05/69

SUPREME COURT OF VICTORIA

BABATSIKOS v CAR OWNERS' INSURANCE CO LTD

Pape J

5, 8, 29 September 1969 — [1970] VicRp 37; [1970] VR 297

INSURANCE – MOTOR VEHICLE – POLICY TAKEN OUT BY DRIVER – VEHICLE INVOLVED IN A MOTOR VEHICLE ACCIDENT AND DAMAGED – DRIVER SOUGHT TO BE INDEMNIFIED BY THE INSURANCE COMPANY – INDEMNIFICATION REFUSED ON THE GROUND THAT THE DRIVER DID NOT DISCLOSE SOME MATTERS WHICH WERE MATERIAL TO THE INSURANCE COMPANY – LENGTH OF TIME DRIVER HELD A DRIVER LICENCE – NATURE OF LICENCE – EVIDENCE GIVEN BY OFFICER FROM INSURANCE COMPANY THAT THEY WOULD NOT HAVE INSURED DRIVER IF HE HELD A PROBATIONARY LICENCE – WORDING OF INSURANCE POLICY REFERRED NOT TO A PROBATIONARY LICENCE BUT A PROVISIONAL LICENCE (NSW) AND A LEARNER'S PERMIT – WHETHER COMPANY REQUIRED TO SHOW THAT A PRUDENT INSURER WOULD NOT HAVE INSURED THE DRIVER – WHETHER EXPERT EVIDENCE ADMISSIBLE – NO SUCH EVIDENCE FORTHCOMING – QUESTION OF NON-DISCLOSURE – WHETHER RELEVANT TO THE CLAIM – CLAIM UPHELD BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *INSTRUMENTS ACT* 1958, S25.

HELD: Order nisi discharged.

1. The question the magistrate had to determine was whether the defendant company had satisfied him on a balance of probabilities that the length of time that the complainant had held a licence was a matter that a prudent insurer would have been influenced by in deciding whether to accept the risk or in relation to the premium he would ask had he decided to accept the risk.

2. In relation to the issue of materiality, evidence may be given by the defendant as to its practice. But although such evidence is admissible as part of the circumstances existing at the time of the proposal, it does not of itself establish materiality, although it may assist the tribunal of fact to come to a conclusion on the issue. In truth it goes only part of the way—it at least establishes that the defendant regarded it as material (and so negatives any suggestion that the defendant did not regard it as of importance), but it does not of necessity establish that a prudent insurer would have regarded it as material. But the mere asking of the question would not make the matter material unless it were established that a prudent insurer would so regard it.

3. The Magistrate was entitled to say that he had not been satisfied that materiality had been established. The only evidence on the matter was that of the company's witness, and from the account of his evidence it was seen that he disclaimed any knowledge of the practice of insurance companies generally in relation to the insuring of holders of probationary licences, and was, therefore, unable to say what a prudent insurer's attitude would be. He did not purport to say that the defendant regarded it as material to know how long the proponent had held the licence.

4. Section 25 of the *Instruments Act* 1958 provides that in future cases where it is sought to avoid insurance contracts on the ground of incorrect statements in proposals or other documents, fraud or materiality in fact had to be shown, and that materiality imputed or inferred by contract or by the asking of the question was no longer sufficient.

5. Accordingly, it was open to the Magistrate to find that the burden of the proof of materiality of the non-disclosure of the fact that the driver held a probationary licence had not been discharged and to make an order for the amount claimed.

PAPE J: The result of the judgment I am about to read is that the order nisi will be discharged with costs.

The complainant, Babatsikos, sued the defendant by way of special summons in the Court of Petty Sessions at Melbourne to recover the sum of $591.15 alleged to be payable under a contract of insurance made on 29 July 1968. The policy of insurance was not tendered in evidence, but it would appear that it was a comprehensive motor vehicle insurance policy and not a compulsory third-party policy issued pursuant to s40 of the *Motor Car Act* 1958. The particulars of demand

alleged in para.3 that by a form of proposal dated 21 June 1968 the complainant offered to enter into a contract of insurance with the defendant, and in para.4 that this offer was accepted for and on behalf of the defendant on 29 July 1968. These allegations were specifically admitted by the defendant. It was then alleged in para.5 that on 25 February 1969 the complainant was involved in a motor car collision wherein he suffered loss and damage (namely, the cost of repairs to his motor vehicle) in the sum of $591.15; in para.6 it was alleged that such loss and damage was caused in circumstances which are within the terms of the contract of insurance referred to; and in para.7 it was alleged that in breach of the terms of such contract of insurance the defendant had neglected or refused to indemnify the complainant in respect of the said loss and damage.

The defences as stated by the solicitor for the defendant (apart from the non-admission of the allegation in para.5 and the denial of the allegations in paras 6 and 7 other than the allegation that it had refused to indemnify the complainant) were that it had refused to indemnify the complainant because the complainant made certain misrepresentations and/or non-disclosures in his proposal form which entitled the defendant to avoid the policy and, alternatively, that the defendant was entitled to avoid the policy whether or not the misrepresentations of the complainant were material since the proposal was expressed to form the basis of the contract.

The proposal form which the complainant admitted having signed was tendered in evidence by the defendant during the cross-examination of the complainant. It contained the following questions and answers by the complainant: Question 4 (c) "How long have you held a driver's licence?" Answer: "Three years and four months."

Question 6 (c) "Will any person holding a learner's permit or a provisional licence ever drive the vehicle?" Answer: "No." The proposal concluded with these words:

> "I do hereby declare and warrant that the answers given above are in every respect true and correct, and I have not withheld any information likely to affect the acceptance of this proposal, and I agree that this proposal and declaration shall be the basis of the contract between the company and myself and I further agree to accept the company's policy subject to the terms and conditions to be contained therein."

The complainant's signature followed these words, together with the date, 21 June 1968.

The evidence of the complainant as disclosed in the affidavits in support of the order nisi and in the answering affidavit showed that he was involved in an accident in which his vehicle was damaged on 25 February 1969. It also showed that he had one year and nine months' driving experience in Victoria, but that he had previously driven in Germany for about 15 months, and that although he had never held a driver's licence in Germany, he was not obliged to hold such a licence because (being a foreigner) he was entitled to drive a motor car if he held a social security card which he did hold. He also swore that he had driven a motor car in Greece for about one year as a driver under instruction. He admitted that his answer to question 4(c) was untrue, but he said that he did not fill in the form. No evidence was elicited as to how he came to make a false answer. In fact, it appeared that the form had been filled in by one Paul Rusack, an estate agent who was an agent for the defendant. With regard to question 6(c) the complainant, when asked whether his answer was true, again said: "I did not fill in the form", but he admitted that he held a probationary licence in Victoria which expired on 29 September 1969, and this licence was tendered in evidence.

By virtue of s22B of the *Motor Car Act* 1958 where a licence has been issued to a person for the first time or after such a licence has been cancelled pursuant to that section or s25 it must be issued as a licence on probation, and by virtue of s22(6)such a licence remains in force for three years. Since this licence expired on 29 September 1969 it must have been issued on 29 September 1966 and so had been in force for one year and nine months at the date of the proposal. There is no provision in Victoria for the issue of a learner's permit or a provisional licence. It should be noted that question 6(c) related to a learner's permit and to a provisional licence, and not to a licence on probation.

The form of the question was explained by counsel as being due to the fact that the defendant company was incorporated in New South Wales, where there is provision for the issue of provisional licences to applicants who have not previously held a licence for a period of 12

months in New South Wales. Such licences are issued for 12 months and contain conditions, one of which is that the driver shall not drive at a speed in excess of 40 miles per hour. The regulations also provide for the issue of a learner's permit: see *Motor Traffic Regulations* 1936-1968, reg7(2), reg10(3) and reg12 and see also Leslie and Butts, *Motor Vehicle Law in New South Wales*, 3rd ed. (1969), pp252 and 254.

Apart from expert evidence regarding the cost of repairs and the pre-accident market value of the car and its salvage value, this was the only evidence called on behalf of the complainant.

The case for the defendant was supported by the evidence of Frank William Van De Graaf, the assistant claims manager of Fire and All Risks Insurance Company Limited of which the defendant company was a subsidiary. This evidence was said to be directed to the materiality of the answers to questions 4(c) and 6(c). He said that he had been employed in the insurance business for five years, and that he was not aware of the practice of insurance companies generally in relation to the insuring of holders of probationary licences. He did, however, say that the practice of his company was that it would not insure persons holding probationary licences at all. He was asked whether his company would have been affected by the other evidence which had been given, and he said "no". I am by no means sure that I understand what this question referred to, but counsel agreed that it meant whether his company would have been prepared to insure the complainant knowing that he held only a licence on probation if they had known that he had held that licence for one year and nine months, had driven in Germany for about one year and three months, and had driven for about one year in Greece as a learner. He said that the reason why his company would not insure holders of probationary licences was that it inferred that such drivers were not very experienced, and that even if a holder of a probationary licence was experienced, his company would still not accept a proposal from him. He said that the lack of driving experience was the only reason why the company would not insure holders of probationary licences—that there was nothing about the probationary licence itself which was objectionable—it was simply the inference drawn. He also said that provided there were no other grounds of objection his company would insure a person who had no more driving experience than the complainant provided he did not hold a probationary licence. He agreed that there were no provisional licences operating in Victoria, and that the proposal form was designed for New South Wales. He said he was aware that provisional licences in New South Wales were effective for 12 months only.

The solicitor for the defendant submitted that when the answer to question 4(c) was taken along with the answer to question 6(c) there was a clear attempt by the complainant to lead the defendant to believe that he was not the holder of a probationary licence, as he stated that he had held a licence for a time greater than that for which he would be required to hold a probationary licence. It was further submitted that even if it be held that the answer to question 6(c) was a truthful answer, the complainant was still under a duty to disclose matters which would affect the mind of a prudent insurer, and he had failed to disclose that he was a holder of a probationary licence. It was submitted that on the evidence the magistrate ought to find that the misrepresentations or the non-disclosures were material, and that even if he found they were not the defendant was entitled to succeed because the proposal contained a statement that the proposal and declaration should be the basis of the contract.

Counsel for the complainant submitted that the common law position in relation to statements in a proposal which were stated to be the basis of the contract had been modified by s25 of the *Instruments Act* 1958—that question 6(c) had been answered truthfully and that the misrepresentation resulting from the answer to question 4(c) had not been shown to be material, because it was for the defendant to prove materiality by evidence as to the general practice of insurers and the only evidence was confined to the practice of the defendant company in relation to holders of probationary licences. The onus of proof of materiality being on the defendant, such onus had not been discharged.

The Stipendiary Magistrate gave the following reasons for judgment: "I have to consider only two questions here, that is question 6(c) – will any person holding a learner's permit or a provisional licence ever drive this vehicle? I hold that the complainant is not the holder of a provisional licence and would not hold a provisional licence in other States. The next question is question 4(c) – how long have you held a driver's licence? The answer given was three years and four months—but

the defendant in fact had only held the licence for one year and nine months. On the authority which has been cited to me on behalf of the complainant (*Godfrey v Brittanic Assurance Co Ltd* [1963] 2 Lloyd's Rep 515) it is for the defendant to show that the representation was material, and upon the evidence before me I am not prepared to say that the insurance company has discharged this burden. There will, therefore, be an order in favour of the complainant." After argument the amount of the order was fixed at $591.15 the cost of repair.

On 5 June 1969 Master Jacobs granted an order nisi to review this decision on the following grounds:–

> (1) That the magistrate was in error in holding that the onus was upon the defendant to adduce evidence to show that the misrepresentation constituted by the complainant's answer to question 4(c) was material.
>
> (2) That the magistrate should have formed his own opinion of the materiality of the said representation irrespective of whether any evidence was given at all as to such materiality.
>
> (3) That even if there was such an onus upon the defendant upon the evidence given to the magistrate he was bound to have found that the said representation was material.
>
> (4) That the magistrate ought to have found that the failure by the complainant to disclose the fact that he was the holder of a probationary licence amounted to a non-disclosure of a material fact sufficient to entitle the defendant to avoid the contract of insurance.
>
> (5) That the magistrate was in error in holding that the complainant was entitled to recover more than the difference between the pre-accident value of the complainant's vehicle and the salvage value thereon.

It is to be observed that no ground in the order nisi is directed to question 6(c) and Mr Merralls (who appeared for the defendant to move the order absolute) specifically stated that he accepted the magistrate's finding that question 6(c) was answered correctly.

I can dispose of ground 5 at once. Mr Merralls addressed an argument to me based upon the recent decision of Newton J in *Jansen v Dewhurst* [1969] VicRp 53; [1969] VR 421. But in the course of his argument I pointed out to him that that was a decision in an action of tort, whereas in this case the cause of action was in contract, and there was no evidence as to the terms of the contract sued upon, for the policy of insurance which would show what the defendant had contracted to do was not put in evidence and was not before the Court. Subsequently, Mr Merralls told me that he would not seek to sustain this ground and I, therefore, say no more about it.

Grounds 1 and 2 I think ought to be considered together. Ground 1, I think, proceeds upon a misunderstanding of what the Stipendiary Magistrate said in giving his reasons for judgment. It assumes that he held that there was an onus on the defendant to prove that the misrepresentation contained in the answer was material, and that he then held that this onus could be discharged only if the defendant adduced evidence of materiality. I do not think the Stipendiary Magistrate so held. What he did hold was that it was for the defendant to show that the representation was material, and that upon the evidence before him he was not prepared to say that this burden had been discharged. There can be no doubt that the burden of proving materiality was on the defendant: *Instruments Act* 1958 s25; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, per Viscount Finlay at p429; [1922] All ER Rep 88; [1922] SC (HL) 156; *Godfrey v Brittanic Assurance Co Ltd* [1963] 2 Lloyd's Rep 515, per Roskill J at p518; *Davies v National Fire and Marine Insurance Co* [1891] AC 485, per Lord Hobhouse at p489; *Dalgety and Co Ltd v AMP Society* [1908] VicLawRp 70; [1908] VLR 481, per Cussen J at p497; 14 ALR 299; Preston and Colinvau, 2nd ed., p89; McGillivray, 5th ed., vol. 1, paras 810, 819 and 920. I did not understand Mr Merralls to contest this proposition.

But the magistrate did not hold that materiality could only be established if the defendant adduced evidence on that issue. Evidence having in fact been adduced the magistrate was bound to give consideration to it and assign to it such weight as he thought proper. But, as I shall subsequently show, the defendant was not required to adduce evidence, for some circumstances are so obviously material and some are so obviously not material that evidence would be superfluous. But there are other circumstances which involve questions of novelty or doubt, and if a defendant does not call evidence to show that such circumstances would be regarded as material by a

prudent insurer, or if the evidence which is called is insufficient to satisfy the tribunal that those representations were material and the tribunal is unable to feel satisfied that they were material, then the burden of proof has not been sustained. The magistrate did not say that materiality could only be established if the defendant called evidence which satisfied him of the materiality.

Ground 2 which was that "The magistrate should have formed his own opinion of the materiality of the said representation irrespective of whether any evidence was given at all as to such materiality" is allied to the first ground and seems to suggest that the magistrate was bound to ignore any evidence given by or on behalf of the defendant and act upon his own opinion. I cannot believe that this is what was intended, for such evidence as there was was led by the defendant and was relied upon by it. Such a proposition could, of course, not be sustained. What I think the ground means is that since the magistrate said that upon the evidence before him he was not satisfied that the defendant had discharged the burden of proving materiality, he must be taken as having failed to apply his own mind to the question. I do not think on a fair reading of his reasons for judgment this was the case. It is true that he did not say: "The evidence of the witness, De Graaf, has not satisfied me that this matter was material, and since I am unable to say for myself whether the question would have been regarded as material by a prudent underwriter, I hold that the defendant has not discharged the burden of proof". But in my view this is the true effect of what he said.

I do not think that it can be maintained that when the magistrate said "It is for the defendant to show that the representation was material and upon the evidence before me I am not prepared to say that the insurance company has discharged that burden", he was intending merely to say that he was not prepared to act on De Graaf's evidence without having turned his own mind to the question. What he meant to convey by his words was that the evidence given did not convince him that the matter would have been material to a prudent insurer, and that in these circumstances he himself was not satisfied that it was material. That is a view which, in my opinion, was quite open to him having regard to the fact that the answer to this question was not self evident or obvious and to the deficiencies in the evidence which was led by the defendant ostensibly to assist him to arrive at an informed judgment. I think, therefore, that neither ground 1 nor ground 2 is made out.

But since these grounds have a bearing on the admissibility and effect of expert evidence in insurance cases, and since Mr Duggan (who appeared for the complainant to show cause) argued that since there was no evidence of the general practice of insurance the magistrate (unless he was able to determine the question of materiality for himself) must decide the issue against the defendant, it is desirable at this juncture to say something with regard to the admission of expert evidence in cases such as this. A clear understanding of the role of such evidence will materially assist in the determination of the real issues involved.

It has frequently been held that there is no difference between the law relating to marine insurance and the law relating to other types of insurance upon the question of materiality. In *Arnould on Marine Insurance*, 15th ed., (vol. 10 in the *British Shipping Laws* series) it is said at para. 578:

> "Whether a particular representation be material or not is, in each case, a question of fact; a question which formerly fell exclusively within the province of a jury. Whether the court, in forming its judgment on this point is to be left to draw its conclusions simply from the facts, or to be aided by the expert advice of underwriters, insurance brokers and merchants, is a point on which the authorities were formerly not agreed, but it is now settled practice to admit such evidence."

The earlier authorities are referred to in *Arnould*, 10th ed. (1921) vol. 1. para. 626, and the nature of the problem is there said to have been "whether the jury in forming their judgment upon the materiality of the facts concealed may be assisted by the evidence of skilled witnesses such as brokers, underwriters, etc. called to give their opinion whether the fact in their judgment was one which, if communicated to a prudent underwriter, would be likely materially to influence him in his estimate of the risk."

The "settled practice" to which *Arnould* refers in the 15th edition is exemplified by such comparatively modern cases as

(1) *Scottish Shire Line Ltd v London and Provincial Insurance Co Ltd* [1912] 3 KB 51, where Hamilton J (as Lord Sumner then was), said at p70:

> "There has been a discussion as to how far concealment is a matter of law, and how far it is a matter of fact, but it is well settled now that evidence is admissible on the subject; and unless I can be satisfied, as a matter of law, that the point in question could not be material, it is a matter upon which I must be guided by the evidence as to whether it was material to a reasonable underwriter, with a view either to his taking the risk, or to the premium he would charge for taking it."

(2) *Yorke v Yorkshire Insurance Co Ltd* [1918] 1 KB 662, at pp669, 670; [1918-19] All ER Rep 877, where McCardie J said:

> "the defendant's counsel asked questions (which I allowed) directed to two points, namely, (a) whether it was material for an insurance company to know of a veronal habit or of insomnia trouble on the part of the proposer and (b) whether or not the illness of 1911 should be regarded as one of consequence. Counsel for the plaintiff objected to these questions, but in my opinion they were admissible. The view of the Courts as to expert evidence in insurance cases seems to have developed. In the days of Lord Mansfield such evidence was apparently regarded as irrelevant: see eg *Carter v Boehm* (1766) 3 Burr 1905; [1558-1774] All ER Rep 183. But the views of 150 years ago have been modified by the broader outlook of later judges, and by a clearer realization of the utility of expert testimony as an aid to the administration of justice....Expert evidence with respect to the materiality of a fact has been freely admitted in recent years by the experienced judges who have administered and are now administering justice in the Commercial Court. The practice I conceive is settled: see per Matthew J in *Herring v Janson* (1895) 1 Com Cas 177, at p179; *Arnould on Marine Insurance*, 9th ed., s626; per Hamilton J in *Scottish Shire Line v London etc Insurance Co Ltd* [1912] 3 KB 51, at p70; see also *Associated Oil Carriers Ltd v Union Assurance Society of Canton Ltd* [1917] 2 KB 184, per Atkin J, which is also well reported as to the evidence in 33 TLR 328. I conceive that no sound distinction can be drawn between cases of marine insurance as distinct from life, fire or other heads of insurance business....Expert evidence may frequently afford great assistance to the court upon questions of novelty or doubt. If excluded, it would deprive the court of the power of ascertaining those considerations and views which a tribunal may well require to know, and the insurance witness would be stricken with absolute silence upon matters of vital importance. Judges are always free to test and revise any form of expert testimony.

In this case, which was a life insurance case, his Lordship admitted opinion evidence not of those skilled in insurance, but of medical men who were, he thought, more competent to express opinions on materiality in connexion with the risks involved in life assurance cases than the directors of life insurance companies.

(3) *Horne v Poland* [1922] 2 KB 364; [1922] All ER Rep 551, where the question was whether it was material in a contract of insurance against burglary for the underwriter to be informed that the proponent was a foreigner. Lush J at (KB) p365, said:

> "The evidence of the underwriters on that question amounted to this; that underwriters would not accept the proposal of an alien for insurance as satisfactory. One or two of the witnesses said that they did not and would not insure aliens. I am doubtful whether evidence of what individual witnesses would do was admissible, but it was not objected to. But, apart from that evidence, I think that in the circumstances of this case the fact was material."

In the report of this case in the Law Times Reports (127 LT (NS) 242, at p243) his Lordship is reported as saying that although he felt some doubt as to whether the evidence of what a witness himself would do was admissible, evidence of the practice of underwriters in such cases was admissible.

(4) *Glicksman v Lancashire and General Assurance Co Ltd* [1925] 2 KB 593, at p609, where Scrutton, LJ, said:

> "There remain two other points which were argued...(1) that before a court can find that a fact is material, somebody must give evidence of the materiality. That is entirely contrary to the whole course of insurance litigation; it is so far contrary that it is frequently objected that a party is not entitled to call other people to say that they think it is material; that is a matter for the court on the nature of the facts. I entirely agree with Roche J (the trial judge) that the nature of the facts may be such that you do not need anybody to come and say, This is material. If a shipowner desiring to insure his ship for the month of January knew that in that month she was heavily damaged in

> a storm, it would, with deference to counsel who has suggested the opposite, be ridiculous to call evidence of the materiality of that fact; the fact speaks for itself." See also per Sargant LJ at p611, where his Lordship refers to the fact that it has for many years been considered an essential element in estimating the risk to know what the estimation of other persons in the same class of business has been with regard to that risk."

(5) *Regina Fur Co Ltd v Bossom* [1957] 2 Lloyd's Rep 466, per Pearson J at p484, affirmed [1958] 2 Lloyd's Rep 425.

The matter has received some consideration in Australia. In *Hanley v Pacific Fire and Marine Insurance Co* (1893) 14 LR (NSW) (L) 224 (a case on a policy of fire insurance), a manager of an insurance company called as a witness for the defence was asked: "Is it a material matter for an insurance company to know whether a person proposing for insurance has previously had a fire on his premises?", and the trial judge disallowed it. Darley CJ considered that the question should have been allowed, and he referred to the conflicting decisions which were set out in *Arnould* 3rd ed, at p548. Windeyer J at p232 said:

> "I also agree with the Chief Justice in thinking that it is a most material thing for the company to be informed whether a proposer has had the misfortune to be subject to previous fires. As to the admissibility of evidence of the materiality of that fact I think that the argument of Lord Tenterden in *Rickards v Murdock* [1830] EngR 176; 109 ER 546; (1830) 10 B and C 527, at p540: [1830] EngR 176; 109 ER 546, at p552, is unanswerable. His Lordship says: 'I know not how the materiality of any matter is to be ascertained but by the evidence of persons conversant with the subject matter of the enquiry. If such evidence is rejected, the Court and jury must decide the point according to their own judgment, unassisted by the others'."

Further, in *Dalgety and Co Ltd v AMP Society* [1908] VicLawRp 70; [1908] VLR 481, at p512; 14 ALR 299, at p311 (a life assurance case), Cussen J said:

> "I doubt whether the members of the assessment committee or the chairman of the Board [of the defendant company] should have been permitted to state in effect that the nondisclosure or concealment by Howe [the assured] was, in their opinion, material to the risk, or would have influenced their action, or that the practice of their office was to regard such a fact as material, though perhaps they might have stated the practice of insurance offices generally. The matter is, however, of no importance, as I have no hesitation as a juryman in saying that, apart altogether from this evidence, I should have found the fact not disclosed to be a most material one."

In *McGillivray*, 5th ed., vol. 1, para. 899, it is said:

> "In marine insurance cases the court is constantly assisted by the evidence of underwriters as to the practice of underwriters in giving consideration to any particular facts and circumstances. It was at one time much doubted whether such evidence was admissible, but now it is commonly received without objection; and in cases of life, fire and other insurances, similar evidence when appropriate would doubtless be received. But because expert evidence of the materiality of certain facts may be admissible, it by no means follows that such evidence is required or would be admitted in every case. Some facts are so obviously material and other facts are so obviously immaterial that the court would decline to hear evidence to the contrary. It is only when the matter is not obvious one way or another that evidence is necessary or admissible...Where evidence is admitted it must be directed to the general practice of insurers as a class, and evidence of insurers which is confined to an expression of opinion as to what they would do is probably inadmissible."

For this last proposition *Horne v Poland*, *supra*, is cited. In *Halsbury*, 3rd ed., vol. 22, para. 360 on p188 it is said that "the materiality of a particular fact...is a question of fact. It may nevertheless be necessary or advisable to have evidence of experts as to insurance practice, seeing the test hinges on whether the representation is of such a nature as to influence the judgment of a prudent insurer, not on whether the representation influenced the particular insurer looking at the proposal. In many cases the fact speaks for itself and no such evidence is required. Materiality is not, however, a question of belief or opinion tested subjectively", and for that proposition is cited *Anderson v Fitzgerald* [1853] EngR 872; (1853) 4 HL Cas 484; 10 ER 551; *Hoare v Bremridge* (1872) 8 Ch App 22; *Morrison v Muspratt* [1827] EngR 265; (1827) 4 Bing 60; 130 ER 690, and *Lindenau v Desborough* (1828) 8 B and C 586, at p592; [1828] EngR 852; 108 ER 1160; [1824-34] All ER Rep 117. I find some difficulty in seeing that any of the cases cited in support of the last proposition establish it.

It would thus appear that such evidence is admissible, but is not essential, unless the question of materiality is not obvious to the tribunal, in which case if no evidence is called the defendant may be held liable because he has not discharged the burden of proof. This is made plain by what was said by Scrutton J,in *Glasgow Assurance Corporation v Symondson and Co* (1910) 16 Com Cas 109, where at p119 his Lordship said:

> "Although in recent practice evidence has frequently been admitted of underwriters to state whether in their opinion certain facts would influence the judgment of a prudent assurer, no such evidence was tendered by either party in this case. I am, therefore, left to form my own judgment on the question from such knowledge as I have of insurance matters."

But although the cases establish that the evidence of experts other than the parties may be given, it is less clear that the insurer himself, or if it be a company, the officers of the company, are entitled to give evidence as to the practice of the insurer in regard to a particular class of risk, for the question is (as is pointed out in the passage from *Halsbury* to which I have just referred) not what the particular insurer would regard as material, but what a prudent insurer would so regard and it does not always follow that a particular insurer is necessarily a prudent insurer. There would seem to be little doubt that an officer of a defendant company (if he were qualified to do so) could give evidence of the general practice of other insurers, and in *Dalgety and Co Ltd v AMP Society*, *supra*, Cussen J was disposed to think that he could. But the learned judge thought that such officers of a defendant ought not be allowed to state that a particular representation or nondisclosure by the assured was material to the risk they were invited to insure against. Nevertheless, there are statements in Australian cases which support the view that they may do so. In *Guardian Assurance Co Ltd v Condogianis* [1919] HCA 33; (1919) 26 CLR 231, at p245; 25 ALR 185, Isaacs J (in a dissenting judgment), said:

> "It is to be noted that... no witness is called from the Guardian Assurance Company to say either that they had no actual knowledge of the fact, (that there had been an earlier fire) or that it was the practice of that company to attach importance to such fires, or that the company was induced as alleged, to issue the policy by its ignorance of that fact. No doubt it is not incumbent on the Company to prove as a matter of law that it was so induced, but in the circumstances the defendant's complete absence from the witness-box weighs with me upon the question of what a reasonable assurance company might have done in the circumstances of the case."

In *Western Australian Insurance Co Ltd v Dayton* [1924] HCA 58; (1924) 35 CLR 355, at p379; [1924] VicLawRp 24; 30 ALR 106, Isaacs, ACJ (with whom Gavan Duffy J agreed), said:

> "As to materiality, that is always a question of fact, dependent on 'all the circumstances at the time the contract was made.' See *Carter v Boehm*, *supra.* The test of materiality is whether in view of 'all the circumstances at the time' which include, of course, the full circumstances of the fact undisclosed, that fact would have influenced the company as a prudent insurer in fixing the premium or in determining to accept the risk. But it must not be forgotten that 'the circumstances' include the knowledge, the practice and the proved conduct of the insurer. If for instance, it were the known practice of a company to disregard a certain class of facts, the non-disclosure of such a fact would not *prima facie qua* that company be material, however it might be with regard to another company."

See also *Saunders v Queensland Insurance Co Ltd* [1931] HCA 42; (1931) 45 CLR 557, per Evatt, J at p571; [1932] 38 ALR 60, and *Godfrey v Brittanic Assurance Co Ltd*, *supra*, where Roskill J permitted an officer of the defendant company to give evidence as to its practice.

These cases seem to establish that upon the issue of materiality evidence may be given by the defendant as to its practice. But although such evidence is admissible as part of the circumstances existing at the time of the proposal, it does not of itself establish materiality, although it may assist the tribunal of fact to come to a conclusion on the issue. In truth it goes only part of the way—it at least establishes that the defendant regarded it as material (and so negatives any suggestion that the defendant did not regard it as of importance), but it does not of necessity establish that a prudent insurer would have regarded it as material. It is conceivable that a particular insurance company may decide as a matter of policy not to insure proponents of a certain religion or faith, and so regard it as material to be informed by the answer to a question in the proposal of the religion of the proponent. But the mere asking of the question would not make the matter material unless it were established that a prudent insurer would so regard it. *Prima facie* such a matter would not be material, but evidence might show that it was material

and could be so regarded by a prudent insurer, as might be the case if the intended insurance was against fire and the subject matter of the insurance within an area where religious dissension had caused rioting and arson.

I turn, therefore, to ground 3, which attacks the magistrate's finding that although the answer to question 4(c) was false, nevertheless, he was not satisfied that it was material to the risk.

In considering ground 3 (which relates solely to the complainant's answer to question 4(c) in the proposal) it is first of all necessary to examine the effect of s25 of the *Instruments Act* 1958. That section was first enacted by s2(1) of the *Instruments (Insurance Contracts) Act* 1936 (No. 4464). It reads as follows:

> "No contract of insurance (other than a contract of life insurance) shall be avoided by reason only of any incorrect statement made by the proponent in any proposal or other document on the faith of which such contract was entered into revived or renewed by the insurer unless the statement so made was fraudulently untrue or material in relation to the risk of the insurer under the contract."

It is to be observed that this section is confined to statements made by the proponent in any proposal or other document, and has thus no application to questions of nondisclosure unless the nondisclosure renders the statement untrue: cf. *Guardian Assurance Co Ltd v Condogianis* [1919] HCA 33; (1919) 26 CLR 231; 25 ALR 185, and on appeal *sub nom Condogianis v Guardian Assurance Co Ltd* [1921] UKPCHCA 1; (1921) 29 CLR 341; 27 ALR 238; [1921] 2 AC 125. It is not easy at first reading of this section to ascertain what the legislature had in mind in enacting it for (apart from cases of nondisclosure) before the passing of the Act contracts of insurance could only be avoided if a false representation was made fraudulently or if made innocently, it was material to the risk. In *Dawsons Ltd v Bonnin* [1922] 2 AC 413, at p422; [1922] All ER Rep 88, Viscount Haldane said:

> "In England it was always possible to set aside a contract for misrepresentation, but the representation, although sufficient for the jurisdiction, even though perfectly innocent, had to be material. Moreover, at common law it was no defence to an action on a contract that there had been misrepresentation, unless the misrepresentation were fraudulent or of a recklessness analogous to fraud."

It cannot be assumed that in enacting this section the legislature intended merely to restate the common law relating to misrepresentations. What then was its object? I think that what the legislature was directing its mind to was the class of case where in the proposals for insurance or the policy the proponent warranted the truth of his answers to the questions put to him and the statements made therein and agreed that the answers or the statements were to be basis of the contract. Where the proponent made his answers or statements part of the contract it was a matter of no consequence whether they were material or not: MacGillivray, 5th ed., vol. 1, p385 para. 794. In *Thomson v Wasms* (1884) 9 AC 671, Lord Blackburn said, at p683:

> "It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material."

In *Glicksman v Lancashire and General Assurance Co* [1927] AC 139, Viscount Dunedin said, at p143:

> "A contract of insurance is denominated a contract *uberrimae fidei*. It is possible for persons to stipulate that answers to certain questions shall be the basis of the insurance, and if that is done then there is no question as to materiality left, because the persons have contracted that there should be materiality in those questions; but quite apart from that, and alongside of that, there is the duty of no concealment of any consideration which would affect the mind of the ordinary prudent man in accepting the risk."

See also: *Anderson v Fitzgerald* [1853] EngR 872; (1853) 4 HL Cas 484; 10 ER 551; *Condogianis v Guardian Assurance Co* [1921] 2 AC 125, at p129; *Schoolman v Hall* [1951] 1

Lloyd's Rep 139, at p142; *Mackay v London General Insurance Co Ltd* (1935) 51 Lloyd's LR 201, and *Graham v Wright* (1872) 3 VR (L) 79.

The point is well illustrated by *Dawsons Ltd v Bonnin*, *supra*, where although a statement as to where a motor vehicle would usually be garaged was held to be immaterial, nevertheless the policy was avoided because it provided that the proposal should be the basis of the contract. A similar result followed in *Mackay v London and General Insurance Co Ltd*, *supra*.

It has further been held that the mere fact that a question is asked about certain matters in the proposal is some evidence of the materiality of that matter: *Glicksman v Lancashire and General Assurance Co*, *supra*, at p144, *Saunders v Queensland Insurance Co Ltd* [1931] HCA 42; (1931) 45 CLR 557, per Evatt J, p571; [1932] ALR 60. Where the parties have agreed that the proposal is to be the basis of the contract (as is the case here) and where questions are asked in a proposal form even if there be no agreement that the proposal is to be the basis of the contract, the result under the law existing before this section was passed was that what I might call "constructive materiality" was or might be established—it was established by the agreement of the parties, if the proposal was made the basis of the contract, and it might by the asking of a question tend to show that the matter was material if there were no such provisions.

In my view, what s25 was designed to do was to abrogate these principles, and to provide that in future cases where it is sought to avoid insurance contracts on the ground of incorrect statements in proposals or other documents, fraud or materiality in fact had to be shown, and that materiality imputed or inferred by contract or by the asking of the question was no longer sufficient. Support for this construction of the section, is I think, to be obtained from the decision of the Judicial Committee of the Privy Council in *Mutual Life Insurance Co of New York v Ontario Metal Products Co Ltd* [1925] AC 344. That case involved the consideration of s156 of the *Ontario Insurance Act* 1914 which provided in subs(3) that "The proposals or application of the assured shall not as against him be deemed a part of or considered with the contract of insurance except insofar as the Court may determine that it contains a material misrepresentation by which the insurer was induced to enter into the contract"; in subs(4) it was provided that "No contract shall be avoided by reason of the inaccuracy of any such statement unless it is material to the contract"; and in subs6 it was provided that "The question of materiality in any contract of insurance shall be a question of fact for the jury or for the Court if there is no jury". The assured was found to have incorrectly answered a question in a proposal for life insurance asking for the names of any physician he had consulted in the last five years. Lord Salvesen in his judgment pointed out at p349 that "this finding would have been conclusive against the assignees of the assured had the policy been in the same form as that which was considered in *Dawsons Ltd v Bonnin*, *supra*, (where the proposal was made the basis of the contract)" and then, after setting out the provisions of the Ontario Act, said at p350:

> "These provisions, read together may be taken to lay down in unmistakable language (1) that no policy shall be avoided by reason merely of any misrepresentation or inaccuracy in a statement made by the insured in the application form, whatever the terms of the policy might otherwise import and (2) that any misrepresentation which may avoid the contract must be misrepresentation of a fact and must be material to the contract."

On p351, in the course of discussing the arguments which had been put to the Board on the test of materiality, his Lordship said:

> "On the other hand, it was argued that the test of materiality is to be determined by reference to the question; that the Insurance Company had by putting the questions shown that it was important for them to know whether the proposer had been in the hands of a medical man within five years of his application, and, if so, to have had the opportunity of interviewing such medical man before accepting the risk. The question was, therefore, they contended, a material one and failure to answer it truthfully avoids the contract. Now if this were the true test to be applied there would be no appreciable difference between a policy of insurance subject to s156 of the Ontario Insurance Act and one in the form hitherto usual in the United Kingdom. All of the question may be presumed to be of importance to the insurer who causes them to be put, and any inaccuracy, however unimportant in the answers would, in this view, avoid the policy."

I, therefore, am of opinion that neither the provision in the proposal making it the basis of the contract, nor the fact that a question was asked, are relevant matters to be considered

in deciding the question of materiality, and that this must be treated as question of fact for the magistrate to determine having regard to all the circumstances disclosed in the evidence.

What then is the test of materiality? Mr Merralls argued that it was whether a prudent insurer would have been influenced in his acceptance of the risk or in his assessment of the premium had the question been answered correctly. Mr Duggan, who appeared to show cause, was disposed to suggest that the test was whether a reasonable proponent would, having regard to all the circumstances, consider the matter material.

In my opinion the test propounded by Mr Merralls is the correct test. I think the position is correctly set out in Preston and Colinvaux's *Law of Insurance*, 2nd ed., at pp89, 90. The learned authors there say:

> "Everything is material which will guide a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions. In determining the question whether a particular fact is one which ought to be disclosed, the test to be applied is not what the assured thinks, nor even what the insurers think, but whether a prudent and experienced insurer would be influenced in his judgment if he knew of it. There are *dicta* to suggest that the test is 'What would a reasonable assured consider material'?" (and the authors there set out the cases where this has been said, and continue:) "but s18(2) of the *Marine Insurance Act* 1906 (24(2) of the Commonwealth *Marine Insurance Act* 1909) adopts the test of the judgment of a prudent insurer, and since marine and non-marine insurance law is identical in this respect, this test may be regarded as the proper one....It does not matter whether the omission to communicate a material fact arises from intention, or indifference, or mistake, provided the assured knew of the fact in question. What is regarded as material by the 'more experienced and intelligent insurers' carrying on the business in question at the time is what matters, and the general practice of insurers is relevant in this respect."

It has sometimes been said in Australian cases that the test is what a reasonable assured would consider material: see for example per Isaacs J in *Guardian Assurance Co Ltd v Condogianis* [1919] HCA 33; (1919) 26 CLR 231, at p246; 25 ALR 185; and recently Megaw J in *Anglo-African Merchants v Bayley* [1969] 2 WLR 686, at p691; [1969] 2 All ER 421, suggested that such might be the case, although he admitted that the position might be more favourable to insurers than as he had stated. Cussen J, on the other hand, in *Dalgety and Co v AMP Society* [1908] VicLawRp 70; [1908] VLR 481; 14 ALR 299, adopted the prudent insurer test (see at VLR p500).

But I think the position is determined for Australian courts by the judgment of the Judicial Committee of the Privy Council in *Mutual Life Insurance Co of New York v Ontario Metal Products Co Ltd* [1924] AC 344, which is binding upon me, for in that case Lord Salvesen at pp350, 351 said:

> "The main difference of judicial opinion centres around the question what is the test of materiality? Mignault J (in the Supreme Court of Canada from which the appeal came) thought that the test is not what the insurers would have done but for the misrepresentation or concealment, but 'what any reasonable man would have considered material to tell them when question were put to the insurer.' Their Lordships are unable to assent to this definition."

It would thus appear that the Judicial Committee rejected the test suggested by Mr Duggan. Furthermore, in *Saunders v Queensland Insurance Co Ltd* [1931] HCA 42; (1931) 45 CLR 557, at p563; [1932] ALR 60, Starke J said:

> "It is an absolute duty at common law on the part of a person proposing assurance to disclose all facts within his knowledge material to the risk."

The question the magistrate had to determine was thus, whether the defendant had satisfied him on a balance of probabilities that the length of time that the complainant had held a licence was a matter that a prudent insurer would have been influenced by in deciding whether to accept the risk or in relation to the premium he would ask had he decided to accept the risk. This, as the cases cited show (particularly *Western Australian Insurance Co v Dayton*, *supra*), was entirely a question of fact for the magistrate to decide, and the decision of the Full Court in *Taylor v Armour and Co Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232, shows that on an order to review the Court should accept his finding unless it was a finding which the magistrate as a reasonable man could not have arrived at (see at p351). Where the burden of establishing

as issue is on the defendant it is not an easy matter to show that the magistrate is bound, as ground 3 asserts that he was, to say that such burden has been discharged.

In my view the magistrate was not bound by the evidence to decide that this matter was material to the risk. He first of all held that the complainant's answer to question 4(c) was false, in that he said that he had held a licence for three years and four months, whereas the magistrate found that he had held such a licence for only one year and nine months. Mr Duggan made a valiant effort to induce me to say that the magistrate's finding was wrong. He contended that as a matter of construction question 4(c) was not directed to the period of time during which the complainant had held a licence in Victoria, but that it comprehend the period of time during which the complainant held a licence in any country. I am disposed to agree with this contention, and Mr Merralls did not contend for a more restricted interpretation. There is, I think, with respect, much force in the observation of Lord Atkinson, in the House of Lords in *Glicksman's Case* [1927] AC 139, at p144 that

> "it is a lamentable thing that insurance companies will abstain from shaping the questions they put to intending insurers in clear and unambiguous language".

Since the question was framed by the defendant it must be construed "contra proferentem".

But Mr Duggan then went on to argue that the word "licence" should be construed in the sense referred to in *Thomas v Sorrell* (1673) Vaugh 330; [1558-1774] All ER Rep 107, namely, as something which makes an act lawful which without it would have been unlawful. He contended that the possession by the complainant of the social security card in Germany for about a year and three months was equivalent in these circumstances to the holding of a licence to drive, and that the answer to question 4(c) was correct, for the period of the complainant's driving in Germany was said to have been "about 15 months".

But I do not think that a licence to drive a motor car issued pursuant to some statutory requirement can be equated to the mere grant of a permission to do an act otherwise unlawful: cf *Banks v Transport Regulations Board (Vic)* [1968] HCA 23; (1968) 199 CLR 222; (1968) 42 ALJR 64, per Barwick CJ at p67; [1968] HCA 23; [1968] ALR 445. This question must receive a reasonable interpretation, having regard to the nature of the transaction which is contemplated, and I think that the word "licence" in a proposal for a motor car policy imports the holding of a document or other authority which specifically confers the right to drive a motor car on the holder. Were this not so an unlicensed person who was learning to drive a motor car would have to be said to have held a licence whilst driving in the circumstances mentioned in s23 of the *Motor Car Act*. I am, therefore, not prepared to accept Mr Duggan's argument on this point, and I am of opinion that the magistrate's finding that the complainant had held a licence for only one year and nine months must be accepted. There was, therefore, a clear misrepresentation by the complainant.

Mr Merralls argued that the answer to question 4(c) showed as a necessary consequence that the plaintiff was asserting that he did not hold a probationary licence because such licences are for a term of three years only unless the proponent had earlier held a probationary licence which had been cancelled, and that the answers to questions 8(d) and 8(e), in which the complainant said he had never been reported or convicted of a traffic offence other than the parking offence and had never had a licence cancelled or suspended, made it plain that he was asserting that he was not the holder of a probationary licence. He further argued that the defendant's evidence showed that it was material to the risk for the defendant to know if the proponent held a probationary licence.

But in considering the materiality of the representation it must not be overlooked that the representation with which we are now concerned related to the period of time during which the complainant had held a licence to drive, and not to whether he held a probationary licence. What is said to be a material fact is that the complainant did not disclose that he had held a licence for only one year and nine months. But the defendant's evidence disclosed that it was not directly interested in this matter, but only in the question whether he had a probationary licence. In these circumstances, I think the magistrate was justified in taking the view that the complainant did not misrepresent a material fact, but misrepresented something which, had it been correctly stated, would have enabled the defendant to ascertain what it contends was a material fact, namely, that

he held a probationary licence, for a true answer would have put the defendant on enquiry as to the nature of the licence which the complainant held: see *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863, per Buckley LJ at p897; and *Guardian Assurance Co Ltd v Condogianis* [1919] HCA 33; (1919) 26 CLR 231, at p246; 25 ALR 185, where Isaacs J says:

> "And it must be remembered that unless the matter itself is directly material it is not open to the company to say that it might have been indirectly material as leading to the discovery of other matters." Although this was said in a dissenting judgment which was not upheld by the Judicial Committee of the Privy Council, I do not apprehend that this particular point was decisive against the view taken by the majority of the Court or by the Judicial Committee.

But even if there be no substance in the matter I have just referred to, in my view the magistrate was entitled to say that he had not been satisfied that materiality had been established. The only evidence on the matter was that of the witness De Graaf, and if the account of his evidence be looked at carefully it will be seen that he disclaimed any knowledge of the practice of insurance companies generally in relation to the insuring of holders of probationary licences, and was, therefore, unable to say what a prudent insurer's attitude would be. He did not purport to say that the defendant regarded it as material to know how long the proponent had held the licence, but merely said:

> "We don't insure persons holding probationary licences because we infer that they're not very experienced—there is nothing in a probationary licence itself that is objectionable, it is simply the inference we draw. We would insure a person who had no more driving experience than the plaintiff, provided there were no other grounds of objection and provided that person did not hold a probationary licence."

I assume that it follows from this evidence that, had the proponent been resident in New South Wales the fact that he had held a licence for one year and nine months would not have been material, for in New South Wales a provisional licence is effective for 12 months only, and there would have been no policy decision of the defendant which would have led it to decline the risk.

It seems to me that the evidence of De Graaf did no more than establish as a matter of general policy that the defendant company would not insure drivers holding probationary licences, but that apart from the possession of such a licence it would insure any driver of limited experience such as the proponent had. So regarded, it is difficult to see that the question asked was material to the risk, for the representation related to the period during which the proponent had held a licence and not to the type of licence held, and the evidence was that the defendant would have insured the complainant but for the possession by him of a probationary licence.

One other matter leads me to conclude that the magistrate was entitled to say that he had not been satisfied that materiality had been shown, and it is this. I have endeavoured to show that evidence by the defendant's own officer, although admissible, provided only part of the material on which a finding of materiality might be made. Such evidence showed that the defendant regarded the possession of a probationary licence as material (if that be to the point of this aspect of the case, which I am disposed to think it was not). But even if that had been a relevant consideration, the evidence takes the defendant only part of the way it must travel, for it must show that the holding of a probationary licence would have affected a prudent insurer. De Graaf was unable to give evidence of the practice of other insurers, and therefore the magistrate was left to make up his own mind on this matter. The materiality of this representation (whether it relates to the length of time the licence had been held or to the possession of a probationary licence) is not a question of a kind that answers itself, as would be the case if the failure to disclose previous fires in cases of fire insurance or the failure to disclose previous illnesses in the case of a life insurance would involve.

Although the authorities I have referred to show that a defendant is not bound to call expert evidence of materiality to a prudent insurer, yet if he does not do so but relies on his convincing the Court that it was material and the Court is unable to come to a conclusion whether a particular fact would affect the prudent insurer or not, he must accept the position that the Court might find itself bound to hold against him on the burden of proof. That seems to me to be exactly what the magistrate has done, and the supplementary affidavit and the answering affidavit

show that it was put to him that he should take this course, and I must confess that had I been in his position and faced with the very unsatisfactory evidence presented in this case, I should have been disposed to say that I had not been satisfied that materiality had been established. I think, therefore, that ground 3 has not been sustained.

Ground 4 is that "the magistrate ought to have found that the failure by the complainant to disclose the fact that he was the holder of a probationary licence amounted to a nondisclosure of a material fact sufficient to entitle the defendant to avoid the contract of insurance".

According to the affidavits, it was argued by the defendant that even if the magistrate held that question 6(c) had been answered truthfully, the proponent was still under a duty to disclose matters which might affect the mind of a prudent insurer, and he had failed to disclose that he was the holder of a probationary licence. Before me it was argued that the fact that the defendant asked a question about learners' licences and provisional licences should have alerted the complainant to the fact that the defendant was interested to know if the complainant held a restricted licence. But it seems to me that this is immaterial, for the duty to disclose material facts does not depend upon whether the proponent believes the matter to be material: *Bates v Hewitt* (1867) LR 2 QB 595, per Cockburn CJ at p607; *Saunders v Queensland Insurance Co Ltd* [1931] HCA 42; (1931) 45 CLR 557, per Starke J at p563; [1932] ALR 60, and *Darrell Lea (Vic) Pty Ltd v Union Assurance Co* [1969] VicRp 50; [1969] VR 401, per Lush J at p404.

That the duty of disclosure of material facts exists along with the duty to answer questions correctly and thereby not to make misrepresentations is demonstrated by what Lord Dunedin said in *Glicksman's Case*, *supra*, in the passage which I have already cited from his judgment. It is also clear from cases such as *Godfrey v Brittanic Assurance Co Ltd* [1963] 2 Lloyd's Rep 515, at p527; *Guardian Assurance Co v Condogianis* [1919] HCA 33; (1919) 26 CLR 231 at p246; 25 ALR 185, and in [1921] 2 AC 125 at pp128-9; *Cleland v London General Insurance Co Ltd*, *Schoolman v Hall* [1951] 1 Lloyd's Rep 139, at p142, and from Macgillivray, 5th ed., vol. 1, paras. 863, 864 and 873; Preston and Colinvaux, 2nd ed., p95 and Halsbury, 3rd ed., vol. 122, p186, para. 356; that the mere fact that a question such as question 6(c) is answered correctly does not relieve the proponent from making a full disclosure of material facts. Nevertheless "it is unquestionably plain that questions in a proposal form may be so framed as necessarily to imply that the underwriter only wants information on certain subject matters or that within a particular subject matter their desire for information is restricted within the narrow limits indicated by the terms of the question, and in such a case they may pro tanto dispense the proposer from what otherwise at common law would have been a duty to disclose everything material": see per Asquith, LJ, in *Schoolman v Hall*, *supra*, at p143.

It might be a nice question in this case whether by using a New South Wales form the defendant was indicating its interest only in the holding of a licence which imposed restrictions on the proponent for 12 months, the term of a provisional licence, and the magistrate held that the complainant would not have held a provisional licence in other States. Thus had the proponent made his proposal in New South Wales it would appear that the defendant would have accepted the risk. But since I do not propose to base my decision on this point, I say no more about it, except to remark that it demonstrates that much of the trouble that has occurred in this case could have been avoided if the defendant had framed the questions in its proposals with due regard to the laws of the locality in which they hoped to write business.

It was argued by Mr Merralls that the magistrate had made no finding upon the issue of nondisclosure at all, and had not adjudicated upon it. On the other hand, Mr Duggan, whilst conceding that the statement in the affidavit as to what the magistrate said contains no direct reference to nondisclosure, contended that by implication it should be found that he did advert to it and that he intended the statement that the defendant had not discharged the burden of proving materiality to have reference, not only to the misrepresentation arising from the incorrect answer to question 4 (c), but also to the nondisclosure of the fact that the complainant held a probationary licence. It is true that the magistrate is not reported as having in terms made any reference to nondisclosure. But it must be remembered that in proceedings in courts of petty sessions no transcript of the evidence or the judgment is taken, and one can never be really sure that an affidavit by a claims manager who was present at the hearing gives an accurate record of what the magistrate said. I am disposed to think that the magistrate did intend his finding that

materiality had not been established to cover both the representation and the nondisclosure, and that the parties believed that he had done so and have acted upon that assumption from the time when the magistrate gave his reasons right up to the time when this case was opened to me by Mr Merralls who had, as I was told, been only briefed a short time before the hearing began.

What influences me in coming to this conclusion are the following considerations:
(1) It is plain from the affidavits that the issue of nondisclosure was taken as a defence and that argument was directed to the magistrate upon that issue. I find it difficult to believe that a magistrate of the experience of this particular Stipendiary Magistrate, after having taken time to consider his findings, would have neglected to adjudicate upon all the issues argued before him.

(2) After the magistrate had given his reasons argument was put to him by the solicitor for the defendant on the question of the amount of the order, and the question raised in ground 5 was debated. Had the magistrate entirely neglected to consider and adjudicate upon an issue which, if decided in favour of the defendant, would have resulted in the special summons being dismissed, it is plain that he could not have given judgment in favour of the complainant whilst that issue remained unresolved. Yet nothing was said by the solicitor for the defendant to the magistrate to the effect that he had not decided the issue of nondisclosure, nor was his omission to do so pointed out to him, nor was he asked to determine that issue by either of the legal representatives of the parties. Each must be taken in these circumstances to have acted upon the view that the magistrate had in his reasons decided all the questions in issue in the proceedings, and this must mean that each thought that the finding related both to the misrepresentation and to the nondisclosure.

(3) When the defendant's solicitor (who presumably was the solicitor who appeared for it at the hearing) applied to Master Jacobs for an order nisi to review, he did not obtain such an order on a ground which (had the entire case not been disposed of) I should have thought would have been the main ground of the order nisi, namely, that "Since the magistrate failed to adjudicate upon the defence taken by the defendant that there was a material nondisclosure by the complainant, he was in law precluded from making an order in favour of the complainant". Instead of obtaining an order nisi containing such a ground, he obtained an order nisi containing ground 4, which seems to me to assume that the magistrate considered the subject matter of such ground but came to a wrong conclusion on it.

(4) It would seem that it was only when Mr Merralls was briefed in the matter that it was realized that it appeared that the reasons of the magistrate, as set out in the affidavit, did not contain any reference to nondisclosure, but even then no application was made to add to the order nisi such a ground as I have suggested, but counsel was content to argue the ground as it stood, namely, that the magistrate ought to have found that here was a nondisclosure of a material fact.

I am, therefore, disposed to accept Mr Duggan's submission that the magistrate must be taken to have held that the burden of proving the materiality of the nondisclosure of the probationary licence had not been discharged, for in spite of the form of the reasons given by him, I think it inconceivable that he would have overlooked the matter and further, I think that the parties by their actions have accepted that he did so decide. But even if this conclusion be unjustified, I think the matter is of little practical consequence, for if the magistrate did hold that the burden of proof of nondisclosure had not been satisfied I am of opinion that he was entitled so to hold, whilst, if he had not so decided and had not adverted to the question of nondisclosure, ground 4 can only be upheld if it can be shown that the magistrate was bound to find that there was a material nondisclosure, and in my view he was not so bound.

The reasons why I conclude that it was open to the magistrate to find that the burden of proof of materiality of the nondisclosure of the fact that the complainant held a probationary licence had not been discharged, and why I conclude that he was not bound to find that there had been a material nondisclosure are very similar to the reasons I gave for concluding that he was entitled to say that the burden of proof of the materiality of the misrepresentation had not been discharged. Doubtless it was of importance for the defendant, because if its policy not to insure holders of probationary licences, to know whether the proponent held such a licence. A question directed to this matter would, if correctly answered, have given it this information, but by its carelessness it asked a question which was relevant in New South Wales, but was not relevant in Victoria.

In these circumstances, since the form was prepared by the defendant, I do not think that it ought to be heard to say that because it asked the wrong question and got a correct answer, yet nevertheless the form of that wrong question put the proponent upon notice that it was interested in another form of licence and required him to speculate upon what matters it was interested in. But, conceding that in fact the defendant desired to know whether the complainant had a probationary licence, as I have already pointed out, that fact takes it only part of the way in the proof of materiality. It must satisfy the tribunal that the existence of such a probationary licence was a matter which a prudent insurer would have thought was material when considering whether to accept the risk. There was no evidence at all which would have assisted the magistrate on this matter-- indeed, he might well have thought that, had it been the practice of insurers generally to decline risks of this kind, De Graaf would have known of it. There being no evidence to assist the magistrate, he was required to make up his own mind on the question. He could have said that he considered the matter was material--he could have said that he did not believe that it was--or he could have said that in the absence of assistance from experts he was unable to say whether it was material or not.

This was, I consider, to use the words of McCardie J in *Yorke v Yorkshire Insurance Co*, *supra*, a case which posed a question of novelty or doubt, and one which a person having no intimate acquaintance with the motor insurance business might well feel considerable difficulty in deciding. The question was whether a prudent insurer would be likely to consider that because all probationary licence holders had not held a licence for more than 3 years the inference that they were all inexperienced ought reasonably to be drawn and would be likely to lead him to decline to insure any of them. I put the question in this form because the evidence of De Graaf showed that the defendant made no exceptions—it did not consider each case on its merits, but declined as a matter of policy to insure any probationary licence holder.

In considering this question the magistrate would have been entitled to take the following matters into account and give consideration to them:

(1) There was no evidence statistical or otherwise that holders of probationary licences are more accident prone than other drivers—in fact, one might assume that by reason of the provisions of s22(B)(3) of the *Motor Car Act* 1958 regarding the compulsory cancellation of probationary licences upon conviction for the more serious driving offences, such drivers would be more than usually careful.

(2) The holder of a probationary licence is authorized by law, after testing, to drive a motor vehicle on the highways, and presumably before such a licence is granted, the testing officer has been satisfied of his proficiency in driving skills and of his knowledge of the regulations. It is interesting to compare on this matter the decision of Kingsmill Moore J in *Re Sweeney and Kennedy's Arbitration* [1950] IR 85, at p92.

(3) Before probationary licences were introduced only a few years ago, it is impossible to believe that any insurance company would have refused to insure a proponent who had only obtained a licence shortly before making the proposal for insurance. I have no doubt that the magistrate's own experience would have told him of this. Indeed he might well have felt that there would have been competition between insurance companies to secure the business of newly licensed drivers, and that it would have been very bad business for insurance companies not to endeavour to secure the business of as many of them as it could in view of the continuity of such business that they might expect.

(4) The evidence showed that this defendant would have insured the complainant knowing of the extent of his driving experience, but for the fact that he held a probationary licence, and it was a reasonable inference that had the complainant been resident in New South Wales their policy would have been not to insure the holders of provisional licences and that they would have accepted the complainant as he would not have held a provisional licence.

(5) The usual practice of owner of motor vehicles is to renew annually their policy with the company who has insured them, unless of course they have been dissatisfied with the company or are able to obtain better terms elsewhere. By declining to insure a holder of a probationary licence an insurance company would run the risk that at the expiration of the probationary period of three

years the proponent would take his business elsewhere, particularly if he had found a company which would accept him during the provisional term of his licence.

In this case the complainant's probationary period has expired on the day on which I have delivered this judgment, and I doubt whether the defendant will continue to attract his business. Having regard to the importance to insurers of renewals of policies they underwrite, the magistrate might well have thought that many insurers would not be prepared as a matter of business to decline to insure probationary drivers.

Having regard to all these considerations I myself, had I been called upon to decide this issue on this evidence, would I think have held that I had not been satisfied that this matter was material to a prudent insurer. I think the considerations I have mentioned might well have caused a prudent insurer to think twice before he declined to insure the holders of probationary licences. It seems to me that it is illogical that the driving competence of any person should be arbitrarily determined by the fact that he held a probationary licence, and I would have been unable to say in the absence of professional expert assistance whether a prudent insurer would have been prepared to turn away the business of a probationary driver who might (if satisfied with the treatment he received) had been a customer for the next 20 years or so simply because he drew an inference that because the driver had only a probationary licence he was so much more likely for a period of no more than three years to become involved in accidents than the driver who had held a licence for three years and six months that it would be uneconomic to insure him. Since that is the view I myself would have taken, it follows that the magistrate would have been entitled to take a similar view, and it is therefore not possible for me to say that the magistrate ought to have found that there was a material nondisclosure.

Mr Merralls also argued that since s25 of the *Instruments Act* does not apply to cases of nondisclosure, the fact that the proposal was made the basis of the contract established the materiality of the complainant's probationary licence. But I do not accept this argument, for question 6(c) and answer relates not to a probationary licence, but to a provisional licence, and all that can be said to be included in the contract by invocation of the declaration is the fact that the complainant did not hold a provisional licence.

I, therefore think that ground 4 is not made out, and that this order nisi should be discharged. The defendant has only itself to blame for this result. It has accepted the complainant's premium, and the trouble that has occurred is largely due to its careless use of a New South Wales form in connexion with Victorian business. I agree entirely with what was said by Kingsmill Moore J in *Re Sweeney and Kennedy's Arbitration*, *supra*, at p92, where the question asked in the proposal was whether any of the proponent's drivers was under 21 years of age and this was answered no. An accident happened while the plaintiff's son, who was under 21, was driving. His Lordship after referring to the fact that the law by granting a licence to drive to the son assumed he was competent to drive, said: "If insurers take a different view of the law it is open to them—indeed, I would say it was incumbent upon them to make this clear by the insertion of specific provisions in the policy and not to attempt to secure their ends by a side wind."

If the defendant desires (as it is entitled to do) to decline as a matter of policy to refuse to insure all holders of probationary licences, it ought in my view to provide in its policies that no indemnity will attach under the policy if the vehicle insured is being driven by the holder of a licence on probation. Had it done so, doubtless it would not have secured the complainant's business, but even if he had accepted a policy in that form, all this litigation would have been avoided. The order nisi will, therefore, be discharged with costs not exceeding $120.

Solicitors for the complainant: Home Wilkinson and Lowry.
Solicitors for the defendant: Evans Guss and Holt.
