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THE CONSUMER GUARANTEES ACT 1993: ISSUES IN INSURANCE LAW

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CONTENTS

This paper will explore the effect that a very new piece of consumer legislation will have on the field of insurance law. Though very little has been written on the Consumer Guarantees Act 1993, and even less on the Act's impact on insurance law, this paper will articulate what the author believes to be some of the key elements in the Act and examine their likely effect, if any, on the insurance relationship.

It is suggested that the Act alone, as a weapon for insureds against errant insurance service providers, may well prove inadequate. Indeed the Act may add very little to what the insured already possesses in the way of remedies. Nevertheless, the Act does take general common law principles of post-contractual service law and engrosses them it into a statutory form.

The paper will start by looking at the rationale for putting into place such a general statutory regime. Consideration will also be given to the impact, if any that the CGA might have on the duty of utmost good faith and on the interpretation of insurance contracts.

The features of the guarantees will be discussed. It must be remembered as the paper touches on each guarantee that , at least in respect of consumers, as defined in the Act, the guarantees are cannot be contracted out of. This might be the most important provision as far as consumer protection is concerned.

Privity aspects and the abilities of third parties to rely on the Act will be examined. As a consumer protection measure a wide definition of "consumer" ought to ensure a responsible attitude from service providers. However, the problems with a wider class of potential plaintiffs is evident.

The possibility of contributory negligence as a defence for service providers will be considered as will the extent to which service providers might have to guarantee results and bow to the expectations of insureds.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 12,270 words.

A customer is the most important person on our premises.
He is not dependent on us; we are dependent on him.
He is not an interruption to our work; he is the purpose of our work.,
He is not an outsider to our business; he is an essential part of it.
We are not doing him a favour by serving him.
He is doing us a favour by allowing us to serve him.
Mahatma Gandhi

I INTRODUCTION

The Consumer Guarantees Act 1993[1] has been part of New Zealand law for over a year now.[2] In an attempt to clarify the rights of consumers in relation to services, the Act establishes a set of statutory guarantees which are to be implied in all contracts for the supply of consumer goods and services. It then equips consumers with rights of redress where any guarantee is not met.

The Act contains a number of innovations. The most significant of these are those that it applies to services. Up until 1 April 1994 only goods had been subject to legislation.[3]

This paper will present an examination of the potential impact that the CGA may have on insurance law. While the CGA might be heralded as a new weapon in the consumers' armoury, the practical effect of the Act by itself within the field of insurance law may be minimal.

Problems exist in that the insurance contracts by their very nature can be long term and produce no tangible result. Problems may not manifest for some time. Added to this is that the battle between the individual or the small corporation and the insurer is inescapably an unequal one. The insurer is well funded, well lawyered and sometimes well able to ruin the insured who, faced with a loss, may not be in a financial condition to add to its burdens the risks and costs of litigation.

On their own, the provisions of the CGA might be a "toothless tiger". But taken in conjunction with causes of action based on contract, tort, statute and

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[1] Hereinafter "the Act" or "the CGA".

[2] The Consumer Guarantees Act 1993 came into force on 1 April 1994.

[3] For example the Sales of Goods Act 1908 and the Hire Purchase Act 1971.

an underlying duty of the utmost good faith, the guarantees in the CGA may provide worthwhile. Certainly from a lay person's perspective the guarantees, if properly publicised, represent a starting point in the balancing of bargaining power between insured and insured.

II CONSUMER GUARANTEES ACT 1993

A Rationale for services to be governed by the CGA

Service providers at all levels of the insurance relationship would do well to consider the words of Mahatma Gandhi quoted at the start of this paper. Customers are the basis of their business. However, the nature of the insurance relationship at a consumer level as a very much "take it or leave it" transaction put insurance companies in a position of strength. Despite competition, insurance contracts seldom differ and insurers can virtually dictate terms to insureds on standard form contracts.[4]

Up until recently service providers, unlike sellers of goods, had little apart from the common law to set out standards for service. Post-sale consumer protection has historically tended to limit coverage to the sale of consumer goods and not include consumer services. However, since consumers lack the ability to protect themselves in equal measure whether the transaction involves goods or services, it is difficult to understand the failure of existing legislation to include at least some kinds of services under the post-sale protective umbrella.[5]

B Tangible and Intangible Services

A possible explanation for the exclusion of services from most consumer-protection legislation is that services, such as insurance services, that have

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[4] The reasons for standard term contracts often lie in administrative efficiency and commercial expediency since the insurer will be contracting with thousands of insureds.

[5] DH Vernon *An Outline for Post-Sale Consumer Legislation in New Zealand* (Iowa City, 1 July 1987) 14.

no tangible or physical result require very different statutory treatment than consumer transactions in goods and services that yield a tangible result. It is difficult to think in terms of intangible services being repaired, have an ordinary useful life, or requiring spare parts.[6]

Further, the repair and replacement remedies, the norm when suppliers default in the sale of consumer goods and services with tangible results, have no applicability to services that lack a tangible result.[7]

Consumer services that yield a tangible or physical result fit rather well within the CGA. Services such as car repairs, building, plumbing, dental services all seek to achieve a specified result. They produce tangible products or achieve some obvious effect. It is easy to identify whether a task that a service provider has been contracted to perform has been carried out with reasonable skill and care. Similarly one can easily identify whether the price charged was, in the absence of contract, reasonable and whether the service achieves a particular result in a reasonable time. Most problems in respect of tangible services can be resolved under the CGA without the interposition of legal counsel.[8]

The reverse is true for problems likely to stem from breaches by suppliers of services that have no tangible or physical end result. The problems raised when an insurance company fails to perform as promised often are substantially more complex than the problems for which consumer legislation is designed. They can encompass long-tail liabilities and can involve significant magnitude of loss. They tend to require legal counsel, and

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[6] Above n5, 15.

[7] This problem is discussed below.

[8] It is envisaged that most grievances that arise under the CGA will be resolved by the parties negotiating or through the Disputes Tribunal.

possibly either very specialised hearing procedures or a full-scale judicial proceedings for their resolution.[9]

With few exceptions, regulation of suppliers of services New Zealand has historically focused on licensing and technical qualifications rather than directly on the quality of service rendered. The absence of detailed protective legislation created a gap that the CGA was intended to fill. Whether the Act does so in respect of insurance services is debatable.

Banks, lawyers and insurance companies tend to require specialised legislation rather than general legislation such as the CGA. Nevertheless the Act is drafted to capture all such services .While it seems clear that consumers need legislative protection in their dealing with the supplier of services that have no physical end product, the post-sale consumer statute seems the wrong place for it. Specialised statutory treatment for insurance services may be the desirable alternative.

C *Australia's Example*

The Australian Trade Practices Act 1974 was used as something of a template for the service guarantees in the CGA.

However, the CGA definition of "service" explicitly includes services provided by a supplier under a contract of insurance.[10] Section 74 of the Australian Act specifically excludes insurance services from the warranty as to reasonable care and skill. This omission could be explained on the basis that Australia has enacted a general law to govern insurance.

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[9] Above n 5, 15.

[10] Section 2(1) "Service" (b).

The Insurance Contracts Act 1984 (Cth) was passed following recommendations of the Australian Law Reform Commission in its report, "Insurance Contracts".[11] The law made substantial changes to the law relating to insurance contracts.

Unlike Australia, New Zealand is still principally governed by the common law. Statutory change appears in the form of the Insurance Law Reform Act 1977 relating, among other things, to misrepresentation and non-disclosure and the Insurance Law Reform Act 1985 relating, among other things, to insurable interest.

A more recent development is the Insurance Intermediaries Act 1994 relating to the obligations of intermediaries with respect to the handling of customer's monies.

New Zealand could be accused of tinkering with aspects of insurance law that need to be addressed in a comprehensive review. Given that the nature of the insurance contract is based on the principle of utmost good faith, a case exists for such special treatment of the area. This would represent a step towards the Trans-Tasman harmony that the CGA has started to move towards.

D An Additional Sword for Insureds?

Contracts of insurance, unlike most other classes of contract, are based on the principle that each party to the contract must act with the utmost good faith in their dealings with the other. In addition to disclosure and representation obligations, the duty of utmost good faith clearly extends to the administration and management of the contract.

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[11] Australian Law Reform Commission Report No 20 1982.

1 *The Doctrine of utmost good faith.*

The common law duty of utmost good faith is not an implied term of the contract of insurance nor does it arise by way of a collateral contract.[12] An insured can recover damages from an insurer in respect of loss suffered by the insured as a result of the insurer's breach of duty. However, this has been restricted. In the House of Lords *Banque Financière de la Cité SA (formerly BKU)* v *Skandia*[13] Lord Templeman said that a breach of the duty of utmost good faith does not sound in damages. "The only remedy open to the insured is to rescind the policy and recover the premium."[14]

The avoidance of the contract is usually an ineffective remedy in the case of a misrepresentation or non-disclosure by the service provider. It will therefore be better to rely on the CGA or for the action to sound in contract or tort.

2 *Common Law and Statute*

Within the law of obligations, a consumer insured can rely on breaches of contract and tort law as the basis of their cause of action.[15]

Statutory protection also exists in the form of the Insurance Law Reform Acts 1977 and 1985 as well as section 9 of the Fair Trading Act 1986.

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[12] *Banque Keyser Ullman* v *Skandia (UK) Insurance Co Ltd* (1987) 4 ANZ Insurance Cases 60-759.

[13] (1990) 6 ANZ Insurance Cases 60-987.

[14] K Sutton (ed) *Australia and New Zealand Insurance Reporter* (CCH, Sydney, 1994) 1-600.

[15] The Ontario Court of Appeal in *Fine's Flowers Ltd* v *General Accident Assurance Co* (1989) 81 DLR 139 suggested that an agent's liability to act with care may be founded in equity. However, AA Tarr and JA Kennedy *Insurance Law in New Zealand* (2ed, Law Book Co, Sydney, 1992) 105 disagree and believe that equity should relate more to allegations of dishonesty.

Now a lay person without a knowledge of insurance law principles can simply rely on some of the broadly applicable consumer guarantees enshrined in the CGA to implement their rights.

Proponents of the Act claimed the CGA took significant court decisions and codified existing rights in respect of goods, spelling them out clearly, setting out extra rights in connection with services, and setting out a clear message so that people can pick it up and read and understand it easily.[16]

Whether the Act will provide consumer insureds with a mechanism with which to seek effective redress is a matter for time and academic debate. Notwithstanding alternative dispute mechanisms and the moves towards industry self-regulation and codes of practice[17], it is worthwhile considering the potential application of the Act in insurance law

3 Effect on Interpretation and construction of insurance contracts.

It will clearly be the case at a consumer level that there ought to be a reorientation in the interpretation and construction of contracts of insurance.

Historically, policy wordings have developed in an evolutionary way through decades of case law. Insurance companies have years of legal experience litigating the terms of their contracts. Skilled lawyers have written these contracts which have been carefully upgraded as new decisions are handed down by the courts. New case law is incorporated into policies and contracts are regularly re-written. Terms that may appear to a consumer to be simple

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[16]NZPD, vol 522, 6904, 17 March 1992 per Warren Kyd.

[17] The Life Office Association of New Zealand *Code of Business Practices for Insurance Companies*, the Insurance Council of New Zealand *Fair Insurance Code* and Insurance and Investment Advisers Association *Code of Professional Ethics* are three examples of self-regulation. Further efforts are manifest by the implementation of the Insurance and Savings Ombudsman Scheme.

English may have their origin in a legal opinion and may have been given a special interpretation. Because companies make it their business to know how standard terms have been defined by judges, insurers have the upper hand in drafting policies and selecting the language they find most advantageous for making a profit.[18]

However, some people within the insurance industry believe that "plain english" wordings that have not been tested in an evolutionary way through decades of case law will be subject to a "cold turkey" introduction to legal testing.[19] In a sense, the wordings themselves are already playing less importance. They are giving way to what is fair to the consumer. Increasingly forums are not just looking at legal liability, but at moral obligations as well, regardless of contractual terms. Indeed the provisions of the CGA may be changing an insurance contract from being solely a written document to an amalgam of both oral and written understandings.

As long ago as 1912 Lord Shaw of Dunfermline in the Privy Council said

> if an answer is obtained to such a question [framed by the insurer] which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of the question. Otherwise the ambiguity would be a trap

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[18] R Alexander "When an Insurance Company Breaches Its Contract A Brief Summary of the General Law in the United States" *The Consumer Law Page* The Alexander Law Firm. Internet email talf@netcom.com

[19] AHM Adams in a paper to the "Insurance Law: Focus on Options" Conference of New Zealand Insurance Association 28 Octoner 1994.

against which the insured would be protected by the courts of law.[20]

Interpretation of insurance contracts in favour of insureds even in the absence of ambiguity might become a matter of course.

We are still some way off from judging whether the CGA will evolve as an interpretation mechanism. Nevertheless, if insurers are aware of the Act's provisions and colour their conduct based on the perceived repercussions of failing to adhere to the guarantees, the Act will have gone some way towards being a success.

III OUTLINE OF THE CONSUMER GUARANTEES ACT 1993.

A Overview

There are a number provisions in the CGA which service providers, including those within the insurance industry, will have to be mindful of. Four of them are statutory guarantees which imply a quality standard into each contract for the supply of services. A further provision imposes harsh penalties for service providers who attempt to contract out of their obligations under the Act.

Suppliers guarantee that the service will be carried out with care and skill.[21]

Also guaranteed is that the service is reasonably fit for any purpose, and of such nature and quality that it can reasonably be expected to achieve any particular result, either of which the consumer has made known to the supplier before or at the time of making the contract for the supply of the service.[22]

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[20] *Condogianis v Guardian Assurance Co Ltd [1921] 2 AC 125.* See also *Norwich Union Fire Insurance Society Ltd* v *Traynor* [1972] 2 NZLR 504, 509.

[21] Section 28.

[22] Section 29.

There is a guarantee that the service will be completed within a reasonable time[23] and that a reasonable price will be charged for the service, unless the price is fixed by the contract.[24]

The consumer is given a range of possible remedies for breach of any guarantee.[25] The adequacy or otherwise of those remedies in the insurance context will be discussed below.

Contracting out of the provisions of the Act is expressly prohibited unless the consumer is acquiring the services for the purpose of a business and provided the agreement for those services is in writing.[26]

In the absence of this exception, every supplier of services who attempts to contract out of any of the provisions commits an offence against s13(i) of the Fair Trading Act 1986. This prohibits making a "false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right or remedy."

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[23] Section 30.

[24] Section 31.

[25] Section 32; giving the supplier the right to remedy the failure and the consumer's right to have the failure remedied elsewhere, to cancel the contract or obtain damages for any reduction in value of the product of a service and consequential loss.

[26] Section 43.

B Coverage of the Consumer Guarantees Act 1993

1 What is a "service"?

The definition of "service" includes any rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred by a supplier under a contract of insurance, including life assurance and life reassurance.[27]

Contracts of or relating to insurance, including life assurance and life reassurance, are specifically included in the definition of service in the Act.[28] Insurance brokerage services fall within the general definition of "services".[29]

Services can be broken up into categories which include advice, policy implementation, servicing, the actual insurance cover as well as claims handling. The broad definition covers conventional liability and contingency products as well as life insurance savings products

To be covered by the Act the contract of insurance must be ordinarily acquired for "personal, domestic or household use or consumption".[30]

The following may be within that scope:

- household insurance;
- motor vehicle insurance;
- life assurance;

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[27] Section 2(1) "Service" (b). The provision of services to procure the issue of a contract of insurance from a third party insurer is antecedent to the issue of a contract of insurance and is not a service under contract of insurance. *Zoneff* v *Elcom Credit Union Limited* (1990) ATPR 41-00, 51,160.

[28] Section 2(1) of the CGA. Contracts of insurance are specifically excluded from the Trade Practices Act 1974(section 74); the Australian equivalent of the CGA. However the Australian Courts have been keen to confine the exclusion: see *Warnock* v *ANZ Banking* Group (1989) 5 ANZ Insurance cases 60-897.

[29] For the purposes of this paper services provided by insurers and their agent will be referred to as "insurance services".

[30] Section 2(1) - definition of "consumer".

- income protection and disability insurance;[31]
- Medical insurance;
- Travel insurance.

2 Who is a supplier?

For the purposes of the CGA, a supplier is, inter alia, a person who in trade, supplies services to a consumer. This definition will encompass insurers and all types of insurance intermediaries. The particular nature of the intermediary[32] will affect the way that the CGA operates.

Insurance intermediaries are either agents or employees of insurers, or independent persons who act on behalf of insureds.

(a) Agents of the Insurer

Intermediaries in the broad sense include such personnel as insurance company management, inspectors, office staff; underwriters and damage assessors. Where the insurer is the principal, the term "agent" may apply to a number of different categories of person. The most common are

- full-time employees,[33]
- full-time employees who are paid partly by salary and partly by commission, and
- persons who are not employed by the insurer but who are restricted by contract with the insurer as to the nature of the work that may be performed for other insurers.[34]

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[31] It is debatable whether this is ordinarily acquired in a business contract. M Ewan and C Grice *Consumer Guarantees Act* (New Zealand Law Society Seminar, March 1994) 71.

[32] For example tied agent, broker, financial planner, professional adviser, even a solicitor or accountant.

[33] For example, customer service personnel; claims clerks. underwriters,

[34] That is, "tied agents" with little or no ability to accept business for other insurers.

To this end, the legal concept of agent includes an employee of the insurer to the extent that the actions of the agent are considered to be the acts of the insurer.

Where the intermediary is a tied agent or a salaried employee, they are at all times the agent of the Insurer. Accordingly, whether they are giving financial advice or facilitating the sale of a specific product, they will be deemed to be "the Insurer" and the Insurer will be liable for their actions under the CGA. The insurer will vicariously be liable for the actions of its agents.

(b) Agents of the Insured

Agents of the insurer can be contrasted with agents of the insured. For the most part, this will encompass insurance brokers whose principal will be their client insured.

A broker is a wholly independent intermediary appointed by the insured to obtain insurance, and thereafter to assist with the operation of the policy, including the making of claims. Where the intermediary can demonstrate some degree of "independence" from the insurer, they are unlikely to bind the insurer in respect of advice given. This is more likely to be the case where consumers purchase financial advice from the intermediary for a fee, as a discreet transaction.

In such a case, the broker will be liable to the insured, independently of the insurer.

The broker and the insurance company are suppliers of a service to the principal, the consumer, in terms of the CGA. The obligations placed on the

agent by the CGA therefore augment those owed to the consumer and are in addition to those arising directly from the contract of agency.

Case law abounds surrounding the distinction between brokers and agents and whether a particular intermediary acts for the insurer or the insured. For the purposes of the CGA, as far as the intermediary's relations with the insured are concerned, it matters little into which of the categories the intermediary falls. All fall within the description of one who supplies services to a consumer.

(c) The Insurance Intermediaries Act 1994

In respect of specific product sales, the intermediary will be deemed to be an agent of the Insurer at the point of sale for the purposes of the Insurance Intermediaries Act 1994. The Insurance Intermediaries Act seeks to make clear the obligations of all intermediaries with respect to the handling of customer monies.

Prior to 1994 the law relating to insurance intermediaries, and particularly brokers, had been uncertain. Particular problems had arisen where customers had given premiums to brokers and the broker had become insolvent[35] or absconded before the money was passed to the insurer. In the specific situations concerned, the broker was found to be the agent of the insured and not the insurer. The insured therefore suffered a financial loss by being unable to obtain refunds from the insurer.

For the purposes of the Insurance Intermediaries Act, all intermediaries appointed under a signed agreement are deemed to be the agent of the insurer for the purposes of receiving money due to the insurer from the insured, or due to the insured from the insurer.

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[35] *Norwich Winterthur Insurance (Aust) Ltd* v *Con-Stan Industries of Australia Pty Ltd* (1986) 160 CLR 226.

To ensure congruity between the CGA and the Insurance Intermediaries Act, both of which are essentially consumer statutes, the Insurer ought to be liable under the CGA in respect of product sales made by these intermediaries. This situation would apply to life insurance brokers, registered financial planners and other single premium intermediaries such as lawyers, accountants and the like.

3 Who is a "consumer"?

The Act defines a "consumer" as a person who "***acquires*** from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption."

This will obviously cover the proposer under the policy as the person who makes the contract with the insurer or who engages the services of an intermediary to arrange the insurance. The case is not so clear where others are to benefit from the policy. The provisions of the CGA might extend to cover third parties and named beneficiaries under the policy who, under the strict doctrine of privity of contract, would not have standing to bring an action.

In section 2 of the Act the word "acquires" in relation to services includes "accept". A third party under a policy might be able to claim that they *accept* the rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred by a supplier under a contract of insurance, including life assurance and life reassurance.

IV PRIVITY ISSUES

A Overview

Given the CGA's consumer underpinning, the guarantees given under the Act could apply broadly to include the situation where a person receives the "benefit" of the service, even though there is no privity with the service provider.[36]

Beneficiaries can recover damages for negligence and breach of contract notwithstanding the fact that there is no contractual nexus between them. Indeed the doctrine of privity is not sacred and circumventing the doctrine is nothing new.

Aside from the potential use of the Contracts (Privity) Act 1982, third parties can maintain an action based on

- the construction of the insurance contract, [37]
- assignment of the benefit of life insurance,[38]
- insuring property as a trustee,[39]
- section 9 of the Law Reform Act 1936,
- section 83 of the Fire Prevention (Metropolis) Act 1774[40] and
- the erosion of the requirement of insurable interest in the section 7 of the Insurance Law Reform Act 1985.

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[36] A Fraser "The Liability of Service Providers Under The Consumer Guarantees Act 1993" [1994] 16 NZULR 23, 27.

[37] For example, the words of the contract expressly confer rights or benefits on a beneficiary.

[38] For example, assigning the death benefits to a mortgagee.

[39] If a trustee has the benefit of the CGA obligations, the trustee might be bound and entitled to enforce these for the benefit of the cestuis que trust.

[40] A person interested in a building that was damaged or destroyed by fire can give notice to the insurer requiring the insurer to apply the insurance monies towards rebuilding, reinstating or repairing the building.

In addition, a third party can rely on the tort of negligence and trust analyses to get around privity problems.

Does this therefore allow a beneficiary under a life insurance contract to not only enforce the terms of the contract under which they receive a benefit but also to cancel the contract to which they are not a party? Does it also allow third parties who are not named under the policy but only designated to interfere in the conduct or otherwise of the insurance?

If this were the case it would be strange that a third party might have a stronger claim under the CGA than that which exists at common law where an insurer would be within their rights to ignore a third party claim.

Under a wide definition of "consumer", the agent could potentially be liable to many parties other than the principal.

The danger in this, from an insurer's perspective, is that a wide and generous interpretation of the term "consumer" could potentially see the insurer liable to a number of different claimants who were not party to the original contract. Arguably, liability could not logically be restricted to cases where a specific named beneficiary was disappointed, but would inevitably have to be extended to cases in which wide, even indeterminate, classes of persons could be said to have been adversely affected. This would increase the risk as well as the premium. The custom of indemnifying undesignated third parties as beneficiaries under the policy might be restricted.

Cooke J answered this type of floodgates liability fear in *Gartside* v *Sheffield, Young and Ellis*[41] by saying he was not "persuaded that we should decide a

[41] [1984] NZLR 37.

fairly straightforward case against the dictates of justice because of foreseeable troubles in more difficult cases."[42]

Nevertheless, it would seem anomalous if a beneficiary under a life insurance policy were to rely on the provisions of the Contracts (Privity) Act 1982 but not the CGA or vice versa. There would be a degree of incongruity if the beneficiary had to rely on the Contracts (Privity) Act and was without a remedy in a situation where statutory guarantees are imported into every consumer contract for services.

B The Service Supplier's Duty to Third Parties

The potential extension of a duty under the CGA to third parties is problematic. Where an agency relationship exists, the agent's duties are owed to his or her employer, the insured. The agent is not permitted to enter into any arrangement which creates a conflict between that duty and either his or her own interest or the interest of another person.

Given that the law seeks to protect the insured against conflicts of interest, it would seem to follow that the courts ought not to impose upon an agent a duty of care to a third party if the effect of such a duty of care would be to dilute the agent's duty to the insured.[43] Imposing a duty of care to third parties may cause an agent, intermediary or insurer, to act differently towards his or her client even where there is no possible conflict of duties.[44]

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[42] Above n 41, 44.

[43] The principle that there can be a duty of care owed to a third party in respect of pure financial loss was confirmed by the House of Lords in *Junior Books Ltd* v *Veitchi Co* [1983] AC 520.

[44] See *Seale* v *Perry* [1982] VR 193; *Gartside* v *Sheffield, Young & Ellis* [1978] 2 NZLR 547.

C *Duty of Care to the Intended Beneficiary under a Policy*

An agent's liability will generally be limited to insureds and to specific persons known to be reliant upon the agent's performance of his or her duties.

The duty does not solely rest on the foundations of contract and can be transferred. A duty of care existed where brokers were asked by a purchaser of a vehicle to transfer the vehicle's insurance from the vendor to the purchaser.[45] In *Bromley London Borough Council* v *Ellis*[46] the third party was able to sue the broker for failing to obey the insured's instructions to transfer the policy on a car to a third party. Duties could also be owed to the intended assignee of the policy.[47]

Closer to home, in *Cee Bee Limited* v *Lombard Insurance Company Limited*[48] a broker was found to be negligent in his failure to arrange for cover to be issued in the name of the new owner.

Where the agent is required by the insured to procure a policy which covers the interests of both him or herself and a third party, the agent owes a duty of care to the third party to obey the insured's instructions.

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[45] *London Borough of Bromley* v *Ellis* [1971] 1 Lloyd's Rep 97.

[46] [1971] 1 Lloyd's Rep 97.

[47] [1992] 3 All ER 104. However note *Verdame* v *Commercial Union Assurance Co plc* [1992] BCLC 793 where no action was possible against a broker who advised that company property be insured in the names of shareholders and directors and a claim was declined for lack of insurable interest. Here the duty was owed to the client company and not the shareholders.. While this decision might be perceived as harsh, it is fully consistent with the strict doctrine of corporate personality.

[48] Unreported, 15 December 1986, High Court, Christchurch Registry, A5/85; endorsed in the Court of Appeal [1990] 2 NZLR 1.

If the agent is a broker, it may be that the insured has acted as the agent of the third party in employing the broker or that the third party is a person who will foreseeably suffer harm in the event of negligence, and there is no conflict of duties concerned in the imposition of a further duty of care.

This, and other similar concerns, is illustrated in the analogous context of duties owed by a solicitor to the intended beneficiary of his or her client's will.

D Analogous Duties of Solicitors

Ordinarily there will be no duty to third parties.

> The solicitor owes no such [paramount] duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client.[49]

But in cases where a solicitor, and by analogy a supplier of insurance services, has acted so as to induce reasonable reliance by a third party a duty may be imposed. This will be more so where the agent is approached to attend matters that will impact on the future interests of identifiable third parties.

In *Ross* v *Caunters*[50] damages were awarded to an intended beneficiary against a solicitor who, for his negligence in preparing his client's will, prevented the gift from taking effect. The analogous situation arises in the insurance relationship where the third party is not covered because of the negligence of a supplier of insurance services.

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[49] *Ross* v *Caunters* [1980] Ch 297, 322.

[50] .[1980] Ch 297

Despite academic support for *Ross* v *Caunters*[51], the case must now be seriously doubted in light of a recent House of Lords decision. A number of conceptual problems were identified by Lords Goff and Mustill in *White* v *Jones*.[52]

Furthermore, the basis on which *Ross* v *Caunters* also seems to have been eroded.

1 *The erosion of* Ross *v* Caunters

In *Ross* v *Caunters* Sir Robert Megarry V-C relied on the House of Lords decision in *Anns* v *Merton London Borough Council*.[53]

The test in *Anns* focussed on "whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter..."[54]

On this approach a prima facie duty of care would arise whenever it should reasonably have been contemplated that carelessness might cause damage to another. Whenever there was a foreseeability of harm of any kind the plaintiff could argue that there arose a prima facies duty of care.

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[51] See J L Dwyer "Solicitor's duties in tort to persons other then their clients" (1994) Tort Law Review 29

[52] [1995] 1 All ER 691, [1995] 2 WLR 187.

[53] [1978] AC 728.

[54] Above n 53, 751.

A tide of criticism mounted in the House of Lords in a succession of cases culminating in *Murphy* v *Brentwood District Council.*[55] In *Murphy* the House of Lords held that *Anns* should not be followed.

Though *Ross* v *Caunters* was founded on the now discredited approach in *Anns,* the New Zealand Court of Appeal has relied on it.

In *Allied Finance and Investment* v *Haddon & Co*[56] the members of the Court analysed the matter of a solicitor's certification in terms of the approach laid down by Lord Wilberforce in *Anns*. Furthermore in *Gartside* v *Sheffield Young & Ellis*[57] the Court of Appeal applied *Ross* v *Caunters* notwithstanding the decision in *Seale* v *Perry*.[58]

The Full Court of the Supreme Court of Victoria in *Seale* v *Perry* refused to follow *Ross* v *Caunters*. Among the reasons for not doing so was that the client owed no duty to the beneficiary nor a duty to make the gift or to perfect the execution of his intention to make the gift. Why then should the solicitor be held subject to a duty of which the client was free?

Also the content of the solicitor's duties was entirely within the control of the client who could change his instructions or waive any breach of instructions. This suggested that the solicitor owed no separate duty to the plaintiff.

Further the concept that a solicitor may owe a duty to a person other than his or her client in discharging the client's instructions involves serious difficulties such as the possibility of conflicting duties.

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[55] [1991] 1 AC 398.

[56] [1983] NZLR 22.

[57] [1983] NZLR 37.

[58] [1982] VR 193.

In *White* v *Jones*[59] Lord Goff rejected *Ross* v *Caunters* as involving many conceptual difficulties. Among these were that liability for a claim for damages for pure economic loss could be excluded on the basis of contract. Also the claim could be based, as was the case in *White* v *Jones*, on a pure omission and therefore would not give rise to tortious negligence. On that basis it would be open to say that the claim could only lie in contract and was therefore not open to a disappointed third party.

2 White *v* Jones

Any doubt over the basis of a professional's duty of care to third parties was put to rest in *White* v *Jones*. A 3:2 majority imposed a duty of care on a solicitor towards third party beneficiaries.

The majority was led by Lord Goff who submitted that a remedy should extend to an intended beneficiary under the *Hedley Byrne* principle.[60] The assumption of responsibility by a solicitor towards his or her client should be held to extent to the intended beneficiary who (as the solicitor can reasonably foresee) may as a result of the solicitor's negligence, be deprived of his or her intended benefit.

Under the same principle, the House of Lords in *Henderson* v *Merrett Syndicates Limited*[61] further held that the assumption of responsibility by a person rendering professional or quasi-professional services coupled with a concomitant reliance by the person for whom the services were rendered

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[59] Above n 52.

[60] *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465

[61] [1994] 3 All ER 506.

could give rise to a tortious duty of care irrespective of whether there was a contractual relationship between the parties.[62]

It may therefore be suggested that an agent, and more especially a broker in a professional capacity, as with any professional person, owes a duty of care to a person other than his or her client if:

a] it is foreseeable that the third party is likely to be harmed by any negligence on his or her part; and

b] the imposition of a duty of care does not have any actual or potentialimpact upon the duties owed by the professional to his or her own client.

Also, if an insured intends to confer a benefit on a third party, the agent will owe a duty of care to the insured and the third party beneficiary in carrying out the instructions.

Given the availability of tortious remedies to beneficiaries and the possible extended definition of consumer, third parties ought to able to rely on the provisions of the CGA on which to found a further cause of action.

V GUARANTEE AS TO REASONABLE SKILL AND CARE: SECTION

28 Given the significance of tasks undertaken by intermediaries (particularly sales intermediaries), the often substantial amounts of money at stake and the fact that the contract of insurance is one of utmost good faith, it is not surprising that a considerable volume of case law has arisen in recent years in relation to insurance intermediaries. This will continue to be so since the CGA establishes the statutory guarantee as to reasonable skill and care into the insurance relationship.

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[62] C Boxer "Tort or Contract" 17 February 1995, Solicitors Journal, 136.

A Basis of Duty of Care of a Broker as the Insured's Agent

There is undoubtedly a contractual relationship between the insured and the agent or insurer, so that negligence on the part of the service provider will render him or her liable in an action for breach of contract.

As Phillips J pointed out in *Youell* v *Bland Welch & Co Ltd*[63], it has been accepted, since before 1964, that an insurance broker owes a duty of care in negligence towards his or her client, whether the broker is bound by contract or not. Furthermore, in *Punjab National Bank* v *de Boinville*[64] it was held that a duty of care was owed by an insurance broker not only to his client but also to a specific person whom he knew was to become an assignee of the policy.

B Contract or Tort?

Cases in New Zealand stemming from *McLaren Maycroft & Co* v *Fletcher Development Co Ltd*[65] required that, in cases where there were concurrent duties in contract and tort, the claimant must pursue their remedy in contract alone. However, Thomas J in *Rowlands* v *Callow*[66] held that a person performing professional services may be sued for negligence by their client either in contract or in tort.

> The issue is now virtually incontestable; a person who has performed professional services may be held concurrently in contract and in negligence, unless the terms of the contract preclude the tortious liability.[67]

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[63] (*The "Superhulls Cover Case*) (No 2) [1990] 2 Lloyd's Rep 431, 459.

[64] [1992] 3 All ER 104.

[65] [1973] 2 NZLR 100.

[66] [1992] 1 NZLR 178.

[67] Above n 65, 190.

In the insurance context Tipping J in the High Court has said "[b]y emphasising the contractual relationship between the parties I am not suggesting that this is an absolute bar to a duty of care being found to exist in tort beyond the scope of the contract."[68]

The existence of a contract between a professional adviser and their client was at one time regarded by the English courts as excluding the possibility of a tortious duty of care, but it is now the case that contractual or tortious duties may exist side by side.

A recent House of Lords case has resolved the long-standing controversy about the co-existence of liabilities in contract and tort. Lord Goff in the leading speech in *Henderson* v *Merrett Syndicates Limited* said that a claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract[69] that the parties must be taken to have agreed that the tortious remedy is to limited or excluded.[70]

Consequently, in the event of negligence, the insured may choose whether to sue in contract or in tort.[71]

It will therefore rarely matter whether the insured's action is contractual or tortious. The broker's duty in contract or tort is to maintain the standards reasonably to be expected of a competent broker, the measure of damages

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[68] *Sinclair Horder O'Malley* v *National Insurance Company of New Zealand Limited* [1992] 2 NZLR 706, 721.

[69] Under the CGA the service provider would not be able to contract out of their responsibility of reasonable skill and care: see section 40.

[70] [1994] 3 All ER 506, 532.

[71] Forshadowing this analysis see *Midland Bank Trust Co Ltd* v *Hett Stubbs & Kemp* [1978] 3 All ER 571 and *Forsikringsaktielskapet Vesta* v *Butcher* [1989] 1 All ER

will be the same, and the defence of contributory negligence is available to the broker in both situations.[72]

Given the long term nature of insurance contracts a question may occur as to when the cause of action arises. The better option is therefore to sue in tort since an action will be likely to accrue at a later date and will be less likely to be defeated by the Limitation Act 1950.

Matthews Corporation Limited v *Edward Lumley & Sons (New Zealand) Limited*[73] concerned the limitation period in relation to insurance services. Holland J likened the cause of action for negligence in obtaining an insurance policy which appeared on its face to be sound but which was unsound because of the financial inadequacy of the insurer, not immediately apparent, with that of negligence for defective workmanship which is not immediately apparent to see or appreciate.

C *Substance of a Duty of Care*

The CGA is not purported to be an attempt to introduce any change to the law of negligence.[74] It could therefore be argued that it adds nothing to existing law.

Nevertheless, the Act now places the obligations of service providers on a statutory basis and incorporates the tort concepts of reasonable skill and care into service contracts. As a result, services must be provided with reasonable care and skill.

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[72] RM Merkin *Insurance Contract Law* (Kluwer Publishing, London, 1991) D.2.3-49

[73] Unreported, 4 November 1994, High Court, Christchurch Registry, CP247/92..

[74] Report of the Department of Justice on the Consumer Guarantees Bill (1992) Part II cited in above n 36, 29.

But given that an objective standard is required, what is the requisite standard of care and skill? How are the duties of reasonable skill and care translated into the insurance relationship?

An insurance broker is under a general duty to exercise reasonable care and skill in the performance of his or her obligations.[75] The test whether a broker is in breach of the duty of care is whether they have failed to measure up in any respect to the standard of the ordinary person exercising that profession.

> In advising the client who employs him, the professional man owes a duty to exercise that standard of skill and care appropriate to his professional status and will be liable both in contract and in tort for all losses which his client may suffer by reason of any breach of that duty.[76]

Where a person possessed of a special skill chooses, irrespective of any contractual or fiduciary duty, to give information or advice in circumstances in which he knows or ought reasonably to know that his or her skill or judgment is being relied on , he or she is under a duty to exercise reasonable care in giving that information or advice.[77]

The duty can be a continuing duty of care.[78] This being the case, the potential liability under the CGA is not extinguished once the business is placed, the premium paid and the policy document issued.

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[75] Above n 14, 9-820.

[76] *Caparo Industries plc* v *Dickman* [1990] 2 WLR 358, 366.

[77] Above n 60.

[78] *Lewis* v *Tressider Andrews Associates Pty Ltd* (1986) 4 ANZ Insurance Cases 60-750, 74,524.

The potential for liability exists throughout the contract since the advice tendered could prove to be unreasonable even after a claim is made under the policy. The duty continues where the agent arranges renewals and co-ordinates premium payment and is covered more specifically in respect of independent agents in the Insurance Intermediaries Act 1994.

1 Clients Instructions

An agent's duty is, first and foremost, to follow his or her client's instructions clearly and the broker must therefore exercise proper care and skill in attempting to carry them out.[79] An agent must exercise proper care and skill in attempting to carry out a clients instructions.

The intermediary's responsibility to duly carry out the insured's instruction fits comfortably within the wording of section 28 in that the instructions must be carried out with reasonable skill and care.

Responsibility could also attach under section 29 if the intermediary does not understand the client's instructions an therefore fails to carry them out. This would be the case where the service has failed to achieve a particular result that the insured has made known.[80]

Normally an agent is instructed to arrange insurance and they should make reasonable inquiries as to the client's needs. It is therefore important to determine what those instructions are. If the instructions are ambiguous, an agent may not be liable if his or her interpretation of the instructions is reasonable in all the circumstances.

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[79] *Fanhaven Pty Ltd v Bain Dawes Northern Pty Ltd* (1982) 2 ANZ Insurance Cases 60-480. Also *Eagle Star Insurance Co Ltd* v *National Westminster Finance Australia Ltd* (1985) 3 ANZ Insurance Cases 60-634 at 78,905

[80] This will be considered below.

In the case of a broker, he or she is instructed to arrange insurance and should make reasonable inquiries as to his or her client's needs.[81] If there are no specific instructions, a broker should obtain insurance suitable to his or her client's needs.

If the broker cannot obtain appropriate insurance and thus carry out their client's instructions they should inform the client. Failure to do so deprives the client of the opportunity of making other arrangements and constitutes a breach of the duty of care.[82] A broker acts negligently if he or she does not act reasonably or within a reasonable time.

Evidence was accepted by the Court in *Parkinson v National Insurance Co of New Zealand Ltd*[83] that the practice was that insurance cover should be arranged immediately.

The broker called on the Parkinsons on 9 February to check their insurance coverage on a new workshop and vehicles and undertook to advise them on their insurance needs.

The broker informed National Insurance to arrange the requisite new and increased coverage on the morning of 14 February, but fire has destroyed much of the workshop and vehicles the day before.

National Insurance succeeded in denying liability. The Parkinson's however successfully claimed against the broker for breach of the broker's contract with them in failing to place new insurance cover and effect the amendments to the existing cover before the loss.

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[81] This may also fit with in the section 29 guarantee discussed below.

[82] Above n 14, 9-927.

[83] (1991) 6 ANZ Insurance Cases 61-072.

The Parkinsons also succeeded against the broker in negligence. The broker owed the Parkinsons a duty of care and was in breach of the duty when he failed to carry out promptly, and within a reasonable time, the instructions of the Parkinsons as to the insurances.

2 *Insolvent Insurer*

A broker should also advise his or her client of any difficulties, for example in relation to the solvency of the insurer, that may arise during the period of the insurance, so that the client can make alternative arrangements if necessary.[84] Brokers have been held liable in damages for recommending their client insure with a company known to be in financial difficulties.[85]

An insurance broker may be liable if insurance is placed with an underwriter who is subsequently unable to meet a claim. The purpose of the service is to obtain insurance cover for the consumer. Failure to do so is, prima facie, in breach of the guarantee as to fitness for purpose.[86] If the broker failed to make reasonable inquiries into the stability of the underwriter he or she would not be able to point to the default of the underwriter to block redress under the Act.[87]

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[84] Above n 78.

[85] *Beck Helicopters Limited* v *Edward Lumley & Sons (New Zealand) Limited* Hillyer J Auckland High Court 268/85. An example of this arose in the *Matthews Corporation Limited* v *Edward Lumley & Sons (New Zealand) Limited* Unreported, 7 December 1992, High Court, Christchurch Registry, and Unreported, 4 November 1992, High Court, Christchurch Registry, CP247/92. Overseas examples include *Osman* v *J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313; *Zisopoulos* v *Barry Johnston (Insurance brokers) Pty Ltd* (1982) 2 ANZ Insurance Cases 60-641.

[86] But see s36(a) of the CGA: No redress in relation to failure due only to a third party fault. However the broker is likely to be acting as the underwriters agent with respect to the consumer and will therefore have a right of indemnity.

[87] Section 36 of the CGA.

3 *Marketing*

While figures are not available, experience indicates that the majority of consumer policies are marketed by direct solicitation and that the sales staff of insurers, whether they are counter attendants or active canvassers are not trained in the nuances of insurance law, nor are they expert in interpreting the terms of their company's policies.[88] Many agents are simply trained in the art of selling and many insureds continue to discover after a loss that the representations made to them art the time of the contract as to the extent of cover under their policies was inaccurate.

Inaccurate representations can fall under the section 28 guarantee of a duty of reasonable skill and care. It is also possible that representations will fall within the section 29 guarantee as to fitness for a particular purpose.

(a) *Negligent Mis-statement*

The reasoning that a solicitor may be liable in a *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd*[89] action to persons who act in reliance on his or her statements or advice whether they are clients or third parties is particularly appropriate in the insurance context.

Where an insurance agent gave incorrect advice as to the cover under a policy he was held liable in damages.[90] Because a client does not need to supervise the agent , the client is entitled to rely upon the agent checking the terms of the insurance.

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[88] B Kercher and R Thomas "The Reform of Insurance Law: Caveat Emptor Survives" (1987) 10 UNSWLJ 173, 183.

[89] Above n 60..

[90] *Elliott* v *Ron Dawson & Associates (1972) Ltd* (1982) 139 DLR (3d) 323.

Recently the New Zealand Court of Appeal relied on *Hedley Byrne*. In *Medical Assurance Society of NZ Ltd* v *Lovie*.[91] The prospective insureds discussed insurance for converting two properties to a single home with the insurer's branch manager.[92] Existing cover was held with NZI but the insured wanted a "contractors all risks policy" to cover the work being carried out. The branch manager was told all the material facts and led the insureds to believe that he was covered.

The High Court had found tortious liability on the basis that the insurer was vicariously in breach of a duty it owed to the insureds. A prudent insurer should have ensured either that NZI was prepared to continue to hold the existing building insured while the client held the contractors all risks insurance, or that they should have arranged to cancel the NZI insurance and take over all the risks involved.[93]

Also, if the insurer would not issue a cover note immediately, the branch manager should have explained the urgency of the situation and ensured all steps were taken to obtain cover immediately.

The High Court found that the branch manager had led his clients to believe that cover had taken effect immediately and that there was no urgency, The High Court found that there was a "special relationship" between the insurer and the insureds in terms of *Hedley Byrne* and that the insureds had relied on the branch manager to give them cover.

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[91] Unreported, 31 March 1993, Court of Appeal, CA255/92.

[92] The Court of Appeal views the branch manager's position as analogous to that of an insurance agent or broker in advising the insureds.

[93] The surprising width of this proposition was subsequently narrowed in the Court of Appeal.

The Court of Appeal clarified and narrowed the duty to the particular facts of the case. The Court of Appeal found that an insurer did not have a general duty to inform the insured on matters arising from policies with another insurer, Generally, the relationship between an insurer and its client should be governed by the contract between them. However, there was no reason why an insurer could not accept such a duty in certain circumstances, either in response to a request or by making a representation which it knew would be relied on. The Medical Assurance Society of NZ Ltd had been the insured's insurer for nearly 30 years. They had a "special relationship" with the client gave rise to a duty of care.

(b) Misrepresentation

Misrepresentation can not only breaches the guarantee that the service will be carried out with reasonable skill and care but it breaches a fundamental part of the Fair Trading Act 1986.[94] The FTA contains a number of provisions on which an insured may rely in relation to misrepresentation by an insurer or intermediary concerning the effect of a contract or a failure by an insurer to provide him or her with adequate information at the time of entry into the contract.[95]

Section 9 of the FTA provides that:

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

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[94] Hereinafter "FTA".

[95] See A Everett, "Fair Trading Legislation and Insurance" (1990) 3 Insurance Law Journal 1.

The test under this section is objective,[96] and a capacity to mislead or deceive is all that is needed; no-one actually need be misled or deceived. There need not be an intention to mislead, and even silence may constitute misleading conduct when the circumstances give rise to an obligation to disclose relevant facts.

In *Warnock v ANZ Banking Group Ltd*[97] the insured had obtained a personal loan from his bank. The manager had also sold him an insurance policy to cover payments in the event of illness or accident. The premiums were to be part of the loan. Mr Warnock had to make a declaration concerning his health. He told the manager he had received medical treatment for rheumatoid arthritis. The manager said it was not relevant to the terms of the policy. The policy contained specific exclusion for (inter alia) disablement as a result of illness which existed at the commencement of the insurance. Two months later Mr Warnock suffered a severe arthritis condition which precluded him or her from further work. he claimed under the policy and was refused.

The Court upheld his claim against the Bank for misleading and deceptive conduct under the TPA[98] and for breaching the statutory warranty as to skill and care.[99] It was held that the bank manager had misled Mr Warnock, had given him no opportunity to read the insurance documents and did not draw attention to the exclusion clause.

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[96] *Mills* v *United Bullding Society* [1988] 2 NZLR 392, 413; *Savill* v *NZI Finance Ltd* [1990] 3 NZLR 135, 146 per Hardie Boys J.

[97] (1989) ANZ Insurance cases 60,897

[98] Section 52.

[99] Section 74 implies a warranty of due skill and care into a contract for services.

Given an appropriate set of facts an insured might have a stronger claim under the FTA than the CGA. Certainly section 9 of the FTA covers a wider area of conduct than any single concept in the general law. It applies to misrepresentation and misdescription in contract. In tort it can provide an alternative cause of action in cases of deceit or negligent mis-statement.

Further, the FTA is administered and enforced by the Commerce Commission. Actions are brought by the Commerce Commission and therefore insured do not have to be concerned about the problems of protracted legal costs.

5 Proposals and Premiums

If the agent undertakes to complete the proposal or to advise the client on its completion, he or she is required to exhibit reasonable care and skill in doing so.[100] Dicta exists to suggest that an insured has a duty to take reasonable steps to see that no untrue statements were put before the insurer.[101] However, the harshness of such decisions has been ameliorated by more recent judgments which place the onus on the intermediary as agent for the insurer.[102]

Statutory protection also exists to protect an insured who has made disclosure to an intermediary but has been advised not to record this on the proposal.

Such statutory assistance for the insured has existed in New Zealand for nearly 20 years in the form of section 10(2) of the Insurance Law Reform Act 1977. This deems the insurer to have had notice of all matters material to a

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[100] *Claude R Ogden & Co* v *Reliance Fire Sprinkler Co Pty Ltd* (1973) 2 NSWLR 7.

[101] *Jumna Khan* v *Bankers and Traders Insurance Co Ltd* (1926) 37 CLR 451.

[102] *Deaves* v *CML Fire & General Insurance Co Ltd* (1979) 23 ALR 539.

contract of insurance known to a representative of the insurer (being any servant or employee of the insurer and any person entitled to receive commission from the insurer) concerned in the negotiation of the contract before the proposal is accepted by the insurer.

An agent may be under a duty to advise his or her client of any exclusions or limitations in the insurance cover he or she arranges for his or her client. Cases may also arise where an agent, particularly an independent agent or broker, should inform his or her client of the broad requirements of insurance law and point out legal pitfalls.[103]

In *Fanhaven Pty Ltd* v *Bain Dawes Northern Pty Ltd* the exercise of reasonable care did not require the broker to inform an insured of the obligation to disclose material matters other than those to which questions in the proposal referred. However where a proposal does not incorporate a general question inviting the disclosure of any material facts, it is incumbent upon a broker to advise a client that the questions posed are not exhaustive and that there may be material facts outside the listed questions that ought to be disclosed.

6 Claims

In addition there might be a duty of care in settling claims.

The main obligation on an insurer is to satisfy within a reasonable time a claim that falls within the scope of the policy. The obligation to pay the claim within a reasonable period of time is implied as a matter of course in any

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[103] *Fanhaven Pty Ltd* v *Bain Dawes Northern Pty Ltd* (1982) 2 ANZ insurance Cases 60-480 77,721.

contract. It is clearly imposed by the duty of utmost good faith[104] as well as within the duty of reasonable care and skill. An insured could sue for loss involved in an improperly conducted claim settlement.

Loss Adjusters have been sued for improperly assessing the extent of an insured's loss. Insureds will also be able to claim for protracted claim settlement, bad faith claim settlement and for consequential loss.

E Contributory Negligence

According to section 4 of the CGA, the Act is not a code. The rights and remedies under the CGA are in addition to any other right or remedy and is does not repeal, invalidate or supersede any other Act.[105] A consequence is that consumers might lose the right to a remedy under the CGA if their negligence has contributed to their own loss.

At common law a defendant in a negligence suit who was able to demonstrate that the plaintiff had been guilty of negligence which contributed to the loss, had an absolute defence. This principle was modified by the Contributory Negligence Act 1947, which introduced the possibility of apportionment.

Apportionment meant that the Court could make a declaration for damages with an allowance being made for the plaintiff's negligence.

Under the Contributory Negligence Act "fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from the Contributory Negligence Act.

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[104] DStL Kelly and ML Ball *Principles of Insurance Law in New Zealand and Australia* (Butterworths, Sydney, 1991) 466.

[105] Section 4.

Under section 3 where any person suffers damage as the result partly of his or her own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage. The Court's justice and equity jurisdiction determines the damages recoverable.

Where the insured sues the service provider in tort, the Contributory Negligence Act 1947 is potentially applicable. A difficulty might arise where the insured's action is framed in contract. It has to be determined whether apportionment is available in a purely contractual action. It is clearly logical that the defence should operate and such a result would be consistent with the general attempt of the judiciary to eliminate as far as possible differences between contractual and tortious actions based on the same facts.

However, the problems with this approach are, first, that contributory negligence appears not to have been a defence in contract at common law and, secondly, that the precise problem of overlapping contractual and tortious liabilities did not emerge until after the passing of the Contributory Negligence Act 1947 and thus was not dealt with by it.[106]

The initial view of the English courts to the English equivalent of New Zealand's Contributory Negligence Act was that the Act had no application when the action is framed in contract. The Supreme Court of Australia in *Claude R Ogden & Pty Ltd* v *Reliance Fire Sprinkler Co Pty Ltd*[107] was of the view that an action in contract against an insurance broker who had allegedly failed to pass on material facts to the insurer was not subject to a defence based on contributory negligence.

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[106] Above n 74.

[107] Above n 100.

The English Court of Appeal has held that where the defendant's liability in contract is the same as his or her liability in the tort of negligence, independently of the existence of any contract, apportionment may be made under the English equivalent of the Contributory Negligence Act 1947. While the establishment of the defendant's liability in tort is a prerequisite to apportionment, the fact that he or she is not sued in tort is immaterial. If tortious liability can be established, apportionment may be made whether the plaintiff's action is framed in contract or tort.[108]

Similar sentiments were raised in the House of Lords in *Henderson* v *Merrett Syndicates Limited*.[109] Subject to the terms of the contract excluding tortious liability[110], the plaintiff can now choose the most advantageous cause of action on which to base their suit.

In New Zealand Pritchard J in *Rowe* v *Turner Hopkins & Partners*[111] in the High Court held that the Contributory Negligence Act 1947 did provide for apportionment for an action in contract, as long as the defendant's liability also sounded in tort. In the Court of Appeal Cooke and Roper JJ said that the Contributory Negligence Act 1947 "can apply wherever negligence is an essential ingredient of the plaintiff's cause of action, **whatever the source of the duty**."[112] (emphasis added)

It could be argued that this is authority for the proposition that the Contributory Negligence Act 1947 may be pleaded in an action for contract

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[108] *Forsikringsaktielskapet Vesta* v *Butcher* [1989] 1 All ER

[109] Above n 61.

[110] Note tortious liability for negligence cannot be contracted out of undr the CGA: see section 40.

[111] [1980] 2 NZLR 550.

[112] [1982] 1 NZLR 178, 181.

and under the CGA. If this view found widespread judicial favour the Contributory Negligence Act could considerably erode the effectiveness of the guarantees under the CGA.

But, while apportionment may well be available, there is almost no authority as to how judicial discretion is to exercised. English cases decided before the passing of the Contributory Negligence Act 1947, when contributory negligence was an absolute defence to the plaintiff's action, show an understandable reluctance to admit that a negligent broker could ever defeat the plaintiff by demonstrating that the plaintiff was partly responsible for his or her own loss.

In *Dickson* v *Devitt*[113] Atkin J, faced with the argument that that policy issued to the insured was inadequate for his or her needs was as much the insured's own fault as that of the broker, had no hesitation in rejecting it.

> Business could not be carried on if, when a person has been employed to use care and skill with regard to a matter, the employer is bound to use his or her own care and skill to see whether the person employed has done what he was employed to do.[114]

The spirit and vitality of this statement continues in the consumer context notwithstanding contributory negligence legislation. This is illustrated by *The Moonacre*[115] where the court refused to make any deduction from the

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[113] (1916) 21 Comm Cas 291.

[114] *Dickson* v *Devitt* (1916) 21 Comm Cas 291, 294. Similarly see *British Citizens Assurance Co* v *Woodland & Co* (1921) 8 Ll LR 89 per Bailhache J and the English Court of Appeal in *General Accident Fire and Life Assurance Corporation Ltd* v *Minet & Co Ltd* (1942) 74 Ll LR 1. However also see *O'Connor* v *Kirby* [1972] 1 QB 90 where the English Court of Appeal held that the insured, by failing to check the broker's answers on the proposal form, was the proximate cause of his own loss.

[115] Above n 83.

insured's damages against the broker in respect of the insured's failure to read the policy after it had been sent to him or her and in thus failing to appreciate that the insured yacht was not covered while it was being used as a houseboat.

In *Parkinson v National Insurance Co of New Zealand Ltd*[116] the broker undertook the onerous burden of establishing on the balance of probabilities that the plaintiffs failed to use reasonable care to see that their own property was properly protected by up-to-date and adequate insurance. In rejecting the defence of contributory negligence Penlington J found the insureds were under no obligation to check on the broker's conduct following the giving of their instructions.

It may therefore be suggested that the Contributory Negligence Act 1947 will pose no great obstacle to insured's relying on the CGA to enforce guarantees.

VI GUARANTEE AS TO FITNESS FOR A PARTICULAR PURPOSE: SECTION 29

A Overview

The guarantee under section 29 has generated a great deal of comment within the insurance industry. Indeed risk management strategies are being recommended by industry bodies such as the Life Office Association of New Zealand.

The fear is that this guarantee might amount to a guarantee as to the result of the service. Guaranteeing the result would be an onerous obligation, particularly in respect of life insurance savings products. This means that if a consumer tells an insurer a desired purpose or result, the service provider must either

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[116] (1991) 6 ANZ Insurance Cases 61-072

a) deliver a service that is reasonably capable of achieving that purpose or result or

b) make it clear that the particular purpose or result cannot be achieved or that the insurer cannot guarantee that it will be achieved.[117]

Any attempt to contract out of this will attract liability under section 40. For this reason the Life Offices Association recommends that customers broad needs and purposes are identified and recorded for future reference at the point of sale.[118] This obviates any evidential difficulty in finding out what the particular purpose or expected result was that the consumer made known when the policy was taken out. Disclosure by the service provider of the likely results might be an important factor in the circumstances indicating the absence or unreasonableness of reliance.[119]

B The Guarantee

The section 29 guarantee requires that the service be reasonably fit for any particular purpose and of such a nature and quality that it can be expected to achieve any particular result that the consumer makes known to the supplier before or at the time of making the contract. The guarantee does not apply where the circumstances show that the consumer does not rely on the supplier's skill or judgment or where it is unreasonable for the consumer to rely on the supplier's skill or judgment.

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[117] V Owen "The Consumer Guarantees Act 1993: How does it apply to the sale of Life insurance?" The Insurance Journal September 1994, 33, 35.

[118] Noting a broad purpose is obviously preferable from an insurer's point of view since a narrowly stated purpose or result might be more difficult to achieve.

[119] Above n 31, 33.

Section 29 places an obligation on the service provider to supply to the consumer a contract of insurance that must be reasonably fit for the purpose for which it was supplied. This is a dramatic departure from the common law which states that service providers will use reasonable skill and care. At common law there is no implied guarantee that the service will achieve the desired result.[120]

The section is worded differently from section 8 which relates to goods. Unlike section 8, there is no qualification that the consumer must have made known to the supplier the particular purpose expressly or by implication. Secondly, there is a requirement that the purpose be made known before or at the time of the contract, which is absent from section 8.

Likewise, the Australian Trade Practices Act 1974 deals with this question in respect of the provision of consumer goods. Section 66(2) of the Australian Trade Practices Act explicitly establishes the buyer's reasonable expectations as a base standard.

> Goods of any kind are of merchantable quality...if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.

Can this reasonable expectation be imported into section 29?

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[120] *Greaves & Co (Contractors) Ltd* v *Baynham Meikle & Partners* [1975] 3 All ER 99, 103-104 cited by A Fraser "The Liability of Service Providers Under The Consumer Guarantees Act 1993" [1994] 16 NZULR 23, 31.

C *Reasonable Expectations*

Where a consumer desires and purchases insurance cover for their home contents policy, the policy must provide that coverage. The extent to which the particular policy achieves the insured's desired purpose will be a central issue under the s29 guarantee. But from who's perspective should the reasonableness as to fitness for purpose is determined?

Section 29 of the CGA contains subjective elements in that fitness for purpose will be judged on the particular purpose for which the service is required or the desired result of the consumer, made known to supplier at the time of contracting.

However, objective elements might be imported.

1 *United States precedent*

United States courts have developed a doctrine specifically for consumer insured's protection to redress the power imbalance perceived as inherent in insurance contracts and purportedly caused by standard term contracts.[121] The doctrine of reasonable expectations of the insured requires the court to enforce an insurance contract in accordance with the level of coverage an average insured would reasonably expect.

A literal application of the doctrine would suggest the focus of the judicial inquiry is in what the particular insured actually expected and whether the particular expectation was reasonable. US courts have instead questioned whether *any* insured might reasonably have expected coverage

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[121] See M Naulls "Compliance with Section 29 of the Consumer Guarantees Act 1993: Can the American Doctrine of Reasonable Expectations Help?" LLB(Hons) Research Paper, Victoria University of Wellington, 1994.

The objective requirement in the reasonable expectations principle is a policy consideration but it is also suggested by the requirement that an expectation be reasonable before it will be honoured. That rider limits the obvious over-reaching that would result if any insured were able to demand their particular expectations be met.

2 Consumer-oriented interpretation

It has already been discussed above how the advent of consumer oriented legislation, such as the CGA might, affect the interpretation of insurance contracts. It might be that the relevant criterion of construction of the contract will be that of "the understanding of the reasonable person in this country [at the time of making the initial contract]".[122]

This is because policies are offered to ordinary working people who are unlikely to have the advantage of the advice of a commercial lawyer when they purchase protection from an insurance company.[123] "...the trend is, if anything, to adopt a liberal interpretation in favour of the assured, so far as the ordinary and natural meaning of the words used by the insurers permits this to be done."[124]

3 Statutory interpretation

Fraser argues that the term "particular purpose" is incorporated into the CGA from section 16(a) of the Sale of Goods Act 1908.[125] This term has acquired a special meaning and was not limited to a special purpose. It includes

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[122] *Groves* v *AMP* [1990] 2 NZLR 408, 415 per Hardies Boys J.

[123] *Australian Casualty Co Ltd* v *Federico* (1986) 66 ALR 99, 106.

[124] Per Cooke J in *Mount Albert City Council* v *New Zealand Municipalities Co-operative Insurance Co Ltd* [1983] NZLR 190 quoting *Halsbury's Laws of England* (4 ed, Butterfworths, London, 1980) vol 25 Insurance, para 594.

[125] Above n36, 35.

"normal", "general" or "common" purposes. She continues that the normal purpose of the goods supplied can easily be implied from the facts. Therefore, the normal purpose can also be implied into a service. For purpose for engaging an insurer or a broker, it is assumed that the services are required to effect cover.

Fraser goes on to suggest that it is necessary to imply into section 29 a requirement that services be fit for their common purpose. Further , when a consumer requests performance of a service and says nothing about any particular purpose, the request should suffice to "make known" that the service is being acquired for its common purpose. The insured who, again, asks for home contents insurance ought not to have to recite all possible contingencies that he or she expects to be covered, not to itemise all possible items that they expect to be covered.

If a home contents policy commonly covers jewellery but the policy taken out only covers jewellery to a specified value , the insured may nevertheless be able to claim.

A further example might be where the insured makes known to the insurer that they require insurance for a specified peril. Restrictions and limitations could be incorporated into the policy document which lessen the cover required.

4 New Zealand Precedent

An insight into how section 29 might apply can be gleaned from the case of *Ker* v *Anthony Ryan & Co Ltd.* [126]

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[126] (1989) 5 ANZ Insurance Cases 75,998.

The owners of a racing car obtained damages in the High Court from an insurance broker as compensation for an uninsured loss caused to spare parts for the car.[127] Gallen J held that the insured had sought cover for parts and if the broker did not understand this, it was part of his obligation, holding himself out as an insurance expert, to ascertain the extent of the cover required and desirable.

It might be argued on the basis of Gallen J's reasoning that fitness for purpose ought to judged from the insured's perspective. The intermediaries understanding of the insured's requirements was not the focus of the Court's inquiry. In respect of the client/intermediary relationship, the point must be made that the intermediary must thoroughly verse themselves in the clients needs to be sure of discharging their responsibilities under the CGA.

VII CONTRACTING OUT: SECTION 40

Aside from the guarantees, the major feature that gives the CGA credibility is that, in a consumer transaction, service suppliers cannot contract out of their obligations.

The starting point at common law for the duty of care between a principal and their agent is the contract. The contract may expressly specify what the agent is employed to do and the standard of care to be observed. The contract may also expressly extend or limit the agent's liability for breach of duty. Provisions in a contract which limit or exclude liability are strictly construed but if such a provision is so "crystal clear" and incapable of any other interpretation then one relieving the party in breach of duty of liability, then it

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[127] If the case was to rely on a CGA there would be obvious difficulties in that arranging insurance for racing cars and their spare parts does not fall within the definition of a service ordinarily acquired for "personal, domestic or household use or consumption".

will operate to do just that.[128]

This position changes dramatically under the CGA which prohibits contracting out of the Act's provisions except in a business relationship. Providers of insurance services cannot contract out of their duty of reasonable skill and care as well as the other guarantees.

If an insured agrees that a savings-linked insurance policy may decrease in value as well as increasing, the insured cannot be bound if by such agreement if the decrease was attributable to the service providers negligence. Additionally, by such a mere cautionary statement, a provider of insurance services might be construed as attempting to contract out of the CGA's provisions.

There may be an arguable case that the insurer constructively contracts out in certain cases. It could also be argued that attempts to exclude coverage contained in the policy but not brought to the Insured's attention might be construed as an attempt to limit the effect of the coverage. Exclusions and restrictions written into the policy document but which the insured may not realise are incorporated into the proposal may lessen the coverage the insured expects. Attempts to restrict coverage commonly expected might be construed as attempting to contract out of the guarantee under section 29.

The insured may have agreed that the policy is of acceptable quality when in actuality it is not. The insurer would not be able to rely on the policy wording if the insured has made known a desired purpose and the policy does not actually satisfy that purpose.

Insurance policies commonly recite that

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[128] *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827; [1980] 1 All ER 556.

> The Insured shall take all reasonable precautions to prevent loss or damage to any property insured hereunder.[129]

The commercial purposes of insurance would be frustrated if the insurer were permitted to avoid liability against the consequences of the insured's negligence which the insurance was intended to provide.[130] Arguably this is an attempt to contract out of the guarantee as to fitness for purpose.

VIII REMEDY ISSUES

A Common Law

Common law remedies governing service contracts only allow for cancellation and/or damages. No opportunity was given to, nor obligation imposed on, a supplier of services to make good any defect in those services.

At common law, the amount recoverable by the insured depends on the nature of the brokers breach of duty and the loss that has caused to the insured. The most common situation is where the insured has been left without a claim. An example , as mentioned above, is where the policy was not procured or was insufficient to cover the loss.

The insured's loss is measured by the sum that they would have been able to claim under the policy, coupled with any costs that they may have incurred in pursuing unsuccessfully the insurer.

When the broker has failed to obtain any cover at all, the insured has the option to seek damages representing the coverage of a notional policy or to

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[129] Above n 48.

[130] Above n 48, 103,334.

seek restitution of any premium paid to the broker on the ground of total failure of consideration.. Interestingly in the event of a small loss or a large commercial risk demanding a hefty premium, restitution may well provide a superior benefit to the insured.[131]

B Section 32

Section 32 provides options to consumers where services do not comply with guarantees. The consumer may require the supplier to remedy the failure.[132] If the service provider fails to do so the failure can be remedied elsewhere and costs recovered or the contract can be cancelled.[133]

Where the failure cannot be remedied, the contract can be cancelled[134] or compensatory damages for the reduction in value of the product of the service below the charge paid by consumer.[135]

Reasonably foreseeable consequential damages are also available for failure of any guarantee.[136]

The remedies provided by the CGA may not operate practically in insurance law. Returning to the service provider once cover has been denied or is found to be insufficient will not remedy any failure. The insured will want to recover the lost expectation of coverage.

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[131] Above n 74, D2.3-51.

[132] Section 32(a)(i).

[133] Section 32(a)(ii)(A) and (B).

[134] Section 32(b)(i)

[135] Section 32(b)(ii)

[136] Section 32(c)

Further, while it might be easy to identify when a more appropriate and better insurance service might be had elsewhere *before* a claim, the inadequacy of the service coming to light *after* a loss could be catastrophic.

Cancellation of a contract and refund of premium is not in itself problematic. However, in the event of a claim by an insured where a guarantee has failed, the ideal remedy would be the payment of the claim.

In *Warnock v ANZ Banking Group Ltd*[137] relief was in the nature of a payment equivalent to the cover Mr Warnock would have obtained had the manager correctly represented the terms of cover to him.

Likewise in *Medical Assurance Society of NZ Ltd* v *Lovie*[138] damages were assessed as the agreed cost of reinstatement along with consequential losses and general damages. The collapse of the building project was reasonably foreseeable by the insurer as a likely consequence of denying insurance cover,

These two cases can be compared to *Gates v City Mutual Life Assurance Society Limited*[139]. Misrepresentations as to the desirability of insurance cover led to an award of damages limited to the amount of the premium being refunded and an order varying or rescinding the insurance policy.

It may be argued that there is a better remedy under Contractual Remedies Act 1979 , the Fair Trading Act or at common law for damages for deceit if there has been a misrepresentation. Potentially, the burden of proof under the FTA is easier for a complainant insured to prove than under the CGA.

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[137] Above n 97.

[138] Above n 91.

[139] (1983) 68 FLR 101

Under the CGA there is always the danger that expert evidence as to what is reasonable may contain a subjective taint.

IX CONCLUSION

Insureds' confidence in the CGA will ultimately depend on the ability to enforce the Act with respect to insurance matters.

One the one hand, the CGA does not create an independent body to enforce the statutory guarantees on behalf of consumers. It is not like the Fair Trading Act 1986 for example, which gives the Commerce Commission fairly wide powers to act upon a complaint.[140] Nor does it create civil or criminal liability for breaches of the guarantees. What the CGA does do is empower consumers to pursue their statutory rights through the courts or the Disputes Tribunal.

Nevertheless, a number of industry bodies now exist in an effort to regulate the insurance services. As mentioned above, the Insurance Council of New Zealand, Life Offices Association and Insurance and Investment Advisers Association have all recently formulated codes of conduct and business practice. This is in addition to the Insurance and Savings Ombudsman Scheme.

It may be that the CGA will provide parameters within which these bodies operate to protect insureds. While using the Act as a sole cause of action

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[140] Nevertheless, a body such as exists under the Australian Trade Practices Act 1974 will be no guarantee of better enforcement. Kercher and Thomas above n 88, 192 describe the TPA as brilliantly conceived in its combination of specific and general prohibitions and of public and private enforcement. However the Trade Practices Commission has never had suffiient resources to fulfil its public enforcement obligations.

may be limiting, it will nevertheless form the basis on by which service providers behave .

The CGA by itself is unlikely to have a significant direct impact on insurance law. Nevertheless, in conjunction with existing common law and statutory mechanisms as well as industry codes the Act may well add another sword to the armoury of the consumer insured.

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