INTRODUCTION

BARBARA BILLINGSLEY*
Special Issue Coordinator

In the fall of 2011, Amy Cheuk and Angela Clark, the then Co-Editors-in-Chief of the *Alberta Law Review*, asked me to be the coordinator of a special issue of the *Alberta Law Review* focusing on insurance law. I was pleased to accept the invitation and to work on this project with Amy, Angela, and their successor Co-Editors-in-Chief, Katherine Fisher and Jeffrey Johnson. I am gratified to see this special issue now published. It is the product of the inspired and dedicated efforts of many people, including the contributing authors, the Co-Editors-in-Chief, and the members of the *Alberta Law Review* Editorial Board.

When we began this project, Amy and Angela told me that the Editorial Board's decision to publish an insurance law edition of the *Alberta Law Review* was primarily inspired by two circumstances which they believed would make the special issue of interest to a wide audience within the legal community: (1) the fact that insurance is an omnipresent feature of modern life in Canada; and (2) the recent and significant reform of Part 5 of Alberta's *Insurance Act*.[1] Not wishing to restrict contributions, we did not specifically identify these considerations when soliciting articles. Instead, we deliberately cast a wide net, seeking contributions in regards to any and all aspects of insurance law and any and all types of insurance. As a result, the articles and case comments included in this issue cover a diverse range of topics falling under the broad subject of insurance law and deal with many different types of insurance. The authorship of the articles in this issue is similarly diverse, including academics, practicing lawyers, and a law student. Viewed as a collection, however, the articles in this issue serendipitously harken back to the initial themes identified by the Editorial Board: the prevailing and significant role played by insurance in modern society and the impact of insurance law doctrine reform. Moreover, each of the articles in this issue reflects a fundamental consideration which ties together these two themes: namely, that, while Canadian insurance law must adapt to keep pace with changes in modern society, it must do so in ways which simultaneously respect fundamental legal principles which have traditionally sustained the viability and enforceability of insurance agreements. In their own ways, each of the articles speaks to the challenges involved in achieving this balance.

There is no doubt that insurance is a ubiquitous feature of contemporary western society. Its various manifestations — including life insurance, property insurance, disability insurance, and automobile insurance, just to name a few — touch on almost every aspect of

---

* Professor, Faculty of Law, University of Alberta.

1 The reform in question is a rewrite of Part 5 of Alberta's *Insurance Act*, RSA 2000, c I-3. These amendments formed part of the province's *Insurance Amendment Act, 2008*, SA 2008, c 19, but only took effect as of 1 July 2012, pursuant to Alberta OIC 325/2011, (2011) A Gaz I 580. These amendments, along with similar reforms enacted in British Columbia under the *Insurance Amendment Act, 2009*, SBC 2009, c 16, were passed in response to the Supreme Court of Canada's call for legislative reform in *KP Pacific Holdings Ltd v Guardian Insurance Co of Canada*, 2003 SCC 25, [2003] 1 SCR 433 and *Churchland v Gore Mutual Insurance Co*, 2003 SCC 26, [2003] 1 SCR 445. The Supreme Court encouraged provincial legislatures to modify their insurance laws so as to clearly apply to modern insurance products and coverages. For a detailed review of the Alberta reforms, see Barbara Billingsley, "Alberta's *Insurance Amendment Act*: Meaningful Change or a Long Arrow with a Short Bow?" (2012) 50:1 Alta L Rev 171.

our daily lives. Insurance is, as the saying goes, an enterprise with "cradle to grave" impact. Further, within the sphere of civil justice, insurance sits at the nexus between private law and public law. Fundamentally, an insurance agreement is a legal contract, and as such, is subject to many basic principles of contract law. Further, because liability insurance protects the interests of a tortfeasor and provides a source of recovery for an injured third party, insurance may indirectly drive, or be influenced by, tort law doctrine. However, insurance contracts also serve an important public role. By spreading the risk of financial loss from a single person or entity to a wide group of people who are subject to the same risk, insurance serves a broad socio-economic purpose. As a risk-sharing device, insurance allows people to undertake or participate in numerous activities which are beneficial in modern society (such as owning a home or driving a car), but which might otherwise be impossible or deemed to be undesirable because of an associated and unacceptable risk of fortuitous financial loss. This risk sharing role of insurance makes the viability of insurance companies, the protection of insurance consumers, and the overall preservation of the insurer-insured relationship a significant matter of public interest. This public interest, in turn, makes insurance an obvious target for government regulation. In every Canadian province and territory, legislation establishes standards for insurance providers, stipulates or restricts the terms of insurance contracts and the rights of the contracting parties, and occasionally mandates insurance coverage for selected activities (such as driving a car).

To remain relevant to modern day circumstances, insurance law must develop with the times. From a legislative perspective, this may mean creating new publicly funded insurance schemes or reforming the rules applicable to private insurance contracts.[2] From a common law perspective, this may mean rethinking the interpretation of insurance contract terms or adapting common law insurance principles to new circumstances. This ongoing task of legislators and courts, along with the accompanying need to balance the fundamental but often competing interests and objectives of insurers, insureds, and society at large, is at the heart of all of the articles published in this issue.

The first two articles are "Insurance Law Principles in an International Context: Compensating Losses Caused by Climate Change"[3] by Professors Craig Brown and Sara Seck of the Faculty of Law at Western University; and "Potential for Genetic Discrimination in Access to Insurance: Is There a Dark Side to Increased Availability of Genetic Information?"[4] by Professor Elizabeth Adjin-Tettey of the Faculty of Law at the University of Victoria. These two articles reflect on the relationship between insurance and matters raised by modern science: climate change and genetic testing respectively. Brown and Seck examine the role that insurance might play in providing compensation for losses from natural disasters, such as earthquakes and floods, which many scientists anticipate will become more frequent, intense, and widespread in the future as a result of climate change. Ultimately, the authors conclude that private insurance and international compensation schemes are unlikely to adequately respond to such losses and that, at least in Canada, such losses are best

---

2 The recent reform of the insurance statutes in Alberta and British Columbia as described *ibid* are examples of the latter.

3 Craig Brown & Sara Seck, "Insurance Law Principles in an International Context: Compensating Losses Caused by Climate Change" (2013) 50:3 Alta L Rev 541.

4 Elizabeth Adjin-Tettey, "Potential for Genetic Discrimination in Access to Insurance: Is There a Dark Side to Increased Availability of Genetic Information?" (2013) 50:3 Alta L Rev 577.

addressed by some sort of government implemented public insurance scheme. On the topic of genetics, Adjin-Tettey asks whether, and to what extent, private health and disability insurers should be entitled to rely on genetic testing results in assessing risk factors for underwriting purposes. She concludes that, given competing societal interests of ensuring comprehensive access to a basic level of health insurance and protecting the financial viability of insurers, government regulation restricting the mandatory disclosure and use of genetic information in the context of insurance underwriting is warranted.

Although these two articles pertain to very different aspects of modern science, in the end both articles recommend government involvement in order to ensure adequate insurance protection for the loss in question. This conclusion implicitly recognizes that insurance is not a distinctly private law enterprise. Further, both articles arrive at this conclusion after evaluating modern applications of insurance law in the context of traditional insurance law values. Brown and Seck discuss the beneficial societal role insurance plays in spreading the risk of loss and the law's resultant development of the principles of fortuity, indemnity, and utmost good faith to protect the solvency of insurers. Adjin-Tettey discusses the principle of preserving an insurer's right to make informed choices about whether, and at what cost, to provide insurance coverage based on the insurer's assessment of the likelihood of loss as determined by relevant moral hazards, but cautions about conflating moral hazard with mere probability.

The next three articles in this issue address questions related to the proper development, via legislation and common law, of specific insurance law principles. In "Personal Responsibility for Intentional Conduct: Protecting the Interests of Innocent Co-Insureds Under Insurance Contracts,"[5] Adjin-Tettey considers recent statutory amendments to the long established doctrine that an insured cannot benefit from his or her own wrongdoing. Specifically, Adjin-Tettey explores the origins, rationale, implications, and future challenges of recent amendments to insurance legislation in Alberta and British Columbia which expressly permit an innocent co-insured to recover for loss intentionally caused by their co-insured. Central to this discussion, and featured in the article, is the tension between the judicial goal of interpreting insurance contracts so as to reflect the expressed intentions of the parties, and the consumer protection objectives of legislators.

"Causation in Canadian Insurance Law,"[6] by Professor Erik Knutsen of Queen's University Faculty of Law, examines the law of causation in the context of insurance. Knutsen argues that, because of the distinct nature of the causation issue in the context of insurance law coverage, tort law causation principles should not be applied to insurance coverage questions. He stipulates that causation in the insurance context determines "who pays," whereas causation in the tort context evaluates "who is at fault" and explains that this distinction necessitates a different test for each context. Accordingly, keeping fundamental principles of insurance law in mind, Knutsen suggests a new process for evaluating causation questions for insurance coverage purposes and explains how this approach is both necessitated and justified by the unique function served by insurance.

---

5 Elizabeth Adjin-Tettey, "Personal Responsibility for Intentional Conduct: Protecting the Interests of Innocent Co-Insureds Under Insurance Contracts" (2013) 50:3 Alta L Rev 615.

6 Erik S Knutsen, "Causation in Canadian Insurance Law" (2013) 50:3 Alta L Rev 631.

In "Why So Serious?: Early Analysis of the Definition of 'Serious Impairment' Under Alberta's *Minor Injury Regulation*,"[7] Christine J. Pratt, Brian D. Filips, and Danielle Bourgeois, from the Edmonton offices of the law firm of Field LLP, and Artem Barsukov, of the Edmonton offices of Bennett Jones LLP, discuss ongoing developments in Canadian common law regarding the interpretation of statutory restrictions designed to protect the insurance industry by limiting third party recovery for loss suffered in a motor vehicle accident. Specifically, this article concerns a statutory interpretation question which has practical and crucial implications for the operation of Alberta's *Minor Injury Regulation*.[8] This regulation, enacted in 2004, limits the financial exposure of automobile liability insurers for third party personal injury claims by imposing a ceiling on the recovery of non-pecuniary general damages for "minor injuries" incurred in a motor vehicle accident. A key feature of this restriction is the definition of a "minor injury," which excludes injuries that result in "serious impairment," making the judicial interpretation of "serious impairment" a critical concern for litigants. In order to evaluate how this restriction might apply in the future, the co-authors of this article compare the Alberta jurisprudence defining "serious impairment" with cases from other Canadian jurisdictions interpreting similar regulatory or legislative provisions. More broadly, this article vividly illustrates how the wording of insurance regulations can impact the substantive rights of parties seeking to trigger liability insurance coverage.

The final article in this collection is "Gender in Automobile Insurance Underwriting: Some Insureds Are More Equal Than Others,"[9] by Kent West, a third year law student at the University of Alberta. This piece explores the relationship between insurance doctrine and contemporary legal protections against gender discrimination. West asks whether the use of gender as an underwriting factor for automobile insurance is justifiable in a society that, in most other contexts, prohibits discrimination on the basis of gender. In addressing this question, West examines the prevailing insurance regulations, practices, and philosophies supporting the use of gender as a risk factor against the anti-discrimination policies of western democracies. Ultimately, West concludes that, while the use of gender as an automobile insurance rating factor may not run afoul of current legal protections against discrimination because of the particular nature of insurance, this practice may nonetheless prove to be unacceptable in our society.

In addition to the articles described above, this issue of the *Alberta Law Review* contains two case comments which address the development of insurance law principles in the context of the common law. In the context of the specific cases under consideration, both of these commentaries speak to the tendency of Canadian courts to interpret insurance contracts generously in order to favour the insured. The first commentary, by Professor Peter Bowal[10] from the Haskayne School of Business at the University of Calgary, reviews the Supreme Court of Canada's 2010 ruling in *Progressive Homes Ltd. v. Lombard General Insurance Co.*

---

7 Christine J Pratt, Brian D Filips, Danielle Bourgeois & Artem Barsukov, "Why So Serious?: Early Analysis of the Definition of 'Serious Impairment' Under Alberta's *Minor Injury Regulation*" (2013) 50:3 Alta L Rev 659.

8 Alta Reg 123/2004.

9 Kent West, "Gender in Automobile Insurance Underwriting: Some Insureds Are More Equal Than Others" (2013) 50:3 Alta L Rev 679.

10 Peter Bowal, "*Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*" (2013) 50:3 Alta L Rev 697.

of Canada.[11] This case, arising from the "leaky condo" problems in British Columbia, concerned the extent of an insurer's duty to defend its insured general contractor under the terms of a Comprehensive General Liability insurance policy. The Supreme Court of Canada interpreted the policy so as to provide coverage, concluding that losses arising from the faulty workmanship of a subcontractor constituted an "accident" within the meaning of the policy. Bowal's comment describes the specifics of the coverage issue addressed by the Court and assesses the future implications of the Court's finding in favour of coverage. The second case comment, by Geoffrey Duckworth,[12] an Associate Lawyer in the Calgary offices of Gowling Lafleur Henderson LLP, addresses the Alberta Court of Appeal's 2011 ruling in *Shaver v. Co-operators General Insurance Co.*[13] In this case, the Court was asked to determine whether an insured's claim against his insurer under the Alberta Family Protection Endorsement S.E.F. No. 44[14] was barred under Alberta's *Limitations Act*.[15] The Court again broadly interpreted the terms of the policy and ruled in favour of the insured. Duckworth evaluates the Court's conclusion in light of pre-existing case authority, comments on the future implications of this ruling, and assesses how the outcome of similar cases may be impacted by the recent amendments to Alberta's *Insurance Act*. Ultimately, both case comments illustrate that, in focusing on the societal role played by insurance, judicial interpretations of insurance policies can expand insurance coverage beyond the parameters anticipated by the insurer and that, to preserve their private contractual interests, insurers must explicitly set out coverage limitations within the insurance contract.

Overall, the articles and case comments included in this issue are a rich resource for readers seeking a better understanding of current developments in insurance law doctrine and of fundamental insurance law principles and values. This collection of articles speaks not only to insurance law itself, as developed by the legislature and common law, but to the importance of insurance contracts as private agreements and as matters of public interest.

---

11 2010 SCC 33, [2010] 2 SCR 245.

12 Geoffrey Duckworth, "The Alberta Court of Appeal Opines on the S.E.F. No. 44 Limitation: The Status Quo and the Unresolved" (2013) 50:3 Alta L Rev 717.

13 2011 ABCA 367, 515 AR 345.

14 Government of Alberta, "S.E.F. No. 44: Family Protection Endorsement," online: Alberta Treasury Board and Finance <http://www.finance.alberta.ca/publications/insurance/sef_44_endorsement.pdf>.

15 RSA 2000, c L-12.