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Chapter 17: Insurance

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C H A P T E R 17

Insurance

GEORGE K. GARDNER

We are sometimes told that we are witnessing a struggle between the idea of "private enterprise" and the idea of "the service state." Perhaps our efforts would be more constructive if we thought of ourselves as engaged in the adventure of creating a truly cooperative Commonwealth. To the extent that the new law of the year just passed reflects the latter of these two approaches it displays improvement in our methods of carrying on our common affairs. To the extent that it reflects the former it displays friction, lost motion, and a conflict of governing ideas.

A. LEGISLATION

§17.1. Comprehensive household insurance under a single policy. A fire insurance company may now — by a single policy — insure all the buildings and personal property which make up the physical equipment of a single household "from any peril proper to insure against in this commonwealth, and may, in addition, insure against the legal liability of the insured or of members of his household arising out of non-business pursuits, and insure with respect to medical, surgical, and hospital expenses."¹ This act will make it much simpler than it is at present for the head of a family to provide for the economic security of his household and — by reducing the volume of necessary computation, paper work, and negotiation — should enable the insurance industry to reduce the cost very substantially. The possibilities of this statute seem quite revolutionary. On its face it seems to permit a single company, by a single policy, (1) to insure the home against fire, flood, windstorm, and all other physical disasters; (2) to insure every member of the family against liability while driving the family motor car; and (3) to assume the responsibilities of the Blue Cross and the Blue Shield. Probably the ambitions of the draftsmen were not so broad. The "Homeowners Policy B," de-

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§17.1. ¹ Acts of 1955, c. 339; id., c. 384, §3.

veloped by the Multiple Peril Rating Organization, and already used in California, Colorado, Delaware, Illinois, Pennsylvania, and Vermont,² which is currently offered in Massachusetts under this statute, seems to aim at achieving the first of these results; but it expressly disclaims the second; and liability for medical, surgical, and hospital expenses is limited to those incurred in consequence of accidents to strangers occurring on the insured premises or resulting from the activities of the insured.

§17.2. Group life insurance. The statutes relative to group life insurance¹ have been amended by enactments, (a) which require every company issuing a group policy to a bank or other creditor on the lives of its debtors to "furnish to the policy-holder for delivery to each debtor a form which will contain a statement that the life of the debtor is insured under the policy and that any death benefit . . . shall be applied to reduce or extinguish the indebtedness";² and (b) which reduce the minimum number of employees who may be insured under a group policy from twenty-five to ten.³

§17.3. Group insurance extended to public employees. The General Court has created a commission which is directed to negotiate with appropriate private insurance organizations one or more group policies providing "life insurance . . . accidental death and dismemberment insurance . . . and . . . general or blanket hospital, surgical, and medical insurance" for the Commonwealth's employees and their dependents.¹ Every employee who does not withdraw from the plan is to be covered, and the premiums are to be paid one-half by the Commonwealth and one-half by deductions from the salaries of the employees. "The amount of group life insurance on each employee shall be two thousand dollars . . . the amount of . . . accidental death and dismemberment insurance . . . shall be two thousand dollars. The amount of the hospital, surgical and medical benefits . . . shall be determined by the commission."² Counties, cities, towns, and districts are permitted to provide similar group insurance for their employees.³

§17.4. Excess liability insurance for cities and towns. One inconspicuous piece of legislation deserves more notice than it is likely to receive. As every lawyer knows, Massachusetts municipalities are not liable for torts committed by their officers or employees. They are not liable to actions of tort brought against them by their employees; nor are they liable to indemnify their officers or employees against tort ac-

² A sample of this policy may be found in Patterson, Cases and Materials on Insurance 776 (3d ed. 1955).

§17.2. ¹ G.L., c. 175, §§133-138.

² Acts of 1955, c. 169.

³ Id., c. 171.

§17.3. ¹ Acts of 1955, c. 628.

² Id., c. 628, §6.

³ Id., c. 760.

tions against them. They may, however, by vote of the appropriating authority, indemnify their officers and employees against particular tort actions;¹ they may, by like vote, purchase liability insurance to indemnify their employees against tort actions;² and they may undertake to provide workmen's compensation for their employees,³ in which case they may make annual appropriations to a reserve fund to meet workmen's compensation claims.⁴ The General Laws have now been amended to permit municipalities to purchase insurance either (a) against all the workmen's compensation claims to which they may be subject, or (b) against the possibility that workmen's compensation may exceed the maximum which the municipality is prepared to bear.⁵ It would seem that this principle might well be extended to tort claims against municipal officers and employees. At present a city or town must elect between purchasing full liability insurance or exposing its officers, employees, and taxpayers to the risk of having suddenly to deal with formidable and unforeseen claims. Would not acceptance of a reasonable degree of responsibility for tort claims both by individual employees and by taxpayers conduce to good morale? If so, the insurance industry has an opportunity to render a public service by providing insurance against excess losses to municipalities as it now does very widely to large private concerns.

The whole subject of municipal tort liability, and of insuring against it, is one to which the General Court might well give some thought. It is, perhaps, not generally known in Massachusetts that the State of New York "assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions . . . against individuals or corporations";⁶ and that the New York Court of Appeals has held that this statute makes municipalities liable to the same extent.⁷ Massachusetts legislation in the same direction, accompanied by appropriate use of liability insurance, might conduce to the simpler and more orderly conduct of our affairs.

§17.5. Motor vehicle insurance. A number of sources of friction and annoyance in the operation of the motor vehicle laws have been smoothed out. Fleet owners may now cover not only their motor vehicles, but also their trailers, by a single bond.¹ The provisions for continuing motor vehicle insurance after the death of the insured during the policy period are extended to include death at any time after the policy has been issued.² Appeals from refusals to issue com-

§17.4. 1 G.L., c. 41, §§100, 100A.

² Id., c. 40, §5(1).

³ Id., c. 152, §69.

⁴ Id., c. 40, §13A.

⁵ Acts of 1955, c. 385.

⁶ Court of Claims Act §8.

⁷ *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945).

§17.5. 1 Acts of 1955, c. 172.

² Id., c. 283.

pulsory liability insurance policies, or from the cancellation of such policies, may now be heard by the Municipal Court of the City of Boston, as well as by the Superior Court.³

The legislature also amended the merit rating system by providing that "No points shall be assessed against the operating record of the owner of a motor vehicle as a result of any violation unless the owner is the operator thereof" with seven specified exceptions, in which responsibility for the violation may be thought to rest upon the owner, at least in part.⁴

B. JUDICIAL DECISIONS

§17.6. Motor vehicle insurance; Failure of insured to cooperate in defense. It is characteristic of insurance litigation that it tends to raise broad questions of principle under the guise of problems of procedure or of interpretation of the policy's words. This truth has been abundantly illustrated by the judicial decisions of the present year. The case of *Gleason v. Hardware Mutual Casualty Co.*¹ has now been before the Supreme Judicial Court three times.

Gleason held a motor vehicle liability policy with Hardware Mutual which included guest coverage. A guest sued him for personal injuries. Hardware Mutual, convinced that Gleason had lied to their attorney about the circumstances of the accident, withdrew from the defense. Judgment went against Gleason, and the guest brought a bill in equity against Gleason and Hardware Mutual to reach and apply the policy claim. This bill was dismissed on the ground that "failure to tell the truth is not cooperation" and that Hardware Mutual was excused by Gleason's violation of the cooperation clause.

Gleason then brought his own action against Hardware Mutual for indemnity under the policy. Mutual pleaded the dismissal of the bill in equity against it as *res judicata*, and the Supreme Judicial Court overruled a demurrer to this plea. Trial resulted in a directed verdict for Hardware on the plea of *res judicata*; but the Supreme Judicial Court sustained Gleason's exceptions on the ground that he did not participate actively as a litigant adverse to Hardware in the equity suit. A second trial resulted in a verdict for Gleason; but the Supreme Judicial Court sustained Hardware's exceptions, and ordered final judgment in its favor on the ground that Gleason's failure to cooperate was clearly proved.

It seems unfortunate that Hardware was thus compelled to argue twice the law of *res judicata* and to try the same issue of fact to the same conclusion twice. In view of this decision it would seem that insurers who may have occasion to defend suits to reach and apply in the future would be well advised to file a cross-bill against the in-

³ *Id.*, c. 412.

⁴ *Id.*, c. 417.

§17.6. 1324 Mass. 695, 88 N.E.2d 632 (1949); 329 Mass. 56, 106 N.E.2d 266 (1952); 331 Mass. 703, 122 N.E.2d 381 (1954).

sured for a judicial declaration of nonliability under the Declaratory Judgments Act.² Such a cross-bill appears to be authorized by the rules which the Supreme Judicial Court adopted in 1952³ as it is in analogous cases under the Federal Rules.⁴

In *Crompton v. Lumbermen's Mutual Casualty Co.*⁵ the Supreme Judicial Court found it necessary to explain to the defendant that the familiar clause in the standard automobile liability insurance policy protecting "any other person responsible for the operation of the motor vehicle with the express or implied consent of the named insured" is legally valid and effectual according to its terms. The defendant contended that the plaintiff, not being a "party" to the contract, but a mere "third party beneficiary," had no legal rights. It is an unhappy commentary on the state of legal learning in Massachusetts that this latter proposition in regard to third party beneficiaries' which was never law in Massachusetts, and which never had any foundation except in the misinterpretation of a few old decisions, should now be seriously advanced as a ground for invalidating an established insurance practice, so as to require the Supreme Judicial Court to demonstrate its fallaciousness at length.

§17.7. **Life and accident insurance; Military service exception.** In *Gudewicz v. John Hancock Mutual Life Insurance Co.*,¹ a life insurance policy provided double indemnity for death by external, violent, and accidental means. The double indemnity, however, was not payable "if such death occurs while the insured is in military, naval, or air service in time of war, whether such war be declared or undeclared." The insured died on June 25, 1951, during the hostilities in Korea, as the result of an automobile accident in Virginia while he was on an unexpired furlough from his naval station in North Carolina. The Court held that the insured was "in the naval service," and that his death occurred "in time of war." Probably the decision on both issues is in harmony with the more numerous authorities, but on both issues the decision raises deeper questions than those involved in the correct interpretation of the words. It can be argued that any provision of an insurance policy which makes recovery of the agreed indemnity depend upon facts having no connection with the loss or with its causes operates as an illegal forfeiture and is, therefore, pro tanto void. There are statutes² and judicial decisions³ to that effect.

² G.L., c. 231A.

³ Rules of the Supreme Judicial Court of Massachusetts adopted January 28, 1952; Rules for the Regulation of Practice at Common Law — in Equity, Rule 13.

⁴ Fed. R. Civ. P. 13(g).

⁵ 1955 Mass. Adv. Sh. 935, 129 N.E.2d 139.

§17.7. 1331 Mass 752, 122 N.E.2d 900 (1954).

² Neb. Rev. Stat. §44-358 (Supp. 1952); N.H. Laws 1942, c. 326, §4; N.Y. Insurance Law §150.

³ Prudential Insurance Co. v. South, 179 Ga. 653, 177 S.E. 499 (1934); Young v. Casualty Life & Insurance Co. of Tennessee, 204 S.C. 386, 29 S.E.2d 482 (1944).