

St. John's Law Review

Volume 9
Number 2 *Volume 9, May 1935, Number 2*

Article 6

June 2014

Warranties--Consultations--Evidence--In Insurance

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Recommended Citation

Boland, Leo F. (1935) "Warranties--Consultations--Evidence--In Insurance," *St. John's Law Review*. Vol. 9 : No. 2 , Article 6.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol9/iss2/6>

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terstate commerce, is within the purview of the "Interstate Commerce" clause. It is submitted that 7 (a) will be upheld by the Supreme Court in conformity with the liberal trend and loose construction of the Federal Constitution as displayed in upholding other New Deal legislation.³⁹ The Nields opinion⁴⁰ doubtless will encourage unfriendly companies to continue their defiance of the law; the national welfare requires that the Supreme Court act promptly in deciding the constitutionality of 7 (a).

IRVING L. KALISH.

WARRANTIES—CONSULTATIONS—EVIDENCE—IN INSURANCE.¹

The term warranty as used in insurance law seems to be the brain child of the market place, foisted upon the courts by "stammering for a word" lawyers, applied loosely by judges until it secured such a firm grasp upon the terminology of insurance law that it is universally employed and as widely undefined.² A warranty is a term of the insurance contract, similar to a condition precedent, providing that a fact exists or will exist, which partly forms the inducement and consideration of the insurer's promise to assume the risk.³

In the early days of insurance, marine being the first kind known to the law, the assured was bound to comply strictly with the terms of his warranties.⁴ The theory was as follows: the underwriter was

³⁹ *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505 (1934); *Perry v. United States*, — U. S. —, 55 Sup. Ct. 432 (1935); *Norman v. Baltimore & O. R. R. Co.*, — U. S. —, 55 Sup. Ct. 407 (1935); *Nortz v. United States*, — U. S. —, 55 Sup. Ct. 428 (1935).

⁴⁰ *Supra* note 35.

¹ See (1931) 6 ST. JOHN'S L. REV. 91.

² Patterson, *Warranties in Insurance* (1934) 34 COL. L. REV. 602, "A warranty in insurance law is (1) a term of an insurance contract (2) which prescribes, as a condition of the insurer's promise, (3) a fact, the presence of which, regarded as of the time of contracting, will or may render less probable than its absence the occurrence of the insured event." RICHARDS ON INSURANCE (4th ed. 1932) §86; DONAHUE, *OUTLINE OF INSURANCE* (1st ed. 1927) 20 (defines by showing effect of); MAY, *INSURANCE* §151 and BLISS, *LIFE INSURANCE* §34 (a warranty is a condition precedent); *Kasprzyk v. Metropolitan Life Ins. Co.*, 79 Misc. 263, 140 N. Y. Supp. 211 (1913).

³ The first reported insurance case is Dowdale's case, 6 Coke R. 476 (1589). In 1601 a special tribunal for the trial of marine insurance cases was established in England. In 1756 Lord Mansfield was appointed Chief Justice of the Court of King's Bench. He is accepted as the father of insurance law. RICHARDS ON INSURANCE §9.

⁴ This, generally, is still the law in New York. *Chase v. Hamilton*, 20 N. Y. 52 (1859); *Alexander v. Germania Fire Ins. Co.*, 66 N. Y. 464 (1876); *American Surety Co. v. Patriotic Assurance Co.*, 242 N. Y. 54, 150 N. E. 599

at the mercy of the insured for a description of the subject and the proposed voyage.⁵

The breach of an express warranty, whether material to the risk or not, whether the loss happens through the breach or not, absolutely determines the policy and the assured forfeits his rights thereunder.⁶ Motive, honest belief, good faith of the assured are all irrelevant if it is shown a warranty has been breached.⁷

Richards⁸ defines a representation as a statement made by or on behalf of a person desiring to enter into a contract of insurance with the intention that it shall come to the notice of the underwriter; and which relates, by way of affirmation, denial or description, to a fact, circumstance, or past event and tends to influence the underwriter's estimate of the character and degree of the risk to be insured against.⁹

A misrepresentation¹⁰ of a material fact has the same effect as a breach of warranty or a concealment of a material fact—it renders the contract voidable at the option of the insurer. Fraud need not

(1926); *Shuster v. Nat. Surety Co.*, 256 N. Y. 150, 175 N. E. 655 (1931); *Graley v. American Eagle*, 235 App. Div. 490, 257 N. Y. Supp. 64 (4th Dept. 1934); *Goldstein v. Nat. Liberty Ins. Co.*, 134 Misc. 90, 234 N. Y. Supp. 40 (1928); *Justry v. Northern Ins. Co.*, 151 Misc. 757, 273 N. Y. Supp. 64 (1934).

⁵ RICHARDS ON INSURANCE §90. This theory is still applied to differ marine from life and fire insurance, *infra* note 16.

⁶ *Bank of Ballston v. Ins. Co. of North America*, 50 N. Y. 45 (1872); *Fitch v. American Life Ins. Co.*, 59 N. Y. 557 (1875); *Cushman v. U. S. Life*, 63 N. Y. 404 (1875); *Bartean v. Phoenix*, 67 N. Y. 595 (1876); *Cogswell v. Chubb*, 1 App. Div. 93, 36 N. Y. Supp. 1076 (1st Dept. 1896), *aff'd* on opinion, 157 N. Y. 709, 53 N. E. 1124 (1898).

⁷ *Gaines v. Fidelity*, 188 N. Y. 411, 415, 81 N. E. 169 (1907). " * * * One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement"; *Le Roy v. Market*, 45 N. Y. 80 (1871); *Foot v. Aetna*, 61 N. Y. 571 (1875); *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341, 8 N. E. 654 (1886); *Allen v. German-American Co.*, 123 N. Y. 6, 25 N. E. 309 (1890); *Clemens v. Supreme Assembly*, 131 N. Y. 485, 30 N. E. 496 (1892); *Eastern District Dye Works v. Traveler's Ins. Co.*, 234 N. Y. 441, 138 N. E. 401 (1923); *Hook v. Michigan Mut. Life Ins. Co.*, 44 Misc. 478, 90 N. Y. Supp. 56 (1904); *Woehrle v. Metropolitan Life Ins. Co.*, 21 Misc. 88, 46 N. Y. Supp. 862 (1897).

⁸ RICHARDS ON INSURANCE §81.

⁹ For substantially the same definition in fewer words see *CADY ON INSURANCE* §45; *Armour v. Transatlantic*, 90 N. Y. 450 (1882).

¹⁰ If statements are oral or in collateral documents there is an inference they are representations. *Jefferson v. Cotheal*, 7 Wend. 72 (N. Y. 1831).

If in the policy the inference is they are warranties. *Ripley v. Aetna Life Ins. Co.*, 30 N. Y. 136 (1864); *Moore v. Prudential*, 170 App. Div. 849, 156 N. Y. Supp. 892 (3d Dept. 1916).

If a doubt arises the courts endeavor to construe it as a representation, *infra* note 19.

A warranty must be complied with strictly, *supra* note 4.

A representation if substantially true will not affect the contract. *O'Connor Co. v. Glens Falls Ins. Co.*, 198 App. Div. 136, 189 N. Y. Supp. 612 (4th Dept. 1922), *aff'd*, 233 N. Y. 659, 135 N. E. 959 (1922).

be shown. An immaterial misrepresentation will not affect the contract unless it was made fraudulently with actual intent to mislead.¹¹

A concealment is the designed and intentional withholding of any fact material to the risk which assured, in honesty and good faith, ought to communicate to the underwriter.¹² A concealment of a material fact avoids the policy.¹³ The question of materiality is ordinarily for the jury.¹⁴ If insurer with full knowledge of the facts would have refused the risk the concealment is material.¹⁵ In marine insurance intent to withhold is not necessary—the rule is “utmost good faith.” In fire and life insurance the rule is “good faith and fair dealing.”¹⁶ A fact may be material, yet no duty to disclose exists because the facts are as readily ascertainable by the insurer.¹⁷

To avoid the harsh and often unjust results of an immaterial breach of contract which would impose upon the assured the burdens of a warranty, the strong inclination was to make the statements of the insured binding only when they were material to the risk where this could be done without running counter to the clear and unambiguous intent of the parties. In conformity with such attitude, the following rules of construction have been developed:¹⁸ 1. All doubts will be resolved in favor of the insured.¹⁹ 2. Expressions of opinion, expectation and belief will be construed as representations.²⁰ 3. Statement of present use is not a warranty of continuance.²¹ 4. To avoid forfeiture the contract will be deemed severable.²² 5. Burden of pleading and proof of breach is on in-

¹¹ Penn Mut. Life Ins. Co. v. Mechanics Savings Bank & Trust Co., 72 Fed. 413 (C. C. A. 6th, 1896).

¹² Daniels v. Hudson River Fire Ins. Co., 12 Cush. 416 (Mass. 1853); Rauls v. Ins. Co., 27 N. Y. 282 (1863); Sebring v. Fidelity-Phenix Fire Ins. Co., 255 N. Y. 382, 174 N. E. 761 (1931); RICHARDS ON INSURANCE §78.

¹³ Sun Mutual Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 1 Sup. Ct. 582 (1882); Merchants Ins. Co. v. St. Paul Ins. Co., 219 App. Div. 636, 220 N. Y. Supp. 514 (1st Dept. 1927), *aff'd*, 246 N. Y. 616, 159 N. E. 674 (1928).

¹⁴ Penn Mut. Life Ins. Co. v. Mechanics Savings Bank & Trust Co., *supra* note 11.

¹⁵ In life insurance the effect depends on the belief of the insured as to the materiality of the fact withheld. Mallory v. Travelers Ins. Co., 47 N. Y. 52 (1871).

¹⁶ Sebring v. Fidelity-Phenix Fire Ins. Co., *supra* note 12.

¹⁷ Gates v. Madison, 5 N. Y. 469 (1851); Kernochon v. N. Y. Bowery, 17 N. Y. 428 (1858); Vallon v. National Fund Assurance Co., 20 N. Y. 32 (1859); Smith v. Countryman, 30 N. Y. 655 (1864); Mallory v. Travelers Ins. Co., *supra* note 15; Clarkson v. Western Assurance Co., 33 App. Div. 23, 53 N. Y. Supp. 508 (4th Dept. 1898); Amer. Artistic v. Glens Falls, 1 Misc. 118, 20 N. Y. Supp. 646 (1892).

¹⁸ RICHARDS ON INSURANCE §§93-97.

¹⁹ Fitch v. American Life Ins. Co., *supra* note 6; Burleigh v. Gebbord Fire Ins. Co., 90 N. Y. 220 (1882); Jennings v. Supreme Council, 81 App. Div. 76, 81 N. Y. Supp. 90 (1st Dept. 1903).

²⁰ Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. 923 (1897).

²¹ Smith v. Mechanics Fire Ins. Co., 32 N. Y. 399 (1865).

²² Donnelly v. Glens Falls Ins. Co., 184 N. Y. 107, 76 N. E. 914 (1906).

surer as differentiated from pleading and proving a condition precedent generally.²³ 6. Questions unanswered or questions not answered untruthfully are construed in favor of insured.²⁴

There is a tendency to accept substantial compliance with a warranty as a substitute for the rule of strict compliance. This rule is more prevalent in fire than any other form of insurance.²⁵

The reasons for the establishment of the above rules prompted the legislature in 1907 to relieve the insured from the burdens of a breach of warranty in life insurance by the enactment of Section 58, N. Y. Insurance Law.²⁶ To create a warranty in the policy under this section the element of fraud must be present.²⁷ All parts of the contract must be in writing and physically attached to the policy.²⁸

*Dilleber v. Home Life Ins. Co.*²⁹ was decided at a time when the social and economic uses of life insurance were not safeguarded by Section 58, N. Y. Insurance Law. In that case the answers in the application were warranted to be full, correct and true. When asked the following questions: 1. "Has the party had, during the last 10 years, any sickness or disease?" 2. "Have you employed or consulted any physician?" the insured answered: 1. "Nine years ago had an attack of typhoid fever." 2. "Dr. Paine, nine years ago: He is now dead."

On the trial it appeared that the insured did not mention an attack of spitting blood. The court held the answer was true as far

²³ *Slocovitch v. Orient Mut. Ins. Co.*, 108 N. Y. 56, 14 N. E. 802 (1888).

²⁴ *Cushman v. U. S. Life*, *supra* note 6; *Dilleber v. Home Ins. Life Co.*, 69 N. Y. 256 (1877); *Higgins v. Phoenix Mut. Ins. Co.*, 74 N. Y. 6 (1878).

²⁵ *Patterson, Warranties in Insurance* (1934) 34 COL. L. REV. 596, 624; *Licht v. N. Y. Indemnity Co.*, 250 N. Y. 211, 164 N. E. 910 (1928); *Weingold v. New Amsterdam Casualty Co.*, 250 N. Y. 533, 166 N. E. 313 (1928); *Atlantic Fruit Co. v. Hamilton Fire Insurance Co.*, 251 N. Y. 98, 167 N. E. 184 (1929); *Miller v. Amer. Eagle*, 253 N. Y. 64, 179 N. E. 495 (1930).

²⁶ N. Y. INSURANCE LAW §58. "Every policy of insurance issued or delivered within the state * * * shall contain the entire contract between the parties and nothing shall be incorporated therein * * * unless * * * indorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties. Any waiver of the provisions of this section shall be void."

²⁷ *Eastern District Dye Works v. Travelers' Ins. Co.*, 234 N. Y. 441, 138 N. E. 401 (1923). "The result of this provision is that in order to produce a warranty * * *, the statement * * * must be characterized by and include the element of fraud. * * * A misstatement even though stated in the form of a warranty, if made in good faith and without this element of fraud passed into the same class as an ordinary representation and became a defense only if it was material. On the other hand the effect of a misrepresentation was left unchanged by the statute. If material it constituted a defense although made innocently and without any feature of fraud; it was sufficient that it was material as an inducement for the issue of the policy and was untrue."

²⁸ *Archer v. Equitable Life Assur. Soc.*, 218 N. Y. 18, 112 N. E. 433 (1916); *Acee v. Metropolitan Life Ins. Co.*, 219 App. Div. 246, 219 N. Y. Supp. 152 (4th Dept. 1927).

²⁹ *Supra* note 24.

as it went and was not a breach of warranty as matter of law. At page 262 the court said:

"The answers were literally true. * * * It was full and complete as far as it went. If a question is not answered there is no warranty that there is nothing to answer. And, so, in a case of partial answer, the warranty cannot be extended beyond the answer * * * breach of warranty must be based upon the affirmation of something not true."

It was a question for the jury whether a portion of the truth was fraudulently and intentionally suppressed or withheld.

In the *Cushman* case³⁰ the question asked was, "Have you ever had a disease of the liver?" It was answered "No." The evidence showed he had an attack of congestion of the liver, had been attended by a physician for six days. It was decided that congestion of the liver was not necessarily, within the meaning of the policy, a disease of the liver. The jury, as they are wont to, having found for the plaintiff, the judgment was affirmed.

In these cases we find excellent examples of the strained construction placed upon the policies before the enactment of Section 58. The courts went a long way to find for the plaintiffs, but these cases have been overruled by *Anderson v. Aetna*³¹ and *Travelers v. Pomerantz*.³²

This brings us to a consideration of the *Anderson* case. The plaintiff sues to recover on life insurance policies. The assured in his application was asked: 9. "Have you consulted a physician * * * for or suffered from any ailment or disease of: * * * C. Stomach, intestines, liver, kidneys or bladder? * * * F. Any other disease or illness or any injury not mentioned above?"

To all of these questions the applicant answered "No," except to 9F which he answered as follows: "Yes. Name of disease, pneumonia. Number of attacks, 1. Began February, 1929. Recovered April 1929. Results (if within five years name and address of every physician consulted), complete recovery. Dr. Hague, Rochester, N. Y."

The rule in the *Dilleber* case, if applied to these questions and answers, would hold no breach of warranty. The Court of Appeals said, in the *Anderson* case:

"The holding of the *Dilleber* case that there was no breach of warranty, because the answer was true as far as it went no longer carries any legal consequences."

³⁰ *Ibid.*

³¹ 265 N. Y. 376, 193 N. E. 181 (1934); see also Penn. Mut. Life Ins. Co. v. Mechanics Savings Bank & Trust Co., *supra* note 11.

³² 246 N. Y. 63, 158 N. E. 21 (1927).

On the trial it appeared by uncontradicted evidence that insured was treated by a physician in his professional capacity, and that an X-ray examination was ordered. The court in holding that this was a consultation as a matter of law said, at page 380:

"Cases calling for an X-ray examination can scarcely be presumed to be mere temporary disorders, having no bearing upon general health. The inquiry was not to be passed over as trivial. It was made material to the risk."

The contention of the plaintiff that the jury should be allowed to consider whether or not he had consulted the physicians without being ill or without being treated was said by Pound, *C. J.*, to be fanciful.

In the *Nowak* case³³ it was shown that the insured was attended by a physician in her professional capacity, that the insured consulted with her, that the insured was ill, and that the physician treated the insured. The Court held that this was not sufficient to permit a finding of "consultation" as matter of law. The Court said the assured may have talked only concerning the weather, or may have gossiped about her neighbors without more. We have the Court of Appeals saying in 1930 the insured "may have gossiped"; in 1934 saying it would be fanciful to consider whether or not the insured was ill. No argument is necessary to show the dicta in the *Nowak* case is just that.

It seems to be a question of degree whether the evidence adduced upon a trial establishes a consultation as a matter of law.³⁴ Somewhere between these cases lies the dividing line. It is respectfully submitted it will be found in closer proximity to the *Nowak* case than to the *Anderson* case.

The existence of the privilege of communications between physician and patient³⁵ makes it a practical impossibility for the insurer to sustain the burden of proving a breach of warranty or misrepresentation of a material fact in life insurance unless the insured waives the statute.³⁶ Within the statute the insurer may prove a misrepresentation,³⁷ but it can not prove the materiality without the consent of the insured.

³³ *Nowak v. Brotherhood of American Yeomen*, 252 N. Y. 465, 169 N. E. 647 (1930).

³⁴ *Travelers v. Pomerantz*, *supra* note 32; *Minsker v. John Hancock Mut. Life Ins. Co.*, 254 N. Y. 333, 173 N. E. 4 (1930); *Jenkins v. John Hancock Mut. Life Ins. Co.*, 257 N. Y. 289, 178 N. E. 9 (1931); *Saad v. N. Y. Life*, 201 App. Div. 544, 194 N. Y. Supp. 445 (1st Dept. 1922), *aff'd*, 235 N. Y. 550, 139 N. E. 730 (1923).

³⁵ N. Y. CIVIL PRACTICE ACT §352.

³⁶ 6 ST. JOHN'S L. REV., *supra* note 1.

³⁷ *Patten v. United Life & Accident Insurance Ass'n*, 133 N. Y. 450, 31 N. E. 342 (1892).

Although the courts have not said the burden is on the insured to prove the performance of conditions precedent or the truth of his material representations, they have placed upon him the duty of going forward with the proof after the insurer has given evidence of a breach of a representation. The recent decisions have achieved that result.³⁸

Not being able to waive the physician's immunity, the beneficiary in life policies often finds it hard to overcome the *prima facie* case which the insurer is allowed to prove without overstepping the bounds of privilege. The result of this is, in many cases, the obstruction of justice and a concealment of the facts.³⁹ The legislature by allowing such beneficiaries the right to waive the privilege would overcome this defect.

LEO F. BOLAND.

AUTOMOBILES—MANSLAUGHTER IN FIRST DEGREE—INTOXICATED DRIVER.

Manslaughter is defined as homicide not amounting to murder in the first or second degree, or justified or excusable homicide.¹ It is specifically defined in its most common form by Section 1050, Subdivision 1, of the New York Penal Law as homicide committed without a design to effect death while engaged in committing or attempting to commit a misdemeanor affecting the person or property either of the person killed or of another.²

³⁸ *Supra* note 34.

³⁹ (1933) 12 ORE. L. REV. 216, quotes from a letter from Professor Wigmore on the subject of privilege:

"For two centuries it has been settled in the law of evidence that confidential communications as such are not entitled to any privilege. The administration of justice must get at the facts of the controversy, or else it is blocked. Any privilege is a distinct exception. The privilege that was established some years ago in many states for communications between medical men and patients has proved to be nothing but an obstruction of justice; it obstructs the ascertainment of facts in insurance cases and in personal injury cases and in most instances its application makes a laughing stock of the law of evidence; nor was it justified by any necessity."

¹ N. Y. PENAL LAW (1909) §1049.

² *People v. Koerber*, 244 N. Y. 147, 155 N. E. 79 (1926); *People v. Darragh*, 141 App. Div. 408, 126 N. Y. Supp. 522 (1st Dept. 1910), *aff'd*, 203 N. Y. 527, 96 N. E. 1124 (1911); *People v. Stacy*, 119 App. Div. 743, 104 N. Y. Supp. 615 (3d Dept. 1907), *aff'd*, 192 N. Y. 577, 85 N. E. 1112 (1908); *People v. Harris*, 74 Misc. 353, 134 N. Y. Supp. 409 (1911); *People v. McKeon*, 31 Hun 449 (N. Y. 1884).