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THE HISTORY OF THE DEVELOPMENT OF THE WARRANTY IN INSURANCE LAW

By William R. Vance, Ph.D., LL.B., Professor of Law, Yale University.

The history of the technical warranty in insurance law is instructive in showing how a rule, never very good or necessary, may, like more human creatures, so degenerate through later associations and changed conditions as to become positively bad, and so injurious to society that it must needs be brought to an end by legal process. In the United States, the reign of the technical warranty is almost over. For over a century it has been condemned by courts and text writers as an instrument of oppression and unfair dealing, and this sentence of condemnation is now being rapidly executed in the several states by the enactment of statutes wholly abolishing it as a rule of law. Even in those states, now relatively few, in which it has not been specifically abolished by statute, the warranty has been deserted even by its only friends, the underwriters. It is seldom that one now finds a trace of the warranty in the policies of reputable life insurance companies; and in the standard fire policy, now almost universally in use, warranties have been confined to a small and relatively unobjectionable field.

These statutes generally provide, with more or less of precision and success, that warranties shall be construed as representations, and that no misrepresentations unless material or fraudulent shall prevent recovery on an insurance policy.[1] The prevalence of these

[1] For examples of these statutes see Rev. Laws, Mass., 1902, Ch. 118, Sec. 21; Comp. Laws, Mich., 1897, Sec. 5180; Ky. St. (*Barbour v. Carroll*), Ch. 32, Sec. 639.

statutes justifies the conclusion that in the opinion of the legal profession the warranty in insurance law is now a mistake, and that it should be transformed into the representation. This very obvious conclusion suggests the inquiry: Was the warranty ever anything but a mistake? And should it not always have been regarded by the courts, as legislatures have now ordered that it must be regarded, as a representation? There can be no question that the warranty, as fully developed in our common law decisions, is an anomaly in contract law. The legal effect of the warranty is thus well stated by Bronson, J.[2]: "A warranty by the assured in relation to the existence of a particular fact must be strictly true, or the policy will not take effect; and this is so whether the thing warranted be material to the risk or not. It would, perhaps, be more proper to say, that the parties have agreed on the materiality of the thing warranted, and that the agreement precludes all inquiry on the subject." Its peculiarity consists in that any error in a warranted statement is fatal to the contract, even though the statement be immaterial or even trivial in nature, and the error due to an honest and even unavoidable mistake. Thus, if the insured in perfect good faith warrants that his three brothers are all alive, whereas one has been recently drowned at sea without knowledge on the part of the insured, the misstatement will absolutely avoid a policy containing such warranty.[3] The error thus made worked absolutely no injury to the insurer, and was due to no fraud or wrong on the part of the insured; yet under this remarkable rule of law the insurer may deny all liability under his contract, although good sense, fair dealing and common justice would require it to be enforced. So where the insured warrants that his father died of pleurisy, whereas in fact he is proved to have died of pneumonia, the mistake innocently made by the insured in such a case is absolutely harmless to the insurer, and yet the insurer need not perform his contract.[4] But if, in either case, the court can discover that the statement is a representation, and not a warranty, the rights of the insured under the policy will be saved, as in good conscience they ought to be.[5] It is needless to attempt to justify such a grotesque result as the

[2] In *Burritt v. Insurance Co.*, 5 Hill (N. Y.), 193, 40 Am. Dec., 345.

[3] Compare *Globe Mutual Life Insurance Ass'n v. Wagner*, 188 Ill., 133.

[4] See *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va., 195; *Hoeland v. Western Union Life Ins. Co.* (Wash., 1910), 107 Pac., 866.

[5] *Moulor v. Ins. Co.*, 111 U. S., 335; *Globe Mutual Life Ins. Ass'n v. Wagner*, 188 Ill., 133.

forfeiture of valuable contract rights upon the trifling turn of a technical phrase by saying that if the insured was foolish enough to make his contract wholly dependent upon the literal truth of the statements warranted, he has no right to complain. In fact, in neither case did the insured have the slightest suspicion that when he signed the paper containing the long list of questions and answers he was staking all his rights under the contract upon the absolute accuracy of the statement in question.

The reports are full of cases involving other branches of mercantile law in which the strict performance of material conditions precedent has been required;[6] but one may search in vain among these cases for a single instance in which an innocent party has lost all rights under his contract because of the non-performance of any condition wholly immaterial.[7] Neither can one find in other systems of law any such harsh rule of forfeiture as is possible under the common law warranty in insurance contracts. It is quite true that continental authorities show that material conditions determining the character of the risk assumed by the underwriter are strictly enforced,[8] but there is to be found no suggestion that the breach of immaterial conditions should prove fatal to the contract.[9]

The considerations just stated lead us to inquire why this peculiar and inequitable rule was ever established, and whether its establishment ever served a useful or necessary purpose. At the threshold of the inquiry into the origin and development of this rule, which is admitted to be peculiar to insurance law, it is necessary first to consider in what respect the contract of insurance is itself peculiar. This, in turn, requires us to note the circumstances under which the underwriter's contract was made during the eighteenth century, when the law of insurance was taking form under the powerful though somewhat arbitrary hand of Lord Mansfield. At that time underwriters were accustomed to congregate at Lloyd's Coffee House, in London. Thither a

[6] See *Smith v. Dart*, 14 Q. B. D., 105; *Austin v. Friars*, 71 L. T., 27; *Morgan v. Brine*, 9 Bing., 672; *Norrington v. Wright*, 115 U. S., 188.

[7] Compare *Oberlies v. Bullinger*, 132 N. Y., 598; *Nolan v. Whitney*, 88 N. Y., 648; *Phillip v. Gallant*, 62 N. Y., 256; *Singer Mfg. Co. v. McLean*, 105 Ala., 316, 16 So., 912.

[8] See Emerigon, *Traité des Assurances*, pp. 164, 171; Roccus, Not. 38; 1 Phillips, Ins., p. 421.

[9] See Goirand, *French Commercial Law*, pp. 331, 332; Schuster, *Principles of German Civil Law*, p. 314.

person desiring insurance brought a paper containing proposals for insurance upon some risk, usually marine in character, which was described on the paper. This paper or policy was then submitted to brokers successively, who underwrote it in such amounts as they thought fit. It might be possible that the applicant for insurance would, upon inquiry, supplement the written description of the risk by further parol statements. By virtue of a usage that very naturally grew up among these underwriters contracting under such circumstances there were several conditions imposed by implication upon every contract of marine insurance. The most important of these were: (1) that a vessel insured should be sea-worthy at the beginning of the voyage; (2) that the voyage described in the policy should be pursued directly without deviation; (3) that the insured had communicated to the underwriter all facts pertaining to the risk assumed which were material thereto, provided they were known to the insured or ought to have been known to him in due course of business;[10] (4) that all material representations made by the insured respecting the risk should be substantially correct, without reference to the question of fraudulent intent. All of these implied conditions arose out of the necessity that in so highly speculative a contract the risk proposed must be accurately defined, and the further necessity that the underwriter should look wholly to the insured for the information defining the risk. In estimating the character of the risk assumed, therefore, the underwriter relied as much upon these implied conditions as upon those expressly written in the policy and termed warranties. Indeed, the first two implied conditions mentioned are customarily termed the implied warranties of sea-worthiness and against deviation.

These usages connected with assurances were manifestly reasonable enough, and the implied conditions arising from them appear with equal clearness to be both convenient and proper. Let us now see how they fared in the courts of common law. The term "warranted" was evidently in customary use in the seventeenth century, but in the few insurance cases reported as being tried in the common law courts prior to Lord Mansfield's accession as Chief Justice of the Court of King's Bench, in 1756, there is nothing to indicate that the term had any other significance than to introduce a condition that had to be strictly per-

[10] *Proudfoot v. Montefiore*, L. R., 2 Q. B., 511.

formed.[11] The first case coming before Lord Mansfield, *Woolmer v. Muilman,*[12] involving a fraudulently false warranty of neutrality, presented no difficulty. It was easily determined that the contract was unenforceable. But the next important case proved more difficult.[13] The underwriter had relied upon written instructions, shown to him by the broker of the insured, in which the vessel insured was described as mounting twelve guns and twenty men. As a matter of fact she mounted only ten carriage guns and nine swivels, with sixteen men and eleven boys. It was testified that the force actually shipped was stronger than that mentioned in the instructions upon which the underwriter relied. Nevertheless, the statement was not literally true, and it became necessary for Lord Mansfield to determine whether the substantial truth of such a statement was sufficient to uphold the contract. This he did in the following sweeping language: "There is no distinction better known to those who are at all conversant in the law of insurance than that which exists between a warranty or condition which makes part of a written policy, and a representation of the state of the case. Where it is a part of the written policy, it must be performed; as if there be a warranty of convoy, there it must be a convoy; nothing tantamount will do or answer the purpose; it must be strictly performed, as being part of the agreement; for there it might be said the party would not have insured without convoy. But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract. Therefore, if there is fraud in a representation, it will avoid the policy, as a fraud, but not as a part of the agreement. So there cannot be a clearer distinction than that which exists between a warranty which makes part of the written policy, and a collateral representation, which, if false in a point of materiality, makes the policy void; but if not material, it can hardly ever be fraudulent." The underwriters were, therefore, held liable since the statement was substantially true and the risk in no wise greater than that which they had assumed. The distinction thus sharply made by Lord Mansfield between descriptive statements of the risk written in the policy and those not so included, evidently came as a surprise to the underwriters,

[11] See *Jeffries v. Legendra* (1891), 4 Mod., 58; Carthew, 216 (S. C., 3 Lev., 320); Lethulier's Case (1692), 2 Salk., 443; *Gordon v. Morley* (1747), 2 Str., 1419.

[12] (1763) 1 W. Bl., 427; 3 Burr., 1419.

[13] *Pawson v. Watson* (1778), 2 Cowper, 785.

for we find the following note attached to Cowper's report of the case: [14] "N. B.—On the Monday following, Mr. Davenport said he was desired by the underwriters to ask whether it was the opinion of the court that to make written instructions valid and binding as a warranty, they must be inserted in the policy? Lord Mansfield answered that most undoubtedly that was the opinion of the court. If a man warrants that a ship shall depart with twelve guns, and it departs with ten only, it is contrary to the condition of the policy."

The underwriters evidently regarded all descriptive statements, relied upon in assuming the risk, whether written in the policy or elsewhere, or only implied from usage, as upon the same footing. They doubtless would have been quite as willing to take advantage of unjust forfeitures upon immaterial misrepresentations as upon immaterial breaches of warranty. In like manner it would have been quite possible for the court, without doing any violence to law or logic, to give to recitals of fact within the policy the same legal effect that was so justly given to recitals of fact written on a separate paper. It is true, however, that the court still looked upon the truth or untruth of the representation as involving a question of fraud, rather than an implied condition of the contract.

In *MacDowell v. Fraser*,[15] decided in the following year Lord Mansfield refers to the distinction between a warranty and a representation as being perfectly well settled. "A representation must be fair and true. It should be true as to all that the insured knows; and, if he represents facts to the underwriter without knowing the truth, he takes the risk upon himself. But the difference between the fact as it turns out, and as represented, must be material." But while the distinction between warranties and representations was regarded at this time as being perfectly well settled, it had not yet been finally determined that an immaterial breach of warranty would avoid a policy, since all the cases that had arisen had involved breaches unmistakably material. Indeed, in *Bean v. Stupart*,[16] decided in 1778, Lord Mansfield gave some hopeful indications of an intention to keep the warranty within the bounds of reason. In that case, the insured had war-

[14] 2 Cowper, 790.

[15] (1779) 1 Doug., 260.

[16] (1778) 1 Doug., 11. See also *Hyde v. Bruce* (1783); 3 Doug., 213, Marshall, Ins., 249.

ranted that the vessel insured was manned by thirty seamen, whereas in fact, only twenty-six persons had signed the ship's articles, and among these were reckoned the steward, the cook, the surgeon, and some boys. The warranted number of thirty could be made up only by including some apprentices, not articled. Nevertheless, the court left it to the jury to say whether the parties meant to include within the term "seamen," all members of the crew, as distinguished from some passengers who were aboard. But any hope that the prenicious growth of the warranty would be checked was quickly disappointed by the decision of *Kenyon v. Berthon.*[17] In that case insurance upon a vessel described in the policy as "in port 20th of July, 1776," was held to be defeated on proof of the fact that she had sailed two days earlier. As a matter of fact the time of the sailing of vessels has always been regarded by underwriters as material to the risk, but Lord Mansfield in deciding this case declared that "though the difference of two days may not make any material difference in the risk, yet as the condition has not been complied with, the underwriter is not liable." But it is not until 1786 that we find the fully developed warranty really in action. In *De Hahn v. Hartley,*[18] a vessel was insured for a voyage from Africa to the West Indies. The vessel was described as "warranted copper sheathed, and sailed from Liverpool with fourteen six-pounders, * * * * fifty hands or upwards." The vessel having been captured during the period covered by the policy, the underwriter paid the loss. Subsequently, learning that the vessel had sailed from Liverpool with only forty-six hands, although it had, six hours later, taken on six additional men at Anglesea, thus sailing from that island with fifty-two men, the broker brought his action to recover the money paid on the ground that the insurance was void for breach of warranty. It is very clear that the risk assumed for the voyage from Africa to the West Indies was in no wise enhanced by the fact that the vessel had only forty-six hands during the short voyage on inland waters from Liverpool to Anglesea, yet it was held that the policy was avoided by the breach of the warranty. In his opinion, Lord Mansfield stated the law in this characteristic fashion: "There is a material distinction between a warranty and a representation. A representation may be equita-

[17] (1779) Park Ins. (6th ed.), 426 (S. C., 1 Doug., 12, n.).

[18] 1 T. R., 343. Phillips gently and sadly disapproves this case. See 1 *Phillips' Ins.* (5th ed.), 419.

bly and substantially answered; but a warranty must be strictly complied with. Supposing a warranty to sail on the first of August, and the ship did not sail till the second, the warranty would not be complied with.. A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with. Now, in the present case, the condition was the sailing of the ship with a certain number of men; which not being complied with, the policy is void."

Since the court had decided that the distinction between warranties and representations was accompanied by such striking and surprising legal consequences, it naturally was a matter of great interest to the underwriters to know when a statement descriptive of a risk was a warranty and when a representation. Lord Mansfield very quickly decided that a statement written in the policy was a warranty, while one written anywhere else, or not written at all, was only a representation.[19] Then the question arose, How must it be written in the policy? It was determined that a statement should bear the magical potency of the warranty if it was written anywhere on the face of the policy as on the margin, straight or obliquely;[20] but if the written statement was inscribed on a different paper folded within the policy,[21] or even fastened by a wafer to the policy,[22] it was no more than a representation, which could not destroy the rights of the insured or enable the underwriter to escape his liability, unless it had really prejudiced the underwriter. It will be observed that the mere fact that a stipulation or a descriptive term was written in the policy was of itself sufficient to determine its character as a warranty. No other evidence of the intention of the parties to make it a warranty was deemed necessary.

In order to appreciate fully the significance of this distinction, as worked out by Lord Mansfield, between warranties and representations, it will be necessary for us to consider briefly the development of the theory upon which the rules of law as to concealment and representations were based. There can be little

[19] *Pawson v. Watson* (1778), 2 Cowp., 785. The rule was regarded as settled in *Lothian v. Henderson* (H. L., 1803), 3 Bos. & Pull, 499.

[20] *Bean v. Stupart* (1778), 1 Doug., 11; *Kenyon v. Berthon* (1779), Park Ins. (6th ed.), 426, E. C. Doug., 12 n.

[21] *Pawson v. Fletcher* (1779), 1 Doug., 12 n.

[22] *Bize v. Fletcher* (1779), 1 Doug., 284, *Park Ins.* (6th ed.), 425.

question but that in the earlier cases, the rules with reference both to concealments and representations were regarded as grounded upon fraud.[23] Sir James Allan Park, whose interesting treatise on insurance was first published in 1786, while Lord Mansfield was still on the bench, treats all concealments and representations under the chapter heading, "Frauds in Policies." Marshall, writing in 1802, also regards concealments and representations as kinds of fraud. But it early became apparent that a misdescription of the risk to be assumed, though due to the honest mistake of the insured, might prove as injurious to the underwriter who relied on it as if it had been fraudulently false. That Lord Mansfield fully appreciated this fact appears from this statement found in his opinion in *Fillis v. Brutton*:[24] "In all insurances it is essential to the contract that the assured should represent the true state of the ship to the best of his knowledge. On that information the underwriters engage. If he states that as a fact which he does not know to be true, but only believes it, it is the same as a warranty. He is bound to tell the underwriters truth." So in *Fitzherbert v. Mather*,[25] where material information possessed by the agent of the insured, but not communicated by such agent was not disclosed to the underwriter because actually unknown to the insured, Lord Mansfield said: "Now, whether this happened by fraud or negligence, it makes no difference; for in either case the policy is void."

The practical result reached by the courts before Mansfield retired from the bench may be stated thus: The description of the risk upon which the underwriter relied in determining whether he would assume the risk or not, or at what premium he would assume it, might be found within the policy or without it. So far as the descriptive terms chanced to be within the policy, they must be literally true, irrespective of their materiality, but if they chanced to be without the policy the insurance remained valid unless the misdescription was of such character as really to injure the underwriter; that is, unless the misdescription was substantial and material. This rule so inherently unreasonable and so highly dangerous in its technicality, cannot be justified on the ground that it accorded with the usages of merchants. Even the

[23] See *Pawson v. Watson* (1778), 2 Cowp., 785; *Bize v. Fletcher* (1779), 1 Doug., 284.

[24] (1782) Park Ins. (6th ed.), 250.

[25] (1785) 1 T. R., 12.

meagre reports of the time contain sufficient information to show that merchants and brokers were not infrequently surprised by Mansfield's decisions, and that they were sometimes ordered in a very summary fashion to change their customary way of doing business in order to comply with the law as Mansfield declared it.[26]

It is well here to note the distinction that exists between affirmative warranties which are stipulations that certain facts exist, and promissory warranties which are merely executory terms of the contract agreed to be material. The rule requiring promissory warranties to be strictly performed has not in practice worked out differently from the general rule that requires strict performance of all material terms in other kinds of mercantile contracts, for it is difficult to find any instance of an immaterial promissory warranty. The very fact that the parties have expressly stipulated for the future performance of any act is in effect conclusive evidence that they regarded the performance of that act as material. It is with reference to such promissory warranties that Sir James Allan Park writes,[27] "To say that the underwriter should answer for a loss, notwithstanding the other party has failed in his engagements, would be to make a different rule in this species of contract, from that which subsists in every other; although this of all other contracts depends most upon the strictest attention to the purest rules of equity and good faith." Promissory insurance warranties have frequently been classed with the ordinary conditions precedent in mercantile contracts. Thus in *Norrington v. Wright*,[28] Mr. Justice Gray had in mind such warranties when he said, "A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract." As to the promissory warranty there is no ground for serious objection.

But the affirmative warranty is of quite different nature. It is a recital of fact. It merely serves to describe and define the risk that is assumed by the underwriter. The underwriter is entitled

[26] See *Pawson v. Watson* (1778), Cowp., 785.

[27] Park Ins. (6th ed.), 422.

[28] 115 U. S., 188.

to a strictly accurate description of the risk that is assumed. He has every reason to complain if he is led, either by the failure of the insured to disclose all material facts bearing on the risk, or by his misrepresentations of such facts, to assume a risk different from that which he had intended to assume. But it really makes no difference to the broker whether the statements descriptive of the risk are written within the policy or without it, or whether they are labeled "warranties" or not, or whether they are express or implied warranties. If the risk differs materially from the one he has assumed he should not be expected to pay, whatever the misleading descriptive terms may be called. But, if the risk as described and assumed, does not differ in any material respect from the risk as it actually exists, there is no reason why the underwriter should not pay, even though the shibboleth "warranty" be found in the policy.

In early times, fire insurance policies and even life policies were made under circumstances not materially different from those existing in the case of marine insurance. The property insured was frequently in some distant and inaccessible place and therefore not susceptible of examination by the underwriter.[29] He was compelled to rely as completely upon the information afforded by the insured as in the case of marine risks. Hence, we are not surprised to find that in England the rule of law that had been developed in connection with marine insurance was applied in its full extent to insurances on property on land, and on life.[30] In the United States, however, the courts early came to an appreciation of the essential difference between the conditions that had given rise to the rules of law governing marine insurance and those that attended the making of a contract of fire or life insurance.[31] The subjects of the latter kinds of insurance are accessible to the insurer for examination, which will usually enable him, with his expert knowledge, to form a far better estimate of the character of the risk than the insured himself. Since the insurer was no longer compelled to rely wholly upon the insured for information, it was no longer necessary to impose upon the in-

[29] For examples, see *Carter v. Boehm* (1766), 3 Burr, 1905; *Bufe v. Turner* (1815), 6 Taunton, 338; *Stackpole v. Simon* (1779), Park Ins. (6th ed.), 582; *Lindenau v. Desborough* (1828), 8 B. & C., 586.

[30] *Bufe v. Turner,* 6 Taunt., 338; *Huguenin v. Rayley,* 6 Taunt., 186; *Morrison v. Muspratt,* 4 Bing., 60; *Lindenau v. Desborough,* 8 B. & C., 586.

[31] See the excellent opinion of Ranney, J., in *Hartford Protection Ins. Co. v. Harmer,* 2 Ohio St., 452, 59 Am. Dec., 684.

sured so heavy a duty of disclosure. Hence, the American courts have very generally relaxed the rules of marine insurance to the extent of relieving the insured from the obligation of disclosing any facts concerning fire and life risks, save such as, in the exercise of good faith, he knows will enhance the risk, and such as are made the subject of inquiry by the insurer.[32] But the harsh rule of the warranty was allowed to continue in all its rigour, although scarcely a vestige of the doubtful reason which had excused its establishment in marine insurance could apply to insurances on life and property on land. The result might well have been anticipated. Policies become overgrown with a wilderness of warranties, many of the most trivial character, in which the rights of the policy holder, however honest and careful, were in grave danger of being lost. It was necessary for the courts to go to the rescue of the public. It was too late to do what Lord Mansfield should have done; that is, declare that an immaterial warranty should have no more effect upon the rights of the insured than an immaterial representation; but they did hold that no stipulation, though written in the policy, should be construed as a warranty, unless it was clearly and unmistakably so intended by the parties, as indicated by the unequivocal language of the policy.[33] The unseemly struggle that ensued between the unwise insurers who sought so to frame their policies as to compel the courts to allow them the dishonest benefit of forfeitures unsuspected by the insured, and the courts who sought by liberal construction, and sometimes distortion of the language of the policies, to do justice in spite of the warranties, resulted in a mass of litigation and confused precedent, the like of which cannot be found in any other field of our law. It is a cause for gratification that the total abolition of the warranty, which never had good reason for existence and now has none at all, will tend to enable the courts to apply to insurance policies the same rules of construction that determine the meaning of other contracts.

New Haven, Conn. *William R. Vance.*

[32] See the opinion of Taft, J., in *Penn Mut. Life Ins. Co. v. Trust Co.*, 72 Fed., 413, which contains the best discussion of the subject to be found in the books. Also see Vance, Ins., 253.

[33] For examples of such liberal construction see *Moulor v. Insurance Co.*, 111 U. S., 335; *Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S., 183; *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala., 467; *Globe Mut. Life Ins. Ass'n v. Wagner*, 188 Ill., 133.