judgment of Windeyer J. implies the need for a greater classification or codification of compensible damages in this area.

While Walsh J. could state that any injury resulting from shock for the purposes of tort liability was in the one class of injury, Payne J. in *Tremain v. Pike*[19] perceived a generic difference between injury from rats' bites and injury from rats by some kind of infection.

> The kind of damage suffered here was a disease contracted by contact with rats' urine. This, in my view, was entirely different in kind from the effect of a rat bite, or food poisoning by the consumption of food or drink contaminated by rats. I do not accept that all illness or infection arising from an infestation of rats should be regarded as of the same kind.[20]

Fridman and Williams[21] have argued the need for more definite, more visible criteria in this area.

> the courts must identify, explain, and justify the criteria or considerations that they are going to utilise or rely upon to arrive at decisions in any given case. It is not enough to speak of "foreseeability": it will not suffice to differentiate on the basis of types or kinds of injury.[22]

The High Court in this case further buttressed their position. Windeyer J. was obviously unhappy with the present situation, and the actual decision, while clearly satisfactory, was based on what can, I think, be fairly called little more than arbitrary judicial value judgments.

JOHN WILLIS

BABATSIKOS v. CAR OWNERS' MUTUAL INSURANCE CO. LTD[1]

Insurance—Motor vehicle policy—Misrepresentation—Instruments Act 1958, section 25—Materiality—Admissibility of expert evidence.

In his proposal for a comprehensive motor vehicle insurance policy the complainant misrepresented the length of time for which he had held a driver's licence. He was asked: '[w]ill any person holding a learner's permit or a provisional licence ever drive the vehicle?' These terms are appropriate to the relevant New South Wales legislation and the complainant therefore correctly answered in the negative. In fact the complainant held a probationary licence issued pursuant to section 22B of the Motor Car Act 1958. The proposal concluded: 'I do hereby declare and warrant that the answers given above are in every respect true and correct, and I have not withheld any information likely to affect the acceptance of this proposal, and I agree that this proposal shall be the basis of the contract between the company and myself. . . .' The complainant's signature followed.

The defendant refused to indemnify the complainant in respect of a claim made under the policy, arguing that it was entitled to avoid the policy by reason of the complainant's material misrepresentations and/or non-disclosures

[19] [1969] 1 W.L.R. 1556.
[20] *Ibid.* 1561.
[21] Fridman and Williams, 'The Atomic Theory of Negligence' (1971) 45 *Australian Law Journal* 117.
[22] *Ibid.* 124.
[1] [1970] V.R. 297; [1970] 2 Lloyd's Rep. 314. Supreme Court of Victoria; Pape J.

and, alternatively, that the policy could be avoided irrespective of the materiality of the misrepresentations, since the proposal was expressed to be the basis of the contract.

At the trial, the defendant gave evidence that its policy was not to insure probationary licence holders by reason of their presumed inexperience. No evidence was adduced as to general insurance practice on the matter. The case came before the Supreme Court on an order *nisi* to review the magistrate's decision in favour of the complainant.

The main question for decision was that of the legal effect of the 'warranty' clause. The common law position with regard to misrepresentation was succinctly stated by Viscount Haldane in *Dawson's Ltd v. Bonnin*:[2]

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

The reason for the insertion of 'warranty' clauses, which are very common in insurance proposals and policies, is to make the question of materiality irrelevant, and their effect in this respect has been recognized by the courts:

> It is competent to the contracting parties, if both agree to it . . . to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material.[3]

This view was followed by the House of Lords in *Dawson's Ltd v. Bonnin*,[4] even though in that case there was an express finding that the misrepresentation which avoided the contract was not material to the risk.[5]

However, Pape J. had to consider the effect of section 25 of the Instruments Act 195 which provides:

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

This section was first introduced in 1936,[6] and is apparently based on North American models. There is no equivalent English legislation, although many codes in the U.S.A. and Canada continue to have similar provisions.[7]

[2] [1922] 2 A.C. 413, 422.

[3] *Thompson v. Weems* (1884) 9 App. Cas. 671, 683-4 *per* Lord Blackburn. See also *Anderson v. Fitzgerald* (1853) 4 H.L. Cas. 484; 10 E.R. 551; and *De Hahn v. Hartley* (1786) 1 T.R. 343; 99 E.R. 1130.

[4] [1922] 2 A.C. 413. This case was recently approved of in *McCartney v. Laverty* [1968] S.C. 207.

[5] The misrepresentation related to the normal place of garaging of a motor vehicle. Today this fact would probably be held to be material, since it would normally indicate density of population and therefore the degree of accident risk.

[6] Instruments (Insurance Contracts) Act 1936 (No. 4464), s.2(1).

[7] *E.g. Massachusetts General Laws Annotated* CL. 175, § 186; *McKinney's New York Insurance Law* § 149(2); Insurance Act R.S.O. 1914 (Ontario), s.156.

Pape J. held that the section was designed expressly to deal with cases in which the truth of the proponent's answers was made a condition of the contract, thus making materiality irrelevant, as well as with those in which materiality has been held established merely by the existence of a question dealing with the matter that had been misrepresented.[8]

In his view, the effect of the section was

> to abrogate these principles, and to provide that in future cases where it is sought to avoid insurance contracts on the ground of incorrect statements in proposals or other documents, fraud or materiality in fact had to be shown, and that materiality imputed or inferred by contract or by the asking of the question was no longer sufficient.[9]

The learned judge derived support for this view from the decision of the Privy Council in *Mutual Life Insurance Co. of New York v. Ontario Metal Products Company Ltd.*[10] There section 156 of the Insurance Act 1914 (Ontario), a provision similar to (though not identical with) the Victorian section, was held to provide that wherever it was sought to avoid a policy on the grounds of misrepresentation, materiality had to be shown. Similar decisions have been reached in Canada[11] and in the United States.[12]

The decision in *Babatsikos*[13] appears to put misrepresentation on a par with non-disclosure. Although section 25 of the Instruments Act 1958 does not address itself to cases of non-disclosure, the common law has always required that a non-disclosure be material if it is to avoid the contract.[14] It is difficult to see how the parties could, by 'agreement', overcome this requirement. The proponent usually undertakes, by the terms of his proposal, not to withhold any information likely to affect the acceptance of the risk (as the complainant in fact did in the case under discussion). Such an undertaking seems to embody the notion of materiality rather than exclude it. Even if the proponent expressly agreed to disclose, say, 'everything of conceivable interest to the insurer' or the like, it could only be expected that a court would nonetheless interpret such an undertaking as conditional on the criterion of materiality being met.[15]

The decision of Pape J. marks yet another modification of the freedom to contract principle. In the light of the judicial trend to recognize the proliferation of standard-form contracts, and especially to take note of real disparities of bargaining power between the parties, the result seems praiseworthy. An insurance company, having collected premiums from the insured, cannot now escape its obligations under a policy unless it can establish that any innocent misrepresentation would have altered, in some way, its acceptance of the risk.

[8] *E.g. Glicksman v. Lancashire and General Assurance Co. Ltd* [1927] A.C. 139.
[9] [1970] V.R. 297, 308.
[10] [1925] A.C. 344.
[11] *E.g. Selick v. New York Life Insurance Co.* (1921) 57 D.L.R. 222.
[12] See Patterson, *Essentials of Insurance Law* (2nd ed. 1957) 428 ff.; Keeton, 'Insurance Law at Variance with Policy Provisions' (1970) 83 *Harvard Law Review* 961. For the American common law position, see *Jeffries v. The Economical Mutual Life Insurance Co.* (1875) 22 Wall. 47, 53; 89 U.S. 833.
[13] [1970] V.R. 297.
[14] *E.g. Glicksman v. Lancashire and General Assurance Co. Ltd* [1927] A.C. 139.
[15] Judges have been highly critical of insurance companies avoiding policies because of immaterial mis-statements or omissions, *e.g. Glicksman v. Lancashire and General Assurance Co. Ltd* [1927] A.C. 139, 145 *per* Lord Wrenbury.

Pape J. went on to consider the test of materiality. Traditionally, materiality has been approached either from the viewpoint of the reasonable proponent[16] or, more commonly, in terms of the prudent insurer.[17] His Honour preferred the latter view, again on the authority of *Mutual Life Insurance Co. of New York v. Ontario Metal Products Company Ltd.*[18]

The preference of Pape J. is very likely a proper one. There are doubtless many real factors which, while they may appear relatively unimportant even to a reasonable proponent, are well understood by insurers to be highly relevant to an evaluation of the risk.

To establish materiality the defendant relied upon its own practice of declining to insure probationary licence holders. Evidence to this effect was held to be admissible despite earlier authority to the contrary.[19]

The defendant's only witness was an officer of the company. Pape J. held that he could have given evidence of *general* insurance practice, if qualified to do so, but the witness had expressly disclaimed knowledge of such practice. While the evidence showed that the *defendant* did not consider the matter immaterial this did not, in the view of Pape J., go to establish materiality in terms of the 'prudent insurer'.

The defendant runs the risk of non-persuasion of materiality. Some matters will be obviously material (or immaterial) so that the tribunal of fact will need no evidence of that fact. But where the matter is one of 'novelty or doubt', expert evidence may be the only means of overcoming the burden of proof.

Under these circumstances, it was held that the defendant had not established materiality. No statistical evidence had been adduced to show that probationary licence holders were more accident prone than other licensed drivers. Since licences are given only after testing, a certain level of driving proficiency must have been reached by the holder. Moreover, Pape J. felt that the prudent insurer would not refuse to indemnify probationary licence holders in view of the continuity which is common in insurance relationships, even though policies run on a year-to-year basis. Most companies, he felt, would insure newly-licensed drivers in the expectation of further custom after the probationary period expired.

SIMON WYNN

HANDMER v. TAYLOR[1]

Criminal law—Statutory offence—Mens rea

Mens rea is normally an essential ingredient of a criminal offence, so that if the defendant asserts a mistake he is only denying guilty intent.

[16] *E.g. Guardian Assurance Co. Ltd v. Condogianis* (1919) 26 C.L.R. 231, 246-7 *per* Isaacs J.: '[the assured's] duty was to disclose such material facts as a reasonable man in his position would have considered material'.

[17] See *MacGillivray on Insurance Law* (5th ed. 1961) i. 402.

[18] [1925] A.C. 344.

[19] The cases seem to be founded on the case of *Carter v. Boehm* (1766) 3 Burr. 1905; 97 E.R. 1162. However, an examination of the judgment reveals that it was not expert evidence as such that was held inadmissible, but the particular testimony given in the case which was, in the view of Lord Mansfield 'mere opinion, which was not evidence. It is opinion after an event'. The modern practice is to admit expert evidence: *e.g. Yorke v. Yorkshire Insurance Co. Ltd* [1918] 1 K.B. 662; *Horne v. Poland* [1922] 2 K.B. 364; *Glicksman v. Lancashire & General Assurance Co. Ltd* [1925] 2 K.B. 593; *Arnould on Marine Insurance* (15th ed. 1961) ii. 547.

[1] [1971] V.R. 308. Supreme Court of Victoria; McInerney J.