Waller v. *Gulf Oil Canada Ltd.*: Some Problems of Interpreting the "Garage Risks" Exclusion in an Automobile Liability Insurance Policy

For no very obvious reason, certain legal problems seem to vex the judicial intellect. Until the recent Ontario Court of Appeal judgment in *Waller* v. *Gulf Oil Canada Ltd.*[1] the problem of appropriately applying the "garage risks" exclusions in a standard owner's policy of automobile insurance appeared to be one of those which numbed the mind of the judges faced with the question. On the basis of a judgment by Ruttan J. in *Sabell* v. *Liberty Mutual Insurance Co.* [2] and of Van Camp J. at trial in the *Waller*[3] case, the courts in British Columbia and Ontario seemed to be launched in a sea of confusion over what should have been a reasonably straightforward enquiry into the scope and application of the "garage risks" exclusions.

Policy Exclusions of "Garage Risks"

The standard owner's automobile policy form (commonly referred to as S.P.F. No. 1) has, sprinkled throughout the form, several exclusionary provisions directed at the risks attendant on the conduct of what, for convenience, is called a "garage business".

For example, in respect of the so-called "accident benefits" provided under Section B of the policy (these are the medical payments and death and disability benefits), the benefits are extended to "any person while an occupant of the described automobile" and to the "insured and . . . his or her spouse and any dependent relative of either while an occupant of any other automobile" *but subject to this proviso:*

> "such person is not engaged in the business of selling, repairing, maintaining, servicing, storing or parking automobiles at the time of the accident."

A proviso in this language actually appears twice in that part of the policy form dealing with the coverage under Section B of the policy.

In respect of the Section C cover against damage to the insured vehicle, one of the insurer's "additional agreements" is:

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[1](1979), 21 O.R. 49 (ont. C.A.).

[2](1973), 38 D.L.R. (3d) 113 (B.C.).

[3](1978), 80 D.L.R. (3d) 603 (Ont.).

"to waive subrogation against every person who, with the insured's consent, has care, custody or control of the automobile, provided always that this waiver shall not apply to any person . . . having such care, custody or control in the course of the business of selling, repairing, maintaining, servicing, storing or packing automobiles."

There are two further important references in the policy form to garage risks; these are found in the general definitional language applicable to all parts of the cover under the policy:

"GENERAL PROVISIONS, DEFINITIONS AND EXCLUSIONS

. . .

4. GARAGE PERSONNEL EXCLUDED
No person who is engaged in the business of selling, repairing, maintaining, storing, servicing or parking automobiles shall be entitled to *indemnity or payment under this Policy for any loss, damage, injury or death sustained*[4] while engaged in the use or operation of or while working upon the automobile in the course of that business or while so engaged is an occupant of the described automobile or a newly acquired automobile as defined in this Policy, unless the person is the owner of such automobile or his employee or partner.

5. AUTOMOBILE DEFINED
In this Policy except where stated to the contrary the words "the automobile" mean

. . . .

under section A (Third Party Liability) only

(d) Any Automobile of the Private Passenger or Station Wagon type, other than the described automobile, while personally driven by the Insured, or by his or her spouse if residing in the same dwelling premises as the Insured provided that

. . . .

(iii) neither the Insured nor his or her spouse is driving such automobile *in connection with the business*[5] of selling, repairing, maintaining, servicing, storing or parking automobiles;"

The two exclusions set out immediately above, Clause 4 and subparagraph 5(d) (iii) of the General Provisions, Definitions and Exclusions, gave rise to the interpretive problems in *Waller* and in *Sabell,* respectively. Those problems will now be summarized in a very brief account of the trial judgments in the two cases.

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[4]The italics draw attention to language which, as the later discussion will illustrate, gave rise to difficulty in the *Waller* case.

[5]The phrase which was critical to the result in the *Sabell* case is italicized.

The Problem in *Sabell*

Agutter held a standard owner's policy, issued by Liberty Mutual to cover his Volkswagen. Desiring transportation from Montreal to Vancouver, Agutter obtained an M.G. from Montreal Auto Delivery Service under a "driveaway" scheme which was designed to provide Agutter with inexpensive transportation and to afford Montreal Auto Delivery Service an inexpensive method to achieve delivery of the M.G. to Hillcrest Auto Sales Ltd. in Vancouver. Before reaching Vancouver, Agutter was involved in the collision which inflicted injury on the plaintiffs. The insurer of Montreal Auto Delivery Service was insolvent; thus, it became important to determine whether Agutter's liability was covered by the Liberty Mutual policy on the ground that the M.G. was within the extended meaning of "the automobile". While conceding that Agutter's normal occupation was in no way related to such activities, Ruttan J. held that, at the time of the accident, Agutter was driving the M.G. "in connection with the business of selling automobiles." Accordingly, the exclusion in sub-paragraph 5(d) (iii) applied, the M.G. was not within the expanded meaning of "the automobile", and Agutter's liability was not covered by the Liberty Mutual policy.

The Problem in *Waller*

In this case the plaintiff pedestrian was injured by Poulin's automobile while it was being driven by Zita, an employee of a car-wash operated by Gulf Oil Canada Limited. Poulin held a standard owner's policy, and Gulf Oil was covered by a "garage policy". Thus, the litigation was to test which insurer was primarily liable to the plaintiff.

In view of the statutory prescription that cover under an owner's policy is a "first loss insurance",[6] Poulin's insurer would be primarily liable unless it could show that the loss was not covered at all by reason of one of the exclusions relating to "garage risks". Toward this end, it was argued that the situation fell within Clause 4 of the General Provisions, Definitions and Exclusions.

Zita was clearly a person engaged in a business involving one of the prescribed "garage risks", it being admitted that the car-wash activity amounted to "maintaining" or "servicing" the Poulin vehicle. The interpretive problem presented to Madam Justice Van Camp was whether Zita's liability was excluded by the language stipulating that no such person "shall be entitled to *indemnity or payment* . . . for any loss, damage, injury or death *sustained* while [so] engaged."

[6] *The Insurance Act*, R.S.O. 1970, c. 224, s. 239(1). For the New Brunswick equivalent, see the *Insurance Act*, R.S.N.B. 1973, c. 1-12, s. 265(1).

At this point it should be noted that, as Zita was not driving the vehicle on a highway, Poulin was not liable to the plaintiff for Zita's negligence. Thus, the issue was exclusively whether Zita was covered as an un-named insured under Poulin's policy. If he was, Poulin's policy was a first loss insurance; if he was not, Gulf's policy was available to answer the plaintiff's claim.

Van Camp J. stated the issue before her as follows:

> "The issue here is whether the exclusion clause in the owner's policy has reference only to claims *by* garage personnel for loss, damage, injury or death sustained *by* such garage personnel, and has no application to third parties such as the plaintiff Waller."[7]

To resolve this issue, Van Camp J. focussed on the two words "indemnity" and "sustained". Whereas the phrase "indemnity or payment" may seem to contemplate insurance in respect of liability ("indemnity") as well as cover in respect of personal loss suffered by the garage employee ("payment"), Van Camp J. found that *Black's Law Dictionary* gave to "indemnity" the meaning "to compensate; to make reimbursement of a loss incurred" as well as the meaning "to save harmless in respect of liability". She concluded that there was no necessary inference that use of the word "indemnity" implied a reference to liability.

The word "sustained" appeared to Van Camp J. to imply a loss or injury suffered by the very person under discussion in the exclusion clause — i.e. the garage employee.

In the result, Van Camp J. concluded that Clause 4 operated to exclude only "the loss or damage sustained by the garage personnel, personally", and that Zita's liability to Waller was covered by Poulin's policy.

The Approach to Interpretation in *Sabell* and in *Waller*

It is trite learning that a basic approach to construction of a document is to read the troublesome part in the context of the whole document. In this fashion, meaning may often be found for a passage which is obscure or ambiguous when read in isolation. Similarly, substantial assistance may be had by looking to other evidence of what the parties must have meant by the language they have chosen to express their contractual intent.

In respect of the exclusion clauses in an automobile liability insurance policy, it is obviously vital to look at the clause in light of the elaborate plan set out in *The Insurance Act.* Also, in respect of the particular

[7](1978), 80 D.L.R. (3d) 603, at p. 60

exclusions concerning "garage risks", it would be quite myopic to ignore the well defined insurance industry design for dealing with those risks.

The trial judgments in *Sabell* and *Waller* are subject to the criticism that the judicial analysis was much too narrow.

In his attempt to construe sub-paragraph 5(d) (iii),[8] Ruttan J. concentrated on the clause entirely in isolation from other parts of the insurance contract and from the statutory provisions authorizing the insurer to insert such exclusions. Most importantly, he ignored entirely the insurance industry understanding concerning how "garage risks" are to be dealt with.

Van Camp J. made some attempt to interpret Clause 4 in context. She consulted several other provisions of the policy, and considered two sections of *The Insurance Act.* However, as the ensuing discussion will disclose, her analysis fell far short of interpreting the troublesome exclusion clause in its full context.

Before dealing with the Court of Appeal judgment, which contrasts nicely with the two trial judgments, I will set out the context within which cases like *Sabell* and *Waller* should be analyzed.

The Industry's Approach to "Garage Risks"

The standard owner's policy (S.P.F. #1) extends the third party liability cover to comprehend any use of the car by another person with the owner's consent. Thus, liability which results from the use of A's car by B, with consent, is covered by A's policy. This, of course, is prescribed by statute.[9] Indeed, it is also prescribed that if B has an automobile liability insurance policy of his own, A's policy will nevertheless be the first loss insurance.[10]

Although A's insurer may not be entirely happy about paying for losses caused by B, it receives the reciprocal benefit of the scheme if A should happen to injure someone while using C's car. This arrangement works well enough in ordinary circumstances, even though A may be more liberal than C about lending his car, or may have a group of friends who are worse drivers than the occasional borrowers of C's vehicle.

However, the insurance industry has apparently identified businesses which involve "selling, repairing, maintaining, servicing, storing or parking"

[8]The exclusion was differently numbered in *Sabell,* but was in the same language as the one which here is referred to as sub-paragraph 5(d) (iii).

[9]*The Insurance Act,* R.S.O. 1970, c. 224, s. 207(1). See also, the *Insurance Act,* R.S.N.B. 1973, c. 1-12, s. 232(1).

[10]Ontario, s. 239(1) and New Brunswick, s. 265(1).

automobiles as involving a significantly higher than average risk, and has responded with S.P.F. #4 — the standard garage automobile policy designed for the protection of those higher risk businesses. This policy contains two insuring agreements which are of vital significance to the present analysis.

> "The Insurer agrees . . . to indemnify the Insured against the liability imposed by law upon the Insured for loss or damage arising from the use or operation for pleasure or in connection with the business of the Insured . . . of any automobile not owned by the Insured
> AND RESULTING FROM BODILY INJURY TO OR THE DEATH OF ANY PERSON OR DAMAGE TO PROPERTY OF OTHERS NOT IN THE CARE, CUSTODY OR CONTROL OF THE INSURED."

This clause is the second insuring agreement in Section A [Third Party Liability] of the policy, and the marginal notation reads "NON-OWNED AUTOMOBILES". Obviously, it is designed specifically to cover liability which arises from the operation of customers' vehicles.

> "The Insurer agrees to indemnify in the same manner and to the same extent as if named herein as the Insured, (a) with respect to Sections A and D of this policy [Section D insures against liability for damage to customers' automobiles], every other person who, with the consent of the owner thereof, personally drives in connection with the ['garage business'] . . . . any automobile . . . [subject to exceptions not germane to our analysis]".

This clause is found among the GENERAL PROVISIONS, DEFINITIONS AND EXCLUSIONS of the garage policy under the heading "ADDITIONAL INSUREDS — NON-OWNED AUTOMOBILES" and opposite the marginal notation "BUSINESS USE". Pretty obviously, the clause is designed to extend to the employees of the business the same protection given the named insured against the third party liability provided by Section A and against liability to customers provided by Section D of the policy.

Thus, the industry itself has attempted to recognize the higher than average risk attendant upon the conduct of a "garage business" and to introduce both fairness and efficiency by a system which allocates that higher risk to the insurer of the business and relieves all the insurers of the customers of the business. The extended cover in the garage policy and the exclusions in the standard owner's policy are meant to be reciprocal. When B drives A's car, there are overlapping coverages under A's policy and under B's policy, and, as we have noted, the statutory solution is to establish A's policy as a first loss insurance and B's policy as an excess insurance. By contrast, when A's car is driven by E, an employee of G, a garage business, there is one insurance only. G's policy is specifically designed to cover the situation, and A's policy and E's own policy are both designed to exclude it.

Thus where Zita, in the course of his duties as an employee of Gulf, drives Poulin's car and injures Waller, Gulf's policy is the only one which

covers the incident. The accident falls within the exclusions in Poulin's policy and in Zita's own policy, and there should arise no problem of overlapping coverage. This simple, blunt proposition seems amply justified by the policy language in S.P.F. #1 and S.P.F. #4 subject only to these two questions:

> *first,* how broadly should the "Garage Personnel" exclusion in Poulin's policy be construed? In particular, what types of injuries are contemplated by the phrase "any loss, damage, injury or death *sustained*"?
>
> *second,* whatever may have been the intention of the insurance industry, is the proposed exclusion in Poulin's policy permitted under the statute?

It was the answers to these two questions which determined the holding by Van Camp J. in *Waller.*

The Trial Judgment in *Waller*

Madam Justice Van Camp set out the terms of three provisions of *The Insurance Act* and referred fleetingly to a fourth.

She referred, of course, to s. 239(1)[11] which establishes, as a first loss insurance, the coverage under an owner's policy on the vehicle which has caused the loss. There is no doubt that if Poulin's policy and Gulf's policy both covered the loss suffered by Waller, then Poulin's policy was the first loss insurance.

The critical argument was that there were no overlapping coverages to trigger the operation of s. 239(1). Rather, Poulin's policy excluded the very loss which had occurred.

Van Camp J. set out the terms of the very familiar s. 207(1)[12] which prescribes that an owner's policy shall extend cover in respect of liability arising from loss caused by other persons driving the car with the owner's consent. Again, there is nothing remarkable here; as we have noted above, A's insurer is normally responsible for loss caused by A's car while it is being driven by B with A's consent.

However, this basic legislative scheme to protect automobile injury victims is neither simple nor universal in its requirement of the extended cover which must be provided by an owner's policy. The statute specifies numerous exceptions which the insurer may use to limit its liability. For example, the insurer is authorized to provide in its contract that it will not

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[11]The New Brunswick equivalent is s. 265(1).

[12]The New Brunswick equivalent is s. 232(1).

be liable while the automobile is rented to another person, or while it is being used to carry explosives, or while it is used to carry passengers for compensation.[13]

The third statutory provision set out by Van Camp J. is just such an enabling device. Section 215 reads:

> "The insurer may provide under a contract evidenced by a motor vehicle liability policy, in either or both of the following cases, that it shall not be liable,
>
> (a) to indemnify any person engaged in the business of selling, repairing, maintaining, servicing, storing or parking automobiles for any loss or damage sustained while engaged in the use or operation of or while working upon the automobile in the course of that business unless the person is the owner of the automobile or is his employee;
>
> (b) for loss of or damage to property carried in or upon the automobile or to any property owned or rented by or in the care, custody or control of the insured."[14]

It is apparent that the "garage personnel exclusion" in Poulin's policy was worded as closely as possible in the terms authorized by section 215, and that the troublesome verb "sustained" occurs in the clause by legislative prescription. Certainly, the clause presents difficulty if one attempts to construe it in isolation. However one may feel about the intended scope of the exclusion, there is force in the observation that "sustained" is a passive verb form nicely suited to describe injuries or losses suffered by the very person referred to earlier in the sentence. Interpreted in isolation, the holding that the exclusion in Poulin's policy would apply to injuries suffered by Zita himself, but not to injuries inflicted upon others, is impossible to refute with any sense of confidence.

This, however, is exactly the point of the criticism of Van Camp J.'s judgment. It was not necessary to attempt an interpretation of the exclusion in isolation.

Van Camp J. herself referred to section 214 of *The Insurance Act* which helps to provide a context for section 215.

> 214. The insurer is not liable under a contract evidenced by a motor vehicle liability policy for any liability,
>
> (a) imposed by any workmen's compensation law upon any person insured by the contract;
>
> (b) resulting from bodily injury to or the death of,

[13]These exclusions are all authorized by s. 217(1) of the Ontario statute; the New Brunswick equivalent is s. 242(1).

[14]The New Brunswick equivalent is s. 240.

> (i) the daughter, son, wife or husband of any person insured by the contract while being carried in or upon or entering or getting on to or alighting from the automobile, or
>
> (ii) any person insured by the contract; or
>
> (c) resulting from bodily injury to or the death of any employee of any person insured by the contract while engaged in the operation or repair of the automobile.[15]

It would appear that, since Zita was a person insured by Poulin's policy, any legislative concern to allow the insurer to deny cover in respect of injuries suffered by Zita personally is expressed in s. 214(b) (ii). Thus, the latitude given to the insurer by s. 215 must refer to something else; that could only be liability in respect of injuries to others. Although she referred to s. 214, Van Camp J. did not deal with its terms, and did not read it alongside s. 215 for the purpose of gaining insight into the meaning of the latter provision.

The Court of Appeal Judgment in *Waller*

The Ontario Court of Appeal, in a judgment written by Morden J.A., allowed the appeal and held that Gulf's policy provided the only liability insurance in respect of the injuries to Waller.

By contrast with the judgments at trial in *Sabell* and in *Waller,* Morden J.A. took great pains to establish both the statutory and the practical context within which the "garage personnel exclusion" should be interpreted.

Morden J.A. noted that the exclusion authorized in s. 215 was one which the insurer might insert in a "contract evidenced by a motor vehicle liability policy", and noted the following definition in paragraph 40 of section 1 of *The Insurance Act:*

> 'motor vehicle liability policy' means a policy or part of a policy evidencing a contract insuring,
>
> (a) the owner or driver of an automobile;
> or
>
> (b) a person who is not the owner or driver thereof where the automobile is being used or operated by his employee or agent or any other person on his behalf,
>
> against liability arising out of bodily injury to or the death of a person or loss or damage to property caused by an automobile or the use or operation thereof;[16]

[15]The New Brunswick equivalent is s. 239.

[16]The New Brunswick equivalent is an unnumbered paragraph in section 1.

His Lordship then concluded:

> From a reading of this provision it is clear that the nature of the insured's interest which may be prejudicially affected by the happening of the specified event is that of liability to third parties and it is against this liability, and nothing else, that a motor vehicle liability policy provides insurance.

Morden J.A. next drew attention to the rights of an unnamed insured, as set out in s. 211:

> Any person insured by but not named in a contract to which section 207 or 208 applies may recover indemnity in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.[17]

On the basis of this statutory context, he gave the following opinion concerning interpretation of the "garage personnel exclusion":

> Against this background it appears to me that s. 215(a), in providing that the insurer 'shall not be liable . . . to indemnify any person', necessarily has to be read as referring to a person who otherwise would have the right under such a policy to be indemnified — and this could only be with respect to such a person's liability to third persons. Accordingly, I cannot accept that the exception authorized by s. 215 is intended to cover claims against the insurer by injured third parties. Such persons have no claims under such a policy against an insurer. The insurer is not, to use the language of s. 215, 'liable to idemnify' such persons in the first place.

Here Morden J.A. paused to consider the possible argument that the insurer is "liable to indemnify" the injured third party by reason of the direct right of action conferred on the third party by s. 225(1) of the statute,[18] and concluded that this provision does not affect the way in which s. 215 should be construed. His Lordship continued:

> With this basic consideration as to the nature of the insurer's liability against which the scope of the exclusion should be determined, in mind, I do not, with respect, think that the considerations which the learned judge of first instance took into account in construing s. 215(a) should lead to the conclusion that the 'person' referred to therein is one who is claiming payment against the insurer. Read in a narrow context it may appear to be a natural interpretation that 'any loss or damage' must refer to injury to (or death of) the person engaged in selling, repairing, *etc.* However, it is reasonable to give the words 'loss or damage' the meaning which they have in the basic liability-imposing provision, s. 207(1), where they obviously mean loss or damage sustained by the insured resulting from liability being imposed upon him — and where the nature of the loss or damage is particularized as follows:
>
> (a) arising from the ownership, use or operation of any such automobile; and
>
> (b) resulting from bodily injury to or the death of any person, and damage to property.

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[17]The New Brunswick equivalent is s. 236.

[18]The New Brunswick equivalent is s. 250(1).

Following this extensive survey of the existing statutory context within which s. 215 is found, and within which the "garage personnel exclusion" must be construed, Morden J.A. traced the historical development of the present statutory provisions, including s. 215, and continued:

> These provisions have undergone many changes between 1932 and the present but the basic function of the exclusion clause, in my view, has remained the same — to provide for an exception to the liability of the insurer for liability coverage.
>
> The exception in the final words of s. 215(a) '. . . unless the person is the owner of the automobile or is his employee' reinforces the view that the 'person' earlier referred to is someone claiming indemnity *against liability* and not someone who is injured by the owner, or by someone driving with his consent, and who claims against an insured person. If the latter were the case then the situation envisaged would be an impossible one — where the injured third party has a claim against the insured for injuries sustained while using or operating his automobile (or his employer's automobile) for which he claims indemnity against liability to himself. The policy, in Section A, provides that 'the insurer shall not be liable . . . for any loss or damage resulting from bodily injury to or the death of any person insured by this section . . .' and this is to the same effect as s. 214(b) (ii) of the Act which provides that the 'insurer is not liable under a contract evidenced by a motor vehicle liability policy for any liability, . . . resulting from bodily injury to or the death of, . . . any person insured by the contract.'

Finally, Morden J.A. did what so frequently is not done; he reviewed the business context within which the insurance contract is formed, and considered the rationale for allowing the insurer to insert the "garage personnel exclusion".

> Further, and conceding that a court often cannot presume to know exactly and to appreciate fully the factual ramifications of different interpretations, it seems to me that there is a sensible basis for enabling insurers to exclude liability under the policy resulting from liability incurred by a person driving with the owner's consent, necessarily, but with respect to whom the owner has no real choice and no real power to control — as in a garage or parking lot situation. These features might be taken into account together with the consideration that such a person is engaged in a business which regularly requires, it may be assume, 'owners' cars to be driven with their consent. It might well be more reasonable that the obligation of insuring against risks of damage from such driving be assumed by the business itself and not the 'consenting' owner. Indeed, in the present case the liability of Gulf, Servico and Zita is covered under the Gulf policy. Considerations of this kind, and others, are referred to in *Couch on Insurance* (2nd ed., 1965) s. 45.981 in the discussion of the garage, service station, repair shops and public parking places exclusion in omnibus clauses in automobile liability policies.

Applying the same kind of analysis to the *Sabell* case, it could be said that when the standard owner's policy states an exclusion in respect of liability arising from the use of a vehicle not owned by the named insured if the insured is driving "in connection with the business of selling, repairing, maintaining, servicing, storing or parking automobiles", that exclusion should be read as referring to a *"connection with the business"* which affects the risk under the insured's policy. Undoubtedly, if Agutter

took a job which required him to spend much of his time moving and parking cars in confined quarters where many pedestrians and other drivers were also competing for space, the risk under his own insurance policy would be increased. It makes good sense to say that this risk should be covered by a policy issued to protect his employer and all the employees, and should be excluded from Agutter's own policy. However, when Agutter drives a car from Montreal to Vancouver, it is impossible to see that the risk is different whether he is driving his own Volkswagen, a rented car or one he borrowed from a friend, or an M.G. belonging to Montreal Auto Delivery Service and destined for Hillcrest Auto Sales Ltd. The statute prescribes that Agutter's policy will be an excess insurance only, but will not exclude liability entirely, if he is driving the rental car or one borrowed from a friend, and there is no reason for a different result when he is driving the M.G. To say that he is driving "in connection with the business of selling automobiles" is simply to give that phrase a large meaning without resorting to any explanatory context.

Thus, the Court of Appeal judgment in *Waller* is valuable for two reasons. It has, I submit, given the correct interpretation to the "garage personnel exclusion" which was at issue, and has therefore, we may fervently hope, corrected a confused and unfortunate jurisprudence that was beginning to develop concerning the interpretation of "garage risks" clauses. Secondly, the thorough and careful analysis of Morden J.A. provides an excellent model for interpretation of insurance policy and Insurance Act provisions generally.

The *Waller* case prompts one further comment. The insurance industry is sometimes vilified for its attempts to narrow the protection afforded to insureds and third parties, and for its resistance to payment of claims. Certainly, some of these criticisms are fully justified. However, a comparison of the *Sabell* and *Waller* cases points up the useful role that insurance companies can serve in helping to clarify our jurisprudence. Although it is admittedly highly speculative, I venture the opinion that *Sabell* might well have been reversed on appeal. Counsel for the plaintiffs was convinced that Ruttan J. had rendered a bad judgment. However, the plaintiffs had already been through two trials, to establish Agutter's liability, and to determine whether Liberty Mutual was liable to answer the claim against Agutter. Ruttan J. having decided that Liberty Mutual was not liable, the plaintiffs could turn to the public fund provided for the victims of uninsured motorists. Their claim being within the fund limits, we could hardly expect the plaintiffs to carry an appeal in order to "see justice done" or to purify our jurisprudence. The insurance industry is in a much better position to appeal judgments which the particular insurer, or the industry at large, considers unfavourable and important. Frequently, the actuating motive for carriage of an appeal is simply a desire to repel the present claim and to obtain a judgment which will save the insurer some number of dollars. Not infrequently, however, the appeal is by way of a "test case" in respect of a

trial judgment which disturbs the insurer because of its implications for the future.

Thus, the appeal in *Waller* was really designed to obtain judicial guidance for the whole industry concerning the respective liabilities under S.P.F. #1 and S.P.F. #4. It is very gratifying to be able to note the occasional instance in which industry self-interest can exercise a eugenic influence on the law.[19]

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[19]Since the above article was written, leave to appeal to the Supreme Court of Canada has been granted. Obviously, industry self-interest continues; its eugenic influence on the law thus continues to be somewhat uncertain.

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