

## **BOOK REVIEWS**

### **LIVRES NOUVEAUX**

*War in Life Insurance Contracts: Judicial Interpretation of Its Meaning*, by Dorothy Schaffter, New York: New York Exposition Press, 1976. Pp.159 (\$10.00).

The use of the word "war" in insurance contracts has posed a significant problem of interpretation. With the United States involvement in a myriad of wars throughout its history, American courts have been required to interpret life insurance policies which expressly deny recovery to the benefactor if the insured dies during a war or while engaged in war. In such cases the success of the benefactor's claim will depend in a large measure upon the definition of war adopted by the courts. The benefactor will recover if the judge determines that the hostility resulting in death falls short of actual war. In contrast, a determination that an actual state of war existed at the time of death will deny the benefactor's right of recovery.

Dorothy Schaffter, a past professor of political science at Vassar College and a specialist in American Government and Public Administration, reveals through detailed case analyses that American courts have given the contractual expression "war" a range of legalistic and practical interpretations, in each case leading to distinctly different results. Thus, war has been construed as amounting to a strict Congressional declaration of warfare against an enemy, or at least, a declaration by an appropriate department of government to that effect. Only such *de jure* warfare will constitute "war" in terms of this approach. Alternatively, war has been construed broadly as consisting of a *de facto* state of hostility, whether declared or undeclared, in which the insured happens to be killed.

Dr Schaffter's careful interpretation of war provisions in life insurance policies in the light of World War II, the Korean Conflict and the Southeast Asian affair, reveals the varied, even inconsistent, approaches adopted by the American judiciary, including the United States Supreme Court. The Supreme Court upheld the legalistic definition of war in *Beley v. Pennsylvania Mutual Life Insurance*,<sup>1</sup> and in *Harding v. Pennsylvania Mutual Life Insurance*.<sup>2</sup> In contrast,

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<sup>1</sup> 90 A. 2d 597 (1952), 95 A. 2d 202 (1953).

<sup>2</sup> 90 A. 2d 589 (1952), 95 A. 2d 221 (1953).

that same court took a practical or common-understanding view of war in *New York Life Insurance v. Bennion*<sup>3</sup> and in *Western Reserve Life Insurance v. Meadows*.<sup>4</sup> These variations in the judicial treatment of war are attributable both to factual differences between these militaristic confrontations as well as to differences in ideology existing among the judges themselves.

From the factual point of view the judges generally take into account the fact that World War II involved a formal declaration of warfare; whereas the Korean Conflict evolved as a regional hostility without a formal Congressional declaration of war. War may, therefore, warrant a different interpretation in the context of World War II than that of conflicts such as existed in Korea.

Ideologically, judges have also differed in preference between literal and constructive methods of interpreting war exemption clauses, thereby resulting in contradictory judgments. From the literal perspective, war can be given narrow parameters, restricting its ambit to formal manifestations of warfare. Inherent in this approach is the predisposition of the judge in favour of certainty, clarity and the predictability associated with "Analytical Positivism".<sup>5</sup>

From the realists' perspective, war can be given wide parameters on the grounds that large scale death and destruction may occur as a result of hostilities not emanating from formal declarations of warfare. Indeed, many major conflicts have developed out of minor incidents, evolving out of religious, economic, cultural and political differences. Such situations may stimulate the judge to follow the leadership of eminent jurists such as Holmes, Cardozo, Pound and Llewellyn, who contended that judges should consider all the circumstances surrounding the contract and not merely the express literal implications which might flow, for example, from such phraseology as "war".<sup>6</sup>

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<sup>3</sup> 158 F. 2d 260 (1946).

<sup>4</sup> 256 S.W. 2d 674 (1953), 261 S.W. 2d 554 (1953).

<sup>5</sup> On the "Positivist" or "Analytical Jurisprudential" approach towards the interpretation of law, see Austin, *The Province of Jurisprudence Determined* (1954); Hart, *Positivism and the Separation of Law and Morals* (1958) 71 Harv.L.Rev. 593; Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart* (1958) 71 Harv.L.Rev. 630; Summers, *The New Analytical Jurists* (1966) 41 N.Y.U.L. Rev. 861.

<sup>6</sup> On Realism and its influence upon the judicial process, see Holmes, *The Path of the Law* (1897) 10 Harv.L.Rev. 457; Frank, *Cardozo and the Upper-Court Myth* (1948) 13 L. & Contemp. Prob. 369; Frank, *Courts on Trial* (1949); Llewellyn, *Some Realism about Realism-Responding to Dean Pound* (1931) 44 Harv.L.Rev. 1222. For studies on the influence of sociology upon methods of

Dr Schaffter makes no attempt to analyse the conflicting approaches adopted by common law jurists in relation to war clauses in life insurance policies. Instead, she relies on her readers' ability to synthesize the many extracts which she selects from pertinent judgments and articles on the subject. For the non-lawyer, therefore, this book constitutes an interesting study of the difficulties faced by insurance companies and their clients who contract to purchase life insurance within an environment marred by warfare of varying intensity and effect.

Yet, to the perceptive lawyer, this book offers a great deal more information about the functioning of contractual and legal regimes within a complex world environment. The case law presented reveals the varied ways in which contracts can be construed, differing in construction according to each judge's jurisprudential inclination.

The book also contains suggestions for contractual draftsmen. The quoted judgments and appended clauses show how life insurance contracts can be devised so as to avoid conflicts over interpretation of language. Thus, the single phrase "war", standing alone, can be redrafted to refer to "war, declared or undeclared", if the design of the contract is to exclude the insurer's liability in the event of both *de jure* and *de facto* warfare. In contrast, a reference to "declared war" in the contract will purposefully encompass only situations of *de jure* warfare. Finally, the draftsman can express himself by deliberately enumerating in detail all war-related contingencies which fall within the realms of the word "war". Included within the enumeration are such words as hostilities, riots, rebellions, civil war, civil commotions, and other instances of armed conflict. The extent of the enumeration can therefore respond to the demands of each situation, that is, according to the nature of prevailing warfare, to the risks associated with different types of warfare, and to the relationship existing between the parties.

Schaffter's book implicitly suggests that the problem of ambiguity can be overcome by careful draftsmanship, based both on language usage and on the environment surrounding the contract. The insured will be clearly appraised at the date of contracting, of the extent of his insurance protection. It is hoped that the insurance company will be able to limit the application of such judicial rules of construction as the *contra proferentem* rule, whereby ambiguous

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legal construction, see Ehrlich, *Fundamental Principles of the Sociology of Law* (1936); Weber, *On Law in Economy and Society* (1954); Pound, *An Introduction to the Philosophy of Law* (1954).

language is construed against the draftsman, namely, against the insurer himself.

Dr Schaffter has provided a very useful compendium of information concerning two forces: first, warfare as a diverse force which continually takes human life; and second, the right of insurance companies to exclude their liability in the event of certain types of warfare, provided that such exclusion from liability is expressed unambiguously in the contract itself.

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*Governmental and Intergovernmental Immunity in Australia and Canada*, by Colin H.H. McNairn, Toronto: University of Toronto Press, 1977. Pp.xiv, 205.

A nagging question for all Canadian lawyers these days should be that of the appropriate role of the legal profession in the great constitutional debate which lies ahead. Should the concern be with the major issues of national unity — linguistic and cultural rights, entrenched human rights, control of immigration and communications and regional disparities — or should lawyers act only as technicians skilled in implementing the political compromises arrived at by others?

The answer must encompass aspects of both, although there may be wide differences of opinion as to how much emphasis should be placed on each role. Indeed, it will be particularly interesting in this context to assess the nature of the recommendations of the Constitution Committee of the Canadian Bar Association. This Committee, established in November 1977, is due to make a report to the Association's annual meeting in the fall of 1978. While it has reported that "reaction in government circles indicated room for a legal contribution to the unity debate", the range of topics to be dealt with, including "the courts, regional disparities and language rights" indicates the ambitious breadth of the proposed "legal contribution". Such problems as the Association's branch presidents' concern that they be consulted as well as the lack of agreement as to how the Committee's budget of almost a quarter of a million dollars will be raised, would seem to indicate that the profession remains somewhat ambivalent as to its support for the Committee's plans "to define the attributes of federalism and to come up with concrete proposals...".<sup>1</sup>

For anyone who espouses the belief that lawyers should play only a relatively modest role in constitution making, Colin McNairn's book is a timely reminder of the type of detailed work which will have to be undertaken if there is to be any workable change. The book does not address itself to any of the provocative issues of constitutional reform but rather to the vital question of the interaction between different levels of government in a federation and the resolution of the disputes which must invariably accompany that process. Whatever the outcome of the "great

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<sup>1</sup>"Branch Presidents' meeting: Access, funding key issues", *The Canadian Bar Association National*, vol.5, no. 1, Jan. 1978, 3.

debate" (even if it ends in some form of "sovereignty association") it will be essential for lawyers and others to address the issues involved in intergovernmental immunity. It is to be hoped that practical matters will not be forgotten in the ensuing unity debate. Certainly the legal profession will need to keep its head in these euphoric times.

Writing some ten years ago, Dale Gibson, after surveying the disparate group of inconsistent Privy Council and Supreme Court of Canada cases which make up the law of intergovernmental immunity in Canada, concluded:

[M]ost of the decisions appear to have been reached in isolation and without a full consideration of either the legal issues or policy ramifications involved. One reason for this may be the fact that interjurisdictional immunity has received very little academic attention in the past. Let us hope that this oversight will be remedied before the Supreme Court of Canada renders such study entirely academic with a terminal decision.<sup>2</sup>

*Governmental and Intergovernmental Immunity in Australia and Canada* goes far to meet Gibson's lament for the lack of academic attention but the thrust of McNairn's analysis favours legislative action to rationalize the law in this area. While he points to no particular "terminal decision" of the Supreme Court of Canada, McNairn is of the view that reform must come from the legislatures; a perspective of the utmost significance in this time of constitutional re-thinking, when it *should* be possible to consider wholesale legislative reform rather than piecemeal adjudicative adjustment, hence the particular timeliness of the book.

McNairn's commendably succinct text examines the limits of two related forms of state immunity — Crown or governmental immunity as opposed to statute and intergovernmental immunity. The former is derived from the rule of statutory construction that the Crown, representing the executive government, is not bound by legislation except by express words or necessary implication. The latter type is of a constitutional order providing each level of authority in a federal system with independence from the laws of the other levels.

The text is divided into six chapters. The first two, "Governmental Immunity from Statute" and "Governmental and Intergovernmental Immunity in a Federal System" provide an overview and introduction to the subject. The emphasis shifts in the following four chapters to "Statute Law in Tort Proceedings by or against the Crown", "Statutes Affecting the Criminal and Contractual Liability

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<sup>2</sup> Gibson, *Interjurisdictional Immunity in Canadian Federalism* (1969) 47 Can.Bar Rev. 40, 61.

of the Crown", "The Effect of Statutes on the Crown as Creditor", and "The Crown as Taxpayer" respectively.

Most commendably, the author has ended each chapter with his specific suggestions for reform. For instance, he is of the view that governmental immunity from statutes should be abolished as British Columbia has already done in that province's 1974 *Interpretation Act*.<sup>3</sup> There, the general rule is that, unless specifically provided to the contrary, all provincial acts are binding on Her Majesty. Thus the Crown in right of British Columbia is in the same position as its subjects, in that it is embraced by the general words of statutes — even though that may be to its prejudice. If the Crown is to be excluded from the scope of a statute, the onus will rest with the legislature to so provide in specific terms:

This seems to be the more appropriate presumption, given the range of activities in which the crown and its agents are now engaged, the proliferation of regulation by statute and subordinate legislation, and the resultant increase in the opportunities for governmental immunity working to the prejudice of subjects. It leaves open the possibility of the legislature giving special protection to the crown in particular circumstances as the situation might dictate. But the crown will have no privileged position, in the face of legislation, by default as it were. Indeed, we are probably quite justified in assuming that the merit of applying a given statute to the crown frequently receives little or no consideration. If that is so then the failure to mention the crown ought not to be attributed to any conscious decision that the crown should be free of the burdens of a statute. (p.22.)

Similarly, McNairn advocates that the liability of the federal Crown in tort should be determinable in accordance with any provincial statute governing the liability of a subject in a comparable situation (pp.77-80). This accords with the original philosophy of Crown liability legislation by placing the Crown in the same position as a private person for the purposes of tort law. Recognizing that this might well lead to discrepancies in the extent of federal Crown liability in tort from province to province, McNairn concludes that it would be better to bring such liability into line with that of private individuals despite the possibility that this might accentuate already existing differences between jurisdictions in a federation.

While the author favours this type of clear-cut solution for matters such as immunity from statute and tort liability, he quite rightly realizes that such an all or nothing approach cannot be employed when it comes to the taxation of the federal Crown. Here any extension of taxes has to be "rather finely tuned" and must

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<sup>3</sup> *Interpretation Act*, S.B.C. 1974, c.42.

take into account the nature of the tax, the Crown enterprises or entities involved and whether, in the event of immunity, one level of government would be required to subsidize another level of government without any offsetting benefit:

The case for subjecting the crown to the burden of a particular tax is perhaps strongest when it is engaged in a commercial type of undertaking in competition with entities in the private sector. We might expect a public enterprise of this kind to survive in the market place without the benefit of hidden subsidies such as those afforded by a tax holiday. That is not to suggest, however, that there would be any general consensus that a particular crown enterprise operating in this environment should be subject to any and every form of taxation. The public purpose behind the undertaking might suggest, for instance, that it ought not to be treated as generating profits subject to reduction through income tax though there might be agreement that it should be subject to other forms of tax. (p.163.)

While this reviewer finds most of the author's proposals to be eminently sensible, the value of the book does not depend on whether or not one agrees with his reasoning. The true value lies in its ability to bring into sharp focus matters which in the past have been notoriously fuzzy. This, in turn, should greatly improve the quality of thinking in an area of law which has never been subject to systematic study and analysis.

As its title indicates, the book is essentially a comparative study of Australian and Canadian law and, in this reviewer's opinion, it serves as an example of the appropriateness of comparative study. All too often "comparative" studies attempt to deal with subject matters which have too little in common. Here the legal and constitutional systems chosen are sufficiently alike to make comparisons genuinely helpful and not merely exotic counterpoints of dubious comparative value.

In all, this is a most welcome publication. The Social Science Research Council for Canada and the Law Foundation of Ontario are to be congratulated for supporting the publication of a law book, the importance of which will not be measured by the number of copies sold but by the commitment to reform of those who read it. The publisher's blurb, one is pleased to report, is quite accurate: "This incisive analysis of a crucial area of the law will be of interest to all who are concerned with governmental accountability as well as to jurists, judges and lawyers."

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