100 Years of Insurance Law – What MacGillivray Might Have Thought of It

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Introduction

To say that the world has changed over the past 100 years would be a gross understatement. The social, economic, religious, health, technological, scientific, communication, transport, equality, legal and other changes are obviously too numerous to list. Some of the most significant events that have changed how the world operates include two World Wars, one Cold War, the population boom, the digital age, modern forms of transport for business and private use, medical advancements, equality laws, the development of the Tiger economies, international bodies including the EU and UN, to mention but a few.

A modern insurer has a different world to contend with than an insurer did in 1912. The changing world has been reflected, to an extent, in the Law Commission's and the Scottish Law Commission's joint review of insurance contract law.

However, to say the least, not every risk is different now to 100 years ago – people are still mortal, the weather can still be bad,[1] financial markets can still collapse, enough holes in a vessel will still make it sink, accidents still happen. Of course, many of the core principles of insurance law are very much the same now as they have been since long before 1912.

The changes and similarities in the law of insurance are reflected in a comparison of the first edition of *MacGillivray*, dated 1912 and titled *"Insurance Law relating to All Risks Other Than Marine"* ("the First Edition"), and the 2012 twelfth edition of *MacGillivray* ("the Twelfth Edition"). We have selected four areas to highlight, although we could have chosen many others – for example, aviation insurance and the conflict of laws would equally have been obvious choices.

In this short article we address changing and consistent areas of insurance law over the century, including: (1) utmost good faith and non-disclosure, tracing the changes especially since *Pan Atlantic*; (2) subrogation, especially in construction situations; (3) the growth of liability insurance, including compulsory motor vehicle insurance; and (4) regulation, including (a) the Ombudsman and FSA, (b) the modern separation between business and consumers, (c) equality legislation and (d) the impact of Europe.

(1) Utmost good faith and non-disclosure, tracing the changes especially since *Pan Atlantic*

In relation to the general duty of good faith and the duty of disclosure generally, the First Edition is remarkably similar to the Twelfth Edition. As one would expect, central differences between the two editions relate to materiality and inducement. We would suggest, however, that in reality the modern (business)[2] law in relation to utmost good faith and non-disclosure (and, in particular, materiality and inducement) is not so very different to what MacGillivray would have understood as being the correct law on these issues.

Chapter V "Voidable Policies" in the First Edition is divided up into the following sections: (I) Generally, (II) Fraud and Misrepresentation, (III) Non-Disclosure, (IV) Warranties, (V) Fraud, Misrepresentation, and Non-Disclosure by Third Parties, (VI) Representations and Warranties in Fire Policies and (VII) Representations and Warranties in Life Policies.

In Section (I) of Chapter V (at pages 269-270) of the First Edition, it is stated (in relevant parts) as follows:

> "**False representation.** ... The essential characteristics of a representation are that it makes the contract voidable if it is

* This article is written further to a BILA lunchtime seminar given by Ben Lynch on 18 January 2013 at Lloyd's of London. The seminar was also to be given by Professor John Birds. However, Professor Birds was snowed-in at home and was unable to make it to London. There was no insurance in place.

[1] See, for example, footnote * above.

[2] The Consumer Insurance (Disclosure and Representations) Act 2012 is addressed briefly below.

substantially false,
material to the risk, and
an operative inducement to the contract.

...

Non-disclosure. Whereas all contracts are voidable on the ground of false representation of material facts, it is only certain classes of contracts which are voidable on the ground of non-disclosure of material facts. The general rule is that each party to a contract is entitled to make the best bargain he can, and although he must not make any false statement, he is, on the other hand, not bound to draw the attention of the other party to everything that might influence his judgment. But in certain classes of contracts the knowledge is almost exclusively on one side, and with regard to them the rule has been established that in order to make fair dealing possible, the party in possession of all the information must make a full disclosure, so that the other may be in a position to make some reasonable estimate of what he is undertaking. Contracts of insurance have always been considered as contracts of this nature, and the rule has been laid down over and over again in the most emphatic manner, that no policy of insurance can stand where the assured has not made a complete disclosure of everything which was material for the insurer to know in order to judge (1) whether he should accept the risk; (2) what premium he should charge[3]."

In Section (II) of Chapter V (at page 280) of the First Edition, it is stated (in relevant parts) as follows:

"***Uberrima fides*** **prohibits negligent misrepresentation.** … But contracts of insurance call for *uberrima fides* on the part of the assured. The contract is voidable on the ground of non-disclosure of material facts, as well as on the ground of misrepresentation, and innocent non-disclosure is just as fatal as fraudulent non-disclosure. Carelessness and forgetfulness afford no excuse. It seems to follow that a misrepresentation, due to carelessness, although not fraudulent, would be a breach of the *uberrima fides*, and ought to afford a sufficient defence to an action upon a contract of insurance, although it might not be a defence to an action upon other contracts[4]."

In Section (III) of Chapter V (at pages 300 and 306) of the First Edition, it is stated (in relevant parts) as follows:

"**General principles stated by Lord Mansfield.** The general principles upon which the assured is required to disclose all material facts within his knowledge, are clearly stated by Lord Mansfield in *Carter v Boehm*[5]. This well-known leading case in the law of insurance was an action on a policy for the benefit of George Carter, the Governor of Fort Marlborough, against the loss of Fort Marlborough in the island of Sumatra in the East Indies by its being taken by a foreign enemy. It was alleged that the weakness of the fort and the probability of its being attacked by the French ought to have been disclosed. The jury found a verdict for the plaintiff, and on a motion for a new trial, which was refused, Lord Masfield said, 'Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance, in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the *risque* run is really different from the *risque* understood and intended to be run at the time of the agreement. The policy would be equally void against the underwriter if he concealed. … Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing the contrary.'[6]

…

Absolute duty to disclose. … the duty is an absolute duty to disclose everything within the knowledge of the proposer or his agent, which would affect the judgment of a rational insurer governing himself

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[3] *Lynch v Hamilton* (1810), 3 Taunt 37.

[4] *Thomson v. Weems* (1884), 9 A.C. 671, 682; *Traill v. Baring* (1864), 33 L.J. Ch. 521, 524; *Jordan v. Provincial* (1898), 28 Can. Sup. Ct. 554; *Campbell v. New England Life* (1867), 98 Mass. 381; *Carpenter v. American* (1839), 1 Story 57; *Imperial Fire v. Murray* (1873), 73 P. 13.

[5] (1766), 3 Burr. 1905, 1909.

[6] 3 Burr. 1909, 1910.

by the principles and calculations on which insurers do in practice act[7], and which might induce such an insurer either to refuse the insurance altogether, or not to effect it except at a larger premium.[8]"

The comparable sections in the Twelfth Edition are, as stated above, notably similar (see paragraphs 17-002 to 17-008 of the Twelfth Edition):

> "2. DUTY OF UTMOST GOOD FAITH
> **17-002** Insurance is one of a small number of contracts based upon the principle of utmost good faith – *uberrimae fidei*. Section 17 of the Marine Insurance Act 1906 states this principle and goes on to provide that if the utmost good faith be not observed by either party, the contract may be avoided by the other party. ... The principle governs all contracts of insurance and reinsurance ...
> ...
> 3. THE DUTY OF DISCLOSURE
> **17-005** The general principles upon which the duty of disclosure is based were stated by Lord Mansfield in the well-known leading case of *Carter v Boehm*.[9] This case concerned an action on a policy for the benefit of George Carter, the Governor of Fort Marlborough in the island of Sumatra in the East Indies, against the fort being attacked by a foreign enemy. It was alleged by the underwriters that the weakness of the fort and the likelihood of its being attacked by the French were material facts known to the assured which ought to have been disclosed to the underwriters. This defence failed, but Lord Mansfield took the occasion to explain the principles necessitating a duty of disclosure in these words:
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> > "Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the *risque* run is really different from the *risque* understood and intended to be run at the time of the agreement … The policy would be equally void against the underwriter if he concealed … Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing the contrary."[10]
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> **17-006** Probably no better justification for the doctrine of non-disclosure has been stated since Lord Mansfield delivered his classic judgment over 200 years ago. …"

The similarity of Section (III) of Chapter V (at pages 300 and 306) of the First Edition, above, and paragraph 17-005 of the Twelfth Edition is particularly striking. However, this is hardly surprising given the essential nature of a contract of insurance.

Turning to the issues of materiality and inducement, in Section (II) of Chapter V (at pages 284 and 287-289) of the First Edition (i.e. in the Section entitled "Fraud and Misrepresentation"), it is stated (in relevant parts) as follows:

> "**Representation must be material.** Apart from warranty, a false statement does not affect the contract unless it is material to the risk. It is not, however, necessary for the insurers to prove that the fact misrepresented was one that was essential to the proper calculation of the risk. It is sufficient if they can show that the fact was one which would have influenced the judgment of a rational insurer governing himself by the principles and calculations on which insurers of his particular class do in practice act[11]. … The proper test, therefore, of materiality in questions of misrepresentation appears to be not, 'Was the misrepresentation material to the risk?' but rather, 'Was the misrepresentation

[7] *Ionides v. Pender* (1874), L.R. 9 Q. B. 531; *Stribley v. Imperial Marine* (1876), 1 Q.B.D. 507.
[8] *Elton v. Larkins* (1832), 5 C. & P. 385, 392.
[9] *Carter v Boehm* (1766) 3 Burr. 1905. The policy was written "interest or no interest", and "without benefit of salvage", but no point could be taken on this prior to the Life Assurance Act 1774.
[10] *Carter v Boehm* (1766) 3 Burr. 1905 at 1909–1910.
[11] Blackburn, J., in *Ionides v. Pender* (1874), L.R. 9 Q.B. 531, 538; *Quin v. National* (1839), Jones & Carey, 316, 331.

material to the inducement?'[12] that is to say, would a reasonable insurer have been influenced thereby?
…
…
The representation must induce the contract. Apart from the possible effect of special conditions it would appear that, however fraudulent or wicked a misrepresentation may be, it has no effect upon the validity of a policy unless it operated on the minds of the insurers as an inducement to them to accept the risk[13]. …
Inducement presumed. It would, however, in most cases be extremely difficult for an insurance company to prove definitely that any particular statement in any particular application was, in fact, relied on by them and operated as part of the inducement to accept the contract, and, therefore, it is presumed as a fair inference of fact that, where a material misrepresentation is made and a policy is issued, the insurers acted upon the misrepresentation, and were misled by it[14]. … The only practical way, therefore, of determining whether they were misled or not is to assume that they were, if the fact misstated is one which would have influenced ordinary and reasonable insurers, in considering a similar risk, and then the assured, in order to recover, must show that the insurers were not in fact influenced by the misstatement, that is to say, they must clearly prove that even if the misrepresentation had not been made, the insurers would have accepted the risk on the same terms[15]."

In Section (III) of Chapter V (at page 312) of the First Edition (i.e. in the Section entitled "Non-disclosure"), it is stated (in relevant part) as follows:

> "**Test of materiality.** In order to show that a fact is material and should have been disclosed, it is not necessary for the insurers to prove that they would have acted differently if the facts concealed had been disclosed, it is quite sufficient for them to say that these facts might have induced reasonable insurers to decline the risk or increase the premium.
> **Traill v. Baring (1864), 4 De G J. & S. 318** … "

The following paragraph from Chapter 16 "Misrepresentation" in the Twelfth Edition is relevant to the issue we are addressing here (leaving out a number of the footnotes):

> "**16-047 Inducement of contract.** A misrepresentation by one party to a contract of insurance does not entitle the other to avoid the policy unless it "induced" the making of the contract in the sense that "induced" has in the general law of contract.[16] The claimant must show that the misrepresentation was a real and substantial cause of his entering into the contract on terms that he would not have accepted if he had been appraised of the truth. It may well be reasonable to infer, in the absence of evidence from the claimant, that he would not have contracted, either on the same terms or at all, if the misrepresentation had not been made. When the assured has made a misrepresentation about a fact material to the risk and which, by definition, would influence the mind of a prudent insurer in deciding whether to take the risk and on what terms, it should not be difficult for a court to presume that it induced the making of the contract. The assured can rebut this presumption only by showing that, even if the misrepresentation had not been made, the particular insurer would still have granted cover on the same terms. Or that while the misrepresentation encouraged him to contract as he did, it was not a substantial cause which induced the contract."

The following paragraphs from Chapter 17 "Good Faith and the Duty of Disclosure" in the Twelfth Edition are relevant to the issue we are addressing (again, leaving out a number of the footnotes):

> "**17-009 The general rule stated.** Subject to certain qualifications considered below, the assured must disclose to the insurer all facts material to an insurer's appraisal of the risk which are known or deemed to be known by the assured but neither known nor deemed to be known by the insurer. Breach of this

[12] *Gordon v. Street*, [1899] 2 Q.B. 641, 645.
[13] *Flinn v. Headlam* (1829), 9 B. & C. 693.
[14] Traill v. Baring (1864), 4 De G. J. & S. 318, 330.
[15] See Lord Cranworth in *Smith v. Kay* (1859), 7 H. L. C. 750, at p. 770; and Lord Chelmsford, L.C., in the same case, at p. 758; *Marshall v. Scottish Employers* (1902), 85 L. T. 757.
[16] *Pan Atlantic Insurance Co v Pine Top Insurance Co* [1995] 1 A.C. 501 at 549.

duty by the assured entitles the insurer to avoid the contract of insurance so long as he can show that the non-disclosure induced the making of the contract on the relevant terms.[17] ...

...

17-029 Inducement. To succeed in a defence of non-disclosure the insurer must prove not only that the assured failed to disclose a material fact but also that the non-disclosure induced the making of the contract in the sense that he would not have made the same contract if he had known the matters in question.[18] This means that the non-disclosure must have been an effective cause of the underwriter making the contract on the terms agreed, but it need not have been the sole cause.[19] The insurer must establish that, had he known the undisclosed circumstances, he would not have concluded it either on the same terms or at all. If he would have made the same contract, the non-disclosure cannot have made a difference.[20] ...

There is no legal presumption that an underwriter has been induced to enter into a contract once non-disclosure of a material fact is proved, but if the fact is plainly material it may justify the court in inferring that he was induced to do so even when he does not testify in court,[21] particularly when evidence of inducement given by co-insurers on the same risk is accepted, but subject to any rebuttal evidence led by the assured. The authorities show that the inference may be drawn even where the insurer has not done everything possible to secure the attendance of the absent underwriter to give evidence to the court. ..."

How did matters (apparently) change and develop from the extract set out above taken from Section (III) of Chapter V (at page 312) of the First Edition to paragraph 17-029 of the Twelfth Edition, also set out above? The first point to make is that it is not so clear that there were, in fact, such significant changes. We note, in particular, the passages on inducement and misrepresentation that appear in the First Edition. We also note that the Learned Editors of *Colinvaux & Merkin* state (at A-0777) that *"There is little clear authority on the matter prior to the passing of the MIA 1906, although it appear to have been accepted up to that date that actual inducement had to be proved."*

Of course, the House of Lords held in *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd*[22] that (*per* Lord Goff p.516 F-G) that:

"... there is to be implied in the Act of 1906 a requirement that a material misrepresentation will only entitle the insurer to avoid the policy if it induced the making of the contract; and that a similar conclusion must be reached in the case of a material non-disclosure. This conclusion is, as I understand it, consistent with the opinion expressed by my noble and learned friend, Lord Lloyd, that Parliament, by enacting the law as it did in section 20 of the Act of 1906, must have intended to codify the common law on materiality without touching the common law on inducement."

Looking at *Pan Atlantic* in a little more detail, of course it was Lords Mustill and Lloyd who gave fully reasoned speeches. Looking at the speech of Lord Mustill, it is for our purposes worth highlighting the following (at p.518 C-D, 521 C-E, 549 D-E, 550 C-D and 551 B-D):

"My Lords, the two short questions upon which this appeal depends should, after more than 200 years of history, be capable of a ready answer. The controversy which they have aroused shows that they are not.

...

[17] *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co* [1995] A.C. 501; *St Paul Fire & Marine Insurance Co v McConnell Dowell* [1995] 2 Lloyd's Rep. 116.

[18] *Pan Atlantic Insurance Co v Pine Top Insurance Co* [1995] A.C. 501 at 549–550; *St Paul Fire & Marine Insurance Co v McConnell Dowell Constructors* [1995] 2 Lloyd's Rep. 116 at 124–125; *Marc Rich v Portman* [1997] 1 Lloyd's Rep. 225 at 234–235, affirming [1996] 1 Lloyd's Rep. 430 at 442; *Insurance Corp of the Channel Islands v Royal Hotel* [1998] Lloyd's Rep. I.R. 154 at 158.

[19] *Assicurazioni Generali Insurance Co v ARIG* [2003] 1 All E.R. (Comm) 140 at [59]–[87].

[20] *Assicurazioni Generali v ARIG* [2003] 1 All E.R. (Comm) 140; *St Paul Fire & Marine Insurance Co v McConnell Dowell Constructors* [1995] 2 Lloyd's Rep. 116 at 124–125; *Marc Rich v Portman* [1997] 1 Lloyd's Rep. 225 at 234–235; *Insurance Corp of the Channel Islands v Royal Hotel* [1998] Lloyd's Rep. I.R. 154 at 158.

[21] *Assicurazioni Generali v ARIG* [2003] 1 All E.R. (Comm) 140 at [62]; followed by *Laker Vent Engineering Ltd v Templeton Insurance Co Ltd* [2009] EWCA Civ 62; [2009] Lloyd's Rep. I.R. 704 at [68].

[22] [1995] 1 A.C. 501

On these facts two questions of law arise for decision. 1. Where sections 18(2) and 20(2) of the Act relate the test of materiality to a circumstance "which would influence the judgment of a prudent underwriter in fixing the premium, or determining whether he will take the risk," must it be shown that full and accurate disclosure would have led the prudent underwriter to a different decision on accepting or rating the risk; or is a lesser standard of impact on the mind of the prudent underwriter sufficient; and, if so, what is that lesser standard? 2. Is the establishment of a material misrepresentation or non-disclosure sufficient to enable the underwriter to avoid the policy; or is it also necessary that the misrepresentation or non-disclosure has induced the making of the policy, either at all or on the terms on which it was made? If the latter, where lies the burden of proof?

...

... I conclude that there is to be implied in the Act of 1906 a qualification that a material misrepresentation will not entitle the underwriter to avoid the policy unless the misrepresentation induced the making of the contract, using "induced" in the sense in which it is used in the general law of contract. This proposition is concerned only with *material* misrepresentations. ...

...

Before embarking on this long analysis I suggested that the questions in issue were short. I propose the following short answers. (1) A circumstance may be material even though a full and accurate disclosure of it would not in itself have had a decisive effect on the prudent underwriter's decision whether to accept the risk and if so at what premium. But, (2) if the misrepresentation or non-disclosure of a material fact did not in fact induce the making of the contract (in the sense in which that expression is used in the general law of misrepresentation) the underwriter is not entitled to rely on it as a ground for avoiding the contract.

...

Differing from the *C.T.I.* case and hence from the principle which the Court of Appeal was bound to apply in the present case I have concluded that it is an answer to a defence of misrepresentation and non-disclosure that the act or omission complained of had no effect on the decision of the actual underwriter. As a matter of common sense however even where the underwriter is shown to have been careless in other respects the assured will have an uphill task in persuading the court that the withholding or misstatement of circumstances satisfying the test of materiality has made no difference. There is ample material both in the general law and in the specialist works on insurance to suggest that there is a presumption in favour of a causative effect."

We would also highlight one passage from the speech of Lord Lloyd (at p.563 B-E):

"Finally, the Court of Appeal in the C.T.I. case [1984] 1 Lloyd's Rep. 476 attached importance to *Traill v. Baring*, 4 De G.J. & S. 318. The case is a well known authority for the proposition that a representation which is true when made must be corrected if, before the contract is concluded, it becomes untrue to the knowledge of the representor. So far as I know, it has never been mentioned in connection with non-disclosure until it was relied on by Samuels J. in *Mayne Nickless Ltd. v. Pegler* [1974] 1 N.S.W.L.R. 228, 239 and cited by Mr. Hutchinson in his argument in *Commonwealth Insurance Co. of Vancouver v. Groupe Sprinks S.A.* [1983] 1 Lloyd's Rep. 67 (see at p. 78). It is true that there is a passage in Turner L.J.'s judgment which supports Mr. Hamilton's argument. But the passage in question is at odds with the judgment of Knight Bruce L.J. who said, at p. 326:

> "It appears to me, I repeat, that the plaintiffs are entitled to assert, and to be believed in asserting, that they would not have acted as they have done if they had known, as they ought to have been informed by the society represented by the defendants of, the real facts."

In these circumstances I attach little weight to the isolated observation of Turner L.J."

The case of *Traill v. Baring*[23] was, of course, the sole authority referred to in Section (III) of Chapter V (at page 312) of the First Edition in relation to the test of materiality and non-disclosure, above.
Looking now at some of the most significant authorities that post-date *Pan Atlantic*, these authorities have addressed (amongst other things) Lord Mustill's "presumption of inducement" (see above). It now seems to be correct that the presumption operates (as the Learned Editors of Colinvaux & Merkin put it at A-0781)

"... where the underwriter who took the decision to accept the insurance is unable for good reason to give evidence of the state of his mind at the date of the placement."

[23] 4 De G.J. & S. 318.

For example, see *Scottish Coal Co Ltd v Royal and Sun Alliance Insurance Plc*.[24] As set out in the Twelfth Edition at 17-029 (with footnotes removed):

> "In *Scottish Coal Co Ltd v Royal and Sun Alliance Insurance Plc* the defendants did not adduce evidence from either the lead or the following underwriters, or from any independent underwriters, as to materiality and inducement. The relevant contract of insurance contained an express term permitting avoidance in the event of "non-disclosure of any facts that would have influenced the Company's decision in either accepting or settling the terms of the insurance". Steel J. observed that there were two inferences that could have assisted the defendants. First, that on the peculiar facts the insurers might have been induced to follow the reinsurers (who were treated by all the insurers as effectively the lead underwriters of the insurance, the leading underwriters being a front for the reinsurers). Secondly, that if the relevant matter had been disclosed, there would have been an expert engineering assessment that would have treated the undisclosed fact as significant in enhancing the risk, which would in the circumstances have influenced the underwriters. The judge did not reach any firm conclusion on the inducement issue (it being unnecessary to do so because the ratio of his decision was that the insurers had in any event elected to waive the non-disclosure and affirm the contract). But it was clear that Steel J. considered the failure of underwriters to give evidence a problem for the defendants, stating: "the absence of any evidence from [the underwriters] on the basis for their decision and the significance of the non-disclosure presents a difficulty from the defendants' point of view" and, having referred to the absence of any independent underwriting evidence, Steel J. said that had the matter turned on the non-disclosure point, "there would have been significant obstacles to this defence to the claim"."

As will of course be well-known, a particularly important authority in relation to the above issues is *Assicurazioni Generali SpA v Arab Insurance Group (BSC)*.[25] At [62], Clarke LJ set out the following very helpful summary:

> "62. In all the circumstances I would summarise the relevant principles of inducement in this context in this way:
>
> i) In order to be entitled to avoid a contract of insurance or reinsurance, an insurer or reinsurer must prove on the balance of probabilities that he was induced to enter into the contract by a material non-disclosure or by a material misrepresentation.
>
> ii) There is no presumption of law that an insurer or reinsurer is induced to enter in the contract by a material non-disclosure or misrepresentation.
>
> iii) The facts may, however, be such that it is to be inferred that the particular insurer or reinsurer was so induced even in the absence from evidence from him.
>
> iv) In order to prove inducement the insurer or reinsurer must show that the non-disclosure or misrepresentation was an effective cause of his entering into the contract on the terms on which he did. He must therefore show at least that, but for the relevant non-disclosure or misrepresentation, he would not have entered into the contract on those terms. On the other hand, he does not have to show that it was the sole effective cause of his doing so."

More recent developments include, for example, cases such as *Synergy Health (UK)Ltd v CGU Insurance Plc*;[26] The Consumer Insurance (Disclosure and Representations) Act 2012; and the Law Commissions' final Consultation Paper (LCCP No.204/ SLCDP No.155): on business insurance disclosure and the law of warranties (published on June 26, 2012). In brief, the Law Commissions consider that the duty of disclosure and the law on misrepresentation should be retained for business insureds, but that the concept of what is material should be clarified and that, where the insured's conduct is not dishonest, the remedy for non-disclosure or misrepresentation should be a proportionate one, similar to that introduced by the Consumer Insurance (Disclosure and Representations) Act 2012. However, the parties would be able to contract out of the proportionate remedy regime by a clear, unambiguous term in the contract that was specifically brought to the attention of the proposer. They also consider that the general duty of good faith in s.17 of the Marine Insurance Act should be clarified as simply an interpretative principle, but not in itself giving either party a cause of action. The Commissions have now rejected the idea of a separate regime for "micro-businesses". It is envisaged that a Final Report and draft Bill dealing with all the outstanding issues outlined above will be published in early 2014.

[24] [2008] Lloyd's Rep. I.R. 718.
[25] [2003] 1 All E.R. (Comm) 140.
[26] [2011] Lloyd's Rep. I.R. 500.

In light of the above, we wonder whether MacGillivray would really have felt so uncomfortable with the modern law in relation to materiality and inducement. Certainly, the 2012 Act would have been something of a surprise. It is also true that the modern distinction and division between consumer and business law would no doubt have been confusing to MacGillivray as a matter of law and also surprising as a matter of fact because the modern "consumer", in reality, did not in truth exist back in 1912.

(2) Subrogation, especially in construction situations

"Subrogation", of course, means literally the substitution of one person for another and has a very long history as a concept. The concept was known to the Roman law. By the close of the eighteenth century the English courts of law and equity had come to recognise rights of subrogation in a number of separate legal relationships, one of which was the contract of indemnity. This is how rights of subrogation attached to insurance contracts. MacGillivray would, of course, have been well aware of doctrines of indemnity and subrogation and he dealt with them. Lord Mansfield made clear reference to the concept in 1782 (see *Mason v Sainsbury*[27]) and the relevant principles were clarified in Nineteenth Century case law, especially in decisions such as *Castellain v Preston.*[28]

In *Mason v Sainsbury*, the Plaintiff's house had been demolished in the riots of 1780. He had insured his house and collected the money from his insurers who proceeded to exercise the Plaintiff's remedy against the Hundred under the Riot Act of 1714. The action was brought in the name of the householder and it was contended on behalf of the Hundred that there could be no recovery because the insurers had received their premium and had not suffered "by any act of the defendant". The Court of King's Bench unanimously rejected this argument, Lord Mansfield saying:

> *"The office paid without suit not in ease of the Hundred, and not as co-obligators, but without prejudice. It is, to all intents, as if it had not been paid. ... Every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer used the name of the insured. ... I am satisfied that it is to be considered as if the insurers had not paid a farthing."*

Of course, this case and the riots of 1780 were long before MacGillivray's time, demonstrating how well established the principle of subrogation was by 1912. However, the later part of the Twentieth Century saw disputes and developments that may well not have been foreseeable in 1912. These were probably heavily influenced by the development of liability insurance, which would have been rare at the beginning of the Twentieth Century, and greater tort liability, and the practice of insurance being effected in layers.
The existence of liability insurance provided greater incentives for insurers of Plaintiffs (as they were then) to take action against insured Defendants. In particular, most subrogating insurers do not seek recovery against parties who are not insured. Therefore, when there was little or no liability insurance in the early part of the Twentieth Century, this would have impacted on the number of subrogated claims. The expansion of tort liability would also have a large impact. For example, the ability to claim for pure economic loss and cases such as *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[29] must have had a significant impact on getting cases to court.

Subrogation in co-insurance or composite insurance situations was also a more recent development. What is interesting is to note is that the cases we will look at briefly were the first of their kind to address the issues raised in them as subrogation cases – i.e. as insurance cases – taking into account that the true Claimant was the insurer bringing a subrogated claim.

Looking first at construction cases, in *Petrofina v Magnaload*[30] the main contractors for the construction of an extension at an oil refinery took out a contractors all risks insurance policy. Under section 1 of the policy the insurers agreed to indemnify the insured against loss and damage to the property. The insured were defined as the main contractors, sub-contractors, the fourth plaintiffs, who held a lease of the refinery, and the third plaintiffs, a company holding the freehold and managing the refinery on behalf of the first and second plaintiffs.

[27] (1782) 99 E.R. 538.
[28] (1883) 11 Q.B.D. 380.
[29] [1964] A.C. 465.
[30] [1984] QB 127.

The main contractors employed sub-contractors for the heavy lifting operations involved in the work and they in turn agreed with the two defendants that the defendants should supply specialist heavy lifting equipment and services. During the dismantling of the equipment provided by the defendants, the gantry became displaced and fell to the ground causing damage to the work in progress. The third plaintiff made a claim against the insurers under the policy, which was settled. The insurers then brought an action in the name of the plaintiffs against the defendants, claiming damages for negligence. The defendants denied that the insurers were entitled to exercise any right of subrogation against the defendants, since the defendants were fully insured under the same policy in respect of the same property.

The insurer was not permitted to bring the claim in the name of one co-assured against another co-assured under a joint names policy in respect of loss or damage to property against which the latter is insured and in which he has an insurable interest. In *Petrofina*, the basis for this rule was stated to be circuity of action,[31] but there are difficulties with this analysis. It appears to rest on the notion that the co-assured who is made defendant to the subrogated proceedings can bring his own claim for indemnity in respect of the loss which has occurred in answer to the insurer's claim. However, the party bringing the suit is not the insurer but the co-assured. Even if it were the insurer he could not be made liable to pay the defendant's claim after having already paid an indemnity to the claimant co-assured.[32] In consequence an alternative analysis found favour based upon an implied term of the insurance policy. A term was to be implied in a joint names policy that where two or more assureds were insured in respect of the same loss or damage which has occurred the insurer would not seek to exercise rights of subrogation to recoup from a second assured the cost of an indemnity which he has paid to a first assured. It has been remarked that the implied term analysis is itself not free from difficulty.[33] For example, it is not easy to see how the defendant co-assured is able to raise the defence that the insurer is in breach of the implied term against the claimant in the action, his fellow co-assured.

The novelty in this case was that it was argued as an insurance case as opposed to a contractual/tortious claim. This is, in our view, something that MacGillivray would probably not have foreseen 100 years ago.
Looking now at *Mark Rowlands Ltd v Berni Inns Ltd*,[34] although not co-insurance as such, this was a landlord and tenant dispute. Such disputes clearly did exist in 1912, but again these disputes would have been between the named parties and decided purely on the basis of the terms of the lease. The case of *Mark Rowlands v Berni Inns* was, however, openly argued and decided on insurance law principles (albeit in the light of the terms of lease).

In *Mark Rowlands Ltd v Berni Inns Ltd*[35] the lease provided that the lessor would insure the building against fire and lay out the insurance monies to rebuild it, while the tenant was to contribute to the cost of the premium by an "insurance rent" and was relieved from its repairing obligations in the event of damage by fire. There was a fire caused by the tenant's negligence. The lessor reinstated the building with monies received from its insurers. These insurers then sought to exercise their right of subrogation to sue the tenant for negligence in the name of the lessor. It was held that they could not do so, because the lessor did not possess the right to bring such a claim. The insurance had been effected for the benefit of the tenant as well as of the lessor[36] and, following Canadian authority,[37] the terms of the lease signified an intention to exclude the tenant's liability in the event of fire and to leave the lessor to recoup its loss out of the proceeds of the insurance for which the tenant had in part paid the premium. Again, the case was argued on the basis of the reality that the claimant was the lessor's insurer bringing a subrogated claim

As a result, a body of law has since grown up regarding the applicability of subrogation (and raising issues of insurable interest) in situations that, had they existed in 1912, would probably have been decided without

[31] *"The Yasin"* [1979] 2 Lloyd's Rep. 45, 54-55; *Petrofina (UK) Ltd v Magnaload Ltd* [1984] Q.B. 127, 139-140; Derham, op. cit., Ch.7, n.4.
[32] *Co-operative Retail Services Ltd v Taylor & Young Partnership Ltd* [2000] 2 All E.R.(Comm) 865, 883 [65]; approved obiter on appeal [2002] 1 All E.R. (Comm) 918, 936-937.
[33] *Tyco v Rolls-Royce* [2008] EWCA Civ 286 [75]-[81] per Rix L.J.
[34] [1986] Q.B. 211.
[35] [1986] Q.B. 211; followed in *Barras v Hamilton* 1994 SLT 949.
[36] The tenant was not a co-insured.
[37] In particular *T. Easton Co. Ltd v Smith* (1977) 92 D.L.R. 3d 425; *Greenwood Shopping Plaza Ltd v Neil J. Buchanan Ltd* (1979) 99 D.L.R. (3d) 289. Although the Court of Appeal did not think it essential that the insurance was effected for the tenant's benefit–[1986] Q.B. 211, 225–it seems that this was a material part of the reasoning of the Canadian courts.

reference to insurance law principles, but rather simply as matters of contract and/or tort and/or landlord and tenant liability between the named parties.

We now look briefly at insurance in layers, the case of *Lord Napier and Ettrick v Hunter*[38] and the assessment of what full indemnity means. The *Lord Napier* case exemplifies the complications in the insurance market, with layers of insurance, that probably would have been less complicated 100 years ago. A case of partial insurance can occur when insurance is given for different layers of risk. In the case of *Lord Napier*[39] stop loss insurers had insured Names at Lloyd's for the amount by which the Names' overall net underwriting loss exceeded a defined "excess" in the policy, and this stop loss insurance was itself subject to a limit. The illustration used for the purpose of argument was a Name who suffered a net underwriting loss of £160,000 and had stop loss for £100,000 excess of £25,000. The stop loss insurer paid the Name £100,000. Subsequently, the Name recovered £130,000, and argued that he need only pay the stop loss insurer £70,000 (being the sum he had received over and above what would be for him a full indemnity) or, in mathematical terms, £230,000-£160,000. Stop loss insurers argued he had agreed to bear the first £25,000 in any event and he should therefore pay £95,000. The House of Lords held that the stop loss insurers' contention was correct because the principle that the insurer cannot recover until the insured is fully indemnified contemplates only an indemnification against the loss actually insured. As Lord Templeman put it *"an insured is not entitled to be indemnified against a loss which he has agreed to bear"*.[40] As set out above, MacGillivray would probably have been somewhat surprised by developments such as these.

(3) The growth of liability insurance, including compulsory motor vehicle insurance

Chapter X in the First Edition contains a Section (VII) entitled "Third Party Risk Policies" and it is less than two pages long. The first paragraph of this Section and the first sentence of the second paragraph provide as follows:

> "These protect the assured against liability in respect of damage caused by him or his servants to the property or persons of third parties. It is usual to limit the risk to a total sum specified in the policy and further in respect of liability for personal injuries to limit the amount which can be recovered in respect of an injury to any one person.
> The most important questions arising on these policies are with regard to the conduct by the company of negotiations for settlement or defence of legal proceedings when any claim for damages is made against the assured. ..."

Chapter 29 of the Twelfth Edition entitled "Third Party Risks", on the other hand, is 64 pages long. Chapter 30 entitled "Motor Vehicle Insurance" is 54 pages long. Chapter 31 addresses Aviation Insurance, Chapter 32 addresses Insurance Against Pecuniary Loss and Chapter 33 addresses Contractors' Risks Policies. These chapters are a total of 46 pages long. The past would, indeed, appear to be a foreign country in relation to liability insurance.

The types of liability insurance that now exist will be well-known to all readers. For example, public liability policies, product liability policies, household composite insurance cover, Directors' and Officers' liability insurance, professional indemnity policies and employers' liability policies (there is a less than three-page section on Employers' Liability Policies in the First Edition). What is interesting is that these types of insurance had not yet become popularly used by 1912 and why that was the case.

In June 2003, the Office of Fair Trading produced a report titled: "An analysis of current problems in the UK liability insurance market A supplemental report to OFT659 Liability insurance prepared for the Office of Fair Trading by Dr Christopher Parsons, Faculty of Finance, Sir John Cass Business School, City of London." Paragraphs 4.1 to 4.5 of that report helpfully state as follows:

> "**4 INTRODUCTION: THE NATURE AND DEVELOPMENT OF LIABILITY INSURANCE**

[38] [1993] A.C. 713.
[39] [1993] A.C. 713.
[40] At p.731E. The result in layer insurance can be summarised by the phrase that the layer insurers "pay up and recover down", see, per Staughton L.J. at [1993] 1 Lloyd's Rep. 10, 24. It seems to follow that in the simple case of a policy containing a deductible, the assured cannot apply a recovery to the amount of the deductible until the insurer is fully indemnified for the amount of the insured loss.

4.1 Liability insurance has its roots in the early nineteenth century, or a little before. Its growth was encouraged by rapid developments in industry, trade and transport around this time.[41] Hitherto, only three forms of insurance were commonly available. They were marine insurance, life insurance and fire insurance, the regular practice of which, in Europe, dates (approximately) from the fifteenth, sixteenth and seventeenth centuries respectively.

4.2 Industrialisation and the growth of the railways created new risks that could lead to accidents, and liability insurance originally formed part of a broad and miscellaneous class known as 'accident insurance'. This name was used to describe any form of insurance that was neither marine, life, nor fire and which covered losses arising from some sudden harmful event, unintended and unexpected by the insured, such as a boiler explosion, or a road or rail accident. These risks were assumed initially by specialist insurers, the 'accident offices'. However, in the first quarter of the twentieth century many of these were bought up by the large fire insurance companies, which thus became the familiar British 'composite' insurers. The liability (or 'third party') risk referred to compensation claims which victims of accidents might make against insured persons who caused them, as distinct from direct claims which latter might make against insurers for damage to their own property or person. Eventually, liability insurance grew into a class in its own right, and at the same time, the term 'accident insurance' fell into disuse.[42]

4.3 An alternative term, 'casualty insurance' (which seems to have originated in the United States), originally had a meaning that was roughly equivalent to that of accident insurance. However, it has now come to be associated with liability insurance in particular. Thus, the two main branches of general (non-life) insurance are now 'property' and 'liability' (or 'property' and 'casualty').

4.4 At the present time there are five major lines of liability insurance in the UK. They are:

1. Employers' Liability ('EL')
2. Public Liability ('PL') – more commonly known as General Liability ('GL') outside the UK
3. Product Liability ('Products') – often combined with 2. (Public Liability)
4. Professional Indemnity ('PI')
5. Directors' and Officers' liability ('D&O')

4.5 There are other classes of liability insurance that are not considered in this report. First, there are some rather specialised types of liability insurance, including libel (defamation) insurance, and environmental impairment liability insurance ('EIL'), which are of little relevance to most businesses. Second, there are liability risks associated with the use of motor vehicles and the operation of ships and aircraft. These liabilities are insured, often in conjunction with the associated 'property' risks, in specialised insurance markets (motor, marine, and aviation respectively). Finally, there are contracts that insure the property and activities of private individuals, such as home insurance policies which, amongst other things, cover liability claims made against policyholders in their in private capacities or their capacities as property owners. At the present time there seems to be little concern about the competitiveness of the market for any of these forms of liability insurance, hence their omission."

A specific example of how the law has progressed in relation to liability insurance is to be seen in the enactment of the Third Parties (Rights Against Insurers) Act 1930.

An important question in this field is whether, and to what extent, the injured party can recover directly against the insurer the damages awarded to him against the assured. At common law there is in general no possibility of his doing so. Before 1930 the right of a person to be indemnified under a contract of insurance against claims made against him by persons whom he might have injured was one personal to himself, and there was no privity of any sort between the injured person and the insurers. The injured person had no interest at law or in equity in the insurance money, either before or after it was paid by the insurers to their assured. If the assured became bankrupt or, being a company, went into liquidation the insurance money became part of the general assets distributable among creditors, and if the injured person had not already obtained judgment and levied execution in respect of his claim for damages his only right was to prove in the bankruptcy or winding-up.

To correct this injustice the Third Parties (Rights Against Insurers) Act 1930 was passed, which effects a statutory assignment of the rights of the assured to the injured person. At the time of writing, the 1930 Act

[41] See generally, Parsons, C., 2002, 'From Accident to Liability: a Brief History of Liability Insurance', *Journal of Insurance Research and Practice*, 17, 2 pp. 23-34.

[42] Though the term 'personal accident' is still used to describe policies that cover accidental bodily injury.

remains in force. However, of course, following proposals by the Law Commission, Parliament has enacted the Third Parties (Rights Against Insurers) Act 2010 c.10 which – when it enters into force – will repeal and replace the 1930 Act.

In relation to motor vehicle insurance, the very existence and the extent of use of motorcars would have been a matter of no doubt significant surprise to MacGillivray. However, once MacGillivray had understood what a modern car was, and that almost every business and family has one (or more), there is equally little doubt that MacGillivray would probably have expected a system of motor insurance similar to the one that currently exists. The modern motor vehicle policy covers the assured against a variety of different risks. In addition to providing cover against third-party risks and, in many instances, the costs of litigation associated therewith, it provides cover against the risk of personal injury or death to the assured while travelling in the insured vehicle, the risks of loss of or damage to the vehicle itself, and, frequently, a variety of ancillary risks such as loss or damage to the contents of the car, destruction of or damage to the garage in which the car is kept, the cost of legal representation in the criminal courts and the cost of hiring a replacement vehicle while the insured vehicle is being repaired.

Accordingly a motor insurance policy can be at the same time a liability cover, a personal accident insurance and a property insurance. These characteristics have been responsible for the wide range of terms and conditions usually found in motor policies, and they also create a far-reaching catalogue of facts material to the several risks embraced by the policy which have to be considered at inception or renewal.

Motor insurance has been the subject of much legislation, originally enacted in the Road Traffic Acts 1930 and 1934, and now consolidated in Pt VI of the Road Traffic Act 1988. Much of the recent legislation stems from EC Directives harmonising compulsory motor insurance law. The First to Fifth Motor Insurance Directives have now been codified as the Consolidated Motor Insurance Directive 2009/103/EC.

(4) Regulation, including (a) the Ombudsman and FSA, (b) the modern separation between business and consumers, (c) equality legislation and (d) the impact of Europe

State control of insurance business was well-established by the early Twentieth Century. Indeed, MacGillivray devoted a fair bit of space to the legislation. However, there was, of course, substantial development over the Century, not least since EU Directives brought about freedom of establishment and of services.

This growth in regulatory requirements was probably, at least apart from the idea of a European market, foreseeable to some extent. What may well not have been was development of consumer as opposed to business insurance "law".

If we look back at classic cases on issues such as non-disclosure of material facts and warranties, those that concerned individual "consumers" (although the term was probably not known then) seem to have been almost exclusively concerned with life insurance. This is not perhaps surprising – the vast majority of individuals in 1912 would probably not have insured their property, they did not really travel and they certainly did not drive. Even much later, consumer cases are extremely difficult to find in non-life insurance.

What would MacGillivray have made of a decision like *Lambert v Co-operative Insurance Society Ltd*,[43] holding that s.18 of the MIA applied to the renewal of home goods insurance? One must remember that at that time (i.e. in 1975), there was still a respectable argument that the duty on an individual was to disclose facts that a reasonable person would consider material.

It was the impact of cases like this that led to the Law Commission Project in the late 1970s and early 1980s; the Statements of Practice; almost certainly to the creation of the IOB and thence to the FOS and the development by the Ombudsmen (and to some extent enshrinement in FSA rules) of what is effectively a "consumer insurance law". Now of course we have a statute along these lines (briefly discussed above). It also looks extremely likely that the Law Commissions' final recommendations, if implemented, will further entrench a consumer versus business divide in some important respects (it is also difficult to imagine MacGillivray foreseeing a large project like that still being undertaken by the Commissions).

[43] [1975] 2 Lloyd's Rep. 485.

Of course this is not the only way in which regulation of insurance contract law has developed, whether by soft or hard law. Anti-discrimination legislation has for some years restricted what must be disclosed to an insurer, culminating in the Equality Act, and the ECJ judgment prohibiting sex discrimination (the *Test-Achats* case) is just one example of the impact of Europe.

MacGillivray can hardly have envisaged the impact that "Europe" would have – after all his first edition was published at a time when the possibility of a "great" war in Europe was extremely high. The idea that the British would be "in partnership" with their neighbours across the North Sea and English Channel would have appeared nonsensical when the British Empire was at its peak.

On the other hand, he would have been well aware of the various ways in which Civil Law had influenced the Common Law. He was a Scots as well as an English lawyer. Civilian insurance law sources had been cited in English decisions and were cited in the book (and some still are). He might then have welcomed the growing "Europeanisation" of insurance law, even if he could not have foreseen it – but that is something that we will never actually know.

We hope that this canter through an incredibly busy century of developing insurance law has been an enjoyable one for the reader. We, of course, look forward to the next stage in the development of insurance law with the forthcoming product of the Law Commissions' project in the near future and further developments in Europe just around the corner.