will first set out the relevant legislative provisions. I will also refer to the relevant provisions in the OAP1, in addition to Statutory Condition 1. I will deal with the issues raised by the parties' able counsel in the following order.

A. Did Ms. DeKoning misrepresent any fact to the defendant insurer Wawanesa?

B. Did Ms. DeKoning fail to reveal a material change in the risk when she did not disclose to Wawanesa, or to the broker assigned to her,

what she knew of the motor vehicle driving record (MVR) of Trevor Bryan in May 2002?

C. Does a duty of due diligence apply in law in the context of automobile coverage under the *Insurance Act of Ontario*, and, if so, did Wawanesa comply with its duty?

D. Did Wawanesa act in accordance with the law in treating as void the contract of insurance with Ms. DeKoning *ab initio*?

Statutory Framework

[28] The following clauses contain the portions of the *Insurance Act of Ontario* which are relevant to this action.

> Section 1.
>
> "Contract" means a contract of insurance, and includes a policy, certificate, interim receipt, renewal receipt, or writing evidencing the contract, whether sealed or not, and a binding oral agreement;
>
> "Motor Vehicle Liability Policy" means a policy or part of a policy evidencing a contract insuring, (a) the owner or driver of an automobile... against liability arising out of bodily injury to or the death of a person or loss or damage to property caused by an automobile or the use or operation thereof.
>
> Section 124:
>
> (6) The question of materiality in a contract of insurance is a question of fact for the jury, or for the court if there is no jury, and no admission, term, condition, stipulation, warranty or proviso to the contrary contained in the application or proposal for insurance....has any force or validity.
>
> (7) This section does not apply to,
> (a) contracts of automobile insurance....
>
> PART IV: AUTOMOBILE INSURANCE:
>
> s. 224 (1) "Contract" means a contract of automobile insurance that,
> (a) is undertaken by an insurer that is licensed to undertake automobile insurance in Ontario...
>
> s. 232(1) A copy of the written application, signed by the insured or the insured's agent, or, if no signed application is made, a copy of the purported application, or a copy of such part of the application or purported application as is material to the contract, shall be embodied in, endorsed upon or attached to the policy when issued by the insurer.

(2) If no signed, written application is received by the insurer prior to the issue of the policy, the insurer shall deliver or mail to the insured named in the policy....a form of application to be completed and signed by the insured and returned to the insurer.

(3) Subject to subsection (5), the insurer shall deliver or mail to the insured named in the policy, or to the agent for delivery or mailing to the insured, the policy or a true copy thereof and every endorsement or other amendment to the contract.

(5) If an insurer adopts a standard policy approved under subsection 227(5) it may, instead of issuing the policy, issue a certificate in a form approved by the Superintendent.[1]

(5.1) A certificate issued under subsection (5) is of the same force and effect as if it were the standard policy, subject to the limits and coverages shown by the insurer on the certificate and any endorsements issued with or subsequent to the certificate.

(5.2) At the request of an insured to whom a certificate has been issued under subsection (5), the insurer shall provide a copy of the standard policy approved by the Superintendent.

s. 233(1) Where,

(a) an applicant for a contract,

(i) gives false particulars of the described automobile to be insured to the prejudice of the insurer, or

(ii) knowingly misrepresents or fails to disclose in the application any fact required to be stated therein,

(b) the insured contravenes a term of the contract or commits a fraud; or

(c) the insured willfully makes a false statement in respect of a claim under the contract;

a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.

(3) No statement of the applicant shall be used in defence of a claim under the contract unless it is contained in the signed written application therefore or... in the purported application, that it is embodied in, endorsed upon or attached to the policy.

(4) No statement contained in a purported copy of the application.... , other than a statement describing the risk and the extent of the insurance, shall be used in defence of a claim under the contract unless the insurer proves that the applicant made the statement attributed to the applicant in the purported application... .

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[1] Section 227(5) reads: The Superintendent may approve the form of standard policies containing insuring agreements...in conformity with this Part for use by insurers in general.

s.234(1) The conditions prescribed by the regulations made under paragraph 15.1 of s. 121(1) are statutory conditions and shall be deemed to be part of every contract to which they apply... .
(2) No variation or omission of or addition to a statutory condition is binding on the insured.

s. 249 A named insured may stipulate by endorsement to a contract evidenced by a motor vehicle liability policy that any person named in the endorsement is an excluded driver under the contract.

s. 251(1) Every contract evidenced by a motor vehicle liability policy insures, in respect of any one accident, to the limit of at least $200,000, exclusive of interest and costs, against liability resulting from bodily injury to or the death of one or more persons and loss of or damage to property.

s. 258(1) Any person who has a claim against an insured for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, even if such person is not a party to the contract, may, upon recovering a judgment therefor in any province or territory of Canada against the insured, have the insurance money payable under the contract applied in or toward satisfaction of the person's judgment and of any other judgments or claims against the insured covered by the contract and may, on the person's own behalf and on behalf of all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

(5) It is not a defence to an action under this section that an instrument issued as a motor vehicle liability policy by a person engaged in the business of an insurer and alleged by a party to the action to be such a policy is not a motor vehicle liability policy, and this section applies with necessary modifications to the instrument.

(9) Despite anything contained therein to the contrary, every contract evidenced by a motor vehicle liability policy shall, for the purposes of this section, be deemed to provide all the types of coverage mentioned in s. 250, but the insurer is not liable to a claimant with respect to such coverage in excess of the limits mentioned in s. 251.[2]

[29] Statutory Condition 1 is deemed by section 234(1) of the *Insurance Act* to be part of a motor vehicle liability policy. It is the statutory condition which deals with material change in risk. Therefore it is important to the issues in this case.

[2] Section 250 lists various uses of the described automobile for which the insurer shall not be liable if the particular use is specified under the insurance contract.

Statutory Condition 1 reads:

> 1(1): The insured named in this contract shall promptly notify the insurer or its local agent in writing of any change in the risk material to the contract and within the insured's knowledge.
>
> (2) Without restricting the generality of the foregoing, the words, "change in the risk material to the contract" include:
>
> (a) any change in the insurable interest of the insured named in this contract and the automobile by sale, assignment or otherwise, except through change of title by succession, death or proceedings under the *Bankruptcy and Insolvency Act (Canada)*; and, in respect of insurance against loss of or damage to the automobile,
>
> (b) any mortgage, lien or encumbrance affecting the automobile after the application for this contract;
>
> (c) any other insurance of the same interest, whether valid or not, covering loss or damage insured by this contract or any portion thereof.

Evidence

[30] I will now outline the evidence on matters that were not admitted (See Admissions, para. 22).

[31] The evidence of Delores DeKoning established that, apart from her first telephone call to Wawanesa in 1997, all of her communications since then and before August 2002 regarding automobile insurance were with the licensed broker Vector Insurance Network (Ontario) Limited ("Vector"). When she originally contacted Wawanesa, Wawanesa directed her to contact Vector for the purpose of applying to Wawanesa. Vector, as a licensed broker under contract with Wawanesa, is bound to relay all relevant information from an insured to Wawanesa (B. Shelby's evidence).

[32] Ms. DeKoning made only one application for insurance to Wawanesa. It was completed by telephone with the broker. The representative of the broker filled out the application from information supplied by Ms. DeKoning over the telephone. The application (Exhibit 1, tab 1) was not sent to Ms. DeKoning for her to sign, as required by s. 232(2) of the *Insurance Act*. It was dated and signed by the broker's representative only, on April 6, 1997. In any event, Ms. DeKoning accepted that this was her application and that the contents of it were provided by her.

[33] Ms. DeKoning's evidence regarding her dealings with Vector since April 1997 was not challenged seriously, with one exception that I will come to. She communicated directly with Vector on some five occasions before August 2, 2002. In April 2001, her prior vehicle was damaged. She reported the loss to Vector. She had to get her prior husband, who was still a named insured, to sign off on the cheque, and so she contacted Vector to have him removed from the policy, something she said she had tried to do on several occasions prior to 2001

unsuccessfully. Shortly thereafter, she purchased the 1989 Tempo, to replace the damaged vehicle which was a total loss, and Vector added it to the policy. These matters were all accomplished by telephone – no forms or other written documents were required of her.

[34] Ms. DeKoning said that she called Vector again in 2001 to add Trevor Bryan, her grandson, as an occasional driver. He was so added in July 2001. This again was accomplished by telephoning Vector – no forms were required, no questions were asked beyond the information that Bryan had his G2 license.

[35] Mr. Bryan at that time was 18 years of age and had just received his G2 driver's license. This license is part of the graduated licensing system in Ontario. The G2 license is required by new drivers for at least 12 months before they can attempt the G2 road test (MTO bulletin, modified to March 20, 2009 and published on the internet).

[36] Ms. DeKoning said that she contacted Vector twice more in 2001. She reported a minor accident where Mr. Bryan backed the Tempo into another car. In November 2001, she missed a premium payment causing Wawanesa to cancel her coverage. She telephoned Vector and was reinstated.

[37] Ms. DeKoning impressed me as a direct, forthright woman who has been retired from her fulltime work since 2006. She has had her share of difficulties in life and has supported herself, her children, and her grandson Trevor Bryan through much of his life. She has taken her responsibilities in life seriously. There is no doubt in my mind that Ms. DeKoning reported Bryan's minor accident of 2001 as she says and I accept her evidence in that regard.

[38] Ms. DeKoning stated that, as of May 2002, she became aware of Trevor Bryan's speeding offence (80 kph in a 60 kph zone) and one other highway traffic offence (either failing to stop or a seatbelt offence). He handed over to her the notice of suspension which showed that his license and driving privileges were suspended from May 20 to July 19, 2002. She went with him to the MTO office in order to have him turn in his license and pay the fines. She made sure that the car was not available to Bryan until his suspension ended. It was kept by her mechanic at his garage.

[39] Ms. DeKoning admitted that she did not tell Vector or Wawanesa of Mr. Bryan's two offences and suspension. In fact, unknown to her, he had run up a total of five highway traffic offences by May 2002. Four were in 2001, and the final one which prompted the suspension was on February 5, 2002. (Exhibit 1, tab 7) She admitted that she talked to him at that time about what she knew of his driving record and told him he would have to walk. Under cross-examination about this conversation, she said (according to my notes) that she mentioned to him a concern that her insurance possibly might go up if his conduct continued. She was asked, "Did you know a driving record affects insurance rates?" Ms. DeKoning said, no, she did not know that then. At that time, she knew that insurance rates could rise if the car was involved in an accident and claims resulted. She said that it was not until her interview with Wawanesa's representative in the fall of 2002, after the August 2nd accident, that she was told that a highway traffic record might affect insurance rates. She said that she was confused when she first said that insurance was discussed with Bryan in May 2002. Ms. DeKoning denied that she raised the

subject of insurance with Bryan at that time. The oral discovery of Trevor Bryan was read to her on consent. According to the transcript, Mr. Bryan stated that Ms. DeKoning had mentioned insurance when she talked to him in May 2002 but when he was asked what she said, he could not remember. Ms. DeKoning continued to maintain that she did not talk of any concerns for insurance rates with Bryan in May 2002, and that it was the insurance adjuster who told her the relevance of a driver's MVR to rates.

[40] I have considered Ms. DeKoning's evidence and found her to be a plain-spoken woman who showed herself to be forthright in reporting her grandson's minor accident. Counsel for Wawanesa did not point out one inaccuracy in what Ms. DeKoning reported over the years since 1997. Though it does not matter in view of my disposition of this case, I accept her evidence. She took the suspension of her grandson seriously and ensured he could not drive any longer until it was up. There is no doubt that, for a person like Ms. DeKoning who is conscious of her reputation and her family's welfare, the limited knowledge Bryan gave her in May 2002 was upsetting. But she had no clue from Wawanesa to indicate at that time that her knowledge of Trevor Bryan's MVR was important to Wawanesa in any respect.

[41] Bernadette Shelby, the automobile underwriting manager, was the witness called by Wawanesa. She testified to her own responsibilities and her knowledge of the processes and standard forms from her 16 years experience at Wawanesa. She gave no evidence as to the practice of other insurers or of standards of conduct with particular reference to driving record information in the industry, nor was she qualified to do so. She said there is nothing unusual in Ms. DeKoning dealing with a broker rather than the insurer; in fact, it is the way the insurer and broker are licensed. She added that by contract, information received by Vector from insureds is supposed to be relayed to Wawanesa.

[42] Ms. Shelby stated that Wawanesa did an MVR search regarding Bryan when he was added to the policy. It did no other MVR search until October 2002, after the major accident of August 2, 2002 had been reported. She saw no reason for Wawanesa to have searched for Bryan's MVR on renewal of the policy in June 2002. She testified that Wawanesa can obtain MVRs from MTO easily by electronic means through CGI Insurance Services. The cost is approximately $12 for each MVR search, about one percent of the annual premium on the DeKoning policy of $1046. It was also her evidence, under cross-examination by Mr. McLeish, that it can program its computer system to automatically obtain MVRs for particular risk categories or individually.

[43] Under cross-examination, Ms. Shelby accepted that Bryan was known to Wawanesa as a novice driver on a G2 license in 2001. She said that young male drivers under 25 are seen by underwriters as just another driver. When pressed, she admitted, somewhat grudgingly I thought, that they "probably" commit more traffic violations, and that they are considered in the underwriting department as higher risk. When asked why, she said that she could not say. I found that answer surprising since she has been managing the underwriting department of Wawanesa for a considerable time. Without doubt, I can say with some degree of certainty that many parents of teenage male drivers have experienced the reason – collision damage and loss claims due to immature judgement, feelings of inviolability, and/or group drinking.

[44] Ms. Shelby could see no benefit to checking on Bryan's MVR before the renewal in 2002 despite Wawanesa's awareness that he was driving on a temporary G2 license when he was added to the policy. In answer to Mr. Feehely's questions, Ms. Shelby could not say that Ms. DeKoning's report of Bryan's 2001 accident got to Wawanesa from Vector, nor could she deny that the report had been made. As an action like this one goes through both oral and documental discovery by all parties, I take this answer to mean there is nothing in the records of Vector documenting what Ms. DeKoning said and nothing to indicate that Vector was not told by Ms. DeKoning of Trevor's minor accident in 2001.

[45] Ms. Shelby identified a document called the "General Rules". It sets out instructions for brokers and underwriters of Wawanesa as to when to decline, terminate or refuse to renew coverage. She described them as Wawanesa's own in-house underwriting criteria. They are subject to approval by FISCO. This document is not sent out to persons insured under Wawanesa policies even in point form. She cited clause A.13(b) to indicate that termination was authorized by it in the circumstances of this case. A.13(b) reads:

> "The rules for declining to issue, terminating or refusing to renew a contract are:
> 13.(b) Any applicant/insured or named operator with two or more minor convictions as defined by the Facility Association and has been licensed in Canada or the United States for less than four years."

The five highway traffic offences on Bryan's MVR by May 2002 are regarded by the Facility Association as minor, Ms. Shelby said.

[46] Ms. Shelby refused to accept Mr. Taylor's suggestion that clause A.13(b) did not provide a basis to terminate insurance in this case. Ms. Shelby maintained that Ms. DeKoning had a duty to disclose what she knew of Bryan's record when she became aware of it in May 2002. She did accept that if and when the company became aware of it, Wawanesa had an alternate step to consider, not only termination of the policy. It could also have required Bryan to be named as an excluded driver. He would then not have been able to drive legally in Ontario unless he obtained other coverage due to the compulsory requirement of coverage to drive[3]. She said that he could have gone for coverage to high risk insurers like Perth or Kingsway, or to the Facility Association, the insurer of last resort in Ontario.

Analysis:

A. Misrepresentation

[47] In its Statement of Defence, paras. 11 and 12, Wawanesa alleged that the plaintiffs made "willful false statements of material matters with respect to the application and policy" and that Ms. DeKoning gave false particulars to the prejudice of Wawanesa when she filed the application and/or knowingly misrepresented or failed to disclose in the application facts required to be stated therein. Wawanesa alleged that by doing so, the plaintiffs "committed a deliberate breach of the good faith obligation" owed to Wawanesa.

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[3] Compulsory Automobile Insurance Act, R.S.O. 1990, ch. C.25, s.2(1).

[48] When asked as to the accuracy of Ms. DeKoning's statements to the broker Vector or to Wawanesa, Ms. Shelby could point to nothing in the application or to any statement made by her to either Vector or Wawanesa that was anything but accurate. Ms. Shelby pointed to the failure to report what she knew of Bryan's driving record as the only failure on Ms. DeKoning's part. Mr. Cormack's submissions were on the same basis – no misrepresentation in the application or anywhere else by Ms. DeKoning other than the negative "misrepresentation" due to Ms. DeKoning's lack of disclosure of Bryan's driving record as she knew it in May 2002.

[49] I find that the allegation that Ms. DeKoning made false misrepresentations in her 1997 application for coverage, or orally to Wawanesa or to its broker Vector, has no support in the evidence whatsoever. The evidence was that only Ms. DeKoning dealt with the Wawanesa policy; Trevor Bryson never dealt with her insurer. Therefore the allegation by Wawanesa of misrepresentations by the plaintiffs is unfounded..

[50] On the back of page one of the certificate of insurance sent out annually to insureds by Wawanesa, there appears a paragraph headed **WARNING**. It states:

> "**WARNING:** The Insurance Act provides that where (a) an applicant for a contract, (1) gives false particulars of the described automobile to be insured to the prejudice of the insurer, or (2) knowingly misrepresents or fails to disclose in the application any fact required to be stated therein; or (b) the insured contravenes a term of the contract or commits a fraud; or (c) the insured willfully makes a false statement in respect of a claim under the contract, a claim by the insured, for other than such statutory accident benefits as are set out in the statutory accident benefit schedule, is invalid and the right of the insured to recover indemnity is forfeited."

[51] Mr. Cormack made a point of referring to this warning. The only portion of it that is relevant to this case is clause (b) in part, whether Ms. DeKoning contravened a term of the contract by failing to report Bryan's driving record as she became aware of it. This issue will be dealt with in the next section of this judgment. Statutory Condition 1 is incorporated as a part of the automobile insurance contract in Ontario by s.234(c) of the *Insurance* Act.

B. <u>Material Change in the Risk and Duty to Disclose</u>

[52] Insurance law is not simply the law of contract applied to a specialized area. The basic principles of contract law, as to offer and acceptance connected by consideration, apply. However, because of the subject matter of insurance – the spreading of risks of random loss - important modifications have developed by statute since the inception of the insurance concept in the commercial setting of the seventeenth and eighteenth centuries. The importance of this history to today is explained by Craig Brown and Julio Menezes in *Insurance Law in Canada*, Thomson Carswell, 2002 (loose leaf), Vol.1, at pages 1-3 and 1-8:

> Although legislation in recent years has given protection to consumers of goods and services in a variety of ways, the traditional rule, 'let the buyer beware', still has considerable application. Founded in the theory of free market economics,

> this rule maximizes economic freedom. If you want information relevant to a deal into which you are entering, you must ask for it.
>
> But it is different with insurance contracts.... It is reasoned that the nature of risk in any given case is so open-ended that it would be impossible for the insurer, who is being asked to accept the risk, to contemplate in advance all the factors which might relate to it. The customer is therefore bound by a duty of utmost good faith in negotiating the contract to disclose all matters relevant to the risk whether or not the insurer has asked about them. It should be said that this rule was developed at a time when ship owners and cargo consigners were arranging to underwrite each other's voyages over coffee at Lloyds. The only source of information about a voyage and its risks was the person who was going to undertake it. It was reasonable to require that person to be completely frank. Today's more sophisticated underwriters perhaps do not need such protection.

And at page 1-8:

> Note that different rationales of insurance law have arisen at different times. At a point in time a prevalent risk has generated the need for insurance of a certain type. In turn that insurance has sometimes required a legal framework to curb abuse or better to pursue public policy goals. The viability of early marine insurance turned on full disclosure of the risk. This led to the development of the utmost good faith principle. Increasing urbanization and industrialization created risks which gave rise to fire insurance, workers compensation, and liability insurance. Rules were developed by courts and legislatures to protect consumers of insurance while enabling insurers to remain solvent so as to have the funds to pay consumers reasonable claims. In the twentieth century this process was accelerated with the technology revolution. The point is that, to be fully understood, the rules of insurance law need to be seen in context, particularly historical context. (emphasis added)

[53] Bernadette Shelby, the witness called by Wawanesa, stressed several times the central role of utmost good faith as a continuing and central principle of insurance law. Wawanesa relies on it in this case. In today's heavily legislated terrain, that principle is continued in Statutory Condition 1, which, by s. 234(1) of the *Insurance Act*, is deemed to be part of every contract of automobile insurance. It does not appear in the document which insureds receive each year from their insurer, the Certificate of Automobile Insurance; in Ms. DeKoning's case, she received the renewal certificate for 2002-3 sometime before May 20, 2002. It offered, in effect, to continue coverage from June 29, 2002 in the terms as set out in the Certificate. Nothing similar to Statutory Condition 1's terms is contained in the Certificate and no document from Wawanesa accompanies the Certificate which is the yearly offer of renewal by the insurer.

[54] Statutory Condition 1 is deemed to be known to insureds as part of their contract of insurance but nothing in the "Warning" on the back of page 1 of the Certificate informs insureds that Statutory Condition 1 is a term of the coverage or offers guidelines for insureds to know of their duty to report changes in the risk. They are simply deemed by the *Insurance* Act to know

of it, and understand and accept it. On the same page, behind p. 1 of the Certificate, the insured is told that (s)he is entitled to a copy of the policy "if you request it". That clause refers to the Ontario Automobile Policy (OAP1), marked Exhibit 2 in this proceeding. It is the standard policy approved by the regulatory authority FISCO under the *Insurance Act* and developed by the insurance industry. A brief history of OAP1 is found in *McNaughton Automotive Limited v. Co-operators General Insurance Company* (2005) Carswell Ont. 2500 (O.C.A.) at paras 25 to 27. The Court of Appeal found that the Ontario Insurance Commissioner ("OIC") was responsible for regulating the insurance industry between 1992 and 1998. It was the OIC who approved the standard owner's policy. In conjunction with Bill 164, a government policy statement was issued called The Road Ahead: Ontario's Strategy for Automobile Insurance Reform (1991). One of the goals was to make insurance more user friendly. To further that goal, the OIC sought the assistance of the Insurance Bureau of Canada and it was after this consultation process that the plain language in OAP1 was approved. It was introduced in 1994. In 1998, responsibility for regulating the industry was transferred to FISCO and the Superintendent of Financial Services who formally approved the standard policy.

In the words of the Court of Appeal,

> Since then, the industry has continued to use this policy, though, of course, it has been amended from time to time to reflect legislative changes and other changes approved by the regulator.

Statutory Condition 1 remains, as I read the Act, the wording incorporated into Ontario automobile liability policies according to s.234(1) and (2). I find that s. 234(2) permits no variance, such as in OAP1, from the terms of the Statutory Conditions without enactment of an amendment to s. 234(2) by the Legislature of Ontario. The Act does not, it seems to me, permit FISCO or the Superintendent to vary the Statutory Conditions. In case I am in error in this, I will deal also with the equivalent provision in OAP1.

[55] Statutory Condition 1 reads:

> **MATERIAL CHANGE IN RISK**
>
> 1(1) The insured named in this contract shall promptly notify the insurer or its local agent in writing of any change in the risk material to the contract and within the insured's knowledge.
>
> (2) Without restricting the generality of the foregoing, the words, "change in the risk material to the contract" include:
>
> (a) any change in the insurable interest of the insured named in this contract....
> (b) any mortgage, lien or encumbrance affecting the automobile....
> (c) any other insurance of the same interest... covering loss or damage insured by this contract.

[56] In OAP1, clause 1.4.1 states:

> You agree to notify us promptly in writing of any significant change of which you are aware...as a driver, owner or lessee of a described automobile. You also agree to let us know of any change that might increase the risk of an incident or affect our willingness to insure you at current rates.

"We" and "us" in OAP1 are said by clause 1.3 to refer to "the company providing the insurance", and "you" refers to "the named insured". Those terms do not refer to, for instance, a person listed as an occasional driver. An occasional driver is said in OAP1 to be one of "other people" who are referred to in OAP1 as "insured persons". Paragraph 1.4.1 does not refer to the term "insured persons". Therefore by para. 1.4.1 of the OAP1 and Statutory Condition 1, the duty to disclose a change material to the risk falls upon the named insured, Ms. DeKoning, and only to the extent that she becomes aware of the facts making up the material change in risk.

[57] The problem in this case is the meaning of the words "change in the risk material to the contract", or in OAP1, "any significant change" and "also ...of any change that might increase the risk of an incident or affect our willingness to insure you at current rates". The issue is whether a MVR of two minor traffic offences under the *Highway Traffic Act* and a demerit point suspension come within those terms in circumstances where the insurer and insured contemplate the insurance contract for the policy year June 2002 to June 2003 without any request by the insurer for information of any kind from the named insured Ms. DeKoning. Neither Statutory Condition 1 itself, nor the plain English of the OAP1, refer to a driving record, much less one of an occasional driver under the policy, or anything like it. Statutory Condition 1 refers expressly to changes in insurable interest in the insured vehicle, security charges or liens against it, and other insurance covering the same risks. OAP1 in clauses 1.4.2 and 1.4.3 also refer to sale or transfer of the vehicle, new liens or mortgages on the vehicle and other insurance against loss or damage. They follow, for the most part, the same examples referred to in Statutory Condition 1. Clause 1.4.4 states:

> You agree to inform us in writing of any incident involving the automobile that must be reported to the police under the *Highway Traffic Act* or for which you intend to make a claim under this policy. You must notify us within seven days of the incident or, if unable, as soon as possible after that.

This clause is not part of Statutory Condition 1. However, it is contained in the standard policy of which the insured is deemed to be aware. Clause 1.4.4 does not particularly help me in this case because it is referring simply to any accident that must be reported to the police as required by the *Highway Traffic Act* or for which is a claim is intended to be made. It does not refer to driving infractions under the *Highway Traffic Act.* It encapsulates Ms. DeKoning's own pre-October 2002 understanding that she was to report an accident where a claim is likely against the insured.

Another more interesting difference in the drafting of the two clauses is this - Statutory Condition 1 clearly refers to information beyond the matters mentioned specifically in it in stating, "without limiting the generality of the foregoing", and in the words material change

"includes", not "means"; clause 1.4.1 of OAP1 uses the expansive wording, "any change" and "also any significant change" relating to increase in risk or the insured's willingness to insure at current rates. But it does not express, as Statutory Condition 1 does, that 1.4.2 to 1.4.7 are not an exhaustive list of items which could be said to be included in the terms "significant change" and "any change that might increase the risk...". For completeness, those terms read as follows:

> 1.4.2 You agree to inform us of any sale or transfer of your interest in the described automobile except through change of title by succession, death or proceedings under the Bankruptcy and Insolvency Act (Canada).
>
> 1.4.3 If you have purchased optional loss or damage coverages, you agree to inform us of any new lien (an interest by others), mortgage or loan that affects a described automobile, as well as any other insurance against loss or damage.
>
> 1.4.4 You agree to inform us in writing of any incident involving the automobile that must be reported to the police under the Highway Traffic Act or for which you intend to make a claim under this policy...
>
> 1.4.5 You agree not to drive or operate the automobile, or allow anyone else to drive or operate the automobile, when not authorized by law.
>
> 1.4.6 You agree not to use or allow anyone to use the automobile in a race or speed test or for any illegal trade or transportation.
>
> 1.4.7 You agree to permit us to inspect the automobile and its equipment at all reasonable times.

[58] The issues of interpretation in this case involve matters of statutory and contractual principle. There are two approaches which have been accepted by the appellate courts in Canada, one relating to statutory, the other to contractual, interpretation. The statutory approach to interpretation is referred to as "the modern principle". It is described in the following terms:

> More than 30 years ago, in the first edition of the Construction of Statutes, Elmer Driedger described an approach to the interpretation of statutes which he called the modern principle: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of parliament.
>
> The modern principle has been cited and relied on in innumerable decisions of Canadian courts, and in *Rizzo and Rizzo Shoes Limited* it was declared to be the preferred approach of the Supreme Court of Canada. It has even been applied to interpretation of the Quebec Civil Code.

> The chief significance of the modern principle is its insistence on the complex multi-dimensional character of statutory interpretation. The first dimension emphasizes its textual meaning.
>
> A second dimension endorsed by the modern principle is legislative intent. All tests, indeed all utterances, are made for a reason....this aspect of interpretation is captured in Driedger's reference to the scheme and object of the Act and the intention of parliament.
>
> A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms are part of the entire context in which the words of an Act must be read. They are also an integral part of legislative intent, as that concept is explained by Driedger.
>
> At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.
>
> Sullivan on the Construction of Statutes, 5th Ed. (Markham: LexisNexis Canada, 2008), at pages 1-3.

[59] According to the law of insurance contracts, the courts have developed the following rules or approaches. Step one in the process of contractual interpretation remains the proposition that the court is to try to ascertain the intention of the parties and to give effect to that intention, as understood from the words used. *Consolidated Bathurst Export Limited v. Mutual Boiler and Machinery Insurance Co.* [1980] 1 S.C.R. 888 at para 25. The following principles of insurance contract interpretation apply where, due to ambiguity or doubt as to the terms of the contract, the intention of the parties is not clear:

- coverage provisions should be construed broadly and exclusion clauses narrowly; and
- the reasonable expectations of the parties should be given effect to..

> *Reid Crowther and Partners Limited v. Simcoe & Erie General Insurance Company*, [993] 1 S.C.R. 252, at p. 269; cited with approval in *Derkson v. 539938 Ontario Limited* (2001), 205 D.L.R. (4th) 1 (S.C.C.), at para 49.

[60] In this case, the outer limits of Statutory Condition 1 - the meaning of change in the risk material to the contract beyond the limited examples in the test - are not clear. Traditionally it was left to a case-by-case analysis, using an objective test of "the prudent insurer" and whether the prudent insurer would take into account the fact in question in setting rates or accepting the risk. As we have seen, OAP1 is less open-ended and appears to confine what is to be disclosed by insureds to the more specific matters in 1.4.2 to 1.4.7.

[61] Mr. Feehely and Mr. Morzaria argued that both insured and insurer are fixed with a good faith obligation in insurance law. In law, each renewal brings into effect a new contract; the failure of an insurer to tell an insured of factors that it considers relevant to the risk, or to inquire into factors relevant to the risk, of which it is aware, and which are accessible by it, has failed in its good faith obligation when it raises lack of information as a defence. The onus should be on the insurer to establish that rules or guidelines used by it reasonably conform to industry standards and to demonstrate the essential components of materiality, not simply that it has internal rules or guidelines. Mr. Morzaria suggested that the doctrine of contra proferentem is applicable and should be applied to this issue against the insurer. He also submitted that the insurer has failed to meet the onus on it of demonstrating that its underwriting guidelines conform reasonably to ordinary standards in the industry.

[62] Mr. Feehely suggested that, though the test of a prudent insurer is objective, the onus is on the insurer not only to establish materiality consonant with industry norms but also a causal link between the material change asserted and the knowledge of the insured that the change was material. (Citing Insurance Law in Canada, Brown and Menezes, at page 17-77). He submits that Ms. DeKoning reported everything she thought was material including Bryan's minor accident in 2001, and that the 'prudent insurer' test must include a duty by the insurer to inform an insured of factors sufficient to indicate that, for instance in this case, Bryan's driving conduct or his MVR was considered material to coverage.

[63] Mr. Cormack submitted that automobile insurance is heavily regulated and Wawanesa cannot change the wording of the contract. The duty to disclose a change material to the risk is clear and not subject to tests of reasonableness or industry standards. On any objective test, Ms. DeKoning is deemed to know of the terms of the Certificate and of OPA1, and Bryan's driving record as known to her in May 2002 represents a material change. The test must be applied objectively because the contractual scheme is statutorily mandated. He stated that the Court of Appeal decision in *Sagl* is not binding on me in finding a duty on the insurer to inquire into facts it considers relevant or to tell an insured something to indicate what it considers a material change beyond the limited examples in the statutory condition or in the standard policy. Sagl is not binding because it overturned the trial decision against the insurer and remitted the case for a new trial. In any event, Ms. DeKoning is taken to have known of Bryan's suspension for minor driving convictions and did nothing about disclosing the facts known to her to Wawanesa as was her duty. Mr. Cormack stated that the court can infer reasonably that the general public is well aware of a connection between premium rates and a driving record. He pointed to the last sentence in OAP1, clause 1.4.1 as governing this case:

> You must promptly tell us of any change in information supplied in your original application for insurance, such as additional drivers, or a change in the way a described automobile is used.

[64] In *McNaughton Automotive Limited v. Co-operators General Insurance Company*, supra, the Ontario Court of Appeal was faced with the task of interpreting a statutory condition (not S.C.1) in an automobile policy. The court used the modern approach from R. Sullivan's text and contract/insurance law principles (paras 60-64 and 79-86).

[65] Looking first at the context of Statutory Condition 1, it is a mandatory part of every policy of automobile insurance in Ontario (s. 234(1), *Insurance Act*). No variance from it is permitted (s.234(2)). There is no declared or express purpose set out in the Insurance Act. From its terms, it can be said fairly, I think, that there are three overall purposes as it applies to automobile policies:

(i) ensuring that there is a viable auto insurance industry in Ontario having monies sufficient to compensate reasonable claims of victims of motor vehicle accidents;

(ii) protecting consumers by providing certainty in the coverage they are purchasing and the obligations expected of them in doing so; and

(iii) a sharing of the risk of loss among, and offering protection to, all drivers in Ontario by requiring compulsory insurance for all and a minimum level of coverage against third party claims.

Insurance Law in Canada, supra, at para. 1.2(a) to (f)

[66] The principle of utmost good faith is fundamental to insurance law and applies to consumers, to brokers, to insurers, and to insureds. The principle of utmost good faith has been a concept fundamental to the insurance industry for the over-200 years of its development. It originated in the field of marine loss where all the details and magnitudes of the risk were known only to the insured ship owners and the captains who took the voyages. The insurers then did not have that kind of detailed knowledge. Today technology has reduced the one-sidedness of the obligation of good faith with the growth and availability of information accessible to particular industries and the public generally. Customers of auto insurance companies certainly are taken to have exclusive knowledge of certain things - the make, ownership details, overall condition of their vehicles, existence of other coverage, other drivers in their home, and the like. (*Schoff v. Royal Insurance;* Insurance Law of Canada, Vol. 1, Ch. 5). Statutory Condition 1 carries out the good faith principle by requiring disclosure where the facts come within a category of changes deemed material to the risk. That includes factors which an underwriter takes into account in setting rates and in accepting the risk.

[67] The statutory conditions do mention vehicle ownership, vehicle encumbrances, and other vehicle insurance as clearly changes in risk material to the contract. None of these express matters in Statutory Condition 1 relate in any way to driving conduct or traffic record of a named insured, and certainly not to the conduct or record of anyone else. The specific matters deemed material in the legislation are within a very narrow ambit, or, as expressed in OAP1, known to the insurer as relevant to the setting of rates.

[68] The only references within Statutory Condition 1 or para 1.4.1 of OAP1 relating to use of the described vehicle are: vehicle use within the law, vehicle not to be used for racing or illicit trade, and requirement of timely written notice of any reportable incident or claim to be made as a result of such incident. Statutory Condition 1 refers to not one factor relating to the use of the vehicle or anything faintly resembling a driving or infraction history. OAP1 refers to racing but to no other driving or use-related criteria. I do not see this condition as one to which

the doctrine of *eiusdem generis* should apply, i.e. the ambit of the examples should control the extent of the provision. I do not read it in context as constrained to that extent.

[69] While the basic purpose of Statutory Condition 1 is clear - disclosure to the insurer of changes material to the risk - and that condition stands alone among the other statutory conditions regarding the subject of material changes, its ambit and reach are by no means clear from its text and context. In fact, the text of Statutory Condition 1 seems to denote a very narrow range of subject matter, not an expansive one, focused on vehicle ownership and other insurance. The clause as re-worded in OAP1 does not mention anything related to a history of offences or conduct (except for racing) and it seems to be a closed list, unlike S.C.1. In *Insurance Law in Canada*, Vol.1, supra, ch. 5, at footnote 79, an issue like this one is referred to as "an interesting question" – must an applicant disclose highway traffic convictions now that MVRs are matters of public record?

[70] The scheme of the *Insurance Act* does not assist me in approaching the range in meaning of Statutory Condition 1 as it should apply to this case. The disclosure obligation generally is deemed part of the auto insurance policy. Within the overall legislative objectives of the *Insurance Act* and the underlying principle of good faith as the law has developed now, what is relevant to the prudent insurer, in assessing risk and changes thereto, and having the benefit of a full underwriting department, is not communicated in an understandable way to consumers so that they can know the extent of the obligations they must meet. In this case, Ms. Shelby said that Wawanesa used the General Rules (Exhibit 6) and in particular clause 13(b) to conclude that it would not have renewed the policy as of June 29, 2002, if it had known of Bryan's convictions. That document is not made known to anyone outside Wawanesa's employment, nor is it deemed to be known to consumers, nor does it make grammatical sense in any event. Apart from an accident required by law to be reported and from which an insurance claim is likely, which I accept is clearly relevant to the risk or to premium rates and known notoriously as material by all including Ms. DeKoning, it is a slippery slope in these circumstances to enter upon the extent and degree to which a driving record of minor offences and a demerit point suspension should be deemed a material change in the risk to a prudent insurer in the absence of evidence of any interest in the subject by the insurer informed of the higher risk driver it added until after the event. Would one minor conviction (using the classification by the Facility Association) be enough to amount to a change material to the risk? Would three qualify? Would two be sufficient, and a demerit-point suspension? Would one be sufficient and a demerit-point suspension? I would have to guess and that is not my function as the trier of fact where the insurer Wawanesa has not attempted to prove industry standards through a qualified witness in order to inform the test of the prudent insurer. See *Lachman Estate v. Norwich Union Life Insurance (Canada)* (1999), 40 O.R. (3d) 343 (S.C.J.) at para. 38 and 43.

[71] The provisions of the statutory conditions operate within the context of an auto insurance policy of which they are deemed part and the Insurance Act. Under s. 251 of the *Insurance Act*, every policy must cover up to $200,000 as minimum third party protection which is not defeatable by the insurer on grounds of non-disclosure or misrepresentation by an insured. This is one of the provisions which provide minimum protection to other users of the road and their passengers.In other words, one aim of the Act is to offer some protection to others using the road.

[72] What is extraordinary to me is the odd break between the practice of Wawanesa (and, no doubt, other auto insurers) and the law as to the nature and term of the insurance contract, in the context of the Supreme Court judgment in *Patterson*, supra, and the Court of Appeal decision in *Sagl v. Cosburn*, supra - that case seems to me to herald a more balanced and contemporary application of the principle of utmost good faith within the insurance law context.

[73] According to Wawanesa's practice, there is one application made by an insured. That occurs at the commencement of the insured/insurer relationship. Ms. DeKoning completed this one application requested of her in 1997 through a broker by telephone. She never signed it despite s. 233(3) and (4) which limit defenses of misrepresentation to statements proven to have been made by the insured in the application or purported application. She acknowledged the content came from her. There is nothing in the application by her that is alleged by Wawanesa to be inaccurate or untrue. That application requested information as to any driving offences within the past three years. Ms. DeKoning and her prior husband had no such convictions, so the broker-representative merely drew a line through it. Before the expiry of each policy year following the first one, a renewal certificate is sent to the insured setting out the types of insurance it offers the insured for the next policy year, the premium rates for each one, and the total annual cost. This is mailed early to allow the insured time to accept it or seek to change the insurance coverage or the insurer. Wawanesa sent no form of application or questions yearly with the renewal offer to Ms. DeKoning. This, despite two important factors:

(i) the law regarding the term of the contract, whether a policy is a continuous contract subject to renewal yearly, or an entire new contract formed each year; and

(ii) changes have occurred, to the insurer's knowledge, to the drivers covered but no inquiry is made as in the original application; for instance, the original application of Wawanesa in 1997 asks specifically for a history of convictions for each listed driver for the prior three years. Ms. DeKoning and her prior husband were the only listed drivers then. By 2002 her prior husband was no longer on the policy and two young drivers had been added, to the knowledge of the insurer, Ms. Bryan as a principal driver and Trevor Bryan as an occasional driver.

[74] As to the status of the "renewal" each year, the Supreme Court of Canada ruled in 1994 that an auto insurance policy was <u>not</u> a single continuous policy with one application or offer and one acceptance; instead, the auto insurance policy expires at the end of its term each year and the "renewal" represents a new contract with its own offer and acceptance. *Patterson v. Gallant*, supra. All parties before me accepted that this is the law. Yet, in May 2002, having added Trevor Bryan, a new driver on a temporary license, to the policy in 2001, Wawanesa sent Ms. DeKoning no question or application form to be answered regarding the conduct of either Mr. Bryan, his wife or Ms. DeKoning. Unknown to Ms. DeKoning, Wawanesa had in fact obtained an MVR for Bryan when he was added 2001. That, of course, was close to the time he started driving legally, when he was unlikely to have driven much, if at all, except as a learning driver

under a G1 license. It was after the first year, after he was added as an occasional driver, that a driving history would probably be most meaningful, because he would have actually been driving on his own that year. Wawanesa's conduct appears to say to the insured, "We do not need to know about Mr. Bryan's conduct as a driver, we need only his name and of course reports of any accidents because claims could result, but nothing else." The new contract came into effect on June 29, 2002, after Ms. DeKoning's acceptance of Wawanesa's offer and receipt of the renewal certificate dated May 11, 2002 (print date) for the policy year June 29, 2002 to June 29, 2003. It has been held that the failure of an insurer to inquire does not necessarily affect materiality of changes. It has also been held that such failure can in some circumstances amount to a waiver of the issue of materiality. *Sagl v. Cosburn, Griffiths and Brandham Insurance Brokers Limited,* supra, at para. 59, citing *Hamzeh v. Safeco Insurance Company of America,* (1988) 32 C.C.L.I. 83 (Alta.Q.B.).

[75] Traditionally, the test for materiality, and hence whether a material change had occurred was whether a prudent insurer would take the particular fact into account in deciding to accept the risk or in setting the premium. The problem with that test is shown in a judgment by Hall J., *Neepawa Yacht* [1994] D.C.J. No. 3042 (BC.S.C.). It assumes that the insurer knows nothing of the risk and the insured knows everything, including what the insurer considers relevant to the setting of premium rates. Hall J. cited the dissent of Sopinka J. in *Coronation Insurance* as representing the general tenor of both the majority and the minority judgments:

> A contract of insurance is *uberrima fides*; utmost good faith must be observed by both parties. It has been said that the relationship between an insurer and an insured is one in which the insurer knows nothing of the risk to be undertaken, and the insured knows everything. From this relationship arises the obligation of the insured to disclose all material facts so that the risk the insurer undertakes will be the risk he intends to undertake.
>
> This fundamental principle of insurance law has been applied by the courts for over 200 years...."

[76] Hall J. continued in the following vein:

> "There are ample historical reasons and justification for this (the high duty of disclosure cast upon an insured). In assessing the risk, the prudent underwriter needs to and wants to have the full picture before him or her... The courts have consistently held that insurers are not to be lightly absolved of their contractual obligations. The *contra proferentem* principle and the insistence by the courts that exclusionary language be given a strict construction are examples of the judicial attitude to the sanctity of insurance contracts. ... The other side of this coin is the principle that, to use the vernacular, the proposed insured has to be 'up front' with the insurer. The principle or doctrine of *uberrima fides* is deeply ingrained in this branch of the law of contract."

[77] Mr. Cormack cited *Neepawa* to illustrate the general principles of materiality; it also confirms however what he argued against, that even in the case of highly regulated insurance contracts, the *contra proferentem* doctrine continues to be applied against insurers in cases of

ambiguity and, as Lindley LJ. stated in *Cornish v. Accident Insurance Company* (1889), 23 Q.B. 453 (C.A.) at page 456, in a case of "real doubt". (Cited in *Consolidated Bathurst Export Limited,* supra, at para. 25.) Statutory Condition 1 is uncertain as to the outer limits of the ambit of materiality and more recent case law no longer retains the purely objective, one-sided approach to materiality that the traditional test of "the prudent insurer" implies.

[78] In *W.H. Stuart Mutuals Ltd. v. London Guarantee Insurance Co.* (O.C.A., released December 23, 2004), the Ontario Court of Appeal, in a case of non-disclosure of aspects of a corporate cheque-writing process, confirmed the trial judge's view that the claimant's duty is limited to facts or risks of which (s)he is aware. In *Gregory v. Jolley* et al, supra, the Ontario Court of Appeal spoke of the claimant-insured's duty to disclose and the effect on materiality of the insurer's failure to inquire (para. 36):

> In some cases, there may be a question about whether a fact must be disclosed. In the present case, no such doubt arises.... where one applies for reinstatement of a disability insurance policy, there is an implied representation that one is at the very least insurable, in other words, that one is earning income that can be insured, whether or not the insurer asks for a written application.
> The significance of the insurer not insisting upon a written application, in my view, is similar to the failure of an insurer to ask a question on the application. As Brown points out, at 5-4, the insurer's failure to inquire may provide evidence that the insurer does not consider the information relevant. Similarly, where the insurer does not insist upon a written application for reinstatement, any doubt regarding the materiality of undisclosed facts will be resolved in favour of the insured....

[79] In the case before me, the insurer was well aware that a novice driver in a high-risk insurance category was added by it to coverage in 2001. It was also aware that by May of 2002 (the renewal certificate date), he would have probably been driving for the past ten months at least to some extent, yet the insurer saw no need to ask any question as to Bryan's driving record, nor did it obtain his MVR from MTO despite the information being readily accessible to it. As to the cost of obtaining the MVR, $12 represents only slightly over one percent of the premium and no one suggests that it cannot be recoverable as part of the rate charged to the insured. I do not accept Ms. Shelby's dismissal of it as an insurmountable cost. That assumes that the insurer would be required to obtain an MVR on every renewal. There is no suggestion of that wide an obligation. Here, the insurer had added a novice, under-25 male driver, a driver within a high-risk category known to the insurer. It had searched his MVR before he was able to legally drive by himself, yet before accepting the risk for the following year, it asks no question about his driving record nor did it obtain the very information accessible to it for a small recoverable cost after he had been legally driving for the first time on his own. The insurer told the insured nothing regarding its interest in Bryan's driving record before it accepted the risk in sending out the new contract in May 2002, to come into force on June 29, 2002. This is a very specific fact situation. If the insurer saw no materiality to its accepting the risk for the 2002-3 policy term, I fail to see how the insured should.

[80] The Court of Appeal decision in *Sagl v. Cosburn et al*, supra, is important to the issue of materiality and the insured's duty to disclose. That case involves a fire insurance policy; however, the Court of Appeal dealt with it on a level of principle applicable to other types of insurance. In *Sagl*, a fire insurer decided to cover two houses of an apparently wealthy person. An expensive art collection was also involved. The insurer did so shortly after the trial decision in her favour against her husband. The insurer accepted the sub-broker's view of the insured and her means, including the assumption that she alone owned the homes, and asked no questions of her as to ownership or her financial situation (actually, she had significant debts at the time). No detailed application was required prior to acceptance of the risk, nor did the insurer inspect the art collection.

[81] At trial, B. Wright J. held as follows on the issue of non-disclosure and materiality:

> (138) Only an insurer knows what it considers a "material fact" in relation to a risk it is assuming. How does an insured know what a material fact is unless so advised by the insurer? I am incensed that an insurer can hide behind this express condition without advising an insured of what the insurer considers to be a material fact.
>
> (139) In *Chenier et al v. Madill* (1974), 2 O.R. (2nd) 361 (Ont. H.C.) Galligan J. held, "...in the absence of knowledge of the materiality to the insurer of the circumstances, there can be no fraud in the omission to communicate them."
>
> (140) At the time the plaintiff sought this insurance coverage from Chubb, Chubb did not require an insured to complete an application form. However, Cosburn sent the plaintiff an application form which was not a Chubb form. The plaintiff signed the incomplete form and returned it to Cosburn. I note that neither Chubb nor Cosburn ever followed up with the plaintiff to have her fully complete the application that she signed.
>
> (141) I cannot believe that the business of insurance was conducted in such a nonchalant fashion. Presumably, Chubb has improved its underwriting practices over the past ten years. ...
>
> (147) If, as in this case, it was a material fact as to the names of the titled owners of the property, that information could have been elicited on a proper application form.
>
> (148) If, as in this case, it was a material fact as to whether the property was mortgaged and the status of any mortgages, that information could have been gained from a proper application form.
>
> (149) Similarly, if it is a material fact to an insurer to know the financial viability of a potential insured, that information could be obtained easily by the appropriate questions on an application form.

> (150) A proper application form should contain a warning with reference to the above expressed condition. The application should be signed by a potential insured in the presence of a broker witness who has reviewed the application form information with the applicant, who has been advised of the material facts of the insurer and told about the consequences of concealing or misrepresenting any material fact.
>
> (151) I agree that an insurer expects an applicant for insurance to act in the utmost good faith in seeking insurance coverage. But, fairness requires that an insurer also act in the utmost good faith. It is my view that an insurer cannot rely on the above express condition unless the applicant for insurance is advised of what the insurer considers to be material facts, and the consequences of concealment and misrepresentation. Chubb failed to act in the utmost good faith toward the plaintiff at the time she requested insurance coverage.
>
> (152) I find that the plaintiff did not intentionally conceal or misrepresent any material facts in relation to the insurance coverage requested prior to the fire.

[82] On appeal, Epstein J.A., writing for a unanimous panel including R. Juriansz and S. Lang JJ.A., defined the case as involving five issues. Issue one is stated as follows:

> Did the trial judge err in concluding that the coverage was not void due to material misrepresentations Sagl made in her application for binder coverage?

[83] The Court of Appeal held, on issue one at paras. 53 - 54 and 59 - 60 and 62 - 63:

> (53) The key issue in this case is materiality. While Chubb argues that the trial judge effectively relieved Sagl of her utmost good faith obligation to disclose facts within her knowledge material to the risk being assumed and reversed the onus of proving material fact disclosure, in actuality Chubb is challenging the trial judge's finding of fact that the information at issue was not material to Chubb. The real inquiry is therefore the legitimacy of that finding.
>
> (54) I would not give effect to this ground of appeal. The trial judge's finding that the facts upon which Chubb relied were not material to its decision to provide insurance coverage to Sagl was supported by the evidence and should not be interfered with by this court.
>
> (59) As previously mentioned in para. 52, while the applicant has a duty to disclose all material facts, an insurer's conduct may be relevant to the analysis of whether a particular fact is material. An insurer's failure to ask a question may be evidence that the particular insurer does not consider the

> issue to be material, even if, objectively, the information would have been regarded as relevant by a prudent insurer: See *Great Northern Insurance Company v. Whitney* (1918), 57 S.C.R. 543; see also *Fordorchuk v. Car & General Insurance Corp. Limited* (1931), 3 D.L.R. 387 (Alta.S.C.) at page 390, citing *Newsholme Bros. v. Road Transport & General Insurance Company* [1929], 2 K.B. 356, where, at page 363, the court stated that insurance companies "run the risk of the contention that matters they do not ask questions about are not material, for, if they were, they would ask questions about them." An insurer who accepts the risk without requiring an answer to a question asked, for example, by not pursuing an unanswered question in an application form, has been found to have waived the question: See *Hamzeh v. Safeco Insurance Company of America* (1988), 32 C.C.L.I. 83 (Alta.Q.B.).
>
> (60) A recent decision by this court has confirmed the principles expressed in those cases. In *Gregory v. Jolley*, at para. 37, this court cited Craig Brown and Julio Menezes. *Insurance Law In Canada*, loose leaf, Toronto: Thomson Carswell (2002) with approval:
>
> > The significance of the insurer not insisting upon a written application, in my view, is similar to the failure of an insurer to ask a question on the application. As Brown points out, at page 5-4, the insurer's failure to inquire may provide evidence that the insurer does not consider the information relevant.
>
> (62) I agree with the trial judge that it runs contrary to the good faith obligation that the insurer owes to the insured for the insurer to agree to insure a risk, whether at the binder stage or at the time the policy is issued, when it knows or should know that there is information relevant to the risk that it does not have and that it did not even inquire into or is incomplete, and then to raise the lack of information as a defence to a claim under the policy.
>
> (63) Through his reasons, the trial judge implicitly put the following question to Chubb: If it regarded these facts as material, why did it not ask about them? Given that that question was left unanswered by the evidence, it was open to the trial judge to draw the inference that the undisclosed matters upon which Chubb now relies to void the coverage provided by the binder were not material to its decision to issue the binder and assume a sizeable risk.

[84] Similarly, in this case, if the driving record was material to the insurer's assessment of the risk, why did it not ask about it, given the knowledge it had of Bryan's lack of experience, limited license, and age when he was added?

[85] Mr. Cormack suggests that *Sagl* is not binding on me because it was sent back for a new trial. I cannot accept this submission for the following reason. Epstein JA. was careful to organize the decision of the Court of Appeal into discrete sections, each dealing with a specific issue. Issue (iii) addressed whether the proof of loss contained intentional misrepresentations which could support a denial of coverage. Only the issue dealing with the proof of loss was remitted for a new trial. The remainder of the court's decision, including the pronouncements regarding materiality in the absence of inquiry by the insurer, remains good law in my view and is binding on me.

[86] Mr. Cormack dealt at some length with the case of *Schoff v. Royal Insurance Company of Canada* [2004], A.D.C.A. 180 (Can.Lii), an interesting decision of the Alberta Court of Appeal. In that case the Court of Appeal was dealing with a fraudulent scheme by an insured including a misrepresentation of one fact that only the insured would know. It was not a matter of public record. The court held, I think rightly on the facts of that case, that Schoff was not a case where the known misrepresentations gave notice of "the unrevealed" which should have put the insurer on notice to investigate further. Schoff was a case of outright lies in the application, whereas I have a case of an ordinary credible insured who has not told one inaccurate fact to the insurer and who was asked for no information about Bryan's driving record before renewal of the insurance coverage for the 2002-3 policy year. I do not see Schoff as in any way disagreeing with the principles applied in this case.

[87] I find that, in the circumstances of this case, Ms. DeKoning as the named insured did not fail in her duty to disclose a material change in the risk. I also find that, in the absence of inquiry by the insurer of the driving record of Bryan, knowing that he was within a high-risk category, the driving record (MVR) of Trevor Bryan was not material to the decision of the insurer to enter the contract of insurance by way of renewal effective June 29, 2002.

C. <u>Duty of Due Diligence</u>

[88] In case I am found in error on the issues in Section B., I will deal briefly with the duty of due diligence. As I mentioned earlier, a significant portion of all auto insurance policies in Ontario deals with insurance against loss or damage incurred by third parties. They include passengers in the vehicle of the insured and other users of the road who incur loss or damage. S.258(1) of the *Insurance Act* specifically provides the right of anyone suffering loss or damage who obtains a judgment against the insured to claim against the insurer, despite having no privity of contract with the insurer. In addition, s. 258(4) deprives insurers of all defences involving any default of the insured if an action is brought under s. 258(1), up to the minimum insurance limits of $200,000 which are available to third party claimants even where the policy of insurance is found to have been breached. These provisions have not been provided by statute for the sole benefit of the insured but also to protect other users of the roads and highways of Ontario who suffer damage arising from the use or operation of a motor vehicle. For this reason, I find that the judgment of Cory J. in *Coronation Insurance*, writing for the majority on this point, should apply on the facts of this case. Cory J. wrote:

> (33) I would think that where the policy of insurance required by statute or regulation is primarily for the benefit of members of the flying public and not just the insured the insurer must take some basic steps to investigate the flying record of the air carrier applying for insurance. At a minimum, it should review its own files on the applicant. Further the insurer should make a search of the public record of accidents of the air carrier.
>
> (37) I believe that in the case at bar the information available in the files of the insurers and that available to the public concerning the accident record of Taku should be considered information that an insurer would be presumed to know. It is information that would readily become notorious to a reasonably competent underwriter working in the field of aviation. Thus the appellant insurers failed to meet the duty imposed by the Canadian Indemnity case. See *Canadian Indemnity Co. v. Canadian Johns-Manville Co.*, [1992] S.C.R. 549.

[89] The evidence is that the MVR of this and other similar new drivers are available to the insurer through GI Insurance Services and MTO, according to Ms. Shelby. In fact, the evidence is that the insurer can merely program its computer system to obtain the record automatically at a nominal cost. After all, it is the acquisition of insurance for the protection of third parties which allows such drivers on the road after 18 legally. I understand Mr. Cormack's advice of caution in applying *Coronation Insurance* which is an aviation insurance case. However, that area of insurance was, like this one, heavily regulated by government, one of the purposes of which was to provide some protection against loss or damage for others than the insured.

[90] I find that in these circumstances, Wawanesa was put on notice in 2001 for the 2002-3 policy year that it had added this novice male driver under 25 years of age, a high-risk category, and that it had a duty of due diligence to inquire from the public information easily accessible to it, a history of his driving record since 2001. This was the first year when he could drive alone legally and when a history would probably have been meaningful and available.

D. <u>Conclusion</u>

[91] I see no need to go into the technical argument of Mr. Feehely regarding the steps taken by Wawanesa in terminating the contract. It appears to me that OAP1 is an answer to Mr. Feehely's argument in that regard in any event. But, for the foregoing reasons, I find that Wawanesa had no ground in law to void the policy *ab initio*.

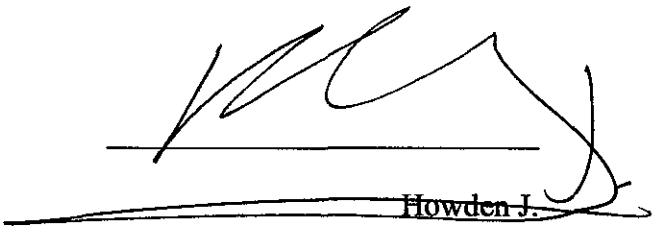
[92] Accordingly, judgment is to issue in the following terms:

(i) a declaration that the automobile insurance policy made between the defendant Wawanesa and the plaintiff Delores DeKoning, naming the plaintiff Trevor Bryan as an occasional driver, and issued as policy number 7574344, in effect on June 29, 2002 is binding on and enforceable against the defendant Wawanesa until June 29, 2003;

(ii) a declaration that the plaintiffs are insured under the terms of the policy in relation to a motor vehicle accident dated August 2, 2002, as a result of which judgment has been obtained against the plaintiffs;

(iii) Wawanesa shall indemnify the plaintiffs for all damages and costs assessed against the plaintiffs in court action 02-B5425 up to the limits in the said policy.

[93] Trial of the plaintiff's claim set out in para. 1(f) of the amended amended statement of claim will await completion of the pleadings and examinations for discovery in respect of the issues in that claim. When counsel advise the trial co-ordinator, that claim will be added to the trial list on completion of the pre-trial processes.



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