INSURANCE (ACCIDENT) — INTERPRETATION OF POLICY — "UNDER THE REGULAR CARE AND ATTENDANCE OF A LEGALLY QUALIFIED PHYSICIAN" — ARGUMENT THAT SUCH CARE WOULD HAVE BEEN USELESS — AMBIGUITY OF CLAUSE

It is not uncommon to find in policies of accident insurance a clause or provision to the effect that the insured will only be indemnified so long as he is under the regular care and attendance of a legally qualified medical practitioner. It does not tax the imagination to conjure up situations where strict compliance with such a provision would be grossly unjust to the insured. Possibly the most obvious situation is one in which the insured, through some accident, becomes totally and permanently paralysed. To receive indemnity under a policy containing such a provision the paralysed insured would have to undertake the expense of paying a doctor to visit him regularly. It is readily seen that such a provision has the effect of penalizing the insured in these circumstances. The question then arises as to whether anything can be done to alleviate this injustice. Can the insured raise the argument that such regular care and attendance would be useless because no treatment therefrom would be of any benefit and that, therefore, he need not comply with the terms of that provision?

This very question came before the Saskatchewan Court of Appeal recently in the case of *Froelich* v. *Continental Casualty Co.*[1] The facts in that case are similar to those suggested above. In consideration of a stated premium, the insurer agreed to pay Froelich a monthly indemnity in case of total disability caused by accident. The policy contained the following provision: "No indemnity will be paid under this part for any period of disability during which the insured is not under the regular care and attendance of a legally qualified physician, surgeon or osteopath other than himself." The policy also contained the following endorsement: "Benefits will not be paid for any disability unless you are regularly attended by a physician".

Froelich suffered permanent paralysis on his left side as a result of an automobile accident on December 20, 1952. He was taken to hospital in Moose Jaw where he remained until May 2, 1953. He was readmitted on June 19, remaining for five days. During these periods of hospitalization he was attended by a doctor. In September, 1953, he went to Montreal for examination where he was advised to continue the physiotherapy treatments which he had received while in hospital. On his return from the east, he received nine of these treatments between October, 1953, and February 1954. The only other medical attention Froelich received was two examinations in 1955, but these were solely for the purpose of permitting the examining doctor to give evidence as to Froelich's condition at the trial of this matter. His evidence was that the attendance of a physician or surgeon would not have improved the plaintiff's condition.

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[1] (1956), 18 W.W.R. (N.S.) 529

When Froelich entered his claim for indemnity under the policy, the insurer refused to pay him on two grounds. The first ground, not relevant to this comment, was that the insured was not wholly and continuously disabled by reason of the said injury from engaging in each and every occupation for wage or profit. As a matter of record, both the trial judge and the entire Court of Appeal agreed that the defence failed on this ground. The second ground was that Froelich was not under the regular care and attendance of a physician. The insured brought his claim for indemnity to court and was successful. The trial judge (Thomson, J.) accepted the doctor's evidence to the effect that if Froelich had attended on him regularly every week since the accident, he could not have prescribed anything to improve his condition. The judge held that the plaintiff should not be penalized because he did not incur useless expenses and, to support this conclusion, he cited *Barbeau* v. *Merchants Casualty Co.*[2]

In that case, Barbeau was held to be entitled to indemnity under the policy, notwithstanding the fact that his physician had not attended him regularly. The policy contained a provision that no claim could be considered for an illness which did not require the care of a qualified physician or surgeon at least once in seven days. It was held that the illness which had incapacitated the plaintiff was one of those contemplated by the policy, and that he should not be penalized because he found a doctor sufficiently conscientious to avoid unnecessary visits. The clauses of the policy should be interpreted by their relation to one another, and in the circumstances of this case, the provision for regular visits by a physician should be considered inapplicable.[3]

The Continental Casualty Co. appealed from the decision of Thomson, J., and the appeal was allowed (Procter, J.A. dissenting) on the ground that Froelich had not been under the regular care and attendance of a physician. Martin, C.J.S. expressed the reasoning of the majority[4] concisely:

> The plea that the regular care and attendance of a legally qualified physician would have been of no benefit owing to the plaintiff's condition cannot help the plaintiff as the court cannot make a new contract for the parties.[5]

Such a reply would seem to be unsatisfactory. Simply by suspending the need for compliance with this one particular provision, the court is not making a new contract for the parties. It is common knowledge that the Insurance Acts of the various provinces contain clauses which provide for relief from forfeiture.[6] The presence of these clauses should refute the suggestion that the court is making a new contract for the parties every time it is asked to suspend compliance with a particular provision. There is no reason for these clauses to be included in the statutes other than to give the court power to suspend compliance without being accused of rewriting the contract for the parties.

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[2](1927), 44 Que. K.B. 295

[3]see 23 Can. Abr. 549

[4]Gordon, J. A. concurred in the result; McNiven and Culliton JJ A concurred with Martin, C.J.S.

[5]at p. 537

[6]For Alberta, see R.S.A. 1942, c. 201, ss. 199, 295, and 322

[6]For Saskatchewan, see R.S.S. 1953, c .133, ss. 162, 268, and 295.

The dissident did not feel that the court would be making a new contract, and he was strongly in favor of allowing Froelich's argument:

> I do not think that the court must, under the circumstances disclosed here, so construe the condition as to medical treatment that the defendant could compel the plaintiff to incur the expense of medical treatment which will benefit neither party to the contract, particularly where the expense might easily exceed the amount of monthly payments under the policy.[7]

It was pointed out that insurance companies could discover that such a provision might easily be a double-edged sword in view of the fact that, in cases of permanent disability where there is no hope of ultimate recovery, such treatments might easily prolong the insured's life — thereby extending the period over which the insurer is liable to indemnify him.

The strongest factor in the dissent of Procter J.A. was his reference to section 268 of the (Saskatchewan) Insurance Act, R.S.S. 1953, c.133. That section is the one providing relief from forfeiture in policies of accident insurance.[8] He said:

> If I am wrong in my interpretation of the effect to be given to this term of the policy, I think that this is a case where the court should exercise its powers under sec. 268 . . . and relieve the plaintiff from the consequences of his forfeiture or avoidance of his insurance . . . If the powers of the court are ever to be used under that section, this seems to be a case where relief should be given.[9]

The majority, on the other hand, refused to recognize the relevancy of that section:

> There is, however, no reference to this section in the statement of claim nor, so far as the record discloses, was it mentioned at the trial. Moreover no reference was made to it on the argument of the appeal. Under the circumstances I am of the opinion that it should not now be considered by this court.[10]

Once again, such a reply would seem to be unsatisfactory. It is unnecessary to state in a pleading the principles of common law or to set forth the contents of a public statute.[11] In the case of *Kruger* v. *Mutual Benefit Health & Accident Assn.*[12] it was argued that the insurer had not been given proof of loss, but the court held that, in the circumstances of that case, it would be inequitable that the insurance should be forfeited or avoided on that ground. Therefore, in exercise of the powers contained in the equivalent section in the Ontario Insurance Act, the court granted relief against such forfeiture or avoidance. No reference had been made to that section by the parties either in the pleadings or in the argument.

The dissenting judge turned to authority which would support the contention that Froelich's argument should be allowed. He cited Couch:

> Again a provision providing indemnity for no longer period than that during which the insured is 'under regular treatment' of a physician presupposes that some advantageous treatment will be possible, so that where it is undisputed that no treatment will be of the slightest assistance the words 'regular treatment' are suspended and none is essential to a recovery of the indemnity provided by the policy.[13]

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[7]at p. 539

[8]The equivalent section in Alberta is s. 295

[9]at p. 540

[10]at p. 537

[11]Odgers, Principles of Pleading and Practice, (15th ed), p. 84

[12][1944] 1 D.L.R. 638 [1944] O.R. 157.

[13]Couch. Cyclopedia of Insurance Law, vol. 7 s.1679.

He also found favor in the judgment of Laidlaw, J.A. in the *Kruger* case (*supra*),

> Perhaps cases might arise in which literal compliance with the requirements of the provision would be essential to entitle a claimant to indemnity under the policy, and likewise particular circumstances might be shown in other cases in which a literal interpretation of the provision would unfairly, unreasonably and unjustly defeat the real intention of the contracting parties. See *Barbeau* v. *Merchants Casualty Co.*[14]

Procter, J.A. omitted another reference to the same judgment which, it is submitted, is as relevant as the reference he made:

> The important question to be determined is whether the plaintiff . . . required visits . . . by a legally qualified physician. It is unnecessary to decide what the result would be if these words were to be applied in a literal sense to every case in which the insured has total disability . . .
>
> It may be that . . . regular visits . . . by a legally qualified physician might not be made under special circumstances, but which would nevertheless not disentitle the insured to the benefits provided by this part of the policy.[15]

Further, the defendant insurance company had been a party in an earlier action in which it was stated:

> Where a policy stipulates that indemnity shall be payable only while the insured is under the regular care and attendance of a physician, no definite rule can be laid down as to the frequency with which the doctor should see his patients. The visits must be at such intervals as are required by the physician to determine whether or not the insured is capable of resuming his work.[16]

It is submitted that, if nothing more, the above statements are sufficient to justify a court holding that section 268 of the Saskatchewan Insurance Act should be invoked to prevent an injustice being done to Froelich.

To obviate any danger that the insurance company might be the victim of a fraudulent claim if the provision were suspended, it was pointed out that the company could, if there were any doubt as to the insured's condition, protect itself. Rights were given to the insurer by another clause in the policy by which it could require proof of the insured's continued disability every sixty days, if necessary.

In attempting to ensure that justice is received by both parties in cases such as the one under comment, it is difficult to avoid adopting the reasoning of the dissentient judgment. Presumably the provision requiring regular care and attendance is for the express purpose of determining when the insured is physically capable of earning his living, so that his injury is not converted into a holiday with pay. If that presumption is correct, it is difficult to appreciate the value of strict adherence to the provision in cases where it is mutually agreed by the parties (or, as was the case with Froelich, was found as a fact by the court) that the insured will never again be physically capable of earning a living.

Section 268 should have been invoked by reason that the regular care and attendance was useless and therefore Froelich should have been successful in the Court of Appeal. However, it is submitted that this was not the only ground upon which the Court should have decided in the plaintiff's favor.

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[14] [1944] 1 D.L.R. 638 at p. 647

[15] Ibid., at p. 643

[16] *Hoffman* v. *Continental Casualty Co.*, (1926), 32 R. de Jur. 230, 23 Can. Abr., 526.

t we assume that the majority was legally correct in disposing of Froelich's gument about the uselessness of compliance with the provision upon the ground that the court would be making a new contract for the parties, then the present situation is not satisfactory. There must be some provision made in these policies to cover expressly contingencies such as permanent disability. In all fairness, it is acknowledged that the insurer does not intend to penalize the insured by the provision as it stands at present. If the company could foresee such a circumstance at the time of entering into the contract with the insured, it is doubtful whether the former would insist upon regular treatment and attendance. Certainly this would be true if ever there was a provision that the insurer was to incur the liability for the insured's expenses in this regard. Be that as it may, the occurrence of total permanent disability is far from impossible, and therefore it is submitted that the provision of regular care and attendance should be altered to provide for such contingencies without penalizing the insured.

We have assumed that the majority was correct in holding that they are unable to rewrite the contract for the parties. Therefore the most feasible method to provide for the necessary alteration is to require the insurer to rewrite the contract. The most satisfactory way to force the insurer to do this is for a court to find fault with the present provision. The most effective means for a court to accomplish this is to declare that the present provision is ambiguous and, by the application of the well-known principle,[17] that it should be construed as against the insurer. It might be thought that this would have been the approach in the *Froelich* case but, on the contrary, the majority held that

> As the words of the provision here in question are precise and unambiguous, they must be construed in their natural and ordinary sense.[18]

In coming to this conclusion, it appears that the majority relied to some extent on the judgment of Rose, C. J. in *Gyles* v. *Mutual Benefit, Health & Accident Assn.*[19] Martin, C.J.S. mentioned that Rose, C.J. was of the opinion that the provisions of the policy in that case were plain and that there was no ambiguity; therefore he dismissed Gyles' claim. It should be noted however (although Martin, C.J.S. apparently did not feel this to be a valid distinction) that the provision in Glyes' policy was that the policy did not cover him while he was not continuously under the care and regular attendance of a physician *at least once a week* beginning with the first treatment. It is submitted that a distinction should have been drawn berween the Gyles provision and the Froelich provision because the time interval constituting regularity of attendance was clearly defined in the former provision. There was no such definition in the Froelich provision.

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[17]See Halsbury, 2nd ed., vol. 18, p. 427, and Corpus Juris, vol. 32, p. 1152

[18]at p. 537.

[19](1940), 7 Ins. L.R. 195

It is submitted that Procter, J.A. took the correct approach:

> I find it very difficult to determine what is meant by the provision 'regular care and attendance of a physician', etc. There is no specified period as there is in many policies providing for attendance in stated periods. Must the [insured] . . . be visited daily, weekly, monthly, or yearly by the physician, surgeon or osteopath in order to comply with the terms in the policy?
>
> I am of the opinion that the clause itself, unexplained as it is, is so vague and indefinite in its requirements that it is unenforceable and cannot provide a defence to the plaintiff's claim under the policy. The clause having been prepared by the defendant should be strictly construed as against it.[20]

Provisions worded such as the one in the Froelich policy should be declared to be ambiguous. This would force the insurance companies to alter these provisions so that they would expressly provide for cases of permanent disability. That would tend to eliminate any injustice of the type that was received by Froelich.

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[20] at p. 536