MISREPRESENTATION IN INSURANCE PROPOSAL FORMS COMPLETED BY AGENTS

INTRODUCTION:

The contemporary insurance industry has grown from modest origins to a position where it provides protection against a multitude of risks, which not long ago were considered to be the direct responsibility of individuals, such as legal liability for defective products and losses from bad debts. At the same time the market has grown so that contemporary purchasers of insurance include all types of business organisations, local authorities, public corporations, societies and individuals, while the sellers of insurance have, themselves, developed along complex lines with a highly developed system of brokers and agents linking the two arms of the industry.

The development of insurance stems from the aim to make provision against the accidental dangers which beset human life, property and dealings. Those who seek insurance are endeavouring to divert the effects of any disaster from themselves by shifting possible losses onto others who are willing, for some consideration, to bear the risk. In a very general sense insurance is a contract to pay a sum of money upon the happening of a particular event or contingency or it is an indemnity for loss in respect of a specified subject by specified perils.

The law relating to contracts of insurance is part of the general law of contract. But contracts of insurance are a species of a special class of contract, that is contracts of the utmost good faith. Special rules apply relating to non-disclosure and misrepresentation which differ from the rules applicable to contracts generally. It is one particular branch of these special rules that this article deals with, namely the misrepresentations on proposal forms which have been filled in by the insurance companies' agents.

PROPOSAL FORMS:

The first step in the making of a contract of insurance is the proposal or application by means of which the insured gives to the insurers particulars of the risk which he wishes them to undertake. The information given by the applicant in his proposal form is the basis of the risk that the insurance company accepts. This makes full disclosure of all material facts essential, and it is at this stage that good faith on behalf of the insured is vital.

Similarly, it is the duty of the insurers, and their agents, to disclose all material facts within their knowledge, since the obligation of good faith applies to them equally with the insured. This was made clear by Farwell L.J. in Re *Bradley and Essex and Suffolk Accident Indemnity Society*[1] when he said:

1. [1912] 1 K.B. 415, 430 (C.A.).

> Contracts of insurance are contracts in which uberrima fides is required, not only from the assured but also from the company assuring.

Proposal forms necessarily vary in their content according to the nature of the proposed insurance. They also vary according to the practice of different insurers. All proposal forms, however, contain questions which the proposed insured is required to answer. It is becoming the increasingly standard practice for the answers to these questions to be filled in by the insurance agent who has solicited the insurance cover in the first place. Enquiries among agents and insurance companies have confirmed this and it seems that in those few situations where the agent does not fill in the form, he usually assists in its completion by advising as to what answers are required. This situation has posed considerable problems as to whether the insurance company is bound by any misrepresentations made by the agent when completing the proposal.

CONFLICTING AUTHORITIES:

An insurance agent is basically someone who is employed by an insurance company to solicit risks and effect insurance. As far as the insurer is concerned he is a person expressly or impliedly authorised to represent it in dealing with third persons. This position is quite distinct from that of a broker who acts as a middleman between the insured and the insurer. A broker solicits contracts from the public under no employment from any special company but, having secured an order, places the insurance with the company selected by the insured, or in the absence of any such selection, with a company the broker selects himself.

The situation has now developed to the extent where every stage of the contract of insurance, from the inception of the negotiation to the receipt of the payment of the loss involves, to a greater or lesser degree, the employment of agents. On questions of the liability of the insured as principal the general principles of agency apply. The question to be examined here is how these principles are affected by the agent for the insurer filling in the proposal form and misrepresenting the situation. Does the agent remain the agent for the insurer or does he, at least for the purpose of completing the proposal, become the agent of the insured?

The situation here has been considerably influenced by conflicting rules of law. On the one hand, a man is deemed to be responsible for what he signs; further, in so far as he delegates to another the filling in of a proposal, that person becomes his agent for that purpose and not the agent of the insurance company. On the other hand, it is argued that the knowledge of an agent is knowledge of the principal, so that if the agent knew the true position the insurance company must be taken to have accepted the proposal knowing that some of the answers contained in it are false and thus to have waived the requirement that these answers should be correct.

There are several English cases of particular importance in connection with this matter. In *Bawden* v. *The London, Edinburgh and Glasgow Assurance Company*[2] the proposer for an accident policy, who was almost illiterate, had only one eye. The proposal which he signed was filled in by the agent and one clause on the proposal was to this effect:

> I am in good health, free from disease, not ruptured and have no physical infirmity, nor are there any circumstances that render me particularly liable to accident.

It was held that, notwithstanding this answer, the company through its agent had acknowledged that the proposer had only one eye, and that it was liable for the amount payable on total disablement when he lost the sight of the other.

The judgments make clear the attitude of the Court towards the continuing agency for the insurer. For instance Lord Esher M.R. said:[3]

> He went to a man who had only one eye, and persuaded him to make a proposal to the Company, which the Company might either accept or reject. He negotiated and settled the terms of the proposal. He saw that the man had only one eye. The proposal must be construed as having been negotiated and settled by the agent with a one-eyed man. In that sense the knowledge of the agent was the knowledge of the company.

Also Kay L.J. said:[4]

> How is it possible for us to say that the knowledge of Quin [the agent] is not to be imputed to the company? That knowledge was obtained by him when he was acting within the scope of his authority, and it must be imputed to the company.

In *Biggar* v. *Rock Life Assurance Company*[5] the proposal in question, which was for an accident policy, was filled in by the agent without consulting the proposer about the answers, and was signed by the latter without being read by him. In fact some of the answers filled in by the agent were incorrect and it was held that Biggar could not claim under the policy. The Court was of the view that the agent had authority only to put answers into the correct form and when he went beyond that and was allowed by the proposer to make up answers he was acting as the agent of the proposer and not of the Company.

Thirdly there is the decision in *Newsholme Brothers* v. *Road*

2. [1892] 2 Q.B. 534.
3. Ibid., at p. 539.
4. Ibid., at p. 542.
5. [1902] 1 K.B. 516.

Transport and General Insurance Company Limited.[6] The agent, although told the true facts, entered false answers on a proposal for an accident policy and the proposer signed, presumably without reading them. The Court decided that the insured could not recover under the policy. Either the agent knew or did not know what he filled in was incorrect. Yet he knew he was committing a fraud on his company, and this prevented him being its agent in the transaction; if he did not know neither he, nor the company through him, had the knowledge of the correct answers. The Court doubted whether *Bawden's* case had been correctly decided.

The question arose in England more recently in *Facer* v. *Vehicle and General Insurance Company Limited.*[7] The case involved the procurement of an insurance policy by one Bonham who was a part-time sub-agent of one Brawn who was the agent of the defendants. In the proposal form the following question was proposed:

> To the best of your knowledge and belief do you, or does any other person who to your knowledge will drive, suffer from defective vision or hearing or from any physical infirmity?

and the answer was given as "No".

It was found as a fact that the answer was written by Bonham, and it was written at a time when he had knowledge that Mr Facer was defective in vision to the extent that he was a one-eyed man.

Marshall J. considered the judgments in both the *Bawden* and the *Newsholme Brothers* cases and said that it was quite clear that in the *Newsholme Brothers* case the Court of Appeal refused to follow the line of reasoning in the *Bawden* case. In particular His Lordship quoted Scrutton L.J. who had said:[8]

> I find considerable difficulty in seeing how a person who fills up the proposal can be the agent of the person to whom the proposal is made. A man cannot contract with himself. A makes a proposal to B by signing it, and communicating it to B. If A gets someone — C — to fill out the form for him before he signs it, it seems to me that C in doing so must be the agent of A who has to make the proposal, not of B who has to consider whether he will accept it.

Marshall J. said that he was quite satisfied that he should regard the *Newsholme* case as one which would govern his decision. His Lordship found further strength from the declaration by the insured which read:

> I, the undersigned, desire to insure the motor vehicle as described above and further agree that if this proposal in

6. [1929] 2 K.B. 356.
7. [1965] 1 Lloyd's Rep. 113.
8. Ibid., at p. 119.

> any particular is filled in by any other person, such person shall be deemed my agent and not the agent of the Company.

Marshall J. could not see how in the face of a signature appended to such a declaration it could be argued that the person filling in the particular form, namely Bonham, was the agent of the company and not the agent of the insured.

A further English Court of Appeal decision is *O'Connor* v. *B.D.B. Kirby & Co.*[9] where the insured approached an insurance broker for the purpose of taking out an insurance policy in respect of a car. The broker filled in a proposal form, the insured supplying him with the necessary information whilst he did so. In answer to one question the insured stated he had no garage and that the car was kept in the street. Through a slip or mis-understanding the broker filled in the answer to the question on the form to the reverse effect. Having completed the form the broker handed it to the insured to check through; the insured glanced at it not noticing the mistake and signed. The insurers accepted the proposal and issued a policy. Some years later the insured made a claim on the policy; the mistake came to light and the insurers repudiated liability. The insured brought an action against the broker for damages for loss he had suffered as a result of the insurers' repudiation alleging that it had been caused by reason of the broker's breach of his contractual duty to complete the proposal form correctly. Davies L.J. said:[10]

> It is argued by counsel for the brokers that failure of the insured properly to read the form was the cause of this loss, the cause of putting the insurance company in a position to repudiate liability. I think counsel for the brokers is right in that regard.

and later:

> But in my view . . . it was the duty of the insured to read this form; it was his application; he signed it and if he was so careless as not to read it properly, then in my opinion he has only himself to blame.

To add to the confusion there have been a number of decisions of the High Court of Australia on similar facts.

In *The Western Australian Insurance Company Limited* v. *Dayton*[11] the agent called upon the proposer and had him sign a blank proposal form for an insurance on his car, telling him that he, the agent, would complete it at home. Incorrect answers were made in completing it. The proposer had a previous policy with the company and the majority of the Court thought that in these circumstances the representation of the agent that the company had all the information it desired and

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9. [1971] 2 All E.R. 1415.
10. Ibid., at p. 1420h.
11. (1924) 35 C.L.R. 355; 31 A.L.R. 170.

that the lodging of the proposal was merely a routine procedure which could be substantially left to him, bound the company and estopped it from relying on the mis-statements in the proposal.

Maye v. *C.M.L.*[12] was a case where the decision was similar to that in *Bawden's* case. Following upon some preliminary negotiations Maye called at the company's Brisbane Office and met two senior officers of the company, after which the proposal was completed. Maye was almost illiterate and signed the proposal after the agent had asked the requisite questions and filled in the answers. The jury found the answers were given truthfully, but were not written as given nor were the written answers read over to Maye. The High Court by a majority decided that Maye's widow was entitled to recover under the policy. On the other hand, in *Jumna Khan* v. *Bankers and Traders Insurance Company Limited*[13] where an illiterate man had allowed the company's agent to fill in a proposal for a fire insurance policy, it was held that the contract could be avoided by the company, *Biggar's* case being followed.

These later cases both in Australia and England are based on the theory that the insurers' act of deciding whether to accept or decline the insurance is the basis for the contract; and the validity of the policy depends upon the accuracy of the proposal form. It therefore follows that the insurers are entitled to assume that the proposal form is indeed accurate and that knowledge of any fact inconsistent with the proposal is not to be imputed to them merely because the person responsible for the inaccuracy knew the truth and happened to be the agent who introduced the insured. From this it follows that the agent in filling in the answer ceased to be the agent of the insurers. He becomes the agent of the proposed insured, and therefore his knowledge cannot be imputed to the insurers. By signing the proposal the proposed insured adopts the answers as his own and makes himself responsible for any inaccuracy in them. The particular circumstances in which he came to sign the proposal form are to be disregarded. He may expressly approve of the answers before signing the proposal, or he may choose to sign it without reading them and pointing out any incomplete or inaccurate answer. Further, it is immaterial whether he has had the opportunity of reading the proposal or not; and if he signed the proposal before completion and leaves it to the agent to fill in the answers and forward the completed proposal to the insurers, he is none-the-less responsible for any inaccuracy.[14] It appears also that the circumstances in which the inaccuracy arose are to be equally disregarded. The proposed insured may have given the agent the correct information and the agent filling in the answers, may have forgotten or misunderstood it; or the agent may have filled

12. (1924) 35 C.L.R. 14; 30 A.L.R. 329.
13. (1925) 37 C.L.R. 451.
14. *In re an Arbitration between Samson and the Atlas Insurance Co. Ltd* (1909) 28 N.Z.L.R. 1035; *Parsons* v. *Bignold* (1846) 15 L.J. Ch. 379; (1909) 28 N.Z.L.R. 1905.

up the answers without asking any questions believing that he was acquainted with the truth. Even the fact that the statements of the proposal are never mentioned to the agent does not under this theory seem to absolve the proposed insured from responsibility and exclude the insurers from relying on the inaccuracy. The only situation which would make him the agent of the insurers under this approach would be where he makes an interpretation as to the materiality of certain facts. The proposed insured is here asking the agent as agent of the insurers as to what facts the insurers require to be disclosed.

The problem in New Zealand has not been particularly prominent as it seems to be only recently that agents have been adopting this practice. However the matter was discussed fairly early on in *Samson's* case[15] where a proposal form which was blank apart from the proposer's signature was left at the insurance company's office where it was incorrectly filled in by a clerk of the company. Williams J. discussed the various authorities and said that they were extremely difficult to reconcile. What he did say, however, was that it was at least clear in *Bawden's* case that the person involved was the agent of the company. In *Samson,* he said, it had not been shown that the clerk was the agent for the purpose of negotiating insurance. On this ground the judge distinguished the case from *Bawden.*

There have been two recent New Zealand cases in related areas. In *Hutton* v. *Royal Exchange Assurance Corporation*[16] the issue did not relate to a proposal for new insurance, but to a recommendation that existing insurance would give adequate protection in particular circumstances. The insurance was in respect of a motor launch and it was held that the company's agent had represented that the launch was covered while used as a pleasure craft, and the company was estopped from denying that it was so covered. Although this case does not concern the completion of a proposal form, it is relevant in the sense that it is an illustration that the New Zealand courts have accepted the general principle that a representation made by an agent can give rise to an estoppel.

In *Blackley* v. *National Mutual Life Assurance Assn.*[17] the Court of Appeal dealt with a life assurance policy which required the disclosure of any circumstances affecting the risk before the policy was issued. The proposal was signed on 30 May, 1963 and the first premium was paid on 7 August. The insured had on 1 August undergone an operation for removal of a brain tumour, and the agent was aware of this when he called upon the insured's wife on 7 August and obtained payment of the premium. The Court held that the agent was clothed by the insurance company with an ostensible authority to receive a disclosure under the clause in the proposal, so that disclosure to the agent was disclosure to the company. The result

15. See n. 14.
16. [1971] N.Z.L.R. 1045.
17. [1972] N.Z.L.R. 1038.

was that there was a binding contract of insurance notwithstanding that the agent did not pass on his knowledge to the company. In the course of his judgment Turner P. said:[18]

> The imputation to a principal of the knowledge of an agent when that knowledge has been disclosed to him in reliance upon his *ostensible* authority to receive it is an application of the principles of estoppel. Though the agent may not in fact have the principal's authority to receive the disclosure so as to bind the principal as if the latter had knowledge of it, yet the principal may not aver that he was not notified of the facts disclosed, for by holding out the agent he must be deemed as against the third party, to have given the authority which in fact the contract of agency may not have conferred.

The case did not concern any error in the completion of the proposal form itself, but dealt only with the disclosure of events happening subsequently. The *Bawden, Biggar* and *Newsholme* cases were discussed and distinguished on this ground. However it is submitted that the general principles outlined by Turner P. are equally applicable to the situation where the proposal form has been inaccurately filled in by the agent.

Because of the uncertainty in the case law and because it is now normal for the agent to fill in the proposal form some insurance companies have taken steps to strengthen their position in cases where the insured alleges that the mistake has been made by the company's agent; they are inserting in the proposal form a notification to the effect that the agent filling up the proposal form is the agent of the applicant and not of the company. Such a clause was present in the most recent English decision in this general area, namely *Stone* v. *Reliance Mutual Insurance Society Limited*,[19] a decision of the Court of Appeal. Stone took out policies of insurance in respect of fire, theft and endowment. One of these policies covered the risk of fire under which policy a claim was made in 1967. Later in that year both the policies lapsed. In January, 1968, O'Shea, an inspector, called from the insurance society. Stone was not in, so his wife saw O'Shea, who asked her if she would like to take out a new policy and suggested it should be for a higher amount. She said in evidence:

> I agreed, and he got out some forms and started filling them in (two forms), he gave them to me to sign and he showed me where to sign. I did not read them.

O'Shea agreed that he had filled in the forms, and he said in evidence:

> It is the company's policy that I should put the questions, writing down answers.

On the proposal form, one of the questions was 'Give particulars and

18. Ibid., at p. 1049.
19. [1972] 1 Lloyd's Rep. 469.

dates of any claims you have made in respect of any risks hereby proposed to be insured', and the answer given was 'none'. Also there were these words:

> . . . in so far as any part of this proposal is not written by me the person who has written the same has done so by my instructions and as my agent for that purpose.

In 1970 the plaintiff made a claim under the policy. The claim was rejected by the defendant on the grounds that he had not disclosed a previous fire claim.

The case was originally tried in the Mayor's and City of London Court. The Judge with some regret dismissed the claim. He thought that the case could not be excepted from the established principle as set out in the *Newsholme* case. In the Court of Appeal Lord Denning said that the only inference that could be drawn was that the answers in the proposal form were inserted by a mistake. Lord Denning said that the mistake was clearly O'Shea's because "he did not ask Mrs. Stone the question" and he inserted the answers out of his own head without checking up whether they were true or not. Lord Denning held that on the facts the agent by his conduct had impliedly represented that he had filled in the form correctly and that he needed no further information from Mrs. Stone who relied upon this representation.

Lord Denning expressed his view of the case in the following way:[20]

> The society seek to repudiate liability by reason of the untruth of two answers in the proposal form. They seek to fasten those untruths onto the insured. They do so by virtue of a printed clause in the proposal form. They make out that it was the insured who misled them. Whereas the boot is on the other leg. The untrue answers were written down by their own agent. It was their own agent who made the mistake. It was he who ought to have known better. It was he who put the printed form before the wife for signature. It was he who thereby represented to her that the form was correctly filled in and that she could safely sign it. She signed it trusting to him. This means that she, too, was under a mistake, because she thought it was correctly filled in. But it was a mistake induced by the misrepresentation of the agent, and not by any fault of hers. Neither she nor her husband should suffer for it. No doubt it was an innocent misrepresentation for which in former times the only remedy would be to cancel the contract and get back the premiums. But nowadays an innocent misrepresentation may give rise to further or other relief. It may debar a person from relying on an exception. Likewise in this case it disentitles the insurance company from relying on the printed clause to

20. Ibid., at p. 475.

> exclude their liability. Their agent represented that he had filled in the form correctly: and having done so, they cannot rely on the printed clause to say that it was not correctly filled in. So they are liable on the policy.

In a separate judgment Megaw L.J. agreed with the approach taken by Lord Denning. He said that the conclusion that was to be drawn was that the wrong answer having been obtained as a result of confusion, muddle or error on the part of the agent, and the evidence being that it was the agent's instructions from the defendant that it was he who was to ask the questions and he who was to record the answers, then the defendant company could not as a matter of law rely upon any erroneous answers. A short concurring judgment was also delivered by Stamp L.J.

While each of the three Judges paid great attention to the particular facts of the case, the principles enunciated by the Court, especially by Lord Denning, have a far wider application than to this particular case. This was certainly the view taken by counsel for the insurer who when moving for leave to appeal said:

> The findings of this Court — even though your Lordship has gone out of your way to quote the particular facts of this case — is going to have the very greatest bearing on the whole conduct in regard to industrial policies and various other insurance policies where it is the practice of an employee o fthe insurers to conduct the inquiries in this way.

It is suggested that the general application of the case and the attitude of the Court is shown in the replies of the Court to this motion:

> Lord Justice Megaw: Mr. Shiner, the declaration that is printed in the proposal form here is one which says:
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> > I further declare in so far as any part of this proposal is not written by me, the person who has written same has done so by my instructions . . .
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> How can you possibly, with such a document, requiring these small people signing this sort of policy to sign a form saying that the agent has written what he has written on the instructions of the insured, intending to bind them thereby and to place legal consequences on it, when, as we know, it is the policy of the company to instruct their representative himself to write down the answers and then get a declaration signed saying what this says?
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> Mr. Shiner: I fully appreciate your Lordship's point. What I am simply saying is that there are in existence today hundreds of thousands of this very policy . . .
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> Lord Denning M.R.: As a result of this case the collectors may in all the circumstances write down the answers correctly.
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> Mr. Shiner: Yes, my Lord. That presupposes the position

> of the agent, or let us call him the employee. It also refers to the other factor, namely, that the insured say that they have read the policy through.
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> Lord Justice Stamp: Would it be a good thing if agents were given instructions to make sure that the insured have read the policies through? I have very little sympathy with you on this case — not you personally.

Leave to appeal was not granted.

The case is significant and close examination of its effects and the principles which support these effects must be undertaken.

STONE'S CASE — CAN A BROAD APPLICATION BE SUPPORTED?

In arguing for support of a concept of the continued agency for the insurer several points can be made. For instance, the principal has power of choice over his agents and has chosen the one involved; he has clothed the agent with apparent authority and he is in a business which presumably is bringing him a profit. Part of being in a profit-making enterprise is the responsible assumption of the normal risks which that enterprise entails. This surely includes all the acts of agents and in this case any possible loss can be represented in the insurance companies' premium rates. Insurance as an instrument of spreading the loss has been an important rationalisation in many areas of vicarious liability and there seems to be no reason why the insurance companies themselves should not be subject to the same principles.

If *Stone's* case is given a broad application then what seems to clearly be an inequitable result can be avoided, as the loss would fall on the insurer who had solicited the risk in the first place. None of the earlier cases have gone to the House of Lords and there are conflicting cases both at the Court of Appeal level in England and at the High Court level in Australia. This means that it is open for the courts to follow *Stone* and in the light of Turner P.'s general comments in *Blackley;*[21] this would be a most appropriate course for the New Zealand courts to take.

There seem to be two main principles reflected in reaching the type of result that was arrived at in *Stone*. The first of these is that an insurer should not be permitted an unconscionable advantage in an insurance transaction even though the policy-holder or other persons whose interests are affected has manifested fully informed consent. This is a recognition of the disparity between the bargaining positions of the insurer and the insured. In the early stages of the development of insurance, perhaps contracts were negotiated among persons of relatively equal bargaining power. But as insurance developed,

21. Supra, n. 17.

standardisation of terms for contracting, almost inevitably drafted by insurers, became progressively more common and so provided for an inequality of bargaining power.

The second principle can be loosely described as the desirability of fulfilling the reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts even though painstaking study of the policy provisions would have negated those expectations. Legally speaking, it is convenient to lump both these principles under a broadly defined concept of estoppel and it is within the notion of these two principles that estoppel will be used in this article. These principles recognise the practicalities of the matter. The insured thinks of the agent as always being the agent of the insurance company and therefore accepts his representations as being both authoritative and on behalf of the company. The insurer benefits from this position that his agent holds and should therefore not be allowed to deny that the agent is acting on his behalf as he has clothed the agent with implied authority, and is aware of the practices that his agent adopts.

What judicial support is there for the approach taken in *Stone*? Apart from *Bawden*[22] there are some decisions around the turn of the century which are of assistance here.

The first is *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.*[23] where the plaintiff effected an insurance policy with the defendant through its agent. The plaintiff was a joiner and builder by trade and this was known to the agent. However the agent when filling in the proposal form described the plaintiff only as a builder. The plaintiff did not read the form but merely signed it where the agent indicated he should do so. When the policy was sent to the plaintiff he noticed the error and the agent subsequently altered the policy to include joiner. There was no communication of this to the agent's head office. It was held that the company was liable on the grounds that by receiving premiums it was precluded from denying the agent's authority to alter the contract and that the knowledge of the agent was the knowledge of the company. But the Court went further than this and said that even if the contract had not been altered the company would have been liable because the contract had to be treated as having been negotiated by the agent with a joiner and builder and knowledge of the agent must be treated as knowledge of the company.

A second case is *Thornton-Smith* v. *Motor Union Insurance Co. (Ltd.)*.[24] The plaintiff insured a motor car with an insurance company, but the company refused to renew the insurance, and he mentioned this fact to an agent of the defendants, another insurance company. The defendants' agent offered to propose him to the defendants, and

22. [1892] 2 Q.B. 534.
23. (1907) 23 T.L.R. 521.
24. (1913) 30 T.L.R. 139.

the plaintiff, on receiving a proposal form with the question whether any company had refused to renew his insurance, spoke about it to the defendants' agent, who replied that he would make it all right. The plaintiff did not fill in any answer to the question. The company accepted the proposal and afterwards agreed that it should cover a new Vauxhall car. Subsequently the plaintiff insured a Siddeley car with the defendants, and they had notice that the plaintiff had had a previous insurance, but the spaces for answers to the question on the proposal form were left blank. Accidents occurred to both cars, and the defendants refused to pay on the ground that the plaintiff had originally represented that no insurance company had refused to renew.

The plaintiff brought an action against the defendants for a declaration that the policies on the Vauxhall and Siddeley cars were valid. The Court held that as the plaintiff had made full disclosure to the defendants' agent, and as there was no evidence of collusion, the plaintiff was entitled to the declaration.

In *Keeling* v. *Pearl Assurance Co. Ltd.*[25] the agent of an insurance company suggested to a married woman that she should insure the life of her husband, and obtained her signature to a proposal form which he took away with certain of the questions left unanswered. He subsequently saw the husband and asked him certain questions as to his health, to which the husband returned true answers. The agent however filled in untrue answers.

It was held that the agent of the insurance company having been employed to negotiate such contracts and to fill up proposal forms for persons who could not fill them up for themselves, and having put down answers which were contrary to the facts stated to him by the insured, was in so doing the agent of the insurance company and not of the insured, and the policy was not vitiated by such untrue statements.

Bailhache J. considered in depth the question of the liability of the company when the agent filled up the proposal form. Discussing the inconsistency between *Bawden's* case and *Biggar*[26] the learned Judge said:

> I have come to the conclusion that in this case the line of cases to be followed is the *Bawden* line of cases rather than the *Biggar* line of cases.

Apart from these three English cases there is quite a substantial body of American authority which follows the approach suggested in this article.

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25. [1923] 129 L.T. 573.
26. [1902] 1 K.B. 516.

THE POSITION IN THE UNITED STATES:

There is no doubt that in the United States there is a difference among decisions on this point. But it is submitted that the decided weight of authority supports the view that the insurer's agent does not represent the insured in taking and filling out his application. Some of the theories that the courts have acted on have been along the lines that the insurance company cannot change the ostensible authority which the agent has been held out by the company as possessing; that it cannot be a rule of law that a party can abrogate the authority of its agent as soon as the agent has accomplished the purpose which he was appointed to perform; that to decide otherwise is a grave attempt to reverse the law of agency by declaring that a party is not bound by his agent's acts; and that it would be a distortion of legal principles to hold that a person dealing with an agent sent out by a company to solicit insurance, and apparently clothed with authority to act for it in the matter in hand, could be affected by notice given after the negotiations had been completed, that the party with whom he dealt was transformed from the agent of the insurer into his own agent.

This type of approach quite clearly leads to the doctrine of estoppel. It has been frequently held that an insurance company will be estopped from denying that a certain person is its agent or possesses the authority he assumes to exercise, where it knowingly causes or permits him so to act as to justify a third person of ordinarily careful and prudent business habits to believe that he is the company's agent or possesses the authority exercised: *Rapides Club* v. *American Union Ins. Co. of N.Y.*;[27] *Scott* v. *Continental Ass. Co.*[28]

Also it has been held that where questions as to material matters are propounded to the applicant by the insurer's agent and are truthfully answered but the agent sets down answers, not as given by the applicant, but in his own way, the insured, if free from fault, is not bound by the answers as recorded and the insurer cannot deny liability: *Pitcher* v. *World Ins. Co.*[29] Similarly it has been held that when the agent informs the insured that no answers are necessary and subsequently, without the applicant's knowledge, fills out the application erroneously the insurer cannot void the policy: *Phoenix Ins. Co.* v. *Stark.*[30]

This approach that the insurer will be estopped from denying liability is even more insistently adopted in recent cases. One example is the decision of the United States Court of Appeal on appeal from Texas in *Southern Farm Bureau Casualty Ins. Co.* v. *Allen.*[31] For

27. (1929) 35 F 2d 253.
28. (1958) 150 N.E. 2d 38.
29. (1950) 42 N.W. 2d 735.
30. (1894) 22 N.E. 413.
31. (1967) 388 F 2d 126.

notice to an agent to be notice to the insurer, the Court ruled that the agent must be acting within the scope of his authority in reference to a matter over which his authority extends and the insured or applicant for insurance must not be involved with the agent, even informally, in perpetrating a fraud against the insurer. Following on from this, the Court ruled that under Texas law, where through the fraud, mistake or negligence of an insurance agent in filling out the application, the insured's truthful answers are incorrectly transcribed, the insurer is estopped from asserting their falsity.

A similar decision was reached by the Michigan Court of Appeal in *Lipsky* v. *Washington National Ins. Co.*[32] The appellant made written application to the insurance company for a policy of hospitalization on himself, his wife, and his daughter. The proposal form was filled out by the agent and signed by the proposer. The major point in the case resolved around the "no" answer recorded to the question of prior medical consultation. In fact this answer was inaccurate. The Court held that information imparted to the agent when he was completing the proposal by the insured was imputed to the insurer, and the insurer was held to be liable.

One year earlier the Supreme Court of Wisconsin dealt with an action by an insured to recover amounts allegedly due under a hospital and surgical insurance policy. The case in question was *Weiss* v. *Mutual Indemnity Co.*[33] Apparently on the proposal form was a question as to whether the proposer suffered from diabetes. The form stated that the proposer did not whereas in fact he did suffer from it and had done so for nearly four years. The insurer was held to be not entitled to judgment on the grounds that there was a factual dispute relating to the possible estoppel of the insurer's right to assert the misrepresentation. The doubt involved was whether or not the agent had prepared the application. Gordon J. said if he had then this would lead to estoppel.

In 1965 the Louisiana Court of Appeal in *Fruge* v. *Woodmen of World Life Insc. Co.*[34] held that the acts of the agent of the insurer in erroneously filling out the blanks in the application form for the proposer who signed it without reading it, but who had informed the agent of the true facts, were those of the insurer.

Schneider v. *Washington National Insc. Co.*[35] came before the Supreme Court of Kansas which held that an insurance agent, upon making out an application for insurance, acts as agent of the company and not of the applicant. Also if the applicant makes truthful answers to the questions, the company cannot take advantage of false answers entered by the agent contrary to the facts as stated by the applicant.

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32. (1967) 152 N.W. 2d 702.
33. (1966) 145 N.W. 2d 171.
34. (1965) 170 So. 2d 539.
35. (1968) 437 P. 2d 798.

This rule was also held to be applicable when the agent without making any inquiry of the applicant and without the applicant's knowledge enters false answers to the questions. A similar result was reached by the Supreme Court of Georgia in 1970 in *Reserve Life Ins. Co.* v. *Meeks.*[36]

A recent case is *Rea* v. *Hardware Mutual Casualty Co. and Anor*[37] which involved an action by the administrator of the estate of the insured against the insurer and a third party who was involved along with the insured in a one-car collision, seeking a declaration of rights, duties and obligations of the parties under an automobile liability policy. The case came before the Court of Appeal of North Carolina.

The proposal form contained a declaration that the named insured was the sole owner of the automobile, but the insurer's agent knew that the certificate of title with respect to the automobile was not in the name of the insured. The proposal was filled in by the agent. The Court held that the knowledge of their agent was imputed to the insurers and that they could not avoid liability even though the policy contained a provision that the statements in the form constituted declarations and representations of the insured.

It has also been held that the fact that the company instructs its agent to regard himself as the applicant's agent does not affect the rule that the insurer's agent is in law its agent for the purpose of taking the application and negotiating for insurance, if such instructions are unknown to the applicant.[38]

Knowledge by the insured that the answers are incorrect does not always vitiate the contract, as where the applicant has been advised by the agent that they were the proper ones to make, and he in good faith relied upon such advice. Such was the case in *Green* v. *South Western Voluntary Assn.*[39] in which the insured described his fiancee as his wife on the advice of the insurer's agent. There the Court held that an applicant for insurance is justified in relying upon the advice and assistance of the insurer's agent in preparing his application, since the agent has a knowledge of the requirements of the application and of the kind of answers required, that is far greater than that of the ordinary applicant.

These American cases show a clear leaning towards a doctrine that holds that an insurer who permits his agent to appear to have authority is estopped from denying such authority. In this context the courts appear to be saying that the insurer clothes his agent with authority to do all things in relation to soliciting and preparing an

36. (1970) 174 S.E. 2d 585.
37. (1972) 190 S.E. 2d 708.
38. Cf. Couch on *Insurance* (2nd Ed. Ed. by Ronald A. Anderson), 25; 103 which cites *Union M.L. Insc. Co.* v. *Wilkinson* 13 Wall 222.
39. (1942) 20 S.E. 2d 694.

application for insurance, and it is unreasonable to expect the applicant to assume that in actual fact the agent is acting as his agent and not that of the insurer. Because it is unreasonable to expect this, the courts have gone on to say that this can never be the case, no matter what clauses the insurer seeks to include in the contract of insurance.

CONCLUSION:

What then is the position? First of all it is necessary to set out again what the position would be if the decisions in the *Newsholme, Facer* and *Jumna Khan* line of cases are followed. The effect of these would be that the proposer for insurance is responsible for the accuracy of the proposal form, and cannot avoid this responsibility by allowing someone else to complete it for him, or by failing to read and check it before signing it. This would be the case even though the person completing the form may be an agent for the insurer employed on a commission basis, and may obtain the signature on a blank form on the representation that he would fill in the correct answers later.

It was submitted that this result is an unjust one based on an unjustifiably narrow application of ordinary agency principles to the insurance situation. It was further submitted that in the context of a contract which called for the utmost good faith on the part of both parties then the insurer should be estopped from denying liability in this situation. Two main principles were cited in support of this submission. First that an insurer should not be permitted an unconscionable advantage in an insurance transaction even though the policy holder or other persons whose interests are affected has manifested fully informed consent. Secondly it was advocated that the reasonable expectations of applicants and intended beneficiaries regarding insurance contracts should be honoured even though painstaking study of the provisions of the contract would leave these expectations negated. It is of course an important corollary on these propositions that the insured is innocent of any attempt to mislead either the insurer or the agent.

Judicial support for this approach was found first of all in *Bawden's* case and then three English decisions in the early part of this century: *Holdsworth* v. *Lancashire & Yorkshire Insc. Co.; Thornton-Smith* v. *Motor Union Insc. Co.* and *Keeling* v. *Pearl Life Assurance Co.* In addition reference was made to the situation as it exists in the United States. While there is some conflict of opinion there the weight of authority seems to be clearly that an insurance agent is always the agent of the insurance company by which he was appointed or employed and he cannot be considered in any sense as the agent of the insured in any matter connected with the issuance of the policy. The reasoning behind this approach was that an insurer who permits his agent to appear to have authority is estopped from denying such auhtority.

Finally, the most conclusive support for this approach was found

in the English Court of Appeal in *Stone*. It was argued that the decision of the Court that the insured had acted on the representation of the insurer's agent and that therefore the insurance company was estopped from denying liability, could and should be given a wide application. It was also argued that if this wide application were made it would fall within the general principles enunciated by the New Zealand Court of Appeal in *Blackley*.

In January, 1957, the English Law Reform Committee issued its fifth report "Conditions and Acceptances in Insurance Policies".[40] It stated that the then position at law was that insurers could repudiate liability where an agent had been allowed by the proposed to fill out the proposal form and had carelessly or deliberately falsified the oral information given to him by the proposer. The Committee recommended that:

> Any person who solicits or negotiates a contract of insurance shall be deemed for the purpose of the formation of the contract to be the agent of the insurers, and the knowledge of such persons shall be deemed to be the knowledge of the insurers.

It is suggested that the common law as it stands, apart from any statutory remedy that might be called for, implements this recommendation. If *Stone's* case is given the application that has been suggested and the doctrine of estoppel is invoked against the insurer then this situation will have been achieved, and an inequitable, regrettable disadvantage to the insured will have been avoided.

J. F. TIMMINS*

40. (1957) 2957 Cmnd 62.

* LL.B.(Hons.).